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

PRESENT: STALLMAN Justice PART 7

225 5TH LLC

-v-

225 FIFTH AVE REALTY

INDEX NO. 603326/08

MOTION DATE 5/8/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for preliminary injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits 1-12	1-2
Answering Affidavits — Exhibits	3-6
Replying Affidavits	7-10

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

FILED
SEP 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 9/16/09

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 STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 7

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225 5TH, LLC,

Plaintiff,

-against-

225 FIFTH AVENUE RETAIL LLC, CERES REALTY GROUP LLC, 24 HOUR FITNESS USA, INC. and WM NEVILLE & SONS USA LLC,

Defendants.

INDEX NO. 603326/08

MOTION SEQ. NO. 001

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

Plaintiff 225 5th, LLC, is the owner of a building located at 225 Fifth Avenue, New York, New York (the Building), the sponsor of an offering plan to convert the Building to condominium ownership, and a lessee of a certain space within commercial condominium units C1N and C2S (the Commercial Units) located in the cellar of the Building. Defendant 225 Fifth Avenue Retail LLC (Retail) is the former owner of the Commercial Units and plaintiff's former landlord vis-a-vis these units. Defendant WM Neville & Sons USA LLC (Neville) is the successor to Retail, and current owner and landlord of the Commercial Units. Defendant Ceres Realty Group LLC (Ceres) is Retail's and Neville's managing agent with respect to the Commercial Units. Defendants Retail, Neville, and Ceres are collectively referred to as the landlord defendants. Defendant 24 Hour Fitness USA, Inc. (Fitness), leases the Commercial Units from Neville. The landlord defendants and Fitness are collectively referred to as the defendants.

Plaintiff moves for a preliminary injunction to enjoin the defendants from interfering with

(a) its rights to gain access to, use, and occupy the so-called work areas within the Commercial Units and other areas in the cellar, including the so-called cellar equipment room, and (b) its rights to perform and compete a project of relocating nonparty New York SMSA Limited Partnership's (Verizon) cellular phone communications facility from the roof of the Building to an equipment room in the cellar (the Verizon Project).

BACKGROUND

In 1991, plaintiff's predecessor in interest, as landlord, and Verizon, as tenant, entered into a lease agreement (the Original Verizon Lease), pursuant to which Verizon received a right (i) to construct and operate a mobile communications facility (the Communications Facility) and 15 antennas (the Antennas) (collectively, Verizon Equipment) on the roof of the Building, (ii) to install and maintain wires and other connections between the Communications Facility and the Antennas, and (iii) to access the Communications Facility and Antennas at all times (the Verizon Access Rights) (complaint, ¶ 7; 11/13/08 Sigoura Aff., exhibit 3). The Original Verizon Lease was amended in 2001 to increase (a) the roof space leased to Verizon and (b) the number of the Antennas that Verizon had a right to install (11/13/08 Sigoura Aff., exhibit 6).

Plaintiff purchased the Building subject to the Verizon Access Rights and undertook to convert the Building into a condominium, which includes construction of penthouse apartments on the roof of the Building where the Verizon Equipment is located (*id.*, ¶ 8).

Plaintiff advised Verizon that its equipment would have to be relocated. Verizon objected and commenced an action, *New York SMSA Limited Partnership d/b/a Verizon Wireless v 225 5th, LLC a/k/a 225 Fifth, LLC* (index No. 600969/05) in Supreme Court, New York County (the Verizon Action), to determine the scope of the Verizon Access Rights pursuant to the Original Verizon

Lease.

In December 2005, pursuant to a purchase agreement (the Neville Purchase Agreement), plaintiff conveyed the Commercial Units in the cellar to Neville (11/13/08 Sigoura Aff., exhibit 4). Prior to this transaction, plaintiff constructed an equipment room in the cellar (the Cellar Equipment Room) to house Verizon's Communications Facility, and installed conduits throughout the Building, including along the ceiling of the Commercial Units, to house the cables and wires that would connect the Antennas on the roof to the Communications Facility that would be moved to the Cellar Equipment Room. Plaintiff also built a closet in the cellar (the Cellar Closet) to house cables connecting different pieces of Verizon's equipment. Plaintiff allegedly spent several hundred thousand dollars on these projects (11/13/08 Sigoura Aff., ¶¶ 10, 22).

In October 2006, plaintiff granted an easement to Verizon to install and maintain its conduits, wires, and equipment throughout the Building, including the cellar (Verizon Easement) (05/01/09 Riegel Aff., exhibit B).

In October 2006, in preparation for the Verizon settlement, plaintiff and Verizon executed a second amendment to the Verizon Original Lease (Verizon Second Lease), pursuant to which plaintiff (a) leased to Verizon the so-called cellar equipment space with access rights and (b) granted Verizon rights to install and maintain the so-called cellar space connections and equipment in the equipment space in order to accomplish the Verizon Project (11/13/08 Sigoura Aff., ¶ 36-37, exhibit 7).

