

SBA Monarch Towers 1, LLC v Hirakis
2019 NY Slip Op 32576(U)
June 21, 2019
Supreme Court, Queens County
Docket Number: 708532/2016
Judge: Marguerite A. Grays
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Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

SBA MONARCH TOWERS 1, LLC, X

Index
No.: 708532/2016

Plaintiff(s)

-against-

Motion
Date: April 2, 2019

PETER HIRAKIS,

Motion
Cal. No.: 23

Defendant(s)

Motion
Seq. No.: 25

PETER HIRAKIS, X

Third-Party Plaintiff(s)

-against-

PETER LONGO, PE, OMNIPOINT
COMMUNICATIONS, INC., also known at
T-MOBILE USA, INC.

Third-Party Defendant(s)

Hon. Marguerite A. Grays X

The Court, *sua sponte*, amends its Order dated June 6, 2019, solely to reflect the proper motion sequence number 25.

The Order remains in effect in all other aspects as follows:

Plaintiff SBA Monarch Towers I, LLC (SBA) has moved for a preliminary injunction, *inter alia*, prohibiting defendant Peter Hirakis from obstructing its application to the New

York City Department of Buildings (DOB) the purpose of which is to cure any alleged permit defects concerning SBA's wireless facilities located on the defendant's premises.

I. Background

A. The Plaintiff's Allegations

Plaintiff SBA Monarch Towers I, LLC alleges the following:

Defendant Peter Hirakis owns property known as 113-02/12 Springfield Boulevard., Queens Village, New York. Plaintiff SBA a wireless communications company, is the successor tenant under a 2007 site lease between defendant Hirakis, as landlord, and Omnipoint Communications, Inc., as tenant. Section 3 of the lease permits the use of the demised premises "for the transmission and reception of radio communications signals and for the construction, installation, operation [etc.] of related facilities, including without limitation, tower and base, antennas, microwave dishes, equipment shelters and/or cabinets and related activities." Section 7(f) of the site lease allows unrestricted access to the leased premises "24 hours a day, 7 days a week", without interference from the defendant, for the purpose of altering, replacing, expanding, enhancing, or upgrading the antenna facilities.

Defendant Hirakis has restricted the plaintiff's access to the leased premises to only certain hours of the day and has demanded that the plaintiff contact only him to open a locked access gate.

Plaintiff SBA brought the instant action for the purpose of, *inter alia*, obtaining a

declaratory judgment that defendant Hirakis has breached the site lease by prohibiting unrestricted access to the leased premises, obstructing the access way to the leased premises, and interfering with necessary work on the antenna facilities.

While this action was pending, defendant Hirakis sent plaintiff SBA a “30 Days Notice to Tenant of Termination of Tenancy and Landlord’s Intention To Recover Possession.” Defendant Hirakis has demanded that SBA build a fence around the leased premises, and plaintiff SBA has denied that it has any obligation to build the fence.

B. The Third-Party Complaint

The third-party complaint brought by defendant/third-party plaintiff Hirakis alleges the following:

Third-party defendant Peter Longo, PE and third-party defendant Omnipoint Communications, Inc. “collaborated to install the foundation of the telecommunications antenna without complying with the rules, codes and regulations of the New York City Department of Buildings (DOB) and other governmental agencies. The third-party defendants developed a plan to circumvent the foundation permitting and testing of said antenna.” The third-party defendants fraudulently and negligently made representations to the DOB concerning the permit and built the antenna in an illegal and inappropriate manner. The antenna caused damage to the building and property owned by Hirakis, and he had to request his tenants to vacate the building.

II. Allegations Made on the Instant Motion

A. The Plaintiff's Allegations

Pursuant to a Memorandum decision dated September 29, 2017, this Court granted a branch of the plaintiff's motion which was for a preliminary injunction prohibiting defendant Hirakis from "impeding, restricting, preventing, or otherwise limiting plaintiff's 24 hours a day, 7 days a week access to the leased premises." On June 9, 2017, this Court granted the plaintiff a Yellowstone injunction prohibiting the defendant from terminating the plaintiff's tenancy.

On December 12, 2017, the defendant served the plaintiff with a notice to cure which alleged that SBA was in violation of Paragraphs 1(b) and 7(a) of the site lease by "constructing the foundation of the antenna without obtaining a proper permit from the NYC Dept. of Building and/or other governmental agencies." This Court signed an Order to Show Cause on January 11, 2018 containing a temporary restraining order prohibiting the defendant from terminating the tenancy pursuant to the notice to cure.

SBA subsequently received an audit notice letter from DOB dated March 26, 2018 informing it that DOB intended to revoke the approval and permit issued in connection with the erection of the antenna unless SBA provided "sufficient information." The DOB began the audit because of complaints made to it by the defendant.

According to Linda Montemarano, the owner of Construction Permit Services Corp. (CPS), which provides services to the telecommunications industry, including those related to the permitting process of the DOB, on April 26, 2018, she and Peter Longo met with an

examiner from the DOB and “promptly resolved items numbers 1 and 5 on the Notice Letter.” Montemarano further alleges that based on her “experience and knowledge of the Department of Buildings, the permitting defect alleged by the defendant and raised in the audit process concerning the foundation is readily curable.” She intended to file applications with the DOB to “validate the existing foundation and to reinstate the Permit.” “That application will require the Defendant’s signature on certain forms as the owner of the building ***”.

