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

PRESENT: HON. PAUL G. FEINMAN Justice PART 7

0110178/1999

DUANE READE
vs
405 LEXINGTON, L.L.C.

SEQ 14

OTHER RELIEFS

INDEX NO. 110178/1999
MOTION DATE 8-13-2004
MOTION SEQ. NO. 014
MOTION CAL. NO. 7

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + memo	1, 14
Answering Affidavits — Exhibits 1 Memo	2, 24
Replying Affidavits + memo	3, 30

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the annexed memorandum decision/order.

FILED
NOV - 8 2004
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: November 1, 2004

Paul G. Feinman
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 7

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DUANE READE, a Partnership,
Plaintiff,

against

405 LEXINGTON, LLC, TISHMAN SPEYER PROPERTIES, L.P., and TURNER CONSTRUCTION COMPANY,
Defendants.

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Index Number 110178/1999
Submission Date Aug. 13, 2004
Mot. Seq. No. 014

DECISION AND ORDER

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Papers considered in review of this motion to recover on a preliminary injunction undertaking:

Papers	Numbered
Notice of Motion, Affidavits and Memo.....	1,1a
Answering Affidavits and Memo.....	2,2a
Replying Affidavits and Memo.....	3,3a

PAUL G. FEINMAN, J.:

The defendants move to recover on two undertakings that were fixed as conditions of a *Yellowstone* injunction issued at the outset of this now-concluded litigation. For the reasons set forth below, the motion is denied.[1]

Defendants-landlord move pursuant to CPLR 6315 to recover two undertakings in the amounts of $1,000,000 and $10,000, which were directed by court orders on December 8, 1999 and May 9, 2001, respectively, as the condition for granting plaintiff-tenant Duane Reade two

[1] In its memorandum of law, Duane Reade makes a passing reference to a request for attorney's fees (Memo of Law at 24-25). There is no properly noticed cross motion, with proof of payment of the cross motion fee, for this relief before the court. Accordingly, the request is denied as not made in a procedurally proper form.

Yellowstone injunctions. The underlying matter concerned two Notices of Default dated March 24, 1999, served upon Duane Reade by defendants, alleging various violations of the two lease agreements for the stores located in the Chrysler Building complex at 405 Lexington Avenue and 666 Third Avenue, New York, New York (Not. of Mot. Ex. F and G), and a third Notice of Default dated April 11, 2001 concerning the 666 Third Avenue store (Not. of Mot. Ex. M). The 1999 notices concerned various decor issues at both stores, as well as the installation of an escalator and water condenser piping at the 405 Lexington Avenue store. The 2001 notice concerned improper installation of an electric sign at the 666 Third Avenue store.

After granting the *Yellowstone* injunction in October 1999, the court directed that the parties settle an order as to the amount of the undertaking, and by decision and order of December 8, 1999, ordered an undertaking of $1,000,000 (Not. of Mot. Ex. A., Dec. & Ord., *Duane Reade v 405 Lexington*, Sup. Ct., NY County, Dec. 8, 1999 at 2, 4 [Gans, J.]). A second, short form decision and order dated May 9, 2001, ordered a $10,000 bond (Not. of Mot. Ex. B., Dec. & Ord., *Duane Reade v 405 Lexington*, Sup. Ct., NY County, May 9, 2001 [Gans, J.]).

A bench trial was subsequently held concerning the alleged lease violations. By Decision and Order dated November 26, 2003, the court found Duane Reade in violation of certain of the sections of its leases concerning decor and the electrical signage (Not. of Mot. Ex. C, Dec. & Ord., *Duane Reade v 405 Lexington*, Sup. Ct., NY County, Nov. 26, 2003 at 14-15 [Gans, J.]).[2]

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[2] Duane Reade's arguments concerning who was the prevailing party in the underlying action were considered by the court in its decision and order in the companion motion for attorney's fees (Seq. 013). Accordingly, this decision will not address those arguments other than to state that the final determination was that defendants were deemed the prevailing party notwithstanding the fact that Duane Reade was found not in violation of certain lease provisions concerning costs to install an escalator and the condenser water piping (Dec. & Ord., Ex. C,

Having a final determination, defendants now move to recover the undertakings totaling $1,010,000.

CPLR 6312(b) governs undertakings. The statute directs that where a plaintiff has given an undertaking in order to be granted a preliminary injunction, and it is "finally determined that he or she was not entitled to an injunction, [he or she] will pay to the defendant all damages and costs which may be sustained by reason of the injunction." In *Margolies v Encounter, Inc.*, 42 NY2d 475, 479 (1977), the Court of Appeals held that the clause, "finally determined that he or she was not entitled to an injunction," refers to the propriety of the issuance of a preliminary injunction rather than to whether the movant was found entitled to a permanent injunction. More recently, *J.A. Preston Corp. v Fabrication Enterpr., Inc.*, 68 NY2d 397, 407 (1986) limited *Margolies* to its facts, which involved an earlier appeal from the grant of a preliminary injunction, as a result of which the Appellate Division held it had been improperly issued because there was no showing of irreparable injury. *Preston Corp.* held that the definition of "final determination" must be "worked out by the courts on a case-by-case basis" (68 NY2d at 404). It also noted that a "determination of the merits upon trial of the action may, indeed, establish whether a plaintiff was entitled to the preliminary injunction" (*Preston Corp.* at 404-405).