In November 2006, plaintiff entered into a lease (the Retail Lease) with Retail[1], pursuant to

[1] The nuances of ownership of the Commercial Units are not clear from the record in this motion. However, the parties agree that the Retail Lease governs plaintiff's relationship with Retail and Neville.

which Retail leased a portion of the cellar to plaintiff so that it could relocate the Communications Facility into the Cellar Equipment Room, and granted plaintiff a right to access the Commercial Units in order to install and maintain cables and wires connecting the Antennas with the Communications Facility (11/13/08 Sigoura Aff., exhibit 5). The Verizon Original and Second Leases were attached to, and referenced in, the Retail Lease (Retail Lease, exhibits A, B).

In September 2007, Retail and Neville officially merged and Neville is the surviving entity (12/09/08 Myers Aff., exhibit E).

In November 2007, Neville leased the Commercial Units to Fitness (the Fitness Lease) (McPhail Aff., exhibit A).

In December 2007, plaintiff and Verizon agreed to settle the Verizon Action and entered into a stipulation of settlement (the Verizon Settlement) (11/13/08 Sigoura Aff., exhibit 2). In July 2008, the court (M. Friedman, J.) so-ordered the Verizon Settlement (05/01/09 Riegel Aff., exhibit A).

Fitness, a California corporation, meanwhile allegedly spent seven million dollars in "building-out" the Commercial Units, installing its equipment, and, in July 2008, opening to public what it calls its New York City flagship fitness club (McPhail Aff., ¶¶ 6, 14, 18). Fitness refuses to provide access to plaintiff to the Commercial Units (access) in order to perform the Verizon Project, and Retail and Neville allegedly failed to compel Fitness to provide access. Fitness allegedly demanded $1,800,000 per month (Access Fee) from plaintiff for a right to have access. Fitness disputes this allegation and claims that this amount was only an estimate of its losses if Verizon were to complete its Project. Plaintiff alleges that without access, it will not be able to comply with its obligations under the Verizon Settlement. This may lead to Verizon keeping its Communications Facility on the roof of the Building, which would mean, in turn, that plaintiff would not be able to

close on the sale of seven apartments to be built on the roof of the Building for which lis pendens have been filed.

In its verified complaint (the complaint), plaintiff pleads eight causes of action: (1) alleging irreparable injury as a result of being denied access, and seeking a permanent injunction restraining defendants from interfering with its access rights in order to complete the Verizon Project (complaint, ¶ 42), (2) alleging that Retail breached the terms of the Retail Lease in that it failed to provide access to plaintiff, resulting in damages to plaintiff, and seeking abatement of rent, (3) alleging that Fitness is tortiously interfering with the Verizon Settlement and Verizon Second Lease by denying access and demanding payment of the Access Fee, and seeking compensatory and punitive damages, (4) alleging that Fitness is tortiously interfering with plaintiff's business relations with Verizon, by withholding access and demanding payment of the Access Fee, which amounts to unfair economic pressure, and seeking compensatory and punitive damages, (5) alleging that Retail's failure to provide plaintiff with access constitutes actual eviction, and seeking that the rent that plaintiff pays to Neville be suspended and that plaintiff be awarded monetary damages, (6) alleging that Retail constructively evicted plaintiff, and seeking an order directing that plaintiff's obligation to pay rent be suspended, and an award of monetary damages, (7) alleging that Retail violated plaintiff's entitlement to quiet enjoyment, and seeking monetary damages, and (8) seeking an order declaring that plaintiff has a right to access the Commercial Units in order to complete the Verizon Project and that defendants may not interfere with such right and must provide plaintiff with access unconditionally.

Plaintiff alleges that the remaining Verizon Project work involves pulling the cables "from the Cellar Closet and then stretch[ing them] out into a significant portion of the cellar of the

Commercial Units (the 'Work Areas') ... and then fe[eding them] through existing conduits from the Cellar Closet to the Cellar Equipment Room" (collectively, the Work) (complaint, ¶ 16). Plaintiff "needs access to the Commercial Units to run the cables and wires through the conduits connecting the Cellar Closet to the Cellar Equipment Room to complete the Work and comply with the terms of" the Verizon Settlement (11/13/08 Sigoura Aff., ¶ 10). It is estimated that the Work will take two months to complete and will occur within an approximately 2,000 square foot area of the cellar (*id.*, ¶ 79). Accordingly, plaintiff seeks access to the so-called "blue" and "green" work areas in the cellar, marked on the cellar floor plan, in order to perform the Work (*id.*, ¶ 10, n 3; order to show cause, exhibit A).

Plaintiff moves for a preliminary injunction, and Retail, Ceres, and Neville cross-move, pursuant to CPLR 3211 (a) (1), (7), for an order dismissing all causes of action in the complaint asserted against them.

DISCUSSION

Landlord Defendants' Cross Motion

The landlord defendants seek dismissal of the first (injunctive relief), second (breach of the Retail Lease), fifth (actual eviction), sixth (constructive eviction), seventh (breach of covenant of quiet enjoyment), and eighth (declaratory relief) causes of action.

A motion to dismiss, pursuant to CPLR 3211 (a) (1), "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

"In assessing a motion under CPLR 3211 (a) (7), ... the criterion is whether the proponent

of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83,88 [1994] [citations and internal quotation marks omitted]).

