Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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CPEOA, LIMITED PARTNERSHIP,

Plaintiff,

-against-

1907 VENTURES LLC; 1411 VENTURES LLC; COLLEGE POINT PROPERTY OWNERS, LLC; AAG MANAGEMENT, INC.; WALDBAUM-COLLEGE POINT CENTER, INC.; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.; APW SUPERMARKETS, INC.; BRINKER RESTAURANT CORPORATION; JETRO CASH AND CARRY ENTERPRISES, LLC; WALBAUM, INC.; COLLEGE POINT MANAGEMENT, OMC.; RD AMERICA, INC.; and PETCO ANIMAL SUPPLY STORES,

Defendants.

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Index No: 19141/06

Decision and Order
After Hearing on Undertaking

This is an action for injunctive relief commenced by plaintiff CPEOA, Limited Partnership, against defendants concerning commercial property in the College Point Shopping Center (the "Shopping Center") located in College Point, New York. Plaintiff holds a leasehold interest in the Shopping Center occupied by, inter alia, a Waldbaum Supermarket with an adjacent two-story facility comprised of warehouse and office space. In May 2006, the owners of the subject property, defendants 1907 Ventures LLC, 1411 Ventures LLC, and College Point Grocery Owners LLC (the "Owners"), entered into an agreement with RD America, Inc. ("RD"), an affiliate of defendant Jetro Cash and Carry Enterprises, LLC ("Jetro"), to lease the second floor within the adjacent Waldbaum space.[1] Thereafter, plaintiff commenced this action upon the ground that the aforementioned lease agreement violates the Reciprocal Easement Agreement that plaintiff holds with the Owners of the Shopping Center, which provides in pertinent part:

No building or other structure of any kind shall be erected by Owner

[1] Jetro conducts a warehousing operation across the street from the Shopping Center and seeks to utilize the additional space for purposes ancillary to its warehousing operations.

> or Waldbaum (I) on any portion of the Common Area of Waldbaum Parcel which would materially interfere with the use or access to the CP (CPEOA) facility [](Article I, Section 2[a].)
>
> [N]either owner nor Waldbaum shall lease any portion of the Waldbaum Facility or the Waldbaum Parcel to tenants or occupants other than Waldbaum, any Affiliates or their respective successors and assigns for commercial office purposes or uses, except such purposes or uses which are or may be ancillary to retail or warehouse uses in other portions of the Waldbaum Facility. (Article VI, Section 11[b].)

Consequently, plaintiff moved, inter alia, to enjoin the Owners, Jetro, and RD (collectively "defendants") from converting the adjacent property from accessory warehouse/office space to stand-alone retail and/or commercial office space. By order of this Court dated November 30, 2006 (Satterfield, J.), that branch of the motion was granted to the extent that defendants were enjoined from implementing the Jetro Lease during the pendency of this action, and the matter was set down for a hearing to determine the amount of an undertaking which was held on December 15, 2006. At the hearing, defendants argued that "there is nothing for the Court to enjoin because the Jetro Lease had been implemented already." Consequently, the parties were given leave to make additional submissions on the issue of whether the lease was implemented prior to December 11, 2006, the date that defendants became aware of the November 30, 2006 decision, thereby rendering the injunction and undertaking moot; all additional submissions were received by this Court in March 2007.[2]

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[2]Submitted were:

1. Defendants' Brief Demonstrating Jetro Lease 'Implementation' Prior to December 11, 2006 and Establishing Appropriate Undertaking Amount if Court Finds that Jetro Lease was not Implemented Prior to December 11, 2006, with attachments, dated January 19, 2007.

2. Plaintiff's Supplemental Brief in Further Support of the Issuance of an Undertaking, with attachments, dated January 19, 2007.

3. Plaintiff's Affirmation Regarding the Fixing of An Undertaking, with attachments, dated January 19, 2007.

4. Supplemental Affidavit of Arnold Gumowitz in Support of Defendants' position on Jetro Lease Implementation and Appropriate Amount of an Undertaking, sworn to February 15, 2007.

