

SHORT FORM ORDER

SUPREME COURT — STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

GEORGE KALOS and CCIG LLC,

Plaintiffs,

— against —

TRIAL / IAS PART 22
NASSAU COUNTY

Index No. 608758/2020

Motion Sequences No. 1

SANDERS EQUITY, DIGBY ASSOCIATES LIMITED
PARTNERSHIP, DIGBY GENERAL CORP. and
NICHOLAS C. ERNEST,
Defendants.

The following papers having been read on this motion:

Order to Show Cause, Affidavits & Exhibits	___ 1, 2 ___
Answering Affidavits.....	_____
Replying Affidavits.....	_____
Briefs: Plaintiff / Petitioner.....	_____
Defendant / Respondent.....	_____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including efiled documents/exhibits numbered 3 through and including 26, this motion is decided as follows:

The plaintiffs, move pursuant to CPLR Article 63 for an order to restrain and enjoin the defendants, their agents, employees and attorneys, from engaging in any conduct that interferes with the plaintiffs’ business operations and the plaintiffs’ access to and use of the subject premises at 35-37 17th Street, Unit 35, Jericho, New York. The plaintiffs’ application also includes but is not limited to requiring the defendants to immediately restore power, electricity

and water to the premises and immediately remove all concrete, structures, barriers and fencing that have been placed by defendants at the premises. The plaintiffs allege the defendants undertook a campaign of illegal harassment and criminal conduct devised to drive the plaintiffs out of the premises.

The defendants assert the motion should be denied because the requested relief is moot given the undisputed facts the tenant is in possession of the space with full utilities, including power, electric and water, and has full ingress and egress. The defendants contend the plaintiffs' statements are vague, unsupported, hearsay and misrepresent the facts. The defendants maintain the plaintiffs do not clearly satisfy the elements for an injunctive relief. The defendants point out the landlord commenced an action in the Supreme Court, County of Nassau against the plaintiffs seeking *inter alia* damages and ejectment due to the plaintiffs' myriad breaches of the lease and guaranty among the parties.

The granting of preliminary injunctive relief requires a probability of success on the merits, danger of irreparable injury in the absence of an injunction; and a balance of the equities in the plaintiffs' favor (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]). The plaintiffs are obliged to establish this three-prong test by clear and convincing evidence (*Arthur J. Gallagher & Co. v Marchese*, 96 AD3d 791 [2d Dept 2012]). "Moreover, the irreparable harm must be shown by the moving party to be imminent, not remote or speculative." (*Golden v Steam Heat, Inc.*, 216 A.D. 2d 440, 442 [2d Dept 1995]).

Here, paragraph 17 the parties' lease expressly grants the landlord the right to reenter upon a plaintiffs' breach of substantial obligations of tenancy or nonpayment of rent. It is well settled even were a Court to determine self-help was not peaceable, a tenant is relegated only to a suit for damages, but not restoration of the subject premises where restoration would be futile

because the landlord is entitled to seek judgment evicting the plaintiffs (*110-45 Queens Blvd. Garage Inc., v Park Briar Owners, Inc.*, 265 A.D.2d 415 [2d Dept 1994]).

The Second Department maintained “[i]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient (*Baschian and Farber, LLP v. Syms*, 147 A.D.3d 714, 717 [2d Dept. 2017]). The plaintiffs’ complaint contains six causes of action seeking money damages. The plaintiffs have access to the space and operates at the space notwithstanding numerous alleged lease breaches and in defiance of a cease and desist order from the Nassau County Fire Department, hence the plaintiffs have not clearly established the danger of irreparable injury in the absence of an injunction.

The plaintiffs failed to clearly show the equities balance in plaintiffs’ favor. It appears the plaintiffs may not have a reasonable expectation of being able to continue to occupy and operate the space without the payment of rent and in violation of the lease and law. The plaintiffs brought this application based upon the failure to disclose their defaults and violations, and the failure to acknowledge the landlord’s rights under the lease in the case of a default or the nonpayment of rent.

ORDERED that the motion is DENIED.

This decision will constitute the order of the Court.

Dated: October 13, 2020

ENTERED



ANTONIO I. BRANDVEEN
J . S . C.

NOT FINAL DISPOSITION