

556 Driggs Ave. LLC v Rex Juno Inc.

2020 NY Slip Op 30685(U)

March 2, 2020

Supreme Court, Kings County

Docket Number: 516688/19

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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556 DRIGGS AVENUE LLC,

Petitioner, Decision and order

- against -

Index No. 516688/19

REX JUNO INC.,

Respondent,

MS # 182

March 2, 2020

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved seeking to enjoin the defendant from utilizing a portion of the restaurant for failing to abide a stipulation with the Department of Buildings concerning the certificate of occupancy. The respondent opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The petitioner is the owner of premises located at 566 Driggs Avenue in Kings County. The respondent is the tenant pursuant to a renewal lease entered into on January 1, 2016. The tenant operates a restaurant at the location. On June 11, 2019 the petitioner received a summons from the New York City Department of Buildings informing them the occupancy of the premises was contrary to the occupancy authorized in the certificate of occupancy. A decision was rendered wherein it was determined that "the respondent [petitioner herein] must also fix the problem shown on the summons" (see, Decision, dated July 24, 2019). The petitioner now seeks to enjoin the respondent from utilizing the restaurant

until the respondent satisfies the requirements demanded to amend the certificate of occupancy. The petitioner seeks a preliminary injunction and the respondent has opposed that request.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009], Ricca v. Ouzounian, 51 AD3d 997, 859 NYS2d 238 [2d Dept., 2008]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994], Schneider Leasing Plus, Inc. v. Stallone, 172 AD2d 739, 569 NYS2d 836 [2d Dept., 1991], Fischer v. Deitsch, 168 AD2d 599, 569 NYS2d [2d Dept., 1990]). Thus, the Second Department

has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010], Berkoski v. Board of Trustees of the Incorporated Village of Southampton, 67 AD3d 840, 889 NYS2d 623 [2d Dept., 2009], Ginsburg v. Ock-A-Bock Community Assn., Inc., 34 AD3d 637, 825 NYS2d 119 [2d Dept., 2006]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is the fact the respondent occupies the premises in violation of a certificate of occupancy. Of course, the respondent denies these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International


Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]).

The basis for the injunction is the fact the certificate of occupancy must be "fixed" (supra). However, the Department of Buildings placed that obligation squarely upon the petitioner, the owner of the premises. The petitioner has not provided any facts supporting the contention the respondent must shoulder that burden and has surely not presented evidence that the only way the certificate of occupancy can be fixed is by closing the restaurant. Indeed, the respondent has argued that a mere change or amendment to the certificate of occupancy is sufficient to satisfy the Department of Buildings. The court cannot evaluate that claim, however, it surely raises questions whether the restaurant must be closed and, as noted, whether the respondent must bear the burden of seeking any changes. Thus, the petitioner has not presented a likelihood of success on the merits. Consequently, the motion seeking an injunction is denied.

So ordered.

ENTER:

DATED: March 2, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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KINGS COUNTY CLERK
FILED

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