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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice PART 5

CITY OF NY
-v-
598 BROADWAY REALTY

INDEX NO. 401531/11

MOTION DATE 8-16-11

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/14/11

NOV 14 2011

BARBARA JAFFE 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 5

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THE CITY OF NEW YORK AND THE CITY OF NEW YORK LANDMARKS PRESERVATION COMMISSION,

Plaintiffs,

-against-

598 BROADWAY REALTY ASSOCIATES, INC., ZVI MOSERY a/k/a STEVE MOSERY, as President or Principal Executive Officer of 598 BROADWAY REALTY ASSOCIATES, INC., and in his individual capacity, NAT MOSERY, as President or Chairman of 598 BROADWAY REALTY ASSOCIATES, INC., and in his individual capacity, COLOSSAL, INC. d/b/a COLOSSAL MEDIA GROUP, JONATHAN AIRIS, as Operations Manager of COLOSSAL MEDIA GROUP and in his individual capacity, PAUL LINDHAL a/k/a PAUL LINDELL, as Vice-President or owner of COLOSSAL, INC. and in his individual capacity, ADRIAN MOELLER, as President or Chairperson of COLOSSAL, INC. and in his individual capacity, and the land and building thereon known as 598 BROADWAY, NEW YORK, NY a/k/a 132 CROSBY STREET, NEW YORK, NY, BLOCK 511, LOT 15, JOHN DOE and JANE DOE,

Defendants.

----------x

Index No. 401531/11

Argued: 8/16/11
Motion Seq. No.: 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiffs:
Melanie V. Sadok, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-676-6051

For defendants:
Paul D. Volodarsky, Esq.
Cohen Hochman & Allen
80 Maiden Lane, Suite 507
New York, NY 10038
212-566-7081

By order to show cause dated June 14, 2011, plaintiffs move pursuant to New York City Administrative Code § 25-317.2(d) for a preliminary injunction ordering defendants to submit immediately a complete application to the Landmarks Preservation Commission (LPC) to obtain

a permit to remove any and all wall signs currently installed on 598 Broadway in Manhattan that have not been issued an LPC permit; to remove immediately any and all wall signs currently installed on the building that have not been issued an LPC permit; and enjoining defendants from installing wall signs on 598 Broadway or other buildings subject to the Landmarks Law, New York City Administrative Code § 25-301, *et seq*, without first obtaining LPC permits.

I. BACKGROUND

On August 14, 1973, much of the SoHo neighborhood in Manhattan was designated the "SoHo-Cast Iron Historic District." (Affirmation of John Weiss, Esq., dated June 13, 2011 [Weiss Aff.], Exh. B). Pursuant to Administrative Code § 25-305, the owner of a building in the district must obtain a permit from the LPC before altering the building's exterior. (Weiss Aff.).

On July 30, 1985, defendant 598 Broadway Realty Associates, Inc. (598 Broadway), of which defendants Zvi and Nat Mosery are Principal Executive Officer and Chief Executive Officer, respectively, obtained title to 598 Broadway, a building located in the SoHo-Cast Iron Historic District. (*Id.*, Exh. C).

On October 15, 1997, Zvi submitted an application to the LPC on behalf of 598 Broadway for non-illuminated, painted advertisement signs to be installed on the side of the building facing Houston Street. (*Id.*, Exh. E). After public hearings on the matter, LPC approved the installation of a single, smaller sign, and on April 20, 1999, it issued a permit for the sign set to expire on April 13, 2005. (*Id.*, Exh. F).

On August 24, 1999, Zvi submitted a second application to the LPC on behalf of 598 Broadway for a different painted wall sign. (*Id.*, Exh. G). By letter dated September 1, 1999, the LPC informed him that he must submit additional information regarding the application within

30 days. (*Id.*). As he failed to do so, by letter dated January 20, 2000, the LPC advised him that he must submit the information within 30 days or the application would be deemed withdrawn. (*Id.*). By letter dated March 8, 2000, as he had again failed to submit the requested information, the LPC informed him that the application had been withdrawn. (*Id.*).

On August 15, 2000, Zvi submitted to the LPC a third application for a painted wall sign, and by letter dated August 24, 2000, the LPC again asked that he submit additional information. (*Id.*, Exh. H). As before, he failed to do so, and by letter dated August 22, 2001, the LPC informed him that the application had been withdrawn. (*Id.*).

On or about September 23, 2005, an LPC enforcement officer observed that the sign for which the April 20, 1999 permit had been issued had been removed and replaced by two different signs, along with signs displaying defendant Colossal, Inc.'s (Colossal) logo (*Id.*, Exh. I). According to its website, Colossal "specializes in high-impact painted wallscapes" and "manage[s] and maintain[s] all landlord relations as well as any permitting or other activity required by various city agencies." (*Id.*, Exh. D).

