

**Kleinsleep of Broadway, Inc. v Macintyre 874 Store  
Assoc.**

2007 NY Slip Op 31515(U)

May 15, 2007

Supreme Court, New York County

Docket Number: 0404607/2006

Judge: Marylin G. Diamond

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: HON. MARYLIN G. DIAMOND**

**PART 48**

*Justice*

KLEINSLEEP OF BROADWAY, INC.,

Plaintiff,

- v -

MACINTYRE 874 STORE ASSOCIATES  
MACINTYRE BUILDING CORPORATION,

Defendants.

**FILED**  
MAY 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

INDEX NO. 404607/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** Motion sequence numbers 001, 002 and 003 are consolidated herein for decision. This is a landlord-tenant dispute involving a commercial tenant's right to hang an exterior sign bearing its name and indicating its presence on a scaffold shed which the landlord has erected in front of the tenant's store and which blocks the store sign that was already in place. The building in question is located on Broadway in Manhattan and is owned by the defendant MacIntyre Building Corporation ("MBC"), a cooperative corporation. The defendant MacIntyre 874 Store Associates ("Associates") is an MBC shareholder which has a proprietary lease for premises located on the street level and basement. It has subleased these premises to plaintiff Kleinsleep of Broadway, Inc., a company engaged in the retail business of selling beds, bedding and mattresses. The sublease between plaintiff and Associates provides that the tenant may not install a store sign on the exterior of the premises without the prior approval of the landlord as to the dimensions, content, location and design, which approval shall not be unreasonably withheld or delayed. In view of the fact that the plaintiff's store sign was blocked by the scaffold shed, the defendants allowed plaintiff to hang a sign in its place on the front of the shed. In addition, the defendants allowed at least one company which was not a tenant in the building to hang a sign advertising its business next to or near the plaintiff's sign.

On April 25, 2005, MBC was cited by a New York City Department of Buildings ("DOB") inspector for a violation of the Building Code by allowing prohibited signs to hang on the shed advertising plaintiff and Charles Schwab. The citation indicated that MBC had until May 31, 2006 to cure the violations and, if not cured by that date, to appear for a hearing on June 15, 2006. Upon its receipt of this citation, MBC promptly removed the offending signs. After it refused to allow the plaintiff to replace its store sign, the plaintiff commenced this action in Supreme Court, Nassau County, claiming that its inability to exhibit a store sign violated its right to have an exterior sign posted outside its premises, as well as its right to quiet enjoyment. It also alleges that these rights were earlier violated by the defendants' placement of signs for nonresident companies, which is alleged to have caused confusion among prospective customers as to the nature of the business being conducted on the premises. The complaint asserts five causes of action. The first cause of action is against Associates for breach of contract. The second is against Associates for negligently allowing MBC to erect scaffolding which covered its store sign. The third cause of action is against MBC for tortious interference with contract. The fourth is against both defendants for trespass by reason of the scaffolding and placement of nearby nonresident

advertisements. The fifth cause of action alleges that the defendants conspired to deprive it of its rights under the lease. The complaint seeks money damages and injunctive relief.

In conjunction with the commencement of this action, the plaintiff moved, by order to show cause, for a preliminary injunction directing the defendants to allow it to place a store sign on the scaffold shed in conformance with the law. By decision and order issued from the bench on May 19, 2006, the court (Leonard B. Austin, J.) granted the motion and enjoined the defendants from preventing plaintiff from erecting a sign so long as the sign does not violate any applicable laws or regulations. In granting the preliminary injunction, the court required that plaintiff post a \$10,000 undertaking to cover, *inter alia*, any reasonable counsel fees defendants may thereafter incur in having to defend against any Building Code violations cited with respect to a sign which plaintiff erects pursuant to the preliminary injunction. In addition, the court directed that plaintiff shall indemnify and hold defendants harmless from any fines imposed as a result of such violations.

Soon thereafter, the plaintiff erected a store sign on the scaffold shed in front of its premises but did so without a permit from DOB. On June 29, 2006, it applied to the DOB for a permit, which was denied. Meanwhile, the time for MBC to cure the cited violations expired at the end of May. It is unclear from the record before the court as to why the hearing on the violations was not held on the scheduled date, June 15, 2006. In any event, the hearing was rescheduled for August 24, 2006. On that date, MBC appeared and offered no defense to the charge. It was fined \$800. Thereafter, plaintiff apparently submitted another application to DOB for a permit to hang the very sign which had been hanging since June, 2006 and, on October 5, 2006, the application was approved.

In the meantime, in June, 2006, both defendants moved to dismiss the complaint herein based on documentary evidence and failure to state a cause of action. Alternatively, they sought a change of venue to this court. In addition, Associates moved to dismiss for lack of personal jurisdiction due to ineffective service and to reargue the court's issuance of a preliminary injunction. By decision and order dated September 29, 2006, Justice Austin denied Associates' motion to dismiss for lack of personal jurisdiction, granted Associate's motion to reargue to the extent of vacating the preliminary injunction with respect to only Associates and granted the defendants application to change venue to this court. The court declined to address that branch of the defendants' motions seeking dismissal based on documentary evidence and failure to state a cause of action.

In motion sequence numbers 002 and 003, the defendants' have essentially resubmitted their motions to dismiss based on documentary evidence and failure to state a cause of action. Although Justice Austin already decided the issue, Associates has also moved to dismiss based on lack of personal jurisdiction. In motion sequence number 001, MBC has moved, pursuant to CPLR 6314, to vacate the preliminary injunction which Justice Austin issued. In addition, it seeks an order directing the surety which issued the bond for the plaintiff's undertaking to release \$9,125 in order to indemnify MBC for the legal expenses it incurred in connection with the plaintiff's motion for a preliminary injunction and the hearing before the DOB. It also seeks \$800 directly from plaintiff for reimbursement of the \$800 fine which it paid to the DOB on August 24, 2006. Finally, plaintiff has cross-moved for leave to amend its pleadings so as to substitute Sleepy's, Inc. in place of Kleinsleep as the plaintiff herein.

### **Discussion**

With respect to the defendants' removal of the plaintiff's sign after having received a citation for violating the Building Code, the court agrees that the documentary evidence establishes that the complaint

fails to state a cause of action for breach of contract, negligence, tortious interference with contract and trespass. As to breach of contract, there is nothing in the lease which prevents the landlord from making necessary repairs to the building. Neither in the complaint nor in its papers herein has the plaintiff suggested that the repairs which MBC has undertaken were unnecessary. Nor has the plaintiff suggested that the scaffold shed was not a necessary component of such repair work. Although the plaintiff asserts that MBC improperly withdrew its consent to the placement of the store's sign on the shed, its lease with Associates does not provide it with an absolute right to maintain such a sign. As already noted, the lease only provides that the plaintiff may install an exterior sign with the landlord's prior approval which may not be unreasonably withheld. Given the fact that the landlord received a citation indicating that the sign was illegal, it was entirely reasonable for the landlord to withdraw its consent. Although the landlord could have permitted the sign to remain until the cure period had expired, it was certainly not unreasonable for it to refuse to do so. Finally, there is no merit to the plaintiff's claim that its contractual rights were violated by the nearby placement on the shed of advertisements for nonresident companies. The plaintiff's right to seek approval from the landlord for the placement of its own exterior sign does not preclude the landlord from placing other signs nearby and is hardly violated by the mere possibility that a prospective customer may be confused as to the plaintiff's location by the presence of these other signs. Indeed, the court notes that there is nothing in the record which indicates that the plaintiff ever complained to the defendants about the presence of these other signs and requested that they be removed or relocated.

As to negligence, the plaintiff has not shown that MBC had any right to prevent the landlord from erecting the scaffold shed, much less that it negligently failed to do so. As to tortious interference with contract, this claim requires a showing that (1) there was a valid contract between plaintiff and Associates, (2) MBC knew about the contract; (3) MBC intentionally induced Associate's breach of the contract without justification and (4) damages resulted from the breach. *See Lama Holding Co. v. Smith Barney, Inc.*, 88 NY2d 413, 424 (1996); *Beecher v. Fedlstein*, 8 AD3d 597, 5982<sup>nd</sup> Dept 2004); *Vigoda v. DCA Productions Plus, Inc.*, 293 AD2d 265, 266 (1<sup>st</sup> Dept 2002). Here, the court has already found that the removal of the plaintiff's store sign was not a breach of contract. Moreover, given the DOB citation that the sign violated the Building Code, the landlord's withdrawal of consent was not without justification.

As to trespass, this is a tort involving the interference with the use or possession of either real or personal property which falls short of destruction or conversion. *See Sporn v. MCA Records*, 58 NY2d 482, 487 (1983). The problem with this claim is that, as the court has already discussed, the plaintiff did not have an absolute right to hang an exterior store sign and the landlord is, in any event, entitled to erect a scaffold in connection with the repair of the building and to eliminate the violation of the Building Code by a tenant.

Thus, the complaint fails to state any valid cause of action with respect to the erection of the scaffold, the placement of nonresident advertising signs and the withdrawal of defendants' consent based on the issuance of a DOB citation. Nevertheless, by moving to vacate the preliminary injunction issued by Justice Austin, MCB has clearly indicated that it intends to withdraw its consent and/or remove the sign for plaintiff's store which is presently hanging on the scaffold shed. In view of the fact that the plaintiff has obtained a permit from DOB allowing such a placement of the sign, any such actions by MCB may constitute not only its interference with contract, but a breach by Associates of its lease with plaintiff and trespass. The court therefore declines to dismiss the action and is persuaded that this

proceeding should go forward in order to determine whether the defendants may properly refuse to consent to the continued placement of plaintiff's sign on the scaffold shed. In the event the defendants stipulate to allow the sign in its present condition to remain so long as there are no outstanding violations against it, the court will issue an order dismissing the complaint in its entirety.

As to MCB's motion, pursuant to CPLR 6314, to vacate the preliminary injunction issued by Justice Austin, such an application is addressed to the sound discretion of the court and may be granted upon compelling or changed circumstances which render continuation of the injunction inequitable. *See Thompson v. 76 Corp.*, 37 AD3d 450 (2<sup>nd</sup> Dept 2007); *Wellbilt Equipment Corp. v. Red Eye Grill, L.P.*, 308 AD2d 411 (1<sup>st</sup> Dept 2003). The defendants have not even attempted to make such a showing. Moreover, in view of the defendants' indication that, despite the issuance of a DOB permit, they intend to refuse to allow the plaintiff's sign to remain on the scaffold shed if the preliminary injunction is lifted, the essential circumstances underlying the issuance of the preliminary injunction remain. Clearly, there is a continued need for the preliminary injunction.

As to MCB's application for an order requiring that it be reimbursed for the \$800 it paid in fines to the DOB and indemnified for the legal expenses it incurred in connection with the plaintiff's motion for a preliminary injunction and the hearing before the DOB, the motion is premature since it has not yet been determined that plaintiff is not entitled to the injunction. Although the court agrees that MCB is entitled, under the clear terms of Justice Austin's order, to be indemnified for the legal expenses it incurred in connection with the hearing before the DOB and for the \$800 fine it paid for the plaintiff's violation of the Building Code, any such indemnification should await the final disposition of this case.

Finally, the plaintiff has cross-moved for leave to amend its pleadings so as to substitute Sleepy's, Inc. in place of Kleinsleep on the ground that its interest in the premises has been assigned to Sleepy's. CPLR 1018 provides that upon any transfer of interest, an action may be continued by the original party "unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." The determination to substitute or join a party pursuant to CPLR 1018 is a matter which lies within the court's discretion. *See NationsCredit Home Equity Servs. v. Anderson*, 16 AD3d 563 (2<sup>nd</sup> Dept 2005). The court is persuaded that Kleinsleep should remain as a plaintiff and should be joined by Sleepy's.

Accordingly, in motion sequence number 001, MBC's motion to vacate the preliminary judgment is denied. Its motion for an order directing that it be indemnified is denied without prejudice to renew upon the final disposition of this case. In motion sequence number 002, MBC's motion to dismiss is denied. In motion sequence number 003, Associates' motion to dismiss is also denied. The plaintiff's cross-motion is granted to the extent that the Sleepy's, Inc. is hereby joined as a plaintiff in this action.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on June 12, 2007 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 5/15/07

Check one:  FINAL DISPOSITION

**FILED**  
MAY 21 2007  
MARYLIN G. DIAMOND  
COUNTY CLERK  
NEW YORK  
OFFICE