

**116 St. Laundromat & Dry Cleaning Inc. v 240-42 W.  
116 St. Hous. Dev. Fund Corp.**

2022 NY Slip Op 33986(U)

November 18, 2022

Supreme Court, New York County

Docket Number: Index No. 654876/2020

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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116 STREET LAUNDROMAT AND DRY CLEANING INC.

Plaintiff,

- v -

240-42 WEST 116 STREET HOUSING DEVELOPMENT  
FUND CORPORATION,

Defendant.

INDEX NO. 654876/2020

MOTION DATE 08/25/2022,  
08/25/2022

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 68, 69, 75, 76, 77, 78, 79, 80, 81, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion for PRELIMINARY INJUNCTION AND LEAVE TO AMEND.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 74, 82, 83, 84, 85, 86, 87, 88

were read on this motion /or PRELIMINARY INJUNCTION.

This is lease dispute between Plaintiff 116 Laundromat and Dry Cleaning Inc. (“Plaintiff” or “Tenant”) and Defendant 240-42 West 116 Street Housing Development Fund Corporation (“Defendant” or “Landlord”). For the reasons stated during the preliminary injunction hearing on September 22, 2022 (NYSCEF 96), Defendant Landlord’s motion for a preliminary injunction and leave to amend its answer is GRANTED to the extent and on the conditions set forth below. Plaintiff Tenant’s motion for a preliminary injunction is DENIED.

**BACKGROUND**

Tenant and Landlord are parties to a lease dated November 1, 2013 (“Lease” [NYSCEF 19]) concerning a portion of the ground floor and basement (the “Premises”) located at 240 West

116<sup>th</sup> Street (the “Building”). On October 1, 2020, Plaintiff Landlord filed a Complaint (NYSCEF 1) asserting, among other claims, breach of the Lease. On December 4, 2020, the Court granted Defendant’s motion for a preliminary injunction (NYSCEF 25 [the “Yellowstone”]) staying the Tenant’s time to cure an alleged default (failure to maintain insurance) under the Lease. On December 22, 2020, the Court entered a Preliminary Conference Order (NYSCEF 30).

There was no activity on the docket for more than a year-and-a-half until August 25, 2022, when both sides moved for injunctive relief. Defendant Landlord moves for a preliminary injunction seeking access the Premises; to compel Tenant to temporarily vacate the Premises in order for necessary construction – including remediation of structural issues – to be completed in the Building; and for leave to amend its answer (NYSCEF 34). Plaintiff Tenant moves for an order preventing the Landlord from accessing the Premises in any manner that is contrary to the Lease (NYSCEF 57).

Landlord argues that it needs to access the Premises to rehabilitate the Building, including low-income housing that was required to be vacated for more than six-months (and counting) by order of the New York City Department of Housing Preservation and Development (“HPD”) on January 25, 2022 (NYSCEF 39). Landlord has submitted copies of violations issued by HPD (NYSCEF 40) and construction plans for the work it intends to complete (NYSCEF 41-42). Landlord argues that it is entitled to access the Premises under Articles 13 and 48 of the Lease and that Tenant is violating the Lease (warranting amendment of the Answer) by refusing access.

Landlord supports its motion with the affidavit of Albert Smith, III, a registered architect (NYSCEF 36), indicating that “the structural supports of the Building are unstable” and that “the

only viable solution to address the remediation issues impacting the Building is a planned gut rehabilitation” and that “major demolition” will be required to “restore the building to a code-compliant manner” requiring access to “the ground floor commercial spaces as well” where Plaintiff operates is laundromat (Smith Aff. ¶¶6-7). Mr. Smith describes the scope of the anticipated work which will necessarily include temporary shut-down of necessary services “including but not limited to, electricity, water and gas” and that the only impediment to starting work is obtaining access to the commercial spaces (i.e. the Premises) (Smith Aff. ¶¶8-12).

Landlord has also submitted the affidavit of Shamas I. Sarwar, President of Shamas Contracting Co. Inc. (NYSCEF 37), which has been retained by Landlord to complete the construction at the Building. Mr. Sarwar testifies that Shamas Contracting has reviewed the architectural plans but cannot start work without access to the Premises (Sarwar Aff. ¶¶ 9-11). Mr. Sarwar adds that Shamar Contracting would be unable to obtain insurance if the Premises remained occupied during construction (Sarwar Aff. ¶12).

