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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7

Justice

ZMOORE, LTD. d/b/a COMMERCE RESTAURANT,

Plaintiff

INDEX NO. 113772/11

-against-

MOTION SEQ. NO. 002

KINGMAN MANAGEMENT LLC, PRIDE ROCK, LLC, RICHARD KINGMAN, JUDITH KINGMAN, ALEXANDER KINGMAN, and JUDITH KINGMAN as custodian for Garrett Kingman Under the New York Uniform Transfers to Minors Act,

Defendants.

FILED
MAR 19 2012
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 3, were read on this motion to

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s).	1
Answering Affidavits — Exhibits	No(s).	2
Replying Affidavits — Exhibits	No(s).	3

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

Motion sequences 001 and 002 are hereby consolidated for purposes of disposition.

Before the Court in Motion Sequence 001 is Zmoore, LTD d/b/a Commerce Restaurant's (plaintiff) Order to Show Cause (OSC) for a preliminary injunction seeking to enjoin and restrain Kingman Managment LLC, Pride Rock, LLC, Richard Kingman, Judith Kingman, Alexander Kingman, and Judith Kingman as custodian for Garrett Kingman Under the New York Uniform Transfers to Minors Act (collectively, defendants) from doing any construction or work on the elevator modernization project (modernization project) of its building located at 50 Commerce Street, New York, NY (the premises).

Before the Court in Motion Sequence 002 is an OSC by plaintiff seeking modification or renewal, pursuant to CPLR 2221, of its OSC dated December 9, 2011, to the extent that the Court denied its previous request for a Temporary Restraining Order (TRO) in Motion Sequence 001. Upon renewal, plaintiff seeks a TRO prohibiting and restraining defendants from performing any

work in connection with their intended modernization project at the premises in any portion of Commerce's basement and/or in front of the basement elevator door. Defendants are in opposition to both of plaintiff's motions.

BACKGROUND

Plaintiff is a commercial tenant who operates Commerce Restaurant at the premises which is located in the West Village of Manhattan. Defendants own and manage the premises. Within the premises is a manually operated elevator that defendants intend to replace in a modernization project. The 100 year old manual elevator employs antiquated technology, and replacement parts for the main components are no longer available. Defendants maintain that the manual elevator is out of service frequently, and the DC current upon which it runs is being phased out by Con Edison. The modernization of the manual elevator includes its removal, demolition of its concrete base underpinning, and the installation of a new automatic elevator that runs on AC current. The elevator opens out into a large basement area that is in common use by the plaintiff and the defendants (*see* OSC, exhibit E).

On December 9, 2011, plaintiff brought an OSC seeking a TRO and preliminary injunction enjoining the defendants from doing any construction work on the elevator at the premises, and on that date the Court heard oral argument on the TRO. In support of the TRO and preliminary injunction plaintiff proffered that the repercussions would be catastrophic if defendants are allowed to move forward with the modernization project. Specifically, the restaurant would go out of business causing plaintiff's two owners to lose their large investment, and its staff of 58 employees would subsequently be laid off. It was plaintiff's concern that the phase of the modernization project which requires jack-hammering in order to remove the cement base of the freight elevator from the basement level will cause serious disruption of the restaurant. Plaintiff claimed that it uses an adjoining room in the basement to store and prepare food, including the preparation of dough for bread and the handling of various raw foods, then moves this food upstairs to the kitchen (see OSC,

exhibit E). Additionally, in front of the elevator shaft in the basement is the area where all deliveries arrive through the sidewalk hatch.

In further support of its motion, plaintiff proffered its concern with steel shavings, substantial dust and potential asbestos contaminating its food that could make its patrons sick, and ultimately cause the diminution of its reputation within the restaurant industry. Furthermore, plaintiff provided a print out from the Department of Buildings (DOB) which indicated that no permits had been issued to defendants. Also this project, according to plaintiff, is in violation of Paragraph 43 of the lease between the parties which states in relevant part, "Landlord's use of the basement space shall not interfere with Tenant's use and enjoyment of the basement" (OSC ¶¶ 27-29).

