

Matthew Flowers, Inc. v Mark Hotel LLC

2009 NY Slip Op 33461(U)

July 14, 2009

Supreme Court, New York County

Docket Number: 103297/09

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER PART 8
Justice

MATTHEW FLOWERS, INC., INDEX NO. 103297/09

Plaintiff, MOTION DATE _____
-against- MOTION SEQ. NO. 001

**MARK HOTEL LLC, ALEXICO MANAGEMENT GROUP,
INC., a/k/a ALEXICO GROUP LLC, as managing agent,
F.J. SCIAME CONSTRUCTION CO., INC.,**

Defendants.

The following papers, numbered 1 to 7 were read on this motion for a preliminary Injunction pursuant to CPLR § 6301:

	<u>PAPERS NUMBERED</u>
Notice of Motion – Affidavit – Affirmation – Exhibits	1,2,3
Memorandum of Law in Support	4
Affirmation in Opposition	5
Supplemental Affidavit in Opposition	6
Reply Affirmation	7

FILED
JUL 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that plaintiff's motion is decided as follows:

This is motion, by the plaintiff art gallery, for a preliminary injunction, prohibiting the defendant landlord from continuing construction.

Discussion

Plaintiff Flowers operates what it describes as an "upscale art gallery" in the

“prestigious Mark Hotel ... a high end first class hotel known for its wealthy international client base; precisely the type of clientele that Flowers services.”

Flowers was advised by the current owner’s predecessor, when it negotiated its lease in 2003, that the owner intended, at some point, to renovate the hotel. Reflective of this intention, the lease included the following provision:

Landlord shall have the right to terminate this lease for major renovations of the upper three floors of the building (which costs shall be at least one million dollars) at any time after five years from the commencement date of this lease by giving Tenant 270 days prior written notice... Upon Tenant’s timely vacating of the premises after notice, and provided Tenant has provided to Landlord proof of its expenditure to improve the premises, Landlord shall pay to Tenant a sum equal to such expenditure reduced by a straight line amortization over the ten year term.

In addition, the lease contained the standard provisions prohibiting the landlord from interfering with plaintiff’s right to quiet enjoyment (¶ 23) and obligating the landlord to provide basic services including heat. (¶4)

In or about 2007, the landlord commenced renovations, as a result of which the plaintiff claims, (1) its windows were blocked by scaffolding; (2) its heat was turned off; (3) there was debris and chemical smells throughout the premises; (4) there were burst pipes; (5) there was water seepage and mold on the walls; (6) there was flooding and water damage to the floor; and (6) there was “continued jack hammering, drilling, cracking and vibration of the walls [which rendered] it impossible to hang any art work.”

Plaintiff claims these conditions, which have rendered it impossible for it to function as an art gallery since 2007, were anticipated when the above-cited provision

was negotiated. Landlord's failure to exercise its option under this provision, together with its breach of the covenant of quiet enjoyment and the provision of basic services entitle plaintiff to an injunction, preventing the landlord from continuing construction; requiring any future construction to be done on notice; and staying the obligation to pay rent during construction. In its complaint, served simultaneously herewith, plaintiff seeks the same injunctive relief plus damages for breach of the lease and constructive eviction.

In opposition, the landlord asserts that there is no construction work currently being performed at the premises and that the only work performed during the last year consisted of a demolition which lasted for 3 days and a roof repair which lasted for 2 days. Landlord disputes plaintiff's specific allegations: (1) the disputed premises are not located in the Mark Hotel, but in an adjoining building, a 4-story walk-up, which is owned by the Mark Hotel; (2) there was never any scaffolding in front of the building but a sidewalk bridge which did not block all plaintiff's light and was removed prior to the institution of this action;¹ (3) landlord offered to install an alternative heating system which offer was refused by the plaintiff; (4) any debris, smells or vibrations existed, if at all, for three days; and (5) landlord observed no water damage to the floors and offered to repair a slight water mark which offer was refused. Finally, landlord asserts that Article 56 creates no obligation on the landlord.

¹ Plaintiff does not dispute that the sidewalk bridge has been removed.

Discussion

The law is well settled that the preliminary injunction is a drastic equitable remedy which requires a clear showing that the movant has no adequate remedy at law and can establish (1) a likelihood of success on the merits; (2) irreparable injury; and (3) the balancing of the equities lies in favor of the movant. (*Aetna Insurance Company v Capasso*, 754 NY2d 860 [1990]) If any one of these requirements is not satisfied, or if there are key facts in dispute, the application will be denied. (*Faberge Intl Inc v DiPlano*, 109 AD2d 235 [1st Dept 1985])

This Court finds that the plaintiff has utterly failed to satisfy any prong of this test. Construction has ceased and there is no and there is no imminent plan for its resumption. Plaintiff cannot establish irreparable injury since there is nothing to enjoin but plaintiff's speculations regarding the landlord's future intentions. Plaintiff cannot demonstrate of a likelihood of success since the conflicting affidavits establish a question of fact as to whether plaintiff has been constructively evicted. . Moreover, in the event that plaintiff does establish that it has been constructively evicted, it has an adequate remedy at law in the form of money damages, which are sought in its complaint. Finally, the injunctive relief sought is over broad and in no way tailored to any specific requirements of the situation. For that reason balance of equities does not tip in movant's favor.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that motion by plaintiff for a preliminary injunction is denied.

This reflects the decision and order of the court.

Dated: 7/14/09

~~MARILYN SHAFER~~
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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