

21-25 31 St. LLC v ABC Super Stores, Inc.
2016 NY Slip Op 31379(U)
June 6, 2016
Supreme Court, Queens County
Docket Number: 702633/2016
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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 21-25 31STREET LLC, HMP ENTERPRISE II, Index No.: 702633/2016
 LLC AND SAG 21-25 LLC,
 Plaintiff, - Motion Date: April 21, 2016
 -against- FILED
 ABC SUPER STORES, INC., JUN 27 2016 Motion Cal. No.: 199
 Defendants, COUNTY CLERK Mot. Seq. No. 3
 QUEENS COUNTY

The following papers read on this motion by plaintiffs for an order restoring their prior motion for a preliminary injunction to the calendar and marking it fully submitted for a determination on the merits.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Affirmations-Exhibits.....	1-4
Opposing Affirmations-Affidavit-Memorandum of Law- Exhibits.....	5

Upon the foregoing papers the motion is determined as follows:

That branch of the plaintiffs' motion which seeks to restore the prior motion for a preliminary injunction is granted, as this motion was inadvertently marked off the Centralized Motion calendar on April 5, 2016, due to a misunderstanding regarding the submission of the hard copies of defendant's opposing papers and the plaintiff's reply papers.

Plaintiffs SAG 21-25 LLC, HMP Enterprises II LLC and 21-25 31 Street LLC, pursuant to a deed dated January 12, 2015, and filed on March 6, 2015, acquired the commercial real property known as 21-25 31st Street, Astoria, New York, from Heller Astoria LLC, Rosenberg Astoria LLC and Schwab-Astoria LLC. The deed recites that purchasers are tenants in common, with each holding a different percentage interest in the real property. The current property owners' respective percentage interest in the real property, as tenants in common, was thereafter adjusted, pursuant to a deed dated June 10, 2015, and filed on October 23, 2015.

The subject real property is improved by a one story building that is presently occupied by defendant ABC Super Stores Inc. (ABC). ABC, a closely held corporation, operates a retail store at the subject premises, and sells consumer goods such as clothing, linens and kitchenware. ABC has been a tenant in the subject premises since July 28, 1992, pursuant to a ten year lease. Said lease term was extended pursuant to an agreement with the then owners, dated September 19, 2002, whereby the lease term was extended for one month to September 30, 2002, and further extended for an additional ten year period, terminating on September 30, 2012. The tenant was granted an option to extend the lease term for an additional five years commencing October 1, 2012 and terminating on September 30, 2017.

A second amendment to the subject lease dated October 15, 2011, reflects a transfer of the then landlord's ownership interest in the subject real property, and acknowledges that the tenant had exercised its option to extend the lease term commencing October 1, 2012 through September 30, 2017. A third amendment to the lease dated February 10, 2014, reflects a transfer of then landlord's ownership interest in the real property to the immediate prior owners, Heller Astoria LLC, Rosenberg Astoria LLC and Schwab-Astoria LLC, as tenants in common. All other terms and conditions of the lease remain in full force and effect. The current property owners, plaintiffs herein, entered into an agreement dated January 12, 2015, with the immediate prior property owners, whereby said prior owners, pursuant to the terms of the contract of sale, assigned the lease, all rents due under the lease, and the security deposits with accrued interest with respect to the lease to the subject premises.

Plaintiffs are developers who seek to demolish the single story building occupied by ABC and construct in its place a new mixed use, multi-story building which will include one floor of approximately 12,000 square feet of commercial space and additional stories devoted to residential space, subject to applicable air rights. In May 2014, during the due diligence period under the contract of sale, plaintiffs hired Tenen Environmental LLC (Tenen) to perform an environmental site assessment of the subject real property prior to purchasing said real property. Tenen, in its June 13, 2014 report, stated that based on historical information, the site was vacant until some time between 1954 and 1967; that the northwest portion of the site was occupied by a dry cleaning facility from 1967 through 1981; that the historic Sanborn fire insurance maps depict the same area as "cleaning from 1985 through 2006"; and that an auto repair shop was shown on the northeast adjacent property in the 1948 Sanborn map. Tenen stated among other things that soil, soil vapor and groundwater were impacted with petroleum constituents and dry cleaning solvents; that it had conducted invasive testing beneath the subject building; and that it had reported the release of contaminants to the NYSDEC Spill Hotline and that it had been assigned a Spill Number.

The NYSDEC sought further clarification, and after providing further information, the plaintiffs notified the NYSDEC on July 3, 2014 that it would enter the site in the New York State Brown field Cleanup Program (BCP) after it acquired ownership of the subject real property.

John Petras, a managing member of 21-25 31 Street LLC, in a letter dated October 24, 2014, sought the then owners' consent to "perform testing at the Property, including invasive testing and remediation that may be reasonably required between the date hereof and Closing" and stated that "access is of course subject to the rights of the existing tenant". The prior owners granted their consent to perform the additional testing.

In November 2014, the plaintiffs submitted an application to enter the site in the BCP, as a "Volunteer" and "Potential Future Purchaser". The subject real property was acquired by the plaintiffs pursuant to a deed on January 12, 2015. Mr. Petras executed a BCP Agreement on behalf of the plaintiffs on February 27, 2015, which was accepted by the NYSDEC on March 10, 2015.

In July 2015, Matthew Carroll, Tenen's principal, submitted a "Remedial Investigation Work Plan" which was reviewed and approved by the NYSDEC on July 30, 2015. The property owners were required to complete field work in connection with said work plan within 34 days of the July 30, 2015 approval. In September 2015, Tanen provided the property owners with a budget for the remediation project, with an estimated total cost of \$1,117,000.00. Said budget was based upon the assumption that the investigation and remediation work would be performed in a vacant site.

Plaintiffs' in a letter addressed to ABC and dated September 30, 2015, referred to the original lease, and the first, second and third amendments, and stated, in pertinent part, that:

"This shall serve as notification that Landlord hereby elects to terminate the Lease pursuant to Paragraph 34(b). There is prior-existing contamination of the Demised Premises which Landlord is obligated to remediate. The estimated cost of such remediation exceeds two years basic rent (i.e. \$652,594.00). Attached thereto is an estimate of the cost of remediation from Landlord's contractor which estimates the cost at over \$1,000,000.00. Therefore, Landlord is electing to terminate the Lease on December 31, 2015. As such, you are required to quit, surrender, vacate and deliver possession of the Demised Premises in the condition required upon the expiration or earlier termination of the Lease on that date."

ABC, in a letter addressed to the property owners and dated October 12, 2015, stated in pertinent part, that it believed that the notice to terminate the subject lease pursuant to Paragraph 34(b) is "defective and of no force and effect. Based on the information provided

it does not appear that the "remediation" had been "ordered remediated by governmental authority". Furthermore the "prior-existing contamination" has not been identified."

In a letter dated December 30, 2015, the NYSDEC informed the property owners and Mr. Carroll, in pertinent part, that the "Remedial Investigation Work Plan (RIWP) was approved on July 30, 2015 and included a schedule for implementation of that work plan. The approved schedule called for the completion of the field work within 34 days of the work plan approval. On October 23, 2015 we held a phone conference with Tenen Environmental and were told that the field work had not started [sic] due to access issues but would be completed by the end of December, 2015. To the best of our knowledge this has not occurred." The NYSDEC further stated that it "considers the progress of the Remedial Program for the site, or the lack thereof, to be unsatisfactory, non-conforming to the approved schedule, and the delay to be in violation of the requirements of the Agreement. This letter serves to put you on notice of the Department's objection to the pace and progress of the Remedial Program at the Site and to provide an opportunity for you to remain in the Brownfield Cleanup Program, provided you submit a revised schedule within 30 days of receipt of this letter."

The NYSDEC required the property owners to complete soil borings and soil vapor samplings; to begin said field work by January 15, 2016 and to complete it by February 19, 2016; and to submit a Draft Remedial Investigation Report by March 31, 2016. The NYSDEC stated that if the property owners did not respond within said time frame it would terminate the BCP agreement, and that certain obligations of the "Volunteer" would remain.

ABC has not vacated the subject premises. Plaintiffs commenced a holdover proceeding against ABC on January 4, 2016. On January 19, 2016, Mr. Carroll informed the NYSDEC that there were some issues with access to the subject real property. On January 27, 2016, Mr. Carroll exchanged an email with the NYSDEC, and approval was given to modify the schedule, which permitted the property owners to commence the field work on February 15, 2016 and submit the draft report on April 15, 2016. Plaintiffs voluntarily withdrew its holdover proceeding on February 11, 2016.

