SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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ASANDA PARK AVENUE, INC., and
GENE FRISCO,

Index No. 653623/2016

Plaintiffs

- against -

DECISION AND ORDER

120 EAST 56TH STREET, L.L.C.,

Defendant

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APPEARANCES:

For Plaintiffs
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For Defendant
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LUCY BILLINGS, J.S.C.:

I. ISSUES PRESENTED

Plaintiffs are a corporate tenant that sells spa services and products in defendant's building at 120 East 56th Street, New York County, and the individual guarantor of plaintiff tenant's obligations under its lease with defendant. Plaintiffs move for partial summary judgment on their eighth claim, that defendant has actually evicted plaintiff tenant from part of the second floor terrace within the leased premises, C.P.L.R. § 3212(b) and (e), and for removal to this court and consolidation with this action defendant's summary proceeding for nonpayment of rent against plaintiff tenant in the New York City Civil Court in New

York County. C.P.L.R. §§ 325(b), 602.

Plaintiffs' witnesses attest that defendant has permitted the owner of the adjacent building at 425 Park Avenue to erect a sidewalk shed and scaffolding as overhead protection against falling debris from demolition, excavation, and construction at the adjacent building. This sidewalk shed and scaffolding have blocked off part of the second floor terrace, preventing plaintiffs from constructing an enclosure over the terrace and a barrier around the air conditioning unit to create a sunlit quiet space for clients. The shed and scaffolding have also damaged the heating, ventilation, and air conditioning (HVAC) compressor and restricted access to the compressor for its maintenance and repair. Claiming an actual partial eviction that suspends the obligation to pay rent, plaintiff tenant has withheld approximately $38,000 per month in rent payments during the last nine months, which defendant seeks in its nonpayment proceeding.

Although not sought by plaintiffs' notice of their motion, nor supported by their affidavits, plaintiffs also claim defendant has permitted the adjacent building owner to extend an overhead protective sidewalk shed and scaffolding in front of defendant's facade on 56th Street. This structure has moved part of plaintiff tenant's signage in the form of a flag, blocked visibility of a second installed flag, and prevented installation of signage in the form of awnings. The areas of signage installation are not part of the leasehold, but the lease permits plaintiff tenant to install its signage in those areas.

Defendant's witnesses attest that the overhead protection covers only a non-material, de minimis part of the second floor terrace limited to the air conditioning units. Regarding the claimed obstruction of signage, defendant concedes that it has not permitted plaintiff tenant to install and maintain all the signage permitted under the lease. Defendant's witnesses nonetheless point out that the adjacent building owner's additional sidewalk bridge and netting to which defendant did not agree, as the bridge and netting do not encroach on defendant's premises, already obscures plaintiff tenant's flags, regardless of the sidewalk shed and scaffolding over defendant's premises that defendant did agree to.

II. ACTUAL PARTIAL EVICTION

To have actually evicted plaintiff tenant from part of the leased premises, defendant must have (1) wrongfully ousted and (2) physically expelled or excluded plaintiff tenant from possession of part of the leasehold. Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77, 82-83 (1970); Marchese v. Great Neck Terrace Assoc., L.P., 138 A.D.3d 698, 699-700 (2d Dep't 2016); Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc., 17 A.D.3d 453, 453 (2d Dep't 2005). The second element distinguishes actual eviction from constructive eviction, which still requires the landlord's wrongful action, a material deprivation of the leasehold's beneficial use, and the tenant's abandonment of at least part of the leasehold, but not a physical expulsion or exclusion. Barash v. Pennsylvania Term. Real Estate

Corp., 26 N.Y.2d at 83, 86; Schwartz v. Hotel Carlyle Owners Corp., 132 A.D.3d 541, 542 (1st Dep't 2015); Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d 167, 172 (1st Dep't 2010); Jackson v. Westminster House Owners Inc., 24 A.D.3d 249, 250 (1st Dep't 2005). Causing the leased premises to become unusable "is insufficient, as a matter of law, to make out an actual eviction," Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d at 82, which entails both a deliberate disturbance of plaintiff tenant's possession as well as a material deprivation of its beneficial use of the premises. Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d 617, 623 (2012); Bostany v. Trump Org. LLC, 88 A.D.3d 553, 554-55 (1st Dep't 2011); Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d at 172; Marchese v. Great Neck Terrace Assoc., L.P., 138 A.D.3d at 699-700.