In opposition defendants, as owners of the premises, proffer that they are within their rights under the Lease and should be permitted to replace the manual elevator with a modern and reliable elevator. According to the defendants, the basis for plaintiff's motion, "amounts to an unwarranted over-reaction to the proposed elevator replacement and substitutes speculation and uninformed hysteria in place of the required showing of irreparable harm" (Opposition ¶ 8). During oral argument defendants proffered their intent to satisfy plaintiff's concerns, proposed and subsequently implemented extra precautions in order to avoid dust contamination. These precautions include erecting an air-tight barrier wall approximately four feet from the basement elevator doors[1], waiting until after the Holiday season to commence construction, only doing said construction before 4:00 p.m. when the restaurant is not open for business[2], and staging the work from the street level vestibule into the basement rather than doing the work from the basement level to avoid tracking dust. Defendants stated that they had submitted an application to the DOB for permits and

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[1] Plaintiff opposed the location of the containment wall on the basis that it was taking up its usable space in the basement and preferred that the wall be flush with the elevator shaft. However, upon an inspection of the architectural drawings of the basement, the containment wall does not obstruct plaintiff's daily operations, nor the sidewalk hatch where deliveries are received.

[2] Commerce Restaurant opens for business at 5:00 P.M. daily.

expected to have same within the following week. Moreover, defendants proffer that according to the lease, the basement area outside the elevator is a common area for use by plaintiff and defendants. In light of these arguments, the Court struck the TRO portion of the OSC, signed plaintiff's OSC and set the argument date for the preliminary injunction for December 20, 2011, which was later adjourned to January 9, 2012.[3] Upon oral argument on the preliminary injunction, plaintiff requested that the Court accept an expert report of John Leitner as part of a Reply Affidavit and Reply Memorandum of Law, which the Court denied.

On January 25, 2012 plaintiff brought an OSC, Motion Sequence 002, seeking to modify or renew its OSC dated December 9, 2011, to the extent that the Court denied its previous request for a TRO in Motion Sequence 001. Plaintiff also sought a TRO pending a hearing on its motion for modification or renewal. The Court struck the TRO portion of plaintiff's OSC and set the argument date for the motion for March 7, 2012.

In support of its renewal or modification motion plaintiff argues, *inter alia*, that defendants improperly constructed a barrier wall and such work was done in a manner that disrupted plaintiff's business operations and threatened to damage their restaurant.[4] Additionally, plaintiff now proffers that since the December 9, 2011 OSC, plaintiff has amended its complaint setting out a cause of action for declaratory judgment as to Commerce's rights to the basement space of the premises.

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[3] As reflected in plaintiff's OSC, the parties agreed to meet on December 12, 2011 at 10:00 A.M. at defendant's counsel's office in an effort to resolve this matter by both sides making efforts to address their concerns. On December 20, 2011, plaintiff with new counsel and defendants appeared. Defendants' counsel met with plaintiff's former counsel as scheduled on December 12, 2011, yet no agreement was reached. Additionally, after the December 12, 2011 meeting plaintiff retained new counsel. Although the Court had concerns regarding whether the plaintiff was interested in a good faith settlement, this Court adjourned the hearing until January 9, 2012, wherein the parties agreed to meet again in an attempt to resolve the underlying dispute. On January 9, 2012 the parties appeared and represented to the Court that they had met again in an attempt to settle their issues, yet such no agreement was reached, and as a result a hearing was held on plaintiff's motion for a preliminary injunction.

[4] The Court notes that plaintiff, subsequent to the defendants erecting a barrier wall, broke through the outermost wall without the authorization of the defendants.

In opposition, defendants state that plaintiff has not suffered either equitable or monetary damages as the restaurant and its kitchen has operated uninterrupted since the commencement of the modernization project. The wall plaintiff erected behind defendants' containment wall is working and passes environmental tests, which is stated by plaintiff's own experts in its reports. Plaintiff's argument, according to defendants, regarding irreparable harm are belied by plaintiff's own expert submissions because the experts only mention cement dust and do not mention asbestos. Furthermore defendants maintain that contrary to plaintiff's assertions they have the proper permits to perform the modernization project, the stop work order issued by the DOB was lifted as of February 24, 2012, and the ECB violation which plaintiff attaches as an exhibit in support of its motion has been resolved. Lastly defendants maintain that the balance of equities are in their favor, and as such plaintiff's motion should be denied.

DISCUSSION

Motion Sequence 001

In support of plaintiffs' motion for a preliminary injunction, plaintiff submits, *inter alia*, an Affirmation of Emergency from Michael Yonker, Affidavit of Tony Zazula the majority owner of plaintiff, letters of correspondence to and from plaintiff and defendant Judith Kingman, various published articles written about Commerce Restaurant, architectural drawings of the basement and first floor of the subject building, a copy of the Summons and Complaint, a print out from the DOB listing all active permits for the building, and a copy of the lease between plaintiff and defendant.

