| **Bakhishi v West 21st St. Props., LLC** |
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| 2008 NY Slip Op 32068(U) |
| July 9, 2008 |
| Supreme Court, New York County |
| Docket Number: 0101183/2008 |
| Judge: Shirley Werner Kornreich |
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| This opinion is uncorrected and not selected for official publication. |

SCANNED ON 7/23/2008

[* 1]

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

PRESENT: Kornreich, Justice    PART 54

Bakrushi, Jon

- v -

West 21st Street Properties

INDEX NO. 101183/08

MOTION DATE 3/20/08

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this motion to/for Mandatory Injunction Preliminary Injunction

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-4 |
| Answering Affidavits — Exhibits | 5-6 |
| Replying Affidavits | 7-9 |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is withdrawn.

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

FILED
JUL 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/08

HON. SHIRLEY WERNER KORNREICH, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 2 ]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

---------------------------------------------------------------------X

JON BAKHISHI and 539 JB ENTERPRISES, LTD., INDEX NO. 101183/08

Plaintiffs,

DECISION & ORDER

-against-

WEST 21ST STREET PROPERTIES, LLC and
EDISON PARKING CORPORATION,

Defendants.

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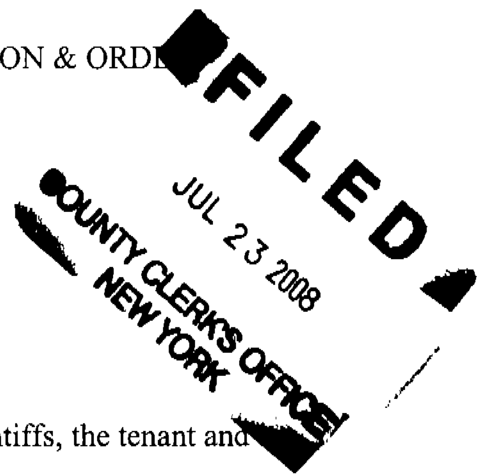


KORNREICH, SHIRLEY WERNER, J.:

In this action alleging violations of a commercial lease, plaintiffs, the tenant and guarantor of the lease, move for a preliminary injunction compelling defendants to approve their renovation plans for the demised premises; to cooperate in obtaining governmental approval for the renovations; staying the tenant's obligations for rent, additional rent, real estate taxes and utilities, or, alternatively, directing those payments to be held in escrow by plaintiffs' attorneys or deposited into court; and staying operation of the indemnification and insurance clauses under the lease.

Defendants oppose the motion on the ground that plaintiffs have not shown a likelihood of success on the merits, a balancing of the equities in their favor, or that the remedy at law is inadequate, and plaintiffs have unclean hands. Specifically, defendants state that the lease did not contain a provision that the landlord's consent to alterations could not be unreasonably withheld and the tenant never signed the documents in which the landlord agreed to alterations with certain conditions. In addition, they state that the tenant attempted to assign the premises to a sex related enterprise in violation of the lease while posing as the landlord's representative.

The motion is granted in part and denied in part for the reasons that follow.

*Background*

On February 1, 1999, Guaranty Storage Centers, Inc. (Guaranty Storage), as Landlord, entered into a lease with New York Caterers, Inc. (Caterers), as Tenant (Lease). Moving Papers, Exh. D. The demised premises under the Lease are a ground floor restaurant and kitchen and a portion of the basement of a building located at 531-539 West 21st St., New York, NY (Building).[1] In a stipulation of settlement, dated January 13, 2002 (Stipulation), in an action entitled, *New York Caterers, Inc. v. Storage USA, Inc., and SUSA Partnership, L.P.,* Supreme Court, New York County, Index No. 107578/00, Caterers and SUSA Partnership, L.P. (SUSA) agreed that Caterers timely exercised an option to extend the Lease to May 31, 2005. Opposing Papers, Exh. B. The Stipulation also provided that Guaranty Storage was the predecessor in interest to SUSA. In a document dated June 22, 2004, with SUSA's consent, Caterers assigned its leasehold under the Lease to plaintiff 539 JB Enterprises, Ltd. (JB), which assumed Caterers' obligations under the Lease. Opposing Papers, Exh. A. On the same day, SUSA and JB entered into a second amendment of the Lease (Second Amendment) that extended its term through May 15, 2015 and amended the clause governing assignments. Opposing Papers, Exh. B. On May 18, 2005, SUSA conveyed the Building to West 21st Street Properties, LLC (West 21), the current landlord.

