

480-486 Broadway, LLC v Keflay

2009 NY Slip Op 31802(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 106798/09

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN
Justice

PART 12

480-486 Broadway, LLC

INDEX NO.

106798/09

MOTION DATE

6/10/09

MOTION SEQ. NO.

1

MOTION CAL. NO.

15

Roman Keelay, Et Al.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ABOVE VERIFICATION AND ORDER.**

FILED
AUG 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/10/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

-----X
480-486 BROADWAY, LLC,
Plaintiff,

-against-

ROMAN KEFLAY and ROMAN KEFLAY, INC.,
Defendants.
-----X

Index No. 106798/09
Mot. Seq. No. 001
Submission Date 6/10/09
Cal. No. 15
Decision & Order

Appearances: For Plaintiff:
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Papers considered on this motion to compel access to premises:
Order to Show Cause, Annexed Affs. & Exhibits
Aff. of Service, Stipulation re Service
Aff. in Opposition, Annexed Exhibits
Reply Affirmation, Annexed Exhibits

FILED
1
2, 3
4
5
AUG 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAUL G. FEINMAN, J.:

Plaintiff landlord moves for a preliminary injunction, pursuant to CPLR 6301 and 6311, to compel defendants (together, tenant) to provide immediate access to the loft space occupied by tenant, for the purpose of determining the location of certain pipes that will span tenant's loft, connecting certain plumbing to adjacent buildings, and to compel tenant to provide immediate access to tenant's loft for the purpose of installing said pipes.

Tenant occupies a loft in a building that is one of three contiguous buildings purchased by landlord in 2004, and is subject to the Loft Law (Multiple Dwelling Law Article 7-C). The other two buildings are classified as Interim Multiple Dwellings, which require legalization to obtain a certificate of occupancy as a residential building. Landlord is also legalizing, for residential use,

the building which contains the unit that tenant currently occupies. In order to obtain the appropriate certificate of occupancy, the legalization of the units must be completed by June 1, 2010, pursuant to the Loft Law.

Tenant acquired possession of the premises pursuant to a two-year commercial lease entered into November 1994 with landlord's predecessor-in-interest. At the expiration of that lease, tenant became a month-to-month tenant.

In 2005, landlord instituted commercial holdover proceedings against tenant. In the answer to the holdover petition, tenant alleged that she always used the unit as her residence, with all the landlords' full knowledge and consent, and that the unit was subject to the rent stabilization laws.

According to the provisions of the Loft Law, a tenant who used the premises as a residence between the period prior to 1974, and/or during the April 1, 1980 through December 1, 1981 window period set forth in the Loft Law, is afforded rent regulation protection. In the holdover action, tenant sought, and was granted, discovery to determine the status of the building. However, that case has, according to landlord, been abandoned.

According to paragraph 13 of the commercial lease entered into by tenant and landlord's predecessor-in-interest,

13. Landlord or Landlord's agent shall have the right ... to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make ... replacements and improvements as Landlord may deem necessary and reasonably desirable to the demised premises or to any other portion of the building Tenant shall permit Landlord to use and maintain and replace pipes and conduits in and through the demised premises and to erect new pipes and conduits therein.

Landlord alleges that it has been attempting to gain access to tenant's unit since September, 2008, but that tenant has refused access. Tenant maintains that she has not refused access, but asserts that the construction in the buildings has filled the loft with dust and debris, and that to permit landlord to continue with such construction would result in physical harm to her, due to such dust and debris. Tenant also states that the construction work has destroyed her fashion design business, because she maintains much of her inventory of fabric in the loft. Tenant further asserts that the type of heating and cooling systems contemplated by the access landlord is seeking is not necessary to obtain legalization of the buildings.

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 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).

Landlord meets the first test to be entitled to a preliminary injunction, that of demonstrating a probability of success. As the Court said in *Huron Associates, LLC v 210 East 86th Street Corp.* (18 AD3d 231, 231 [1st Dept 2005]), in analyzing a similar lease provision:

In pertinent part, article 13 of the subject commercial lease gives landlord the right to enter tenant's premises 'to make such repairs, replacements or improvements as [landlord] may deem necessary and reasonably desirable to any portion of the building or which [landlord] may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease.' We find no basis on which to disturb the trial court's finding that this provision gives landlord a right of access to make any building improvements it

reasonably deems desirable, and is not limited to such access as is necessary to perform work that tenant itself was obligated to perform.

Further, a similar result was found in *1500 Broadway Chili Company, Inc. v Zapco 1500 Investment, L.P.* (259 AD2d 257 [1st Dept 1999]), in which the Court permitted a landlord, pursuant to a similar commercial lease provision, to gain access to install a sprinkler system in the tenant's premises.

The law cited in opposition by tenant deals with rights and obligations of landlords and tenants who are already subject to rent regulation, which, despite tenant's assertions, is not the case at bar. The only documentation concerning the building indicates that it is an Interim Multiple Dwelling, awaiting legalization.

"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 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, the legalization must be completed by June 1 of next year, less than a year away, and landlord would be irreparably harmed if it could not complete the legalization process it has already commenced. However, at this juncture, to preserve the status quo until a full hearing on the merits of a permanent injunction, it would only be necessary to compel access to tenant's unit to determine the location of the eventual pipes. Furthermore, tenant has asserted that she is not denying access, so this would not permanently interfere with tenant's rights.

The final requirement to granting a preliminary injunction is the balancing of the equities between the parties. *Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77 (1970).

Although tenant alleges that the dust and debris are causing physical harm, and that the remodeling may damage her premises, such inconvenience is the normal result of any remodeling, and tenant would have recourse to other remedies, other than halting the legalization of the buildings, to rectify any such alleged injuries. The equities are balanced in favor of the legalization of the buildings, which would provide certificates of occupancy for residential use for all tenants.

Tenant's argument that landlord does not have to install the heating and cooling system proposed in order to complete the legalization process is unavailing. Tenant has cited no law or precedent that permits a tenant to determine the nature of the improvements that a landlord undertakes. Accordingly, it is

ORDERED that defendants Roman Keflay and Roman Keflay, Inc., their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, 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 defendants or otherwise, any of the following acts:

Denying access to the fifth floor at 484 Broadway for purposes of permitting plaintiff and/or its contractors to determine the location of certain pipes that will span the defendants' loft connecting certain plumbing in 486 Broadway to a cooling tower atop 482 Broadway; and it is further

ORDERED that the undertaking is fixed in the sum of \$75,000.00 conditioned that the

plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendants, Roman Keflay and Roman Keflay, Inc., all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that all parties shall appear for a preliminary conference on October 7, 2009 at 2:15 p.m. in Part 12, Room 212, 60 Centre Street, New York, NY 10007.

Dated: August 10, 2009



J.S.C.

FILED
AUG 12 2009
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