Schulman, Blitz & Williamson, LLP v VBG 990 AOA LLC
2018 NY Slip Op 32993(U)
November 28, 2018
Supreme Court, New York County
Docket Number: 155798/18
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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SCHULMAN, BLITZ & WILLIAMSON, LLP,

Plaintiff,

- v -

VBG 990 AOA LLC,

Defendant.

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INDEX NO. 155798/18

MOTION DATE

MOTION SEQ. NO. 004, 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157. 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200

were read on this application for a preliminary injunction

By order to show cause, plaintiff seeks a preliminary injunction. Defendant opposes.

I. BACKGROUND

Plaintiff, a personal injury law firm, is a tenant in defendant's building. Its lease runs through June 30, 2025.

In early 2018, defendant purchased the building and sought to undertake renovations. Before renovations commenced, most of the other tenants had accepted defendant's offers to buy them out of their tenancies; plaintiff refused the offer. Defendant then started the renovation by removing ceiling tiles, carpets, and finishes in the common areas, and intends to commence reconstructing them early next year. The building has had problems with the central air-conditioning and elevators.

In its first order to show cause (seq. four), plaintiff seeks an order mandating that defendant restore the air-conditioning, fix the elevators, limit the noise coming from the renovations, return the building to its original state or complete the renovations quickly, and an order enjoining it from harassing it and from violating Administrative Code § 22-902. (NYSCEF 108). In its second order to show cause (seq. five), plaintiff seeks an order mandating that defendant maintain functioning elevator service, central air-conditioning and heating, and water and for an order enjoining it from shutting down the fourth-floor restrooms in violation of Admin. Code § 22-902 and from generating unlawful noise. (NYSCEF 152).

II. MOTION SEQ. 004

A. Plaintiff's contentions (NYSCEF 98-107)

Plaintiff asserts that it is entitled to a preliminary injunction because it has been subjected to harassment in the form of malfunctioning central air-conditioning, noise exceeding municipal limits, dangerous and "ugly" common areas, and unreliable elevators. It offers photographs of allegedly dangerous passageways. (NYSCEF 107). Due to these conditions, created under the "pretext" of Local Law 11 work, plaintiff has been unable to meet with clients, some of whom are disabled, and has been forced to send its employees home. (NYSCEF 107). Plaintiff claims that it will succeed on the merits because it has demonstrated that defendant has subjected it to tenant harassment with the intent of forcing it to terminate the lease and vacate the building, that it will suffer irreparable injury as it has been prevented from meeting with clients, and that the balance of equities weighs in its favor because it will force defendant to finish the renovations and allow plaintiff to conduct business.

B. Defendant's contentions (NYSCEF 109-135)

Defendant argues that plaintiff fails to show a likelihood of success on the merits absent evidence that the noise levels are unlawfully high, irreparable harm as the alleged damages are compensable by money, and that the equities weigh in its favor. It alleges that the noise is a product of its Local Law 11 work, that no dangerous condition exists in the building as all passageways are safe, clean, and clear of obstacles or debris, and that as an additional caution and at its own expense, it has installed temporary carpeting and ceiling tiles and painted the walls on the fourth floor. Moreover, the elevators and air-conditioning function and when the central air-conditioning malfunctioned for three days, it was promptly repaired, and tenants were furnished with portable air-conditioning units pending the repairs. Likewise, when the elevators did not level with the floor, defendant had them repaired and operating within two days.

Defendant also contends that plaintiff fails to show an intent to cause it to vacate the building or waive its rights under the lease and that not only does the lease allow for the work, but the Department of Buildings (DOB) approved the renovation plans.

In support, defendant submits the affidavit of the vice president of one of its affiliates, in which he explains the nature of the renovations and the repairs to the elevators and central air-conditioning (NYSCEF 110), and the affidavit of an accessibility compliance specialist in which he states that the renovations comply with the Americans with Disabilities Act of 1990 and that

the work does not constitute a danger to health and safety (NYSCEF 111). Also attached are the plans, permit, and the contract for the Local Law 11 work (NYSCEF 124, 125, 126), as well as invoices for the air-conditioning repairs, portable air-conditioners, and elevator repairs (NYSCEF 129, 131, 133).

