

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

DOCKETED
JAN 22 2018
R. POSTELL
COMMERCE PROGRAM

JB CONVENIENCE CENTER, LLC

Plaintiff

v.

ANNA MAE BURGHER, TRUSTEE
and JOHN BURGHER, ALLEGED TRUSTEE for
the ANNA MAE BURGHER LIVING TRUST,
and CITY OF PHILADELPHIA, DEPARTMENT
OF LICENSES AND INSPECTIONS

Defendants

October Term, 2017

Case No. 03449

Commerce Program

Control Nos. 17122754,
17103666

ORDER

AND NOW, this nd 22 day of January, 2018, upon consideration of plaintiff's petition for special injunction and for preliminary injunction, the response of defendants, and the parties' respective *memoranda* of law, it is **ORDERED** that the petition is **DENIED**.

Upon consideration of plaintiff's emergency motion to enjoin sale or transfer of defendants' property at issue in the litigation, the response of defendants, and the parties' respective *memoranda* of law, it is **ORDERED** that the emergency motion is **DENIED**.

BY THE COURT,



RAMY I. DJERASSI, J.

Jb Convenience Center Llc Vs The Anna Mae Bu-ORDOP



MEMORANDUM OPINION

Defendant is Anna Mae Burgher, Trustee for the Anna Mae Burgher Living Trust (hereinafter, “Landlord”). Plaintiff is JB Convenience Center, LLC, (“Tenant”), an entity conducting its business at the “Property” owned by Landlord. The Property is located at 2822 North Broad Street, in Philadelphia, Pennsylvania.

On June 10, 2015, Landlord and Tenant entered into a lease Agreement (the “Lease”). Pursuant to the Lease, Tenant is entitled to possession of the first floor of the Property for a period of fifty years.¹ Under the Lease, the rents owed by Tenant amount to \$12,000.00 per year during the first decade, and increase at the beginning of each new decade by a specified amount.² By the beginning of the fifth or last decade, Tenant will be obligated to pay rents in the amount of \$24,880.00 per year.³ The Lease also contains a provision entitling Tenant to exercise its right of first refusal, should the Landlord decide to sell the Property.⁴

Between October 6, and October 8, 2016, Landlord and Tenant executed a SETTLEMENT-AND-CONFIDENTIALITY AGREEMENT (hereinafter, the “Lease Amendment”).⁵ Pursuant to the Lease Amendment, Landlord undertook the obligation to correct certain structural problems in the basement, replace a sanitary pipe therein, stop water from infiltrating the basement, and repair other specified areas of the premises.⁶

On August 9, 2016, Tenant forwarded to Landlord an offer to buy the entire Property. In the offer, Tenant indicated that it had appraised the value of the Property

¹ Lease, § 2—Term, Exhibit A to the instant petition.

² Id. at § 3—Rent.

³ Id.

⁴ Id., § 22—Right of First Refusal.

⁵ Lease Amendment, Exhibit B to the instant petition.

⁶ Id., ¶¶ 6—7.

at \$162,000.00. However, noting that the Property was burdened with additional problems requiring remediation, structural, concrete, and maintenance or repair work, Tenant offered to buy Landlord's Property for \$50,000.00.⁷ There appears to be no evidence in the record of any discussions or negotiations following Tenant's offer to acquire the Property for \$50,000.00.

On August 29, 2017, the Department of Licenses and Inspection of the City of Philadelphia ("L&I"), notified Landlord that the Property was in violation of specific sections of the Philadelphia Code, and instructed Landlord to make the necessary corrections.⁸

On October 27, 2017, Tenant filed a complaint against Landlord and L&I. In the complaint, Tenant asserts the claims of equitable relief and breach-of-contract. Under the claim of equitable relief, Tenant asks the Court to issue an Order requiring L&I to "work with [Tenant] ... to allow the installation of a fire detection system only on the first floor," and to enjoin L&I "from closing off access to the first floor so long as ... [Tenant] is making a good faith effort to install a fire protection system on the first floor."⁹ Also under the same claim for equitable relief, Tenant asks the Court to issue an Order requiring Landlord to make the structural corrections and repairs contemplated under the Lease Amendment.¹⁰ Under the second claim, breach-of-contract, Tenant asks the Court to issue an Order requiring Landlord to reimburse all sums expended by Tenant to install the fire protection system, to pay all sums that Tenant has expended or

⁷ Letter from Tenant to Landlord dated August 9, 2017, Exhibit A to Landlord's response to the emergency motion to enjoin sale of the Property.

⁸ INITIAL NOTICE OF VIOLATION AND ORDER dated 08/29/2017, Exhibit I the petition for special injunction and preliminary injunction, filed simultaneously with Tenant's complaint.

⁹ Complaint, Count I—Equitable Relief, ¶¶ 47—52.

¹⁰ *Id.*

may expend to perform the corrective structural and repair work, or, in the alternative, “to pay [to Tenant] ... all future lost profit of \$300,000.00.”¹¹

Simultaneously with the complaint, Tenant filed a petition for special injunction and preliminary injunction against Landlord and L&I. In the petition, Tenant asserts that unless a fire detection system is installed at the Property, L&I will “padlock the entire building.”¹² Through this petition, Tenant seeks an Order enjoining L&I from shutting down the leased portion of the Property, and allowing Tenant to continue to “install a fire detection system on the first floor [of the Property.]”¹³ On December 7, 2017, L&I was dismissed from the instant action by stipulation of all the parties.

