
SWEET IMPORTS, INC.

Plaintiff

- against -

E.S. MCCANN & SON, INC., NATIONAL
BROADCASTING COMPANY, INC.,
ROCKEFELLER CENTER PROPERTIES,
and ROCKEFELLER CENTER MANAGEMENT
CORPORATION,

Defendants

Index No.32663/91

CAROL E. HUFF, J.:

Raising the spectre of potentially life threatening asbestos exposure, plaintiff moves to preliminarily enjoin defendants, their agents and employees from entering its premises to engage in any type of construction. Defendants cross-move for an order seeking to complete the work and for attorneys fees, costs and sanctions. After oral argument of the application, an immediate full evidentiary hearing was ordered to address the issues of whether immediately hazardous asbestos existed, and the necessity for the conduit pipes to traverse plaintiff's premises.

Plaintiff is the tenant and owner of Sweet Imports, Inc., (Sweet) a chic sandwich shop located on the concourse level at 30 Rockefeller Plaza. The shop has an exposed ceiling design with no drop ceiling and the mechanical systems are exposed. Defendant E.S. McCann & Son, Inc. (McCann) is a construction contractor. Defendant National Broadcasting Company, Inc. ("NBC"), is also a tenant with some operations on the second floor of 30 Rockefeller Plaza. Defendants Rockefeller Center Properties, and Rockefeller Center Management Corp. are respectively the owner and manager of the building.

The hearing, which encompassed 9 witnesses, and 11 exhibits including a

videotape of the premises, and the submissions revealed the following:

On November 22, 1991, Frank Darmstadt, Project Manager for Construction for defendant NBC, met with plaintiff and a representative of E.S. McCann, Nicholas Carozza. Plaintiff was advised that work was going to commence and told her to order a guard at NBC's expense. Marsha Shaich, plaintiff's president, consented to the work and ordered the guard service. Work commenced and progressed rapidly on November 23, and November 24. Defendant McCann opened the exterior wall to permit installation of nine 4" conduit pipes, which would contain NBC telecommunications cables. Brackets to hold the conduit pipes were installed along the intended course the conduit pipes would follow inside the demised premises. Approximately 10 feet of conduit pipe were installed.

On Monday, November 25, Darmstadt again met with Shaich, and reviewed the work. At that time, Shaich registered no objections or concerns and again ordered the guard service. Later Darmstadt learned the guard service had been cancelled by Shaich, and the installation was halted. The parties met on November 26, to discuss Shaich's objections and she allegedly demanded payment before work could continue. Shaich denies demanding payment contending that an offer of a 515,000 remuneration was made to her by Darmstadt. Although no temporary restraining order was obtained, defendants have ceased work in the face of plaintiff's failure to order a guard to secure her inventory.

Plaintiff seeks an order permanently enjoining the work, while on the contrary defendants seek an order directing that the work continue.

The initial inquiry is whether or not there is immediately hazardous asbestos in the demised premises. Both parties presented their experts, together with their reports.

Robert Carvalho, director of Safety of Executive Abatement Industries, testified for plaintiff. He is licensed by New York City and accredited by

the Environmental Protection Administration. He visited Sweet Imports on December 5, and obtained bulk samples from the plenum in the phone booth area in the lobby adjacent to the Sweet premises; from above a ceiling tile in a rear kitchen within the Sweet premises. He found the sample friable, constituting an immediate hazard. He defined friable as easily crumbled by hand. He also obtained air samples which on the date of his testimony were not yet analyzed by Transmission Electron Microscopy, a rather expensive test. On cross examination he admitted that there was no airborne asbestos in the demised premises, and that the total of all fibers per cubic centimeters, (.003) were considerably well below the asbestos abatement clearance standards (.01) of the Department of Environmental Protection.

Glenn Small, Project Engineer for Law Associates, testified on behalf of defendants. He holds a New York City Department of Environmental Protection license, and a Department of Labor Inspector's license.

On December 7, he visited Sweet Imports. Although he was not permitted in the interior of the demised premises, he was able to obtain a bulk sample from the plenum in the adjacent phone lobby area. He stated that the insulation in plenum contained no asbestos (consistent with plaintiff's laboratory report). He also said he saw no cementitious mudpacking. He stated it was maleable as reported by plaintiff's expert, and was by definition non-friable. He further stated it was not in an air stream, concluding there was no hazardous condition. On cross examination he stated no air sample was taken because no friable asbestos was found, and plaintiffs laboratory work itself found the fibers per cubic centimeter well within the acceptable range.

This record presents no evidence of an immediate asbestos hazard.

Turning to the reasons proffered for traversing plaintiff's premises with the piping defendants' witnesses indicated that apparently the decision was economic. Plaintiff's premises offer the most advantageous location with

respect to the existence of a column permitting or assisting the upward turn of the conduit pipes into the NBC premises.

Defendants also rely on paragraph B of the lease, which reads as follows:

Eighth. Changes or Alterations by Landlord. The Landlord reserves the right to make such changes, alterations, additions, improvements, repairs or replacements in or to the Building (including the premises) and the fixtures and equipment thereof, as well as in or to the street entrances, halls passages, elevators, escalators and stairways and other parts of the Building and the Center, and to erect, maintain and use pipes, ducts and conduits in and through the premises, all as it may reasonably deem necessary or desirable; provided, however, that there be no unreasonable obstruction of the means of access to the premises or unreasonable interference with the use of the premises.

Nothing contained in this paragraph or in Article Sixth hereof shall be deemed to relieve the Tenant of any duty, obligation or liability of the Tenant with respect to making any repair replacement or improvement or complying with any law, order or requirement of any governmental or other authority.

The Landlord reserves the right to change the name or address of the Building at any time. Neither this Lease nor any use by the Tenant shall give the Tenant any right or easement to the use of any door or any passage connecting the Building with any subway or any other building or to the use of any public conveniences, and the use of such doors, passages and conveniences may be regulated or discontinued at any time by the Landlord.

The granting of preliminary injunctive relief lies within the sound discretion of the court (see, Gerges v. Koch, 62 NY2d 84) and is predicated upon movant demonstrating: irreparable injury absent granting of the preliminary injunction; a likelihood of ultimate success on the merits; and, a balancing of the equities in favor of the movant's position (see, Gambar Enterprises, Inc. v. Kelly Services, Inc., 69 AD2d 297, 306; Albini v. Solork Associates, 37 AD2d 835). It is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing such an undisputed right rests upon the movant (First National Bank of Downsville v. Highland

Hardwoods, Inc., 98 AD2d 924, 926; see also, Family Affairs Haircutters, Inc. v. Detling, 110 AD2d 745).

Plaintiff has failed to submit sufficient proof to show that it would suffer irreparable injury absent the granting of the requested relief. (See, Quandt's Wholesale Distributors, Inc. v. Guardino, 87 AD2d 684). Plaintiff's expert did not report airborne asbestos in the demised premises necessitating immediate cessation of the work. Moreover, plaintiff cannot sustain the claim of breach of the warranty of quiet enjoyment. (See, Salesian Society Inc. v. Village of Ellenville, 121 AD2d 823). The work was accomplished neatly and after hours. Plaintiff was able to continue operations without interruption. (A decision to cease operations was apparently made during the hearing by Shaich) Absent a finding of immediately hazardous asbestos, plaintiff demonstrates no irreparable harm. Exposed mechanical systems are an integral part of the decor of the demised premises, and additional pipes do not constitute irreparable harm.

Plaintiff also fails to show a likelihood of success on the merits. Plaintiff has not demonstrated that the existence of additional pipes interfered in any way with plaintiffs use or enjoyment of the demised premises. Again absent an immediate asbestos hazard, plaintiff is unlikely to succeed on the merits. Having failed to demonstrate a clear right to the relief demanded, injunctive relief should not be granted until the issues have been fully explored and the entire matter resolved after plenary trial (see, Little India Stores, Inc. v. Singh, 101 A02d 727).

Finally, the equities do not weigh in plaintiff's favor (see, W.T. Grant Co. v. Srogi, 52 NY2d 496; Nielsen v. Corbo, 35 AD2d 580). Although plaintiff reasonably relied upon her asbestos expert, the record does not support her contentions. The equities weigh heavily in favor of defendants who incur substantial costs each day the work is interrupted.

On this record, the application for a preliminary injunction and

temporary restraining order is denied. Plaintiff is directed to permit the work to continue forthwith.

Defendants' application for costs, sanctions and attorneys fees is denied. Since there was an asbestos abatement procedure prior to construction or occupancy of the demised premises, plaintiff's concern was not entirely unreasonable.

This constitutes the decision and order of the Court.

Dated: DEC 17, 1991

J.S.C.
Carol Huff