

**Wilson Evans 50th LLC v 936 Second Ave. L.P.**

2019 NY Slip Op 32982(U)

October 10, 2019

Supreme Court, New York County

Docket Number: 156514/2018

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

-----X

INDEX NO. 156514/2018

WILSON EVANS 50TH LLC,  
Plaintiff,

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 007

936 SECOND AVENUE L.P., JONIS REALTY  
MANAGEMENT CORP., JONIS MANAGEMENT  
CORP., CITI-URBAN MANAGEMENT CORP.,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 268-294  
were read on this motion for injunction/amend.

Plaintiff moves pursuant to CPLR 3025(b), for an order granting it leave to amend its  
amended verified complaint, deeming the proposed second amended verified complaint served  
and filed, and pursuant to CPLR 6301, 6311 and 6313, granting it a preliminary injunction  
(i) enjoining defendants from interfering with its management and control of the premises by,  
*inter alia*, withholding documents and information necessary for the management of the land and  
buildings, known as and located at 300 East 50th Street, 302 East 50th Street and 304 East 50th  
Street, a/k/a 934-936 Second Avenue and 938-940 Second Avenue, New York, New York  
(premises), including, but not limited to, insurance policies, loss runs, tenants' lease files,  
correspondence with tenants, security deposits and the books and records (collectively,  
management records), and (ii) directing defendants to deliver the management records to  
plaintiff. Defendants oppose.

### I. PERTINENT BACKGROUND

Defendant 936 Second Avenue LP was the triple net lessee of the premises pursuant to a written triple net lease agreement, dated October 27, 1996, by and between plaintiff's predecessor-in-interest, as landlord, and 936's predecessor-in-interest, as tenant, as subsequently amended and assigned to them (collectively, lease) (NYSCEF 285). Pursuant to article 9 of the lease, 936 is obligated to keep, replace, and maintain in thorough repair and good, safe and substantial order and condition all buildings and improvement on the premises and to use all reasonable precaution to prevent waste, damage or injury. In article 11, it agreed to observe and comply with all laws, etc. affecting the premises and pay all costs, liabilities, losses, damages, fines, penalties, claims and demands, including reasonable counsel fees incurred due to a failure to comply with such requirements. (*Id.*).

On or about July 13, 2018, plaintiff commenced this action against defendants (NYSCEF 2), and on or about January 15, 2019, filed a verified amended complaint, with a single cause of action for breach of contract based on defendants' failure to maintain and repair the premises in violation of the lease, and for attorney fees. (NYSCEF 182).

Plaintiff subsequently sued 936 in the Civil Court and on July 11, 2019, a judge of that court awarded plaintiff a money judgment in the amount of \$1,954,995.88, with interest, and a judgment of possession against defendant. (*Wilson Evans 50th LLC, v 936 Second Ave. L.P., et al.*, L&T Index No. 54727/19) (NYSCEF 275). A judgment of possession and money judgment totaling \$2,398,967.42 against defendant issued on July 12, 2019. (NYSCEF 276).

On July 30, 2019, defendants delivered a set of keys to the premises to plaintiff's counsel's office, and on July 31, 2019, counsel sent defendants' counsel a letter requesting the immediate turn over all the tenant files, including renewal leases, annual registrations, rent rolls,

ledgers, Con Edison account numbers, insurance information, and service contract information. (NYSCEF 277). On August 1, 2019, defendants' counsel emailed plaintiff's counsel advising that defendants were preparing the items. A warrant of eviction issued on August 15, 2019. (NYSCEF 291).

On August 27, 2019, after receiving notice of plaintiff's intent to seek a temporary restraining order against his clients, defendants' counsel sought from plaintiff's counsel a form for transferring security deposits to plaintiff's bank. The completed form was dated August 12, 2019. While the form lists the tenants for whom security deposits are held, it does not reflect the amounts. (NYSCEF 288). Another justice of this court signed plaintiff's order to show cause, temporarily restraining defendants from interfering with the management and protection of the premises from potential claims and requiring defendants, by August 30, to deliver to plaintiff all insurance documents reflecting coverage for the last two years including umbrella, general liability, and workers compensation policies, and associated loss run reports. (NYSCEF 283). By email dated August 30, defendants' counsel sent plaintiff's counsel the required insurance information. (NYSCEF 287).

By email dated September 14, 2019, defendants' counsel sent plaintiff's counsel financial statements showing income and expenses for 2013 through August 2019, DHCR filings from 2015 to 2017, invoices for repairs and improvements from June 2015 to 2018, and amendments/assignment of leases for 50th Street Laundry & Cleaner, Inc. He also advised that the tenant of apartment 3B had moved out and that the apartment is occupied by holdover tenants who have no lease. With that production, counsel stated that his clients had "fully satisfied their obligations with respect to such production." (NYSCEF 289).

## II. CONTENTIONS

### A. Plaintiff (NYSCEF 282)

In moving to amend the complaint, plaintiff seeks to add a cause of action for a permanent injunction, along with certain facts which it claims defendants know or should know. (NYSCEF 274). Given its need for the documentation in running the building, plaintiff argues that there is no adequate remedy at law, thereby necessitating injunctive relief.

Plaintiff complains of defendants' refusal to provide it with management records, such as executory leases for the premises, without which it cannot determine the duration of the tenancies, the rent due or whether any tenancy has expired. Moreover, as the premises is subject to rent stabilization, plaintiff needs the rental histories to verify the legal rents for the apartments and to determine whether the deregulated apartments were properly deregulated, which is critical in light of the new Housing Stability and Tenant Protection Act. It claims that defendants are also withholding the rent roll which is needed to determine how much the tenants are obligated to pay in rent, whether there are any rent abatements, and who is or is not paying rent. Documents reflecting the security deposits and the accounts in which they are held are also being withheld. Without that information, plaintiff is unable to determine how much money is being held for each unit and how much, if any, has been applied to the tenants' rent. In addition, defendants have not provided plaintiff with information or documentation regarding tenant arrears. Plaintiff does not know how much rent, if any, tenants may owe.

Plaintiff also requires copies of correspondence between defendants and the tenants to determine whether and who has complained of needed repairs or other maintenance issues in their apartments. Utilities records are also required, including what companies service the premises, the account numbers, payment status and/or the terms of any services contracts.

Relying on articles 9 and 11 of the lease, plaintiff argues that defendants' refusal to provide such records constitutes a breach of the lease and a substantial interference with plaintiff's ability to manage the premises. Moreover, should its complaint be amended as requested, plaintiff claims that it is likely to succeed on the merits of its cause of action for a permanent injunction enjoining defendants from interfering with its management of the premises by withholding the records and preventing it from managing the premises. Notwithstanding their relinquishment of control of the building, defendants cause plaintiff irreparable harm by obstructing plaintiff from properly fulfilling its duties. Plaintiff recites a lengthy history of defendants' malfeasance, as they have failed to maintain the premises, incurred numerous violations, failed to pay rent and property taxes to plaintiff, and engaged in dilatory litigation tactics.

Plaintiff also maintains that absent any prejudice to defendants in turning over the required documentation or any indication that they need the documents, the balance of equities is in its favor.

#### B. Defendants (NYSCEF 290)

Defendants observe that rather than maintaining the status quo, plaintiff demands the imposition of "an affirmative obligation on 936 to take steps to assist [it] in operating its business where [they] otherwise [have] no legal obligation to do so" by requiring them to assemble and deliver records relating to the premises, the possession of which 936 had surrendered more than five weeks ago. Claiming that the lease was "annulled" and the landlord-tenant relationship terminated when plaintiff was awarded the possessory judgment and a warrant of eviction, defendants argue that the cause of action for breach of contract based on the lease is not actionable.

Plaintiffs additionally maintain that nothing in the lease obliges them to provide plaintiff with books, records or other information, nor does article 9 or 11 apply outside the term of the lease or provide that they survive the cancellation of the lease.

According to defendants, the harm alluded to by plaintiff is fatally speculative or remote, and the sole documentation it references in relation thereto concerns information that has been provided. Moreover, they argue that plaintiff does not demonstrate that their failure to provide it with documentation would cause irreparable harm and that any liabilities incurred as a result of the failure to turn over documents can be remedied with money damages.

Defendants also argue that in order for plaintiff to obtain the rent rolls, pursuant to article 42(a) of the lease, it must, on 20 days' notice, serve a written request on them by registered or certified mail, return receipt requested. Absent proof of such service, a condition precedent has not been satisfied, even if the lease remained in effect after July 2019. Thus, plaintiff does not demonstrate a probability of success on the merits. In any event, defendants assert that in connection with a use and occupancy hearing held in September 2018, it provided plaintiff with all of the requested documents including annual income and expense statements, DHCR filings, and invoices for repairs and improvements to the premises.

#### C. Plaintiff's reply (NYSCEF 293)

Plaintiff argues that as it demanded the management records before the warrant issued, the lease governed and, having acknowledged receipt of its request for the records and stated that they would be provided within a week, absent any complaint concerning the notice, defendants assertedly waived any failure to comply with the notice provision of the lease. It clarifies that it relies on articles 9 and 11 of the lease solely in support of its claim for breach of contract regarding defendants' failure to maintain the premises which, it observes, was interposed long

before the issuance of the warrant of eviction, and pursuant to Real Property Actions and Proceedings Law § 749(3), it is the issuance of a warrant of eviction that cancels the lease. As the warrant issued August 15, 2019, its July 31 request for the records was timely. The motion for injunctive relief, on the other hand, relates to its request for the management records, and plaintiff contends that defendants offer no authority for their proposition that the refusal to turn over the records is compensable by money damages.

That defendants transferred “some security deposits to [it]” does not excuse their refusal to provide other records.

Plaintiff observes that in their opposition, defendants do not address the motion for leave to amend the amended complaint.

#### D. Oral argument (NYSCEF 294)

On September 18, 2019, oral argument was held on this motion. Plaintiff claimed that it was still owed past leases, lease renewals, and any correspondence relating to repair requests, DHCR filings, documentation relating to violations or complaints of repairs, and all historical data and current leases. It acknowledged receipt of the security deposits and insurance information. Moreover, since September 2018, it alleged, “there have been numerous other leases that were entered into that we do not have copies of.”

Defense counsel set forth the documentation that was emailed to plaintiff on September 14, 2019, claiming that it had all been turned over in September 2018. In response, plaintiff’s counsel reiterated the need for the historical data for all of the residential tenancies, absent which the bases for deregulation of certain apartments and rent increases for rent-stabilized apartment remain unknown. He expressed his view that defendants withheld the records for the sake of being difficult, and defense counsel expressed his view that absent a legal requirement to turn

over the records, defendants need not do so.

### III. ANALYSIS

#### A. Preliminary injunction

Pursuant to CPLR 6301, the court may grant a preliminary injunction “where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights.” Preliminary injunctions are drastic remedies, substantially limiting the nonmovant’s rights, and are awarded in special circumstances. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]). To be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and that the equities weigh in its favor. (CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

To establish a likelihood of success on the merits, the movant need not present conclusive evidence, but must demonstrate, *prima facie*, a reasonable probability of success. (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]). When key facts are in dispute, a preliminary injunction is not warranted. (*Scotto v Mei*, 219 AD2d 181, 184 [1st Dept 1996]). Here, as plaintiff demonstrates that defendants waived their right to notice as required in the lease, it shows the likelihood of its success on the merits of its request for the records, which was communicated to defendants before the termination of the lease.

Irreparable injury is not established where monetary damages are an adequate remedy. (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434–435 [1st Dept 2019]). Here, plaintiff demonstrates without dispute that defendants’ refusal to turn over all management records will interfere with the proper management of the premises, and it is also not disputed that their refusal to turn over records constitutes interference with the proper management of the premises. (*See*

*Rakoski v Sidney Rubell Co., LLC*, 155 AD3d 564 [1st Dept 2017] [court enjoined managing agent's management of properties and directed it to turn over all books, records, and accounts for properties]; *Central Park Sightseeing LLC v New Yorkers for Clean, Livable & Safe Streets, Inc.*, 157 AD3d 28 [1st Dept 2017] [irreparable harm shown by defendants' interference with plaintiff's right to carry on business without obstruction]; *David Harp Rest. Mgt. v Cromwell*, 183 AD2d 423 [1st Dept 1992] [acts that interfere with carrying on business constitute irreparable injury]; *Olympia House, Inc. v Eighanayan*, 111 AD2d 674 [1st Dept 1985] [trial court granted preliminary injunction against defendant's management of property and directed it to turn over books and records to plaintiffs' attorney]). It is difficult to imagine, nor do defendants explain, how money damages would remedy their refusal.

It cannot be disputed that plaintiff needs these records to manage and maintain the premises properly and as defendants no longer manage the premises or occupy it, they have no need for the records. As defendants articulate no reason other than an erroneously asserted absence of a legal obligation to provide the records to plaintiff, the balance of the equities clearly weighs in plaintiff's favor.

#### B. Amendment

Plaintiff argues that due to defendants' conduct in withholding the management records, it is entitled to amend its complaint to add a claim for a permanent injunction prohibiting defendants' interference with plaintiff's management of the premises. Defendants submit no opposition thereto.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for a preliminary injunction is granted, and plaintiff is

directed to submit a proposed order for the injunction which sets forth which records and information remain outstanding; and it is further

ORDERED, that plaintiff's motion for leave to amend is granted, and the second amended verified complaint is deemed served and filed upon service of a copy of this order with notice of entry upon defendants.

20191010155024BAFFFE43B18911AA95A46479A8BCBE6F25E9FD4

10/10/2019  
DATE

  
\_\_\_\_\_  
BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE