SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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KENNETH SWEZEY, LAURA LINDGREN and LINDGREN ASSOCIATES,

Plaintiffs,

Index No.: 654837/17
DECISION/ORDER

-against-

A. TRENKMANN ESTATE, INC.,

Defendant.

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ROBERT R. REED, J.:

In this commercial landlord/tenant action, plaintiffs move for injunctive relief via order to show cause, and defendant cross-moves for summary judgment to dismiss the complaint (motion sequence number 002). For the following reasons, the motion is granted, and the cross motion is denied without prejudice to renewal under circumstances set forth below.

BACKGROUND

Plaintiffs Kenneth Swezey (Swezey) and Laura Lindgren (Lindgren) are the tenants of apartment 4 B/C/D in a building located at 407 Broome Street in the County, City and State of New York (the building). *See* order to show cause, Willis affirmation, exhibit F (complaint), ¶ 1. Plaintiffs allege that Lindgren Associates (LA) is a "trade name" under which Lindgren conducts her business as a graphic artist and publisher. *Id.*, ¶ 3. Defendant A. Trenkmann Estate, Inc. (landlord) is the building's owner. *Id.*, ¶ 5.

Plaintiffs have presented New York City Department of Buildings (DOB) records that show that the building was constructed sometime in 1901 as a commercial warehouse. *See* order to show cause, exhibit D-J. Swezey and Lindgren state that they first moved into the building in

1996, at which time landlord had combined two of the four residential units on the fourth floor (4C and 4D) into one unit - apartment 4 C/D. *Id.*; Swezey aff, ¶ 10. Swezey and Lindgren state that they took possession of unit 4 C/D pursuant to a commercial lease that landlord executed with LA as the tenant of record, although landlord had earlier renovated all of the fourth floor units for residential use, and outfitted them with separate bathrooms and kitchens. *Id.*, ¶¶ 10, 15; exhibit A. Swezey and Lindgren state that they later acquired unit 4B in 2007, upon the previous tenant's departure, and that landlord removed walls and performed other work necessary to combine it with their existing space to create their current unit - apartment 4 B/C/D. *Id.*, ¶¶ 12-13. Swezey and Lindgren emphasize that their tenancy is residential, despite the terms of their leases, that landlord is well aware of this fact, and that LA's status as the tenant of record is "nominal." *Id.*, ¶ 10.

The initial 1996 lease for apartment 4 B/C between landlord and LA ran from June 1, 1996 through May 31, 2006, and included a rider that provided, in part, as follows:

> "36. If tenant obtains an 'Artist Certificate' from the New York City Department of Cultural Affairs, tenant may use loft as 'artist in residence' (work/live).
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> * * *
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> "40. This is a commercial or 'artist in residence' lease only."

See order to show cause, exhibit A. Despite the foregoing lease term, the parties executed a second lease for apartment C/D that ran from June 1, 2003 through May 31, 2010, and that again listed LA as the tenant of record, stated that the apartment unit was "to be used only for graphic design and allied fields," and included a longer rider that provided, in relevant part, as follows:

> "44. This is a commercial lease. 'Artist Certificate' may not be obtained from NYC Dept. Of Cultural Affairs. If tenant resides in demised premises and does NOT have an 'Artist Certificate,' then tenant is in default of this

> lease. Tenant is required to give landlord a copy of this 'Artist Certificate'."

Id. In 2007, after the fourth floor units had been combined into apartment 4 B/C/D, and, again, despite the foregoing lease term, the parties executed separate yet identical leases for units "4C" and "4B." *Id.* Both of these leases ran from June 1, 2007 through May 21, 2014, listed LA as tenant of record, provided that the units could "be used only for graphic design and allied fields," and contained identical riders that provided, in relevant part, as follows:

> "49. As long as this lease is in effect, tenant shall not initiate a court action or voluntarily participate in any lawsuit to bring about controls for rent on any and all property owned by [landlord].
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> * * *
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> "53. The demised premises is to be used for COMMERCIAL purposes only. LIVING and RESIDENTIAL uses are NOT permitted."

Id. (emphasis in original).

A dispute between the parties arose in 2015, when the residential tenant of apartment unit 4A vacated, and landlord rented that unit to a commercial tenant. *See* order to show cause, Swezey aff, ¶ 16. Swezey and Lindgren state that, in March 2015, landlord's employees installed a metalwork door in the portion of the fourth floor hallway that led to plaintiffs' three conjoined units (4B, 4C and 4D), along with an alarm and a sign marked "private," to ensure that customers of the new commercial tenant in unit 4A would not accidentally enter their living space. *Id.*, ¶ 17. Still concerned, on January 31, 2017, Swezey and Lindgren filed an application with the New York City Loft Board (Loft Board) for coverage of unit 4 B/C/D as an "interim multiple dwelling." *Id.*, ¶ 20; exhibit C. Landlord filed an answer to that application with the Loft Board on March 2, 2017. *Id.*, ¶ 22; exhibit D. In June 2017, the parties appeared before the Loft Board in connection with the application (Docket No. TR-1325). *Id.*, ¶¶ 21, 23. Evidently, the matter is

still pending and a decision is expected.

In the meantime, however, Swezey and Lindgren allege that, on February 15, 2017, landlord's principals came to the apartment with an inspector from the New York City Fire Department (FDNY), with which landlord had filed a complaint alleging that the recently installed metalwork door in front of apartment 4 B/C/D constituted a "blockage," and seeking an order authorizing the removal of the door. *Id.*, ¶¶ 24-25. Swezey and Lindgren allege that landlord undertook this action purely in retaliation for their having filed the Loft Board application, and solely as an attempt to harass them. *Id.*, ¶¶ 27-28. Swezey and Lindgren note that the FDNY inspector did not find that the door constituted a violation of the Fire Code, and that the FDNY did not issue an order for its removal. *Id.*, ¶ 26. Swezey and Lindgren further note that, on June 28, 2017, landlord served them with a 10-day notice to quit that purported to revoke their "license" to use the door in front of apartment 4 B/C/D, and that informed them that landlord would commence a holdover proceeding against them if they did not voluntarily remove the door themselves before June 30, 2017. *Id.*, ¶¶ 30-33; exhibit F. On June 30, 2017, counsel for the respective parties executed a stipulation in which they agreed to extend the final date for door removal until July 10, 2017. *Id.*, ¶ 34; exhibit G. Ultimately, Swezey and Lindgren opted not to remove the door.

Instead, on July 14, 2017, plaintiffs submitted an application for an order to show cause, to prevent landlord from enforcing its 10-day notice, to the Housing Part of the Civil Court of the City of New York (Housing Court). *Id.*, ¶ 43. On that day, the Housing Court purportedly denied plaintiffs' application for lack of jurisdiction. *Id.* Thereafter, on July 17, 2017, plaintiffs submitted their first order to show cause for injunctive relief to this court, which the court signed

with the requirement that a copy thereof be personally served on landlord (motion sequence number 001). *Id.*; Willis affirmation of emergency, ¶ 6. Counsel for plaintiffs was unable to effect such personal service, although she did serve a copy of the order to show cause on defendants' counsel. *Id.*, ¶¶ 7-11. As a result, on July 20, 2017, counsel for plaintiffs presented the court with an order to show cause, identical to the first, which permitted service on defendant by overnight courier instead, and the court immediately signed it (motion sequence number 002). Plaintiffs' order to show cause contains a summons and complaint that includes proposed causes of action for 1) a declaratory judgment; 2) a preliminary injunction; and 3) attorneys fees. *Id.*; exhibit F. On September 11, 2017, landlord filed an answer that contains affirmative defenses and a counterclaim for an order requiring plaintiffs to post an undertaking. *See* notice of cross motion, exhibit B. Now before the court are the portion of plaintiffs' order to show cause that seeks injunctive relief, and landlord's cross motion for summary judgment to dismiss the complaint (motion sequence number 002).

DISCUSSION

As an initial matter, the court notes that the request for a preliminary injunction that is contained in plaintiffs' order to show cause is separate and distinct from the request set forth in the second cause of action in their complaint. The former requests an order enjoining and restraining landlord from: 1) acting to enforce the 10-day notice; 2) serving any additional notices; 3) acting to interfere with their right of quiet enjoyment of unit 4 B/C/D; 4) removing the front door; and 5) acting to cancel or terminate their lease. *See* order to show cause at 3-4. The latter requests an "order to maintain the status quo ante in all respects, and a permanent injunction thereafter, subject only to a final determination of the application by the Loft Board,

including appeals." *See* Willis affirmation of emergency, exhibit F (complaint), ¶ 45. The former request for injunctive relief is the subject of this order.

In that connection, the court notes that, 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 plaintiff's 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. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

Id. The Court of Appeals has held that "[t]he 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 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Plaintiffs cite four statutes that, they assert, entitle them to a finding that landlord's threat to remove the door to their combined premises constitutes harassment, and authorize injunctive relief to prevent landlord from acting on its threat. *See* order to show cause, Willis affirmation, ¶¶ 7-22. These include: 1) Real Property Law (RPL) § 223-b; 2) Multiple Dwelling Law (MDL) § 282-a; 3) RPL 235-d, and 4) New York City Administrative Code (Admin. Code) Chapter 2, §§ 27-2004, 27-2005 and 27-2115. *Id.* Plaintiffs then argue that a finding that one of these statutes applies to the facts of this case is sufficient to satisfy the requirements for injunctive relief that are specified in CPLR 6301. *Id.*, ¶¶ 23-26.

At the oral argument of this motion on November 9, 2017, plaintiffs devoted the bulk of

their discussion to RPL § 223-b, which provides, in part, as follows:

> "1. No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:
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> "b. Actions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; . . .
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> "2 No landlord or premises or units to which this section is applicable shall substantially alter the terms of the tenancy in retaliation for any actions set forth in paragraphs a, b, and c of subdivision one of this section. Substantial alteration shall include, but is not limited to, the refusal to continue a tenancy of the tenant or, upon expiration of the tenant's lease, to renew the lease or offer a new lease; provided, however, that a landlord shall not be required under this section to offer a new lease or a lease renewal for a term greater than one year and after such extension of a tenancy for one year shall not be required to further extend or continue such tenancy.
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> "3. A landlord shall be subject to a civil action for damages and other appropriate relief, including injunctive and other equitable remedies, as may be determined by a court of competent jurisdiction in any case in which the landlord has violated the provisions of this section."

Id. Plaintiffs specifically argued that landlord's act of serving the 10-day notice to quit (which landlord styled as the revocation of the "license" to use the door in the hallway in front of their conjoined units) constituted an act of harassment: 1) pursuant to RPL § 223-b (1) (b), because landlord served it in response to their filing the Loft Board application, which was a qualifying "action[] taken in good faith, by . . . the tenant, to secure or enforce any rights . . . under any other law of the state of New York . . . which has as its objective the regulation of premises used

for dwelling purposes"; and 2) pursuant to RPL § 223-b (2), because landlord's decision to remove the door reflects the intent to "substantially alter the terms of the tenancy in retaliation for any actions set forth in paragraph[] a . . . of subdivision one of this section." *See* order to show cause, Willis affirmation, ¶¶ 8-12; transcript at 23-36.

