Brooklyn Tabernacle v Thor 180 Livingston LLC
2020 NY Slip Op 31511(U)
May 20, 2020
Supreme Court, Kings County
Docket Number: 518739/2019
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 20th day of May 2020.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

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THE BROOKLYN TABERNACLE,

Plaintiff,

- against -

THOR 180 LIVINGSTON LLC, THOR MANAGEMENT CO. LLC, 180 BKLYN LIVINGSTON LLC, d/b/a DALLAS BBQ, THE 180 LIVINGSTON STREET CONDOMINIUM, THE BOARD OF MANAGERS OF THE 180 LIVINGSTON STREET CONDOMINIUM,

Defendants.

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Mot. Seq. No. 1-3

DECISION/ORDER

Index No: 518739/2019

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Order to Show Cause/Cross Motion/Order to Show Cause and Affidavits (Affirmations)/ Memo of Law Annexed	1-6, 7-11, 12-21
Opposing Affidavits (Affirmations)/Memos of Law Annexed	8-11, 22, 23, 24-29
Reply Affidavits (Affirmations)/Memo of Law Annexed	30-34, 35, 36-39

Upon the foregoing papers, plaintiff, The Brooklyn Tabernacle moves, in motion sequence 1, for a mandatory preliminary injunction, pursuant to CPLR § 6301 (i) enjoining defendants from interfering with the enjoyment, use and occupancy of the unit designated in the Declaration of Condominium as the Lower Unit ("Church Unit"); (ii) requiring defendants to temporarily shut down a restaurant operated by defendant, 180 Bklyn Livingston LLC, d/b/a Dallas BBQ ("Dallas BBQ") located in the Condominium unit designated as Upper Unit 4 ("Thor Unit") and owned by defendant, Thor 180 Livingston LLC ("Thor"), to permit permanent repairs to be performed; and (iii) mandating the defendants to immediately abate conditions in the Thor Unit causing persistent leaks, and perform repairs, pursuant to a scope of work and protocol set forth in the accompanying affidavit of Jon

Colatrella, sworn to October 25, 2019 ("Colatrella Affidavit") and the protocol and scope of work set forth in Documentary Supplement as Exhibit DD.

Defendant 180 Bklyn Livingston LLC, d/b/a Dallas BBQ cross moves, in motion sequence 2, for an order, pursuant to CPLR Article 31 and CPLR 3120, directing that defendant Dallas BBQ be given access to plaintiff's premises at issue in this litigation, to perform an investigation of the leaks, and to conduct dye tests.

Defendant Dallas BBQ moves, in motion sequence 3, for a preliminary injunction (i) directing that plaintiff immediately restore water to the premises, (ii) directing that the restaurant shall have access to the mechanical room which is where the water apparatus is located, as per the terms and conditions of the Access Agreement, and (iii) directing that plaintiff and their employees/agents shall be enjoined and restrained from taking any actions or measures to disrupt, interfere with, discontinue or otherwise turn off any and all utility services to the premises.

Background/Procedural History

On August 23, 2019, Plaintiff commenced this action against defendants, including Thor, the owner of the condominium unit designated as Upper Unit 4, and Dallas BBQ, Thor's tenant (Complaint, NYSCEF No. 21). In its amended complaint, the church, owner of the lower unit of the condominium, is seeking "monetary damages for nuisance, waste and negligence and an order granting plaintiff a declaratory judgment and injunctive relief" (Amended Complaint ¶ 1, annexed as exhibit A to plaintiff's motion papers). Plaintiff alleges that leaks from Dallas BBQ became a problem while construction was being performed on the Church Unit, and that the leaks became worse in April 2018 when "liquid poured into the Church Unit from Dallas BBQ that consisted of putrid water, sludge and rotting food debris" (*Id.* at ¶¶ 35, 37). The leaks have continued to occur since that time. Plaintiff turned off the water to the restaurant on March 28, 2020, which precipitated the filing of defendant's emergency order to show cause (Meisel Emergency Affirmation, NYSCEF No. 92, ¶ 4). In an order

by Judge Donald S. Kurtz, dated April 3, 2020, defendant Dallas BBQ's motion for a temporary restraining order requiring the church to restore water to the premises, and preventing the church from disrupting the water service, was granted (NYSCEF No. 100). In an order dated April 8, 2020, Judge Carl J. Landicino, adjourned the hearing of motion sequence 3 to April 17, 2020, to allow the parties an opportunity to inspect the premises, and perform dye tests (NYSCEF No. 126). Since Judge Landicino's order was issued, this court has held virtual conferences with the parties on four occasions: April 17, April 22, April 29, and May 13. The conferences in April were adjourned without a decision, to allow Dallas BBQ to perform further tests to prove that the leaks were not coming from the restaurant.

Dallas BBQ's expert, J.A. Frezza & Associates, LLC, performed water testing at the premises on April 13 to April 15, 2020, and April 27, 2020. The phase 1 testing, conducted from April 13 to April 15, confirmed leaks coming from the bar and dishwashing areas (Frezza Report, NYSCEF No. 127 at 5, 9). No conclusions could be reached from the test of the crawl space on April 27, 2020 (Frezza Report, NYSCEF No. 128 at 2). The court adjourned the conference on April 29, 2020 without a decision to allow Dallas BBQ to perform water testing on the sidewalk (April 29 Conference tr. 63, lines 5-7; at 64, lines 19-24). However, Dallas BBQ later declined to perform a sidewalk test (NYSCEF No. 134). On May 8, 2020, water leaks were reported by the Church to building management, and FDNY shut the water off (Roschelle Affirmation, NYSCEF No. 148, ¶ 37; May 13 Conference tr. 2, lines 16-24). Dallas BBQ ceased operations after the water was turned off on May 8, 2020 (*Id.* at 27, lines 14-15).

Parties' Contentions

In support of its motion for a mandatory preliminary injunction, plaintiff contends that it has established that it is likely to succeed on the merits, it will suffer irreparable harm absent the granting of the injunction, and the balance of the equities is in its favor (Roschelle Memo of Law, NYSCEF No.

18 at 6). Plaintiff indicates that it is likely to succeed on its breach of contract claim, because Thor is responsible, under the Declaration of Condominium, for performing repairs to the restaurant to prevent damage to other units (*Id.* at 8). Plaintiff also contends that it is likely to succeed on the merits of its nuisance claim, because the church repeatedly informed the defendants of the leaks, the leaks are traceable to Dallas BBQ, whose repairs were insufficient, and Thor failed to perform the repairs recommended by its experts (*Id.* at 14). Plaintiff maintains that it has suffered irreparable harm, because it is unable to use its property, "uniquely developed" for its needs (*Id.* at 15). Plaintiff concludes that the balance of equities tips in its favor, because the defendants have no right to permit leakage of water and other substances into their premises, and the "continuing injury" to the church outweighs the harm that the defendants will experience if the injunction is granted (*Id.* at 17-18).

Thor, in opposition to plaintiff's motion, contends that plaintiff is not entitled to a mandatory preliminary injunction, because the injunction would "actually grant the ultimate relief" (Matalon Memo of Law, NYSCEF No. 62 at 4). Thor also claims that plaintiff has not established a likelihood of success on the merits, irreparable harm, and that the balance of equities tips in its favor (*Id.* at 5-7). Thor states that if the court grants plaintiff's motion, the church should be required to post an undertaking of $2,500,000 (*Id.* at 8). Dallas BBQ, in opposition to plaintiff's motion, and in support of its cross motion (motion sequence 2), maintains that Dallas BBQ has taken steps to repair the premises, and that a preliminary injunction should not be granted until it has an opportunity to perform water testing at the premises (Wetanson Aff., NYSCEF No. 64, ¶¶ 10, 15). Dallas BBQ suggests that an undertaking of $1,000,000 would be sufficient if the court grants plaintiff's motion (Miller Memo of Law, NYSCEF No. 72 at 9).

In reply, plaintiff maintains that Thor is required to maintain its unit and perform repairs, and that Dallas BBQ's repairs have not stopped the leaks (Cymbala Aff, NYSCEF No. 75, ¶¶ 13, 15). Plaintiff claims that it has established all three prerequisites for the court to grant a mandatory

preliminary injunction, and Thor must post an undertaking since the injunction will only require Thor and Dallas BBQ "to perform work required to be done under the Condominium's governing documents and law" (Roschelle Reply Memo of Law, NYSCEF No. 84 at 1, 6). Plaintiff also opposes Dallas BBQ's cross motion, stating that further dye tests may damage the Church Unit (*Id.* at 7).

In support of its motion for a preliminary injunction (motion sequence 3), defendant Dallas BBQ contends that it does not need to establish a likelihood of success on the merits, because the absence of a preliminary injunction would render the final judgment ineffectual (Meisel Affirmation, NYSCEF No. 93, ¶¶ 34-36). Defendant maintains that it will suffer a loss of business opportunities and the loss of its leasehold interest, constituting irreparable harm, if a preliminary injunction is not granted (*Id.* at ¶¶ 41-42). Defendant states that the balance of equities is in its favor, because the church allegedly violated New York Penal Laws by shutting off the water (*Id.* at ¶¶ 53-56). In opposition, plaintiff affirms that defendant is not entitled to a preliminary injunction, because it can be compensated with money damages, and defendant has not established a likelihood of success on the merits (Roschelle Emergency Affirmation, NYSCEF No. 104, ¶¶ 20, 22). In reply, defendant restates its points, and maintains that it is not required to establish a likelihood of success on the merits (Meisel Affirmation in Reply, NYSCEF No. 117, ¶ 47).

Law

Requirements for Obtaining a Preliminary Injunction

CPLR § 6301 mandates that a preliminary injunction "may be granted in any action 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 respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (CPLR § 6301).

"To prevail on a motion for a preliminary injunction, the moving party must establish: (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the moving party's position" (*Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 569 [2d. Dept. 2005]). "[P]rior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction" (CPLR § 6312(b)).

Likelihood of Success on the Merits

"To establish a likelihood of success on the merits, '[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits'" (*Barbes Restaurant Inc. v. ASSR Suzer 218, LLC*, 140 A.D.3d 430, 431 [1st. Dept. 2016] (quoting *Weissman v. Kubasek*, 112 A.D.2d 1086, 1086 [2d. Dept. 1985])). "A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive" (*Barbes*, 140 A.D.3d at 431).

Irreparable Injury

Irreparable injury constitutes "a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue" pending a trial on the cause of action (*Chrysler Corp. v. Fedders Corp.*, 63 A.D.2d 567, 569 [1st Dept. 1978]). "[I]rreparable injury, for the purposes of equity, has been held to mean any injury for which money damages are insufficient" (*DiFabio v. Omnipoint Communications Inc.*, 66 A.D.3d 635, 636-37 [2d. Dept. 2009]).

Balancing of the Equities

To balance the equities, a court must weigh the benefit to the movant of granting the preliminary injunction against the harm to the opposing party (*Reuschenberg*, 16 A.D.3d at 570). A

court "must [also] consider the 'enormous public interests involved'" (*Seitzman v. Hudson Riv. Assoc.*, 126 A.D.2d 211, 214 [1st Dept. 1987], *quoting Barney v. City of New York*, 83 A.D. 237, 241 [1st Dept. 1903]) (granting preliminary injunction preventing defendant from terminating contract to sell apartment to plaintiffs, which plaintiffs intended to use as a medical office to treat patients).

