

**Lewis Lasky Mem. Med. & Dental Ctr., LLC v 63 W.
38th St., LLC**

2007 NY Slip Op 32071(U)

July 2, 2007

Supreme Court, New York County

Docket Number: 0107495/2007

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

-----X
LOUIS LASKY MEMORIAL MEDICAL AND DENTAL CENTER, LLC, as assignee of N.O.I.T.U. INSURANCE TRUST FUND d/b/a LOUIS LASKY MEMORIAL MEDICAL AND DENTAL CENTERS,

Plaintiff,

Index No. 107495/07
Motion Date 06/22/07
Motion Seq. No. 001
Motion Cal. No.

-against-

63 WEST 38th STREET, LLC,

Defendants.
-----X

The following papers, numbered 1 to were read on this motion for Preliminary Injunction

NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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Plaintiff is the operator of dental services for union members and their eligible dependents. The defendant owns the building occupied by plaintiff, and is engaging in substantial renovation in connection with the conversion of the building from commercial to residential status.

Plaintiff has moved for a preliminary injunction which seeks to abate a private nuisance based on dangerous noises and debris emanating from adjacent floors in the building. Plaintiff occupies the 4th floor and part of the 5th floor. Defendant cross-moves to dismiss based on the failure of the plaintiff to plead a cause of action.

The Court issued a temporary restraining order enjoining construction activities on the 5th floor pending the argument of this motion.

Defendant urges dismissal on the failure of plaintiff to prove that its activities are substantial enough to constitute a private nuisance. Plaintiff counters that there were several incidents of falling plaster from the floor above together with loud jarring noises that could have caused substantial harm where dental instruments operated by one of the dentists could cause injury as a result of the effect of the loud pounding and drilling.

According to defendant, Phase 1 of the demolition has been completed. The complaints regarding that phase are now moot. Next, there is going to be asbestos removal. That will include floor tiles on the 5th floor in the unoccupied portion of the floor. The construction manager for the job has furnished an affidavit stating that the work will be "done in a proper, reasonable and normal manner." In addition, the asbestos remediation will be subject to inspection by the New York City Department of Environmental Protection. The second phase of renovation involving interior demolition will begin after the asbestos removal is completed. The affidavit with regard to this phase is somewhat ambiguous stating that it will only apply to occupied or partially unoccupied parts of the building "and will not involve any area of the building occupied by plaintiff." This is somewhat ambiguous with respect to the 5th floor which is partially occupied by the plaintiff. During oral argument, defendant's attorney vigorously argued that this meant that there will not be any demolition

work being done on the 5th floor. This is supported by the Department of Buildings' Permit, which sets forth those parts of the building to be gutted. They do not include the 4th or 5th floors, which are the ones occupied by the plaintiff.

We are left with the complaint that the future removal of the asbestos tiles and their replacement with non-asbestos containing tiles or the removal of asbestos from the 5th floor tiles is, plaintiff contends, a private nuisance. The defendant argues that this has not happened yet and there is no indication that plaintiffs are suffering harm or will be suffering harm.

One need not wait for the barn to burn down before one attempts to put out the fire. To establish a private nuisance, there must be an unreasonable, intentional interference with a person's right to use and enjoy the premises he/she occupies (*Ward v The City of New York*, 15 AD3d 392, 393, 789 NYS2d 539, 540 [2d Dept 2005]) (citing *Copart Indus. v Con Ed*, 41 NY2d 564, 568, 394 NYS2d 169; *Weinberg v Lombardi*, 217 AD2d 579, 629 NYS2d 280). It cannot be denied that asbestos fibers in the air would be very hazardous to any of plaintiff's customers on the second floor. Moreover, if the tiles are removed and replaced, the consequent hammering and pounding that would accompany such activity could cause serious accidents to patients who have dental instruments in their mouths. The Court holds that this is a potentially private nuisance. There is, therefore, a likelihood of success on this narrow issue. Because asbestos exposure is renowned for causing fatal illnesses such as lung cancer and mesothelioma, there can be serious and irreparable injury to those members

and patients who are on the 5th floor. Comparing the hardships, one must conclude that exposure to a deathly disease tilts the balance of equities in the plaintiff's favor.

Nevertheless, the asbestos must be removed. Therefore, it is

ORDERED that pending the resolution of this action, the defendant is enjoined from doing any asbestos removal on the 5th floor of the subject premises during the hours of 8:00 a.m. to 6:00 p.m. until he and the plaintiff meet and agree on a reasonable time during which the asbestos removal on the 5th floor may commence and continue until completed.

Dated: ~~June~~ ^{July} 2, 2007

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Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

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