[1] Juvenal Reis, Plaintiff, against J.B. Kaufman Realty Co., LLC and 43-01 22nd STREET OWNER LLC, Defendants.**

707612/2015

SUPREME COURT OF NEW YORK, QUEENS COUNTY

54 Misc. 3d 1225(A); 2017 N.Y. Misc. LEXIS 850; 2017 NY Slip Op 50308(U)

March 7, 2017, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PRIOR HISTORY: Reis v. J.B. Kaufman Realty Co., LLC, 2015 N.Y. Misc. LEXIS 4805 (N.Y. Sup. Ct., Dec. 22, 2015)
Reis v. J.B. Kaufman Realty Co., LLC, 2017 N.Y. Misc. LEXIS 1440 (N.Y. Sup. Ct., Mar. 7, 2017)

HEADNOTES

Injunctions--Preliminary Injunction--Interference with Lease Agreement.

JUDGES: [*1] ROBERT J. MCDONALD, J.S.C.

OPINION BY: ROBERT J. MCDONALD

OPINION

Robert J. McDonald, J.

Plaintiff is a tenant, defendant J.B. Kaufman Realty Co., LLC is the prior owner, and defendant 43-01 22nd Street Owner LLC is the current owner of the premises located at 43-01 22nd Street in Long Island City, New York.

On July 20, 2015, plaintiff commenced this action by filing a lis pendens and summons and complaint, seeking a declaratory judgment that the term of plaintiff's lease is scheduled to expire on February 28, 2030 and the annual percentage rent under the lease shall increase at a rate of not less than 5% and not to exceed 8% annually.

The complaint alleges that by lease dated March 12, 2002, plaintiff entered into possession of the premises. The lease was for a term to expire on April 30, 2004. Between 2002 and 2008, the parties entered into letter agreements renewing and modifying the original lease by expanding the premises and extending the term of the lease.

At issue is a letter dated June 27, 2012 (hereinafter the 2012 Letter). In relevant part, the 2012 Letter provides that the "Lease terms to be extended to now terminate on February 28, 2030; terms to be determined at the expirations of this initial **[*2]** lease consolidation period." The 2012 Letter further provides: "Tenant will have the option to renew entire lease at expiration of above with written notification to Landlord within 1 year prior to expiration of present lease. Terms and length to be determined at that time. Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually."

Defendants moved to dismiss the complaint on the grounds that the 2012 Letter was merely a letter of intention and, **[**2]** therefore, is unenforceable. By

Short Form Order dated December 22, 2015 and entered on December 29, 2015, this Court denied defendants' motion.

By Stipulation dated March 17, 2016, the parties agreed "to honor and fulfill each of their respective obligations under the Lease, as if there was no such dispute and it was therefore still in full force and effect".

Plaintiff now seeks a preliminary injunction enjoining Landlord from interfering with the heat, disabling security doors, leaving the building elevator unlocked after 9:00 PM, making excessive noise and vibrations, and performing demolition and construction work at the building without the necessary permits from the New York City Department **[*3]** of Buildings (DOB).

In support of the applications, plaintiff submits his own affidavit dated January 24, 2017, summarizing Landlord's interference with his rights. He affirms that beginning in late November 2016, Landlord began a demolition project on the 5th and 6th floors. The construction noise and vibrations were so bad that many of his subtenants left to work out of their homes and some have even permanently moved out of the premises. A telecommunications line was cut, and extension cords have been strung across the ceiling, replacing the electrical wiring. On January 17, 2017, construction workers caused the lock on the entrance door to the building to no longer work. The lock was repaired on January 20, 2017. The passenger elevator is no longer locked at 9 p.m. as it used to be. On December 16, 2016, someone held a large party in the portion of the 6th floor, which was recently demolished by Landlord. As the elevator was not shut off, there was open access for the party. On January 10, 2017, Landlord cut off the heat to the premises.

Plaintiff also submits an expert affidavit from Alan D. Chasan, a licensed architect. Mr. Chasan affirms that on January 24, 2017, he visited the **[*4]** premises and observed evidence of demolition of heavy glass-block masonry facade materials on the 5th and 6th floor levels. He states that the work requires a DOB permit, but there is no record of any application for a permit having been made at DOB. The work also requires the installation of sidewalk sheds to protect pedestrians and visitors entering the building, but there was none. He observed glass shards, some as large as several inches in diameter, all along the 22nd Street sidewalk, and scattered out into the street.

In opposition to the applications, defendants submit an affidavit from Toma Nikac, the Director of Property Management of **[**3]** Olmstead Properties, Inc., the managing agent for the Landlord. He affirms that plaintiff's allegations regarding the heat are false. Landlord has at all times, including January 10, 2017, operated the primary boiler during business hours and provided more than adequate heat throughout the building. He acknowledges that two radiators were not functioning properly in late-January 2017, but were repaired on February 1, 2017. Regarding the 6th floor party, Landlord did not authorize the party. Mr. Nikac affirms that it was plaintiff's subtenants **[*5]** who improperly used the vacant space. He also states that the security door has never been removed. The entrance door lock was temporarily repaired on January 20, 2017, and a new lock was installed on January 23, 2017. The allegations regarding the elevator being unlocked after 9:00 p.m. are false. Landlord has the exact same routine as the prior owner. Lastly, the demolition work performed on the vacant portions of the 5th and 6th floors was performed pursuant to a valid permit issued by DOB and annexed to the opposition papers. Regarding the window replacement work, he affirms that a DOB permit is not required for such work. He further affirms that, in any event, after the Temporary Restraining Order was signed, DOB issued a violation and a stop work order as to Landlords' window replacement work. The violation states that Landlord must get a permit and erect a sidewalk shed.

To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction (see *Stockley v Gorelik, 24 AD3d 535, 808 N.Y.S.2d 282 [2d Dept. 2005]*; *Brach v Harmony Servs., Inc., 93 AD3d 748, 940 N.Y.S.2d 652 [2d Dept. 2012]*; *Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612, 862 N.Y.S.2d 551 [2d Dept. 2008]*; *Montauk-Star Is. Realty Group v Deep Sea Yacht & Racquet Club, 111 AD2d 909, 491 N.Y.S.2d 32 [2d Dept. 1985])*.

Upon a review of the two applications, **[*6]** opposition, and reply thereto, this Court finds that plaintiff has satisfied the criteria for the grant of a preliminary injunction.

Here, plaintiff has demonstrated a probability of success on the merits. This Court has already denied defendants' motion to dismiss finding that issues of fact remain including whether the 2012 Letter extended the lease term beyond February 28, 2015 and whether the parties already performed under the 2012 Letter. If a primiliminary injunction is denied, the status quo would be disturbed and a final judgment would likely be rendered ineffectual as all of plaintiff's subtenants would likely be constructively evicted (see **[**4]** *Mr. Sound, USA Inc. v 95 Evergreen Bldg. Investors III, LLC, 51 Misc 3d 1202[A], 36 N.Y.S.3d 48, 2016 NY Slip Op 50353[U] [Sup. Ct., Kings Cnty. 2016]*; *Law Offices of Michael A. Cervini v 8210 Roosevelt Ave., Inc., 42 Misc 3d 1220[A], 988 N.Y.S.2d 523, 2014 NY Slip Op 50103[U] [Sup. Ct., Queens Cnty. 2014])*. The threat of plaintiff's loss of subtenants and good will and the threat due to the lack of heat and safety concerns, for which there is no monetary award, satisfies the irreparable harm prong. Lastly, the balance of equities favors the granting of the injunction as defendants have failed to demonstrate how they will be harmed or prejudiced by the injunction. Moreover, pursuant to the 2016 Stipulation, the parties already agreed to abide by the terms of the Lease during the pendency of this matter. **[*7]**

Accordingly, for the above stated reasons, it is hereby,

ORDERED, that plaintiff's applications (seq. nos. 3 & 4) are granted to the extent that defendant 43-01 22nd STREET OWNER LLC is enjoined from cutting off or reducing to below previous customary and normal levels the heat provided to the leased premises which are the subject of this action on business days from 8:00 AM to 5:00 PM, disabling security doors to the premises, leaving the building elevator unlocked after 9:00 PM, and from performing demolition and construction work at the building without the necessary permits from the New York City Department of Buildings and without taking all safety measures and safeguards prescribed for such work by the New York City Buildings Code.

Dated: March 7, 2017

Long Island City, NY

ROBERT J. MCDONALD

J.S.C.