

42 W. Group Inc. v 510 W42 Hotel Operating LLC

2022 NY Slip Op 33803(U)

November 7, 2022

Supreme Court, New York County

Docket Number: Index No. 652713/2022

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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42 WEST GROUP INC.,

Plaintiff,

- v -

510 W42 HOTEL OPERATING LLC,

Defendant.

INDEX NO. 652713/2022

MOTION DATE 09/28/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion for PRELIMINARY INJUNCTION.

Upon the foregoing papers, and for the reasons stated on the record during the October 18, 2022, preliminary injunction hearing (NYSCEF 62), Defendant 510 W42 Hotel Operating LLC’s (“Landlord”) motion for a preliminary injunction requiring Plaintiff 42 West Group Inc. (“Tenant”) to comply with Sections 4.01. 4.04(a) and 4.05(c) of the lease (“Lease” [NYSCEF 33]) is GRANTED.

The Lease provides, in relevant part, that “Tenant shall. . .operate the Premises. . .solely as first class, full service restaurant, bar and event space. . .substantially similar in quality and fare as Tenant’s affiliate’s Delmonico’s restaurant. . .” (Lease §4.01). The Lease further provides that “Tenant agrees not to . . . use or permit to be used any loudspeaker or other sound system or advertising device which may be heard outside the Premises. . . Landlord shall be entitled to seek to enjoin Tenant from any violation. . .” (Lease §4.04[a]). The Lease specifically prohibits Tenant’s use of “sound amplification or reproduction devices, such as loud

speakers, paging systems, stereo systems, musical instruments, public address systems, amplifiers, radio or broadcasting equipment. . .audible outside the Premises” (Lease §4.05[c]).

Landlord has provided substantial evidence to show that Tenant is operating a business – a club known as 42 D’Or – that is playing amplified music in violation of the Lease, and that this conduct is interfering with Landlord’s hotel business, warranting injunctive relief (*Cemco Restaurants, Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461, 464 [1st Dept 1987]). The Court finds that Landlord has met each of the requisite elements: (1) a likelihood of success on the merits; (2) irreparable harm absent relief; and (3) a balancing of the equities (Tr, 26:12-16) (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 3 AD3d 335, 335 [1st Dept 2004], *affd*, 4 NY3d 839 [2005]).

CPLR 6312(b) requires that the Court fix an undertaking that is “rationally related to the potential damages recoverable if the preliminary injunction is later determined to have been unwarranted” (*Witham v VFinance Investments, Inc.*, 52 AD3d 403, 404 [1st Dept 2008] *citing Kazdin v Putter*, 177 AD2d 456, 457 [1st Dept 1991]). In a business litigation such as this one, an application for an undertaking should be supported by “competent evidence of the potential losses” (*Spivak v Bertrand*, 147 AD3d 650, 652 [1st Dept 2017]).

The Court determined that the record submitted in advance of the hearing was insufficient to support an undertaking because Tenant’s “materials were backward-looking” as opposed to prospective (Tr. 23:14-24:2). Accordingly, the Court directed additional briefing (Tr. 24:3-23, 27:5-8).

On October 25, 2022, counsel for Tenant submitted an affirmation of counsel accompanied by Tenant’s purported sales totals for September and October of 2022 (NYSCEF 58-60). Counsel for tenant proposes that the undertaking should be “10% of the Tenants

monthly gross sales from the time of the preliminary injunction up to the end of this case” which counsel estimates to be thirteen months (Affirmation of Rodney R. Austin ¶3 [NYSCEF 58]). Counsel suggests that the undertaking should be in an amount between \$236,762.00 - \$291,946.21 or ten percent of historical monthly gross sales multiplied by thirteen (Austin Aff. ¶¶4-5). Tenant has not submitted a client affidavit in support of its supplemental papers in support of an undertaking.

On November 1, 2022, counsel for Landlord submitted a memorandum in opposition (NYSCEF 61). Landlord argues that the Tenant’s application is not supported by adequate or admissible evidence; that Tenant’s argument as to the amount of the bond is similarly unsupported given the Court’s directives to consider prospective harm; and, finally, that Tenant may continue to operate a business without violating the injunction and is nevertheless likely to violate the injunction given that it has parties planned for future dates. Landlord suggests a nominal bond of \$500.

Having reviewed the parties’ submissions with respect to the undertaking, as well as the record on the preliminary injunction motion more broadly, the Court finds that an undertaking of ten thousand dollars (\$10,000.00) is appropriate.

* * * *

Accordingly, it is

ORDERED that Defendant Landlord’s motion for a preliminary injunction is **GRANTED**, conditioned on Landlord posting an undertaking of ten thousand dollars (\$10,000) pursuant to CPLR 6312(b); it is further

ORDERED that during the pendency of this litigation, and subject to further order of the Court, Plaintiff Tenant and its agents, officers, employees, licensees, and/or tenants are enjoined

from using or permitting to be used, (i) any loudspeaker or other sound system or advertising device which may be heard outside of the leased premises which consists of a portion of the ground floor and cellar (the “Premises”) in the building located at 512 West 42nd Street, New York, NY (the “Building”); and (ii) sound amplification or reproduction devices, such as loud speakers, paging systems, stereo systems, musical instruments, public address systems, amplifiers, radio or broadcasting equipment within the Building or within the Premises so as to be audible outside of the Premises; and it is further

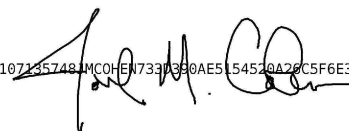
ORDERED that the parties appear for a telephonic preliminary conference on **December 6, 2022, at 11:30 am** and circulate dial-in information to sfc-part3@nycourts.gov in advance.¹

This constitutes the decision and order of the Court.

11/7/2022

DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

¹ In lieu of appearing at the preliminary conference, the parties may submit in advance of the conference a proposed stipulated PC Order using the form available at [PC-Order-Part-3.pdf \(nycourts.gov\)](#).