An actual eviction, even if from only part of the leasehold, and even though plaintiff tenant remains in possession of the remainder of the leasehold, suspends the entire rent, because defendant, having caused the actual partial eviction through wrongful action, may not apportion defendant's own wrong. Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d at 622; Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d at 83-84. See Joylaine Realty Co., LLC v. Samuel, 100 A.D.3d 706, 706-707 (2d Dep't 2012); Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc., 17 A.D.3d at 453; 487 Elmwood v. Hassett, 107 A.D.2d 285, 288 (4th Dep't 1985). Nevertheless, not every intrusion into the leased premises justifies a total

suspension or abatement of rent. Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d at 622; Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 A.D.2d 258, 260-61 (1st Dep't 2001). An intrusion that does not materially interfere with plaintiff tenant's use of the premises may warrant damages compensating for the intrusion or injunctive relief prohibiting the intrusion, rather than a suspension of rent. Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d at 622-23; Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d 101, 106 (1st Dep't 2013). See id. at 624; Carlyle, LLC v. Beekman Garage LLC, 133 A.D.3d 510, 511 (1st Dep't 2015); Camatron Sewing Mach. v. Ring Assocs., 179 A.D.2d 165, 167 (1st Dep't 1992); 487 Elmwood v. Hassett, 107 A.D.2d at 288.

A. Defendant's Wrongful Action

The parties stipulate that the court may consider the lease attached as Exhibit H to plaintiffs' motion authenticated and admissible for purposes of determining their entitlement to partial summary judgment. Paragraph 34 of the lease provides:

> If an excavation shall be made upon land adjacent to the demised premises, . . . Tenant shall afford to the person causing . . . such excavation, a license to enter upon the demised premises . . . to preserve the wall or the building of which the demised premises form a part from injury or damages, . . . without any claim for damages or indemnity against Owner, or diminution or abatement of rent.

Aff. of Gene Frisco Ex. H ¶ 34 (emphasis added).

The parties agree that the adjacent building owner has excavated its land adjacent to the demised premises. Plaintiffs claim the adjacent owner's sidewalk shed and scaffolding are to

protect pedestrians from falling debris overhead. Defendants' witnesses, on the other hand, attest that the sidewalk shed and scaffolding blocking off part of the second floor terrace are to preserve the terrace and other parts of defendant's building from damage due to the falling debris and adjacent construction activity.

No New York City Building Code provision or other law that defendant relies on required its or plaintiff tenant's cooperation in providing the overhead protection, however, as defendant urges. The code required the adjacent building owner to provide that protection, which defendant made a business decision to allow, to avoid litigation by the adjacent owner under R.P.A.P.L. § 881, and to play a role in devising the means to preserve defendant's building, and which plaintiffs did not impede. Nevertheless, under ¶ 34 of the lease, defendant at minimum raises a factual issue whether defendant's collaboration in any physical exclusion of plaintiff tenant from the second floor terrace was not wrongful, but instead was entirely permissible to preserve defendant's building from damage. Carlyle, LLC v. Beekman Garage LLC, 133 A.D.3d at 510; Jackson v. Westminster House Owners Inc., 24 A.D.3d at 250; Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 A.D.2d at 260-61.

Defendants' witnesses do not attest to a similar purpose of the overhead protective sidewalk shed and scaffolding in front of defendant's facade on 56th Street that plaintiffs claim has moved or blocked visibility of plaintiff tenant's installed signage and

prevented installation of further signage. Defendant's very concession that this shed and scaffolding are in front of the building facade, over the sidewalk, indicates that this structure is in fact solely to protect pedestrians from falling debris overhead. While defendant insists that the lease does not require that plaintiff tenant's signage be visible, the lease does require that plaintiff tenant be permitted to install and maintain its signage in specified areas and be free to select within those areas sites of maximum visibility. The adjacent building owner's construction of the overhead protective sidewalk shed and scaffolding in front of defendant's facade on 56th Street, with which defendant has collaborated, has undisputedly blocked plaintiff tenant from installing and maintaining its signage at its selected sites within the lease's parameters.

Contrary to defendant's suggestion, again, no law requires plaintiff tenant to accede to the blockage of permitted signage. Nor is the signage a building service, governed by ¶ 91(C) and (D) of the lease, which permit the interruption or suspension of such a service when required by law or the landlord's, not the adjacent building owner's, alterations, improvements, or similar activity. As set forth below, ¶ 90 of the lease governs signage, distinct from building services.

Nevertheless, because the installation of the signage is in an area that is not part of the leasehold, any physical expulsion or exclusion from this area is not an actual partial eviction unless plaintiff tenant's entitlement to use that area amounts to

an easement appurtenant to the leasehold. Second on Second Cafe v. Hing Sing Trading, Inc., 66 A.D.3d 255, 267-68 (1st Dep't 2009); Badding v. Inglis, 112 A.D.3d 1329, 1330-31 (4th Dep't 2013); 487 Elmwood v. Hassett, 107 A.D.2d at 286. Again, the interference must entail a physical ouster, not just a diminution of use. Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d at 85-86; 127 Rest. Corp v. Rose Realty Group, LLC, 19 A.D.3d 172, 173-74 (1st Dep't 2005); 487 Elmwood v. Hassett, 107 A.D.2d at 287.

Even if plaintiffs' motion might be construed as seeking a declaration that defendant has actually evicted plaintiff tenant from the area of the signage, plaintiffs have not established that the tenant was granted an easement on that area. An easement is a permanent interest in real property created by a grant or conveyance, as by a deed. Willow Tex v. Dimacopoulos, 68 N.Y.2d 963, 965 (1986); Kampfer v. DaCorsi, 126 A.D.3d 1067, 1068 (3d Dep't 2015); Millbrook Hunt v. Smith, 249 A.D.2d 281, 282-83 (2d Dep't 1998); Clements v. Schultz, 200 A.D.2d 11, 13 (4th Dep't 1994). Any ambiguity as to the permanence of the right of use dictates that it be construed as a license to use the real property, rather than an easement. Willow Tex v. Dimacopoulos, 68 N.Y.2d at 965. When the right of use did not predate the lease, the right must be necessary to the premises' use expressed in the lease. Second on Second Cafe v. Hing Sing Trading, Inc., 66 A.D.3d at 269-70.

Paragraph 90(H) of the lease provides that "Landlord hereby

consents to . . . Tenant's installation of two (2) exterior white flags and new white awnings above each window . . . ." Frisco Aff. Ex. H ¶ 90(H). Signage, as important as it may be to plaintiff tenant's business, is a dispensable accessory to its sale of spa services and products. More significantly, paragraph ¶ 90(H) lacks any grant or conveyance of a permanent or enduring interest in the areas where plaintiff tenant is authorized to install signage. The absence of such terms from this lease provision, as well as the inessential connection between the signage and plaintiff tenant's business, at minimum raises an issue whether this provision is simply a license to enter those areas to install and maintain the signage, personal to this tenant, and limited to the lease's duration, rather than an easement. Willow Tex v. Dimacopoulos, 68 N.Y.2d at 965; Kampfer v. DaCorsi, 126 A.D.3d at 1068; State of New York v. Johnson, 45 A.D.3d 1016, 1019 (3d Dep't 2007). See Second on Second Cafe v. Hing Sing Trading, Inc., 66 A.D.3d at 269-70; Millbrook Hunt v. Smith, 249 A.D.2d at 282.

