[* 1]

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

PRESENT: BARBARA JAFFE, J.S.C. Justice

PART 5

City of New York

- v -

Good Friends Realty

INDEX NO. 401915/10

MOTION DATE

MOTION SEQ. NO. 001

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

see decision under sequence # 002

FILED

NOV 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-15-10

NOV 15 2010

BARBARA JAFFE 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

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

THE CITY OF NEW YORK,

Plaintiff,

-against-

GOOD FRIENDS REALTY CORP., *et al.*,

Defendants.

----------x

Index No. 401915/10

Subm.: 9/21/10

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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NYPD Legal Bureau
Civil Enforcement Unit
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New York, NY 10007
917-454-1174

For Good Friends:
Christopher Lynn, Esq.
24-15 Queens Plaza North
Long Island City, NY 11101
718-392-2117

For tenants self-represented:
Kenneth Kendly
J Unisex Barber & Beauty Salon
300 W. 155th St.
New York, NY

By order to show cause dated July 20, 2010, plaintiff moves pursuant to CPLR 6301 and New York City Administrative Code §§ 7-707, 7-709, 7-710, and 7-711 for a temporary restraining order, preliminary injunction, and closing order to enjoin and restrain defendants from permitting a public nuisance at "J Unisex Barber & Beauty Salon" and prohibiting them from using the premises for the purpose of selling and/or possessing marijuana or any other illegal activity. By notice of motion dated August 6, 2010, defendant Good Friends Realty Corp. (Good Friends) moves pursuant to CPLR 3212 for an order granting it summary dismissal of the complaint. For the following reasons, both motions are denied.

I. BACKGROUND

On July 20, 2010, plaintiff commenced the instant nuisance abatement action against defendants pursuant to General City Law § 20, New York City Charter § 394, and New York

City Administrative Code §§ 7-704(a) and 7-706(a). On July 27, 2010, a hearing was held before me on plaintiff's request for a preliminary injunction, at which a New York City Police detective testified for plaintiff and Kenneth Kendly, tenant's guarantor, testified for defendants. By surrender agreement dated July 29, 2010, Kendly and the other tenant surrendered the premises to Good Friends, the landlord.

Following the hearing, by decision and order dated August 5, 2010, I denied plaintiff's application for a preliminary injunction.

II. CONTENTIONS

Good Friends moves to dismiss the complaint on the ground that plaintiff has not met its burden of establishing a public nuisance at the premises absent proof of more than one criminal conviction, or that Good Friends had any connection to or had any knowledge of the alleged nuisance. As a detective testified on plaintiff's behalf, which testimony would likely be repeated at trial, Good Friends asserts that a trial is unnecessary. (Affirmation of Christopher Lynn, Esq., dated Aug. 6, 2010).

Plaintiff denies any requirement that it demonstrate that Good Friends had a connection to or knowledge of the alleged nuisance in order to obtain a permanent injunction, and argues that the only issue to be resolved is whether illegal activity occurred on the premises, which it alleges it has established. That Good Friends has regained possession of the premises is irrelevant, it maintains, as is whether or not multiple criminal convictions were obtained as a result of the alleged illegal activity. It also contends that even without a preliminary injunction, it is entitled to establish at a trial whether a permanent injunction should be granted. (Affirmation of Allen F. Schwartz, Esq., dated Aug. 26, 2010).

III. ANALYSIS

Pursuant to New York City Administrative Code § 7-701 (Nuisance Abatement Law), a civil action may be maintained to abate a public nuisance occurring on premises, and the City may bring an action to permanently enjoin a public nuisance and "the person or persons conducting, maintaining or permitting the public nuisance from further conducting, maintaining or permitting the public nuisance" (Admin. Code § 7-706).

Generally, a permanent injunction, embodied in a final judgment, is only available after a trial (NY Prac, Enforcing Judgments and Collecting Debts § 4:75 [2010]; *see Ryan v McLean*, 209 AD2d 913 [3d Dept 1994]; *Byrne Compressed Air Equip. Co., Inc. v Sperdini*, 123 AD2d 368 [2d Dept 1986]), and the denial of a preliminary injunction does not constitute an adjudication on the merits for the purposes of considering whether a permanent injunction should issue. Consequently, an application for a permanent injunction must be tried notwithstanding the grant or denial of an application for a preliminary injunction. (*Kaplan v Queens Optometric Assocs., P.C.*, 293 AD2d 449 [2d Dept 2002]).

As applicable here, a public nuisance exists in:

> any building . . . wherein, within the period of one year prior to the commencement of an action under this chapter, there have occurred three or more violations of one or any combination of the provisions of article two hundred twenty, [or] two hundred twenty-one . . . of the penal law . . .

or wherein a public nuisance as defined by Penal Law 240.45 exists. (NYC Admin. Code § 7-703[g], [i]). Penal Law 220 *et seq.* governs the criminal possession or sale of controlled substances, Penal Law 221 governs the unlawful or criminal possession or sale of marihuana, and Penal Law 240.45(2) provides that a person is guilty of criminal nuisance in the second degree when he "knowingly conducts or maintains any premises, place or resort where persons gather

for purposes of engaging in unlawful conduct."

The Administrative Code sections on which plaintiff relies do not require the demonstration of one or more criminal convictions in order to prove the existence of a nuisance. Rather, the occurrence of three or more violations within one year must be established, and a violation has been defined as an instance of prohibited conduct, not a criminal conviction. (*City of New York v Castro*, 160 AD2d 651, 652 [1st Dept 1990]). Section i also contains no requirement of a criminal conviction.

While a landlord's knowledge of or acquiescence in the nuisance is irrelevant in determining whether a preliminary injunction is warranted (*City of New York v Partnership 91, L.P.*, 277 AD2d 164 [1st Dept 2000]; *Castro*, 160 AD2d at 652), there does not appear to be any prohibition to considering a landlord's knowledge or acquiescence in determining the appropriateness of a permanent injunction. The court in *Castro* relied on Administrative Code § 7-709(a), which governs preliminary injunctions and provides that the plaintiff need only show that a public nuisance is being conducted, maintained or permitted on a premises. In contrast, Administrative Code § 7-704, which governs an action for a permanent injunction, provides that the person or persons conducting, maintaining or permitting a public nuisance may be enjoined from further doing so. Thus, based on the foregoing, the relevant question on a permanent injunction appears to be whether Good Friends was conducting, maintaining or permitting a public nuisance on the premises, which requires a consideration of its actions and knowledge to be determined at trial.

However, that the tenants have vacated the premises does not render academic plaintiff's application for a permanent injunction. (*Partnership 91, L.P.*, 277 AD2d at 164 [tenants'

surrender of premises does not establish, standing alone, that nuisance had abated]; *City of New York v Philips*, 272 AD2d 568 [2d Dept 2000], *lv denied* 95 NY2d 762 [while tenant's eviction may abate nuisance, it does not render academic plaintiff's entitlement to permanent injunction]; *City of New York v Mor*, 261 AD2d 185 [1st Dept 1999], *app dism* 93 NY2d 1041 [plaintiff's request for permanent injunction not mooted by tenants' consent to judgment of eviction]; *City of New York v 924 Columbus Assocs., L.P.*, 219 AD2d 19 [1st Dept 1996], *app dism* 88 NY2d 979 [fact that tenant had vacated and new tenant had entered premises did not show that nuisance had abated]; *see also City of New York v Ring*, 34 AD3d 218 [1st Dept 2006] [plaintiff has ongoing right to make sure that defendants do not recommence illegal activities at premises]).

In light of the foregoing, Good Friends has failed to set forth a legal or factual basis for granting Good Friends summary judgment dismissing the complaint.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is denied as academic; and it is further

ORDERED, that defendant Good Friends Realty Corp.'s motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 15, 2010
New York, New York