

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

JOEL ELFMAN, DDS et al	:	COMMERCE PROGRAM
	:	
v.	:	FEBRUARY TERM 2001
	:	
ARNOLD BERMAN et al	:	No. 2080
	:	
	:	Control No. 70286

ORDER

AND NOW, this 2nd day of October, 2001, upon consideration of the petition of John Blatteau Associates, Inc. (“Blatteau”) and JBA Interiors, Inc. (“JBA”) for a preliminary injunction and in accordance with the opinion contemporaneously filed with this order, IT IS HEREBY ORDERED that the preliminary injunction is GRANTED as follows:

- (1) John Turchi, Jr., 1930-34 Associates, 1930-34 Corporation and Walnut Construction (the “Turchi defendants”) shall repair the water system at 1930 Chestnut Street (the “building”) so that Blatteau and JBA have a continuous supply of safe, potable running water.
- (2) The Turchi defendants shall supply heat for the building from October 10 until May 20 each year.
- (3) The Turchi defendants shall remove all garbage and debris from the common areas of the building, including trash blocking the stairways and exits.
- (4) The Turchi defendants shall maintain at least one working elevator at all times and shall supply the elevator with a working emergency telephone.
- (5) The Turchi defendants shall enter into a contract for biweekly maintenance of the elevator.
- (6) The Turchi defendants shall provide daily cleaning service to the common areas of the

building and the premises leased by Blatteau and JBA.

(7) The Turchi defendants shall give Blatteau and JBA, their employees, their clients and their visitors access to the building and the leased premises from 6:30 am to 12:30 am seven (7) days per week within three (3) business days of removal of the cease operations order.

(8) The Turchi defendants shall not do any residential conversion or other renovation work if that work deprives Blatteau and JBA in any way of the use of the leased premises.

(9) The Turchi defendants shall act diligently and in good faith to remedy the electrical violations identified in Exhibit D-1, Tabs A and E (except for violations of Phila.Code § PM-407.2), restore water service to the building, and have the cease operations order lifted and the building re-opened.

(10) Such diligent and good faith efforts shall, at the minimum, consist of all the following:

(a) Within five (5) days of the date of entry of this order, notifying all counsel in writing of the identity of the electrical and plumbing contractors who will repair the electrical and water systems.

(b) Within five (5) days of the date of entry of this order, notifying all counsel in writing of the identity of the third party inspectors who will inspect the electrical and water systems upon completion of repairs.

(c) Within five (5) days of the date of entry of this order, applying or causing to be applied for all permits necessary to repair the water and electrical systems.

(d) Sending copies of each permit to all counsel within five (5) days of issuance.

(e) Requiring the contractors to identify and perform all repairs to the water and electrical systems required by the cease operation order and ensuring that such repairs are completed. If necessary to identify the required work, the Turchi defendants shall have the contractor walk through the

building with the appropriate inspector from the City of Philadelphia Department of Licenses and Inspections (“L&I”).

(f) Upon commencement of the repairs, asking L&I to inspect the property and to remove the cease operations order based on good faith partial efforts to remedy the violations.

(g) Requiring the inspectors to inspect the work upon completion and to finalize the permits or state reasons why they cannot finalize the permits, and immediately performing any additional work necessary to have the permits finalized.

(h) Hand-delivering each finalized permit to L&I within three (3) business days of finalization.

(i) Hand-delivering copies of each finalized permit, along with an affidavit that the permits were hand-delivered to L&I, to all counsel within three (3) business days of finalization.

(j) Hand-delivering to all counsel written notice of the removal of the cease operations order within three (3) business days of the removal.

(k) Hand-delivering to counsel for Blatteau and JBA keys to the front door of the building within three (3) business days of the removal of the cease operations order.

(l) Hand-delivering to all counsel written notice of any oral or written refusal by L&I to remove the cease operations order within three (3) business days of receiving such notice.

(m) Taking immediate steps in accordance with paragraphs 11(a) through (l) above to remedy all additional violations for which L&I gives notice.

(11) The Turchi defendants shall send to all counsel copies of all written communication from L&I within five (5) days of receipt.

(12) L&I employees with notice of this order are preliminarily enjoined from acting in concert with the Turchi defendants to keep the building closed by refusing without lawful reason to remove the

cease operations order upon receipt of the finalized permits.

(13) All others with notice of this order, including James Sherman, are preliminarily enjoined from acting either in concert with the Turchi defendants as agents, representatives or employees of the Turchi defendants to keep the building closed or violate this order by any other means.