5. Supplemental Affidavit of Stanley Fleishman in Support of Defendants'

(continued...)

In support of their position that the lease has already been implemented, defendants contend that pursuant to the leasing agreement, the Owners were to deliver the demised premises in an "As Is" condition, and Jetro/RD were to pay monthly rent. As such, defendants state that as the lease contained no conditions precedent that had not been met prior to the November 30, 2006 order, "by the expressed terms of the Jetro Lease, all that is required for implementation is delivery of the space by the Landlord (Owners), and payment of rent by the Tenant (Jetro/RD), all of which took place months before plaintiff commenced this litigation []." Defendants further state:

> By December 11, 2006, Jetro/RD (and the Owners) had already effected the following "concrete measures," which clearly constitute "implementation" of the Jetro Lease:
>
> - The parties had executed a commercial lease for the Jetro Space (mid-April 2006)
>
> - Jetro/RD, as required by the Jetro Lease, had paid to the Owners, over the course of several payments, rent, common area maintenance charges, and real estate taxes, in the total amount of $96,645.42 (payments on 4/17/06, 9/8/06 and 12/7/06);
>
> - Jetro had received keys to the Jetro Space from the Owners (5/1/06– this date corresponds with the commencement date of the Jetro Lease term);
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> - Jetro had assumed full possession of the Jetro Space, installing a new lock (11/2/06– exactly one day after the

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[2](...continued)

position on Jetro Lease Implementation and Appropriate Amount of an Undertaking, sworn to February 15, 2007.

6. Affirmation of Scott E. Mollen (1) in Opposition to Plaintiff's Supplemental Brief on the Issuance of an Undertaking and (2) in further Support of Defendants' Position on Jetro Lease Implementation and Undertaking Amount, with attachments, signed February 27, 2007.

7. Plaintiff's Reply Memorandum of Law in Response to Defendants' Supplemental Brief, with attachments, dated February 27, 2007.

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vacatur of the [original] TRO)

- Jetro had entered into contract for electrical work (4/11/06), air-conditioning repair (4/20/06), plumbing work (7/27/06), telephone service (8/24/06), demolition and removal (11/3/06), and carpeting (11/21/06);

- Jetro had obtained requisite permits to build out the space from the Department of Buildings (11/3/06), as well as a required electrical work permit (11/17/06);

- Jetro had furnished Certificates of Insurance to the Owners, as per the Jetro Lease (11/7/06, 11/9/06);

- Jetro had purchased over $30,000.00 worth of supplies to be utilized in the Jetro Space (11/15/06); and

- Jetro had made various expenditures in connection with building out the space [including alterations, installations, additions or improvements...].

Additionally, defendants contend that if Jetro is prevented from continuing occupancy in the subject premises, it will be forced to cancel the lease agreement between it and the Owners, thereby giving plaintiff the ultimate relief of a permanent injunction.

Plaintiff, in support of the position that the injunction is not a nullity and an undertaking should be set, asserts that defendants, by alleging that the lease agreement has already been implement, are attempting to "obtain a second bite of the proverbial apple. In arguing that the undertaking is now moot, they are actually arguing that the preliminary injunction should be vacated or they are requesting reargument. The case law, however, is clear; upon granting a preliminary injunction, an undertaking must be fixed." Plaintiff further asserts that since defendants failed to take the proper course of action by moving to reargue or vacate this Court's previous order which already determined that an injunction is appropriate, an undertaking should be fixed. Additionally, plaintiff contends that if Jetro is permitted to continue with its proposed use of the premises, its bargained for contractual rights will be further compromised and irreparably harmed, and states:

> Defendants' actions materially interfere with the operations of CPEOA and its tenant, Staples, by causing congestion and disorder in the Shopping Center, which results in customers shopping elsewhere, and impedes the ability of CPEOA's commercial office tenants to have visitors and conduct business, all of which incalculably damages the value of CPEOA's leasehold interest through the loss of customers and good will (citations omitted).

> Whatever monetary damages may be available after it is determined that defendants breached the Reciprocal Easement Agreement, Plaintiff cannot be compensated for the loss of good will, customers and overall business that will inevitably result from defendants' prohibited use of the restrained property.

Plaintiff asserts that there is no merit in the argument that the Owners will lose RD as a tenant and Jetro will cancel the lease, as defendants were aware of the Reciprocal Easement Agreement at the time that they entered into the leasehold in May 2005. Plaintiff states that defendants entered into such an agreement at their own peril, and despite the alleged attractiveness of the tenancy of Jetro and RD, the Owners can mitigate their damages by finding a new tenant. Further, plaintiff asserts that to the extent that defendants are harmed if it is found that the injunction was inappropriately granted, defendants have the protection of the posted undertaking.

With respect to the implementation of the subject lease, plaintiff contends that the execution of the lease is not the equivalent to implementation of the lease, and defendants' actions are tantamount to commencing construction and development on property which is governed by a Reciprocal Easement Agreement, and for which an injunction motion was pending. Plaintiff further contends that defendants have not moved in or begun operating out of the space, and construction was ongoing when the restraint was granted. Plaintiff also states that although the Court used the word "implement" with respect to the subject lease, "there can be no question as to this Court's intention that defendant[s Jetro or RD] not be permitted to operate within the facility. Defendants are relying upon one single word within the Order and blatantly ignoring the overall Order issued, which, when read as a whole, evidences that the Court's intention was to enjoin any use of the Restrained Property until the underlying lawsuit was resolved [to maintain the status quo]."

In response, defendants assert that plaintiff unjustly alleges that they have made much ado about the word "implement" in an attempt to misconstrue the Court's intentions and obtain a second opportunity to assert arguments which were considered by this Court in the first instance. Defendants further assert that their focus on the word is to clearly ascertain what is actually being enjoined by the Court to illustrate, as defendants posit, that implementation of the subject lease has already been accomplished, and is a fait accompli. Moreover, defendants state that this Court agreed that the meaning of the word "implement" was pivotal to understanding what actions were to be enjoined, and cites to the following which was stated by this Court at the December 15, 2006 hearing:

> This is where we are now. [The parties] are before this Court for a hearing on an undertaking that may or may not have applicability at this point; and this Court is not in a position to rule that it is applicable or not; and what this Court is going to need before we proceed with the undertaking, you have made your oral arguments, you made representations to the Court, I need a record upon which to make a determination whether, as claimed by [the defendants] and suggested by the arguments that [the defendants have] asserted the

> undertaking is really inapplicable at this point because of [changed circumstances]. So that I am going to adjourn the undertaking... in order for me to evaluate the issues that have been raised...

As such, defendants assert that despite plaintiff's characterization, their focus on the word "implement," which was a word selected by the Court in its November 30, 2006 Order, is in response to this Court's request. Further, defendants assert that even if plaintiff is entitled to preservation of status quo, "the Jetro Lease has been fully implemented, and Jetro had taken full possession of the Jetro Space, prior to December 11, 2006 (the date of entry of the November 30th Order, and the date upon which defendants first learned of the Order). Thus, any clarification of the terms of the limited, conditional injunction set forth in the November 30th Order, such that would dispossess RD/Jetro, or force the cancellation of the Jetro Lease, would not preserve the status quo but, rather, would radically and irreparably alter the status quo, and would be akin to invalidating the Jetro Lease and evicting Jetro from the Jetro Space."

Lastly, defendants assert that plaintiff has misconstrued their position as to the implementation of the lease. They contend that implementation occurred upon the subject lease being executed, the space delivered to and accepted by Jetro and RD, the Owners meeting all of conditions subject to such tenancy, and RD making rental payments, all in accordance with the lease. Defendants contend that although much effort and resources were expended in building out the space, the alterations and improvements made were at the behest of RD and Jetro, and not required by the terms of the lease. Consequently, they assert that the build out, as well as use of the space, are unconnected with the concept of implementation of the Jetro Lease, and therefore inconsequential to the issue of whether the lease has or has not been implemented.

Plaintiff, in responding to the various arguments by defendant, assert, inter alia, that preservation of the status quo is to restore a party to the position held "at the time of commencement of the proceeding to enforce a restrictive covenant where the defendant, fully aware of a plaintiff's intent to enforce the restrictive covenant, proceeds during the pendency of the action to violate the covenant in an obvious effort to render the granting of any injunctive relief moot based upon the argument that defendant's actions rendered the matter a fait accompli." Plaintiff contends that defendants were aware of its intentions to enforce the Reciprocal Easement Agreement as of the commencement of this action on August 31, 2006, and they proceeded at their own risk in taking further action with respect to the subject lease and space. Consequently, plaintiff asserts that the injunction should issue, and an undertaking be posted.

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, Kelley v. Garuda, 36 A.D.3d 593 (2nd Dept. 2007); 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); Aetna Ins. Co. v Capasso, 75 N.Y.2d 860, 862 (1990). 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 [(Klein, Wagner & Morris v. Lawrence

A. Klein, P.C., 186 A.D.2d 631 (2nd Dept.1992)], and such injury is imminent, not remote or speculative. See, 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). "Where [] a litigant can fully be recompensed by a monetary award, a preliminary injunction will not issue." Price Paper and Twine Co. v. Miller, 182 A.D.2d 748, 750 (2nd Dept.1992).

Moreover, the purpose of a preliminary injunction is to preserve the status quo of an action pending trial. See, Ruiz v. Meloney, 26 A.D.3d 485 (2nd Dept. 2006); Fung Moy v. Hohi Umeki,10 A.D.3d 604 (2nd Dept. 2004). As such, the granting of the 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." Hoeffner v. John F. Frank, Inc., 302 A.D.2d 428 (2nd Dept. 2003); Doe v. Poe; 189 A.D.2d 132 (2nd Dept.1993). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court [see, Matter of Merscorp v. Romaine, 295 A.D.2d 431, 432, 433, 743 N.Y.S.2d 562 (2nd Dept. 2002); cf. Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272 (1988)]." Glorious Temple Church of God in Christ v. Dean Holding Corp., 35 A.D.3d 806 (2nd Dept. 2006).

In the case at bar, by order of this Court dated November 30, 2006, that branch of plaintiff's motion which sought to enjoin defendants from converting the subject premises in violation of the Reciprocal Easement Agreement was granted to the extent that defendants were enjoined from implementing the Jetro Lease during the pendency of this action, and the matter was set down for a hearing to determine the amount of an undertaking on December 15, 2006. In finding that plaintiff was entitled to injunctive relief, this Court stated the following:

> As to the May 2006 agreement with Jetro, it must be analyzed in the context of the language employed in Article VI, Section 11(b) which controls the leasing of the adjacent Waldbaum space. The Owners contend that this section does not prohibit the leasing of space to third parties and that the Jetro Agreement conforms with the restrictions set forth since its contemplated use is "clearly ancillary ... to warehouse uses." While Section 11(b) of Article VI initially limits the leasing of the Waldbaum facility or Waldbaum parcel to Waldbaum, its affiliates, successors and assigns, for commercial office purposes or uses, an exception exists for third parties when the leasing purposes or uses are ancillary to retail or warehouse uses in other portions of the Waldbaum Facility. This language indicates that the ancillary purposes or uses involved are to relate to the Waldbaum Facility and not the warehouse uses of a third party such as Jetro. This private agreement sets forth a restrictive covenant which may be enjoined although its use is permissible under zoning provisions. (See, Matter of Friends of the Shawangunks v. Knowlton, 64 N.Y.2d 387 [1985].) Under these circumstances, the equities lie in favor of maintaining [plaintiff's] previously negotiated rights, by preserving the status quo and avoiding a later judgment in its favor being rendered ineffectual.

> (See, Ruiz v. Meloney, 26 A.D.3d 485 [2006]; Weinreb Mgt., LLC v. KBD Mgt., 22 A.D.3d 571 [2005]; Moy v. Umeki, 10 A.D.3d 604 [2004].) No determination can be made at this juncture upon the papers presented as to whether the potential occupancy of the first floor adjacent Waldbaum space by a retail tenant would be in violation of the Reciprocal Easement Agreement.

Here, although defendants contend that the lease agreement has already been implemented by its execution, possession of the property by the tenants, the fulfillment of the Owners' obligations as a condition precedent to such possession and tenancy, and the payment of rent, this Court deems that interpretation as narrowly construed and misplaced. Despite the fundamental principles of a landlord/tenant relationship, it cannot be said, as defendants posit, that the very existence of that relationship ends this Court's query as to what constitute implementation of the lease. Indeed, if implementation of the subject lease was solely hinged upon those base factors, then *any* tenant that occupies the subject space would inevitably threaten the valuable contract rights encompassed in the Reciprocal Easement Agreement. The mere presence of Jetro and RD as tenants in the demised property is less objectionable than their intended use, and as a consequence, the ensuing construction conditioned thereupon. Implementation of the lease in this context is akin to actions which would "materially interfere with the use or access" of plaintiff's leasehold, in violation of the contractual rights set forth in the Reciprocal Easement Agreement. Therefore, notwithstanding defendants' contentions, the building out of the space, the alterations, the improvements made and the intended use, although not conditions of the subject lease, are inextricably intertwined to the concept of implementation of the Jetro Lease. Indeed, the import of these factors are clearly illustrated by the fact that Jetro and RD have stated on numerous occasions their intention to cancel the subject lease if they are not allowed to do more than execute the lease, take possession of the demised property and pay rent.

The facts and circumstances presented in this case highlight the need to carefully balance the interests of all parties and adherence to the well-settled principle that "[m]andatory injunctive relief should not be granted pendente lite without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action [see, St. Paul Fire and Mar. Ins. Co. v. York Claims Serv., 308 A.D.2d 347, 349 (1st Dept. 2003); Rosa Hair Stylists v. Jaber Food Corp., 218 A.D.2d 793, 794 (2d Dept.1995.)]." Village of Westhampton Beach v. Cayea, 38 A.D.3d 760 (2d Dept. 2007). "Whether an injunction should issue depends on all the equities between the parties and upon the facts and circumstances of the particular case (citation omitted). An injunction which will work hardship or oppression upon a defendant with comparatively slight corresponding benefits to the plaintiff will be withheld (citations omitted), especially when the defendant acted in good faith or plaintiff expressed a willingness to accept monetary relief (citations omitted). But, where the wrong was unwarranted or where the defendant acted with full knowledge and planned his violation of plaintiff's rights, his position does not appeal to the equitable conscience and an injunction should issue (citations omitted)." Goodfarb v. Freedman, 76 A.D.2d 565, 574 (2nd Dept.1980).

The status quo in the instant case was disturbed by defendants' improvident and somewhat risky decision to build out the subject space while the underlying preliminary motion was pending, notwithstanding that they were within their legal rights to do so as the temporary restraint had been vacated. Defendants' election to proceed in that fashion, however, cannot dictate the determination of whether injunctive relief should be granted.. Further, notwithstanding defendants' contentions to the contrary, the issuance of an injunction would not give plaintiff the ultimate relief of a permanent injunction in and of itself. Since, at this juncture, that effect would be achieved only upon Jetro's fulfillment of its promises of vacatur should this Court do anything less than find that the lease has been fully implemented and the injunction a nullity, the issuance of the injunction to maintain the status quo of the action would not serve to give plaintiff its ultimate relief, except as by a recourse of defendants' own choosing.

Accordingly, based upon the various submissions made on the issue of whether the underlying injunction is moot, it hereby is determined by this Court that plaintiff has established, as it did on its first factual presentation, a clear right to injunctive relief, and defendants' supplemental submissions have fail to demonstrate that the lease has been fully and sufficiently implemented such as to be considered a fait accompli and a nullification of the injunction. Additionally, as this Court finds that maintenance of the status quo is something less than restoration of the subject premises to a pre- Jetro lease status, which would present an additional hardship to defendants, but something more than allowing defendants' to have unfettered rights and access to the subject property, the defendants are enjoined from continuing to implement the Jetro Lease by resuming all construction, alteration and improvement of the subject premises, and taking any further action to convert the premises for their intended use pursuant to the Jetro Lease until the rights of all parties are determined in the underlying action. Having so decided, the next query is the appropriate undertaking to be fixed in this case.

"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 (2nd Dept.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). 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 (2d 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 (2d Dept. 1985). Here, the November 30, 2006 order set this matter down for a hearing to fix an undertaking on December 15, 2006, which produced the instant issues addressed by this order. As the parties have argued alternatively, with respect to the fixing of the undertaking, this Court dispenses with the need to schedule another hearing, and will determine the appropriate amount based upon the supplemental submissions set forth herein.

The Owners assert that if it is determined that the Jetro lease was not implemented prior to the entry of the November 30, 2006 order, plaintiff should be required to post an undertaking in the amount of $5 million, based upon the potential damage to the Owners as a result of the continuation of the injunction. The Owners contend that RD's tenancy is contingent upon whether or not the injunction would continue. As a result, Jetro will cancel the lease if the restraint is not vacated, and the Owners would lose the full value of a ten year lease at the rental amount of $225,000.00 per year, exclusive of annual rate increases. They further contend that the total lost revenue to the Owners would be in excess of $3.6 million, including rental income, common area maintenance charges and taxes. Additionally, the Owners also allege consequential damages resulting from the "diminished appearance and consequent reduced value of the Shopping Center, which would be caused by the existence of a large block of vacant space." Lastly, the Owners assert that "the Jetro deal represents a unique opportunity which cannot be easily replaced (if at all). Moreover, due to the existence of the Reciprocal Easement Agreement, and the restrictions contained therein, the pool of potential 'permitted' tenants of the Jetro Space is necessarily smaller in number. Thus, it would be extremely difficult for the Owners to mitigate any of the damages which would be caused by the issuance of an injunction by this Court and the subsequent cancellation of the Jetro Lease resulting therefrom.

Jetro and RD, in support of the posting of an undertaking in the amount of $5 million, contend that from November 2 through December 15, 2006, Jetro expended approximately $150,000.000 renovating the Jetro Space, and have made post-order expenditures of an additional $150,000.00 based upon arrangements and contracts entered into prior to such order, totaling almost $300,000.00. They assert that they would lose the benefit of those expenditures if they are forced to change course and seek a new location for RD's operations. Jetro and RD also state the following:

> Finally, it must be stressed that there is simply no space that Jetro could find which could adequately replace this opportunity. Given the proximity of the Jetro Space to Jetro's main operations–located across the street from the Shopping Center– it is a virtual certainty that whatever space Jetro ultimately finds will not be as operationally efficient, convenient, useful or cost-effective as the Jetro Space. Thus, the potential damage to Jetro associated with the injunction easily exceeds $1 million.

With respect to the posting of an undertaking, plaintiff asserts that defendants' request to set the bond amount at $5 million is unfounded. Plaintiff states that from the outset, if the entire rental value of the lease over ten years is $3.6 million according to defendants' calculations, the additional $1.4 million that defendants claim they will suffer is purely speculative and without evidentiary support. Moreover, it contends that the Owners' assertion that they cannot mitigate their damages because they will be unable to find another tenant is unreasonable. Consequently, plaintiff states that since the injunction prohibits defendants from going forward with the Jetro Lease, the Court should set the amount of the undertaking at $1 million, based upon the monthly rent on the premises through 2011, the outside date that plaintiff estimates that this action will conclude.

The standard to be applied in determining the undertaking is an amount that is rationally related to the damages the non-moving party might suffer if the court later determines that the relief should not have been granted. [See, Ujueta v Euro-Quest Corp., 29 A.D.3d 895 (2nd Dept. 2006); Lelekakis v Kamamis, 303 A.D.2d 380 (2nd Dept. 2003)]. In analyzing the legal arguments made at the December 15, 2006 hearing, as well as in the post-hearing submissions, this Court is guided by the well-recognized principle that the court, in its discretion, may set an undertaking in an amount rationally related to the quantum of damages which the nonmoving party would sustain in the event the moving party is later determined not to have been entitled to the injunction. See, 3636 Greystone Owners, Inc. v. Greystone Bldg., 4 A.D.3d 122 (1st Dept. 2004); Sportsplex of Middletown, Inc. v. Catskill Regional Off-Track Betting Corp., 221 A.D.2d 428, 429 (2nd Dept. 1995); see, also, Mayfair Super Markets, Inc. v. Serota, 262 A.D.2d 461 (2nd Dept. 1999); Schwartz v. Gruber, 261 A.D.2d 526 (2nd Dept. 1999); Bennigan's of New York, Inc. v. Great Neck Plaza, L.P., 223 A.D.2d 615 (2nd Dept. 1996); 61 W. 62nd Owners Corp. v. Harkness Apt. Owners Corp., 173 A.D.2d 372 (1st Dept. 1991). It is equally well settled that the amount of the undertaking must be rationally related to the amount of the defendant's potential liability if the preliminary injunction later proves to be unwarranted, and not based upon speculation. Ujueta v. Euro-Quest Corp., 29 A.D.3d 895 (2nd Dept. 2006); Blueberries Gourmet, Inc. v. Aris Realty Corp., 255 A.D.2d 348 (2nd Dept. 1998); 7th Sense v. Liu, 220 A.D.2d 215 (1st Dept. 1995).

Here, defendants' request for the undertaking to be set at $5 million is untenable. Notwithstanding the fact that the Owners assert that they will sustain consequential damages resulting from the "diminished appearance and consequent reduced value of the Shopping Center," such claim lacks evidentiary support, and is speculative at best. See, M & A Oasis, Inc. v. MTM Associates, L.P, 307 A.D.2d 872 (2d Dept. 2003); See, also, Lelekakis v. Kamamis, 303 A.D.2d 380 (2d Dept. 2003). Nevertheless, plaintiff's contentions that the undertaking should be set at $1 million does not sufficiently protect the interest of defendants should it be found that the injunction in this matter was inappropriately issued. See, Schwartz v. Gruber, 261 A.D.2d 526 (2d Dept. 1999).

The Owners argue more concretely and persuasively that as a result of the injunction, Jetro and RD will cancel the lease, and as a consequence, the Owners will lose the full value of a ten year lease at the rental amount of $225,000.00 per year, for total lost revenue in excess of $3.6 million, including rental income, common area maintenance charges and taxes. This conclusion, however, disregards that the Owners should be able to mitigate this loss by finding a new tenant to occupy the subject space once the rights of the parties have been determined. That the property is in the midst of incomplete construction and may work to impair the Owners' ability to find a suitable tenant is not lost on this Court, and must also be factored into the analysis. On the other hand, although defendants Jetro and RD may not receive in this Court's determination of whether injunctive relief should issue, the favorable benefit of their efforts in commencing construction and alterations, those efforts are relevant to this Court's setting of the amount of the undertaking. Jetro contends that it has expended approximately $300,000.00 in renovating the Jetro Space, and post-order expenditures based upon arrangements and contracts entered into prior to the November 30 order of this Court. They assert that they would lose the benefit of those expenditures if they must vacate the subject space and seek a new location for RD's operations, and allege potential damage

to them to be in excess of $1 million, a figure that is not supported by the record. See, Ujueta v. Euro-Quest Corp., 29 A.D.3d 895 (2nd Dept. 2006). Consequently, this Court determines that under the circumstances presented, the posting of an undertaking by plaintiff in the amount of $3.5 million would be appropriate in this case. Thus, based upon the foregoing, it is hereby

ORDERED, that plaintiff shall post a bond in the sum of $3,500,000.00 within sixty (60) days of service of a copy of this order with notice of entry.

Copies of this decision and order are being sent to counsel for the parties.

Dated: April 27, 2007

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J.S.C.