

**Pema Enters. Inc. v New Ninth Ave. Corp.**

2023 NY Slip Op 32586(U)

July 19, 2023

Supreme Court, New York County

Docket Number: Index No. 651538/2021

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

-----X INDEX NO. 651538/2021

PEMA ENTERPRISES INC.,  
Plaintiff,

MOTION SEQ. NO. 002

- v -

**DECISION + ORDER ON  
MOTION**

NEW NINTH AVENUE CORP.,  
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

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

The underlying facts of this case are set forth in detail in the decision and order of this court dated July 18, 2023, resolving Mot. Seq. 001. Defendant now moves, by order to show cause, for an order “[e]njoining the operation of any business or construction activity at 857 Ninth Avenue, South Store and Basement, New York, New York 10019 (“premises”) pending completion of herein described remediation”, including installing a ramp to access the premises; expand tread to riser ratio for all steps in the front stoop to 7” riser and 11” tread; put lintel over the hole in the wall in the cellar, close the hole, and weatherproof the hole/wall; cure recurring grease trap overflow; reconstruct wall in the tank room using concrete block (NYSCEF Doc. No. 39, *order to show cause*).

Defendant contends that tenant’s actions have created unsafe conditions affecting the health and safety of building residents and anyone on the premises and that its actions are motivated by a desire to ensure tenant adheres to state and local laws. Specifically, defendant relies on the affidavit of Robert Strong (“Strong”), a licensed architect, who was hired by defendant to review plans submitted by plaintiff in connection with a build-out of the premises. Strong visited the premises on December 28, 2021, and attests that, based on his inspection, plaintiff has not complied with the stipulation of settlement and some of the work that was performed at the premises was not consistent with the plans. He prepared a report detailing his findings (NYSCEF Doc. No. 34, *January 5, 2022, report*). Strong’s January 5, 2022, report was forwarded to plaintiff, who submitted responses. Strong prepared another report to address plaintiff’s comments, as memorialized in a report dated January 18, 2022. (NYSCEF Doc. No. 35, *January 18, 2022, report*). A final report was prepared in February 2022 (NYSCEF Doc. No. 36, *February 8, 2022, report*).

Rona Lane, defendant’s board president, affirms that plaintiff has failed to comply with the settlement agreement insofar as work that was being done in the premises is contrary to the terms of the settlement agreement and, some of the work has not been consented to by the landlord. Referencing the affidavit of Strong, Lane affirms that tenant has performed extensive work outside the scope of work approved by the Board, including storefront alteration, without

Board approval; bathroom gutting and renovation, without Board approval; removal of a portion of a load-bearing basement wall, without Board approval; and removal of an oil tank with torch without appropriate permits and without Board approval, which resulted in smoke throughout the building at a level that necessitated response from the Fire Department (FDNY) and the Department of Buildings (DOB). Lane attests that plaintiff has also engaged in “objectionable conduct”, which include “disrespect of residents and building policies” and “still water and hanging cords, affecting overall building safety.” According to Lane, a violation was placed on the premises for work done without a permit. The violation was for the removal of a beam of a loadbearing wall (NYSCEF Doc. No. 30, *DOB violation*). Lane also avers that there is a leak from a grease trap that is causing continuing flow of grease onto the floor of the basement, which is accumulating and creating a hazard. Pursuant to the settlement, tenant was to remove violations that had been placed on the premises in the past, yet plaintiff has failed to remove them.

In opposition to the motion, plaintiff argues that defendant has failed to establish its entitlement to injunctive relief. First, plaintiff argues that the motion is jurisdictionally defective because defendant has not interposed an answer or counterclaim in this matter. Furthermore, it maintains that this application, filed prior to serving a notice to cure, is in contravention to the terms of the stipulation which requires that, upon a default under the stipulation, a seven (7) day notice to cure must be served upon the defaulting party to cure the breach. Plaintiff also notes that defendant annexes the wrong lease to its moving papers. It also contends that failure to implead its subtenant to this action as defendant seeks to restrain/enjoin activities which could negatively affect the subtenant’s bakery business from operating at the premises, is an additional ground for denial of the application (NYSCEF Doc. No. 42, *affirmation in opposition*).

Emanuel Kaliontzakis, president of plaintiff, affirms that plaintiff has either completed the work, has been working to complete the work, or such work is not required as demonstrated by documentary evidence submitted in opposition to the motion. Addressing the ramp, plaintiff argues that Strong’s January 2022 reports are silent as to the installation of a ramp for handicap access to the premises and are completely silent as to this alleged “urgent remediation” issue. This was not raised by Strong as an issue until February 2022, after the filing of Mot. Seq. 002. Nevertheless, plaintiff represents that, for the past thirteen (13) years, there has been a temporary handicapped accessible ramp at the premises; proper wheelchair accessible signage in accordance with § 1110 of the New York City Building Code and § 313 of the New York City Administrative Code; as well as, installation of a bell (NYSCEF Doc. Nos. 41 ¶13; 43, *photo of ramp*; 44, *sign and bell photo*). Kaliontzakis affirms that no work has occurred on the front steps during renovation (NYSCEF Doc. No. 41 ¶ 14).