Defendants' cross motion does not address RPL § 223-b. At oral argument, however, defendants argued extensively that the statute did not apply to the facts of this case because landlord's act of granting a "license" to use the door did not constitute the leasing of a portion of the floor as premises to the plaintiffs. *See* transcript at 9-36. Defendants further noted that nothing in the language of either of plaintiffs' two current leases purports to grant them exclusive possession of the fourth floor hallway that runs past units 4B, 4C and 4D as part of their tenancy, and urges that the hallway space should be regarded as a common area. *Id.* Plaintiffs disputed this assertion at oral argument, and in their reply papers, they argue that: 1) the leases *do* indicate that the fourth floor hallway is part of their demised premises because (a) each lease includes an annexed diagram of the fourth floor entitled "floor area with hallways," (b) each diagram bears the notation that the portion of the floor shaded by crosshatching indicates the "area included under this lease," and (c) that area includes a portion of the hallway; 2) the facts demonstrate that defendant's claim of a "license" with respect to the door is false, because defendant, itself, installed the door; and 3) alternatively, the portion of the fourth floor hallway behind the door that runs past units B, C and D should be considered an "appurtenance" to plaintiffs' demised premises. *See* plaintiffs' reply mem of law at 4-13.

At argument, the court noted certain difficulties that it has in connection with plaintiffs' RPL § 223-b argument. With respect to RPL § 223-b (1) (b), the statutory proscription against

retaliation applies to "premises . . . to which this section is applicable," and defendants have argued cogently that there is an issue as to whether the portion of the fourth floor hallway is a part of plaintiffs' "premises," or whether it remains a common area. The court believes that plaintiffs' argument regarding the interpretation of the diagrams that are annexed to its two current leases, while reasonable, is not dispositive. The court also takes note of plaintiffs' observation that the FDNY's actions apparently indicate that the Fire Code does *not* require that anyone on the fourth floor have access to the disputed stretch of hallway as a means of egress from the building in case of fire, but finds that this issue is not before it. What is before the court is the question of whether plaintiffs are entitled to an injunction pursuant to RPL § 223-b (1) (b), and the court concludes that there is a disputed issue of fact which precludes resolution of that question at this juncture. The court also notes that the issue of the entire composition of plaintiffs' premises is currently before the Loft Board, and finds that it would be imprudent to resolve that issue in this decision.

Regarding RPL § 223-b (2), the court harbors the same reservations, because that statute also applies to those "premises or units to which this section is applicable," and there is an open question of fact as to whether plaintiffs' premises now include the disputed stretch of hallway. As a result of its reservations, the court finds that it would be improper to grant plaintiffs' request for injunctive relief, pursuant to RPL § 223-b, in the absence of a ruling from the Loft Board as to whether the disputed hallway is now a part of plaintiffs' premises, and constitutes an interim multiple dwelling.[1]

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[1] At this point, the court feels compelled, however, to express its dubiousness of defendant's "license" argument in response to plaintiffs' RPL § 223-b request. It appears more likely that the portion of the fourth floor hallway outside of plaintiffs' three apartment units

Plaintiffs' request for injunctive relief pursuant to RPL § 235-d is a different matter, however. That statute provides, in part, that:

> "1. Notwithstanding any other provision of law, within a city having a population of one million or more, it shall be unlawful and shall constitute harassment for any landlord of a building which at any time was occupied for manufacturing or warehouse purposes, or other person acting on his behalf, to engage in any course of conduct, including, but not limited to intentional interruption or discontinuance or willful failure to restore *services customarily provided* or required by written lease or other rental agreement, which interferes with or disturbs the comfort, repose, peace or quiet of a tenant in the tenant's use or occupancy of rental space if such conduct is intended to cause the tenant (i) to vacate a building or part thereof; or (ii) to surrender or waive any rights of such tenant under the tenant's written lease or other rental agreement.
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> "4. A tenant may apply to the supreme court for an order enjoining acts or practices which constitute harassment under subdivision one of this section; and upon sufficient showing, the supreme court may issue a temporary or permanent injunction, restraining order or other order, all of which may, as the court determines in the exercise of its sound discretion, be granted without bond. In the event the court issues a preliminary injunction it shall make provision for an expeditious trial of the underlying action."

Id. (emphasis added). Here, it is clear that the building was originally "occupied for warehouse purposes." *See* order to show cause, exhibit D-J. It is also clear that plaintiffs' right to the exclusive use of the disputed portion of fourth floor hallway is a "service customarily provided," since defendant voluntarily constructed the door in March 2015 (after it had performed additional construction work to conjoin plaintiffs' three fourth floor apartment units). Finally, it is clear that defendant's service of the 10-day notice is an attempt "to cause the tenant . . . to surrender or

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would constitute an "appurtenance," given that the exclusive use of that portion of hallway seems "essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed or leased," i.e., the three apartments that defendant itself performed the work to conjoin. *See e.g. Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 267 (1st Dept 2009). Unlike a "license," the use of an appurtenance may not be terminated before the end of the tenant's leasehold. *Id.* This law would nullify defendant's "license" argument.

waive any rights" to such exclusive use. Thus, three of the four component elements of a RPL § 235-d harassment claim are indisputably present here.

The last remaining issue is whether the presence of a door on the fourth floor, which secures plaintiffs' exclusive use of the disputed portion of hallway, is "required by written lease or other rental agreement." The court has already found that it is for the Loft Board to make a final determination of that issue, given the pendency of plaintiffs' application before that body. However, the court has also found that plaintiffs' "appurtenance" argument is far more legally tenable than defendant's "license" argument, given the facts of this case. As a result, the court now further finds that there is a great likelihood that plaintiffs will be able to establish the final element of their RPL § 235-d harassment claim, once the Loft Board has ruled. This begets the concomitant finding that plaintiffs are likely to succeed on the merits of their application to this court for injunctive relief pursuant to that statute.

The other two component elements of the request for a preliminary injunction are plainly present. The removal of the fourth floor door will plainly result in an "irreparable injury" by exposing plaintiffs to a danger that does not currently exist – i.e., the possible intrusion of strangers into their living space. Similarly, the equities plainly balance in plaintiffs' favor, since the potential harm that they would suffer as a result of the door being removed clearly outweighs any potential, speculative harm that might result to defendant, which pleads no such harm. Therefore, the court concludes that plaintiffs are entitled to a preliminary injunction pursuant to CPLR 6301, and grants plaintiffs' motion in full. In view of this finding, the court need not reach the other arguments set forth in plaintiffs' order to show cause.

In its cross motion, landlord seeks summary judgment to dismiss plaintiffs' complaint. As

was previously mentioned, the complaint asserts three causes of action, including a request for a permanent injunction that is distinct from the one that the court just granted. However, the viability of all three of plaintiffs' causes of action turns on a determination of the extent of their tenancy rights in the building's fourth floor, and that determination is committed to the Loft Board. Therefore, it would be improvident for this court to pass on the sufficiency of plaintiffs' causes of action at this juncture. Accordingly, the court finds that defendant's cross motion should be denied without prejudice to renewal following the Loft Board's determination of the application currently before it.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the order to show cause of plaintiffs Kenneth Swezey, Laura Lindgren and Lindgren Associates, which seeks relief pursuant to CPLR 6301 (motion sequence number 002), is granted and, due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the plaintiffs and against the defendant A. Trenkmann Estate, Inc. and that the plaintiffs are entitled to a preliminary injunction on the ground 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, as set forth in the aforesaid decision, it is

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant

or otherwise, any of the following acts:

1) acting to enforce the 10-day notice that it served on June 28, 2017;

2) serving any additional such notices;

3) acting to interfere with plaintiffs' right of quiet enjoyment of apartment unit 4 B/C/D in the building located at 407 Broome Street in the County, City and State of New York;

4) removing the "front door" located in the fourth floor hallway; and/or

5) acting to cancel or terminate plaintiffs' lease; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 581, 111 Centre Street, on March 1, 2018, at 2:30 p.m.; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of the defendant A. Trenkmann Estate, Inc. (motion sequence number 002) is denied without prejudice to renewal following a final determination by the New York City Loft Board of the application bearing Docket No. TR-1325 that is currently before it, together with any subsequent appeals thereof or challenges thereto.

Dated: New York, New York
January 22, 2018

ENTER:

Robert R. Reed, J.S.C.

1/22/18