In maintaining that the balance of equities favors it, defendant argues that if the court were to enjoin it from performing the Local Law 11 work, unsafe conditions would persist, exposing it to violations, liability, and fines, and preventing it from completing its expensive renovation project which, when completed, will benefit plaintiff. It accuses plaintiff of "unclean hands" for claiming that the elevators and air-conditioning do not work and observes that plaintiff is in violation of the court order dated August 8, 2018, requiring it to pay defendant's share of the subtenant's rent.

Having waited until September 2018 to complain about conditions which allegedly became emergent in February 2018, defendant argues that plaintiff fails to demonstrate an urgent need for injunctive relief, and observes that plaintiff's offer of the affidavit of one of its members, dated September 5, 2018, who states that he read and verified counsel's September 10 affirmation (NYSCEF 102, 107), should be rejected as incredible given their relative dates. If an injunction is granted, defendant asks that it be conditioned on the posting of an undertaking.

On September 27, 2018, plaintiff filed a letter detailing its good-faith effort to comply with the August 8, 2018 order, and included a copy of a check sent to defendant. (NYSCEF 136).

C. Analysis

Pursuant to CPLR 6301, the court may grant a preliminary injunction "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." Preliminary injunctions are drastic remedies, substantially limiting the nonmovant's rights, and are awarded in special circumstances. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]). A mandatory preliminary injunction, used to compel the performance of an act, may only be granted in "unusual circumstances." (*Matos v City of New York*, 21 AD3d 936, 937 [2d Dept 2005]; *Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011]).

To be entitled to a preliminary injunction, whether or not mandatory, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and that the equities weigh in its favor. (CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). Injuries compensable by monetary damages are not irreparable. (*444 E. 86th Owners Corp. v 435 E. 85th St. Tenants Corp.*, 93 AD3d 588, 589 [1st Dept 2012]).

To establish a likelihood of success on the merits, the movant need not present conclusive evidence, but must demonstrate, *prima facie*, a reasonable probability of success. (*Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 [1st Dept 2016]). Conclusory allegations are insufficient. (*Kaufman v Int'l Bus. Machines Corp.*, 97 AD2d 925, 926 [3d Dept 1983], *affd* 61 NY2d 930 [1984]; *see also Faberge Int'l Inc. v Di Pino*, 109 AD2d 235, 240 [1st Dept 1985] [plaintiff must provide affidavits and other competent proof, with evidentiary detail]). When key

facts are in dispute, a preliminary injunction is not warranted. (*Scotto v Mei*, 219 AD2d 181, 184 [1st Dept 1996], citing *Faberge*, 109 AD2d at 240).

1. Likelihood of success on the merits

Pursuant to Admin. Code § 22-902, landlords are prohibited from engaging in "commercial tenant harassment," which is defined as an act or omission intended to cause a tenant to vacate the premises or surrender or waive rights under a lease agreement or law. Violative conduct includes, in pertinent part, "interruption or discontinuance of an essential service."

Here, plaintiff offers insufficient evidence that defendant engaged in commercial tenant harassment as the affirmation of counsel and the affidavit of its member, even if the respective dates of these documents are disregarded, are fatally conclusory absent expert affidavits or other supporting evidence. (*See Hui v New Clients, Inc.*, 126 AD3d 759, 760 [2d Dept 2015] [bare and conclusory affidavit insufficient to support imposition of preliminary injunction]). Even if the evidence is sufficient to demonstrate, *prima facie*, a likelihood of success on the merits, defendant's repair invoices create factual disputes demonstrating that there is no clear right to the relief requested. (*Advanced Digital Sec. Sols., Inc. v Samsung Techwin Co.*, 53 AD3d 612, 613 [2d Dept 2008]).