Article 7 of the Lease is entitled "Tenant's Wok [sic]. Section 7.01 defines "Tenant's Work" as:

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[1] The parties do not dispute that the demised premises are in 539 West 21st St., but the Lease states that the demised premises are marked in red on Exhibit A, a copy of which has not been provided to the court.

> all work, additions, and alterations which may be undertaken by or for the account of Tenant to prepare, equip, decorate and furnish the Demised Premises for Tenant's use and occupancy, all in conformity with the standard of quality construction as reasonably determined by Landlord.

Section 7.02 of the Lease provides as follows:

> Within thirty (30) days of the execution of this Lease, Tenant, at Tenant's sole cost and expense, shall cause to be prepared and delivered to Landlord two (2) copies of complete, detailed architectural, mechanical and electrical drawings and specifications for Tenant's Work ("Tenant's Plans"). Tenant's Plans shall be subject to Landlord's prior written approval and shall be prepared by architects and engineers approved by Landlord. Such approval shall not be unreasonably withheld by Landlord. Tenant's Plans shall comply with all applicable laws, ordinances and regulations and shall conform to Landlord's interpretation of the standards of the Building.

Section 7.05 of the Lease governs alterations after the 30 day period following execution of the Lease:

> After completion of Tenant's Work, if any, if Tenant shall desire to make further additions, alterations, or changes of any kind to the Demised Premises ("Alterations"); such Alterations shall not be made without Landlord's prior written consent thereto and shall comply with the foregoing requirements of this Article 7 as though such Alterations were Tenant's Work.

Section 8.01 of the Lease permits the tenant to use the demised premises "solely for the purpose of operating a restaurant with "live and reproduced music, dancing and service of alcoholic beverages." Section 8.04 prohibits use of the demised premises "as a so-called rubber goods shop, or as a massage parlor, live sex theatre, or topless bar."

The Second Amendment amended Section 22.01 of the Lease to provide that the Landlord's consent to an assignment could not be withheld unreasonably. However, the Second Amendment left intact Section 22.03, which requires a non-refundable fee to the landlord in the amount of $250.00 to accompany a request by the tenant to assign the Lease.

On December 15, 2006, JB submitted demolition plans to West 21. On December 22, 2006, West 21 broached the issue of fire egress and JB's architect responded that "[c]oncerning the means of egress, everything will be worked out as per code." The demolition plans were approved by West 21 in an email from Stephen Rosefsky, dated January 4, 2007. Mr. Rosefsky explicitly limited to his approval to demolition, stating that, "[a]ny work other than work reflected on the approved demolition plans is not consented to, nor addressed in any way by Landlord. Such other work will require separate submissions and independent review." The demolition was completed by JB in January 2007.

On February 22, 2007, JB submitted alteration plans to West 21. By letter dated March 14, 2007, West 21, by its manager, defendant Edison Parking Corporation (Edison), conditionally approved the plans. The conditions were: 1) modification of the Lease to prohibit JB from using any door leading from JB's premises to an interior space as a means of ingress or egress, including for emergencies; and 2) West 21's receipt of JB's countersignature on the letter within three days. The secondary means of egress that West 21 sought to eliminate was part of the demised premises.

Subsequently, JB submitted new plans for approval, eliminating the secondary means of egress from the demised premises in order to resolve West 21's objection. The new plans resulted in a loss of square footage in the demised premises. On May 15, 2007, West 21 denied JB's request without explanation.

Plaintiffs assert that the failure to approve the alteration plans, after approving the demolition, was malicious and that, as part of the same malicious pattern, in October 2006, West 21 refused to consent to the assignment of the Lease to IKFD, LLC. Plaintiffs allege on

information and belief that defendants want to convert the Building to a condominium are seeking to force JB out because it refused to accept $300,000.00 to vacate the premises.

Defendants contend that the assignment was refused because IKFD operates a burlesque club and plaintiffs never paid the $250.00 fee. However, there is evidence that defendants acted in bad faith. The record contains an October 5, 2006 email from a principal of West 21 to his staff instructing them to continue being uncooperative, but polite, with regard to the IKFD assignment and adding, "[f]inally, it goes without saying that we don't want any of these guys to know yet that we are gearing up to take them out."

To prove plaintiffs' bad faith, defendants point to an email from a principal of IKFD, who apparently was under the impression that the attorney for Jon Bakhshi, JB's principal, was a representative of West 21, which defendants point to as evidence of plaintiffs' unclean hands.

*Discussion*

CPLR 6301 provides that:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

In order to obtain preliminary injunctive relief, a party must show a likelihood of ultimate success on the merits; that irreparable injury would result in the absence of preliminary injunctive relief; and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of extraordinary relief. *Pilgreen v. 91 Fifth Ave. Corp.*, 91 A.D.2d 565, 567 (1st Dept.1982), app. dismissed, 58 N.Y.2d 1113 (1983). Injury is not irreparable where it

can be compensated by money damages. *New York City Off-Track Betting Corp. v. New York Racing Ass'n*, 250 A.D.2d 437, 442 (1st Dept. 1998). "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite." *St. Paul Fire & Marine Ins. Co. v. York Claims Serv.*, 308 A.D.2d 347, 349 (1st Dept. 2003).

Plaintiffs' motion for a preliminary injunction is granted to the extent that, during the pendency of this action, plaintiffs shall deposit all monies due under the Lease with the Clerk of the Court and defendants are stayed from commencing eviction proceedings for non-payment. Plaintiffs have shown a likelihood of success on the merits of their claim that defendants acted in bad faith in refusing to approve the alterations. Defendants approved the demolition and then refused to consent to alterations, giving no reason, after plaintiffs altered their plans, lessening their space and eliminating their secondary means of egress, which was the basis of defendants' objection. Defendants' email discussing "gearing up to take them out," lends credence to plaintiffs' bad faith claim. While the Lease is, at best, ambiguous as to whether the Landlord's refusal to consent to alterations must be reasonable and there is no basis for finding an estoppel,[2]

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[2] Section 7.01, which requires reasonable refusal, only applied to alterations within 30 days of the Lease's execution in 1999. Section 7.05 of the Lease, which relates to later alterations, does not contain a clause limiting refusal to reasonable grounds and it is unclear whether the language that alterations "shall comply with the foregoing requirements of this Article 7 as though such Alterations were Tenant's Work," engrafts the limitation in section 7.01 on the landlord's right to refuse, or is directed to the Tenant's obligation to supply appropriate plans. There is no basis for an estoppel because plaintiffs have not shown that they relied on a false representation or concealment of material facts by defendants. *BWA Corp. v. Alltrans Express U.S.A., Inc.*, 112 A.D.2d 850, 852 (1st Dept. 1985). West 21's approval of the demolition plans expressly stated that any work other than work reflected on the approved demolition plans was not consented to and any other work would "require separate submissions and independent review."

there is a covenant of good faith and fair dealing implied in every contract, *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88, 90-91, 118 N.E. 214 (1917), which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement. *Jaffe v. Paramount Communications, Inc.*, 222 A.D.2d 17, 22-23 (1st Dept. 1996). Here, plaintiff have shown a likelihood of succeeding on their claim that defendants have acted in bad faith in order to deprive plaintiffs of the benefits of the Lease and to frustrate their ability to profit from it. Although business losses can be compensated with money damages, loss of the leasehold would be an irreparable injury and, therefore, defendants will be stayed from taking steps to terminate the Lease for non-payment during the pendency of this action. In order to preserve the status quo, plaintiffs shall deposit all payments due under the Lease with the Clerk of the Court. However, there is no basis for staying plaintiffs' insurance and indemnification obligations. Further, ordering approval of the alterations would grant plaintiffs their ultimate relief. Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is granted solely to the extent that, during the pendency of this action, plaintiffs' shall deposit with the Clerk of the Court, all rent, additional rent, real estate taxes and utilities due under the lease, dated February 1, 1999, between Guaranty Storage Centers, Inc., as Landlord, and New York Caterers, Inc., as Tenant, as amended by a stipulation of settlement, dated January 13, 2002, a second amendment, dated June 22, 2004, and an assignment and assumption agreement, dated June 22, 2004; and defendants and their agents, attorneys, employees, assignees and anyone acting on their behalf, are hereby stayed from taking any actions to terminate said Lease for non-payment of rent,

additional rent, real estate taxes and utilities, and in all other respects the motion is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference at the courthouse located at 111 Centre Street, New York, NY, in Part 54, Room 1227, on July 31, 2008 at 9:30 a.m., to set an expedited discovery and trial schedule.

Dated: July 9, 2008

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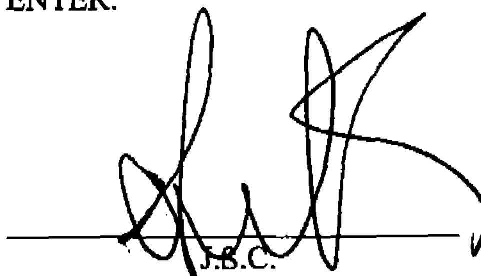

J.S.C.

FILED
JUL 23 2008
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NEW YORK