On December 19, 2018, the plaintiff’s attorney sent the defendant’s attorney a copy of the DOB application which required the defendant’s signature. The defendant’s attorney responded by requesting more information and payment of the defendant’s costs of hiring his own professional engineer to review the application. The plaintiff’s attorney agreed to provide the additional information, but refused to pay the costs of defendant’s engineer. The instant motion ensued.

B. The Defendant’s Allegations

The application that SBA wants Hirakis to sign is untimely and very prejudicial to the latter, and its only purpose is to avoid the cancellation of the site lease. The application filled out by the plaintiff does not meet the DOB requirements. Hirakis is unwilling to fill out the application under the penalty of perjury. The tenant has filed false applications in the past.

III. Discussion

In order to obtain a preliminary injunction, plaintiff SBA had to show (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and

(3) a weight of the equities in his favor (*see, Aetna Insurance Co. v. Capasso*, 75 NY2d 860 [1990]; *McNeil v. Mohammed*, 32 AD3d 829 [2006]). The plaintiff successfully carried this burden.

In regard to the first requirement, the plaintiff established a likelihood of ultimate success on the merits by making a prima facie showing that it can prove one of its causes of action (*see, McNeil v. Mohammed, supra; Trimboli v. Irwin*, 18 AD3d 866 [2005]; *Four Times Square Associates, L.L.C. v. Cigna Investments, Inc.*, 306 AD2d 4 [2003]). The site lease contains clauses which allow the tenant to upgrade the antenna facilities at any time during the term of the lease and to have access to the premises (see this Court's decision dated September 29, 2017). As specifically pertains to the instant motion, section 1(b) of the site lease provides that " Landlord agrees to cooperate with tenant in obtaining at Tenant's expense, all licenses and permits or authorizations required for Tenant's use of the premises **** from all applicable government and/or regulatory entities ****" Section 1(b) further provides that "[d]uring the Initial Term or any Renewal Term of this Lease, Landlord agrees that it will not interfere with Tenant's efforts to secure other licenses and permits or authorizations that relate to the property." Moreover, the implied covenant of good faith and fair dealing in every contract includes the promise that no party shall do anything which will have the effect of preventing the other party from receiving the fruits of the contract (*Dalton v. Educ. Testing Serv.*, 87 NY2d 384 [1995]).

In regard to the second requirement, this Court has previously found that the defendant's alleged interference with the plaintiff's rights under the site lease could

jeopardize the reliable operation of the cellular communications facility and potentially impact 911 emergency service from the site (see this Court's decision dated September 29, 2017). Moreover, irreparable injury has been defined as "a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue pendente lite ***" (*Chrysler Corp. v. Fedders Corp.*, 63 AD2d 567, 569 [1978]; *Societe Anonyme etc. v. Feller*, 112 AD2d 837 [1985]). In the case at bar, the defendant's refusal to sign the DOB application effectively threatens to make the leased site useless to the plaintiff. Moreover, the requirement of irreparable harm "may be met by proof that the defendant's act threatens to destroy an ongoing business concern ***" (*Reuschenberg v. Town of Huntington*, 16 AD3d 568, 570 [(2005)]), and SBA made such a showing.

In regard to the third requirement, the plaintiff demonstrated that the irreparable injury to be sustained by it is more burdensome than the harm that will be caused to the defendant through imposition of the injunction (*see, Reuschenberg v. Town of Huntington, supra*). The defendant did not persuade the court that his refusal to sign the application is based on a genuine fear that he faces penalties because it contains false information. The defendant did not specifically identify any false statements on the application, even though he was sent a copy of it, and he did not show that he attempted to cooperate in the drafting of the application to ensure its accuracy. Moreover, the plaintiff, who is aware that the defendant is monitoring the application process, has engaged Construction Permit Services Corp. to manage the permitting process.

The Court is mindful that "[a] mandatory injunction, which is used to compel the

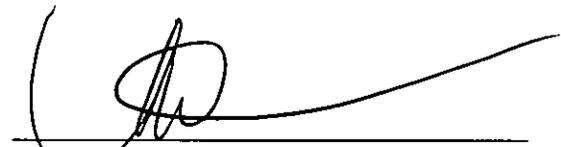
performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action ****” (*Matos v. City of New York*, 21 AD3d 936, 937 [2005]; *Zoller v. HSBC Mortg. Corp. (USA)*, 135 AD3d 933 [2016]). Under all of the circumstances of this case, where the existence of an ongoing business is threatened, the defendant should be required to sign the DOB application.

Accordingly, the motion is granted. The parties may submit affidavits concerning the appropriate amount of the undertaking at the time of the Settlement of the Order.

Settle Order.

Dated:

JUN 21 2019


MARGUERITE A. GRAYS
J.S.C.

FILED
JUL -2 2019
COUNTY CLERK
QUEENS COUNTY