

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

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**HEIBERGER AND ASSOCIATES, P.C. and
JAMIE HEIBERGER-HARRISON
AS GUARANTOR,**

Plaintiffs,

- against -

TOWER 39 ASSOCIATES, LLC,

Defendant,

JP MORGAN CHASE, N.A.,

Defendant.
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Index No.

**AFFIRMATION OF ACTUAL
EMERGENCY AND IN
SUPPORT OF MOTION**

COVID-19 RELATED

Jamie Heiberger-Harrison, an attorney duly admitted to practice law before the Courts of the State of New York affirms the following to be true pursuant to CPLR 2106 and under the penalties of perjury:

1. I am the principal of the Law firm of Heiberger & Associates, P.C., the attorneys for the Plaintiffs herein and a Plaintiff herein. As such, I am fully familiar with the facts and circumstances herein as delineated in Plaintiffs' summons and verified complaint, and a review of office files. *(See Exhibit "F" for a Copy of the Summons and Complaint with Exhibits Redacted).*

2. I submit the instant affidavit in support of the plaintiff's motion which seeks a Temporary Restraining Order and a Preliminary Injunction enjoining and/or restraining Defendants, its Agents, Attorneys, Assigns, and/or all other persons acting by, through or under such Defendants from drawing upon or releasing funds from Plaintiff's HEIBERGER & ASSOCIATES, P.C. (hereinafter, "H&A") Letter of Credit currently being held by Defendant

J.P. MORGAN CHASE, N.A. (hereinafter, "Chase") on behalf of Defendant TOWER 39 ASSOCIATES, LLC (hereinafter, "Tower") as and for the security deposit on the Lease between Defendant Tower as landlord and Plaintiff H&A as tenant for 589 Eighth Avenue, 10th Floor, NY, NY 10018 (hereinafter, "the Demised Premises") or otherwise defaulting Plaintiff under the Plaintiff under the payment terms of the lease.

3. Truly this is order to show cause is of an emergency nature as the force majeure of the COVID-19 pandemic and the laws passed by New York State in reaction thereto have destroyed all H&A's economic value in its Law Office Lease, made H&A's use of the Demised Premise under the lease impossible and has frustrated the intended purpose of the Lease. Clearly, this pandemic of epic proportions which has smothered the economy and all but shuttered court system could not have been foreseen by the Plaintiff H&A and Defendant Tower at the time of drafting of the lease. Moreover, with the lease frustrated and H&A having no ability to use the Demised Premise or to generate income, the ability of the Landlord to draw down on the Chase Letter of Credit and/or hold Plaintiff Heiberger personally liable for a default in Accrued Rent (a sum no less than \$23,000 per month with rent and additional rent) under the terms of the Lease amounts to unjust enrichment and would lead to the demise of H&A and the economic ruin of Plaintiff Heiberger personally. Plaintiff is not currently in default in any term of the Lease. If Defendant were to draw down on the Letter of Credit while this case is pending and Plaintiffs prevail in rescinding the lease, it would render the ultimate decision of this court meaningless.

4. Plaintiff H&A is a real estate based law firm which conducts seventy-five percent (75%) of its business through real estate litigation, primarily in the New York City Housing

Courts. This litigation is made up of Residential and Commercial Summary Non-Payment and Holdover proceedings for the representative client base of owners and managing agents of multi-family multi-use buildings in New York City.

5. On January 23, 2013, Tower as Landlord and H&A as Tenant entered into a commercial lease for 589 Eighth Floor, 10th Floor, New York, New York 10018 for “office space” with the purpose of housing H&A’s principle law office. *(See Exhibit “A” for the Lease and in particular Paragraph 2).*

6. As and for the security deposit on the Lease, H&A caused a Letter of Credit to be issued by Chase in the sum of \$62,400.00 on behalf of Tower as beneficiary which Tower may draw upon request to Chase based on a default by H&A. *(See Exhibit “B” for a copy of the Chase Letter of Credit).*

7. The lease between Tower and H&A is personally guaranteed by Plaintiff Heiberger with a “Good Guy” guaranty which holds Plaintiff Heiberger liable for all minimum rent, additional rent and all other charges that may accrue to the latest date of that H&A has:

- (a) Notified the Landlord on no less than one-hundred twenty (120) days prior written notice of its intent to vacate the premises, and
- (b) Vacated and surrendered the Demised Premises to the Landlord pursuant to the terms of the Lease following the one-hundred twenty (120) day notification period, and
- (c) Delivered the keys to the Demised Premises to the Landlord, and
- (d) Paid to the landlord all Accrued Rent to and including the date which is the later of (x) the actual receipt of by the Landlord of said Accrued Rent, (y) the surrender of the Demised Premises, or (z) receipt by Landlord of the keys to the Demised Premises...

It is agreed that any security deposited under Article 34 shall not be

computed as a deduction from any amount payable by Tenant or Guarantor under the terms of this Guaranty or the Lease. (See the final two pages of Exhibit "A").

8. In December, 2019, COVID-19 was detected in Wuhan, China and swelled over the coming months into a *force majeure* pandemic of epic proportions throwing the entire world economy into disarray.

9. Upon information and belief, prior to the pandemic, the closure of the courts, and the rejection of non-essential filings, Plaintiff H&A was a successful firm with averaging daily court appearance billing of \$5582.92 and with average litigation paperwork billing for processing predicate notices and court filings of \$3393.20 and additional daily landlord-tenant paperwork billing of approximately \$7,500.

10. On March 16, 2020, in an attempt to stem the spread of COVID-19, the New York State Office of Court Administration halted court appearances in New York City Civil Court/Landlord Tenant Court.

11. On March 20, 2020, in response to the COVID- 19 pandemic emergency circumstances Governor Andrew Cuomo issued Executive Order 202.8 which provides in pertinent part:

The provisions of Executive Order 202.6 are hereby modified to read as follows: Effective on March 22 at 8 p.m.: All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions.... Any business violating the above order shall be

subject to enforcement as if this were a violation of an order pursuant to section 12 of the Public Health Law.

There shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property for a period of ninety days. (See Exhibit "C" for a copy of Executive Order 202.8). Emphasis added.

12. It cannot be debated that a real estate based law firm does not qualify as an "essential business" under this order. And it should further be noted that each violation of NYS Public Health Law 12 carries a penalty of \$2000-\$10,000 plus injunctive relief.¹

13. In implementing Executive Order 202.8, Chief Administrative Judge Lawrence K. Marks issued Administrative Order 78/20 which directed that; "immediately and until further notice, no papers shall be accepted for filing by a county clerk or a court in any matter not in the list of essential matters." (See Exhibit "D" for a copy of Administrative Order 78/20).

14. It should be noted that none of the regular litigation work cited above, to wit, landlord and tenant matters, performed by H&A qualifies as essential matters under this administrative order and will not be accepted by the courts.

15. Thus with courts closed, with no ability to draft and file court papers, with a current 90 day moratorium summary eviction proceedings, and no ability to go to the office,

¹ 1. (a) Except as provided in paragraphs (b) and (c) of this subdivision, any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto for which a civil penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation.

(b) The penalty provided for in paragraph (a) of this subdivision may be increased to an amount not to exceed five thousand dollars for a subsequent violation if the person committed the same violation, with respect to the same or any other person or persons, within twelve months of the initial violation for which a penalty was assessed pursuant to paragraph (a) of this subdivision and said violations were a serious threat to the health and safety of an individual or individuals.

(c) The penalty provided for in paragraph (a) of this subdivision may be increased to an amount not to exceed ten thousand dollars if the violation directly results in serious physical harm to any patient or patients.

H&A has ceased to function. Due to the effects of COVID-19, even the transactional work which comprises 25% of revenue, while not dependent on the courts, has also been directly affected by COVID-19 as closings are being cancelled or delayed, and there are no new transactions on the horizon, thus further harming any remaining H&A revenue stream.

16. Furthermore, upon information and belief, H&A's representative client base, the owners and managing agents of multi-family multi-use properties in New York City will have great difficulty paying the bills owed to H&A with the 90 day moratorium on evictions and judgment enforcement pursuant to Executive Order 202.8.

