

251 W. 30th St. LLC v 251 W. 30th St. Owner, LLC

2017 NY Slip Op 30645(U)

March 31, 2017

Supreme Court, New York County

Docket Number: 653399/2016

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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251 WEST 30th ST. LLC d/b/a SLAKE,

Plaintiff,

Index No. 653399/2016

- against -

251 WEST 30th ST. OWNER, LLC,

Defendant.

-----X

Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, Defendant 251 West 30th St. Owner LLC ("Owner") moves for a preliminary injunction preventing plaintiff 251 West 30th St. LLC ("Tenant") from using the fire escape route ("Fire Egress") located at 251 West 30th Street ("Subject Premises") for non-emergency purposes.

For the reasons set forth below, this Court grants Owner's motion for a preliminary injunction.

Background

The Subject Premises is a sixteen story structure with a variety of commercial tenants, including residents, a school, music studios, workshops, and offices. Tenant occupies space consisting of a ground floor store, a mezzanine, and the entire second floor (the "Venue").

In 2004, non-parties Justin Tower, Ltd. ("Previous Owner") and SCB Enterprises LLC ("Previous Tenant") entered into a commercial lease (the "Lease"), in which the Previous Owner

leased the Venue to the Previous Tenant for a term of ten years commencing on December 1, 2004, with two five-year extension options. The Lease describes the Venue as "excluding public areas" of the Subject Premises (Ballinger Aff., Exh. B).

By assignment and assumption of the Lease between the Previous Tenant and Tenant dated January 23, 2014, and with consent of Previous Owner, the Lease was assigned to the Tenant. Tenant maintains that it properly and effectively extended the initial term of its ten-year lease (Ballinger Aff., ¶4). In contrast, Owner alleges that Tenant did not effectively renew the Lease due to its failures to cure at least seven Department of Buildings ("DOB") violations (Nocera Aff., ¶4).

Tenant further alleges that it has spent approximately \$1.8 million on improvements and operation costs (Ballinger Aff., ¶2). The Previous Owner purportedly made improvements to the West 30th Street Staircase and corridor by painting the walls and floors and installing electronic displays (Ballinger Aff., ¶15).

Paragraph 6 of the Lease, entitled Requirements of Law, Fire Insurance, provides, in relevant part:

Tenant, at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards and any direction of any public officers pursuant to law, and all orders, rules and regulations of the New York Board of Fire Underwriters or the Insurance Services Office, or any similar body which shall impose any violation, order or duty upon Owner or Tenant with respect to the demised premises... Tenant

shall not do or permit any act or thing to be done in or to the demised premises which is contrary to law, or which will be invalidated or be in conflict with public liability, fire or other policies of insurance at any time carried by or for the benefit of Owner.

(*Id.*)

Paragraph 41(b) of the Rider attached to the Lease ("Rider") requires Tenant to conduct its business in an orderly manner to avoid unreasonable annoyance, discomfort, and/or injury to other tenants, patrons, pedestrians, and adjacent residents (*Id.*).

Paragraph 42(o) of the Rider provides, in relevant part, that "Tenant acknowledges and agrees that it will not block, or permit to be blocked, egress and ingress to the freight elevator or the building lobby entrance" (*Id.*).

Paragraph 85 of the Rider provides, in relevant part:

[T]he hallways and the sidewalks appurtenant thereto, shall be kept free from and unencumbered by any of Tenant's equipment, Tenant's employees' equipment, Tenant's employees...Tenant acknowledges and agrees that the loitering, congregation or assemblage or its employees in said areas and/or the maintenance or storage of its property or property employees in said areas obstruct the flow of traffic in, through and about the building and constitutes a fire hazard and as such, constitutes a breach of a substantial obligation of this lease and shall entitle Owner to declare Tenant [in] default of this Lease and to exercise any remedies available against Tenant at law or in equity including, but not limited to, *the right to seek injunctive relief* or commence eviction proceedings against Tenant after applicable notice to cure period has expired notwithstanding the fact that occurrences complained of are not within the Demised Premises.

(*Id.*)

Rule 1 of the Lease Rule and Regulations provides, in

relevant part, that "the elevators, vestibules, [and] stairways shall not be obstructed or encumbered by any Tenant or used for any purpose other than for ingress in and egress from the demised premises and for delivery of merchandise and equipment in a prompt and efficient manner."

According to the Owner, in compliance with applicable laws, fire codes, and insurance regulations ("Fire Codes"), the Subject Premises is equipped with two separate fire escape routes ("Fire Egresses"), which consist of: (i) fire-proof stairways and corridors ("Fire Stairwells") that run from the uppermost level of the [Subject Premises] to the ground floor; (ii) exits from the Fire Stairwells opening on West 30th Street (the "Fire Discharge Exits"), and (iii) exits and exit access corridors (collectively, the "Fire Exits") through which the Fire Stairwells are entered from the interior portions of the Subject Premises (Nocera Aff. ¶ 5).

