

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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STANSLAV KAFARSKIY and STANLY’S &
STANLY’S CORP. d/b/a SINAI RESTAURANT,

Index No: 11941/08
Motion Date: 6/4/08
Motion Cal. No: 15
Motion Seq. No: 1

Plaintiff,

- against -

ZUBLI BROTHERS, INC., AVI ZUBLI and
JACK ZUBLI,

Defendants.
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The following papers numbered 1 to18 read on this motion for an order staying the Queens County Housing Court proceeding pending under Index No. 61008/08, enjoining defendants and all persons known and unknown acting on their behalf from taking any action to terminate plaintiffs’ lease and/or commence a summary proceeding to evict plaintiffs or otherwise interfere with their possession of the subject premises, and consolidating the Queens County Housing Court proceeding pending under Index No. 61008/08.

	<u>PAPERS NUMBERED</u>
Order to Show Cause - Affidavits - Exhibits.....	1 - 9
Answering Affirmation- Exhibits.....	10 - 16
Reply.....	17 - 18

Upon the foregoing papers, it is hereby ordered that the motion be disposed of as follows:

This is a breach of contract action arising from a commercial lease agreement entered into by the parties on February 14, 2006, whereby defendants, owners of the leased premises located at 91-33 63rd Drive, Rego Park, New York, allegedly leased the subject premises to plaintiff for the operation of a restaurant in contravention of the certificate of occupancy (“certificate”). Although plaintiffs began received violations from the New York City Department of Buildings in July 2006, and contend that they have not been legally able to run their business, they continued to adhere to the monthly rental schedule until February 2008, at which time the corporation was convicted for violation of the Administrative Code and fined \$5,000.00. On or about March 28, 2008, defendants served plaintiffs with a Ten Day Notice for payment of the arrearage by April 16, 2008, and

thereafter, on April 17, 2008, commenced a summary non-payment proceeding in the Civil Court, Queens County, under Index No. L & T 61008/08. It is upon the foregoing that plaintiff now moves for an order staying the Queens County Housing Court proceeding pending under Index No. 61008/08, enjoining defendants from taking any action to terminate plaintiffs' lease and/or commence a summary proceeding to evict plaintiffs or otherwise interfere with their possession of the subject premises, and consolidating the Queens County Housing Court proceeding with the instant matter.

The purpose of a preliminary injunction is to preserve the status quo of an action pending trial. See, Kelley v. Garuda, 36 A.D.3d 593 (2nd Dept. 2007). As such, the granting of a preliminary injunction is a drastic remedy which is to be used sparingly, and such remedy will not be granted "unless a clear right thereto is established." Doe v. Poe; 189 A.D.2d 132 (2nd Dept.1993). To prevail on a motion for preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence: (1) the likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) that a balancing of equities favors movant's position. See, Aetna Ins. Co. v Capasso, 75 N.Y.2d 860 (1990); Coinmach v Alley Pond Owners Corp., 25 A.D.3d 642 (2nd Dept. 2006); Cruz v. McAneney, 29 A.D.3d 512 (2nd Dept. 2006); Ocean Club v Incorporated Vil. of Atlantic Beach, 6 A.D.3d 593 (2nd Dept. 2004); Price Paper and Twine Co. v. Miller, 182 A.D.2d 748 (2nd Dept.1992).

Moreover, a plaintiff must demonstrate that he or she will sustain irreparable injury absent the granting of the preliminary injunction, which in this context means any injury for which money damages are insufficient. See, Credit Index, L.L.C. v. Riskwise Intern. L.L.C., 282 A.D.2d 246 (1st Dept. 2001); Klein, Wagner & Morris v. Lawrence A. Klein, P.C., 186 A.D.2d 631 (2nd Dept.1992). Additionally, it must be shown that the irreparable injury to be sustained is more burdensome to plaintiff than the harm caused to defendant through the imposition of the injunction (citation omitted), and such injury is imminent, not remote or speculative. See, Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC, 42 A.D.3d 420 (2nd Dept. 2007); Village/Town of Mount Kisco v. Rene Dubos Center for Human Environments, Inc., 12 A.D.3d 501 (2nd Dept. 2004); Golden v. Steam Heat, Inc., 216 A.D.2d 440 (2nd Dept. 1995). Moreover, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court. Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988); City of Long Beach v. Sterling American Capital, LLC, 40 A.D.3d 902 (2nd Dept. 2007); Glorious Temple Church of God in Christ v. Dean Holding Corp., 35 A.D.3d 806 (2nd Dept. 2006); Ruiz v. Meloney, 26 A.D.3d 485 (2nd Dept. 2006).

Plaintiffs, in support of the motion for injunctive relief, contend that upon receiving violations from the New York City Department of Buildings in July 2006, they realized that the March 25, 1996 certificate annexed to the lease agreement gave temporary use and occupancy for the operation of a restaurant for ninety (90) days after its issuance. Plaintiffs further contend that upon this revelation, they hired Precision Engineering Design, P.C., an engineering firm, to obtain a final certificate, but despite their best efforts, they have been unable to obtain a certificate for the usage contemplated in the lease.

In opposition, defendants assert that the 1996 certificate is permanent and allows the premises to be used in the manner designated in the lease. However, defendants contend that plaintiffs made alterations to the premises in violation of the certificate which resulted in the violations of which they complain. They further contend that plaintiffs converted a vacant room on the ground level into a dishwashing room and the chapel area into a dining room, which such use was not authorized by the 1996 certificate. As such, under paragraph 13 of the rider to the lease, plaintiffs were required to obtain a modified certificate at their own expense. Additionally, defendants state that although plaintiffs made unapproved alterations and thereafter hired Precision Engineering to obtain the proper documentation, plaintiffs have failed to remit payment to the engineer thereby delaying the final certificate process for the alterations. Nevertheless, they contend that they made payments to Precision on plaintiffs behalf, despite having no obligation to do so, to help plaintiffs resolve the certificate issue regarding the alterations. In support of this contention, defendants proffer payment invoices and demand letters from Precision to plaintiffs from May 2007 through February 2008, and several copies of checks paid to the order of engineer Jude Cozzolino of Precision. Defendants assert that as a result, a modified certificate was prepared for submission on the condition that plaintiffs modify the sprinkle system to comport with approved Department of Buildings plans, and install a second staircase as a means of egress from the cellar to the street, which they have failed to do. Defendants assert that despite plaintiffs' contentions, they have continued to operate their business without interruption, and the instant motion is a futile attempt to forestall their eviction from the premises based upon the non-payment of rent.

In response to defendants' opposition, plaintiffs contend that according to the Department of Buildings Certificate of Occupancy Listing for the premises, there is no 1996 certificate on record, the last one being the expired 1995 certificate. Thus, plaintiffs contend that the certificate annexed to the lease and relied upon by defendants as evidence that the premises has been approved for use as a restaurant has been altered and is invalid. However, contrary to plaintiffs' contention, the March 25, 1996 certificate attached to the lease agreement does not have a temporary designation and on its face, appears to be the most recent certificate for the premises. Indeed, the certificate upon which plaintiffs rely was issued on March 14, 1995, and gave temporary permissible use and occupancy for the operation of a restaurant for ninety (90) days after its issuance. That certificate has a "temp." denotation next to the certificate number and states that "the above use for a temporary period of (90) days only, same to expire on 6-12-95." Nevertheless, troubling to this Court is the allegation that the 1996 certificate upon which the underlying lease agreement was conditioned, and upon which defendants assert their opposition, does not exist. Indeed, the 1996 certificate is a disputed fact that is central to the issue at hand.

It is well-recognized that "where the facts are in sharp dispute, a temporary injunction will not be granted." Related Properties v. Town Board of Town/Village of Harrison, 22 A.D.3d 587, 590, 802 N.Y.S.2d 221, 224 (2nd Dept. 2005); see, Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., 53 A.D.3d 612 (2nd Dept. 2008); Abinanti v. Pascale, 41 A.D.3d 395 (2nd Dept. 2007); Peterson v. Corbin, 275 A.D.2d 35 (2nd Dept. 2000). This is because the weight of authority views "injunctive relief [as] a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers.'" Nalitt v. City of

New York, 138 A.D.2d 580, 581 (2nd Dept. 1988); see, Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., 53 A.D.3d 612 (2nd Dept. 2008); Abinanti v. Pascale, 41 A.D.3d 395 (2nd Dept. 2007); Hoeffner v. John F. Frank, Inc., 65, 302 A.D.2d 428 (2nd Dept. 2003). However, even when the facts are in dispute, a court may find a likelihood of success on the merits, and conclusive proof is not required. “[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction [].” Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604, 605 (2nd Dept. 2004); see, Ruiz v. Meloney, 26 A.D.3d 485 (2nd Dept. 2006). Thus, despite the conflicting evidence, there is a likelihood of success on the merits, particularly in view of the fact, as alleged by plaintiffs, that the Department of Buildings has no record of the 1996 certificate.

It is clear that plaintiffs will suffer irreparable injury should defendants evict plaintiffs, as they will lose the commercial lease, and all the inherent benefits associated therewith, including the establishment of the restaurant at that location, and thus an injunction on such action would be necessary so as to preserve the status quo. Kelley v. Garuda, supra; Church of God Pentecostal Fountain of Love, MI v. Iglesia de Dios Pentecostal, MI, 27 A.D.3d 685 (2nd Dept. 2006); Coinmach Corp. v. Alley Pond Owners Corp., 25 A.D.3d 642 (2nd Dept. 2006). Although defendants contend that the summary proceeding is not seeking eviction, in the absence of injunctive relief staying any future eviction of plaintiff from the premises, a later judgment in their favor may be rendered ineffectual. See, Kelley v. Garuda, supra; 36 Gaentner v Benkovich, 18 A.D.3d 424 (2nd Dept. 2005); Hightower v Reid, 5 A.D.3d 440 (2nd Dept. 2004). Under those circumstances, a balancing of the equities also militate in favor of plaintiffs in light of the possible loss of their valuable leasehold and a desire to preserve the status quo. See, Coinmach Corp. v Alley Pond Owners Corp., 25 A.D.3d 642 (2nd Dept. 2006); Moy v Umeki, 10 A.D.3d 604 (2nd Dept. 2004).

Consequently, as the criteria for an injunction have been met, the injunctive relief would be conditioned upon plaintiff filing an undertaking in accordance with CPLR 6312. “Although the fixing of the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court [see, Blueberries Gourmet v. Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557 (2nd Dept. 1998); see, Clover St. Assocs. v. Nilsson, 244 A.D.2d 312, 313, 665 N.Y.S.2d 537 (2nd Dept. 1997)], the language of CPLR 6312(b) is “clear and unequivocal,” and it requires the party seeking the injunction to give an undertaking [see, Carter v. Konstantatos, 156 A.D.2d 632, 633, 549 N.Y.S.2d 131 (1996); Walter Karl, Inc. v. Wood, 137 A.D.2d 22, 29, 528 N.Y.S.2d 94 (2nd Dept. 1988); Burmax Co. v. B & S Indus., 135 A.D.2d 599, 601, 522 N.Y.S.2d 177(2nd Dept. 1987)].” Schwartz v. Gruber, 261 A.D.2d 526, 527 (2nd Dept. 1999); see, Livas v. Mitzner, 303 A.D.2d 381 (2nd Dept. 2003). The standard to be applied in fixing the undertaking is an amount that is rationally related to the damages the nonmoving party might suffer if the court later determines that the relief should not have been granted. See, Lelekakis v. Kamamis, 303 A.D.2d 380 (2nd Dept. 2003); Schwartz v. Gruber, 261 A.D.2d 526 (2nd Dept. 1999); Carter v. Konstantatos, 156 A.D.2d 632 (2nd Dept. 1996); Bennigan's of New York, Inc. v. Great Neck Plaza, L.P., 223 A.D.2d 615 (2nd Dept. 1996). As a general rule, however, the amount is fixed by the court after a hearing held for such purpose. See, Cohn v. White Oak Coop. Hous. Corp., 243 A.D.2d 440 (2nd Dept. 1997); Peron Rest. v. Young & Rubicam, Inc., 179 A.D.2d 469 (1st Dept. 1992); Times Sq. Stores

Corp. v. Bernice Realty Co., 107 A.D.2d 677 (2nd Dept. 1985).

Accordingly, the motion is granted to the extent that the parties are directed to appear before this court in Part 19, courtroom 63, on October 8, 2008, at 10:30 A.M., for a hearing to determine if an injunction should be granted in the first instance, and if so, the amount of the undertaking and arrears that should be set for such injunctive relief. Further, copies of this order are being sent to counsel for the parties on the motion by facsimile.

Dated: August 21, 2008

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J.S.C.