



Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **PHILLIP HOM**
Justice

IA PART 14

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8808 Rockaway LLC,

Plaintiff,

Index No.: 725447/21
Motion Date: 02/10/22
Motion Seq. No.: 1

-against-

88-08 Rockaway Liquors, Inc., et al.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number, were read on this order to show cause by Plaintiff seeking a preliminary injunction.

PAPERS	NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	2 - 13
Affirmation in Opposition-Exhibits.....	15 - 26
Replying.....	27 - 29

Upon the foregoing papers and after hearing oral arguments on February 4, 2022, it is ordered that Plaintiff’s order to show cause (“OSC”) for an order granting a mandatory preliminary injunction, is determined as follows:

Plaintiff 8808 Rockaway, LLC (“Plaintiff-Landlord”) commenced this action against Defendants, 88-08 Rockaway Liquors, Inc. (“Rockaway Liquors”), Rashida Jackson a/k/a Rashida Kenyatta Voorhies (“Jackson”), Patrick Filbotte a/k/a Patrick John Flibotte (“Filbotte”; collectively: “Tenant-Defendants”), to recover damages for breach of contract, for a declaratory judgment directing Tenant-Defendants to allow Plaintiff-Landlord to perform necessary construction, and attorneys’ fees.

Background Facts

On May 5, 2016, Plaintiff-Landlord’s predecessor, Wave Build, Inc., and Rockaway Liquors, through Jackson, the purported President of Rockaway Liquors, executed a commercial lease (“Lease”) (EF Doc. No. 7). Simultaneously, Jackson and Filbotte executed a Guaranty of Lease (“Guaranty”) (EF Doc. No. 7). Under the Lease, Rockaway Liquors rented the right

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storefront of the building known as 88-08 Rockaway Beach Boulevard, Rockaway Beach, NY 11693 (“Premises”). The Lease term was for “five (5) years (or until such term shall sooner cease and expire as hereinafter provided)” beginning May 1, 2016 and ending on April 30, 2021. Upon the Lease’s expiration, Tenant-Defendants continued to retain possession of the Premises as holdover tenants, and a month-to-month tenancy was created.

On September 28, 2021, Plaintiff-Landlord served a “Thirty (30) Day Notice to Terminate” the month-to-month tenancy, notifying Tenant-Defendants they had until October 31, 2021 to vacate the Premises. Tenant-Defendants did not vacate the Premises upon said date. On November 3, 2021, Plaintiff-Landlord mailed a letter by Certified Mail, Return Receipt Requested, to Tenant-Defendants under Article 28 of the Lease, advising them of the construction required for compliance with the Americans with Disabilities Act (“ADA”) (“Request Letter”) (EF Doc. No. 7). On November 4, 2021, Tenant-Defendants sent a letter refusing Plaintiff-Landlord access to perform construction (“Refusal Letter”) (EF Doc. Nos. 7 & 22).

On November 15, 2021, Plaintiff-Landlord commenced this action. On November 28, 2021, Plaintiff-Landlord commenced a holdover proceeding under Index No. LT-308326/21/QU. On February 9, 2022, an inquest was conducted before the Hon. Claudia Lanzetta, who awarded Plaintiff-Landlord a final judgment of possession and a warrant of eviction. Tenant-Defendants failed to appear for the inquest. Tenant-Defendants moved via OSC (“OSC 2”) to vacate said judgment and warrant. That OSC 2 stayed the warrant of eviction pending the hearing and determination of said OSC 2.

Now, Plaintiff-Landlord moves for injunctive relief to build a hallway from Tenant-Defendants’ entrance door, which leads to the elevator in the back of the Premises, to comply with the ADA (“ADA-compliant hallway”). The Court notes that this OSC was filed on November 15, 2021 and served on November 20, 2021. Tenant-Defendants oppose.

Discussion

The determination of whether to grant a preliminary injunction is vested within the sound discretion of the trial court (*see Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]; *Shake Shack Fulton Street Brooklyn, LLC v Allied Property Group, LLC*, 177 AD3d 924, 927 [2d Dept 2021]; *Karr Graphics Corp. v Spar Knitwear Corp.*, 192 AD3d 673, 673 [2d Dept

2021]). To obtain a preliminary injunction, a movant must clearly demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury/harm absent granting of the preliminary injunction; and (3) a balancing of the equities in the movant's favor (*id.*; *see also* CPLR 6301).

“A mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action” (*Matos v City of New York*, 21 AD3d 936, 937 [2d Dept 2005]; *see Shake Shack Fulton Street Brooklyn, LLC*, 177 AD3d at 927; *Zoller v HSBC Mortg. Corp. (USA)*, 135 AD3d 932, 933 [2d Dept 2016]).

In support, Plaintiff-Landlord submits, among other things, an affidavit of O'Ed Patisso, a member of Plaintiff-Landlord (EF Doc. No. 6), the Lease and Guaranty, the Request Letter coupled with the approved construction plans and proof of mailing (EF Doc. No. 7), and the Refusal Letter.

Likelihood of Success

The determination of the likelihood of success depends on whether Plaintiff-Landlord properly invoked Article 13 and Article 20 of the Lease.

Article 13 provides, in relevant part, that “[Plaintiff-Landlord] shall have the right [...] to enter the demised premises in any emergency at any time, and at other reasonable times [...] to make such repairs, replacements, and improvements as [Plaintiff-Landlord] may deem necessary and reasonably desirable to the demised premises or to any other portion of the building or which [Plaintiff-Landlord] may elect to perform [...].”

Article 20 provides, in relevant part, that “[Plaintiff-Landlord] shall have the right at any time without the same constituting an eviction and without incurring liability to [Tenant-Defendants] therefor to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators [...] or other public parts of the building [...].”

The Court finds that Article 13 and Article 20 clearly and unambiguously grant Plaintiff-Landlord the right to access the Premises to perform the necessary and reasonable construction work for ADA compliance. The Court further finds that Plaintiff-Landlord properly invoked Article 13 and Article 20 of the Lease when it mailed the Request Letter in accordance with Article

28.¹ Plaintiff-Landlord demonstrates the likelihood of success on the merits because Tenant-Defendants are breaching the Lease by refusing to allow it to perform the construction.

Irreparable Injury/Harm Absent Granting the Mandatory Preliminary Injunction

“Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient” (*DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-37 [2d Dept 2009], quoting *Walsh v Design Concepts, Ltd.*, 221 AD2d 454, 455 [2d Dept 1995] [internal quotations omitted]).

Plaintiff-Landlord alleges irreparable harm will occur if the preliminary injunction is not granted, as it will continue to be in violation of the ADA and persons with disabilities are unable to access the hallway and elevator. Plaintiff-Landlord shows that the absence of the ADA-compliant hallway is currently causing harm because the tenant in the third-floor commercial space of the building is unable to access her office due to said absence. Additionally, some of said tenant’s constituents, who visit her office and have disabilities, also require the ADA-compliant hallway. Such harm cannot be compensated by a monetary award. Therefore, the Court finds that Plaintiff-Landlord establishes an imminent and nonspeculative irreparable harm will occur absent the absent the mandatory preliminary injunction (*see id.*; *see generally Alyoff v Alayoff*, 112 AD3d 564 [2d Dept 2013]; *Joseph v Joseph*, 108 AD3d 597 [2d Dept 2013]; *Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]; *1414 Holdings, LLC v BMS-PSO, LLC*, 167 AD3d 425 [1st Dept 2018]).

Balancing of the Equities

Plaintiff-Landlord and Tenant-Defendants had discussed the required construction on several occasions prior to the mailing of the Request Letter. Plaintiff-Landlord attests that it will work with Tenant-Defendants and schedule and perform the construction outside of Tenant-Defendants’ business hours. Plaintiff-Landlord further states that it will, among other things, install a new entrance without affecting Tenant-Defendants’ business. Tenant-Defendants’ entrance is the only location with a ramp and the only one that would lead directly to the elevator.

¹ Article 28 of the Lease provides, in relevant part, that “[...] a [...] notice or communication which [Plaintiff-Landlord] may desire or be required to give to [Tenant-Defendants], shall be deemed sufficiently given or rendered if in writing, delivered to [Tenant-Defendants] personally or sent by registered or certified mail [...].”

Given the circumstances, the Court finds that the equities are balanced in Plaintiff-Landlord's favor.²

Opposition

In opposition, Tenant-Defendants submit, among other things, Filbotte's affidavit (EF Doc. No. 15), a notice of rent increase dated June 28, 2021 (EF Doc. No. 17), the notice of the holdover proceeding (EF Doc. No. 18), and a Memorandum of Law in Opposition (EF Doc. No. 26). Tenant-Defendants argue that this OSC should be denied on the basis that, among other things, Plaintiff-Landlord is unlikely to succeed, as the Lease is unenforceable because it expired, and a month-to-month tenancy was created.

Generally, where a tenant remains in possession after the expiration of a lease, thereby creating a month-to-month tenancy, i.e., a holdover tenant, under common law, there is an implied continuance of the tenancy under the same terms and provisions contained in the underlying lease (see *City of New York v Pennsylvania R. Co.*, 37 NY2d 298, 300 [1975]; *Mona and Jack's Clothing, Inc. v Ola, Inc.*, 133 AD3d 642, 643 [2d Dept 2015]; *Henderson v Gyrodyne Co. of America, Inc.*, 123 AD3d 1091, 1093 [2d Dept 2014]; *Logan v Johnson*, 34 AD3d 758, 759 [2d Dept 2006]; *McClenan v Brancato Iron and Fence Works*, 282 AD2d 722, 722 [2d Dept 2001]).

Contrary to Tenant-Defendants' contention, the law is clear that terms and conditions within the underlying Lease are binding upon them as holdover tenants. The Court notes that the caselaw relied on in the Memorandum of Law in Opposition supports said finding. The Court finds Tenant-Defendants' remaining arguments to deny the preliminary injunction unavailing.

Undertaking

Tenant-Defendants argue that an undertaking is required if the Court grants the mandatory preliminary injunction; however, they do not submit an estimate of potential damages.

Under CPLR 6312 (b), "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally

² The Court notes that Tenant-Defendants allegedly signed a new lease at a different location and has a pending application with the New York State Liquor Authority.

determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction [...].”

Based upon the parties’ evidentiary submissions and oral arguments, the Court finds that Plaintiff-Landlord shall provide an undertaking in the amount of \$30,000.

In accordance with the foregoing, it is hereby

ORDERED that Plaintiff-Landlord’s OSC for a mandatory preliminary injunction is granted, conditioned upon the filing of an undertaking in the amount of \$30,000 by Plaintiff-Landlord; and it is further

ORDERED that, upon the filing of such undertaking, Tenant-Defendants shall allow Plaintiff-Landlord access to perform the proposed construction; and it is further

ORDERED that, if possible, Plaintiff-Landlord shall perform the proposed construction in a manner that least affects Tenant-Defendants’ business; and it is further

ORDERED that Plaintiff-Landlord shall serve a copy of this Order with Notice of Entry upon Tenant-Defendants, within ten (10) days of entry.

This constitutes the Decision and Order of this Court.

Dated: February 18, 2022


PHILLIP HOM, J.S.C.