

Flippers NYC, LLC v West Broadway Glass Co., LLC

2025 NY Slip Op 31181(U)

March 27, 2025

Supreme Court, New York County

Docket Number: Index No. 654481/2022

Judge: Lyle E. Frank

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

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

FLIPPERS NYC, LLC,

Plaintiff,

- v -

WEST BROADWAY GLASS COMPANY, LLC, WEST
BROADWAY GLASS CO.

Defendant.

-----X

INDEX NO. 654481/2022

MOTION DATE 12/05/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 114, 115, 116, 117, 118 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, defendant’s order to show cause is granted in part.¹

Background

Flippers NYC, LLC (“Plaintiff”) is the lessee of a store in the building located at 337 West Broadway, New York (the “Premises”), out of which it operates a breakfast restaurant. The building is owned by West Broadway Glass Company, LLC and West Broadway Glass Co. (collectively, “Defendants”). There is another commercial space directly below them (the “Ground Floor Premises”). The Premises had formerly been an office space, so prior to opening in 2019 Plaintiff had conducted a five-month long conversion project. Included in this project was the installation of a new subfloor, flooring, and waterproof membrane. Starting in June of 2022, the tenant for the Ground Floor Premises began to complain about leaks coming in, allegedly from the Premises. Plaintiff, the Ground Floor Tenant, and Defendant began discussing the issue and a water test was performed in July of 2022 and then another in August of 2022,

¹ The Court would like to thank Mingyue Deng, Lingyi Yang, and Ziwei Wang for their assistance in this matter.

following some floor repairs performed by Plaintiff. There appear to be recurring leaks to this day seeping into the Ground Floor Premises. Plaintiff alleges that the recurring leaks in the Ground Floor Premises come from a leaky roof, and that they too have had leaks. Defendants allege that the water testing shows that the leaks are coming from Plaintiff's premises.

Plaintiff brought the underlying proceeding in November of 2022 when Defendants were urging that Plaintiff's business be temporarily shut down in order to replace the flooring. Plaintiff also moved by order to show cause for a preliminary injunction enjoining Defendants from accessing the Premises during the pendency of this proceeding. This TRO was granted, and the parties attempted to enter into an access agreement but were unsuccessful. Defendants moved in May of 2023 to vacate the TRO. An order by this Court was issued in June of 2023, lifting the TRO only to the extent of allowing Defendants access to the premises, giving them leave to again seek the remaining relief. The parties negotiated on a scope of work that resulted in a set of mutually agreed upon Bid Documents in May and August of 2024. Tenant was to provide a date when their preferred contractor could begin the work, but to date has not provided any start dates. Defendants brought the present motion in December of 2024, seeking to vacate the TRO currently in place and for a preliminary injunction enabling them, among other things, to perform the remediations outlined in the Bid Documents. Plaintiff opposes. Oral argument on this motion was held on March 26, 2025.

Standard of Review

“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). The granting of a preliminary injunction lies in the court's discretion and it is “an extraordinary provisional remedy which will only issue where the proponent demonstrates (1) a likelihood of success on

the merits; (2) irreparable injury absent a preliminary injunction, and (3) a balance of equities tipping in its favor.” *Harris v. Patients Med., P.C.*, 169 A.D.3d 433, 434 (1st Dept. 2019).

Discussion

Defendants seek the preliminary injunction and argue that Plaintiff is violating the lease by refusing to repair the leaks and by denying Defendants access in order to repair the leaks. Plaintiff opposes on the grounds that 1) Defendants have not established that the leaks are originating from the Premises instead of the roof; 2) Defendants have failed to establish irreparable harm; 3) that the balance of the equities weigh against Defendants; and 4) Defendants fail to address the heightened standard for a mandatory injunction. For the reasons that follow, Defendants’ motion is granted in part.

Likelihood of Success on the Merits

Whether or not Defendants can show likelihood of success on the merits in large part comes down to whether the likelihood of the undisputed leaks, water damage, and mold in the Ground Floor Premises originates from the Plaintiff’s use of the Premises. This prong of the preliminary injunction test does not require conclusive evidence, but “may be sufficiently established even where the facts are in dispute” and a “prima facie showing of a reasonable probability of success is sufficient.” *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 1401 A.D.3d 430, 431 (1st Dept. 2016). Plaintiff alleges that they themselves have leaks from the ceiling when it rains, and that contractors for the Ground Floor Tenant told Plaintiff that the leaks only appear when it rains. Defendants have submitted expert and client affidavits, along with photographs, to support their contentions that the leaks are ongoing and occur even during long dry periods without rain. Furthermore, the Bid Documents were approved by both parties. Defendants have adequately shown a likelihood of success on the merits.

Irreparable Harm

Plaintiff argues that Defendants cannot show irreparable harm because they can be compensated by money damages. An irreparable harm “means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite*.” *Chrysler Corp. v. Fedders Corp.*, 63 A.D.2d 567, 569 (1st Dept. 1978). Generally, the availability of monetary remedies means a lack of irreparable harm. *See Moltisanti v. East Riv. Hous. Corp.*, 149 A.D.3d 530, 531 (1st Dept. 2017). But the threat of destruction of property constitutes irreparable harm. *See Randisi v. Mira Gardens, Inc.*, 272 A.D.2d 387, 388 (2nd Dept. 2000). Here, Defendants have pointed to the current water damage and mold in the Ground Floor Premises and argue that the damage to property will continue until the leak is fixed. The threat of continuing damage to the building in the absence of repairs satisfies the irreparable harm prong. *See, e.g., Pamela Equities Corp. v. 270 Park Ave. Café Corp.*, 62 A.D.3d 620, 620 (1st Dept. 2009).

Balancing of the Equities

The final prong is the balancing of the equities. This tips in favor of the movant when the harm they would suffer is more than the relative prejudice to the non-movant. *See, e.g., J.S.I.K. Intl. LLC v. Schuster*, 225 A.D.3d 472, 474 (1st Dept. 2024). Here, Defendants risk losing the Ground Floor Tenant and, importantly, sustaining further damage to their property. Plaintiff risks potentially having to temporarily close their business while repairs are made. While the Court understands Plaintiff’s concern, here the balance weighs in favor of Defendants.

Undertaking

Plaintiff has requested that Defendants post an undertaking as required by CPLR § 6312. Such an undertaking is to be “rationally related to the quantum of damages” that the non-movant

would sustain should it ultimately be determined that the movant was not entitled to the injunction. *East 54th Operating LLC v. Brevard Owners, Inc.*, 223 A.D.3d 407, 409 (1st Dept. 2024). Plaintiff, through an affidavit from their CEO, requests an undertaking of their approximate monthly revenue (\$300,000) plus \$200,000 as goodwill damages. Defendants argue that because there “is no chance that the repair work would ever be found to not be necessary and caused by Tenant’s Premises”, the minimum of \$500 should be posted. The Court finds that a reasonable undertaking amount in these circumstances is \$50,000, particularly since the Court is declining to grant the portion of the temporary restraining order requiring Plaintiff to completely cease operations during the remediation work.

Mandatory Injunction

Plaintiff characterizes the requested TRO as a mandatory injunction. Defendants argue that they are mainly seeking to prevent Plaintiff from interfering with Defendants’ remedial work, rather than requiring Plaintiff to act. Mandatory injunctions generally “should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought.” *St. Paul Fire & Marine Ins. Co. v. York Claims Serv.*, 308 A.D.2d 347, 349 (1st Dept. 2003). But “cases do arise where a provisional remedy of this nature is appropriate.” *Second on Second Café v. Hing Sing Trading*, 66 A.D.3d 255, 265 (1st Dept. 2009). These cases include incidents when “the activity complained of will cause irreparable injury to the party seeking such relief before a trial can be held to resolve the underlying controversy.” *Chrysler Corp.*, at 569. Here, the ongoing damage to property, as explored further above, constitutes the threat of irreparable injury to Defendants.

But some of the requested relief, such as an order allowing Defendant and the NYPD to forcibly evict Plaintiff should they not comply with the preliminary injunction, is not narrowly

tailored. Furthermore, at the oral argument on this motion, counsel for Defendants agreed to forgo seeking this part of the requested relief. Defendants also request an order prohibiting Plaintiff from operating at all from the premises until the repairs are done, but they have not adequately shown why this would be necessary and that the repairs cannot be conducted with less interference with Plaintiff's business. Accordingly, it is hereby

ADJUDGED that the defendants' motion is granted in part; and it is further

ADJUDGED and ORDERED that the temporary restraining order in this matter, NYSCEF # 27, is vacated; and it is further

ORDERED that plaintiff Flipper's NYC, LLC is to grant Defendants, their employees and agents unimpeded access to plaintiff's premises for the purpose of investigating and remediating (including, but not limited to, the remediations detailed in the Bid Documents attached as NYSCEF # 91) the water leaks originating from plaintiff's premises; and it is further

ORDERED that plaintiff and its agents are enjoined from interfering with defendants' inspection and remediation of the water leaks, except that they may observe such inspection and remediation; and it is further

ORDERED that defendants are to take all reasonable care to minimize the interference with plaintiff's ordinary course of business during the remediation; and it is further

ORDERED that defendants have three weeks to complete remediation from the date inspection or repair work first starts, with the ability to request a conference with the court should more time be deemed necessary; and it is further

ADJUDGED that plaintiff reserves all rights to challenge the source of the water leaks; and all rights to seek monetary damages related to the above-described inspection and remediation; and it is further

ORDERED that defendants post an undertaking pursuant to CPLR § 6312(b) in the amount of \$50,000, prior to the commencement of the above-described inspection and remediation; and it is further

ADJUDGED that the order to show cause is otherwise denied.

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3/27/2025

DATE

LYLE E. FRANK, 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