SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: COIN PART 63

ELLEN M. COIN *Justice*

Index Number : 652290/2012 J.S.C.
1414 HOLDINGS LLC
vs.
BMS-PSO LLC
SEQUENCE NUMBER : 001
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/30/13

EM , J.S.C.
ELLEN M. COIN
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

1414 HOLDINGS, LLC,

Plaintiff,

Index No.652290/12
DECISION AND INTERIM ORDER
Motion Seq. Nos. 001, 002

-against-

BMS-PSO, LLC,

Defendant.

ELLEN M. COIN, A.J.S.C.:

Plaintiff 1414 Holdings, LLC ("1414")is the owner and recent purchaser of a multi-story building located at 1414 Avenue of the Americas, New York, New York (the "Building"). It bought the Building with the express purpose of converting it from its existing use as a commercial office building into a hotel. Defendant, whose principals are a group of endodontists, has occupied the entire 19th (penthouse) floor of the Building, together with rights to the adjacent Deck, since 1996 pursuant to a written lease (the "Lease"). In January 2011, when 1414 acquired the Building, defendant was the last remaining "space" tenant located above the Building's ground floor.

On January 21, 2011, only three days after it took title, 1414 issued a Notice of Cancellation of Lease to defendant tenant, informing the tenant that the Lease would terminate as of

July 31, 2012, more than eighteen months later. On the verge of the termination date 1414 commenced this action and moved, by order to show cause, for a preliminary injunction requiring defendant to begin the process of removing its patient medical records from the premises so that it would be able to surrender vacant possession on the termination date (motion seq. 001).

In response, defendant moved, also by Order to Show Cause, for an order enjoining plaintiff from closing access to the Building or shutting down its electrical and plumbing services (motion seq. 002).

The court held six days of hearings on the issues raised by each party's motion. Determination of these motions requires interpretation of the Lease.

THE LEASE

The Lease is dated August 26, 1996 and is for a period of fifteen years and six days, ending August 31, 2011.[1] The Lease granted defendant the option to extend the Lease term for two periods of five years each (Lease, Art. 75). Defendant has exercised the first of its five-year renewal options, extending the current Lease term through August 31, 2016 (Compl., para. 6).

Article 86 of the Lease provides:

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[1]A First Amendment to Lease was executed in or about July 2006, intended to clarify and amend the provisions of the original lease concerning the deck/terrace area of the 19th floor. Its provisions are not implicated in the current controversy.

DEMOLITION:

If Landlord intends to apply to the New York City Buildings Department for a permit to demolish all or substantially all of the Building of which the Demised Premises forms a part then Landlord shall be entitled to cancel this Lease by notice given to Tenant, the effective date of which shall be not earlier than August 31, 2011. In addition, the effective date of such cancellation shall be not less than five hundred and forty eight (548) days after the giving of such notice. However, time shall be of the essence as to Tenant's obligations to vacate the Demised Premises on the expiration of the term of this Lease upon the effective date of any such cancellation, and Tenant hereby agrees to indemnify and hold Landlord harmless from and against any cost, claim, liability or expense arising out of Tenant's failure to vacate the Demised Premises upon the date required by any such notice of cancellation. If Landlord exercises its option to cancel this Lease as set forth in this Article 86 and thereafter does not obtain a permit from the New York City Buildings Department for a permit [sic] to demolish all or substantially all of the building which the Demised Premises form a part prior to the effective date of such cancellation, and Tenant and [sic] has not vacated the Demised Premises prior to said effective date, then such cancellation by Landlord shall be void.

The Applications

1414 submitted a number of work applications to the Department of Buildings. These included applications by its architect (Def. Exs. A, G); its structural engineer (Def. Ex. C); its general contractors (Def. Exs. D, F, H, I, K); its master plumber (Def. Ex. E); and its engineer (Def. Ex. J). Those applications were of two types: PW1 Plan/Work Applications and PW2 Work Permit Applications (Testimony of George Berger, Mar. 1, 2013 at 40).

In conjunction with its applications to the Department of Buildings, and in support of them, 1414 submitted plans

reflecting its proposed changes. Specifically, in connection with the Work Permit issued on June 20, 2012 (Pl. Ex. 17), it submitted the plans denominated at the hearing as Plaintiff's Exhibits 3, 5, 7 and 8; in connection with the Work Permit issued on June 27, 2012 (Pl. Ex. 18), it submitted the plans denominated as Plaintiff's Exhibit 2.

The June 20, 2012 Work Permit describes the work covered by the permit as follows: "Alteration type 1-application filed to change use of building from offices to hotel. Relocate existing floor area to fill in southeast corner on 3rd through 18th floors. No increase to zoning floor area."

The June 27, 2012 Work Permit describes the work covered as follows: "Alteration type 2-gen. constr application filed for interior demolition on floors cellar to 18. No change in use, egress or occupancy." The comments section in the Application Details supporting each Work Permit states, "Herewith filed to include 50% or more of work in the area of buuilding [sic] for exterior work under this appl [sic] and to include the demo of 50% of work under appl #120710515".

THE PLEADINGS

Plaintiff pleads two causes of action: (1)for a declaratory judgment that tenant is in breach of its obligation to wind down its practice and for a permanent injunction requiring the tenant to remove its medical records, or (2)for a declaratory judgment

that plaintiff can box up defendant's records and convey them to the State Department of Health.

Defendant's counterclaims seek (1)a declaratory judgment that 1414 is not entitled to evict defendant by means of self-help absent court order; and (2)a preliminary and permanent injunction precluding 1414 from cutting off defendant's utilities and access to the Building.

DISCUSSION

In order to obtain preliminary injunctive relief, the movant must show (1)a likelihood of success on the merits of the action; (2)the danger of irreparable injury in the absence of preliminary injunctive relief; and (3)a balance of equities in its favor. (*See, e.g., Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005], citing CPLR 6301). "However, the function of a provisional remedy is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011][citation and internal quotation marks omitted]). Thus, a mandatory preliminary injunction, such as 1414 seeks here, is appropriate only where such extraordinary relief is essential to maintaining the status quo. (*Id.*). That is certainly not the case here, where 1414 seeks to have defendant move all of its medical records out of the Building.

LIKELIHOOD OF SUCCESS

As noted, determination of the likelihood of success for each side on its respective motion turns on whether 1414 has properly invoked Article 86 of the Lease. Two sentences of that paragraph are critical to this determination. The first provides, "If Landlord **intends to apply to the New York City Buildings Department for a permit to demolish all or substantially all of the Building** of which the Demised Premises forms a part then landlord shall be entitled to cancel this Lease...." (emphasis added). The second critical section states, "**If Landlord exercises its option to cancel this Lease as set forth in this Article 86 and thereafter does not obtain a permit from the New York City Buildings Department** for a permit [sic] **to demolish all or substantially all of the building** which the Demised Premises form a part prior to the effective date of such cancellation, and Tenant and [sic] has not vacated the Demised Premises prior to said effective date, then such cancellation by Landlord shall be void." (emphasis added).

As defendant argues, there is no prior case interpreting language identical to that of the instant Lease. Nevertheless, the court is not entirely without guidance in construing the operative language of the Lease.

The Appellate Division, First Judicial Department, established the principle that a common sense meaning of

"demolish" is not confined to razing the building. (*Jack LaLanne Biltmore Health Spa, Inc. v Builtland Partners*, 99 AD2d 705, 706 [1st Dept 1984][citing *Friedman v Ontario Holding Corp.*, 279 App Div 23 (1st Dept 1951), *aff'd* 304 NY 625 (1952)]; *see also North Shore Mart v F.W. Woolworth Co.*, 124 AD2d 574 [2d Dept 1986]). Thus, in *Jack LaLanne*, the Appellate Division determined that as a practical matter the Biltmore Hotel was demolished, where all that remained of the "old Biltmore" was most of the steel skeleton and two structural slabs above Grand Central Station; everything else, such as the exterior masonry, internal walls, floors, ceilings, elevators, fixtures, electrical and plumbing conduits had been removed. (99 AD2d at 705).

Similarly, in *Friedman,* in interpreting the former Business Rent Law, the First Department found a demolition although the existing foundation, steel columns, facing and cornice of a two-story building was used in the construction of a twenty-story office building incorporated into an existing, adjacent twenty-story office building. (279 App Div at 25).

In *Peckham v Calogero* (12 NY3d 424 [2009]) the Court of Appeals upheld the determination of the State Division of Housing and Community Renewal (DHCR), which granted a landlord's application to refuse renewal of its tenant's lease. There the landlord planned to "demolish" the building by removing its roof, entire interior, partitions, floor joints, subfloors, building

systems, entire rear wall and much of the facade. Indeed, the landlord's plan stated, "Once the demolition is completed, one will be able to stand on the roof of an adjoining building and look straight down to the basement of this Building." (54 AD3d at 29). The Court noted that while the Rent Stabilization Law and Code contained no precise definition of "demolition", DHCR's interpretation of the term, upheld by the courts, did not require that the structure be razed to the ground, but that "[a]n intent to gut the interior of the building, while leaving the walls intact" was sufficient. (12 NY3d at 431). (*But see Robbins v Herman*, 11 NY2d 670, 672 [1962][reinstating State Rent Administrator's determination that proposed alteration of apartment building, replacing 26 apartments with 43 apartments, did not constitute demolition]).

Here, in contrast, plaintiff's evidence fails to show that it intends to "demolish" all or substantially all of the Building.

The Building has a cutout at the southeast corner from the 3d floor through the 18th floor, which 1414 plans to fill in. To expand the Building to fill in the missing corner, 1414 will remove 17 linear feet of walls[2] from the 3rd through the 17th

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[2]Pl. Ex.7 at A-101.00, 3d-17th Floor Plan

floors at the Building's southeast corner and the column supporting the floor area there; add to the existing foundation to provide support for a new column at the new corner of the Building; and extend the existing walls (Testimony of Silvian Marcus Aug. 14, 2012, at 39-42, 44, 52, 54; Pl. Ex. 3 at S-400.01). However, this change will involve only 5% of the total perimeter of the Building and require removal and replacement of only one of the approximately 40 existing principal columns providing support to the Building.[3]

In addition, 1414 will relocate one of two existing staircases, and will cut openings in the floor slabs (1)to permit the relocation, (2)to expand an existing elevator and (3)to install a new service elevator (Pl. Ex.3 at S-400.01; Pl. Ex. 20 at SOE-500.00, S0E-530.00). However, the balance of the floor slabs are to remain intact. Further, while 1414 plans to remove 3 to 5 structural beams from each floor of the Building, over 100 beams on each floor will remain intact (Marcus testimony Nov. 9, 2012 at 13-16, 20-21, 23-24, 31-32; Berger testimony Mar. 1, 2013 at 85-6).

On all floors except the one occupied by defendant, 1414 has removed the interior walls from the former offices, along with

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[3]The parties differed as to the number of columns in the Building pre-renovation. (Owner's Post-Hearing Memo. at 24, n39; Def's Post-Hearing Memo at 11).

appurtenant plumbing, electrical and HVAC units[4].

Thus, while 1414 is to expand the southeast corner of the Building to enlarge it, most of the structural elements of the building are to remain intact, including the floors, the columns and the beams. The existing elevators are to remain, one is to be added, and a staircase is to be relocated.

Similarly, plaintiff's permits from the Department of Buildings fail to meet the second criterion of Article 86: obtaining a permit to demolish all or substantially all of the Building. Neither of its permits (Pl. Exs. 17, 18) is for demolition of "all or substantially all" of the Building. The first permit states that the southeast corner on the 3rd through 18th floors is to be filled in (Pl. Ex. 17). The second permit is "for interior demolition on floors cellar to 18" (Pl. Ex. 18). As noted, the plans supporting the applications underlying these permits show that the vast majority of the essential Building structural elements are to remain intact. Further, the amendments to the applications submitted in support of these permits ("to include 50% or more of work...for exterior work and to include the demo of 50% of work under appl #120710515") fail to meet the second criterion of Article 86.

1414 concedes as much. It states, "Owner has never

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[4]Removal of these units created holes in portions of the exterior Building wall.

contended that the structural demolition work, if considered alone, and as a proportion of just the Building's total structural elements, involves more than 50% thereof." (Owner's Post-Hearing Memo at 6). Instead, it argues that "the test is whether, on a qualitative basis--considering, altogether, both the interior total gut-demolition work, and also the significant and substantial structural demolition work approved here, all in the context of the fundamental change of use here--the 'commercial office building' that existed when the Lease was made, is now being destroyed." (Owner's Post-Hearing Memo at 6; emphasis in text).

It is well settled that "when parties set down their agreement in a clear, complete document, their writing should...be enforced according to its terms." This rule is of "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where [the document] was negotiated between sophisticated, counseled business people negotiating at arm's length. In such circumstances, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (*Vermont Teddy Bear Co.*,

Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004][citations and internal quotations omitted]; *Tantleff v Truscelli*, 110 AD2d 240, 244 [2d Dept 1985], *aff'd* 69 NY2d 769 [1987]).

The instant Lease is comprised of a Standard Form of Loft Lease with six pages of insertions plus a 23-page Rider. The Lease does not provide for cancellation in the event of alteration or "change of use;" that is not the test. Instead of focusing on Article 86, 1414 points to two references in the Lease to the word "building" to support its contention that changing its use from a commercial office building to a hotel gives it the right to cancel defendant's Lease. Thus, it argues that in requiring the Owner to maintain "the exterior of and the public portions of the building,"[5] the Lease demonstrates that the Building is not merely its skeleton, but its interior systems. However, 1414 overlooks the fact that more than the mere skeleton of the Building is to be preserved under its own conversion plans: the interior stairs, elevators, floors, ceilings and roof are also to remain.