(14) The Turchi defendants shall have complied fully with this order, including securing the lifting of the cease operations order and the re-opening of the building, within thirty (30) days of the entry of this order. On the thirty-first day after entry of this order, the Turchi defendants shall pay a daily fine of \$500 to Blatteau and JBA. The Turchi defendants shall hand-deliver the accumulated fines for each week (Sunday through Saturday) to counsel for Blatteau and JBA by 4:30 pm on the Monday immediately following that week. The fines shall be in the form of a certified check. Once the cease-operations order is lifted, the building is re-opened and the Turchi defendants have otherwise complied with this order, the Turchi defendants shall petition the court to stay the fine. Should L&I refuse to lift the cease operations order in spite of the Turchi defendants' having otherwise fully complied with this order in good faith, the Turchi defendants shall petition the court to stay the fine.

(15) When any daily fine is paid as provided in paragraph 11 of this order, the Turchi defendants may seek an increase in the amount of the bond and the court will immediately address the request.

(16) Blatteau and JBA shall serve a certified copy of this order on James Sherman, L&I, L&I Commissioner Edward McLaughlin, L&I Deputy Commissioner Dominic Verdi, L&I Inspector Daniel Rosanova and L&I Inspector Kenneth Gassman, Jr.

BY THE COURT:

JOHN W. HERRON, J.

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OPINION

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW IN SUPPORT OF
ORDER GRANTING PETITION FOR PRELIMINARY INJUNCTION

This is a consolidated action in which several tenants in a commercial high rise building seek equitable enforcement of their leases. On April 4, 2001, the Department of Licenses & Inspections (L&I) of the City of Philadelphia closed the building for lack of running water. On August 30, 2001, the court granted the petition of a tenant, plaintiff Joel Elfman, DDS, for a preliminary injunction. The court ordered the building's owner, defendant 1930-34 Associates LP, and the owner's principal, defendant John Turchi, to restore the water, remedy electrical violations cited by L&I, comply with other provisions of the lease, and have the building re-opened.

At issue now is the preliminary injunction petition of two more tenants, plaintiffs John Blatteau Associates, Inc. ("Blatteau") and JBA Interiors ("JBA") against Turchi and 1930-34 Associates and defendants 1930-34 Corporation and Walnut Construction (the "Turchi defendants") asking for similar relief. The court grants the petition. Following are findings of fact, a discussion and conclusions of law in support of the order. This opinion adopts the discussion supporting the May 10, 2001 order and the

findings of fact, discussion and conclusions of law supporting the August 30, 2001 order. Elfman v. Berman, February 2001, No. 2080 (C.P.Phila. May 10, 2001); Elfman v. Berman, February 2001, No. 2080 (C.P.Phila. Aug. 30, 2001).

FINDINGS OF FACT

1-64. This opinion incorporates findings of fact 1 through 64 supporting the August 30, 2001 order granting Dr. Elfman's petition for a preliminary injunction.

IX. BLATTEAU AND JBA'S LEASE

65. Blatteau and JBA are affiliated companies leasing a 5000 square foot office on the fifth floor of the building. 8/21/01 N.T. 58; P-40.

66. Blatteau conducts an architectural practice out of the office. 8/21/01 N.T. 55-58. JBA conducts an interior design practice out of the office. 8/21/01 N.T. 55-57. They have renovated the space to reflect the kind of architecture and design that they do so that they can host clients in the office and market themselves. 8/21/01 N.T. 77.

67. As of April 4, 2001, the companies together employed seven full-time employees and one part-time employee. 8/21/01 N.T. 60.

68. Blatteau and JBA's lease expires in 2003. 8/21/01 N.T. 58; P-40.

69. In the Blatteau/JBA lease, the landlord covenanted to

- (a) Keep at least one passenger elevator in operation at all times.
- (b) Provide heat between October 10 and May 20 of each year.

- (c) Clean the leased space daily.
- (d) Provide water for drinking, lavatory and toilet purposes. P-40, § 10.

70. The lease provided that the landlord would not be held liable for failure to provide elevator, heat, utility or cleaning services unless the failure resulted from the landlord's gross negligence or willful misconduct. P-40, §§ 10, 12.

71. The lease gave Blatteau and JBA access to the building from 6:00 am to 12:30 am, seven days per week. P-40, Ex. A, § 8.

72. The lease gave Blatteau and JBA a right of "quiet and peaceful enjoyment of premises." P-40, § 25.

73. The lease provided that, in the event of sale of the building, Blatteau and JBA would become tenants of the purchaser upon the same terms and conditions as set forth in the lease for the balance of the term of the lease. P-40, § 25.

