

**Strulovitch Family, LLC v F.I. Assoc.**

2020 NY Slip Op 31624(U)

May 22, 2020

Supreme Court, Kings County

Docket Number: 504658/2019

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 22 day of May, 2020

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

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THE STRULOVITCH FAMILY, LLC,  
Plaintiff,  
- against -  
F.I. ASSOCIATES,  
Defendant.  
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Index No.: 504658/2019  
  
Motion Seq. #1 and 2  
  
DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Order to Show Cause, Affidavits, Affirmation and Exhibits	1
Landlord's Reply Affirmation in Support	2
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	3
Affirmation in Opposition to Cross-Motion	4
Reply Affirmation if Further Support of Cross-Motion	5

Upon the foregoing papers the Strulovitch Family, LLC ("Tenant"), moves this Court for an Order (a) pursuant to CPLR § 2201 granting a preliminary and permanent injunction enjoining and restraining F.I. Associates ("Landlord") (together with its agents) from taking or continuing any step(s) toward and/or in furtherance of: (i) removing Tenant from the subject premises located at 1245 61<sup>st</sup>, Brooklyn, NY ("the Premises") in any way based upon Landlord's purported Notice to Cure, dated October 2, 2018 or Notice of Termination dated February 6, 2019; (ii) disturbing in any manner the possession and rights of Tenant in and to the Premises and/or otherwise ousting Tenant from the Premises in any way based on the Notice to Cure or Notice of Termination; (iii) maintaining and continuing *F.I. Associates v. The Strulovitch Family, LLC* (Civil Court, Kings County L&T Index No. 54951/19 (the "Holdover Proceeding") or any other action or proceeding attempting to remove Tenant from the Premises in any way based upon

the Notice to Cure or Notice of Termination; (b) awarding attorneys' fees incurred in connection with this application – whether as a sanction or pursuant to the parties' lease – given the Landlord's frivolous conduct in fabricating a termination of the lease where it had no right to terminate; and (c) granting in Tenant's favor such other and further relief as this Court deems just and proper. Landlord cross-moves for an Order (a) granting Landlord a Judgment for Possession and Warrant in this action, vacating all prior stays in this matter; or in the alternative (b) restraining Tenant from maintaining and operating a forklift in or about the premises; (c) restraining Tenant from further work to the roof of the Premises, authorizing Landlord to remove all structural modifications and enlarged HVAC units installed by Tenant at Tenant's expense; (d) restraining Tenant from erecting and maintaining any tents or other structures or impediments within the common areas of the shopping center; (e) requiring Tenant to reimburse Landlord for all costs relating to the damage caused by Tenant to both the flooring and roof to the premises; and (f) granting Landlord attorney fees and costs relating to both this action and the Holdover Proceeding.

**Background**

This is a commercial landlord /tenant matter originally brought in the New York City Civil Court, Kings County under a L&T Index number. Tenant owns and operates a kosher, wholesale supermarket and was assigned a lease after a pervious tenant went bankrupt. The controversy in question arises from Tenant's use of a forklift in the Premises and damage the forklift allegedly caused. Tenant maintains that previous tenants used similar forklifts in the premises, and the forklifts caused no damage. Moreover, Tenant argues that the Premises is not maintained properly, and the lack of maintenance caused the damage in question. In addition

to the forklift issue are potential arrears owed to Landlord for rent, previously arbitrated common area maintenance (CAM) payments, work Tenant allegedly did to the roof of the Premises without Landlord’s permission, erection of a tent in the common area, and Tenant’s use of common areas to store its merchandise and pallets.

On October 2, 2018, Landlord sent a Notice to Cure to Tenant, alleging that the Tenant’s use of a forklift in the Premises had caused structural damage and, therefore, violated the lease. On February 6, 2019, Landlord served Tenant with a Notice of Termination, citing the use of the forklift as grounds to terminate the lease. On February 6, 2019, Landlord then commenced a Holdover Proceeding in the Civil Court. On March 5, 2019, Tenant moved—by Order to Show Cause—for a preliminary injunction restraining Landlord from maintaining the case in Civil Court (Motion Sequence #1). On March 29, 2019, before Tenant as plaintiff in this action served its Complaint, Landlord filed a cross-motion (Motion Sequence #2) which Tenant opposed. This Decision and Order will address Motion Sequences #1 and 2. Motion Sequence #3 and 4 were decided in an earlier Order of this Court dated September 18, 2019. Motion Sequence #5 was decided in an earlier Order of this Court dated April 30, 2020.

