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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>1286 RR Operating, Inc. v Herald Towers, LLC</b>                                                                                                                                                                              |
| 2011 NY Slip Op 32552(U)                                                                                                                                                                                                         |
| September 23, 2011                                                                                                                                                                                                               |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 109979/11                                                                                                                                                                                                         |
| Judge: Lucy Billings                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

PRESENT: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

1286 RR OPERATING, INC.

- v -

Hervab Towers, LLC

INDEX NO. 109979/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for a preliminary injunction

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

**FILED**

3

SEP 27 2011

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that ~~this motion~~: NEW YORK  
COUNTY CLERK'S OFFICE

*The court grants plaintiff's motion for a preliminary injunction to the extent and on the conditions set forth, pursuant to the accompanying decision. C.P.L.R. §§ 6301, 6311(1), 6312(a) and (b).*

Dated: 9/23/11

Lucy Billings

LUCY BILLINGS  
J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

1286 RR OPERATING, INC.,

Index No. 109979/2011

Plaintiff

- against -

DECISION AND ORDER

HERALD TOWERS, LLC,

**FILED**

Defendant

SEP 27 2011

-----x

LUCY BILLINGS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

The court converts the temporary restraining order dated August 30, 2011, in part, to a preliminary injunction pending the determination of this action or until a further order. C.P.L.R. §§ 6301, 6311(1), 6312(a); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 271-72 (1st Dep't 2009); OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d 413, 414 (1st Dep't 2007); FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d 145, 146 (1st Dep't 2004); Putter v. Singer, 73 A.D.3d 1147, 1149 (2d Dep't 2010). The preliminary injunction shall prohibit defendant, its managers, members, employees, servants, agents, attorneys, affiliates, and partners, and all other persons acting on behalf of or in concert with defendant from:

- (1) shutting down the duct work, exhaust stack, or cooking ventilation system servicing the premises previously leased to plaintiff at 1286 Broadway, New York County, or
- (2) removing plaintiff's exterior signage or sidewalk canopy

at the premises.

The preliminary injunction shall expire if by October 7, 2011, at 5:00 p.m., plaintiff has failed to provide an undertaking or other security of \$150,000 in favor of defendant. This amount reflects a potential loss to defendant, from the injunction, of eight months' rent at a market rate above the rate plaintiff is paying, accounting for time to re-rent and defendant's preserved claim for plaintiff's continued use and occupancy at market rates in the summary eviction proceeding that defendant has commenced against plaintiff. C.P.L.R. § 6312(b). The injunction is further conditioned on plaintiff's payment for use and occupancy at the rate and times specified in the parties' lease that expired June 30, 2011.

Plaintiff has shown that defendant has threatened the measures specified above immediately, which would pose a danger of irreparable injury to the health and safety of plaintiff's employees and customers and building occupants; halt plaintiff's business; indicate it is closed; and cause irreparable loss of good will and injury to plaintiff's relationships with its franchiser and customers. On the other hand, plaintiff has not shown that defendant has threatened or is about to engage in any other extra-judicial conduct at the premises affecting plaintiff's occupancy there. The more limited injunction is enough to protect against any immediate and irreparable injury to plaintiff or to other persons' health and safety. C.P.L.R. §§ 6301, 6312(a); Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty

Assocs., 85 N.Y.2d 600, 607 (1995); Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 271-72; OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d at 414; FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d at 146. See Putter v. Singer, 73 A.D.3d at 1149. Therefore the court lifts the temporary injunction, as an unnecessary restraint, against other conduct.

Plaintiff also has shown an entitlement to defend its claimed right to continued possession of the premises in the summary eviction proceeding that defendant notified plaintiff defendant would commence and now has commenced, without resort to self-help measures, posing a danger to health and safety, to achieve the eviction. Defendant has not demonstrated that the limited injunction will impose undue hardship, Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d at 607; Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 273; drastically upset the status quo, Putter v. Singer, 73 A.D.3d at 1149; or materially interfere with defendant's pursuit of its claim for possession of the premises in the summary eviction proceeding where defendant has elected to pursue its claim, including recovery for plaintiff's continued use and occupancy at market rate. Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d at 607; Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d at 273. Defendant has made no recent complaints regarding odors from plaintiff's use of the duct work, exhaust stack, or cooking ventilation system servicing

the premises or regarding other danger or nuisance from that use or from plaintiff's exterior signage or sidewalk canopy at the premises.

Consequently, the court grants plaintiff's motion for a preliminary injunction to the extent set forth above. C.P.L.R. §§ 6301, 6311(1), 6312(a). This decision constitutes the court's order. The court will provide copies to the parties' attorneys.

**FILED**

DATED: September 23, 2011

SEP 27 2011

*Lucy Billings*

NEW YORK  
COUNTY CLERK'S OFFICE

**LUCY BILLINGS**  
J.E.