B. Exclusion or Expulsion

Plaintiffs demonstrate that the sidewalk shed and scaffolding have prevented plaintiff tenant's intended use of the entire second floor terrace as an enclosed area in which to provide its services to clients and have damaged and restricted access to the HVAC compressor. Plaintiffs do not demonstrate that the shed and scaffolding have barred access to or possession of any part of the terrace other than the air conditioning units

or any other part of the leasehold. Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 A.D.2d at 261. See Bostany v. Trump Org. LLC, 88 A.D.3d at 555; Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d at 173. Plaintiffs present no measurement of the percentage of leasehold space occupied by the air conditioning units. Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d at 106; Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 A.D.2d at 261. See 487 Elmwood v. Hassett, 107 A.D.2d at 288.

The lease and defendant's witnesses demonstrate that the leasehold consists of the entire second floor of the building, plus the terrace, plus portions of the building's basement, all of which plaintiff tenant continues to occupy, except the air conditioning units' immediate surroundings. This evidence suggests not only that the air conditioning units may be an insignificant portion of the terrace, but also that the entire terrace, of which the units are a small part, is in turn a small part of the entire second floor, and that the entire leasehold expands well beyond the entire floor. See Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d at 624; Goldstone v. Gracie Terrace Apt. Corp., 110 A.D.3d at 105-106; Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 A.D.2d at 261.

The location of the sidewalk shed and scaffolding, covering only the air conditioning units, also may minimize the structure's measurable effect on space essential to the leasehold's use. Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d at 624; Cut-Outs, Inc. v. Man Yun Real Estate

Corp., 286 A.D.2d at 261. Plaintiffs present no evidence of how essential their proposed enclosure was to plaintiff tenant's operations, or even when plaintiffs intended to complete the enclosure for use in the business, or losses in expected sales, revenue, or customers because the intrusion on the air conditioning units prevented plaintiff tenant from proceeding with its operations. Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d at 172-73; 487 Elmwood v. Hassett, 107 A.D.2d at 290. Defendant's evidence at minimum raises a factual issue whether the sidewalk shed and scaffolding bar only a non-material, de minimis part of the entire leasehold and thus do not constitute an actual eviction that suspends the entire obligation to pay rent. Eastside Exhibition Corp. v. 210 E. 86th St. Corp., 18 N.Y.3d at 622-23; Pacific Coast Silks, LLC v. 247 Realty, LLC, 76 A.D.3d at 173; Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 A.D.2d at 260-61; Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc., 17 A.D.3d at 454.

III. CONSOLIDATION

Since this court has found material factual issues that preclude summary judgment on plaintiffs' claim of an actual partial eviction, the parties may proceed in the Civil Court to a trial of those issues, as well as the tenant's partial constructive eviction defense and any other defenses to the nonpayment of rent that overlap with its claims here. Those defenses are central to the Civil Court's determination of the tenant's rent obligation, if any. The Civil Court may not

determine the landlord's rent claim without determining those defenses. Simens v. Darwish, 105 A.D.3d 686, 686 (1st Dep't 2013). The tenant may obtain complete relief on the merits of those claims in defense of the nonpayment proceeding, Brecker v. 295 Cent. Park W., Inc., 71 A.D.3d 564, 565 (1st Dep't 2010), and, insofar as plaintiffs have not elected their remedies, may obtain damages here for any contractual breaches that deprived the tenant of its use of the leased premises and interfered with its business operations. See Schwartz v. Hotel Carlyle Owners Corp., 132 A.D.3d at 542-43; Bostany v. Trump Org. LLC, 88 A.D.3d at 554; 487 Elmwood v. Hassett, 107 A.D.2d at 288-89.

