

**486 Ninth Ave. LLC v M&T Pretzel Inc.**

2025 NY Slip Op 34191(U)

November 3, 2025

Supreme Court, New York County

Docket Number: Index No. 153386/2025

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LESLIE A. STROTH PART 12M**

*Justice*

-----X

486 NINTH AVENUE LLC,

Plaintiff,

- v -

M&T PRETZEL INC., 484 NINTH AVENUE, LLC,

Defendant.

-----X

INDEX NO. 153386/2025

MOTION DATE 03/17/2025,  
03/17/2025

MOTION SEQ. NO. 001 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 34, 50, 51, 52, 53, 54, 55, 56, 68, 69, 70, 91  
were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 34, 50, 51, 52, 53, 54, 55, 56, 68, 69, 70, 91  
were read on this motion to/for MISCELLANEOUS.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff 486 Ninth Avenue LLC commenced this action seeking injunctive and declaratory relief relating to an iron fence at the rear of its premises located at 486 Ninth Avenue, New York, New York. Plaintiff asserts that Defendant M & T Pretzel Inc. erected a 12-foot iron fence partially encroaching on Plaintiff's property, thereby preventing tenants from the rear apartments from accessing a second means of egress. Plaintiff contends that such egress is required by the New York City Fire Code and that violations were issued by the Department of Buildings ("DOB") and the Department of Housing Preservation and Development ("HPD") for lack of egress. HPD directed Plaintiff to provide a means of egress either through a fireproof passageway or an unlocked door or gate with the consent of an adjoining owner.

Plaintiff filed the instant Order to Show Cause seeking permission to cut an opening or remove the fence altogether. In support, Plaintiff submits the affidavit of its principal, Jung P. Chun, affirmations of counsel, and exhibits including a survey, DOB violations, and HPD directives.

Defendant M & T Pretzel Inc. opposes. Defendant denies responsibility for the fence, asserts that Plaintiff has alternative secondary means of egress through (i) an underground fireproof passageway under Plaintiff's building and (ii) a historic egress route across the property of co-defendant 484 Ninth Avenue LLC, and argues that Plaintiff cannot establish any legal right to create an egress across M & T's commercial yard. Defendant emphasizes that Plaintiff purchased the building with knowledge of its configuration, that violations concerning the fence were dismissed at OATH, and that Plaintiff's claimed relief is unsupported in law, as an easement by necessity requires unity of title and absolute necessity.

### LEGAL STANDARD

Pursuant to CPLR 6301, "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiffs rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005)).

“The party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence that there was a unity and subsequent separation of title, and that at the time of severance an easement over the servient estate's property was necessary” (*Liberty Sq. Realty Corp. v Doe Fund, Inc.*, 202 AD3d 55, 69 [1st Dept 2021]). “The necessity must exist in fact and not in mere convenience, and must be indispensable to the reasonable use of the adjacent property” (*Liberty Sq. Realty Corp. v Doe Fund, Inc.*, 202 AD3d 55, 69 [1st Dept 2021]).

### DISCUSSION

Plaintiff has not demonstrated a likelihood of success on the merits. The record does not establish any easement or legal right to use Defendant M & T's property for egress. Plaintiff has not shown unity of title between its parcel and Defendant's, nor has it shown that access through M & T's commercial yard is “absolutely necessary” rather than a matter of convenience. To the contrary, DOB's violation history notes that Plaintiff may provide egress by constructing a fireproof passageway to the street or by securing consent of an adjoining owner. Plaintiff concedes that no consent has been granted.

Moreover, the opposition papers demonstrate that Plaintiff retains at least two potential alternative means of egress: (i) a fireproof underground passageway beneath its building to Ninth Avenue, and (ii) an unobstructed route across 484 Ninth Avenue's property, subject to removal of an obstruction thereon. Courts have repeatedly declined to impose new property burdens where other alternatives exist. (*Boerum Johnson, LLC v Marte*, 220 AD3d 636, 638 [2d Dept 2023]).

Plaintiff has likewise failed to establish irreparable harm warranting extraordinary relief. Plaintiff purchased the building in its current condition, has managed DOB and HPD violations

using a fire guard, and retains alternative means to resolve the violations. The inconvenience and expense of pursuing other remedies does not constitute irreparable injury.

Finally, the balance of equities does not favor Plaintiff. Defendant's property is a commercial storage yard with active forklift and distribution operations, unsuitable for pedestrian egress. Compelling Defendant to create or permit access would alter the status quo and burden Defendant with substantial safety and operational risks, while Plaintiff retains alternative remedies.


Accordingly, Plaintiff has failed to meet the standard for injunctive relief.

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Order to Show Cause seeking preliminary injunctive relief is denied in its entirety; and it is further

ORDERED that the temporary restraining order(s) issued previously are vacated.

11/3/2025  
DATE

  
**HON. LESLIE A. BROTH**  
J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE