

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

SULLIVAN PROPERTIES, L.P.,

**Plaintiff,**

**-against-**

BARIS DINCER,

**Defendant.**

Index No.: \_\_\_\_\_/2020

---

**PLAINTIFF'S MEMORANDUM OF LAW  
IN SUPPORT OF ITS ORDER TO SHOW CAUSE FOR A  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

---

**INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP**

Attorneys for Plaintiff  
150 East 42<sup>nd</sup> Street, 19<sup>th</sup> Floor  
New York, New York 10017  
(212) 907-9600

**PRELIMINARY STATEMENT**

Plaintiff Sullivan Properties, L.P. (“Plaintiff”) respectfully submits this Memorandum of Law in support of its Order to Show Cause seeking an injunction against defendant, Baris Dincer (“Defendant”), in accordance with Article 20 of the subject lease, enjoining Defendant from: (a) smoking in the Building hallways and leaving cigarette butts in the hallways; (b) conducting any sort of work in his apartment – construction or otherwise – that could damage the Building or any Building-wide systems; (c) threatening other residents in any manner, including, but not limited to, screaming at them or throwing liquid substances on their apartment doors and breaking apartment windows; and (d) otherwise continuing his course of conduct that is endangering the health, safety and well-being of other residents at 111 Sullivan Street, New York, New York (the “Building”).

As more fully set forth herein, as well as in the accompanying affidavits, Defendant’s objectionable conduct as a resident of the Building, not only breaches his lease obligations, but is endangering the health, safety and well-being of his neighbors *in the midst of a global pandemic!*

Initially, Plaintiff received complaints from Building residents about Defendant causing disturbances to other tenants in the Building, such as Defendant throwing items out of his apartment window into a common courtyard where another resident could be hit and injured, and Defendant causing incessant noises (banging and use of power tools) in his apartment preventing other residents from sleeping.

Unfortunately, Defendant’s behavior escalated and on three (3) separate occasions, Defendant – who was conducting unauthorized work in his apartment – drilled into a water pipe causing excessive damage both to his apartment and to the apartment beneath. In addition,

Defendant's behavior has further escalated and Plaintiff has received complaints regarding threats to other residents in the Building, including throwing unknown liquid substances onto a neighboring resident's door and breaking apartment windows. In addition, Defendant has been smoking throughout the Building, leaving cigarette butts in the hallways and stairwells, causing the hallways to become filled with smoke from cooking, and other unsafe behaviors.

Defendant's behavior has left the remaining residents in the Building fearful for their health, safety and well-being – particularly given that each resident is required to stay at home due to the pandemic 'pause' that has been in effect in New York State.

The situation has escalated to the point where two residents have left the Building – one permanently due to her apartment being flooded three (3) times, and one temporarily until the 'pause' is lifted, citing her health and safety as the reason for vacating – and other residents have threatened to leave their homes in the midst of this global pandemic.

Due to the egregious nature of Defendant's behaviors and their effect on other residents in the Building, Plaintiff seeks a temporary restraining order and preliminary injunction, in accordance with Article 20 of the subject lease, enjoining Defendant from (a) smoking in the Building hallways and leaving cigarette butts in the hallways; (b) conducting any sort of work in his apartment – construction or otherwise – that could damage the Building or any Building-wide systems; (c) threatening other residents in any manner, including, but not limited to, screaming at them; throwing liquid substances on their apartment doors or breaking windows; and (d) otherwise continuing his course of conduct that is endangering the health, safety and well-being of other residents at 111 Sullivan Street, New York, New York (the "Building").

First, Plaintiff is entitled to a preliminary injunction against Defendant under CPLR 6301 because there is an express lease provision permitting Plaintiff to seek such relief, as a result

Defendant's continued objectionable conduct which is not only causing a nuisance, but threatening the health, safety and well-being of other residents in the Building. As such, Plaintiff has a likelihood of success on the merits.

Next, there is a serious danger of irreparable harm to the other residents in the Building, and thus to Plaintiff as the landlord, in the absence of an injunction as the course of Defendant's behavior is worsening.

Finally, the balancing of the equities clearly favors Plaintiff – who is charged with providing all residents in the Building with a safe and habitable place to live. Not only does Plaintiff stand to lose tenants as a result of the unsafe and uninhabitable conditions being caused by Defendant, but Plaintiff stands to lose its valuable business and leaseholds as a result of Defendant's behavior.

### **STATEMENT OF FACTS**

The relevant facts are set forth in the Affidavit of Paul Regan ("Regan Aff."), the Affidavit of Miwako Messer, the Affidavit of Daniel Rispoli, and the affidavit of \_\_\_\_\_, each of which is submitted with this Memorandum of Law in support of the Order to Show Cause. The relevant facts will not be repeated herein at length, but will be incorporated as required in the legal argument below.

### **ARGUMENT**

#### **I. PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION**

CPLR 6301 provides, in relevant part, that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of plaintiffs' rights respecting the subject of the action, and tending to render the judgment ineffectual...." A plaintiff is entitled to a preliminary

injunction where, by clear and convincing evidence: “(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [the plaintiff’s] favor.” *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Invesco Institutional v. Deutsche Inv. Mgmt. Americas*, 74 A.D.3d 696 (1<sup>st</sup> Dep’t 2010); *see also Gilliland v. Acquafredda Enters., LLC*, 92 A.D.3d 19, 24 (1<sup>st</sup> Dep’t 2011) (a party must demonstrate by “clear and convincing evidence” the three-pronged requirements of a preliminary injunction when seeking such relief).

**A. Plaintiff is Likely to Prevail on the Merits**

Because Plaintiff demonstrates herein that Defendant’s behavior has threatened the health, safety and well-being of other residents in the Building and is spiraling into ever more dangerous activity, Plaintiff is likely to prevail on the merits.

**i. Relevant Statutory Authority and Lease Provisions**

Real Property Law § 235-b states, in relevant part:

(1) In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

The Court is respectfully referred to the Lease between Plaintiff and Defendant, a copy of which is annexed to the accompanying Regan Aff., for a full recitation of the rights and obligations of the parties. As more fully set forth herein, Plaintiff points out the Lease provisions that are relevant to the case at bar.

Article 10(A) of the Lease states, in relevant part:

[Defendant] will take good care of the [Premises] and not permit or do any damage to it...

Article 12(E) of the Lease states, in relevant part, that Defendant should not do anything to:

...interfere with or make [Plaintiff's] efforts to provide [Defendant] and all other occupants of the building with required facilities and service.

Article 13 of the Lease states, in relevant part:

As a tenant in the Building, [Defendant] will not engage in objectionable conduct. Objectionable conduct means behavior which makes or will make the [Premises] or the Building less fit to live in for [Defendant] or other occupants. It also means anything which interferes with the right of others to properly and peacefully enjoy their apartments, or causes conditions that are dangerous, hazardous, unsanitary and detrimental to other tenants in the Building. Objectionable conduct by [Defendant] gives [Plaintiff] the right to end this Lease. [Defendant] shall not make or permit any disturbing noises in the [Premises] or the Building or permit anything to be done that will interfere with the rights, comfort or convenience of other tenants...

Article 20 of the Lease states, in relevant part:

If [Defendant does] not do, or if [Defendant does] anything which shows that [Defendant] intend[s] not to do what [Defendant has] agreed to do, [Plaintiff] has the right to ask a Court to make [Defendant] carry out [his] agreement or to give the [Plaintiff] such other relief as the Court can provide. This is in addition to [other] remedies in...this lease.

Paragraph 6 of the Rules which are a part of the Lease states:

Defendant]...shall not make or permit any disturbing noises in the [Premises] or the Building or permit anything to be done that will interfere with the rights, comforts or convenience of other tenants.

Paragraph 3 of the Smoke Free Lease Addendum states:

[Defendant] agrees and acknowledges that the premises to be occupied by [Defendant]...have been designated as a smoke-free living environment. [Defendant]...shall not smoke anywhere in the unit rented by [Defendant], or the building where the [Defendant's] dwelling is located or in any of the common areas or adjoining grounds of such building...

Notwithstanding the foregoing Lease obligations, Defendant is exhibiting and continues to exhibit ever more egregious nuisance behavior and objectionable conduct that is threatening

the health, safety and well-being of other Building residents, causing physical damage to the Building, and is otherwise behaving in a manner that is contrary to that which is required under the Lease.

**ii. What Constitutes Objectionable Conduct**

To this end, in *Domen Holding Co. v Aranovich*, 1 N.Y.3d 117 (2003), the Court of Appeals states as follows with regards to nuisance and objectionable conduct:

To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land. The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance. However, not every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights - - "**a pattern of continuity or recurrence of objectionable conduct.**"[*Emphasis provided.*]

(Internal citations omitted).

Courts have held that to make a tenant objectionable, his use of the property must have been unreasonable or unlawful to the annoyance, inconvenience, discomfort or damage of others. *Douglas L. Elliman & Co., Inc. v Karlsen*, 59 Misc.2d 243 (Civ. Ct. N.Y. Co. 1969); *see, also, Kaufman v Hammer*, 49 Misc.2d 773 (Nassau Co. Dist. Ct. 1966) [objectional conduct is misconduct that becomes persistent and continues, and there appears to be either a lack of desire or of ability on the part of the tenant to prevent or control the conduct].

**iii. Plaintiff's Likelihood of Success on the Merits**

In *1234 Broadway LLC, v West Side SRO Law Project*, 86 A.D.3d 18 (1<sup>st</sup> Dep't 2011), the Court states:

With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action (*Doe* at 750–751, 536 N.Y.S.2d 44, 532 N.E.2d 1272). While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action (*Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 187, 604 N.Y.S.2d 84 [1993], *lv. dismissed* 83 N.Y.2d 847, 612 N.Y.S.2d 110, 634 N.E.2d 606



[1994]; *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 605, 781 N.Y.S.2d 684 [2004]), “[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers” (*Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, 335)

As more fully set forth in the accompanying Regan Aff., Defendant’s behavior has been persistent, escalating and unreasonable to the annoyance, inconvenience, discomfort of his fellow tenants and most importantly, has threatened the health, safety and well-being of other Building residents. The evidence also suggests that Defendant cannot control such behavior as evidenced by his interactions with fellow tenants and incredibly inconsistent explanation to those people of the reason for his disturbance of their peace.

Based on the foregoing, Plaintiff demonstrates its likelihood of success on the merits in seeking this relief, and an injunction should be issued enjoining Defendant from continuing his conduct.

**B. Plaintiff Will Suffer Irreparable Injury**

Plaintiff will suffer irreparable injury should this Court not grant its motion for a preliminary injunction.

Irreparable injury requires that there is no other remedy at law, including monetary damages that could adequately compensate the party seeking relief. *Zodkevitch v Feibush*, 49 A.D.3d 424 [1<sup>st</sup> Dept 2008]; *Marmara, Inc. v Pantoja*, 2018 NY Slip Op 30906(U) [Sup. Ct. N.Y. Co. 2018].

It has been held that each parcel of real property is unique. *EMF Gen. Contr. Corp. v Brisbee*, 6 A.D.3d 45 [1<sup>st</sup> Dept 2004], *lv dismissed* 3 N.Y.3d 607 [2004]. This includes a leasehold interest in real property. *Concourse Rehab. & Nursing Ctr., Inc. v Gracon Assocs.*, 64 A.D.3d 405 [1<sup>st</sup> Dept 2009] (“If defendants were permitted to treat the lease as terminated,



plaintiffs would lose their substantial interest in real property”). This argument is particularly compelling on behalf of those tenants who remain in the Building without a meaningful alternative location to which they can relocate. There can be no adequate monetary award to compensate them for living under the stress of an ever more erratic neighbor like the Defendant herein.

Thus, Plaintiff’s obligation to provide each tenant in the Building with an apartment that is not dangerous, hazardous or detrimental to their life, health or safety, together with the unique nature of Plaintiff as the owner and landlord of the Building, as well as the loss and potential loss of tenants as a result of Defendant’s egregious and objectionable conduct, would cause Plaintiff - and more importantly its tenants - to suffer irreparable injury for which monetary damages are not an adequate remedy.

**C. A Balance of the Equities Tips in Plaintiff’s Favor**

Finally, a balance of equities tips in Plaintiff’s favor. Plaintiff’s ability to provide all tenants in the Building with an apartment that is not dangerous, hazardous or detrimental to their life, health or safety tips the equities overwhelmingly in Plaintiff’s favor, when compared to Defendant continuing with his current course of objectionable and egregious conduct.

If the Court fails to grant the injunction to halt Defendant’s objectionable conduct, it would be akin to sanctioning behavior that is dangerous, hazardous and detrimental to the life, health and safety of all residents in the Building – particularly in light of the ongoing global pandemic which is forcing all residents to stay at home and virtually eliminating their ability to seek any alternative refuge. Defendant faces no irreparable injury from having to behave in a manner that is not dangerous, hazardous or detrimental to the life, health and safety of other residents in the Building, and as he otherwise required to behave in accordance with his Lease.

Based on the foregoing, the equities tip overwhelmingly in Plaintiff's favor.

**CONCLUSION**

For the foregoing reasons, as well as the reasons set forth in the Laskowitz Affirmation and the accompanying affidavits, Plaintiff respectfully requests that the Court grant an order, in accordance with Article 20 of the Lease, enjoining Defendant from: (a) smoking in the Building hallways and leaving cigarette butts in the hallways; (b) conducting any sort of work in his apartment – construction or otherwise – that could damage the Building or any Building-wide systems; (c) threatening other residents in any manner, including, but not limited to, screaming at them or throwing liquid substances on their apartment doors and breaking apartment windows; and (d) otherwise continuing his course of conduct that is endangering the health, safety and well-being of other residents at the Building, together with such other and further relief that this Court deems just and proper.

**Dated: New York, New York  
June 4, 2020**

  
**Shari S. Laskowitz**