"In order to obtain a preliminary injunction, the plaintiff was required to put forth evidence demonstrating, '(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 [its] favor.'" (*61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [1st Dept 2010] quoting *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see also Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Plaintiff's motion for a preliminary injunction is denied as the Court finds that plaintiff has not

met its burden of establishing a likelihood of success on the merits, irreparable injury or that the balance of equities are in its favor (*see 61 W. 62 Owners Corp. v CGM EMP LLC*, 77 AD3d at 334). In light of the containment wall erected by defendants, as well as the other accommodations agreed upon during the oral argument on the TRO and subsequently implemented by defendants, the Court finds plaintiff's argument that it will suffer irreparable harm because of asbestos and contamination to be nothing more than speculation (*see Golden v Steam Heat, Inc.*, 216 AD2d 440, 442 [2d Dept 1995] ["irreparable harm must be shown by the moving party to be imminent, not remote or speculative"]). The Court also notes that there are no expert affidavits in support of plaintiff's position that bolster these claims.

Additionally, the Court does not agree with plaintiff's position regarding a likelihood of success on the merits (*see e.g. Willow Media, LLC v City of New York*, 78 AD3d 596 [1st Dept 2010]) because the Court does not find that the modernization project violates the lease agreement between the parties. As the owner of the premises defendants are within their rights to make repairs to the premises as they see fit, as long as it does not violate the lease with plaintiff. Paragraph 43 of the lease agreement between the parties entitled "Basement Space" states the following, in relevant part:

> Subject to the terms and conditions contained elsewhere in this lease, Tenant may exclusively use the portion of the basement of the building designated as part of the demised premises as noted in **Exhibit A**.
>
> Subject to the terms and conditions contained elsewhere in this Lease . . . Landlord's use of the basement space shall not interfere with Tenant's use and enjoyment of the basement (OSC, exhibit E).

Exhibit A that is referenced in Paragraph 43 is a drawing of the basement space, and in this drawing specific areas of the basement are designated either: exclusive use by tenant, exclusive use by owner or common space - no storage. The elevator shaft is designated, pursuant to Exhibit A to the lease, to be exclusive use by owner and the area directly outside the elevator is designated as common space. Even with the containment wall located four feet from the elevator shaft, there is no

disruption of plaintiff's use and enjoyment of the basement as the wall does not block the sidewalk hatch where deliveries are received, or any other points of ingress or egress. Moreover, the Court finds that the balance of equities are in defendants favor because they have a need to replace their elevator and the modernization project need not be preceded by any DOB violations. Thus, plaintiff's motion for a preliminary injunction is denied.

Motion Sequence 002

In support of plaintiffs' motion to renew in Motion Sequence 002, plaintiff submits, *inter alia*, an affidavit from Jenn Leatherman who is the General Manager of Commerce Restaurant, Emergency Affidavit and Supplemental Affidavit from plaintiff's attorney, a copy of its original and amended complaint, report by plaintiff's expert John J. Leitner of Environmental Building Solutions, LLC, who is a licensed environmental consultant and an asbestos investigator, black and white photographs, a copy of a New York City Environmental Control Board (ECB) Violation and a copy of a Stop Work Order issued by the New York City DOB. Defendants appeared and proffered argument in opposition.

A renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2] and [3]). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beihy*, 71 NY2d 994 [1988] [internal citation omitted]); *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]).

For this Court to consider the new facts, it must find that the plaintiff did not know of the facts at the time of the original motion or had a reasonable excuse for failing to present the new facts

(*Yarde v New York City Tr. Auth.*, 4 AD3d 352, 353 [2d Dept 2004]; *Foley v Roche*, 68 AD2d at 568]). Upon consideration, the renewal or modification motion is denied as plaintiff has not demonstrated through its arguments and expert reports attached in support of its motion that the new facts would have changed the Court's previous determination to deny the TRO in Motion Sequence 001 (*see* CPLR 2221[e]). Specifically, the affidavit of plaintiff's expert John J. Leitner in which he states he visited the basement of the premises on January 25, 26 and on February 6, 2012, and determined on those visits that the wall put up by plaintiffs, which is located directly behind the containment wall erected by defendants, did not reveal any leakage of construction debris and other potentially harmful contaminants. This affidavit vitiates any argument by plaintiff of imminent and irreparable harm. Further, the Stop Work Order as well as ECB violation are irrelevant as both of these issues have been resolved. Additionally, plaintiff does not present any new facts that shift the balance of equities in its favor.

Upon the foregoing, it is,

ORDERED that plaintiff's motion for a preliminary injunction, Motion Sequence 001, is denied in its entirety; and it is further,

ORDERED that plaintiff's motion seeking renewal or modification, Motion Sequence 002, is denied in its entirety; and it is further,

ORDERED that the parties are directed to appear for a Preliminary Conference on at 11:00 a.m. on May 30, 2012 at 60 Centre Street, Room 341, Part 7.

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 3-13-12

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**