Mandatory Preliminary Injunction

"[A] mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought in the final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action" (*Second on Second Café, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 265 [1st Dept. 2009]). Mandatory preliminary injunctions have been granted in cases involving the risk of extensive property damage, and in cases where property has remained vacant due to incomplete renovations (*See PLWJ Inc. v. Omnipoint Communications*, Inc., 2011 WL 13272731, at *1, *8 [Sup Ct, New York County 2011] (granting PLWJ's motion for a mandatory preliminary injunction requiring T-Mobile to remove its cellular equipment from the rooftop of the building owned by PLWJ in order to comply with New York City laws and prevent further structural damage to the building); *see also Borini v. Sixty Sutton Corp.*, 2019 WL 3973879, at *2 [Sup Ct, New York County 2019] (granting plaintiffs' motion for a mandatory preliminary injunction enjoining defendant from interfering with plaintiffs' renovation of their cooperative apartment which had remained "vacant and unused" on the grounds that the court found the "impasse" between the two parties to "constitute an extraordinary circumstance")). The Appellate Division has affirmed orders granting mandatory preliminary injunctions requiring defendants to perform repairs (*see Shapiro v. 350 East 78th Street Tenants Corp.*, 85 A.D.3d 601, 602 [1st Dept. 2011] (affirming order requiring defendant to perform repairs to "restore plaintiff's use of the roof appurtenant to her apartment"); *McMahon v. Cobblestone Lofts Condominium*, 161 A.D.3d 536, 537 [1st Dept. 2018] (affirming order which granted plaintiff's motion for a preliminary injunction

requiring condominium "to make all necessary repairs to prevent further infiltration of water in plaintiffs' unit")).

Amount of the Undertaking

The court has absolute discretion in determining the amount of an undertaking (*see Lelekakis v. Kamamis*, 303 A.D.2d 380, 380 [2d. Dept. 2003]). "However, the amount of the undertaking must be rationally related to the amount of the defendant's potential [damages] if the preliminary injunction later proves to be unwarranted" (*Id.*). "The amount of the undertaking must not be excessive, and the court must not consider defendants' speculative or conclusory claims of potential financial losses" (*Peyton v. PWV Acquisition LLC*, 35 Misc.3d 1207(A), at *4 [Sup Ct, NY County 2012], *citing Ujueta v. Euro-Quest Corp.*, 29 A.D.3d 895, 896 [2d. Dept. 2006]). "It is improper to require, as a condition of a preliminary injunction, an undertaking in an amount which would result in a denial of the relief to which the plaintiffs show themselves to be entitled" (*Peyton*, 35 Misc.3d 1207(A) at *5).

Breach of Contract

The violation of a condominium's bylaws is "akin to a breach of contract" (P*omerance v. McGrath*, 124 A.D.3d 481, 482 [1st Dept. 2015]).

Nuisance

"The elements of a common-law claim for private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act" (*Berenger v. 261 W. LLC*, 93 A.D.3d 175, 182 [1st Dept. 2012]).

Analysis

Motion Sequence 1

Plaintiff is entitled to a preliminary injunction pursuant to CPLR § 6301, because defendants' actions have resulted in a continuing injury to the plaintiff's property, which will render the property

unusable "during the pendency of the action" (CPLR § 6301). Since 2018, plaintiff has sustained extensive property damage due to the "mold, water and sewage contamination" entering the church's premises, resulting in "significant financial damage," including "hundreds of thousands of dollars in repairs and clean-up costs" (Cymbala Aff., NYSCEF No. 16, ¶ 3). The continuing leaks have also delayed construction to the church's unit, and the damage has prevented the church from using its property "to accommodate overflow from the [church's] main campus and provide programs for community children" (*Id.* at ¶¶ 3, 6). Therefore, injunctive relief is appropriate in this case, because "the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." (CPLR § 6301).

Plaintiff is entitled to a preliminary injunction preventing the defendants from interfering with its use and enjoyment of its property, and ordering repairs, because plaintiff has established a likelihood of success on the merits, irreparable injury in the absence of injunctive relief, and that the balance of the equities is in its favor. In its amended complaint, plaintiff is seeking an injunction ordering the defendants to perform repairs to the premises, alleging that "Thor, Thor Management and the Condominium Board" failed "to properly maintain the plumbing pipes servicing the Thor Unit," thereby breaching the "Declaration and By-Laws of the Condominium" (Amended Complaint ¶ 150). In support of their breach of contract claim, plaintiff cites numerous articles of the Declaration and By-Laws, including Article 6 of the Declaration and Article 6.9 of the Condominium By-Laws. Article 6 of the Declaration indicates that "each Unit Owner shall be responsible for" "all plumbing, gas, and heating fixtures and equipment and other appliances as may be affixed, attached or appurtenant to such Unit and serving such Unit exclusively" (*Id.* at ¶ 59). Article 6.9 states "[e]ach unit shall be kept in good order and repair," and that "[e]ach Unit Owner shall promptly make or perform, or cause to be made or performed, all maintenance work, repairs and replacements necessary in connection with the

foregoing maintenance obligations" (*Id.* at ¶ 61). Article 6.9 also imposes an "affirmative duty" on Thor to "[m]aintain its respective [u]nit in such a manner so as to prevent and avoid causing damage to or impairing the use of the other [u]nit, Common Elements or the Building" (*Id.*) The water testing performed by the parties' experts confirms that the leaks are most likely coming from the restaurant, who is Thor's tenant (SGH Report, NYSCEF No. 36 at 8; Frezza Report, NYSCEF No. 127 at 5, 9). Since the Condominium's By-Laws constitute a contract (*Pomerance*, 124 A.D.3d at 482), plaintiff has established a likelihood of success on its breach of contract claims, since the By-Laws confirm that Thor is responsible for maintaining the Dallas BBQ premises to "avoid causing damage" to the Church Unit. Since plaintiff has established a likelihood of success on the merits with respect to its breach of contract claim, it is unnecessary to evaluate the merits of its nuisance claim.

Plaintiff has also established that it will suffer an irreparable injury absent the granting of a preliminary injunction. Plaintiff's property is currently contaminated with sewage and leaking water, and cannot be used for the church's purposes. The affidavit of Pastor Cymbala indicates that this piece of property is uniquely amenable to the church's needs since it is across the street from the Church's main campus, and "the ceiling heights in most of the rooms in the Church Unit vary from 16 to 19 feet, which will accommodate [plaintiff's] need for performance spaces" (Cymbala Aff., NYSCEF No. 16, ¶ 8). Money damages are insufficient to compensate the church, because the property is unique (*New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.*, 2002 WL 35311779, at *5 [Sup Ct, Kings County 2002]) (granting preliminary injunction enjoining defendants from altering or transferring the property on the grounds that plaintiff has established an irreparable injury because "real property is unique").

Finally, plaintiff has established that the balance of the equities is in its favor. When considering the balance of the equities, a court must weigh the benefit to the plaintiff of granting a preliminary injunction against the harm to the defendants (*See Reuschenberg*, 16 A.D.3d at 570). A

court should also consider the public interests involved (*see Seitzman*, 126 A.D.2d at 214). If the court orders repairs to stop the leaks, the church will potentially be able to resume construction and eventually open up the Church Unit to its members. Thor and/or Dallas BBQ will have to pay for the repairs, and Dallas BBQ may have to shut down its restaurant temporarily. Although Dallas BBQ claims that a mandatory preliminary injunction would result in a "closure of the restaurant for months and the resulting loss of employment for more than 100 employees" (Wetanson Aff., NYSCEF No. 64, ¶ 5), defendant has already ceased operating its restaurant due to the water being turned off by FDNY, indicating that any further harm to the restaurant resulting from the preliminary injunction would be minimal. Given the fact that the restaurant has been given ample opportunity to demonstrate that they are not the source of the leaks, the balance of the equities is in the plaintiff's favor. The sooner the repairs are performed, the sooner the water may be turned back on.

Granting a mandatory preliminary injunction is appropriate in this case, because the property is unusable, has remained vacant for years, and the parties have been unable to resolve their conflict (*See Borini*, 2019 WL 3973879, at *2). The fact that the water leaks have continued despite Dallas BBQ's attempts to repair its premises indicates that a mandatory preliminary injunction is necessary to "maintain the status quo" (*Second on Second Café*, 66 A.D.3d at 265). Water leaks could further damage the church if/when FDNY restores water to the restaurant. Therefore, ordering repairs is necessary to prevent further damage to the church. Accordingly, plaintiff's motion for a mandatory preliminary injunction is granted to the extent that defendants are enjoined from interfering with the enjoyment, use and occupancy of the Lower Unit of the condominium. Defendants are ordered to perform repairs pursuant to a scope of work from the affidavits of Stephanie Nussbaum and Christopher Sheridan, employees of Thornton Tomasetti, an engineering firm, and exhibit A accompanying their affidavits (NYSCEF Nos. 58, 60, 61) (*see* April 29 Conference tr. 20, lines 1-5 in which Andrea Roschelle, plaintiff's attorney, concedes to the scope of work in Thor's expert reports).

An undertaking of $1,000,000 will adequately compensate the defendants if the preliminary injunction later proves to be unwarranted. Defendant Thor, in opposition to plaintiff's motion, states that plaintiff should be required to post an undertaking of $2,500,000 "given the expense of the project, the time Dallas BBQ's restaurant would have to be shut down while the work is performed, and Dallas BBQ's resistance to the performance of the work" (Matalon Memo of Law, NYSCEF No. 62 at 8). Defendant Dallas BBQ contends that an undertaking of $1,000,000 is necessary to compensate defendant "given the loss of business and employment that would result" (Miller Memo of Law, NYSCEF No. 72 at 9). Some of these damages are speculative, since neither Dallas BBQ nor Thor has submitted specific amounts estimating the loss of business/employment that would result. In addition, Dallas BBQ has ceased operations due to the water to its premises being turned off by FDNY on May 8, and prior to this, Dallas BBQ had allegedly lost 60% of its business due to the pandemic (April 29 Conference tr. 41, lines 11-13). Therefore, an undertaking of $2,500,000 seems excessive in light of the fact that the pandemic is causing Dallas BBQ to suffer lost revenue. The church is a not-for profit organization who should not be denied the relief it is entitled to due to its inability to pay (*See Peyton*, 35 Misc.3d 1207(A) at *5; Amended Complaint ¶ 3). Thor has submitted an affidavit from its Director of Asset Management stating that the work proposed by Thornton Tomasetti, will cost approximately $600,000 (Lavinsky Aff., NYSCEF No. 57, ¶ 2). In light of this figure, an undertaking of $1,000,000 should cover the cost of the work, and any additional damages sustained by the parties should it later be determined that the preliminary injunction was granted erroneously. Plaintiff is to post an undertaking of $1,000,000 within 30 days of the date of this order.

Motion Sequence 2:

Defendant Dallas BBQ's cross motion for access to the plaintiff's premises to perform an investigation of the leaks has been granted to the extent that the court allowed defendant to perform dye tests at the plaintiff's premises.

Motion Sequence 3:

Defendant Dallas BBQ's motion for a preliminary injunction is denied, because defendant has failed to establish all three prerequisites to the granting of a preliminary injunction, including a likelihood of success on the merits, irreparable injury, and that the balance of the equities is in its favor. As written above, the balance of the equities does not favor defendant Dallas BBQ, because their repairs have failed to alleviate the leaks, they have failed to demonstrate that the leaks are not coming from their restaurant, and the church continues to sustain property damage from the leaks. The restaurant's water was turned off by FDNY, and the court declines to disturb FDNY's decision to turn off the water. All other relief is denied.

This constitutes the decision and order of the Court.

E N T E R:

Hon. Pamela L. Fisher
J.S.C.