

47-07 39th St. v Eagles Mgt. Sys., Inc.

2021 NY Slip Op 31928(U)

February 24, 2021

Supreme Court, Queens County

Docket Number: 709269/20

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

2/25/2021

9:29 AM

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

**COUNTY CLERK
QUEENS COUNTY**

-----x
47-07 39th STREET, Index No. 709269/20

Plaintiff,

Motion

Date: November 16, 2020

-against-

Seq. No. 2 & 3

EAGLES MANAGEMENT SYSTEM, INC., et al.,

Defendants.
-----x

The following papers numbered EF 17-41 read on this Order to Show Cause by the plaintiff for an order enjoining the defendants from interfering with plaintiff's access to store #3 and store #4 at the subject premises, directing the defendant to repair and/or replace the interior boundary wall between store #3 and store #4, and upon such restoration, enjoining the defendants from removing the interior boundary wall, and upon restoration of the wall, enjoining the defendants from entering store #3 of the premises (Seq. No. 2); and separate Order to Show Cause by the plaintiff for an order holding the defendants in contempt. (Sequence No. 3).

PAPERS
NUMBERED

Order to Show Cause - Affidavits - Exhibits.... EF 17-28
Order to Show Cause - Affidavits - Exhibits.. EF 30-41

Upon the foregoing papers it is ordered that this Order to Show Cause by the plaintiff for a preliminary injunction (Sequence No. 2) and separate Order to Show Cause for an order of contempt (Sequence No. 3) are jointly decided as follows:

Plaintiff is the owner and landlord of the subject premises located at 39-10 47th Avenue, Sunnyside, Queens. Pursuant to a written commercial lease dated September 27, 2019, defendant Eagles Management System, Inc. ("Eagles") leased store #4 in the premises. Defendant has attempted to negotiate the terms of the lease for the vacant commercial space adjacent to store #4

(hereinafter "store #3"). According to the plaintiff, the negotiations fell apart in June 2020.

Thereafter, plaintiff states that it learned on June 26, 2020, that the defendants, without the plaintiff's knowledge or consent, removed a 5' by 9' section of the existing interior wall between store #3 and store #4 in order to create an opening between the two spaces. Plaintiff retained a contractor to repair the hole but defendants refused to allow the contractors access to the premises. Plaintiff brought an Order to Show Cause with a Temporary Restraining Order, and on July 14, 2020, the court signed the Order to Show Cause and enjoined the defendants from further removing, in whole or in part, the interior boundary wall between store #3 and store #4 of the subject building and from otherwise entering store #3 of the building pending the hearing and determination of the application.

The decision to grant a preliminary injunction is a matter ordinarily committed to sound discretion of the court hearing the motion. (*Dixon v Malouf*, 61 AD3d 630, 630 [2d Dept 2009]; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072, 1073 [2d Dept 2008].) In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable injury in the absence of injunctive relief and (3) a balancing of the equities in favor of the movant. (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Mangar v Deosaran*, 121 AD3d 650, 650 [2d Dept 2014].)

At bar, plaintiff has established the right to a preliminary injunction. The subject lease only pertained to store #4, not store #3. Thus, defendants have no right to possession of store #3. Further, defendants violated section 5.1 of the lease, which prohibits defendants from performing any work on the leased premises without plaintiff's prior written consent. Moreover, section 5.9 of the lease makes Eagles responsible for repairing any damage to the building caused by its work. Thus, plaintiff has demonstrated the likelihood of success on the merits. Further, inasmuch as defendant Eagles is not entitled to possess store #3, plaintiff will suffer irreparable harm should the possession of store #3 continue. Plaintiff is unable to lease the premises to another party because of defendant's possession, and there is also insurance for store #3.

Plaintiff has also brought a separate application for contempt. Plaintiff contends that the defendants have violated the Temporary Restraining Order set forth in the July 14, 2020

order by continuing to use store #3. Plaintiff also states that defendants have continued to allow the hole between the two stores to remain.

In order to find one in civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed, the party to be held in contempt must have had knowledge of the order and prejudice to the rights of a party to the litigation must be demonstrated. (see Judiciary Law § 753[A][3]; *Galanos v Galanos*, 46 AD3d 507, 508 [2d Dept 2007]; *Sterngass v Town Bd. Of Town of Clarkstown*, 27 AD3d 550, 551 [2d Dept 2006]; *Rienzi v Rienzi*, 23 AD3d 447, 449 [2d Dept 2005].) The movant bears the burden of proving the contempt by clear and convincing evidence. (*Riverside Capital Advisers, Inc. v First Secured Catgrapital Corp.*, 43 AD3d 1023, 1024 [2d Dept 2007].)

In the instant case, plaintiff avers that the defendants have not complied with the Temporary Restraining Order, and is in fact, still utilizing store #3 without insurance. However, inasmuch as contempt is a drastic remedy, the court will afford the defendants another opportunity to comply, particularly in view of the fact that an injunction is being granted herein. (see *Casey v Casey*, 289 AD2d 361, 362 [2d Dept 2001].)

Accordingly, this Order to Show Cause by the plaintiff for a preliminary injunction is granted, without opposition, and it is

ORDERED, that defendants and their affiliates, officers, attorneys and any other persons or entities acting on its behalf or in concert with defendants are enjoined from interfering with plaintiff and its agents access to store #3 in the building located at 39-10 47th Avenue, Sunnyside, New York, 11104, and it is further

ORDERED, that defendants are directed to repair and replace the interior boundary wall between store #3 and store #4 of the subject building within 60 days after service of a copy of this order with notice of entry, and it is further

ORDERED, that upon such restoration, defendants are enjoined from removing, in whole or in part, the interior boundary wall between store #3 and store #4. (Seq. No. 2).

The foregoing is conditioned upon the filing of an undertaking in accordance with CPLR 6312 in the amount of \$25,000.00 in the Office of the Clerk of the County of Queens, together with a copy of this order with notice of entry.

The Order to Show Cause by the plaintiff for an order of contempt is denied. (Seq. No. 3).

Dated: February 24, 2021



CARMEN R. VELASQUEZ, J.S.C.

FILED

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9:29 AM

**COUNTY CLERK
QUEENS COUNTY**