

979 Second Ave. LLC v Wah Win Group Corp.

2022 NY Slip Op 30412(U)

February 3, 2022

Supreme Court, New York County

Docket Number: Index No. 656493/2021

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

-----X

979 SECOND AVENUE LLC,

Plaintiff,

- v -

WAH WIN GROUP CORP., JOHN AND JANE DOE, XYZ
CORP.

Defendant.

-----X

INDEX NO. 656493/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiff moves this court for an order pursuant to CPLR § 6301, compelling the defendant to remediate and remedy the conditions in the demised premises, 979 Second Avenue, New York, New York; an order pursuant to RPL §220 directing defendant to pay use and occupancy *pendente lite* for the premises from December 29, 2021, through final determination of this action in the amount of \$40,000.00 per month, plus the additional rental payments as required by the lease; and directing defendant to maintain the insurance covering the premises as required by the lease; and granting plaintiff attorneys' fees and costs incurred in the instant application pursuant to the terms of the lease. In response to the application defendant moves to consolidate the instant matter with another matter in this court. Further, defendant specifically does not oppose the portion of the application that seeks access to the premises.

“A movant's burden of proof on a motion for a preliminary injunction is particularly high” *Council of the City of NY v Giuliani*, 248 AD2d 1, 4 [1st Dept 1998]. A party seeking a preliminary injunction must clearly demonstrate (1) the likelihood of ultimate success on the

merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor. (*Doe v Axelrod*, 73 NY2d 748 [NY 1988]; *Housing Works, Inc. v City of New York*, 255 AD2d 209 [1st Dept 1998]).

Preliminarily, the Court will deny defendant's cross-motion to consolidate. The Court finds that defendant has failed to establish little more than the same parties are involved in litigation. Defendant has failed to establish that the separate action arises from the same transactions or occurrences and involve common questions of law and fact. *See Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005]. Moreover, as little of substance has happened in the other matter, it would be prejudicial to the plaintiff in this matter to have to wait on the other matter.

The Court finds that plaintiff's motion for preliminary injunction is not substantively opposed and that plaintiff has established the necessary elements. Thus, the Court grants plaintiff's motion that seeks to compel defendant to remediate and remedy the condition of the premises without opposition. Defendant does not oppose this portion of the application, rather agrees that the conditions of the subject premises must be kept "clean and healthy".

The Court is not persuaded by defendant's arguments that plaintiff is not entitled to payment for defendant's use and occupancy of the premises. Defendant argues that the conditions that caused defendants to vacate the premises were caused by plaintiff, however defendant does not dispute that it is in essence a holdover tenant that to date has not provided the landlord access to the premises. The defendant does not dispute that plaintiff has taken the procedural steps necessary to be entitled to the demanded payment.

Moreover, defendant contends that it timely filed commercial tenant's declaration of financial hardship thus it was not required to pay rent during the time in question. The Court is

not persuaded by this argument as there is no submitted proof on the record that the declaration of financial hardship was served or filed with any entity. Moreover, the purported declaration states “I further understand that lawful fees, penalties or interest for not having paid rent in full or met other financial obligations as required by my tenancy, lease agreement or similar contract may still be charged or collected and may result in a monetary judgment.”, thus any argument that defendant is relieved of rental payments is without merit.

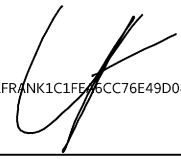
Defendant contends that the issue of insurance is moot because defendant currently maintains an insurance policy as required by the lease. See NYSCEF Doc. 28. Accordingly, the Court will deny that portion of the application as moot. As to the portion of plaintiff’s motion that seeks attorney’s fees, the Court will deny that portion of the application without prejudice. While a review of the record establishes that plaintiff is entitled to costs, as per the terms of the lease, plaintiff has not provided an accounting of the same. As the litigation is ongoing, the Court will grant plaintiff leave to request the fees it is entitled to pursuant to the lease at a later time. Based on the foregoing, it is hereby

ORDERED that defendant is directed to pay \$40,000.00 per month from December 29, 2021, through the final determination of this action, along with the additional rental payments owed by defendant; and it is further

ORDERED that defendant is directed to remediate and remedy the condition of the subject premises within 48 hours of Notice of Entry of this Order; and it is further

ORDERED that if defendant fails to remediate as provided in this Order, plaintiff is granted immediate access to the premises.

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2/3/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					OTHER
					REFERENCE