Duane Reade argues that because its preliminary injunctions took the form of *Yellowstone* injunctions, which differ from the "typical" preliminary injunction in that there is no requirement for a showing of likely success on the merits, but rather a showing that the movant has the desire

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Duane Reade v 405 Lexington, Sup. Ct., NY County, Nov. 26, 2003 at 15 [Gans, J.]).

and ability to cure the alleged default by any means short of vacating the premises, *Preston* does not apply. It points to *Time Warner Cable v Brustowsky*, 233 AD2d 150 (1st Dept. 1996), and *Greenberg v Tamir*, 178 AD2d 184 (1st Dept. 1991), both of which cite *Margolies* and hold that the right to damages depends on whether the party obtaining the preliminary injunction was entitled to it. It must be noted that neither *Margolies* nor *Greenberg* concerns a *Yellowstone* injunction, nor does *Preston Corp.* However, *Time Warner Cable* does address a situation in which a *Yellowstone* injunction was granted but the defendant-landlord was found ultimately successful on the merits in the declaratory judgment action. Nonetheless, the court found that there was nothing to show that the tenant had not been entitled to the issuance of the *Yellowstone* injunction and therefore declined to award damages. Similarly here, although defendant was found to be the prevailing party in the underlying action, in that Duane Reade was found to have violated certain lease provisions, nothing shows that Duane Reade was improperly granted the *Yellowstone*, given that the purpose of a *Yellowstone* injunction is "to maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture." (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]).

The mandatory posting of an undertaking as a condition to the granting of a *Yellowstone* injunction provides insurance to the defendant-landlord should it suffer damages during the time the preliminary injunction is in force (*see*, 6 Warren's Weed New York Real Property [4th ed. 2004] § 2.12 [6][a], p. 42, citing *Weitzen v 130 East 65th St. Sponsor Group*, 86 AD2d 511 [1st Dept. 1982]). In the instant matter, when the court made its determination as to the amount of

the bond, it noted that "[s]hould the court determine that Duane Reade is in violation of its lease and Duane Reade fails to cure the violation within the cure period, then the defendant may be entitled to damages" (Not. of Mot. Ex. A, Dec. & Ord., *Duane Reade v 405 Lexington*, Sup. Ct., NY County, Dec. 8, 1999 at 2 [Gans, J.]), which seems to indicate that only if Duane Reade failed to cure, would there be damages. However, the court posited the possibility of damages on several grounds, including failure to cure, but also including the decrease in value to the overall building during the time Duane Reade's stores were of a "lower quality" than desired by the landlord (*Id.* at 2). The court ultimately "ordered" that if it were determined that Duane Reade was not entitled to the injunction, it would pay defendant "all damages and costs which may be sustained by reason of this injunction." (*Id.* at 4).

CPLR 6315 provides that "the damages sustained by reason of a preliminary injunction may be ascertained upon motion on such notice to all interested persons as the court shall direct." Defendants argue that they should be awarded $1,010,000, the total of the two undertakings. However, they offer absolutely no evidence to establish what damages, if any, they have sustained as a result of the preliminary injunction (*Cross Properties, Inc. v Brook Realty Co., Inc.*, 76 AD2d 445, 458 [2d Dept. 1980] [party seeking damages bears burden of proof on each element of its claim]; *see also,* 13 Weinstein Korn Miller, NY Civ Prac [2004] ¶ 6315.01 at 63-211 ["moving papers should include a showing that the party is entitled to damages under CPLR 6312(b), 6313, or 6314, and also a showing concerning the amount of damages."]). They instead attempt to argue that because the court directed the parties to settle an order as to how much the bond should be, and considered testimony or affidavits by witnesses with knowledge prior to making its ruling, giving both parties a full and fair opportunity to be heard in the matter, the

decision to require a bond of $1,000,000 is "law of the case." (Def. Memo of Law at 10, citing *People v Evans*, 94 NY2d 499, 502 [2000]). In other words, defendants want to argue that the court set the initial bond at $1,000,000 because it found that defendants will have suffered damages of $1,000,000 during the pendency of the preliminary injunction. This overlooks the clear import of the court's December 8, 1999 decision which, while it "agreed with Lexington that its *potential* loss would be the decrease in value, *if any*, to the overall project," also noted that "the damages projected by Lexington are highly speculative" (Not. of Mot. Ex. A, Dec. & Ord., Dec. 8, 1999 at 2, 3 [Gans, J.] [emphasis added]). Moreover, it overlooks that the party moving for an award of damages must establish its claim. Defendants merely point to the length of time the *Yellowstones* were in effect, as well as the granting of the undertaking, to justify their claim.

Here, where defendants have not alleged actual damages and the parties have agreed that the undertaking was not a form of liquidated damages, and where the court is unpersuaded that the *Yellowstone* injunction was improperly granted in the first instance, the court finds that CPLR 6315 damages are not recoverable. This renders the issue of the apparent discharge of the bond academic. It is therefore

ORDERED that defendants' motion to recover on the undertakings posted as a condition of the *Yellowstone* injunction is denied.

This constitutes the decision and order of the court. The court has mailed courtesy copies of this decision to counsel.

Dated: November 1, 2004
New York, New York

Paul G. Feinman
J.S.C.

PAUL G. FEINMAN

FILED

NOV - 8 2004

COUNTY CLERK'S OFFICE