

New Kim Thanh Jewelry Corp. v 169 Canal St. LLC

2024 NY Slip Op 32210(U)

June 28, 2024

Supreme Court, New York County

Docket Number: Index No. 650297/2024

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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NEW KIM THANH JEWELRY CORPORATION, WALTER
QUYEN TO,

Plaintiff,

INDEX NO. 650297/2024

MOTION DATE 05/18/2024

MOTION SEQ. NO. 001

- v -

169 CANAL STREET LLC, CANBOW REALTY CORP.,
ALEXANDRA DADOURIAN

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Upon the foregoing documents, Plaintiffs New Kim Thanh Jewelry Corporation (“Tenant”) and Walter Quyen To (“Mr. To”) (collectively “Plaintiffs”) motion seeking an injunction against Defendants 169 Canal Street LLC (“169 Canal”), Canbow Realty Corp. (“Canbow”), and Alexandra Dadourian (“Ms. Dadourian”) (collectively “Defendants”) is denied.

I. Background

Tenant has rented the premises located at 37 Elizabeth Street, New York, NY (the “Premises”) since 2010 (NYSCEF Doc. 2 at ¶ 7). Since September 2023, Tenant has leased the Premises as a month-to-month tenant (*id.* at ¶ 8). Plaintiffs claim the leased Premises has its own bathroom but due to ongoing construction in an adjacent storefront they no longer have access to that bathroom (*id.* at ¶¶ 10-11). Plaintiffs concede they were given a key to a restroom on the 2nd floor of the adjacent building (*id.*). Plaintiffs demand that Defendants cease construction and restore access to the bathroom in their unit.

Tenant, which operates a jewelry store, attributes a decline in business sales as a result of not having access to a bathroom. Plaintiffs claim the bathroom on the second floor in the adjacent building serves a high volume of users causing Plaintiffs to “endure prolonged waiting times” to use the restroom. Plaintiffs seek a preliminary injunction enjoining Defendants from continuing construction of the adjacent building. Plaintiffs argue that the construction is in breach of the covenant of quiet enjoyment and is aimed at constructively evicting Tenant.

The Defendants oppose. Defendants argue that there is no bathroom within the confines of the leased Premises and that pursuant to the terms of the lease, the month-to-month tenancy could be cancelled upon 180 days’ notice, which was served on February 23, 2024 (NYSCEF Doc. 20). Defendants argue that the bathroom at issue is not a legal structure, was causing leaking, and had caused floor joists to rot and sag. Defendants claim that pursuant to the lease, the landlord has a right to make repairs, alterations, or improvements without said repairs constituting any claim of constructive eviction. Defendants argue that requiring them to cease repair work is endangering the life and safety of other occupants in the building, and that Tenant has failed to pay rent and arrears which was a condition of maintaining the temporary restraining order. They also argue that reluctance to use a nearby bathroom is not valid grounds for injunctive relief. Defendants further argue that the request for injunctive relief is not supported by anyone with personal knowledge of the facts and is therefore inappropriate. Defendants further assert that Mr. To is not a party to the lease and has no standing to bring this action. Defendants argue that Plaintiff lacks any likelihood of success on its claims which warrants denying the motion for a preliminary injunction.

In reply, Plaintiffs submit the affidavit of Mr. To. In that affidavit, Mr. To states he does not contest Defendants’ right to alter public entrances pursuant to the Lease and does not contest Defendants’ right to make repairs, alteration, or improvements to the Premises.

II. Discussion

In order for a plaintiff to demonstrate entitlement to a mandatory injunction, it must be shown, by clear and convincing evidence, a likelihood of success on the merits, irreparable injury if provisional relief is not granted, and that the equities are in his favor (*Kazantis v Cascade Funding RMI Acquisitions Grantor Trust*, 217 AD3d 410, 411 [1st Dept 2023]).

Moreover, a preliminary injunction prior to joinder of issue is inappropriate (*Northern Funding, LLC v 244 Madison Realty Corp.*, 41 AD3d 182, 183 [1st Dept 2007] citing *St Paul Fire & Mar. Ins. Co. v York Claims Serv.* 308 AD2d 347, 348-349 [1st Dept 2003]). Courts are generally reluctant to grant mandatory preliminary injunctions, and such relief will be granted only where right thereto is clearly established (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 [1st Dept 2009]). As a preliminary matter, the Court finds that issue has not yet been joined and therefore the grant of an injunction would be inappropriate.

Moreover, the Court has serious doubts regarding the likelihood of success on the merits of Plaintiffs' claims. Indeed, Mr. To has conceded that pursuant to the terms of the lease, Defendants had a right to make repairs without same giving rise to a claim of constructive eviction (NYSCEF Doc. 16 at § 73[k]; see also *Fieldstone Capital Inc. v Ryan & Conlon, LLP*, 64 Misc.3d 62 [1st Dept, App. Term 2019]). Plaintiffs have likewise failed to show how they would not be compensated for their alleged injuries via money damages, thereby failing to show irreparable injury. Indeed, aside from the request to reopen a restroom and to sign a three-year lease extension, Plaintiffs expressly seek money damages for all their causes of action. However, Plaintiffs fail to show irreparable injury from having to use a restroom in a neighboring building¹, and in the month-to-month lease, Plaintiffs expressly agreed that either party could terminate the month-to-month

¹ Defendants concede they are being given rent concessions to compensate for the lack of a bathroom in immediate proximity to the premises.

lease with 180 days' notice (NYSCEF Doc. 20; *see also Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020] [written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms]).

Finally, the Court finds that the equities do not balance in Plaintiffs' failure. First, Plaintiffs' have failed to comply with their own requested temporary restraining order as they concede they have not paid Defendants' rent. Second, Plaintiffs' have not refuted Defendants' assertion that the bathroom repairs are necessitated by leaking which has caused wood rot and is threatening the structural safety of the building. Given the totality of the circumstances, the Court is unable to grant Plaintiffs' the preliminary injunction they seek at this juncture.

Accordingly, it is hereby,

ORDERED that Plaintiffs' motion for injunctive relief is denied; and it is further

ORDERED that any restraints put in place pursuant to the Order to Show Cause dated January 31, 2024 (NYSCEF Doc. 10) are hereby vacated; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order with notice of entry on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>6/28/2024</u> DATE					<u>Mary V Rosado Jsc</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED		<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED			<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER			<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE