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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART Short

Apollo International Holdings

INDEX NO. 600796/08

MOTION DATE 3/26/08

- v -

MOTION SEQ. NO. 001

W3M 295 Madison Owner, LLC

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUL 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE, III

Dated: 7/11/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 56

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PHILIPS INTERNATIONAL HOLDING CORP.,

Plaintiff,

Index No.: 600796/08

-against-

WBM 295 MADISON OWNER, LLC,

Defendant.

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Richard B. Lowe, III, J.:

Plaintiff, a tenant, is seeking a preliminary injunction, pursuant to CPLR §§ 6301, 6311 and 6313, enjoining the defendant landlord from demolishing or otherwise impairing the "grand staircase" in the building in which plaintiff has leased commercial space. The plaintiff has brought this action seeking to have the staircase declared part of plaintiff's demised premises. Plaintiff initially sought a temporary restraining order, which was granted.

BACKGROUND

The plaintiff entered into a ten and one-half-year commercial lease on October 15, 2003, for the entire second and part of the third floor (demised premises) in the subject building with defendant's predecessor in interest. The lease also contained a right to renew for an additional five-year period.

Plaintiff alleges that when it was looking for rental space it was attracted to the demised premises because it was marketed as having a "grand staircase" to the Madison Avenue entrance to the building. The staircase leads only to the second floor, and provides access to the "corner office" senior executive area of the office space leased by plaintiff. Access to this area, as well

as the rest of the demised premises, is also generally available by means of public elevators located at the 41st Street entrance to the building. The "grand staircase" only provides access to the demised premises.

Plaintiff asserts that one of the main reasons it rented the space was because of this private staircase to the executive suite, and after the lease was entered into, plaintiff had an expensive security system installed in the stair area. It is noted that the lease is totally silent with respect to the "grand staircase." Plaintiff's principal, a real estate developer, is an allegedly public figure who specifically desired having private ingress and egress to his office.

Defendant has filed plans to renovate a portion of the building, including the demolition of the "grand staircase." This area is planned to be replaced with retail space, and no replacement staircase is envisioned. Plaintiff is now seeking to enjoin defendant from demolishing the staircase or, in the alternative, have defendant construct a new staircase so that plaintiff can continue to enjoy private access to its executive area.

DISCUSSION

A preliminary injunction is a drastic remedy which should only 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 likelihood of success on the merits, 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]).

Likelihood of Success on the Merits

In the matter at bar, plaintiff requests a permanent injunction and a declaration that the

"grand staircase" is not part of the public portion of the building, but is appurtenant to the demised premises. This request is based on the fact that the staircase only leads to plaintiff's leased area. As a consequence, according to plaintiff, defendant's elimination of the "grand staircase" constitutes a partial eviction of the demised premises.

Plaintiff relies upon *Hamilton v Graybill* (19 Misc 521 [App Term 1st Dept 1897])in support of its argument. In *Hamilton*, the court held that a landlord's elimination of a private entrance to an office as part of the renovation of a commercial building constituted a partial eviction. The court stated that, whereas the use of this second door was not necessary for the business because there was another means of access, that door was necessary to the full enjoyment of leased space. (*Id* at 522).

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.*)

As stated above, the lease itself is totally silent with respect to the "grand staircase" and, as such, it is not technically part of the demised premises. However, plaintiff argues that the staircase is an appurtenant right of the leasehold. *Hamilton v Graybill*, 19 Misc 521 (*supra*).

An appurtenance is a right and privilege which is essential or reasonably necessary to the full beneficial use and enjoyment of the leased property. An appurtenance may not be revoked or otherwise terminated until the lease ends. (1 Dolan, Rasch's Landlord and Tenant–Summary

Proceedings § 7:5 [2006]). However, a tenant's mere convenience in its use and enjoyment of the space does not create an appurtenance. (*Id. §* 7:8).

Courts are divided as to what might actually be necessary for the full beneficial use and enjoyment of a demised premises. "[W]here premises are not essential to the tenant's business or use and enjoyment, and there exists alternative premises for the tenant's use, courts have declined to find an appurtenance (citations omitted)." (*Blenheim LLC v Il Posto LLC*, 14 Misc 3d 735, 741 [Civ Ct, NY County 2006]). Conversely, courts have held that "merely changing or limiting the means of ingress and egress without denying access to the leased premises can amount to an actual eviction from a substantial portion of the premises." (*487 Elmwood, Inc. v Hassett*, 107 AD2d 285 at 287).