It is undisputed that the Owner owns and maintains the Fire Egresses (Nocera Aff. ¶ 6). Owner contends that Tenant is prohibited from using the Fire Egresses for non-emergency purposes. In an affidavit submitted in support of the instant motion, Gerard Nocera, the Managing Partner of Herald Square Properties, LLC, the Managing Member of Owner, indicated that the Fire Discharge Exit doors have a locking system that only allows egress from the Fire Stairwells to West 30th Street (Nocera Aff.

¶ 7).

Presently, Tenant's patrons can access the Venue through six glass doors located at the front of the Subject Premises.

However, Tenant maintains that it is not feasible for its patrons to use these doors for repeated entry because of the resulting excessive noise on the sidewalk and street, and it would make it difficult to regulate the HVAC (Nocera Aff. ¶ 23). As a result, instead of using these entry doors, Tenant has been allowing its patrons to enter the Venue through designated fire entrances.

Owner maintains that when a large event occurs at the Venue, Tenant positions security guards and crowd control barricades at different areas in front of the Subject Premises, including the street exit of both Fire Egresses (See Rohit Aff. ¶5). As a result, Tenant's security guards, personnel, patrons and/or trade fixtures purportedly obstruct and impede the Fire Egresses through the Fire stairwells. Owner asserts that Tenant's crowd control procedures create significant backup and crowding in the Fire Egresses, in breach of the Lease.

On April 28, 2016, the Previous Owner sold the Subject Premises to Owner. One month later, on May 24, 2016, Tenant received a notice terminating Tenant's month to month tenancy ("Terminating Notice"), directing Tenant to vacate the premises by June 30, 2016.

Tenant commenced this action shortly thereafter, seeking a

yellowstone injunction enjoining Owner from terminating, revoking, nullifying, and/or canceling the Lease and temporarily restraining Owner from taking any steps to evict Tenant from the Subject Premises. On June 28, 2016, this Court declined to sign Tenant's proposed order to show cause.

On August 10, 2016, Owner answered and asserted counterclaims for breach of contract, trespass, forcible entry, and detainer. Owner also seeks a declaration that it is entitled to immediate possession of the Subject Premises, use and occupancy of the Subject Premises, and an injunction against Tenant from committing fire code violations.

On October 6, 2016, Owner moved for a preliminary injunction seeking to prevent Tenant from using the Fire Egresses in violation of the Lease and New York City law. Owner asserts that it does not object to Tenant using the Fire Egresses for freight and construction purposes, but does object to Tenant utilizing the Fire Egresses in violation of the Lease and New York City law.

On February 23, 2017, this Court conducted an informal inspection of the Subject Premises, and thereafter, on March 21, 2017, the parties submitted supplemental briefs pertaining to the limited issue of Tenant's use of the passenger elevator to access the Subject Premises. Tenant maintains that pursuant to Rule 1 of the Lease Rules and Regulations, it is entitled to use of the

passenger elevators. Tenant also asserts that the use of the passenger elevator constitutes an appurtenance, as it is necessary to the use and full enjoyment of the demised premises. Owner argues that Tenant's use of the passenger elevators also violates the Fire Code, the Building Code, and the Lease.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) a balance of the equities in favor of the moving party (*1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]).

To establish a likelihood of success on the merits, Plaintiff must make a prima facie showing of a reasonable probability of success (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]). A moving party need not demonstrate a certainty of success (*Doe v Dinkins*, 192 AD2d 270, 275-76 [1st Dept 1993]).

Owner maintains that it is likely to succeed on its breach of contract claim due to Tenant's illegal and unjustified use of the Fire Egresses.

In contrast, Tenant maintains that granting an injunction would frustrate the purpose of the Lease by preventing Tenant from utilizing the freight entrance, freight corridor, and

freight and passenger elevators to allow patrons to access the Venue. Further, Tenant alleges that Owner's breach of contract counterclaim is without merit due to Tenant's implied right under Rule 1 of the Lease, which allows Tenant to use points of ingress and egress from the common areas of the building into the Subject Premises (Ballinger Aff., Exh. B). In an affidavit in opposition to the instant motion, Lorne Kaelin Ballinger, the Vice President of Tenant, maintains that its conduct is not illegal, and it has never received a violation from the DOB, Fire Department of New York ("FDNY"), or New York Police Department ("NYPD") stemming from the use of the Fire Egresses or otherwise (See Ballinger Aff, ¶16).

Tenant also maintains that an appurtenance to the Lease exists, allowing it to utilize the common areas such as the freight entrance, passenger elevators, freight corridor, and freight elevator bar, in order to effectively use and enjoy the Subject Premises, citing *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, in support of this proposition (66 AD3d 255 [1st Dept 2009]).

The Court finds Tenant's arguments unpersuasive, although Rule 1 of the Lease entitles it to use means of egress and ingress into the Subject Premises from the common areas of the building (Ballinger Aff., Exh. B). Nonetheless, this provision does not entitle Tenant to circumvent its obligations under the

New York City Fire Code 1027.2 and portions of the Lease (Lyons Aff., Ex. E, p. 3).

As a result of the high volume of patrons at the Venue, Tenant has implemented a crowd control procedure which can lead to significant backup of Tenant's employees and patrons. This overflow of patrons and employees and the use of the security desk appears to violate Paragraph 42(b) of the Lease, which requires Tenant to keep the common areas of the Subject Premises free from crowds and obstruction.

Tenant's conduct also appears to violate New York City Fire Code § 29-1027.2, which makes it illegal to "obstruct or impede access to any required means of egress, including any exit, exit access or exit discharge" (Lyons Aff., ¶ 6). Further, allowing hundreds of patrons to exit the Venue via three small fireproof doors leading into the Fire Egresses also appears to violate Building Code § 27-371(I), which maintains that "exit doors and corridor doors shall normally be kept in the closed position."

Based on evidence of the above-mentioned violations, Tenant's conduct also appears to violate Paragraph 6 of the Lease, which requires Tenant to comply with all present and future laws and regulations, particularly all orders, rules, and regulations of the New York Board of Fire Underwriters.

Owner has set forth sufficient evidence of Tenant's violations of the Lease as well as relevant portions of the New

York City Fire Code, thereby warranting the conclusion that Owner is likely to succeed on the merits of its breach of contract claim. Similarly, Tenant failed to set forth expert testimony or evidence from a fire prevention professional supporting its allegation that it is entitled to utilize the Fire Egresses to operate its business (Lyons Aff. ¶5).

In support of its arguments, Tenants cite to *Second on Second Café, Inc. v Hing Sing Trading, Inc.* (66 AD3d 255 [1st Dept 2009]). However, this case can be distinguished from *Second on Second Café*. There, the First Department ruled that the installation of a new exterior exhaust vent on the roof of the building was necessary for the use and enjoyment of the premises (*Id.* at 256). Further, there was no evidence that such conduct was wrongful or illegal (*Id.*). Here, at issue is whether Tenant can utilize fire stairwells for ingress and egress, which Owner has effectively demonstrated is in violation of the New York City Fire Code. The record demonstrates that the parties had not intended that Tenant would circumvent its obligations under relevant law to successfully run an eating or drinking establishment.

Owner alleges that while an injunction will not cause irreparable harm to Tenant because it will only ensure compliance with the law, it's denial will cause disproportionate harm to Owner. Owner maintains that, in the absence of an injunction, it

could be exposed to civil liabilities and subject itself as well as its employees to criminal and administrative prosecution. In addition, Owner alleges that Tenant's crowd control procedures place other tenants, Tenant's patrons, and bystanders at risk of injury should an emergency occur.

Tenant maintains that Owner's overbroad injunction impedes Tenant's ability to successfully operate its business. Further, Tenant argues that it has utilized these entrances and exits from the demised premises consistently since it assumed the Lease (Ballinger Aff., § 3). Specifically, prohibiting tenant from using the Fire Egresses for purposes of ingress and egress would render the ground floor rear event space inaccessible, thereby frustrating the terms of the Lease.

Owner has made adequate showing of irreparable harm by establishing that Tenant's use of the Fire Egresses is a safety hazard to residents and patrons, as well as to police and firefighters who need to gain entry during an emergency.

Owner has also sufficiently established that money damages are insufficient to compensate it for Tenant's actions, which places Owner at risk of civil liability should a fire or emergency occur or could, at worse, result in injury or death (*Sirius Satellite Radio, Inc. v Chinatown Apartments, Inc.*, 303 AD2d 261, 261 [1st Dept 2003]).

The "balancing of the equities" usually requires that the

court look to the relative prejudice to each party accruing from a grant or a denial of the requested relief (*Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 186-87 [1st Dept 1993]).

Tenant maintains that an injunction would be inequitable as there is insufficient evidence of a continuing violation of the law. Further, according to Tenant, restrictions on its ability to utilize the Freight Access Areas will negatively impact its ability to operate the Venue. Tenant further argues that an injunction would be inequitable because Owner's invitees, contractors, employees, servants, and agents continue to enjoy access to the Freight Access Areas for means of ingress and egress.

Tenant has failed to establish that it will suffer any calculable and specific harm merely from being bound by their contractual obligations as well as relevant New York City law (*See Somers Assoc. v Corvino*, 156 AD2d 218 [1st Dept 1989]). It is evident that Owner will be prejudiced absent injunctive relief, as Tenant's conduct appears to be illegal and dangerous.

The Court is persuaded that the equities tip in Owner's favor, and rejects Tenant's arguments that compliance with the Lease and relevant New York law will pose a substantial hardship.

Pending a determination on the merits, a preliminary injunction will serve to maintain the status quo, thereby prohibiting any future violations of the Lease or applicable New

York City law.

The owner maintains in its sur-reply that use of the passenger elevator violates section 27-31 of the Fire Code. Since this issue was not part of the original application for preliminary injunction it will not be considered at this time. Accordingly,

ORDERED that Owner's motion for a preliminary injunction is granted; and it is further

ORDERED that the undertaking is fixed in the sum of \$50,000 conditioned that Owner, if it is finally determined that it was not entitled to an injunction, will pay to Tenant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that Tenant shall continue to pay use and occupancy pursuant to the amount set forth in the Lease.

DATED: March 31, 2017

ENTER:

J.S.C.

CHARLES E. RAMOS