**Discussion**

**Tenant’s Motion for Preliminary Injunction**

Tenant moves for a preliminary and permanent injunction on the basis that the lease does not allow Landlord to terminate the lease for the reason set forth in the Notice of Termination, namely use of a forklift and its ensuing damage to the Premises. Article 29.1 of the lease provides a procedure for Landlord to “reenter the Demised premises and dispossess Tenant and any other occupants thereof” if Tenant defaults in the payment of rent. Article 29.1

of the lease also provides “[i]f such default is other than a default in the payment of Fixed Annual Rent or additional rent... Landlord shall have the right... to seek damages or an injunction.” Article 29.2 of the lease allows Landlord to terminate the lease if (a) Tenant seeks reorganization with its creditors; (b) a receiver, trustee or liquidator of Tenant is appointed; or (c) Tenant is adjudicated bankrupt or insolvent. Furthermore, Article 29.4 of the lease states:

Landlord hereby expressly waives any and all rights granted by or under any present or future laws to reenter the Demised Premises, to dispossess Tenant or any other occupant thereof or remove their effects not previously removed by them, or to terminate this Lease for any reason or in any manner, other than as expressly set forth in this Lease.

Moreover, Tenant contends that the New York City Civil Court lacks the power to grant the injunctive relief that Tenant seeks. *See, Trump VII. Section 3 v. Sinrod, 219 A.D.2d 590 (2d Dep’t 1995)* (holding that Civil Court cannot grant injunctive relief).

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005)*. “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual.” *Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604 (2d Dep’t 2004)*. “The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court.” *Id.*

In the instant case, Tenant has proven the necessary elements to warrant a preliminary injunction. Landlord cites no authority to refute Tenant’s contention that the lease cannot be terminated for this reason. Landlord merely argues that Tenant’s contention that the lease cannot “be terminated for failure to cure non-monetary default is erroneous. Based on

Tenant's argument, the Tenant would be able blow up the building and remain a tenant in good standing under the Lease Agreement." However, the lease expressly waives termination on the bases of non-monetary defaults of the lease. Success on the merits is therefore probable. Additionally, irreparable harm is presumed where a commercial lease is terminated. **A 1 Entertainment LLC v. 27<sup>th</sup> St. Prop. LLC, 60 A.D.3d 516 (1<sup>st</sup> Dep't 2009)**. Landlord has failed to rebut this presumption. Finally, the balancing of equities weighs in favor of granting a preliminary injunction. Tenant is at risk of losing its business if Landlord is allowed to evict Tenant from the Premises, while the risk to Landlord is relatively low. Accordingly, a preliminary injunction is granted prohibiting Landlord from dispossessing Tenant of the Premises, disturbing Tenant's rights under the lease or maintaining the Holdover Proceeding in Civil Court.

#### Tenant's Motion for Attorney's Fees

Tenant does not support its contention that attorney's fees should be awarded in this case, either as a sanction or through a lease provision. Under CPLR § 8303-a, "it is not enough that the action be meritless; it must be brought or continued in bad faith." **McGill v. Parker, 179 A.D.2d 98, 111 (1<sup>st</sup> Dep't 1992)**. In the instant case, Tenant has failed to argue, much less prove, that Landlord brought a Holdover Proceeding in Civil Court in bad faith, nor has tenant pointed to a lease provision entitling it to attorneys fees. Accordingly, the branch of the motion requesting the award of attorney's fees is denied.

#### Landlord's Motion for Judgment of Possession and Warrant

A judgment of possession and warrant is premature in the instant case and further proceedings must be conducted to determine whether such a judgment is warranted. Moreover, as referenced above, the parties have waived eviction on the basis Landlord cites,

namely damage to the property. Accordingly, the branch of Landlord's motion for Judgment of Possession and Warrant is denied.

Landlord's Motion for Restraining Order Regarding Forklift Use

Landlord maintains that Tenant's use of a forklift in the Premises has caused structural damage to the extent that it caused debris to rain down into the below tenant's space and interfere with its business. Tenant maintains that the Premises was designed to support the weight of the forklift and that previous tenants in the space used forklifts with no issue. Accordingly, Tenant argues that the forklift did not cause structural damage and any structural damage to the Premises is caused by Landlord's poor maintenance. Landlord disputes that previous tenants ever used forklifts and asserts that previous tenants used hand-held pallet jacks—lighter weight machines—to move their merchandise.

