

OSG, LLC v 119 West 25th LLC

2008 NY Slip Op 31770(U)

June 20, 2008

Supreme Court, New York County

Docket Number: 0105037/2008

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN
Justice

PART 7

OS C

INDEX NO. 105037108

- v -

MOTION DATE 5/22/08

MOTION SEQ. NO. 01

119 W 25th St

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-B
Answering Affidavits — Exhibits A-B
Replying Affidavits — Exhibits A-D
Sur-Reply

PAPERS NUMBERED

1-3
4-5
6-7
8-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined according to the unopposed memorandum decision and order.

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

FILED

JUN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN
J.S.C.

Dated: 6/20/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW
COUNTY OF NEW YORK: IAS PART 7

-----X
OSG, LLC,

Plaintiff,

- against -

119 WEST 25TH LLC,

Defendant.
-----X

HON. MICHAEL D. STALLMAN, J.

Index No.: 105037/08

DECISION AND ORDER

Plaintiff tenant moves for a preliminary injunction, pursuant to CPLR 6301, enjoining defendant landlord from performing demolition and construction work on the building in which plaintiff has leased commercial space.

BACKGROUND

Plaintiff entered into a seven-year commercial lease that terminates on May 30, 2011, with defendant's predecessor in interest. Pursuant to the lease, plaintiff rented a portion of the fourth floor of a twelve story building for dramatic and other artistic pursuits, and extensively renovated the premises to suit those purposes. The building itself is over one hundred years old.

In December, 2006, defendant purchased the building subject to all current leases, including plaintiff's. Subsequent to the purchase, defendant submitted plans to the Department of Buildings to renovate the entire structure, except for the eleventh floor. According to the plans, defendant intends to divide the space currently rented by plaintiff into two offices and to construct communal bathrooms encroaching on a portion of the demised area.

Additionally, defendant is renovating the outside structure of the building, upgrading the building's electrical and heating system, and eliminating an internal staircase.

Defendant has started some of the renovation work, including some demolition on the floor on which plaintiff's space is located, and intends to close down the passenger elevators, having the tenants and patrons use the existing freight elevators.

Plaintiff maintains that the proposed work breaches the covenant of quiet enjoyment of its lease by the landlord (1) doing demolition and construction work in its leased premises, (2) discontinuing electrical and elevator services, (3) eliminating an internal staircase, (4) doing facade work on the building and (5) forcing plaintiff to endure the noise and vibration of the construction.

Defendant maintains that it does not intend to perform any construction or demolition work in plaintiff's leased premises until after the termination of the leasehold, and that the renovation work will benefit all of the tenants by modernizing an extremely old building.

In signing the order to show cause which noticed the instant motion, Justice DeGrasse denied the request for a temporary restraining order (order to show cause, April 8, 2008).

DISCUSSION

A preliminary injunction is a drastic remedy which should be granted where the movant has demonstrated a clear legal right to the relief demanded based upon the undisputed facts. *Scotto v Mei*, 219 AD2d 181, 182 (1st Dept 1996). To be entitled to a preliminary injunction, the movant must show a probability of success, the danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor. *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 (1990). If any one of these elements is missing, a preliminary injunction cannot be issued.

In the case at bar, plaintiff bases its request for a preliminary injunction on a breach of its lease's covenant of quiet enjoyment. To prevail under this theory, plaintiff tenant is required to "establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant [internal citations omitted]" *Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 (2005).

To constitute a partial actual eviction, a landlord must oust a tenant from physical possession of the leased premises, (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77 [1970]), even if only from a portion of the premises (*Scolamiero v Cincotta*, 128

AD2d 224 [3d Dept 1987]), or deprive the tenant of appurtenant rights. *487 Elmwood, Inc. v Hassett*, 107 AD2d 285 (4th Dept 1985). However, to constitute any type of eviction, the tenant must be deprived of something to which he or she is entitled to by virtue of the lease. (*Barash, id.*)

Pursuant to paragraph 23 of the lease, plaintiff is granted a covenant of quiet enjoyment. However, other provisions of the lease enumerate certain actions on the part of defendant which plaintiff has contractually agreed do not constitute a breach of quiet enjoyment.