On October 13, 2005, the LPC issued warning letters to 598 Broadway for "[i]nstallation of painted wall sign[s] . . . without permit," advising that it must apply for same within 20 days or risk receiving notices of violation, which may result in up to $5,000 in civil penalties. (*Id.*, Exh. J). As 598 Broadway never applied for permits, on January 11, 2006, the LPC issued two notices of violation, which provided that the violations would be adjudicated by the New York City Environmental Control Board. (*Id.*, Exh. K).

Sometime thereafter, and before the violations were adjudicated, the signs were painted over, and on October 12, 2006, the LPC issued to 598 Broadway a permit for their removal and

revoked the warning letters and notices of violation. (*Id.*, Exh. M).

On November 2, 2007 and January 3, 2008, an LPC staff member and an enforcement officer, respectively, saw two different wall signs on the side of the building and took photographs of them. (*Id.*, Exhs. N, O).

On January 10, 2008, defendant Jonathan Airis, Colossal's Operations Manager, submitted to the LPC an application for a permit to remove the signs currently painted on the building, identifying Colossal as the "tenant/lessee" of the building (*id.*, Exh. P). On February 4, 2008, the LPC issued to 598 Broadway a warning letter pertaining to the as-yet unpermitted signs (*id.*, Exh. Q), and on February 12, 2008, in response to Airis's application, issued a permit for the removal of the signs. (*Id.*, Exh. R).

On or about the same date, an LPC staff member observed a different sign on the side of the building (*id.*, Exh. S), and on February 15, 2008, the LPC issued another warning letter pertaining to the new sign (*id.*, Exh. T). By letter dated February 18, 2008, Zvi and Airis asked LPC to issue a notice of compliance with the warning letter, as the sign had been painted over, attaching thereto photographs of the painted wall. (*Id.*, Exh. U). On February 25, 2008, the LPC issued a letter of compliance and a permit for removal of the sign. (Id).

By letter dated July 18, 2008, an attorney, on behalf of Colossal and 598 Broadway, submitted an application to LPC for a permit to install a new sign, and on July 22, 2008, the LPC requested additional information from defendants in order to process the application. (*Id.*, Exh. W). As defendants failed to comply with the request, by letter dated May 4, 2009, the LPC informed them that the application had been deemed withdrawn. (*Id.*).

That same day, an LPC staff member observed two new signs on the side of the building,

and in turn, the LPC issued warning letters to 598 Broadway on May 8, 2009. (*Id.*, Exh. X). Defendants neither applied for permits nor responded to the warning letters, and on July 13, 2009, the LPC issued notices of violation reflecting that the violations would be adjudicated on September 21, 2009. (*Id.*, Exh. Y). Defendant did not appear at the hearing, thereby defaulting. (Weiss Aff.).

On September 25, 2009, two different signs appeared on the building, below both of which appeared Colossal's logo (Weiss Aff.), and on March 2, 2010, Weiss observed that these signs had been replaced by two other signs and that Colossal's logo appeared with them (*id.*, Exh. AA).

On or about March 18, 2010, the LPC issued notices of violation to 598 Broadway for the new signs, predicated on the July 13, 2009 notices of violation on which it defaulted, but as they were not served correctly, a hearing on the new violations never occurred. (*Id.*, Exh. BB).

On July 7, 14, and November 17, 2010, and February 4, March 1 and 9, April 26, and May 31, 2011, Weiss observed different signs on the building for which the LPC had not issued permits, beneath seven of which appeared the Colossal logo. (*Id.*, Exhs. A, CC, DD, EE, FF, GG, HH, II).

II. CONTENTIONS

Plaintiffs claim that they are entitled to a preliminary injunction, as they have demonstrated, *prima facie*, that defendants repeatedly violated Administrative Code § 25-305(a)(1) by failing to obtain permits for wall signs installed on a building within the SoHo-Cast Iron Historic District, and a municipality need only show that its local laws have been violated in order to obtain such relief. (Pls.'s Mem. of Law).

In opposition, defendants argue that plaintiffs have not been harmed by their installation of unpermitted wall signs, as the building is located in an area with many wall signs, and that the LPC's delay in granting their October 15, 1997 application violated their rights under the First Amendment and the Commerce Clause of the United States Constitution. (Affirmation of Paul Volodarsky, Esq., in Opposition, dated July 12, 2011). Additionally, they allege that plaintiffs are precluded from seeking a preliminary injunction, as they have already been found to have violated the Landmarks Law by virtue of defaulting on the July 13, 2009 notices of violation, and they assert the defense of laches, contending that plaintiffs' delay in bringing the instant action prejudices them insofar as their claims pertain to violations that occurred 15 years ago and that they will have difficulty finding witnesses and evidence, and that plaintiffs are not acting in a governmental capacity to protect a public right, as the permit requirement pertains to aesthetics only. (*Id.*). And they claim that the individual defendants should not be held liable, as plaintiffs have not shown the necessity of piercing the corporate veil. (*Id.*).

In reply, plaintiffs assert that defendants do not explain how their constitutional rights were violated by the delay between their submission of the application and the LPC's issuance of the permit. (Affirmation of Melanie V. Sadok, Esq., in Reply, dated August 11, 2011). Moreover, as they are seeking to enjoin current and future sign installation activity, they deny that the default judgment on the July 13, 2009 notices of violation or laches precludes the instant application, and as the individual defendants are "persons in charge" as defined by Administrative Code § 25-302(t), they claim that they may be enjoined regardless of whether the corporate veil is pierced. (*Id.*).

III. ANALYSIS

A. Laches

"Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 816 [2003]). Laches cannot be invoked against a governmental body discharging its statutory duties (*Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349, 350 [1st Dept 1996]), or acting in its governmental capacity to "enforce a public right or protect a public interest" (*State of New York by Vacco v Astro Shuttle Arcades, Inc.*, 221 AD2d 198, 198 [1st Dept 1995]).

Pursuant to Administrative Code § 25-301(b):

> [It is] a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose [of the Landmarks Law] is to [ ] effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history . . . .

Here, in seeking to enjoin preliminarily defendants from violating the Landmarks Law, plaintiffs are acting in their governmental capacity to protect the public interest, as identified in Administrative Code § 25-301(b), in the protection and preservation of historic buildings. And, even if they are not acting in their governmental capacity to protect that interest, as their claims relate to current and future unpermitted signs, not those installed on the building in the past, defendants have demonstrated neither delay nor prejudice.

B. Constitutional violations

Absent any explanation as to how their rights under the First Amendment and the

Commerce Clause were violated by the delay between their submission of a permit application and the LPC's issuance of a permit or as to how such violations impact the instant application, I decline to consider this issue.

C. Preclusive effect of default on notices of violation

"Collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal." (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *see Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]; *Alamo v McDaniel*, 44 AD3d 149 [1st Dept 2007]). The proponent of collateral estoppel must demonstrate identity of issues, whereas the opponent must demonstrate the absence of a full and fair opportunity to litigate. (*Jeffreys*, 1 NY3d at 39; *Ryan*, 62 NY2d at 501).

At issue in the New York City Environmental Control Board's adjudication of the July 13, 2009 notices of violation was whether defendants violated Administrative Code § 25-305(a)(1) in installing or permitting to be installed the wall signs that the LPC employee saw on the side of the building on May 4, 2009. As those signs have since been removed and replaced by other signs, and as plaintiffs seek to enjoin only defendants' current and future installation of unpermitted signs, defendants have failed to demonstrate an identity of issues.

D. Preliminary injunction

Administrative Code § 25-317.2(d) provides as follows:

> (1) Upon the violation of any provision of this chapter . . . or whenever any person is about to engage or is engaging in any act or practice that may constitute a violation of any provision of this chapter, the chair may request the corporation counsel to institute all

> necessary actions and/or proceedings to restrain, correct or abate such violation or potential violation . . . .
> (2) . . . In such actions and proceedings, the city may apply for restraining orders, preliminary injunctions or other provisional remedies, with or without notice.

And, pursuant to section 25-305(a)(1):

> it shall be unlawful for any person in charge of a landmark site . . . located in an historic district to alter, reconstruct or demolish any improvement constituting a part of such site . . . and located within such district . . . or to cause or permit any such work to be performed on such improvement or land, unless the commission has previously issued a [permit] and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such [permit] has been previously issued.

Administrative Code § 25-302(i) defines improvement as "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment," and a "person in charge" is defined as:

> The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, . . . lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

(Administrative Code § 25-302[t]).

Traditionally, a preliminary injunction may be granted where the moving party shows: (1) a likelihood of success on the merits; (2) irreparable injury in the absence of the relief requested; and (3) a balance of the equities in its favor. (CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Absent any controlling case law describing the showing City must make in order to obtain a preliminary injunction pursuant to Administrative Code § 25-317.2(d), I look to the requirements for preliminary injunctions pursuant to Town Law § 268(2) and Administrative Code §§ 7-706(a) and 7-707(a).

Town Law § 268(2) provides as follows:

> In case any building or structure is erected, constructed, reconstructed, altered, converted, or maintained . . . in violation of this article or of any local law, ordinance, or other regulation . . . , the proper local authorities of the town, in additional to other

> remedies, may institute any appropriate action or proceedings to prevent such unlawful [activity] . . . .