Moreover, plaintiff's photographs do not support its allegations that dangerous conditions on the premises prevent employees from meeting with disabled clients and force employees to vacate the office. Thus, the allegation that the common areas are dangerous is unsupported. In any event, defendant submits documentation demonstrating that the renovation plans have been reviewed and approved by the DOB, along with photographs reflecting the temporary measures it implemented to minimize the impact of the renovation and an expert affidavit, all of which raise an issue concerning the conditions in the building. The aesthetics of the common areas is of no moment.

Moreover, defendant timely remediated every condition of which plaintiff complains, and its installation of temporary carpeting, ceiling tiles, and finishes calls into dispute any malicious intent. Thus, plaintiff fails to meet its burden of establishing its entitlement to a preliminary injunction. (*New York Yankees P'ship v SportsChannel Assocs.*, 126 AD2d 470, 472 [1st Dept 1987] [burden is on movant to establish "clear right" to requested relief]). Absent sufficient proof of defendant's intent to force plaintiff to vacate the building, plaintiff is not entitled to a preliminary injunction under Admin. Code § 22-902.

2. Irreparable injury

Plaintiff's allegations that it is not able to meet with clients at the building, and that it is obliged to send employees home due to noise and the malfunctioning air-conditioning are not irreparable, as they are compensable with money. (*See Wall St. Garage Parking Corp. v New York Stock Exch., Inc.*, 10 AD3d 223, 228 [1st Dept 2004] [no irreparable harm where parking garage's substantial loss of business and decline in patronage was compensable with money];

Chiagkouris v 201 W. 16 Owners Corp., 150 AD3d 442 [1st Dept 2017] [damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable]).

Plaintiff thus fails to establish that it will suffer irreparable injury absent an injunction, or that monetary damages will not sufficiently compensate it for its injuries. (*See Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011] [request for preliminary injunction properly denied, as plaintiff did not establish any imminent and non-speculative harm that would occur in absence of injunction or demonstrate potential injuries not compensable by money damages]).

3. Balance of equities

Absent a sufficient showing of a likelihood of success on the merits or a danger of irreparable injury, the balance of equities need not be addressed. (*See Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008] [court need not address irreparable injury where plaintiff failed to establish two other necessary elements]). In any event, defendant has expended substantial sums of money and is engaging, in part, in mandatory Local Law 11 work. Enjoining it from completing this work would be highly prejudicial, and continuing the temporary restraint from harassing plaintiff is unnecessary given its legal obligation in that regard. Moreover, to compel defendant to restore the now-demolished common areas to their original condition would not remediate existing circumstances as such a restoration would entail construction work comparable to that presently being performed, and mandating that defendant complete construction is unnecessary absent a factual basis for determining that it is not doing so. Plaintiff's delay in seeking injunctive relief indicates that any harm it may suffer is not imminent or emergent. (*See Barbes Rest.*, 140 AD3d at 432 [failure to demonstrate that potential harm is imminent weighs against movant]). Absent any unusual circumstances, plaintiff is not entitled to the requested mandatory injunction.

III. MOTION SEQ. 005

A. Contentions

1. Plaintiff's contentions (NYSCEF 142-151)

Plaintiff alleges that, since the filing of motion sequence four on September 10, 2018, the conditions at the building have worsened: the elevators remain unreliable and the central air-conditioning varies between freezing and "roasting" hot. (NYSCEF 144). Moreover, it claims, defendant created new harassing conditions, such as "chintzy" and ineffective carpeting and ugly hallways with exposed cinder blocks and dangling wires and cables that have driven away many clients. (NYSCEF 143). In addition, on October 19, 2018, the lobby was left unattended, leaving it vulnerable. It also complains that defendant intends to shut down the restrooms on plaintiff's floor, and that notwithstanding the availability of the third-floor restroom, the unreliability of the elevators renders the accommodation illusory.

2. Defendant's contentions (NYSCEF 153-182)

In opposition, defendant asserts that plaintiff again fails to demonstrate irreparable harm and that the arguments about the fourth-floor restroom are no different from those advanced in

opposition to the first order to show cause (*supra* at II.B.). Defendant also alleges that the security guard has been replaced.

