SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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CROWN CASTLE AS LLC,T-MOBILE NORTHEAST LLC

Plaintiff,

- v -

723 ELEVENTH AVE LLC,

Defendant.

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INDEX NO. 157842/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, plaintiffs move for, inter alia, a preliminary injunction to temporarily remove the existing telecommunications equipment from the roof of the building located at 723 Eleventh Avenue in the County, City and State of New York and an order directing defendant to approve reinstallation plans. Defendant cross moves for an order, inter alia, vacating this Court's temporary restraining order (TRO) as set forth in the order to show cause dated August 31. 2021 (NYSCEF Doc No 24) and granting declaratory judgment on its first counterclaim.

Preliminary Injunction & Disputed Proposed Orders

During oral argument on March 16, 2022, the parties agreed that immediate steps needed to be taken to remove plaintiff T-Mobile's equipment or facility from the roof in order to repair the roof and ameliorate dangers or hazards that the current condition of the roof presents to the building, its tenants, and the public. The parties were directed to submit proposed orders, and the

Court was to issue its order by amending the plaintiffs' proposed order, as it clearly delineates each step of the process, with details as to the scope of work and noting where various approvals may be needed. Defendants' objections to plaintiffs' proposed order (NYSCEF Doc No 300) and plaintiffs' response to the same (NYSCEF Doc No 302) are addressed and resolved as follows:

1. *Alleged False Statements in Plaintiffs' Exhibits*

Defendant contends that "all self-serving and inaccurate statements should be removed from Plaintiff's exhibits" and that defendant as owner "cannot sign off on false statements to the DOB" (NYSCEF Doc No 300). However, no one is asking the owner to sign off on any false statements to the DOB. The referenced exhibit unequivocally states that Azimuth Engineering assumes that T-Mobile's statements were accurate in preparing the document. Therefore, this has nothing to do with anything that defendant has to supply to the DOB.

2. *Bifurcating Removal Process*

The Court cannot discern why defendant objected to plaintiffs' order on this basis, as defendant's own proposed order also separates the removal work to two phases because repairs and asbestos abatement is needed before removing the north dunnage beam. Specifically, the defendant's proposed order directs removal of the Facility "except for the North dunnage beam" within 30 days; then an asbestos abatement; followed by removal of the north dunnage beam (NYSCEF Doc No 291 at ¶¶ 1, 4).

This, along with the previous disputed issue, are borderline frivolous and have no basis in fact. Indeed, as plaintiffs point out, just last November, defendant's engineer suggested that the facility removal be broken down into two phases (see NYSCEF Doc No 302). It appears that plaintiffs intends to use defendant's preferred removal process and yet defendant continues to object.

3. *Notice of Evacuation & Time to Complete Phase 1*

The tenants of the building require sufficient notice to evacuate the building before the removal can proceed. Plaintiffs' order suggested five days' notice and defendant proposed ten days' notice. The Court finds that seven (7) days' notice is reasonable. Further, although neither the plaintiffs nor this Court can say with absolute certainty that the removal work will be completed within four hours (see NYSCEF Doc No 302), the Court will insert a new paragraph directing plaintiffs to use reasonable efforts and endeavor to complete the removal work during a single work day, at a time when most of the tenants may be out of the building anyway.

4. *Insurance*

Defendant has not provided a sufficient basis for demanding that plaintiffs increase their insurance coverage. While the Court acknowledges the dangerousness of the situation, there is no specific reason why $2 million in coverage is insufficient and $5 million is needed; or why the $4 million in coverage T-Mobile has is insufficient and $5 million is needed. Additionally, as plaintiffs point out, new or more insurance will only delay the matter further and the work is needed now.

5. *Removal & Repair Work as Evidence*

Defendant takes issue with plaintiffs' proposed language at ¶ 7, wherein it states "The Owner shall not use this work in any way whatsoever to suggest that Plaintiffs are responsible for any damage to the Building" (NYSCEF Doc No 294). The Court assumes that plaintiffs mean that the mere fact that plaintiffs are agreeing to undertake this work should not be used as some sort of evidence or suggestion of liability and/or responsibility for the damage to the building. In which case, the sentence is duplicative of ¶ 8, which, in the Court's order, will include ¶ 11 of defendant's proposed order on the same topic.

The Court anticipates that both sides will be present, overseeing work, performing site visits and inspections, and maybe taking pictures with their respective agents and experts. Whatever may be seen during the course of the work may, in the proper case, be used as evidence by any party. The Court will therefore delete that disputed sentence so as to not suggest that evidence (like pictures) may not be taken and used against the plaintiffs. The sentence should be deleted for the additional reason that it is one-sided and prohibits owner from using something against plaintiffs but not the other way around.

Defendant's Cross-Motion

The Court denies that branch of defendant's cross motion seeking to vacate the TRO as moot without prejudice in light of the decision and order on motion sequence no. 001, granting the *Yellowstone* injunction pendent lite (NYSCEF Doc No 305) and otherwise denied as premature because defendant has since moved to reargue the same (motion sequence no. 005), which will be argued before the Court on June 1, 2022. For similar reasons, the Court denies that branch of the cross-motion granting defendant a declaratory judgment on its first counterclaim. The only support for this application is essentially "all the reasons set forth in [defendant's] opposition to the *Yellowstone* Motion" (NYSCEF Doc No 236, defendants' memorandum of law at 31), which was rejected by the Court in its decision and order on motion sequence no. 001. Granting the *Yellowstone* injunction served to, in effect, preserve the issue for a disposition on the merits of the claims in this matter; and defendant's application is essentially asking for summary judgment on the counterclaim, which is inappropriate at this juncture.[1]

[1] If construed as a summary judgment motion, it would also be deficient in proof. CPLR 3212 (b) requires that the motion be supported by an affidavit "by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." The party affidavit is woefully insufficient in this regard (see NYSCEF Doc No 237).

The Court denies those branches of the cross motion for an undertaking without prejudice. It appears as though all parties maintain insurance and neither side referenced it in the proposed orders.

The Court grants those branches of the cross motion for an injunction directing plaintiffs to remove the equipment from the roof and/or granting plaintiffs' motion solely to the extent of removing the equipment. Because the parties have not consented to that branch of plaintiffs' motion concerning approval of reinstallation, that branch of plaintiffs' motion is denied without prejudice. It should be noted that the Court's decision as to this branch is not based on defendant's contention that the lease has terminated; rather, the removal is the first step in rectifying a dangerous situation and issues concerning reinstallation may be disputed at another juncture.

Accordingly, it is hereby ORDERED that the branch of plaintiffs' motion for a preliminary injunction is granted in part to the extent that the Court will issue a long-form order as to the removal of the equipment; and it is further

ORDERED that the branch of plaintiffs' motion directing defendant to approve the reinstallation plans is denied without prejudice to be renewed after the removal and repair work has taken place; and it is further

ORDERED that the branch of defendant's cross-motion for an injunction directing plaintiffs to remove the equipment from the roof is granted; and it is further

ORDERED that the balance of defendant's cross motion is denied.

This constitutes the decision and order of the Court.

5/20/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE