[* 1]

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

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Seventh Avenue Assocs

- v -

176 Bway Owners Corp

INDEX NO. 103889/12

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 ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
JUN 03 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/29/13

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 : IAS PART 12

----------x

SEVENTH AVENUE ASSOCIATES,

Plaintiff,

- against -

176 BROADWAY OWNERS CORP.,

Defendant.

----------x

Index No. 103889/12

Mot. seq. nos.: 001, 002
Subm.: 1/9/13

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiff:
Robert G. Silversmith, Esq.
Silversmith & Assocs. Law Firm, PLLC
30 Broad St., 20th Fl.
New York, NY 10004
212-922-9300

For defendant:
Brett L. Carrick, Esq.
Cantor, Epstein & Mazzola, LLP
49W. 37th St., 7th Fl.
New York, NY 10018
212-768-4343

By order to show cause dated September 27, 2012, plaintiff moves for an order enjoining defendant: (1) to allow plaintiff's subtenant, Varocco Maiden, LLC (Pronto Pizza) to perform and complete renovations and alterations to the premises leased by plaintiff; (2) from obstructing or interfering with Pronto Pizza's renovations and alterations; (3) from tortiously interfering with the lease between plaintiff and its subtenants; (4) to allow plaintiff's subtenant, Capital One Bank (Bank), to comply with American Disabilities Act (ADA) requirements for the leased premises; and (5) to execute Owner's authorizations on New York City Department of Buildings (DOB) and other governmental applications as required to enable Pronto Pizza to perform alterations and open for business; and also declaring that the Lease and Offering Plan provide that defendant's consent is not required as a predicate to alterations, except for waste, and that the renovations and alterations at issue here do not constitute waste. Defendant opposes.

By order to show cause dated October 19, 2012, defendant moves for an order enjoining

plaintiff from performing or permitting Pronto Pizza from performing any renovation, alteration or construction within the demised premises and directing it to cease any renovation, alteration or construction pending a determination on plaintiff's order to show cause. Plaintiff opposes.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

The building at issue was previously owned by 176 Broadway Owners Corp. (Owners Corp.), of which Harold Thurman was a principal. By lease signed in October 1980, Owners Corp. leased to 176 Broadway Builders Corp., of which Thurman was also a principal, the ground floor commercial space and basement in the building for a 50-year term. The lease contains no restriction on alterations. (Affidavit of Brad Thurman, dated Sept. 19, 2012 [Thurman Affid.]).

Subsequently, the building was converted to a cooperative. An offering plan to create the cooperative, dated November 2, 1979, mentions the lease, and provides that the landlord/co-op is required to comply with all of the landlord's obligations under the lease. (*Id.*, Exh. D).

Sometime thereafter, Builders Corp. assigned the lease to Thurman and Patrick Consalves. (*Id.*, Exh. A). And on December 29, 1991, Thurman and Consalves assigned the lease to 176 Funding Corp. (Funding Corp.), which thereafter, by agreement dated August 1, 1994, assigned the lease to plaintiff. (*Id.*). All of the assignments provide that the assignee obtains the lease subject to the rents, covenants, conditions, and provisions therein, and the expiration date of the lease, October 7, 2030, remained in effect. (*Id.*).

A. Capital One Bank

By lease dated June 30, 2000, plaintiff leased to North Fork Bank (now Capital One

Bank) for a 15-year term, the ground floor, lower level and mezzanine in the building. (*Id.*, Exh. B).

By letter dated November 3, 2011, the Bank sent a copy of its architectural drawings for work it intended to perform in the front and outside of the store, including a handicap-accessible ramp, in order to make the premises compliant with the Americans with Disabilities Act (ADA), along with DOB forms for defendant to review and sign. (Thurman Affid., Exhs. I, J).

By letter dated November 23, 2011, counsel for the co-op wrote to plaintiff's counsel to advise that "[b]ecause of the outstanding violations in the stop work order relating to a portion of [the Bank's] space, [the co-op] cannot consider the request. [The co-op] requires that all violations and open items, including the stop work order be finally cleared before considering further alterations." (*Id.*, Exh. K).

By letters dated January 6 and 20, April 10, and July 12, 2012, the Bank again sought permission to construct a handicap ramp at the Bank's entrance in order to comply with the ADA, and by letters dated May 25 and August 2, 2012, the co-op replied that it was reviewing the request. (*Id.*, Exhs. L-Q).

B. Pronto Pizza

By lease dated November 15, 2011, plaintiff leased to Pronto Pizza, for a term beginning on November 15, 2011 and ending on February 28, 2024, the westerly store in the building including the basement. (*Id.*, Exh. C). To date, Pronto Pizza has been unable to open for business. (*Id.*).

By letter dated January 20, 2012, plaintiff submitted Pronto Pizza's plans and drawings for its proposed renovations for defendant's review. (Thurman Affid., Exh. T). By letter dated

January 30, 2012, Pronto Pizza's engineer submitted its planned scope of work to the co-op, which included a new store front and sign, front awning, porcelain/ceramic floor tiles, walls, counter, and shelves, a three-ton air conditioning unit and duct work, electric lights and work, and plumbing work. (*Id.*, Exh. U).

