

Midtown Fiesta LLC v Broadway 36th Realty LLC

2017 NY Slip Op 30215(U)

February 1, 2017

Supreme Court, New York County

Docket Number: 153351/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

153351/2016 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 2

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MIDTOWN FIESTA LLC,

Plaintiff,

-against-

BROADWAY 36th REALTY LLC, and
EVO REAL ESTATE GROUP, INC.,

Defendants.
-----X

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS PETITION.

| PAPERS | NUMBERED |
|--|-------------------------|
| PLTF.'S ORDER TO SHOW CAUSE AND AFFS. IN SUPPORT | 1-4 (Exs. A-C; 1-6) |
| PLTF.'S FURTHER AFFS. IN SUPPORT | 5-6 (Exs. D-G; 7-9) |
| DEFS.' AFFS. IN OPP. | 7-9 (Exs. A-M) |
| DEFS.' SUPP. AFFS. IN OPP. | 10-11 (Ex. A) |
| PLTF.'S REPLY AFFS. | 12-14 (Exs. H-M; 10-12) |
| SMITH LETTER | 15 |
| BERKOWITZ LETTER | 16 (Exs. 1-3) |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE PETITION IS AS FOLLOWS:

In this action seeking, inter alia, declaratory relief and damages for breach of contract, Midtown Fiesta LLC (“plaintiff”) moves, by order to show cause (“OSC”), for a preliminary injunction against Broadway 36th Realty LLC (“defendant”). Defendant and co-defendant, EVO Real Estate Group, Inc., oppose the application. After oral argument, and following a review of the parties’ motion papers and the relevant statutes and case law, plaintiff’s application is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about February 23, 2015, Midtown Fiesta LLC (“plaintiff”), as tenant, entered into a lease agreement with Broadway 36th Realty LLC (“defendant”), as landlord, for the purpose of operating a restaurant and bar on the first floor and mezzanine of defendant’s building located at 29 West 36th Street, New York, New York (“the premises”). Ex. 3 to OSC. Defendant EVO Real Estate Group Inc. (“EVO”) was managing agent at the premises. Section 13.02 of the lease required, inter alia, that plaintiff was to obtain a temporary or permanent certificate of occupancy for the premises and that defendant “shall take reasonable efforts to cooperate with and assist [plaintiff] in obtaining all necessary permits, variances and certificate of occupancy . . . for the use of the premises.” Id., at pp. 25-26. Section 13.04 of the lease required defendant, inter alia, to cooperate with plaintiff in obtaining any permits needed to make alterations and in obtaining “a temporary certificate of occupancy and/or other evidence of governmental approval that may be required permitting the use of the [p]remises in accordance with the [lease].” Id., at p. 26.

There is no dispute that extensive alterations were needed to renovate the premises so as to render it suitable to house a restaurant and bar. However, a significant dispute arose between the parties regarding whether, and to what degree, defendant was required to assist plaintiff by obtaining a Fire Protection Plan, a Fire Safety and Evacuation Plan, and Emergency Action plan in order to remove stop work orders which were in place, thereby allowing a Certificate of Occupancy to be issued for the premises. This dispute culminated in defendant’s service on plaintiff of a “Ten (10) Day Notice to Tenant” (“the 4/4/16 Notice”) dated April 4, 2016 which sought the payment of outstanding rent. Ex. 6 to OSC.

On April 20, 2016, plaintiff commenced the captioned action against defendant and EVO

claiming, inter alia, damages in an amount no less than \$1.2 million based on defendant's alleged breach of the lease. Ex. A to OSC. Plaintiff further alleged that it was entitled to a declaration that defendant breached the lease. Id.

Plaintiff now moves, by OSC, seeking an order:

- a) granting plaintiff a preliminary injunction directing defendant and any of its agents, employees, attorneys, or anyone acting on its behalf, to file a Fire Protection Plan for the premises with the New York City Department of Buildings ("DOB") and the New York City Fire Department and to address the existence in DOB records of two stop work orders regarding conditions endangering the health, safety and welfare of plaintiff and its employees;
- b) granting plaintiff a preliminary injunction enjoining defendant, its agents and attorneys, or anyone acting on its behalf, from terminating plaintiff's lease pursuant to the [4/4/16 notice] during the course of this litigation and further enjoining defendant and anyone on their behalf from serving any further notice of termination or commencing any action or proceeding seeking to recover possession of the subject premises; and
- c) for such other relief as this Court deems just and proper.

NYSCEF Doc. Nos. 3-16.

Defendants oppose the application.

At a preliminary hearing held in connection with the OSC on April 22, 2016, this Court declined to issue a temporary restraining order. NYSCEF Doc. No. 17. However, the parties stipulated, among other things, that the 4/4/16 notice was not to be considered a predicate for the service of a termination notice but rather as the predicate for a summary nonpayment proceeding, and that plaintiff would pay base rent and fixed additional rent to defendant by May 10, 2016. Id.

POSITIONS OF THE PARTIES:

Plaintiff asserts that it is entitled to a preliminary injunction because it can demonstrate

defendant's breach of the lease and therefore establish a likelihood of success on the merits. Further, plaintiff argues that it will suffer irreparable harm if an injunction is not granted because "it will be forced to risk loss and interference with [its] sole place of business." Berkowitz Aff. In Supp., at par. 14. Plaintiff also maintains that defendants will not be prejudiced in the event an injunction is granted. In support of its argument, plaintiff maintains that defendant failed to cooperate with it during the renovation process by, among other things, allowing plaintiff's architect to self-certify applications for necessary permits.

In opposition, defendants argue that it was plaintiff's responsibility pursuant to the lease to obtain a Fire Protection Plan. They further assert, inter alia, that plaintiff did not demonstrate a likelihood of success on the merits or that it would suffer irreparable harm if an injunction were not granted.

In its reply, plaintiff essentially reiterates its contention that defendant failed to cooperate during the renovation pursuant to the terms of the lease.

By correspondence dated October 21, 2016, defendant's attorney wrote to plaintiff's attorney stating that it had "come to [his] attention that the plaintiff's build-out of the subject premises as a restaurant and bar has received a temporary Certificate of Occupancy and that plaintiff has been open for business as 'Habanero Blues' since on or about October 15, 2016." NYSCEF Doc. No. 61. Counsel for defendants further requested that plaintiff's OSC be withdrawn as moot given that plaintiff had opened for business. *Id.*

In a November 4, 2016 response to defense counsel's letter, plaintiff's counsel maintained that plaintiff's motion was not moot because the "principal legal issue [of] whether [defendant was] required to file a Fire Protection Plan, a Fire Safety and an Evacuation Plan and Emergency Action

plans as required by both the NYC Building and Fire Codes still requires judicial determination.” NYSCEF Doc. No. 64. Although plaintiff’s counsel acknowledged that his client’s restaurant was open for business pursuant to a temporary Certificate of Occupancy, he insisted that it was to expire on October 27, 2016 and plaintiff will be required to renew the same “in perpetuity” unless defendant “fulfills its legal responsibilities.” Id.

By order dated November 4, 2016, the parties were directed to return to court on November 17, 2016 for a conference addressing the issue of whether the instant OSC was moot. NYSCEF Doc. No. 65. At that conference, plaintiff’s counsel reiterated his contention that the OSC was not moot and he stated that he did not wish to withdraw the same.

LEGAL CONCLUSIONS:

“A preliminary injunction substantially limits a defendant’s rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party.” *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). Whether to grant a preliminary injunction is a matter to be determined in the discretion of the court. *See Cityfront Hotel Assoc. Ltd. Partnership v Starwood Hotels & Resorts Worldwide, Inc.*, 142 AD3d 873 (1st Dept 2016).

Here, plaintiff specifically asserted that it would “suffer irreparable injury in the event [it was not granted a preliminary injunction] because it will be forced to risk loss and interference with [its] sole place of business.” Berkowitz Aff. In Supp., at par. 14. Now that plaintiff’s business has

opened, however, there is clearly no risk of irreparable harm and thus its request for a preliminary injunction must be denied. Thus, this Court need not address the remaining factors usually considered in determining whether to grant a preliminary injunction.

Therefore, in accordance with the foregoing, it is hereby:

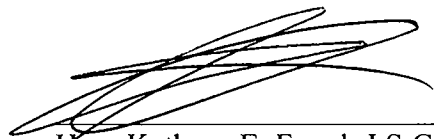
ORDERED that the motion by plaintiff Midtown Fiesta LLC seeking a preliminary injunction is denied; and it is further,

ORDERED that the parties are to appear for a preliminary conference in this matter on April 4, 2017 at 2:30 p.m. at 80 Centre Street, New York, New York, Room 280; and it is further,

ORDERED that this constitutes the decision and judgment of the Court.

DATED: February 1, 2017

ENTER:


Hon. Kathryn E. Freed, J.S.C.