Absent evidence of an intent to harass plaintiff, defendant argues that plaintiff cannot prevail on the merits, and having obtained the approval of and permits from the DOB, it has demonstrated an absence of intent to cause plaintiff to vacate the building. In addition, the lease expressly permits defendant to engage in necessary repairs and improvements, and may stop services such as elevators, heat, air-conditioning, and water to accomplish its work. Moreover, the balance of equities is in its favor as defendant is complying with the law, and the imposition of a preliminary injunction would require it to delay its multi-million dollar, building-wide renovation. Should a preliminary injunction be granted, defendant asks that plaintiff be ordered to post an undertaking. (NYSCEF 182).

In support of its request that sanctions be imposed on plaintiff, it claims that plaintiff is motivated by its refusal to offer it a multi-million dollar buyout and it references an alleged altercation between plaintiff's counsel and an employee of defendant's leasing agent, who occupies space on the same floor as plaintiff, which left the employee "shaken" and "scared." (NYSCEF 154). Defendant thus seeks sanctions and an order that plaintiff be enjoined from filing further motions in this action.

3. Plaintiff's reply and defendant's sur-reply (NYSCEF 183-200)

In reply, plaintiff submits the affidavit of an expert architect who asserts that the conditions suffered by plaintiff are disproportionate to the plans approved by the DOB, and that many of the plans have not been filed with the DOB, and that defendants have proceeded in a "highly unusual" manner that "appears to be based on something completely other than the normal needs and requirements of construction." (NYSCEF 183).

In sur-reply, defendant submits the affidavits of the engineer, architect, and property manager involved in the renovation project, in which they explain that the conditions of the building are typical of those undergoing renovations, and that plaintiff will file the remaining renovation plans with the DOB at the appropriate and customary time. (NYSCEF 187, 188, 189).

B. Analysis

1. Preliminary injunction

Although plaintiff's second motion for a preliminary injunction includes new allegations and evidence, the alleged injury remains the same and it is undisputedly compensable by money (*supra* at II.c.2.), notwithstanding the speculation of plaintiff's expert.

Plaintiff's allegations pertaining to security in the building are too speculative to warrant a preliminary injunction (*Khan v State Univ. of New York Health Sci. Ctr. at Brooklyn*, 271 AD2d 656, 657 [2d Dept 2000] [speculative and conclusory allegations of harm insufficient for preliminary injunction]), and in any event, that the building was left without security on one occasion proves nothing. Consequently, plaintiff fails to allege an imminent irreparable harm.

(*See Wall St. Garage Parking Corp.*, 10 AD3d at 229 [preliminary injunction unwarranted where defendant's conduct already ceased]; *Golden v Steam Heat, Inc.*, 216 AD2d 440, 442 [2d Dept 1995] [irreparable harm must be imminent for preliminary injunction]).

2. Sanctions

Pursuant to 22 NYCRR § 130-1.1(d), sanctions may be imposed or costs awarded a party for an adversary's frivolous conduct. Upon a finding that a party has engaged in frivolous and vexatious conduct, that party may also be enjoined from filing additional motions without court approval. (*Capogrosso v Kansas*, 60 AD3d 522, 523 [1st Dept 2009]; *Sud v Sud*, 227 AD2d 319, 319 [1st Dept 1996]). That plaintiff has filed two unsuccessful motions for a preliminary injunction does not rise to the level of frivolousness or vexatiousness required for the imposition of sanctions or an injunction. (*See, e.g.*, *Levy v Carol Mgmt. Corp.*, 260 AD2d 27 [1st Dept 1999] [imposing sanctions not just because of lack of merit of claims, but because party engaged in nearly 15 years-worth of frivolous litigation intended to delay, harass, and obfuscate]; *see also Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 70 [1st Dept 2006] [court should avoid imposing sanctions where party asserts colorable, albeit unpersuasive, arguments]).

IV. CONCLUSION

Accordingly, it is hereby

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

ORDERED, that all stays previously issued are hereby vacated and lifted.

11/28/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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