Alleged Retail Lease Modification by Plaintiff

Landlord defendants argue that dismissal is warranted, pursuant to CPLR 3211 (a) (1), based on the provisions of the Retail Lease. They contend that plaintiff violated the terms of section 4 (B) (iii) of the Retail Lease, which in pertinent part provides that

> [t]enant[, plaintiff,] agrees that it will not modify or amend the Verizon Lease without the prior written consent of the Landlord[, Retail,] in each instance, which consent shall not be unreasonably withheld ... provided that the purpose of such modification or amendment is to facilitate the settlement of the Verizon Litigation, and such modification or amendment does not materially and/or adversely affect this lease or Landlord's rights and obligations hereunder

(11/13/08 Sigoura Aff., exhibit 5, Retail Lease, § 4 [B] [iii]).

Landlord defendants allege that the Verizon Settlement in effect modified the Verizon Original and Second Leases by expanding the scope of the Verizon Project, which adversely affects Neville's rights under the Retail Lease and was done without obtaining Neville's consent (12/09/08 Myers Aff., ¶ 24).

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

In the Neville Purchase Agreement, Neville acknowledged that it was aware of the Verizon Action, "including the possibility of leasing or licensing to Verizon a portion of the cellar space ... as part of any settlement ... " (11/13/08 Sigoura Aff., exhibit 4, Neville Purchase Agreement, § 3.1

[d] [ii]).

Pursuant to the Retail Lease, which adopts the terms of the Verizon Second Lease, Retail leased to plaintiff

> the Cellar Equipment Space, *which includes certain areas in the cellar of the Building, all as substantially shown on Schedules C-1B* and C-2B ... and ... grant[ed] to [plaintiff] the rights granted to Verizon in Section 2 of the Original Verizon Lease[2] and *the right to install and maintain the Cellar Space Connections and equipment in the Equipment Space all as substantially shown on Schedules C*-1B, C-2B, C-3B, C-4B and C-5 ...

(11/13/08 Sigoura Aff., exhibit 5, Retail Lease, § 1 [A], [B] [i], [ii] [emphasis added]).

Pursuant to the Verizon Second Lease, plaintiff leases to Verizon, inter alia, "the Cellar Equipment Space, which includes that certain area located in the cellar of the Building, with a right of access thereto ... *all as substantially shown on Schedules C-1B* and C-2B ... " (11/13/08 Sigoura Aff., exhibit 7, Verizon Second Lease, § 1, exhibit A [emphasis added]). Additionally, plaintiff granted Verizon "the right to install and maintain the Cellar Space Connections and equipment in the Equipment Space all *as substantially shown on Schedules C-1B*, C-2B, C-3B, C-4B and C-5 ... " (*id.*, § 3, exhibit B [emphasis added]).

Schedule C-1B is the cellar floor plan detailing the location of Verizon's, inter alia, equipment and cables in the cellar (*id.*). The Verizon Original Lease and both amendments are attached to and incorporated into the Retail Lease, and schedule C-1B is attached to the Retail Lease as well (11/13/08 Sigoura Aff., exhibit 5, at 2, exhibit A). Although the terms of the Retail and

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[2] Section two of the Original Verizon Lease, dated September 5, 1991, and the first amendment of the Verizon lease, dated July 12, 2001, granted Verizon a right to install the antennas, and "install and maintain wires, cables and necessary connections between the equipment," on the roof of the Building (11/13/08 Sigoura Aff, exhibit 3, Verizon Original Lease, § 2).

Verizon Second Leases themselves are not precise, schedule C-1B provides definitiveness as to what plaintiff and Verizon and plaintiff and Retail agreed to (*see e.g Hirsch v Food Resources, Inc.*, 24 AD3d 293, 295 [1st Dept 2005] ["[w]hether a contract is ambiguous is a matter of law for the court ... as is the interpretation of an unambiguous contract"]).

As part of the Verizon Settlement, plaintiff and Verizon agreed on the scope of the Verizon Project (*id.*, exhibit 2, ¶ 37, exhibit N). Sheet A-3 attached to the Verizon Settlement is the cellar floor plan, detailing the location of the Verizon's Cellar Equipment Room, cables, and conduits (*id.*, exhibit N). Sheet A-3 appears to be substantially similar to schedule C-1B, which is attached to both the Verizon Second Lease and the Retail Lease (Verizon Settlement, exhibit N; Retail Lease, exhibit A; Verizon Second Lease, exhibit A). Landlord defendants specifically claim that the Verizon Settlement contemplates installation of gas lines and a generator through portions of the Commercial Units (12/09/08 Myers Aff., ¶ 32). However, both of these items are reflected on Schedule C-1B, which is attached to the Retail Lease (*see* Retail Lease, exhibit A). Accordingly, the Verizon Settlement did not materially modify the demised area or the scope of the Verizon Project under either the Verizon Second Lease or Retail Lease, and, hence, plaintiff did not need to seek Neville's approval of the scope of work agreed to under the Verizon Settlement.

Landlord defendants further argue that plaintiff modified the use of cellar premises that plaintiff leased to Verizon through a Sixth Amendment to the Declaration of the Condominium, modifying section 1 (B) of the Retail Lease (12/09/08 Myers Aff., ¶ 32). In response, plaintiff contends that the amendment to the condominium declaration only changed the shading on the cellar floor plan to designate the previously installed conduits in the cellar as commercial limited common elements and did not modify plaintiff's access rights under the Retail Lease (04/06/09 Sigoura Aff.,

¶¶ 27-28, exhibit G, ¶¶ 5, 6). Indeed, the cellar floor amended plan differs from the existing cellar floor plan in that the former identifies the route of Verizon conduits that are mounted to the cellar's ceiling (12/09/08 Myers Aff., exhibit H). The amended floor plan did not change the square footage of the Commercial Units (*id.*). The changes have not enlarged the scope of the proposed Verizon work or the access rights granted by the Retail Lease that plaintiff seeks to enforce.

Request to Access the Cellar

Landlord defendants contend that plaintiff never requested access to the Commercial Units (12/09/08 Myers Aff., ¶¶ 34-36) and that plaintiff failed to commence the Work prior to June 2008, when the cellar was either empty or in the process of "being built-out" by Fitness (*id.*, ¶ 38). Additionally, plaintiff allegedly did not file applications to obtain permits from the Department of Buildings to perform the Work (*id.*, ¶ 39).

In reply, plaintiff explains that the Verizon Settlement was executed in December 2007, submitted to the court in January 2008, and so-ordered by the court on July 16, 2008 (05/01/09 Riegel Aff., ¶¶ 8-12, exhibit A). Accordingly, plaintiff could not commence any work until the court so-ordered the Verizon Settlement. Plaintiff submitted evidence that it sought access to the cellar to conduct the Work in July, September, October, and November of 2008 (04/06/09 Sigoura Aff., exhibits A-F). A letter from Neville to plaintiff, dated October 24, 2008, responds to plaintiff's request to perform the Work (*id.*, exhibit D). Plaintiff claims that it experienced delays in obtaining permits due to the landmark status of the Building (Shargian Aff., ¶ 12). Accordingly, the landlord defendant's argument is meritless.

Notice Provision of Retail Lease

The landlord defendants maintain that plaintiff failed to allege that it complied with the

notice provision of the Retail Lease, requiring notice by certified or registered mail that Retail breached the lease (Retail Lease, §§ 5 [B], [28]). Section 5 (B) of the Retail Lease provides that plaintiff shall give Retail a written notice of breach by Retail of a lease provision, and Retail shall have 30 days to cure the breach, and plaintiff may not maintain any action "for default" against Retail unless and until Retail has failed to cure the breach (Retail Lease, § 5 [B]). The lease, however, also provides that "it shall be a default under this lease if [Retail] fails within three (3) days after receipt of written notice of such breach, to either (i) perform an obligation required to be performed by [Retail] ... or (ii) commence performance of an obligation within such three (3) day period ... provided the failure to perform such an obligation materially and adversely affects [plaintiff's] ability to conduct its business in [the B]uilding" (*id.*).

Plaintiff offers a letter, dated September 19, 2008, from plaintiff's counsel to counsel of landlord defendants (04/06/09 Sigoura Aff., exhibit B) and a letter, dated November 5, 2008, from plaintiff to Neville (*id.*, exhibit E). Both letters detail how Neville failed to follow the provisions of the Retail Lease and, therefore, constitute notice of breach. Neville does not deny receiving the September 19, 2008 letter, and plaintiff provides a signed postal receipt, confirming the delivery of the November 5, 2008 letter (04/06/09 Sigoura Aff., exhibit F). Plaintiff commenced this action on or about November 13, 2008 (11/13/08 Sigoura Aff., exhibit 1). Accordingly, plaintiff gave adequate time to Neville to begin to cure its alleged breach. Since Neville allegedly failed to do so, plaintiff was not estopped by the terms of the Retail Lease from bringing this action (Retail Lease, § 5 [B]). Additionally, even if this action is not for "default" within the meaning of the Retail Lease, plaintiff can still seek a court order to enforce its right to gain access to the cellar. Finally, contrary to landlord defendants' argument, the aforementioned grounds do not preclude plaintiff from

pleading the first and the second causes of action, seeking a permanent injunction and alleging that Retail breached the Retail Lease, respectively.

Breach of Retail Lease

The landlord defendants argue that "plaintiff has not alleged facts sufficient to establish that there was a breach or default of the Lease and a failure by the landlord under the Lease to cure such default," necessitating dismissal of the first and second causes of action for the alleged breach of the Retail Lease (12/11/08 Shaw Mem. Law, at 17).

A pleading alleging a breach of contract should specify "the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant" (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]; *see also Sebro Packaging Corp. v S.T.S. Indus.*, 93 AD2d 785, 785 [1st Dept 1983]). The complaint alleges (i) that plaintiff and Retail entered into the Retail Lease and includes the material terms of the lease (complaint, ¶¶ 19, 20), (ii) that plaintiff complied with the terms of the lease, including paying monthly rent (*id.*, ¶ 49), and (iii) that "Retail has failed and refused to provide Plaintiff with access to the Commercial Units" (*id.*, ¶ 46; *see also* ¶¶ 29, 36). Accordingly, the complaint adequately pleads the cause of action for breach of the Retail Lease.

Allegation of Verizon's Possession of the Cellar Premises

The landlord defendants contend that the fifth through seventh causes of action, actual eviction, constructive eviction, and breach of the covenant of quiet enjoyment by Retail, respectively, should be dismissed, because plaintiff alleged that Verizon is in possession of the premises as plaintiff's subtenant. However, plaintiff clearly alleges that "Fitness is in possession and occupies" the cellar premises (complaint, ¶ 23) and that plaintiff sought, and was denied, access to the cellar

in order to conduct the Work for the benefit of Verizon (*see e.g.* complaint, ¶¶ 26-31). The letter from Neville to plaintiff, dated October 24, 2008, clearly demonstrates that only Fitness is in possession of the Commercial Units in the cellar and that Neville objects to the proposed Work (04/06/09 Sigoura Aff., exhibit D). This shows that Verizon is not in possession of the cellar premises and, hence, defeats defendants' argument.

Duplicative Claims

The landlord defendants further contend that the eighth cause of action seeks the same relief as the first one. The first cause of action alleges that plaintiff has been harmed as a result of the defendants' failure to provide access to the cellar premises and seeks "a permanent injunction, restraining and enjoining Defendants from interfering with ... Plaintiff's right to access the Commercial Units for the purpose of performing and completing the Work" (complaint, ¶ 42). The eighth cause of action seeks "[a] judicial determination of the rights and obligations of the parties" and a declaration that (a) plaintiff has access rights to the Commercial Units, (b) defendants may not interfere with such rights, and (c) plaintiff's "rights are not conditioned upon prior consent of Defendants or the payment of the Access Fee ... " (complaint, ¶¶ 79, 81). Clearly, these two causes of action do not seek the same relief: the first one seeks injunctive relief, whereas the second one seeks declaratory relief.

Merger of Retail and Neville

The landlord defendants provide a copy of a certificate of merger, which was filed with the Department of State, showing that Neville and Retail merged into Neville in September 2007 (12/09/08 Myers Aff., ¶ 56, exhibit E). Because Neville is the surviving entity, they contend that the complaint as against Retail should be dismissed, pursuant to CPLR 3211 (a) (1). Plaintiff does not

object to the discontinuance of the action as against Retail without prejudice, provided that Neville "is liable for all of Retail's duties, obligations, debts and other liabilities as provided by [Limited Liability Company Law] § 1004 and [can] represent that the merger is legally valid, binding and recognized as such by the State of New York" (04/10/09 Theis Mem. Law, at 22).

As plaintiff argues, Limited Liability Company Law § 1004 (a) provides that, following a merger of two entities, all "obligations, liabilities, penalties and duties" of a business entity vest in, and attach to, the surviving business entity and may be enforced against it as if they "had been incurred or contracted by it." Accordingly, the complaint is dismissed as against Retail based on the certificate of merger and Retail's representation that it merged with Neville and that Neville is a surviving entity. Should Retail's representation be inaccurate, plaintiff may reinstate the action against Retail. Accordingly, all of plaintiff's claims against Retail are continued as against Neville; conversely, all remaining defenses asserted by Retail are deemed asserted by Neville.

Ceres

Landlord defendants also seek dismissal as against Ceres, because "Ceres has no contractual connection to plaintiff," and plaintiff fails to "allege any contractual obligation owed to it by Ceres" (12/11/08 Shaw Mem. Law, at 18). In opposition, plaintiff contends that Ceres has been Retail's and Neville's managing agent and that plaintiff has dealt with Ceres with respect to plaintiff's gaining access to the cellar premises (04/06/09 Sigoura Aff., ¶¶ 8-15). Specifically, the letter from Neville to plaintiff, dated October 24, 2008, was signed by Ceres (*id.*, exhibit D). Minutes from a March 14, 2008 meeting, regarding Verizon's work in the Building, show that Ceres was present and participated in it (McPhail Aff., exhibit C). Given these allegations and evidence, at this early stage in this action, dismissal as against Ceres is unwarranted. Additionally, the court is granting

plaintiff's application for a preliminary injunction. Ceres, as the property manager of the Commercial Units, must be subject to the court order for the Court to give complete relief to plaintiff.

Accordingly, the cross motion of the landlord defendants is granted only to the extent that the action is dismissed as against Retail, and is otherwise denied.

Plaintiff's Motion for a Preliminary Injunction

> A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor

(*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see also Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Likelihood of Ultimate Success on the Merits

The record on this motion reveals that plaintiff entered into the Retail Lease with respect to the cellar premises. Plaintiff alleged, and landlord defendants do not dispute, that it has been paying monthly rent to Neville (complaint, ¶ 49). Plaintiff has also alleged and demonstrated that after the court so-ordered the Verizon Settlement in July 2008, it sought access to the cellar premises in order to complete the Verizon Project (complaint, ¶ 26; 04/06/09 Sigoura Aff., ¶¶ 6-17, exhibits A-F). Plaintiff alleged that defendants refused to provide such access (complaint, ¶¶ 28-31; 11/13/08 Sigoura Aff., ¶¶ 16-18, 69-78; 04/06/09 Sigoura Aff., ¶ 18). Fitness also does not deny that it has resisted performance of the Verizon Project (*see e.g.* McPhail Aff., exhibit D).

Landlord defendants contend that plaintiff, in this preliminary injunction, seeks to expand the scope of Verizon's work in the cellar from what was agreed to in the Retail Lease (12/11/08

Shaw Mem. Law, at 7).

Plaintiff now seeks access to the so-called "green" and "blue" work areas, marked as such on a copy of the cellar floor plan, in order to perform the Work (order to show cause, exhibit A). The Retail Lease grants plaintiff "the Cellar Equipment Space" and "the right to install and maintain the Cellar Space Connections and equipment in the Equipment Space," as shown on schedule C-1B (Retail Lease, § 1 [B] [i], [ii]).

Retail Lease adopts definitions of the terms in the Verizon Second Lease, which, in turn, defines "the Cellar Equipment Space" as "space within the cellar of the Building" (Verizon Second Lease, at 1). "Equipment Space" is defined as "such spaces depicted on drawings attached to this Second Amendment" where Verizon has "the right to install and maintain ... equipment" (*id.*). "[T]he Cellar Space Connections" are "wires, cables, conduits and necessary connections and appurtenances" connecting all the different pieces of equipment in the cellar and on the roof (*id.* at 1-2). These definitions, as previously discussed, are not precise. However, schedule C-1B clearly identifies the scope of the Verizon Project in the cellar and is the measure of what plaintiff and Retail agreed to.

Plaintiff here seeks access to the "cellar equipment room," which is one of two "green" work areas (order to show cause, exhibit A). "The cellar equipment room" is the same space as "Verizon Wireless Equipment Space," which is shown on schedule C-1B. Pursuant to the Retail Lease, plaintiff has a right "to install and maintain ... equipment in the Equipment Space all as substantially shown on Schedule[] C-1B ... " (Retail Lease, § 1 [B] [ii]). Accordingly, plaintiff has a right to access, and install equipment in, this space (*id.*).

Plaintiff also seeks access to the "blue" area, which is the area along the route of the conduits,

mounted on the cellar's ceiling, which are also shown on schedule C-1B, and, therefore, plaintiff has a right to access this area as well. It appears that a "cellar closet," marked on the floor plan attached to plaintiff's motion (*id.*), already exists and there is no dispute that plaintiff has a right to access it as well.

It is the second "green" work area, marked in the lower right corner of the cellar floor plan, that appears to generate controversy among the parties here (*id.*). Plaintiff does not seek to install any equipment in this area, but only to temporarily occupy it in order "to run the cables and wires through the conduits connecting the Cellar Closet to the Cellar Equipment Room to complete the Work" (11/13/08 Sigoura Aff., ¶ 10; *see also* complaint, ¶ 16). Pursuant to the Retail Lease, plaintiff has "the right to install and maintain the Cellar Space Connections" as shown on schedule C-1B (Retail Lease, § 1 [B] [ii]).

Contract terms should be understood in light of a particular purpose that contracting parties wanted to achieve (*see e.g. Matter of Stravinsky*, 4 AD3d 75, 81 [1st Dept 2003]). Specific clauses should be interpreted in the context of the whole contract (*Bijan Designor For Men v Fireman's Fund Ins. Co.*, 264 AD2d 48, 52 [1st Dept 2000]). The Retail Lease clearly provides that its purpose is to accommodate the Verizon Original and Second Leases (Retail Lease, at 1-2). Even the meaning of the capitalized terms in the Retail Lease is derived from the Verizon leases (*id.*, § 1 [A]). Clearly, the intention of plaintiff and Retail was to enable Verizon to complete its Project, and this is precisely what plaintiff seeks here. Accordingly, under the Retail Lease, plaintiff has a right to temporarily occupy that part of the cellar that is necessary in order to complete the Verizon Project (*id.*, 1 [B] [i], [ii]). Therefore, it does not appear that plaintiff now seeks to enlarge the scope of Work or the scope of its access rights reserved to it under the Retail Lease (04/06/09 Sigoura Aff.,

¶¶ 16, 23-25).

The Retail Lease further provides that plaintiff "shall have access to the demised premises on a 24-hour a day, 7 day a week basis" (Retail Lease, § 1 [D]). Therefore, plaintiff has shown a likelihood of success on the merits with respect to the first cause of action, where plaintiff seeks an injunction restraining defendants from interfering with plaintiff's access rights. As previously discussed, plaintiff also demonstrated a likelihood of success with respect to the second cause of action for breach of the Retail Lease.

In the third cause of action, plaintiff alleges that Fitness tortiously interfered with the Verizon Settlement.