Tenant, in its motion, argues that Landlord is attempting to improperly terminate the Lease and that it will suffer irreparable harm if its business is forced to temporarily close (NYSCEF 59). Tenant’s motion is supported by the affidavit of Dmitriy Berezovsky (NYSCEF 58) who asserts that Tenant has spent more than \$1 million equipping and renovating the Premises since it entered the Lease (Berezovsky Aff. ¶6). Mr. Berezovsky also claims that the Premises have been vandalized and that the Landlord’s claimed needs to complete construction are “a ruse” designed to remove Tenant from the Premises (Berezovsky Aff. ¶¶7-26).

Tenant, in opposition to Landlord’s motion, submits an affidavit of Guerman Vainblat, P.E. of R.V. Engineers (NYSCEF 77) who has reviewed Landlord’s submissions, including the Smith and Sarwar affidavits, as well as Department of Building’s (“DOB”) filings and inspected

the Building on August 30, 2022 (Vainblat Aff. ¶¶3-6). Mr. Vainblat concludes that the Premises are “in fair to good condition” but concedes that he has “not examined the residential portions of the Building, which apparently require major repairs” yet concludes that “in my opinion such repairs can be done without vacating [the Premises]” (Vainblat Aff. ¶¶6-8). Tenant also submits an email of Michael Rabkin, P.E., also of R.V. Engineers, including photographs that generally agrees with the Vainblat testimony (NYSCEF 85). According to DOB records, the residential portion of the Building remains unoccupied (NYSCEF 79).

Oral argument was held on September 22, 2022, during which counsel for the Landlord represented that construction at the Building would last approximately two years and that eleven years remained on the Lease (Tr. 3:16-4:2). The Court granted Defendant Landlord leave to amend as well as a preliminary injunction and denied Plaintiff Tenant’s motion on the record (Tr. 18:23-19:3 [NYSCEF 96]).

The Court provided the parties with thirty (30) days to mutually agree on the language of a proposed order (Tr. 19:1-21:17). Despite several extensions, no agreement was reached. On November 10, 2022 – seven weeks after argument – counsel for Tenant requested leave to supplement the record with additional expert reports but did not file copies (NYSCEF 95).

On November 16, 2022, counsel for Tenant submitted another letter (NYSCEF 97-99) annexing copies of the Affidavit of David Salamon, P.E. of Salamon Engineering PLLC sworn to on November 16, 2022 concerning an October 13, 2022 inspection of the Premises (“Salamon Report”) and the Affidavit of Nouredine Benabdelhak, P.E. of Alnour Consulting Engineering, P.C. sworn to on November 16, 2022, concerning November 1, 2022, inspection of the Premises (“ACE Report”). On November 17, 2022, counsel for Landlord submitted a letter (NYSCEF

100) to the Court objecting to the Tenant's submission of the Salamon and ACE Reports as untimely.

Together, the Salamon Report and ACE Report conclude that the Landlord could complete necessary work without the need for Tenant to vacate the Premises for any appreciable amount of time. However, neither the Salamon report nor the Ace Report represent that the residential portions of the Building were inspected or that work is unnecessary given the HPD Order.

### DISCUSSION

To be entitled to preliminary injunctive relief, the movant must demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor (*Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 [1990]). The Court determines that Defendant Landlord has met each of the three prerequisites applying "the heightened standard for the grant of a mandatory preliminary injunction" permitting entry and construction (*Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 273 [1st Dept 2009]); (Tr.16:22-17:11, 19:18-9).

The relevant Lease provisions are as follows:

#### Article 13

Owner or Owner's agents shall have the right... to enter the demised premises in any emergency at any time, and at other reasonable times, to examine same and to make such repairs, replacements and improvements. . .for the purposes of complying with laws, regulations and other directions of governmental authorities. . .Owner may during the progress of any work in the demised premises take all necessary materials and equipment into said premises without the same constituting an eviction, nor shall the Tenant be entitled to any abatement of rent while such work is in progress, nor to any damages by reason of loss or interruption of business or otherwise.

## Article 48

Tenant covenants and agrees that it will permit Landlord, its agents, servants, employees, licensees, invitees and contractors, at any and all times during regular business hours, to pass and repass on and through the Demised Premises. . . in order that they or any of them may gain access to any facilities of the Building. Landlord shall make reasonable efforts to give Tenant advance notice of such entry and to avoid disruption of Tenant's business activities. . . .