By letter dated February 17, 2012, the co-op wrote to Pronto Pizza and requested that it sign the enclosed alteration agreement and provide several items, including a security deposit. (*Id.*, Exh. W).

By letters to the co-op written in April and May 2012, plaintiff and Pronto Pizza asked for its approval of the plans as the business could not open until it did so. (*Id.*, Exhs. X, Y).

By letter dated May 25, 2012, the co-op advised plaintiff that it would consider the alteration plans. (*Id.*, Exh. O).

Between May and August 2012, plaintiff repeatedly asked the co-op to approve the subtenants' renovation plans and the co-op repeatedly declined to review them until the subtenants signed the co-op's proposed alteration agreement. (*Id.*).

II. PLAINTIFF'S MOTION

A. Contentions

Plaintiff alleges that the purpose of the original lease, which was agreed to between companies with the same principal, Thurman, was to allow the prime tenant an unrestricted right to sublet the commercial space and to make alterations and to permit it unrestricted usage. It observes that the lease was made part of the offering plan when the building was converted to a residential co-op, and that for more than 30 years, each subtenant performed alterations to the leased premises without any objections or problems. (Thurman Affid.).

Plaintiff also contends that although its lease contains no restriction on alterations, and that therefore the co-op's consent is thus not required for alterations, the DOB now requires that on certain applications, the co-op must execute authorizations and applications, and that the co-op has refused to execute the pertinent authorizations. (*Id.*). Plaintiff asserts that the co-op first attempted to have plaintiff sign an alteration agreement that would have required the co-op's consent for alterations, and that after plaintiff refused to sign it, the co-op sent it directly to its subtenant, which also refused to sign. (*Id.*, Exhs. F, G, H). In particular, plaintiff maintains that it has been damaged as Pronto Pizza has been unable to open and is thus not paying rent. (*Id.*).

Defendant denies that plaintiff has established a right to a preliminary injunction absent a showing of a likelihood of success on the merits or irreparable harm or that the equities are in its favor. It contends that as the lease does not permit plaintiff to perform any and all renovations, its subtenants' proposed alterations constitute waste and are thus impermissible. Defendant also denies that plaintiff suffered irreparable harm as it may be compensated by money damages. Finally, it argues that the equities are in its favor given that the proposed renovations may have an adverse impact upon it and/or render it liable for any resulting damages, and that, in any event, plaintiff seeks the same relief on this application as it seeks as the ultimate relief in this matter. (Affirmation of Brett L. Carrick, Esq., dated Oct. 19, 2012).

B. Analysis

A preliminary injunction may be granted upon a showing by the movant of a likelihood of success, a danger of irreparable injury, and that the balance of equities is in its favor. (*Jones v Park Front Apts., LLC*, 73 AD3d 612 [1st Dept 2010]). The decision whether to grant a preliminary injunction rests in the sound discretion of the court. (*Rowland v Dushin*, 82 AD3d

738 [2d Dept 2011]).

Here, the relief sought by plaintiff in its request for a preliminary injunction is identical to the relief sought in its complaint, and it would alter the status quo by directing defendant to authorize the alterations, rather than preserving the status quo. Thus, preliminary injunctive relief is inappropriate. (*See Bd. of Mgrs. of Wharfside Condo. v Nehrich*, 73 AD3d 822 [2d Dept 2010] [board not entitled to preliminary injunction compelling defendants to restore condominium unit to original condition as it sought identical relief in complaint]; *Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051 [2d Dept 2009] [court improperly granted preliminary injunction enjoining defendant from enforcing stop-work order as ultimate relief sought was judgment declaring stop-work order void and compelling defendant to rescind it]; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2d Dept 2005] [preliminary injunction compelling defendant to execute documents for building permit upon certain conditions did not preserve status quo but rather granted ultimate relief sought]; *see also Jones*, 73 AD3d 612 [mandatory preliminary injunction, which would mandate specific conduct, by which movant would receive some form of ultimate relief sought, is granted only in unusual situations where relief is essential to maintain status quo]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347 [1st Dept 2003] [preliminary injunction should not be granted absent extraordinary circumstances if status quo would be disturbed and plaintiff would receive ultimate relief sought]).

Moreover, plaintiff has not demonstrated that money damages would not adequately compensate it for defendant's allegedly improper actions. (*See ERS Enter., Inc. v Empire Holdings, LLC*, 286 AD2d 206 [1st Dept 2001] [preliminary injunction properly denied as

plaintiff could be compensated by money damages if the landlord's failure to sign off on work permit application was found to have been improper]; *see also Louis Lasky Mem. Med. and Dental Ctr. LLC v 63 W. 38th LLC*, 84 AD3d 528 [1st Dept 2011] [plaintiff not entitled to preliminary injunction enjoining landlord from terminating lease as it failed to show that its potential damages were not compensable monetarily and capable of calculation]).

In light of this result, I need not consider plaintiff's remaining contentions.

III. DEFENDANT'S MOTION

As defendant sought an preliminary injunction enjoining plaintiff from performing any renovations until a determination was made on the merits of plaintiff's request for a preliminary injunction, defendant's application is now moot.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED, that defendant's motion for a preliminary injunction is denied.

ENTER:

Barbara Jaffe, J.S.C.

DATED: May 29, 2013
New York, New York