As for the condition of the unsupported opening in the cellar exterior structural foundation wall, which allegedly compromises the integrity of the wall, Kaliontzakis attests that the wall has existed in this manner since at least 2018 as shown by a drawing prepared by defendant’s architect in 2018 (NYSCEF Doc. No. 41 ¶ 16). Notwithstanding that plaintiff did not create the opening in said wall, by letter dated January 31, 2022, counsel for plaintiff indicated it would add the lintel defendant was requesting for the hole (NYSCEF Doc. No. 48, *January 2022 letter*). Defendant, however, refused to allow plaintiff to replace the lintel until first obtaining a permit; however, plaintiff maintains that, replacing steel lintel that is less than

10 square feet and not longer than 4 feet long, as is the case here, does not require a permit (NYSCEF Doc. No. 49, *correspondence with senior project manager*). Plaintiff's engineer, Sandeep Gunnala, PE, CWI, SSM, confirms that a temporary steel lintel was placed over the alleged condition and that this will suffice to support the bricks until permanent installation is completed. (NYSCEF Doc. No. 50, *Gunnala affidavit*). Kaliontzakis affirms that the grease trap is currently being serviced (NYSCEF Doc. No. 41 ¶ 20-21; 52, *agreement for removal of cooking oil*).

Addressing the issue with respect to the wall in the tank room, Kaliontzakis disputes that plaintiff removed the tank without plaintiff's permission, referencing an application to the New York State Department of Conservation for the removal of the oil tank, signed by Anthony Pagan, property manager at New Bedford Management Corp., the managing agent for the building where the premises are located. (NYSCEF Doc. No. 53, *tank removal application*; 54, *tank e-mails*). ABC Tank Repair and Lining, Inc., the company contracted to remove the oil tank, indicated that removal of the tank room access door and portion of the tank room wall is standard procedure when removing an oil tank to create a safe work area while performing the tank removal job (NYSCEF Doc. No. 58, *March 23, 2022, letter from ABC Tank Repair*). Gunnala affirms that "having performed an inspection of the wall that [was] demolished during removal of oil tank in the basement, the wall is not a structural wall and it will not be a structural stability issue for the building." (NYSCEF Doc. No. 50). Furthermore, in a letter dated November 2021 addressed to defendant's counsel, plaintiff offered to rebuild the wall. (NYSCEF Doc. No. 59, *November 4, 2021, letter*). With respect to the note in defendant's papers that there is a "accumulation of combustible debris" in the rear yard, constituting a fire hazard, defendant contends that the debris belonged to the neighboring building as confirmed by email correspondence with the property manager of said property, and that the debris has already been removed. (NYSCEF Doc. No. 60, *e-mails about debris*).

To prevail on a motion for injunctive relief, a movant "is required to make a clear showing of likelihood of ultimate success on the merits, that it will suffer irreparable injury unless the relief sought is granted and that the balancing of the equities lies in its favor." (*OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 [1st Dept 2007] [internal quotation marks and citation omitted]; *see Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008].) Here, this court notes that defendant's application for injunctive relief, filed prior to the filing of an answer in this action with a counterclaim which would provide the jurisdictional prerequisite for any such relief, is defective and is therefore denied. (*See Davis v Influx Capital Group, LLC*, 183 AD3d 538, 538 [1st Dept 2020], *citing BSI, LLC v Toscano*, 70 AD3d 741, 741 [2d Dept 2010]; *Wells Fargo Bank N.A. v Area Plumbing Supply, Inc.*, 150 AD3d 932, 935 [2d Dept 2017]; *Seebaugh v. Borruso*, 220 AD2d 573, 573 [2d Dept 1995]; *Arvay v New York Tel. Co.*, 81 AD2d 600, 600-601 [2d Dept 1981].)

Assuming, *arguendo*, this court could entertain the application, upon consideration of the moving papers and opposition thereto, defendant has failed to persuade this court of the need for the drastic remedy of injunctive relief, insofar as plaintiff has either remedied or agreed to address many of the issues complained of, and there has been a lack of showing of irreparable injury absent the granting of this application. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

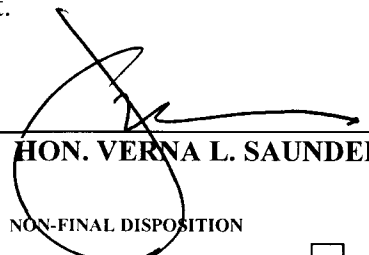
**ORDERED** that defendant's application for injunctive relief is denied; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

**ORDERED** that the parties in this action are hereby directed to appear for a preliminary conference on September 27, 2023, details which shall be provided by this court no later than September 25, 2023.

This constitutes the decision and order of this court.

July 19, 2023

  
\_\_\_\_\_  
HON. VERNA L. SAUNDERS, JSC

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