The Civil Court proceeding is set for trial January 3, 2017. Plaintiffs acknowledge that this action, in contrast, is far from ready for trial, and both sides need disclosure before proceeding to trial. The tenant has not sought disclosure in the nonpayment proceeding, C.P.L.R. § 408, and, by moving for summary judgment, demonstrates the absence of any need for disclosure relating to the actual partial eviction claim. See Brecker v. 295 Cent. Park W., Inc., 71 A.D.3d at 565. Consolidation of the nonpayment proceeding with this action would only delay, dramatically, the nonpayment proceeding's immediate trial. Wachovia Bank, N.A. v. Silverman, 84 A.D.3d 611, 612 (1st Dep't 2011); Ahmed v. C.D. Kobsons, Inc., 73 A.D.3d 440, 441 (1st Dep't 2010); Cronin v. Sordoni Skanska Constr. Corp., 36 A.D.3d 448, 449 (1st Dep't 2007); Goldman v. Rosen, 15 A.D.3d 321, 321 (1st Dep't 2005). See Simens v. Darwish, 105 A.D.3d at 687.

Keeping this action separate need not pose a risk of inconsistent dispositions. See Murphy v. 317-319 Second Realty LLC, 95 A.D.3d 443, 445 (1st Dep't 2012); Badillo v. 400 E. 51st St. Realty LLC, 74 A.D.3d 619, 620 (1st Dep't 2010); Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 340 (1st Dep't 2006); Matter of Progressive Ins. Co., 10 A.D.3d 518, 519 (1st Dep't 2004). The issues in the nonpayment proceeding overlap with the issues here, but they are not so inextricably intertwined that dual litigation is unfeasible or inefficient. Insofar as this action involves issues in common with the Civil Court proceeding, the determination of those issues upon the trial of that proceeding, involving two of the three parties here, may determine the same issues here under principles of preclusion. Matter of Hunter, 4 N.Y.3d 260, 269 (2005); Gellman v. Henkel, 112 A.D.3d 463, 464 (1st Dep't 2013); PJA Assoc. Inc. v. India House, Inc., 99 A.D.3d 623, 624 (1st Dep't 2012); UBS Sec. LLC v. Highland Capital Mgt., L.P., 86 A.D.3d 469, 474 (1st Dep't 2011). In any event, this action may proceed to determine plaintiffs' contractual and negligence claims for lost business and damage to personal property. See Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d 51, 58-59 (1st Dep't 2006). Since this court has determined the single claim that plaintiffs have presented for immediate disposition here, no reason of judicial efficiency or avoidance of inconsistent dispositions remains to dictate a stay of the nonpayment proceeding's determination of the issues before the Civil Court. C.P.L.R. § 2201. E.g., Wachovia Bank, N.A. v.

Silverman, 84 A.D.3d at 612; Handwerker v. Ensley, 261 A.D.2d 190, 191 (1st Dep't 1999); Dun-Donnelly Publ. Corp. v. Kenvic Assoc., 225 A.D.2d 373, 374 (1st Dep't 1996). See Fewer v. GFI Inc., 59 A.D.3d 271, 271-72 (1st Dep't 2009); Somoza v. Pechnik, 3 A.D.3d 394, 394 (1st Dep't 2004); Lessard v. Architectural Group, P.c. v. X & Y Dev. Group, LLC, 88 A.D.3d 768, 770 (2d Dep't 2011).

IV. CONCLUSION

Because material factual issues remain bearing on plaintiffs' claim of actual partial eviction, the court denies their motion for partial summary judgment on that claim. C.P.L.R. § 3212(b) and (e). These issues include whether:

(1) the sidewalk shed and scaffolding blocking off part of the second floor terrace are to preserve defendant's building from damage and thus permissible under ¶ 34 of the parties' lease, rather than wrongful;

(2) physical expulsion or exclusion from the area for installation of the signage is the denial of a license, rather than an eviction from an easement appurtenant to the leasehold; and

(3) the sidewalk shed and scaffolding bar only a non-material, de minimis part of the entire leasehold and thus do not suspend the entire obligation to pay rent.

For the further reasons explained above, the court also denies plaintiffs' motion for removal to this court and consolidation with this action of defendant's nonpayment proceeding against

plaintiff tenant in the Civil Court or for a stay of that proceeding. C.P.L.R. §§ 325(b), 602, 2201.

DATED: December 23, 2016

LUCY BILLINGS, J.S.C.

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