

FAMO, Inc. v Green 521 Fifth Ave., LLC

2007 NY Slip Op 33074(U)

September 18, 2007

Supreme Court, New York County

Docket Number: 0109028/2007

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

FAMO J Inc.

INDEX NO. 109028/07

MOTION DATE 10/03/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Green 521 Fifth Avenue, LLC

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE


MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED that plaintiff's order to show cause pursuant to CPLR 6301 to enjoin defendant, Green 521 Fifth Avenue LLC (the "Landlord") from (1) terminating the Tenant's lease for space rented to the Tenant in the lobby of the building located at 521 Fifth Avenue, New York, New York (the "Building") and used as an art gallery (the "Premises") by reconfiguring the lobby of the Building, (2) commencing summary proceedings to oust the Tenant from the Premises, (3) erecting a wall in front of the Premises which will affect or disturb the present visibility of the Premises from the lobby and the 43rd Street entrance, and (4) disturbing the Tenant's possession, rights, and use of the Premises for events such as art exhibitions is denied; and it is further

ORDERED that the parties appear for a preliminary conference on October 3, 2007, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

Dated: 9/18/07 this constitutes the decision and order of the Court.


HON. CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
FAMO, INC.,

Index No. 109028-2007

Plaintiff,

-against-

GREEN 521 FIFTH AVENUE, LLC,

Defendant.

-----X
HON. CAROL ROBINSON EDMOND, J.S.C.

FILED
SEP 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff, FAMO Inc., (the "Tenant") moves by order to show cause pursuant to CPLR 6301 to enjoin defendant, Green 521 Fifth Avenue LLC (the "Landlord") from (1) terminating the Tenant's lease for space rented to the Tenant in the lobby of the building located at 521 Fifth Avenue, New York, New York (the "Building") and used as an art gallery (the "Premises") by reconfiguring the lobby of the Building, (2) commencing summary proceedings to oust the Tenant from the Premises, (3) erecting a wall in front of the Premises which will affect or disturb the present visibility of the Premises from the lobby and the 43rd Street entrance, and (4) disturbing the Tenant's possession, rights, and use of the Premises for events such as art exhibitions.¹

Plaintiff's Order to Show Cause

The Building is located at the northeast corner of Fifth Avenue and 43rd Street.

According to the Amended Complaint, the Tenant occupies the Premises-rent-free- pursuant to a

¹ The Tenant's additional request to enjoin the Landlord from converting the Premises into a storage area is moot, as the Landlord has agreed to refrain from so converting the Premises.

written lease agreement, “dated as of” January 1, 2003 (the “Lease”), with the Landlord’s predecessor, 521 Fifth Avenue Partners, LLC (the “Landlord’s Predecessor”).² The Tenant claims that under Article 3 of the Lease, the Tenant was demised the Premises to operate an art gallery and it was intended that the Premises be used for the display and sale of art. Under Article 4 of the Lease, Tenant was not required to pay rent, but was leased the Premises “as an amenity to the other tenants of the Building.” The Tenant alleges that the Landlord’s Predecessor intended that the art gallery space be used in conjunction with events in the Building and its lobby, including openings and receptions. It is also alleged that the Landlord’s Predecessor deliberately omitted from the Lease any provision allowing the Landlord to change the arrangement and/or location of the lobby entrances or passageways, as this would materially and adversely affect the Tenant’s use of and access to the art gallery and assure that the art gallery would remain open and visible. Tenant alleges that the open visibility of the gallery space, from both the Building lobby and from the 43rd Street entrance, was an important factor in inducing the Tenant to enter into the Lease.

The Premises had previously been a passageway in the lobby from the Building to the adjacent building located at 529 Fifth Avenue, and pursuant to Article 2 of the Lease, was rented in “as is condition.” Further pursuant to Article 2, the Tenant was obligated to perform whatever work and alterations were needed to convert the former passageway into an art gallery. After signing the Lease, Tenant expended over \$115,000 in making the Premises suitable for the art gallery. The Tenant also complied with its obligations to clean the space, and perform all repairs

² The Landlord is the successor-in-interest as landlord under the Lease, having become the ground lessee of the Building pursuant to a ground lease with Landlord’s Predecessor on March 10, 2006.

and maintenance of the Premises and expended many thousands of dollars so doing.

It is alleged that subsequent to entering into possession of the Premises, the Tenant developed its business at the Premises, building up a considerable amount of good will with the Tenants at the Building, with Tenant's customers and with the general public who patronized the art gallery. However, after becoming the landlord of the Building, the Landlord precluded the Tenant from using the Building lobby for openings and other events, and began planning to renovate the lobby, thereby interfering with the Tenant's beneficial enjoyment of the Premises.

By letter dated October 25, 2006, the Landlord notified the Tenant that it would be erecting a demising wall in front of the Premises. The wall would effectively eliminate the visibility of the Premises and preclude the Tenant from enjoying the Premises as an art gallery.

After commencement of this action, the Landlord changed its plans and decided to erect a so-called "floating wall" from floor to ceiling directly in front of the entrance to the Premises. The Tenant claims that even this "floating wall" would eliminate the Premises' open access and visibility from the lobby and from the 43rd Street entrance. And, the quality of the display space would be largely diminished such that no artist would want to display art in what would amount to a "walk-in-closet."

Plaintiff claims that the rights afforded under Article 15, Rule 1 of the Lease "to control and operate the public portions of the Building" and Rule 15 which precludes the use of the Premises as a store for the sale or display of goods or merchandise, do not allow the Landlord to obliterate the Premises from view. Further, the Lease does not contain the reservation of rights typically included by landlords to permit them to perform work in the public areas without such work being considered an actual or constructive eviction.

With the “floating wall” in place, the gallery would only be visible to someone standing in front of the elevators who purposely looks to the left. And, the gallery would not be noticeable until one passed through the Building security systems. In order to enter the gallery, one would have to pass through the Building security.

The Tenant contends that it is clearly likely to succeed on the merits of its claim to continued use and occupancy of the Premises consistent with the terms of the Lease. According to the Tenant, the terms of the Lease clearly prevent the Landlord installing the “floating wall,” and unless enjoined, the Landlord’s “floating wall” will preclude Tenant’s use and enjoyment of the Premises to conduct events in the Premises and in the lobby of the Building.

Further, the Tenant will suffer irreparable harm if deprived of its rights under the Lease in and to the unique Fifth Avenue location of the Premises. Caselaw holds that a party’s loss of the possession and use of real property is an irreparable injury warranting injunctive relief. The Premises is a unique location, in which the Tenant has garnered a considerable following and business. The Tenant has held events which were well attended by the Building’s tenants, the Building’s management, and the general public. Further, the Tenant will sustain irreparable injury in that the Tenant will forfeit the use and beneficial enjoyment of the Premises, forfeit over \$150,000 in improvements, as well as the considerable amount of business prestige and good will the Tenant has amassed since January 2003.

Finally, the equities balance heavily in the Tenant’s favor, who is seeking to enforce the terms of the Lease, rather than in favor of the Landlord, which is seeking to circumvent the Lease and render the Premises useless to the Tenant as an art gallery.

Landlord's Opposition

In opposition, the Landlord argues that the Tenant failed to meet its burden for injunctive relief. The Tenant failed to show that the Landlord breached any specific - express or implied provision of the Lease to support its claim that the Landlord is interfering with its rights. The Tenant cannot even point to a breach of any written covenant of quiet enjoyment because no such covenant exists in the Lease. Nor has the Tenant demonstrated how the alleged right of unobstructed visibility over the 43rd Street lobby is interwoven within the rest of the Lease so that this alleged right would be “implied” here. The provision that addresses the Tenant’s rights regarding the Building’s entrances and corridors expressly limits the Tenant’s rights to ingress and egress from the Tenant’s Premises, and thus, does not provide a right to be free from visual obstruction over the entrances and corridors.

Further, the Tenant cannot rely on provisions of a standard lease omitted from the Lease at issue or on the Landlord’s Predecessor’s intent outside the four corners of the Lease. The Landlord maintains that the key to understanding the Tenant’s rights is to look at how much rent the Tenant was required to pay: which is nothing. In addition, the Lease clearly states that the Tenant’s operation shall be solely as an amenity for the benefit of the Building’s tenants. The Tenant is not permitted to market to the outside public.

Further, any new claim for actual or constructive eviction would fail, since (1) the Tenant has not abandoned the Premises, (2) the Landlord is not entering into and taking away any portion of the Premises and (3) the Landlord’s purported invasion/deprivation is not “wrongful” or in breach of any obligation.

The Tenant also failed to address Rules and Regulation ¶15, which precludes the Tenant’s

use of the Premises to sell or display goods of any kind or use the Premises as a retail store.

Under such Rule, the Tenant has no right to seek the patronage of the general public. Nor has the Tenant cited to any Lease term permitting the Tenant to use the lobby for openings and other events. And, the Landlord is not bound by any waivers or other informal permission that the Landlord's Predecessor may have granted.

Under the Lease's Rules and Regulations, the Landlord is clearly entitled to redesign the public portions of the Building, which includes repositioning the lobby and its use. Further, the Lease reserves the Landlord's right to change the configuration of the lobby. Under the new plan, the Landlord is not performing work in or even at the borderline of the Premises, even though the Lease permits the Landlord to enter the Premises to make any alternations the Landlord deems necessary or reasonably desirable.

Under the Predecessor Landlord, the Building's main lobby entrance was from Fifth Avenue. The Building's elevator's were located, however, some 160 feet to the east of that Fifth Avenue main entrance. Thus, the Building's tenants needed to walk through a tunnel-like corridor that was 160 feet deep to reach these elevators. The Tenant's art gallery had no visibility from Fifth Avenue, as it was approximately 130 feet east from Fifth Avenue, just before one reached the elevator's banks. The art gallery did not have any visibility from the 43rd Street entrance under standard conditions. Nor was there any signage on the outside of the Building disclosing the existence of the art gallery. Yet, the new plan calls for more visible signage, which will be to be the west of the floating wall.

The Landlord intends to permit the Tenant to continue to function, rent-free, as an amenity to the Building's tenants, who will be able to enter the art gallery without having to pass

through any doorway, and without any obstruction. The “floating wall” is not at the demising borderline, but rather three feet south thereof. Thus, the Premises’ entrance will continue to be entirely open, and plainly visible to the Building occupants as they stand in the elevator lobby. Persons interested in entering Tenant’s art gallery will continuously be able to do so without passing through security (although they will have to walk past the main security desk).

The Landlord contends that injunctive relief is unwarranted, as money damages are an adequate remedy. Where a commercial tenant claims that various conditions have impaired its use of its premises, the tenant has an adequate remedy in an action for damages for, *i.e.*, constructive eviction, breach of the covenant of quiet enjoyment, or rent abatement. And, the alleged injury to the Tenant’s business goodwill is insufficient.

Further, the Tenant failed to demonstrate that the balance of harm tips in its favor. The Tenant’s attack of the Landlord’s plans in the October 25, 2006 letter should be rejected as late, and such an unexplained delay belies any claim that irreparable harm will result if relief *pendete elite* is not provided.

In the event the Court grants an injunction, a bond or undertaking in the amount of \$40,000 should issue.

Tenant’s Reply

In reply, the Tenant adds that access to the art gallery would have to be by single file through a 3 foot entryway, thereby taking it longer for visitors to exit the gallery space in the event of a fire or emergency in violation of Section 27-370 of the New York City Administrative Code. The Tenant also submits the affidavit of the Landlord’s Predecessor, in which he states

that the art gallery was intended to be highly visible from lobby and from the 43rd Street entrance³ and that the gallery space was to be used in conjunction with events in the Building and its lobby, including openings and receptions. The Tenant contends that in addition to the art gallery being invisible once the wall is built, the quality of the display space would be largely diminished.

According to the Landlord's Predecessor, any provision in the Lease allowing the Landlord to change the lobby configuration or entrance and exit passageways was also intentionally deleted.

Under fundamental rules of contract interpretation, each provision of the Lease, including Article 3, entitling the Tenant to use the Premises as an art gallery, must be presumed to have been inserted in the Lease to accomplish a particular purpose. The Lease clauses should be interpreted to assure the Tenant's use of the Premises for its intended purpose, and not in a way that would frustrate the underlying purpose of the demise. The visibility of an art gallery goes to the essence of the demising grant. And, to the extent the Landlord goes beyond the scope of its right to enter the demised Premises to make repairs and improvements so as to render the Premises untenable, the Landlord will have wrongfully evicted the Tenant.

The Tenant adds that the Landlord's bad faith and unclean hands, demonstrated by the picture of the wall obscuring the Premises, precludes it from obtaining any equitable relief. If the wall, as it is depicted in the rendering on display in the Building lobby, is built, the Tenant "is effectively out of business." No visitor or Building tenant standing in front of the elevators is likely to purposely look to the left, or view the art gallery after passing through the Building

³ The Landlord's Predecessor attests that "To assure that the art gallery leased to Famo, Inc. would remain open and visible, we deliberately omitted from the Lease any provision allowing the landlord to change the arrangement and/or location of the lobby entrances or passageways, as this would materially and adversely affect the tenant's use of and access to the art gallery."

security systems. And, someone who had cleared the security gate to get to the elevators and then noticed the art gallery would have to go back through the security gate to go into the gallery. The drop in traffic from Building tenants and their visitors would be immediate.

Further, the Landlord's claim that the Tenant failed to cite to a provision in the Lease is an attempt to obfuscate the issue. There was no prohibition against selling the art displayed, nor was such prohibition ever intended. The space was rented as an art gallery, not an art museum. And, the Landlord's reliance on certain Rules and Regulations is misplaced, as they have no application to the Building or its common areas. Implicit in Article 3's definition of the use of the Premises, is the use that the Tenant would be displaying art and selling art to interested purchasers. To adopt the Landlord's contention as to the restricted non-retail use of the Premises, in reliance on a general rule rather than a specific use provision of the Lease itself, would violate contract construction principles. Also, it would be unreasonable to construe a rule and regulation, which could change from time to time during the Lease term, to supercede the use clause of the Lease.

Contrary to the Landlord's contention, the art gallery has always been and is still visible from the 43rd Street entrance. Now that it is no longer possible to enter the Building from Fifth Avenue, the 43rd Street entrance is the only way to the Building. The Tenant never claimed that its Premises was visible from the less attractive, and less favored Fifth Avenue corridor.

Further, the Tenant argues that it did not "sleep" on its rights, but instead sent a letter dated October 27, 2006 to the Landlord immediately after it received notice of the Landlord's plans to erect a wall, triggering months of negotiations.

And, as further proof the Landlord's intent to oust the Tenant, the Tenant contends that it

does not have ready access to the security gate for the Premises, as the Landlord has steadfastly refused to provide the Tenant with the key to operate the security gate and has covered over the Tenant's existing signage.

Nor is there any basis for the Landlord's assertion that it needs the wall to affix signage for the Building. The wall would be at the end of an approximately 80-foot corridor, and the Landlord's own renderings show that the Building will be prominently identified from the outside, above and around the 43rd Street entrance. Thus, the burdens on the Landlord of the injunction are nonexistent or minimal, while the harmful effects to the Tenant if the relief is denied is fatal to the art gallery's operation.

And, since the Tenant is not obligated to pay rent, there is nothing to abate with respect to any claim for constructive or actual eviction.

Furthermore, a bond or undertaking is unwarranted as there is no documentation showing that Landlord's construction costs would increase by \$40,000 if a preliminary injunction were granted. And, even if the Landlord were able to support such figure, (1) this alleged damage is not cognizable since the Landlord purchased the Building with full knowledge of the Tenant's rights under the Lease and (2) caselaw dictates that a bond is superfluous since the Tenant has invested over \$150,000 in improving and maintaining the Premises.⁴

Analysis

A preliminary injunction is a drastic remedy that "require[s] a clear showing of likelihood of ultimate success on the merits," danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor (*Faberge Intl. v Di Pino*, 109 AD2d 235, 240 [1st Dept

⁴ The Landlord adds that any bond or undertaking should be set in a nominal amount.

1985]; *see also, Credit Index v RiskWise Intl.*, 282 AD2d 246 [1st Dept 2001]; *see also Grant Co. v Srogi*, 52 NY2d 496, 517, 438 NYS2d 761 [1981]; *Casita, L.P. v Maplewood Equity Partners (Offshore) Ltd.*, -- NYS2d ----, 2007 WL 2199043 [1st Dept 2007]).

It is uncontested that the “floating wall” to which the Tenant takes issue greatly diminishes the visibility of the art gallery (Transcript, page 26, lines 22-25, page 27, lines 1-9). The issue is whether the Landlord’s reconfiguration of the Building’s lobby, by installing the “floating wall” in front of the Premises, violates the Tenant’s right to operate the art gallery as an amenity to the Building’s tenants as expressed in the Lease. The resolution of this issue turns on the terms of the Lease as follows:

3. USE OF PREMISES. The Premises may be used by the Tenant solely as and for an art gallery and for no other purpose. . . .