Tenant, in its opposition to Landlord's motion and support of its own motion, asserts that its quiet enjoyment of the Premises will be disturbed during construction. Tenant relies primarily on *Camatron Sewing Mach., Inc. v F.M. Ring Assoc., Inc.*, 179 AD2d 165, 166 [1st Dept 1992] to support its position. *Camatron* is distinguishable because it involved a planned renovation that would result in an actual taking of the leased space – not a legally required Building-wide construction project that is rendering the attached residential space uninhabitable. The authority advanced by Landlord is more analogous (*Huron Assoc., LLC v 210 E. 86th St. Corp.*, 18 AD3d 231 [1st Dept 2005] [similar Article 13 of a commercial lease permitted access for construction]); (Tr. 17:3-11). Given the pertinent Lease provisions and determinations by HPD and DOB, Landlord has demonstrated a likelihood of success, irreparable harm and a balancing of the equities in its favor (*251 W. 30th St. LLC v 251 W. 30th St. Owner, LLC*, 55 Misc 3d 1208(A) [Sup Ct New York County 2017]

Contrary to the Tenant's assertions, this does not appear to be a situation in which a landlord is using a proposed construction project as a pretext to effectively terminate a Lease (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 [1st Dept 2016]). Landlord has stated an intention to perform immediately necessary work on the Building and submitted plans and affidavits in support. Tenant's initial, conclusory submissions in opposition do not refute Landlord's more-detailed submissions, and do not suggest alternative construction methods.

Moreover, there is no dispute that the residential portion of the Building is uninhabitable, warranting relief in favor of Landlord (*Ragone v Devoe Properties, LLC*, 15 Misc 3d 1104(A) [Sup Ct Kings Co. 2007]).

The Court determined at the September 22, 2022 hearing that the Landlord was entitled to injunctive relief and that resolution of these motions would not await additional filings (Tr. 19:9-12, 21:4-17). Generally, only papers authorized by the Court will be considered on a motion (CPLR 2214[c]). The Court thus could properly decline to consider the belated Salamon Report and ACE Report as unauthorized surreplies (*Gao v City of New York*, 145 AD3d 939, 940 [2d Dept 2016] [supplemental expert report could not be considered]). That the Salamon and ACE Reports were submitted post-argument and after the parties had the benefit of more than a month to work on the terms of a stipulated order further militates in favor of excluding them (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]).

However, even if the Court fully credited the Salamon Report and ACE Report, an injunction would still issue because the reports concern the means and methods to be utilized in forthcoming construction that is clearly required – not whether access and work is required in the first instance. Thus, while the Lease requires Landlord to take steps to “avoid disruption of Tenant’s business activities. . . ,” the Salamon Report and ACE Report are insufficient to deny the requested relief. It is premature and speculative to determine at this time whether the actual construction to be undertaken by Landlord in the future will be consistent with contractual obligation to avoid disruption of Tenant’s business.

Accordingly, a preliminary injunction will issue in favor of Landlord. Landlord’s access and construction should be designed to impact the Tenant as minimally as possible; Landlord

shall acquire insurance to protect Tenant’s personal property; and Landlord shall post an undertaking pursuant to CPLR 6312(b) . Finally, the *Yellowstone* injunction remains in place.

Accordingly, it is

**ORDERED** that Defendant Landlord’s motion for a preliminary injunction is **GRANTED** and Plaintiff Tenant along with its agents, subtenants, assigns and all those acting by and through Plaintiff shall provide, upon reasonable notice, access to Defendant Landlord and its agents to the Premises; it is further

**ORDERED** that counsel for Defendant Landlord shall provide at least ten (10) days prior to the commencement of any physical work at or affecting the Premises and Plaintiff Tenant shall temporarily vacate the Premises to accommodate the work; it is further

**ORDERED** that Defendant Landlord shall procure insurance or have Plaintiff Tenant named as an additional insured in an amount sufficient to cover any damages to Tenant’s personal property (*i.e.* machinery) during the course of work at the Premises; it is further

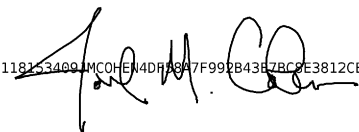
**ORDERED** that Defendant Landlord post an undertaking in the amount of \$10,000 pursuant to CPLR 6312(b); it is further

**ORDERED** that Plaintiff Tenant’s motion for a preliminary injunction is **DENIED**.

This constitutes the decision and order of the Court.

11/18/2022

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