Irrespective of whether the Premises should be able to support the weight of a full-size forklift, at present it cannot. Landlord has demonstrated that the property can be severely damaged if Tenant continues to use a forklift. Moreover, Landlord contends that such damage can be structural and potentially irreparable. In the interest of maintaining the status quo and preventing any further damage to the Premises, an injunction is granted restraining Tenant from using forklifts anywhere in the Premises for the duration of litigation.

Landlord's Motion for Restraining Order Regarding Roof Work

Landlord maintains that Tenant had work done to the roof of the shopping center, without its consent that damaged the roof and invalidated the warranty for the recent roof repair. Tenant argues that the roof work in question was done with Landlord's consent. Tenant has not demonstrated that any provision of the lease allows it to do work to the roof and

paragraphs 11.2 (c) and 12.1 of the Lease Agreement specifically provide the Landlord is responsible for maintaining and repairing the roof of the Premises. Moreover, paragraph 2.1 of the Lease Agreement specifically outlines the Demised Premises which does not include the roof of the Premises. Accordingly, there is a high probability that the roof work previously done was violative of the lease and Landlord has demonstrated irreparable harm if any further work is done to its roof. An injunction is therefore granted restraining Tenant from further work to the roof of the Premises for the duration of litigation; as there remains a question of fact as to whether work previously done was authorized, this injunction does not extend to authorizing Landlord to remove all structural modifications and enlarged HVAC units at Tenant's expense.

Landlord's Motion for Restraining Order Regarding Tent in Parking Area

Landlord argues that on or about March 27, 2019 Tenant erected a tent in the parking area, a common area shared with other tenants of the building, in violation of the lease. Under paragraph 11.1 of the Lease Agreement, parking areas are explicitly defined as common areas. Tenant concedes that it has previously erected a tent in the parking area but argues that the tent has since been removed so this motion is moot. However, in the interest of protecting the status quo, an injunction is granted restraining Tenant from erecting and maintaining any tents or other structures within the common areas of the Premises for the duration of this litigation. Additionally, an injunction is granted restraining Tenant from storing any of its merchandise or other items in the common areas of the Premises for the duration of this litigation.

Landlord's Motion for Reimbursement of Costs

Landlord moves for an order reimbursing it for all costs relating to the damage caused by Tenant to both the flooring and roof of the Premises. With regard to the alleged damages to

the flooring of the Premises, Tenant maintains it that the Premises should be able to support the use of a forklift and the damage alleged was caused by structural problems with the Premises. With regard to the alleged damage to the roof of the Premises, Tenant maintains it had Landlord's consent to do work on the roof. Accordingly, there is a question of fact as to whether and to what degree damage was done to the flooring and roof and whether it was caused by the operation of a forklift. The branch of Landlord's cross-motion seeking reimbursement of costs relating to alleged damage to the Premises is, therefore, denied.

Landlord's Motion for Attorney's Fees and Costs

Landlord moves for an award of attorney fees and costs relating to both this action and the Holdover Proceeding. Landlord does not provide any basis for entitlement to an award of attorney's fees and costs in this case, either as a sanction or through a lease provision. Accordingly, this branch of Landlord's cross-motion is denied.

Accordingly, it is HEREBY:

ORDERED that Tenant's motion is GRANTED to the extent of prohibiting Landlord from dispossessing Tenant of the Premises on the bases asserted in the Notice of Termination, disturbing Tenant's rights under the lease or maintaining the Holdover Proceeding in Civil Court; and its further

ORDERED that Tenant's motion for attorney's fees is DENIED; and it is further

ORDERED that Landlord's cross-motion for judgment of possession and warrant is DENIED; and it is further

ORDERED that Landlord's cross-motion for a restraining order is GRANTED prohibiting Tenant from using a forklift anywhere in the Premises; doing any work to the roof of the


Premises; erecting or maintain any tent in the common areas of the Premises; or storing any of its merchandise or other items in the common areas of the Premises; and it is further

ORDERED that Landlord's cross-motion for reimbursement of costs related to damage to the roof and flooring of the Premises is DENIED; and it is further

ORDERED that Landlord's cross-motion for attorney's fees and costs is DENIED.

This is the Decision and Order of the Court.

ENTER



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LOREN BAILY-SCHIFFMAN, JSC