4. NO FIXED RENT. As stated above, Landlord is leasing the Premises to tenant as an amenity to the other tenants of the Building. Accordingly, no fixed rent shall be payable for the lease of the Premises.

* * *

9. RULES AND REGULATIONS. Tenant shall comply with the Rules and Regulations annexed hereto as Schedule B and any such other and further reasonable rules and regulations and standards as Landlord and Landlord’s agent may from time to time adopt, on notice to Tenant to be given as Landlord may elect.

* * *

12. INTENTIONALLY OMITTED

* * *

15. ACCESS BY LANDLORD. Landlord . . . shall have the right to enter the Premises, at reasonable times to examine any Building Systems or to make any repairs or alterations that Landlord may deem necessary or reasonably desirable and shall also have the right to enter the Premises for the purpose of exhibiting them to prospective tenants, licensees or mortgagees.

Schedule B, Rules and Regulations provides:

(1) The rights of tenants in the entrances, corridors, elevators and escalators of the Building are limited to ingress and egress from the tenant’s premises for the tenants and their employees Landlord reserves the right to control and operate the public portions of the

Building and the public facilities, as well as facilities furnished for the common use of the tenants, in such manner as it deems best for the benefit of the tenants generally.

* * *

(15) No premises shall be used, or permitted to be used, at any time as a store for the sale or display of goods or merchandise of any kind

“It is a court’s task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document” (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [2004]). “A contract is ambiguous ‘if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings’” (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

The Lease incorporates by reference the Rules and Regulations attached thereto, and thus, the Court may rely upon the terms contained in the Rules and Regulations as a basis to determine the rights and obligations of parties (*see e.g. Cipriani Fifth Ave., LLC v RCPI Landmark Properties*, 4 Misc 3d 850, 782 NYS2d 522 [N.Y.Sup. 2004]). Nothing can be clearer than that the Lease and the Rules and Regulations provided that (1) the Premises was leased to the Tenant as an amenity provided by the Landlord for the benefit of the Landlord’s remaining tenants in the Building, (2) the Premises was not to be used for any other purpose, (3) and that notwithstanding the Tenant’s use of the Premises as an art gallery, the Landlord reserved the right to control and operate the public portions of the Building. The unambiguous terms of the Lease leaves no room

for the contention that the Landlord reserved no rights over the common areas, such as the lobby.

The Latin phrase '*expressio unius est exclusio alterius*,' interpreted to mean the mention of one thing implies the exclusion of another, does not apply so as to conclude that the Landlord did not reserve any right to control or alter the common areas of the Building. That the Lease states that Paragraph 13 was "Intentionally Omitted" simply means that the parties agreed to omit the contents, as expressed in Paragraph 13, from the Lease. However, contrary to the Tenant's contention, Paragraph 13's "Intentionally Omitted" phrase does not, in and of itself, support the conclusion that the Landlord agreed to forego the reservation of the right to control the common area. Such a conclusion would require the Court to improperly look to extrinsic evidence, where no ambiguity exists (*Lake Constr. & Development Corp. v. City of New York*, 211 AD2d 514, 515, 621 NYS2d 337 [1st Dept 1997] [circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where, as here, the intention of the parties can be gathered from the instrument itself]). Thus, the fact that the body of the Lease is silent on the reservation of the Landlord's right to control or modify the common areas of the Building, is no basis to reject or ignore the term of the Rider, incorporated therein, which reserves such a right.

Further, in light of the merger clause contained within the Lease, the Tenant cannot rely upon the oral representations or waiver by conduct by the Landlord's Predecessor (*see Sioris v 25 West 43rd Street Co.*, 223 AD2d 475 [1st Dept. 1996] [stating that the general merger clause in the lease precludes plaintiff tenant's claim that he relied on oral representations by the predecessor landlord]). As such, looking within the four corners of the Lease, which includes the Rider, the Court finds that the Lease contains a specific reservation of the Landlord's right to

control the Building's lobby and build a "floating wall" in the lobby.

However, the Tenant's purported right to use and possess an art gallery with unobstructed view from the Building lobby and the 43rd Street is not as clearly established. The Tenant's claim that the Landlord is interfering with the "fruits of the contract" requires a closer look to determine the intended "fruit" of the Tenant's contract.

According to the express terms of the Lease, the Tenant's intended use and occupancy of the Premises was limited to operating a "small art gallery." The Landlord's intended use of the Premises as an art gallery, on the other hand, was as an "amenity" to the remaining tenants of the Building (Article 4). Except for its use as an art gallery, the use of the Premises for any other purpose was expressly prohibited (Article 3).⁵ Thus, whether the inability to observe the art gallery from the 43rd Street entrance or from the Building's lobby, in and of itself, conflicts with the Lease is not the issue. It is whether the art gallery is no longer an amenity to the Building's tenants where it is no longer visible from the 43rd Street entrance or from certain vantage points of the Building's lobby.

At the outset, the Court notes that no portion of the Premises would be rendered unusable by the "floating wall." Further, the record does not indicate that the "floating wall" situated a few feet in front of the art gallery, would eliminate the Tenant's right to operate the art gallery. There is no indication in the record that the Building's remaining tenants cannot frequent the art gallery, view the art from within the art gallery, or are otherwise precluded from entering the art gallery. The Tenant may display art and attend to the Building's tenants when they visit the art

⁵ The Court observes that consistent with the Lease, the Tenant acknowledges that the "object and intent of Article 4 (rent-free provision) was for the Landlord to get more back in tenant good will as a result of the operation of the gallery space that Tenant could have paid in rent."

gallery, and the floating wall does not prevent access by any Building tenant to enjoy or appreciate the art gallery. Nor is there indication that any diminished visibility caused by the “floating wall” would detrimentally affect the Tenant’s access to or knowledge of, or appreciation for the art gallery. Thus, it is unclear whether the fact that these same Building tenants cannot also view the art gallery from the 43rd Street entrance or will have to “purposely look to the left” from the elevators to observe the art, renders the art gallery any less an amenity.

The Tenant’s claim of an implicit right to sell art is unwarranted, since such a construction would run counter to the expressed provision that prohibits the sale of goods and merchandise. To sanction the *sale* of art where the Lease, by incorporation by reference, prohibits the sale of goods, is tantamount to rewriting the terms of the contract, which this Court is not authorized to do (*see Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 808 NYS2d 214 [1st Dept 2006]).

The Court also observes that it is unlikely that the Tenant will succeed on the merits of its actual or constructive eviction claims, since the Tenant has not abandoned any portion of the demised Premises (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82-83, 308 NYS2d 649, 256 NE2d 707 [1970]; *Express Indus. Group v City of New York*, 4 AD3d 197, 772 NYS2d 54 [2004]; *West Broadway Glass Co. v I.T.M. Bar*, 245 AD2d 232, 666 NYS2d 629 [1997]).

Thus, the submissions fail to demonstrate the likelihood of Tenant’s ability to establish that the Landlord violated any express or implied right of the Tenant.

In any event, the record fails to support the Tenant’s claim of irreparable injury. The goodwill contemplated by the Lease was goodwill enuring to the ultimate benefit of the

Landlord, and not to the ultimate benefit of the Tenant. Further, any loss in sales (which this Court concludes was not a right of the Tenant contemplated under the Lease) belies a claim of irreparable injury, as a loss in sales is calculable and recompensable by money damages (*Credit Index, L.L.C. v Riskwise Intern. L.L.C.*, 282 AD2d 246, 722 NYS2d 862 [1st Dept 2001]; *New York City Off-Track Betting Corp. v New York Racing Ass'n, Inc.*, 250 AD2d 437, 673 NYS2d 387 [1st Dept 1998]).

Based on the foregoing, it is hereby

ORDERED that plaintiff's order to show cause pursuant to CPLR 6301 to enjoin defendant, Green 521 Fifth Avenue LLC (the "Landlord") from (1) terminating the Tenant's lease for space rented to the Tenant in the lobby of the building located at 521 Fifth Avenue, New York, New York (the "Building") and used as an art gallery (the "Premises") by reconfiguring the lobby of the Building, (2) commencing summary proceedings to oust the Tenant from the Premises, (3) erecting a wall in front of the Premises which will affect or disturb the present visibility of the Premises from the lobby and the 43rd Street entrance, and (4) disturbing the Tenant's possession, rights, and use of the Premises for events such as art exhibitions is denied; and it is further

ORDERED that the parties appear for a preliminary conference on October 3, 2007, 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

HON. CAROL EDMEAD

Dated: September 18, 2007

FILED
SEP 25 2007

Hon. Carol Robinson Edmead, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE
16