> The tort of ... interference with contractual relations[] consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff

(*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *see also White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Plaintiff alleges that Fitness interfered with the Verizon Settlement and the Verizon Second Lease. There is no allegation or showing that Fitness had knowledge of either of these contracts. Fitness, however, was on notice of Verizon rights pursuant to the Verizon easement (McPhail Aff., exhibit A, Fitness Lease, § 3.11 [b]). In its lease, Fitness expressly acknowledged "that, pursuant to said Verizon [easement], Verizon is entitled to install, operate and maintain certain conduit along the ceiling in the basement level of the Unit (as well as an equipment closet relating to such conduit), and that Verizon has certain access rights to the Unit for such purposes" (*id.*). Fitness alleges that both the conduit and the equipment closet were in place when it took possession of the cellar premises, and, hence, it assumed that the Verizon Project was

completed (McPhail Aff., ¶ 11, exhibit B). However, the Verizon Easement, which the Fitness Lease references, gives Verizon a right to "install, use, access, maintain, repair or replace any and all equipment, antennas, connections, wires, conduit, and appurtenances ... " throughout the Building including the cellar (Riegel Aff., exhibit B, § Second [2]). The Work that plaintiff now seeks to enable Verizon to perform falls squarely within the parameters of the Verizon Easement (*id.*). Accordingly, Fitness knew of the Verizon Easement and rendered its performance impossible by not allowing access to the cellar (*see Kronos, Inc.*, 81 NY2d at 94). Therefore, plaintiff demonstrated a likelihood of success on the merits on this cause of action.

In its fourth cause of action, plaintiff alleges that Fitness tortiously interfered with plaintiff's business relationship with Verizon.

> Intentional interference with business relations requires a demonstration that the individual defendant "intentionally and through wrongful acts prevented a third party from extending a contractual relationship to the plaintiff"

(*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dept 2002] [quoting *Freedman v Pearlman*, 271 AD2d 301, 304 (1st Dept 2000)]). There is no allegation here that Fitness prevented Verizon from "extending a contractual relationship to the plaintiff" (*id.*). Hence, plaintiff failed to demonstrate a likelihood of success on this cause of action.

In its fifth, sixth, and seventh causes of action, plaintiff alleges that Retail actually or constructively evicted it from the cellar premises and breached the covenant of quiet enjoyment, respectively. "To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). "[W]here the landlord

barred the tenant from entering the premises it has been held a partial actual eviction" (*id.* at 83). "[C]onstructive eviction exists where ... the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*id.* at 83; *see also Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999]). Proper allegation of constructive eviction is sufficient to allege a breach of the covenant of quiet enjoyment of leased premises (*see e.g. Granirer v Bakery, Inc.*, 54 AD3d 269, 272 [1st Dept 2008]). "Where eviction is constructive, breach of the covenant of quiet enjoyment does not require a physical ouster. Rather, a showing of abandonment of the premises under pressure is sufficient" (*Dinicu*, 257 AD2d at 224).

The court notes that the rights of access to the cellar that plaintiff received pursuant to the Retail Lease are more akin to a license or easement, and, therefore, a cause of action for eviction would not naturally lie. However, because plaintiff and Retail entered into the lease, technically speaking it cannot be said that these causes of action are lacking in merit where there is an allegation (*see e.g.* complaint, ¶¶ 70-76) and showing that Neville and Ceres prevented plaintiff from accessing the cellar. Accordingly, there is a likelihood of success on the merits of these causes of action. Plaintiff has also demonstrated a likelihood of success regarding the declaration of rights that it seeks in the eighth cause of action.

Danger of Irreparable Harm

Irreparable harm is an "injury for which money damages are insufficient" (*see e.g. Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [2d Dept 1992]). Plaintiff alleges that its irreparable injury, inter alia, is loss of possession, enjoyment, and use of the cellar premises. The use of the cellar premises is limited solely to housing the Communications Facility and wiring (Retail Lease, § 1 [c]). Plaintiff contends that without access to the cellar premises to complete the

Verizon Project, the cellar premises is useless for its intended purpose and only permitted use. Additionally, plaintiff alleges that the Verizon Settlement is in danger of falling apart if Verizon is not provided access to the cellar. Plaintiff also will not be able to close on the sale of the units, which are planned to be constructed on the roof of the Building. Finally, plaintiff alleges that it has spent several hundred thousand dollars to construct the Cellar Equipment Room and install the conduits throughout the Building.

Defendant landlords allege that plaintiff does not have imminent plans to commence the Work, because it failed to obtain permits from the Department of Buildings, and that, therefore, plaintiff's harm is not imminent. Plaintiff claims that it has encountered difficulty in obtaining permits due to the landmark status of the Building (Shargian Aff., ¶ 12; *see also* McPhail Aff., exhibit C, ¶¶ 2-3 [minutes of March 14, 2008 minutes indicate that Verizon applied for permits in 2008]). It is unclear on this record if either plaintiff or Verizon obtained such permits since then. However, it is not the role of the court at this time to ensure that plaintiff has necessary permits, if any, to complete the Verizon Project.