Plaintiff's second citation in the Lease is to Article 90, paragraph (E), which permits access to defendant to areas within the Building for installation of wiring, so long as such installation does not adversely affect other tenants or occupants "or [t]he building as a commercial office building." There is no

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[5]Lease, Article 4.

dispute that at the time the parties entered into the Lease the Building was being operated as a commercial office building. It is, however, a considerable stretch to construe Article 86, governing cancellation of the Lease, in accordance with this telecommunications wiring provision.

Article 86 of the Lease did not refer to an alteration of the Building or change of use as a predicate for its cancellation. Thus, the court finds that 1414's Notice of Cancellation fails to conform to the requirements of Article 86 of the Lease. Accordingly, 1414 has failed to establish its likelihood of success on the merits of its complaint and defendant has established the likelihood of its success on the merits of its counterclaim for a declaratory judgment that 1414 is not entitled to cut off its access to the Building and to utilities.

IRREPARABLE INJURY

Plaintiff has also failed to demonstrate that it will suffer irreparable injury if the requested mandatory preliminary injunction is not granted. Indeed, it concedes that if its motion is not granted, 1414 "is prepared to provide a protected space on the 19th Floor" for storage of defendant's medical records. (Plaintiff's Post-Hearing Memo n.2).

Conversely, defendant has established irreparable injury in the potential loss of utilities and services required to operate

its premises as a dental practice. Defendant alleges that after exercising its option to renew the Lease it invested between $175,000 to $200,000 in its space in the Building, a penthouse suite with terraces and views of Central Park where its members have practiced dentistry for over fifteen years. (*See, e.g., Oriburger, Inc. v B.W.H.N.V. Assocs.*, 305 AD2d 275, 279-280 [1st Dept 2003][loss of restaurant business developed over 22 years]; *South Amherst, Ltd. v H.B. Singer, LLC*, 13 AD3d 515, 517 [2d Dept 2004][property suited to amusement-ride business]; *City of New York v Red River Partners, LLC* 2011 WL 6330183 [Sup Ct, New York County 2011][garage and maintenance facility leased for 99 years]); *cf. Louis Lasky Memorial Medical & Dental Center LLC v 63 West 38th LLC*, 84 AD3d 528 [1st Dept 2011][potential damages compensable in money where lease provided for substantial payment to tenant on termination]).

Here, defendant will be unable to practice dentistry absent the electrical service, plumbing service and Building access it seeks to retain in its application for a preliminary injunction. (*See, e.g., City of New York v Red River Partners, LLC,* 2011 WL 6330183 [Sup Ct, New York County 2011]; *Omabuild Corp. v Dolron Restaurant, Inc.*, 1994 WL 16856827 [Sup Ct, New York County 1994]).

BALANCE OF THE EQUITIES

The equities balance in favor of defendant tenant.

Defendant maintains, and 1414 concedes, that conversion of the premises to a hotel will be feasible even if it cannot immediately include the 19th floor as part of the hotel. (Aff. of Robert A. Wolfson sworn to July 16, 2012, ¶49 at 20; Aff. of Gavin A. Middleton sworn to June 28, 2012, ¶18 at 8). Moreover, defendant's zoning and land use law expert contends that under existing law, defendant's use of the premises for the practice of endodontics would remain legal after the conversion of the balance of the Building to a hotel (Aff. Of Carole S. Slater dated July 17, 2012, ¶15). 1414 does not contend that defendant is failing to pay its rent. Based on all of the foregoing, 1414 will not be prejudiced by an injunction pending determination of the underlying action (*Oriburger, Inc. v B.W.H.N.V. Assocs.*, 305 AD2d at 280; *City of New York v Red River Partners, LLC*, 2011 WL 6330183).

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's application for a preliminary injunction is denied; and it is further

ORDERED that defendant's application for a preliminary injunction is granted, conditioned upon the filing of an undertaking. Counsel for each party shall submit to the court within one week from the docketing of this decision its proposal for an undertaking to be filed by defendant in an amount that defendant will pay to plaintiff for damages and costs in the

event that it is finally determined that defendant was not entitled to the injunction. CPLR 6312(b). Pending such submission and further order of this court, the temporary restraining order granted in motion sequence 002 is continued.

This constitutes the decision and interim order of the Court.

Dated: May 30, 2013

Ellen M. Coin, A.J.S.C.