In the instant case, plaintiff asserts that one of the main reasons for its lease of the premises was to have exclusive access to the executive offices by means of the "grand staircase." Even though the staircase is not mentioned in the lease, plaintiff maintains that, because it only gives access to plaintiff's premises, it is appurtenant thereto.

Plaintiff further argues it has acquired an easement for the use of the staircase which defendant may not revoke without plaintiff's consent. *(See Hamilton v Graybill*, 19 Misc 521 *supra).* This easement is an incorporeal appurtenant right that passes with the demised premises, even though it is not part of the demised premises. *(Henry A. Fabrycky, Inc. v Nad Realty Corp.*, 261 App Div 268, 269 [2nd Dept 1941]).

Plaintiff also argues that it has the easement based on the representations made by defendant's predecessor-in-interest as evidenced by the marketing materials, and the fact that, in reliance thereon, plaintiff expended significant funds in installing security devices.

An easement by estoppel may arise if an owner of land, through specific representations, leads another to reasonably believe a permanent, alienable interest in real property had been created, and if in reliance on such representations, the other makes permanent or valuable improvements on the land. To invoke the doctrine of estoppel, it must be shown that it would be inequitable to allow the owner to interrupt the enjoyment of the easement. *Olin v Kingsbury*, 181 App Div 348, 354 (1st Dept 1918).

In the instant case, plaintiff's documents indicate that the premises were marketed as being accessed by the "grand staircase," and plaintiff asserts that it was enticed into renting the premises because of the private access thus afforded. If the staircase were to be removed, the door leading to and from the executive section of the demised premises would lead nowhere.
These arguments support the contention that plaintiff has acquired an easement by estoppel with respect to the "grand staircase."

Conversely, defendant's argument rests on the allegation that the "grand staircase" is part of the public areas of the building, which defendant may alter or remove pursuant to the lease. This argument presupposes that plaintiff only had a license to use the staircase, which may be revoked.

"A license is a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein (internal quotations and citations omitted)." (*Kohman v Rochambeau Realty & Development Corp.*, 17 AD3d 151, 153 [1st Dept 2005]). It is noted that, as stated by defendant, under the terms of the lease defendant has the right to make alterations to the public areas.

Once the "grand staircase" is demolished, it cannot be replaced. In such circumstances,

were preliminary injunctive relief to be denied, the final judgment might be ineffective and, therefore, "the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced." *Republic of Lebanon v Sotheby's*, 167 AD2d 142, 145 (1st Dept 1990). If plaintiff ultimately demonstrates that it has an easement by estoppel, it will prevail on the merits of the case. The mere existence of the factual dispute occasioned by the divergent theories posited by the parties does not necessarily preclude the issuance of preliminary injunctive relief, which would preserve the status quo and result in no harm or prejudice to the enjoined party. *(See Melvin v Union College*, 195 AD2d 447, 448 [2d Dept 1993]).

Therefore, based on the foregoing, plaintiff has presented a sufficient case to indicate it that may meet the first requirement to obtain a preliminary injunction.

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 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, plaintiff has demonstrated a potential for irreparable injury since its legal remedies may not be as efficient or effective as its equitable one, in terms of enforcing the easement to provide access to the executive area of the demised premises. *(See Poling Transportation Corp. v A & P Tanker Corp.*, 84 AD2d 796 [2d Dept 1981]).

Balancing of the Equities

Lastly, in terms of the third requirement, the equities favor plaintiff. If plaintiff has indeed acquired an easement by estoppel with respect to the "grand staircase," its permanent removal would deprive it of a substantial legal right. Under these circumstances, a preliminary injunction is appropriate to preserve the status quo. (*See Gramercy Co. v Benenson*, 223 AD2d 497 [1st Dept 1996]).

Conclusion

Accordingly, based on the foregoing, plaintiff's motion for a preliminary injunction is granted to the extent of continuing the temporary restraining order pending the trial.

It is therefore hereby:

ORDERED that plaintiff Philips International Holding Corp.'s motion for a preliminary injunction is granted to the extent of continuing the temporary restraining order pending the trial, and it is further

ORDERED that the undertaking is fixed in the sum of $1,000,000.00 (one million dollars) conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant, WBM 295 Madison Owner, LLC, all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision of control of defendant or otherwise, any of the following acts:

Permit, cause, undertake or perform any demolition or other work as will effect the stairway or entrance at 295 Madison Avenue (entrance to the building).

Dated: July 1, 2008

ENTER:

J.S.C.
HON. RICHARD B. LOWE, III