On February 15, 2016, plaintiffs entered the approximately 800 square foot parking area, which is part of the leased premises, and commenced drilling operations in connection with the field work they are required to perform under the Remedial Investigation Work Plan.

On February 19, 2016, plaintiffs commenced a second holdover proceeding against ABC, which remains pending in the Civil Court, Queens County. Plaintiff alleges in the within complaint that during the course of the holdover proceeding before the Hon. Donna-Marie Golia and her law clerk, its counsel requested that the tenant provide access to the

premises in order that the plaintiffs could conduct testing of the ground beneath the subject premises, and that counsel for the defendant made it clear that the defendant would not provide access absent a court order. Judge Golia informed plaintiffs' counsel that any such order would need to be sought in this court.

Plaintiffs counsel, in a letter addressed to defendant's counsel dated March 4, 2016, stated that when they were before Judge Golia and her law clerk on March 1, 2016, he reiterated his client's request, first made in early February that the tenant provide access to the property owners so that its environmental contractor Tenen and its sub-contractors could perform testing required by NYSDEC. In order to meet the reporting deadline of April 15, 2016, counsel stated that testing inside the store must commence no later than March 28, 2016. Counsel asserted that the lease expressly required the tenant to provide the landlord with access to the premises, based upon paragraphs 16, and 34(b); described in detail the testing work to be performed; proposed that the inventory be covered with plastic sheeting provided by Tenen; and proposed that the work commence at 7:30pm, after the store closed, on three consecutive days and be completed by 2am; and stated that Tenen would remove all equipment and plug all holes. Counsel requested that defendant's counsel advise him by Monday morning (March 7) whether his client would permit the work to go forward. It is unclear as to whether defendant or its counsel responded to this letter.

Plaintiffs commenced the within action by e-filing a summons and complaint on March 7, 2016, and seeks a permanent injunction requiring the defendant to provide access to the subject premises, "whenever necessary to permit Plaintiff to perform the necessary testing and remediation", and for damages for breach of contract based upon defendant's failure to vacate the premises in a timely manner and paragraph 36 of the lease.

In an order to show cause dated March 14, 2016, plaintiff sought a preliminary injunction enjoining defendant from interfering in any way with plaintiff's access to inspect the subject premises whenever necessary to comply with its obligations under the BCP, including inspection, testing and remediation of contaminants; directing defendant to afford plaintiff, pursuant to paragraphs 16, 34(a) and 34(b) of the lease, unfettered access to the subject premises for the purpose of complying with all BCP requirements; and directing defendant "to cooperate and not interfere with plaintiff's performance of necessary testing and remediation of contaminants required by the BCP, including but not limited to the initial testing, excavation of contaminated soil beneath the premises, installation of a vapor barrier, subslab depressurization system injection and monitoring wells, all in connection with the remediation of contamination".

The Honorable Anna Culley granted a temporary restraining order on March 14, 2016, enjoining "Defendant from interfering in any way with Plaintiff's access to the premises to

perform the necessary initial NYSDEC mandated testing work which includes, among other things, drilling at least seven borings in the Premises and conducting soil vapor point samplings at the locations shown on the attached diagram... and one day of sampling the indoor air/soil vapor which was approved by the NYSDEC as necessary and appropriate. Defendant is further directed to: (i) give Plaintiff and Plaintiff's agents and contractors access to the Premises during non-business hours for the purpose of inspection in preparation for testing the contamination; and (ii) within 48 hours of service of this Order upon Defendant clear a minimum five foot radius from each location indicated on the attached diagram and a minimum two foot wide pathway to each location so that the testing locations can be accessed and testing can begin forthwith. The testing shall be done only in the evening hours after 8 pm and shall cease by 6 am, on consecutive days until completed, but no more than 4 days. Movant shall provide the defendant with the appropriate means, ie a portable storage unit, a storage unit to his merchandise while the testing is being performed. Defendant's oral request on the record on 3/14/16 is denied".

The "purpose of a preliminary injunction is to preserve the status quo pending a trial" and "the remedy is considered a drastic one, which should be used sparingly" (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713 [2nd Dept 2011]). "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Id.*; *Doe v Axelrod*, 73 NY2d 748 [1988]). "In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction." (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 [2nd Dept 2011]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *W. T. Grant Co. v Srogi*, 52 NY2d 496[1981].) In order to obtain a permanent injunction, the moving party must establish that there was a "violation of a right presently occurring, or threatened and imminent," that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]; *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). The court cannot grant the ultimate relief that petitioners seek under the guise of a preliminary injunction (*see SportsChannel Am. Assocs. v Natl. Hockey League*, 186 AD2d 417 [1st Dept 1992]). "[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]; *see Board of Mgrs. of Wharfside Condominium v Nehrich*, 73 AD3d 822, 824 [2d Dept 2010]; *Village of Westhampton Beach v Cayea*, 38 AD3d 760, 762 [2d Dept 2007]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347 [2003]).

The circumstances presented here are not of such an extraordinary nature as to warrant mandatory injunctive relief. At the outset, plaintiffs have not established the

likelihood of success on the merits. Plaintiffs assert herein and in the Civil Court proceeding that they properly terminated the subject lease, pursuant to Section 34(b) of the lease. Said lease provision, provides in pertinent part, that: "in the event such prior-existing contamination is identified and is ordered remediated by governmental authority... then the Lessor shall undertake such remediation, at its sole cost and expenses... and the Lessee shall provide access necessary for such undertaking and remediation. It is agreed however, that in the event the Lessor's estimated costs of remediation (including testing, analysis, reporting, plans, disposal and restoration) as prepared by Lessor's contractors, exceeds a sum equal to two (2) years of the then current basic rents hereunder, the, lessor may, at its option cancel and terminate this Lease, upon 90 days prior notice thereof to tenant; and paying to the tenant, the tenant's reasonable costs* of relocation within the borough of Queens. There shall be no liability of the Lessor to the Tenant for collateral damages or loss of business or leasehold in connection with any such contamination, remediation or termination resulting therefrom.

*[undepreciated leasehold improvements, reasonable legal fees of new lease, moving costs and set-up costs] limited to an aggregate amount of \$100,000.00."


Contrary to plaintiffs' assertions, their voluntary participation in the BCP is not the equivalent of a remediation order issued by a governmental authority. Rather, plaintiffs' obligations to perform testing and remediation, pursuant to the BCP Agreement, are contractual in nature. In addition, the estimated cost of remediation provided by plaintiff's contractor's, Tenen, which is only set forth in the affidavit submitted by Mr. Carroll in support of the within motion, is not based upon a remediation order issued by a governmental authority. The court further notes that plaintiffs' September 30, 2015 notice purporting to terminate the lease made no mention of the lessor's obligation to pay the tenant's relocation costs, limited to an aggregate of \$100,000.00, pursuant to the terms of paragraph 34(b) of the lease.

Plaintiffs have also failed to demonstrate the existence of irreparable harm in the absence of granting a mandatory injunction. The within motion was e-filed on April 13, 2016, after plaintiffs performed and completed the testing on March 19, 2016, pursuant to the terms of the temporary restraining order. Plaintiffs' claim that it is necessary to "commence contamination and air quality testing by March 28, 2016," so that they can meet their April 15, 2016 reporting deadline, is now moot. It is further noted that at the time the within motion was submitted to the court, the NYSDEC had yet to review and approve a report that may have been submitted to said agency by the plaintiffs. This Court will not engage in speculation as to what remediation will be required by the NYSDEC and when it must be completed.

Finally, plaintiffs allege that absent a mandatory injunction that the NYSDEC may cancel the BCP agreement in the future; that such cancellation may subject plaintiffs to liability for off-site contamination; that its insurance policy will not cover off-site contamination; that its lender could declare it in default; and that its costs of remediation may substantially increase. Plaintiffs' alleged injuries are economic in nature, and plaintiffs in their second cause of action seeks monetary damages. "Where, as here, a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue" (*Matter of Rice*, 105 AD3d 962, 963[2d Dept 2013] quoting *Dana Distribs., Inc. v Crown Imports, LLC*, 48 AD3d 613, 613[2d Dept 2008]; see also *Matter of Armanida Realty Corp. v Town of Oyster Bay*, 126 AD3d 894 [2d Dept 2015]).

In view of the foregoing, plaintiffs' motion to restore their prior motion for injunctive relief is granted, and upon restoration the prior motion for a preliminary injunction is denied.

Dated: June 6, 2016



J.S.C.

FILED
JUN 27 2016
COUNTY CLERK
QUEENS COUNTY