On December 9, 2017, Landlord forwarded a notice to Tenant. In the notice, Landlord stated that a third party had offered to buy the Property “As Is” for \$238,000.00.¹⁴ The notice was provided to Tenant in accordance with Tenant’s contractual right of first refusal.¹⁵ There appears to be no evidence in the record showing that Tenant has made an offer under its right-of-first-refusal.

On December 13, 2017, Landlord filed an answer with new matter and counterclaim against Tenant. In the single counterclaim, Landlord alleges that Tenant breached the Lease by failing to pay rents and by blocking access to the demised premises.¹⁶ In the counterclaim, Landlord also asserts that Tenant has “taken or claimed unwarranted setoffs against rent.”¹⁷ On December 20, 2017, Tenant filed its

¹¹ Id., Count II—Breach of Contract, ¶¶ 53–58. The Court cannot find in the record any evidence showing how Tenant has determined that its “future lost profits” will amount to \$300,000.00.

¹² Petition for special injunction and for preliminary injunction, ¶¶ 5–6; see also Complaint, ¶ 26, which Tenant has incorporated into the petition by reference.

¹³ Proposed Order attached to the petition for special and preliminary injunction, “Wherefore” clause.

¹⁴ Letter from Landlord to Tenant dated December 9, 2017, Exhibit C to the emergency motion to enjoin sale of the Property.

¹⁵ Id.

¹⁶ Answer to complaint with new matter and counterclaim, pp. 10–11 (un-numbered).

¹⁷ Id.

answer to the new matter and counterclaim of Landlord. Tenant specifically denies the allegations contained in Landlord's counterclaim.¹⁸

On December 21, 2017, the petition for special and preliminary injunction was withdrawn by Tenant upon stipulation by the parties. However, the following day, December 22, 2017, the parties stipulated to withdraw the stipulation withdrawing the petition for special and preliminary injunction. Also on December 21, 2017, Tenant filed the instant emergency motion to enjoin sale or transfer of ownership of Landlord's property at issue in the litigation. Tenant argues that the sale of the Property to a third party must be enjoined because "the sale [would] irreparably harm" Tenant and "eliminate any remedy at law."¹⁹ Tenant appears to argue that if the Property is sold "As Is," the new owner will have no duty to make the correction and repair work mandated under the Lease Amendment, while Landlord/seller will avoid its obligations thereunder "because [Landlord] will have dissipated its only asset –the Property."²⁰

DISCUSSION

To obtain injunctive relief in Pennsylvania—

a petitioner must establish that:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by **money** damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the

¹⁸ Tenant's answer to Landlord's new matter and counterclaim.

¹⁹ Emergency motion to enjoin sale of the Property, p. 1.

²⁰ Id., ¶

merits;

(5) the injunction is reasonably suited to abate the offending activity; and

(6) the public interest will not be harmed if the injunction is granted.²¹

I. THE PETITION FOR SPECIAL INJUNCTION AND FOR PRELIMINARY INJUNCTION.

Through this petition, Tenant seeks an Order enjoining L&I from shutting access to the first floor of the Property. This argument is rejected because Tenant cannot demonstrate that the injunction is necessary to prevent immediate and irreparable harm. Tenant cannot demonstrate any immediate and irreparable harm because in a subsequent filing –namely, the emergency motion to enjoin the sale of the Property– Tenant specifically concedes that its petition for injunctive relief–

served its intended purpose, forcing the ... [Landlord] to allow the installation of the fire detection system and holding off L&I until the fire detection system was installed.²²

The foregoing admission moots the petition for injunctive relief, and for this reason the petition is denied.

II. THE EMERGENCY MOTION TO ENJOIN THE SALE OR TRANSFER OF THE PROPERTY.

In this motion, Tenant argues that if the Property is sold “As Is,” Tenant will be unable to enforce the corrective and repair work required under the Lease Amendment; therefore, its business will suffer irreparable harm that cannot be adequately compensated. According to Tenant, the harm cannot be adequately compensated because Landlord “will have dissipated its only asset –the Property.”²³ This argument is

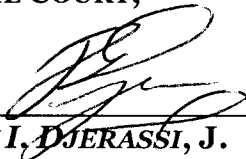
²¹ Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1241 (Pa. Super.2011).

²² Motion to enjoin sale of the Property, ¶ 7 (emphasis supplied).

²³ Emergency motion to enjoin the sale or transfer of Landlord’s Property at issue in the litigation, ¶1 8.

rejected. The argument is rejected because our Pennsylvania Courts have explained that “[a]n injury is irreparable if it cannot adequately be compensated by **money** damages.”²⁴ In this case, even if the Property is sold “As Is” and Tenant’s business were to suffer harm stemming from the sale, such harm would not be irreparable because it could be adequately compensated with money, including the proceeds collected by Landlord at the time of the sale. For this reason, the Court finds that Tenant’s emergency motion fails to overcome the standards for injunctive relief, and the emergency motion to unjoin the sale or transfer of Landlord’s property is denied.

BY THE COURT,



RAMY I. DJERASSI, J.

²⁴ Sovereign Bank v. Harper, 674 A.2d 1085, 1091 (Pa. Super. 1996) (emphasis supplied).