Similarly, pursuant to Administrative Code § 7-706(a), "the corporation counsel may bring and maintain a civil proceeding in the name of the city to permanently enjoin a public nuisance," which includes zoning resolution violations (Administrative Code § 7-703[k]), and "[p]ending an action for a permanent injunction . . . , the court may grant a preliminary injunction enjoining the public nuisance" (Administrative Code § 7-707[a]).

When seeking to enjoin preliminarily a zoning violation pursuant to Town Law § 268(2), a municipality need only show the first and third prongs. (*Town of Southampton v County of Suffolk*, 2011 WL 5085037, 2011 NY Slip Op 7629 [2d Dept Oct. 25, 2011]; *Town of Islip v Modica Assocs. of NY 122, LLC*, 45 AD3d 574 [2d Dept 2007]; *Vanno v River Market Commodities, Inc.*, 168 AD2d 979 [4th Dept 1990]). And although the three-prong test applies where City is seeking to enjoin preliminarily a zoning violation pursuant to the Nuisance Abatement Law, Administrative Code § 7-701, *et seq* (*City of New York v 330 Cont., LLC,* 60 AD3d 226 [1st Dept 2009]; *City of New York v Untitled, LLC*, 51 AD3d 509 [1st Dept 2008]), as irreparable injury is presumed from the existence of a public nuisance (*330 Cont.*, 60 AD3d at 230; *City of New York v Love Shack*, 286 AD2d 240 [1st Dept 2001]), it need only demonstrate the first and third prongs, as well.

As the requirements of Administrative Code § 25-317.2(d) resemble those set forth in Town Law § 268(2) and Administrative Code §§ 7-706(a) and 7-707(a), and as a violation of Administrative Code § 25-205(a)(1) resembles a zoning violation insofar as it pertains to land use, I find that City need only establish a likelihood of success on the merits and a balance of the equities in its favor in order to be entitled to a preliminary injunction pursuant to section

25-317.2(d).

Here, plaintiffs offer the correspondence regarding 598 Broadway's applications for sign permits, the warning letters and notices of violations the LPC issued regarding the unpermitted signs, Weiss's affidavit reflecting that he and other LPC employees observed unpermitted signs on the building with Colossal's logo below, and photographs of same. As this evidence demonstrates that defendants installed or permitted to be installed wall signs for which LPC permits were not obtained, plaintiffs have shown that defendants violated Administrative Code § 25-305(a)(1), and thus, that they are likely to succeed on the merits of their claim. Moreover, as the correspondence between the LPC and defendants reflects that defendants were aware of the permit requirement and installed or permitted to be installed wall signs without obtaining permits anyway, plaintiffs have also shown that the balance of the equities weighs in their favor. Therefore, plaintiffs have demonstrated entitlement to a preliminary injunction.

E. Piercing the corporate veil and liability of individual defendants

Although defendants claim that the corporate veil must be pierced in order to attribute liability to the individual defendants, as Zvi and Nat Mosery are officers of the entity that owns the building, and as Airis, Paul Lindhal, and Adrian Moeller are officers of Colossal, the entity that installed signs on the building and was identified as a "tenant/lessee" thereof on the January 10, 2008 permit application, the named individuals directly and indirectly control the building and constitute "person[s] in charge" pursuant to section 25-302(t). Consequently, there is no need to pierce the corporate veil.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for a preliminary injunction against defendants is

granted; and it is further

ORDERED, that defendants must immediately submit a complete application to the New York City Landmarks Preservation Commission to obtain a permit to remove any and all wall signs currently installed on 598 Broadway, New York, New York for which a permit has not been issued; and it is further

ORDERED, that defendants must immediately remove any and all wall signs currently installed on the building for which a permit has not been issued; and it is further

ORDERED, that defendants are enjoined from installing or permitting to be installed wall signs on 598 Broadway or other buildings subject to the Landmarks Law, New York City Administrative Code § 25-301, *et seq*, without first obtaining permits from the New York City Landmarks Preservation Commission; and it is further

ORDERED, that service of a copy of this Order be made upon defendants personally or by leaving a copy thereof with a person of suitable age and discretion at the subject premises; or by posting a copy thereof at the subject premises, on or before the 21st day of November, 2011, and that be deemed good and sufficient service on defendants, provided, however, that if service is not made personally, a copy of the Order will be mailed to such defendants at either the last known business address or residential address by overnight mail on or before the 21st day of November, 2011.

ENTER:

FILED
NOV 16 2011
NEW YORK
COUNTY CLERK'S OFFICE

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 14, 2011
New York, New York

NOV 14 2011