Denial of plaintiff's right to access the cellar cannot be compensated by monetary damages. Accordingly, plaintiff does not have an adequate remedy at law.

Balancing of Equities

As previously discussed, the scope of work that plaintiff seeks to perform was within contemplation of the parties pursuant to the Verizon easement, Verizon Second Lease, and Retail Lease. Fitness alleges that it will suffer significant damages, including a possible shutdown of its fitness club, if Verizon or its contractor is allowed to perform the Work in the cellar (*see e.g.* McPhail Aff., ¶¶ 3, 19, 24, 26). However, as previously discussed, Fitness was on notice of

Verizon's rights, pursuant to the Verizon Easement (McPhail Aff., exhibit A, Fitness Lease, § 3.11 [b]). The Work that plaintiff now seeks to enable Verizon to perform falls within the parameters of the Verizon Easement (Riegel Aff., exhibit B, § Second [2]). Additionally, contrary to Fitness's contention, plaintiff did not unreasonably delay commencement of the Verizon Project. As plaintiff demonstrated, it did not delay submitting the Verizon Settlement to the court and requested access right after the court so-ordered the Verizon Settlement in July 2008 (Riegel Aff., ¶¶ 8-12, exhibit A; 04/06/09 Sigoura Aff., exhibits A-F).

Fitness argues that, in its lease, Neville "agrees to use commercially reasonable efforts to cause Verizon to exercise such access rights in a manner that does not unreasonably interfere with Tenant's operations in the Premises" (Fitness Lease, § 3.11 [b]). Fitness argues that the scope of the proposed Work would "unreasonably interfere with" its operation of the gym.

Plaintiff and Verizon, however, are not parties to the Fitness Lease, and they never agreed not to unreasonably interfere with Fitness's operation of the premises. Additionally, the scope of Work, as previously discussed, is within the parameters of the Verizon Easement and Retail Lease and appears to be reasonable. Moreover, at the time Neville entered into the Fitness lease, it was bound by the terms of the Retail Lease, and, hence, could not convey to Fitness a greater leasehold than it had. However, a lack of awareness by Fitness, if any, of the scope of anticipated work cannot prevent plaintiff from completing it, as was agreed to in the Retail Lease. Accordingly, plaintiff demonstrated its entitlement to a preliminary injunction with respect to allowing access to the cellar for purposes of performing its Work.

CONCLUSION

Plaintiff is entitled to a preliminary injunction on the ground that the defendants threaten or

are about to do, or are 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, as set forth in the aforesaid decision, and plaintiff has demanded and would be entitled to a judgment restraining the defendants 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, as set forth in the aforesaid decision, it is

ORDERED that the undertaking is fixed in the sum of $30,000 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendants, 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 or control of defendants or otherwise, any of the following acts:

(a) interfering with the rights of plaintiff and its members, managers, employees, contractors, servants and/or agents, including those of Verizon, pursuant to the terms of the lease, dated November 9, 2006 (the Retail Lease), to gain access (i) primarily, to and from the "work areas" in the cellar of commercial condominium units C1N and C2S (the Commercial Units) in the Building located at 225 Fifth Avenue, New York, New York (the Building), which are shown in green (the green work areas) in Exhibit 1 (Exhibit 1), attached to plaintiff's order to show cause, dated November 17, 2008, and (ii) ancillarily, to and from other areas in the cellar, including, without

limitation, the cellar equipment room, which other areas are shown in blue (the blue work areas) in Exhibit 1 (all of which areas are referred to hereinafter, collectively and/or individually as the work areas), for the purpose of relocating the cellular telephone Communications Facility of Verizon located on the roof of the Building into the cellar equipment room, including, without limitation, installing equipment, connections, conduits, cables, lines, wires, etc. and related construction (the Work);

(b) interfering with plaintiff's rights to use and occupy the Work Areas pursuant to the terms of the Retail Lease;

(c) interfering with plaintiff's rights to perform and fully complete the Work pursuant to the terms of the Retail Lease; and

(d) otherwise interfering with plaintiff's rights under the Retail Lease relating to the Work;

and it is further

ORDERED that Work must be performed according to law and code; and it is further

ORDERED that in order to minimize inconvenience, the parties and Verizon should attempt to agree upon a scope of work, schedule, including spacial and temporal requirements that would endeavor to lessen any inconvenience to Verizon and the parties; and it is further

ORDERED that the cross motion of defendants 225 Fifth Avenue Retail LLC (Retail), Ceres Realty Group LLC, and WM Neville & Sons USA LLC (Neville) is granted to the extent that the complaint is dismissed as against defendant 225 Fifth Avenue Retail LLC based on a representation that defendant Neville is the surviving business entity as a result of a merger between it and Retail. If such a representation is incorrect, plaintiff may reinstate its action as against Retail, and the cross

motion is otherwise denied; and it is further

ORDERED that all parties shall appear for a conference in IAS Part 7 on October 8, 2009, at 9:45 AM.

Dated: September 21, 2009
New York, New York

ENTER:

J.S.C.

FILED
SEP 29 2009
COUNTY CLERK'S OFFICE
NEW YORK