17. In response thereto, I have been forced to lay off a majority of the staff leaving a skeleton crew; but despite these cutbacks, the remaining payroll is needed to support:

- myself as the sole source of support for a family of five;
- Lawrence McCourt a 23 year employee attorney with a family of four;
- Robert Ehrlich a 23 year employee attorney with a family of four;
- Francis Coffey, a 12 year employee attorney with a family of four, with a daughter at high risk of infection as she suffers from Spinal Muscular Atrophy;
- Cynthia Schaetzle, an 18 year employee paralegal with a family of four;
- Heather DeRosa, the office manager of 16 years;
- Daniel Lelay, a paralegal of 8 years with a family of three with a newborn daughter;
- Ryan Saxon, an attorney employee of 3.5 years;
- Nyasha McKenzie a paralegal of 4 years a single mother supporting her daughter and mother;
- Natasha Sarwan a paralegal of 3.5 years

- Karen Law a paralegal of 1.5 years;
- Malvi Figueroa the bookkeeper of 2 years; and
- Mindy Mintz a paralegal.

which if each paid our full salary would be \$187,729.17 – an impossibility without the ability to earn revenue.

18. Furthermore, the firm must also pay: liability insurance billing of \$4155.59 per month, Microsoft licensing of \$1978 per month, health insurance premiums of \$11,000 per month, Phones/internet costs at \$1280 per month, and copiers rental at \$2739 per month. After the above monthly costs, the current rent and additional rent of \$23,000 per month for an unusable space is simply unsupportable.

19. Clearly, immediate and irreparable injury, loss or damage will result unless the defendants are restrained before the hearing can be had on the issue of the preliminary injunction: to wit the Defendant Tower has the ability under the Lease to draw down on Plaintiff H&A's Letter of Credit held at Defendant Chase for any unpaid rent and additional rent as it accrues on a leasehold whose economic value to Plaintiffs has been destroyed. This act must be restrained pending the hearing and determination of this motion and the ultimate issues before the court.

20. At bar, maintenance of the status quo, by the issuance of a Temporary Restraining Order and a Preliminary Injunction will allow Plaintiffs the opportunity to be heard on the merits of the case.

21. Truly this is order to show cause is of an emergency nature as the Plaintiff's currently are not in default under the Lease; however, on April 1, 2020 the accrued April 2020

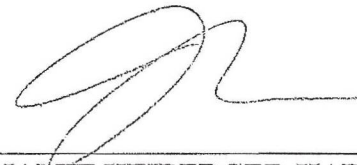
rent and additional rent will come due which Plaintiff H&A is unable to pay. Plaintiff H&A will then go into default and Defendant Tower may apply to Defendant Chase to draw down on the Letter of Credit to cover the accrued rent and additional rent – a sum no less than \$23,000. This can continue for subsequent months until \$62,400 letter of credit is exhausted at which point Defendant Tower will look to Plaintiff Heiberger personally under the Guaranty. Should the funds of the Letter of Credit be turned over from Defendant Chase to Defendant Tower and the Lease is ultimately rescinded it would render the ultimate decision of this court meaningless and force the firm into immediate bankruptcy.

22. For all of these reasons this court is requested to grant the Plaintiffs a Temporary Restraining Order and Preliminary Injunction.

23. *No prior application has been made for the relief requested herein.*

WHEREFORE, it is respectfully requested that the instant motion be granted in its entirety together with such other and further relief as this court deem just and proper under the circumstances.

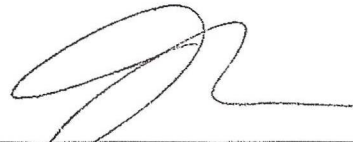
Dated: New York, New York
March 26, 2020



JAMIE HEIBERGER-HARRISON

CERTIFICATION PURSUANT TO 22 NYCRR s. 130-1.1

Jamie Heiberger-Harrison, an attorney duly admitted to practice before the Courts of New York State hereby certifies that the annexed papers are to best of my knowledge not frivolous as defined by 22 NYCRR s. 130-1.1.



JAMIE HEIBERGER-HARRISON