X. HARM TO BLATTEAU AND JBA

74. The April 4, 2001 closing of the building harmed and continues to harm Blatteau and JBA.

75. On the Tuesday before Good Friday, April 2001, an employee of 1930-34 Associates ordered Blatteau and JBA to remove all of their personal property from the building by Friday, and Blatteau and JBA moved it out. 8/21/01 N.T. 67, 101.

76. Since the closing of the building, Blatteau and JBA have conducted business out of three locations. Their offices are now in the home of JBA's president, Diane Mileski, in Philadelphia

and the home of Blatteau's president, John Blatteau, in Merion, Pennsylvania. Their files and library are now in 370 boxes stacked in a warehouse in Philadelphia. The separation of their operations, employees and records makes operations inefficient. The computers are not networked between the two homes. Files and library materials, to which they need constant access, are not close at hand. Space is not sufficient. 8/21/01 N.T. 68-70.

77. These inefficiencies have decreased the two firms' revenues. Because of the decrease in revenue, the firms reduced employee work hours. Blatteau laid off an architect who had been with the firm 15 years. The two firms stopped making contributions to their employees' retirement plan. 8/21/01 N.T. 69-72.

78. The firms are less able to market themselves because they have no office space in which to host clients. 8/21/01 N.T. 76.

DISCUSSION

The court will grant the preliminary injunction for reasons outlined in the discussions supporting the May 10, 2001 and the August 30, 2001 preliminary injunction orders. The Turchi defendants have raised four arguments meriting discussion – either because the arguments are new or because they are particular to Blatteau and JBA.

The Turchi defendants argue that Blatteau and JBA have unclean hands because Blatteau and JBA installed a kitchenette in the leased space without obtaining a building permit from the city. The court rejects this argument. Equity does not require Blatteau and JBA to have led blameless lives. Lucey v. Workmans Compensation App. Bd., 557 Pa. 272, 732 A.2d 1201, 1204 (1999). To show

unclean hands, the Turchi defendants must show that Blatteau and JBA acted unfairly or with fraud, deceit or iniquity in the matter in which they seek relief. Id. Even if a permit was necessary and Blatteau and JBA were responsible for getting the permits, the Turchi defendants have not made such a showing. Neither the Turchi defendants nor Berman ever notified Blatteau or JBA of any breach of the lease when they installed the kitchenette in 1998-99. There is no evidence that Dr. Berman or the Turchi defendants' received a notice of violation or paid a fine or suffered any other damage from there being no permit for the kitchenette installation. See D-1 (list of L&I violations for the building); Phila Code § A-601.1 (\$300 fine for code violation). The Turchi defendants do not claim that Blatteau and JBA deceived them or Berman about the permits. Blatteau and JBA's conduct is not tainted with unfairness, fraud, deceit or inequity. They do not have unclean hands.

The Turchi defendants argue that Blatteau and JBA failed to mitigate damages by relocating to alternative space – space that cost twice as much as their space in the building – after being evicted. The court rejects that argument. Blatteau and JBA are entitled to specific performance of the implied and express covenants of quiet enjoyment in their lease. Emerman v. Baldwin, 186 Pa.Super. 561, 142 A.2d 440, 445 (1958). Mitigation of damages is not a defense to equitable enforcement of the lease. Otherwise, a wrongfully evicted tenant could never have its lease equitably enforced. See Kelly v. Miller, 249 Pa. 314, 94 A. 1055, 1056 (1915) (holding that tenant was entitled to mandatory permanent injunction enforcing the covenant of quiet enjoyment); Checker Oil Co. of Del. v. Harold H. Hogg, Inc., 251 Pa.Super., 380 A.2d 815, 818 (1977)(en banc) (same). Even if mitigation were a defense, Blatteau and JBA have mitigated damages. They set up offices in their presidents' homes, moved their records to a warehouse and continued operations.

The Turchi defendants argue that Blatteau and JBA have not suffered irreparable harm. The court disagrees. The office space is a unique asset. Emerman, 142 A.2d at 445. The loss of use of that space, alone, is irreparable harm. See Checker Oil Co., 380 A.2d at 820 (where landlord breaches covenant of quiet enjoyment, “[t]he difficulty of establishing the amount of pecuniary loss and the continuing nature of the wrong make the remedy of legal damages inadequate.”). And the dislocation has caused disruption to their business, the loss of an employee and a threat of unascertainable profit losses. See id. and Sovereign Bank v. Harper, 674 A.2d 1085, 1093 (1996) (“An injury is regarded as ‘irreparable’ if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard.”).

The court will order compliance with the order within 30 days. Blatteau and JBA ask for an immediate fine to compel compliance. The court will not impose an immediate fine, but will impose a conditional fine to take effect on the 31st day of noncompliance. For the first time in these consolidated proceedings, the Turchi defendants argue that the court does not have authority to impose conditional fines without a contempt proceeding. The court disagrees. “A court of equity has broad powers to fashion relief according to the equities of the case.” Hicks v. Saboe, 521 Pa. 380, 555 A.2d 1241, 1245 (1989). Those powers include the authority to award monetary relief. Id. The equities of this case and the requirement that the court specifically tailor the injunction to abate the Turchi defendants’ wrongs require a conditional fine against the Turchi defendants to ensure their compliance.¹

¹ The same considerations supported imposing fines as part of the May 10, 2001 and August 30, 2001 injunction orders. The Turchi defendants ignored the April 6, 2001 temporary restraining order and Dr. Elfman and Penn Fed needed relief from the Turchi defendants’ wrongs. 5/10/01 Findings of Fact ¶¶ 40-43. Balancing the equities and the need to abate those wrongs, the

Blatteau and JBA, unlike Dr. Elfman, joined 1930-34 Corporation and Walnut Construction as defendants in this action. Those companies have partaken as agents in the wrongful acts of 1930-34 Associates, and the court will enjoin them in that capacity. See Americans Be Independent v. Commonwealth, 114 Pa. Commw. 179, 321 A.2d 721, 727 (1974).

CONCLUSIONS OF LAW

1-13. This opinion incorporates conclusions of law 1 through 13 supporting the August 30, 2001 order granting Dr. Elfman's petition for a preliminary injunction.

14. Blatteau and JBA have a right to remain in their office until 2003.

15. The change in the building's ownership does not affect Blatteau's and JBA's rights under the lease.

court exercised its equitable powers to impose fines to ensure compliance with the May 10 order. The Turchi defendants then obtained reconsideration by submitting a false affidavit, thereby wrongfully avoiding the injunction and the fines. Upon reconsideration, the court again granted the injunction on August 30. The equities of the case and the need to vindicate the May 10 order caused the court to reinstate the fines to ensure compliance with the August 30 order. That order is now on appeal. In the extensive litigation following the May 10 order – including the many briefs and hearings on the motion for reconsideration, the motion for clarification and the rehearing of the preliminary injunction petition – and concluding with the August 30 order, the Turchi defendants never argued that a court of equity lacks authority to impose a fine to ensure compliance with an injunction order. See, e.g., Motion of Defendants for Reconsideration of May 10, 2001 Order Granting Injunction, at 8 (filed May 17, 2001); Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Reconsideration (filed June 6, 2001); Response of Defendants to the Motion of Plaintiff Joel Elfman for Clarification of the June 6, 2001 Order Granting Reconsideration (filed June 19, 2001); Post-Hearing Memorandum of Law of John Turchi, at 27-31 (filed August 22, 2001). Instead they argued only that the court should not impose a fine in this case because the Turchi defendants were not at fault and because compliance was impossible. See Dilliaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974) (holding that failure to raise issue before the trial court waives that issue on appeal).

16. 1930-34 Associates owes Blatteau and JBA a duty to comply with the terms of the lease, including a duty to supply potable running water and elevator, heat and cleaning services.

17. 1930-34 Associates covenanted to provide Blatteau and JBA with quiet enjoyment of the leased premises. This covenant includes a duty to provide access to the leased premises from 6:30 am to 12:30 am seven days per week, a duty to comply with the City of Philadelphia Code and a duty to take all steps necessary to remove the violations cited by the cease operations orders such that the building is re-opened.

18. 1930-34 Associates has breached and continues to breach these duties.

19. The loss of heat, elevator, water and cleaning services resulted from 1930-34 Associates' willful misconduct.

20. 1930-34 Associates has constructively and actually evicted Blatteau and JBA.

21. Blatteau and JBA have a clear right to specific performance of these covenants.

22. Blatteau and JBA will suffer imminent irreparable harm not compensable by monetary damages if 1930-34 Associates continues to breach these duties.

23. Greater injury will occur from denying the preliminary injunction than from granting it.

24. A preliminary injunction will restore the parties to the status quo.

25. A preliminary injunction ordering the Turchi defendants to comply with the lease is reasonable to abate the harm to the Blatteau and JBA.

26. Blatteau and JBA do not have unclean hands.

CONCLUSION

On the basis of the record of the consolidated cases of all plaintiffs, the court will enter a contemporaneous order granting Blatteau and JBA's petition for a preliminary injunction. Blatteau and JBA shall each deposit bond or legal tender of \$1000 in accordance with Pa.R.C.P. 1531(b) within one (1) week after the entry of this order.

BY THE COURT:

JOHN W. HERRON, J.

DATE: October 2, 2001