According to paragraph 20 of the lease,

"Owner shall have the right at any time without the same constituting an eviction and without incurring liability to tenant therefor to change the arrangement and or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets or other public parts of the building and to change the name, number or designation by which the building may be known. There shall be no allowance to tenant for diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner or other Tenant making any repairs in the building or any such alterations, additions or improvements. Furthermore Tenant shall not have any claim against Owner by reason of Owner's imposition of any controls of the manner of access to the building by Tenant's social or business visitors as the Owner may deem necessary for the security of the building and its occupants [emphasis added]."

Paragraph 31 of the lease provides:

"Elevators, Heat, Cleaning Owner shall : (a) provide necessary passenger elevator facilities on business days from 8 a.m. to 6 p.m. and on Saturdays from 8 a.m. to 1 p.m.; (b) if freight elevator service

is provided, same shall be provided only on regular business days Monday through Friday inclusive, and on those days only between the hours of 9 a.m. and 12 noon and between 1 p.m. and 5 p.m.; (c) furnish heat, water and other services supplied by Owner to the demised premises, when and as required by law, on business days from 8 a.m. to 6 p.m.; (d) to clean the public halls and public portions of the building which are used in common by all tenants. **Owner reserves the right to stop service of the heating, elevator, plumbing and electrical systems, when necessary by reason of accident, or emergency, or for repairs, alterations, replacements or improvements in the judgment of Owner desirable or necessary to be made, until such repairs, alterations, replacements or improvements shall have been completed.** If the building of which the demised premises are a part supplies manually operated elevator service, Owner may proceed diligently with alterations necessary to substitute automatic control elevator service without in any way affecting the obligations of Tenant hereunder. Building is 7 day/24 hour accessible [emphasis added]."

Paragraph 91 of the lease states:

"Landlord reserves the right, without any liability to the Tenant, except as otherwise expressly provided in the lease, and without being in breach of any covenant of this lease, to stop, interrupt or suspend service of any of the heating, elevator, or the rendition of any other services required of Landlord under this lease, whenever and for so long as may be necessary, by reason of accidents, emergencies, and making of repairs, or changes which Landlord is required by the lease or by law to make or in good faith, deems advisable, or by reason of inadvertent delays. In each instance, Landlord shall exercise reasonable diligence to eliminate the cause of the stoppage and to effect restoration of service and shall give Tenant reasonable notice whenever practicable of the commencement and anticipated duration of such stoppage. Landlord will use its best efforts to avoid interference with Tenant's use and enjoyment of the premises. Tenant shall not be entitled to any diminution or abatement of rent or other compensation nor shall this lease or any of the obligations of Tenant be effected or reduced by reason of the interruption, stoppage or suspense [sic] of any of the building's systems or services arising out of the clauses set forth

herein [emphasis added]."

Lastly, paragraph 13 of the lease provides:

"Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building **Tenant shall permit Owner to use and maintain and replace pipes and conduits in and through the demised premises and to erect new pipes and conduits therein provided, wherever possible, they are within walls or otherwise concealed. Owner may, during the progress of any work in the Demised Premises, take all necessary materials and equipment into said premises without the same constituting an eviction nor shall Tenant be entitled to any abatement of rent while such work is in progress nor to any damages by reason or loss or interruption of business or otherwise ... [emphasis added]."**

Consequently, the question is whether the lease provisions preclude plaintiff from obtaining a preliminary injunction.

In support of its contention that defendant has breached the covenant of quiet enjoyment, plaintiff cites *Appliance Giant, Inc. v Columbia 90 Associates, LLC* (8 AD3d 932 [3d Dept 2004]), a case in which the court found a breach of the covenant of quiet enjoyment caused by an actual partial eviction when a landlord took control of numerous parking spots that were leased to the tenant. However, in the instant case there is no actual partial eviction at the present time, merely plans to reconfigure the demised premises. Plaintiff maintains that the threat of defendant's taking of a portion of its demised premises is imminent, whereas defendant maintains such taking will not take place until after the

expiration of the leasehold.

Plaintiff's assertion that defendant is planning to encroach upon its demised premises is based on the renovation plans filed by defendant, the work actually started, and representations that plaintiff alleges were made by defendant's principal. According to the renovation plans, among other things, defendant intends to create two public bathrooms that would physically be within a portion of plaintiff's demised premises. Plaintiff asserts that it would be impossible to provide piping for these bathrooms, which are to be on every floor, without taking a portion of plaintiff's area (plaintiff is on the fourth floor and the bathrooms would be in the same physical area on the first ten floors). Conversely, defendant, while agreeing that the eventual reconstruction will divide up the space currently occupied by plaintiff, insists that that portion of the work will not take place until after plaintiff's lease expires, that the other construction does not affect plaintiff's space, and that plaintiff misinterpreted the statements made by defendant's principal.

Because there are factual questions as to whether the landlord's actions are imminent and would constitute a partial actual eviction of plaintiff's demised premises, a preliminary injunction would be appropriate to maintain the status quo under the lease until the rights of the parties have been adjudicated. *See 144 East 40th St. Leasing Corp. v Schneider*, 125 AD2d 195, 196

[*9]
(1st Dept 1986).

Secondarily, plaintiff argues that defendant's actions constitute an anticipatory breach. This argument is based on alleged statements by defendant's principal, which she disavows. In the affidavit submitted with the opposition, the defendant's principal maintains that no work will be done in plaintiff's leased premises until after the lease terminates.

Under New York law, the doctrine of anticipatory breach has been held to apply only to contracts of a special character, such as contracts to marry, for personal services, and for the manufacture and sale of goods. Furthermore, under this doctrine, the innocent party has a right to seek immediate damages for breach of the contract. *Acacia National Life Ins. Co. v Kay Jewelers, Inc.*, 203 AD2d 40 (1st Dept 1994); *Indian Rivers Island Corp. v Manufacturers Trust Co.*, 253 App Div 549 (1st Dept 1938). If an innocent party may be made whole by the payment of money damages, no irreparable injury has occurred (*SportsChannel America Associates v National Hockey League*, 186 AD2d 417 [1st Dept 1992]), and therefore this argument does not support plaintiff's request for a preliminary injunction.

Plaintiff asserts that if a preliminary injunction is not issued it will suffer irreparable harm. "Irreparable injury," the second requirement that must be proved to allow for a preliminary injunction, is defined as "a continuing harm resulting in

substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite* [W]here injunctive relief is to be granted, it is to be molded to fit the circumstances so as to preserve the *status quo* to the extent possible (internal citations omitted)." *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne (Sabena) v Feller*, 112 AD2d 837, 840 (1st Dept 1985).

In the instant case, if plaintiff were correct, once its demised premises have been broken through to provide piping for the proposed communal bathrooms, the area could not easily be restored and plaintiff's business would suffer. Even if it would be able to obtain a reduction in the rent for this partial taking of its leased area, such legal remedy may not be sufficient or as effective as its equitable one, in terms of preserving its use and enjoyment of the demised area. See *Poling Transportation Corp. v A & P Tanker Corp.*, 84 AD2d 796 (2d Dept. 1981).

The final requirement for granting a preliminary injunction is the balancing of the equities between the parties. *Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77 *supra*. Plaintiff alleges in its memorandum in support of its application that "the balance of the equities weighs heavily in Tenant's favor. Tenant has done nothing wrong." Defendant asserts that it would suffer substantial prejudice if it is enjoined from continuing the construction because of the extremely high interest it must pay on

its building loan, and that the renovations would benefit all present and future tenants of the building. It is noted that neither side provides any judicial support for the proposition that the equities favor its position.

The nature of the injunctive relief requested by plaintiff, that of a total restraint of defendant's reconstruction work on the entire building, is far too broad, impinging on defendant's rights under the lease and extending far beyond plaintiff's space. However, at the same time, equity favors permitting a lawful tenant to have the quiet enjoyment of its leased premises, including the right to use the space as currently configured for the purposes contemplated by the lease.

Therefore, based on the foregoing, plaintiff is entitled only to a limited preliminary injunction, one that restricts defendant from doing any work in plaintiff's demised premises that is not permitted by the lease.

CONCLUSION

It is hereby:

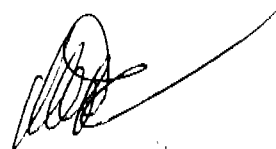
ORDERED that OSG, LLC's request for a preliminary injunction is granted only to the extent of restraining defendant from doing any construction or renovation work in plaintiff's demised premises pending final determination or further court order based on proof of a change in circumstances; and it is further

ORDERED that defendant shall serve an answer to the complaint within 30 days of service of a copy of this order with a notice of entry; and it is further

ORDERED that counsel for both sides shall attend a preliminary conference in IAS Part 7, Room 949, 111 Centre Street, on Thursday, August 21, 2008 at 9:30 A.M.

Dated: New York, New York
June 20, 2008

ENTER:



MICHAEL D. STALLMAN J.S.C.

FILED

JUN 25 2008

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