

**Pleasantville Food & Gas, Inc. v One Pleasantville Rd., LLC**

2009 NY Slip Op 32818(U)

November 16, 2009

Supreme Court, Nassau County

Docket Number: 016173/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 9**

PLEASANTVILLE FOOD & GAS, INC. and  
DAKHIL EL JAMAL,

Plaintiff,

INDEX NO.: 016173/2009  
MOTION DATE: 09/11/2009  
MOTION SEQUENCE: 001

-against-

ONE PLEASANTVILLE ROAD, LLC and  
MONTGOMERY DISTRIBUTORS, LLC,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavits & Exhibits Annexed .....	1
Affidavit of Chris Thomas in Opposition & Exhibits Annexed .....	2
Defendants' Memorandum of Law in Opposition to Plaintiff's Motion .....	3
Plaintiffs' Reply Memorandum of Law in Further Support Plaintiff's Motion.....	4

**PRELIMINARY STATEMENT**

Plaintiffs move pursuant to Civil Practice Law and Rules §6301 to preliminarily enjoin Defendants from terminating or non-renewing the retail gasoline station lease agreement and all other related agreements. Plaintiffs also seek to preliminarily enjoin Defendants from further prosecuting the pending landlord-tenant proceedings brought by Defendants in Village Court, Pleasantville, New York.

## BACKGROUND

Plaintiff Dakhil El Jamal, ("Jamal"), is the President of Plaintiff Corporation Pleasantville Food & Gas, Inc. ("PF&G"). On September 15, 2003 Jamal entered into a retail gasoline station lease for a Getty branded gasoline service station by paying the prior franchisee \$355,000 for the ongoing service station business and inventory. This station is located at One Pleasantville Road, Pleasantville, New York, ("Premises"). Getty subsequently leased the Premises to Montgomery Distributors, LLC, ("Montgomery"). The agreement between Jamal and Getty was then terminated on July 14, 2004 when Jamal, at the request of Getty, executed a mutual cancellation of lease and lessee commission contract.

On July 1, 2004 PF&G entered into a Retail Gasoline Station Lease Agreement, ("Lease") and Lessee Commission Contract, ("Commission Contract"), with Montgomery Distributors, LLC, ("Montgomery"). The Lease was for a five year term from July 1, 2004 through June 30, 2009 and provides that PF&G is a tenant and commission agent of Montgomery. Under the terms of the Lease PF&G was to pay monthly rent to Montgomery, with the monthly amount increased in each year of the Lease. In addition to the monthly rent, PF&G was also responsible for paying excess real estate taxes and water and sewage charges. The Lease also provides that should the agreement be extended, renewed, or the lessee holds over possession, with consent of the Company, after the expiration of the term, that the terms and conditions of the Lease shall continue and it should be considered a month to month tenancy.

In accordance with the Commission Contract, gasoline was delivered to the Premises by or for Montgomery. PF&G then sold the gas and deposited the funds into a designated account to which Montgomery had access. Montgomery paid PF&G a commission ranging from \$0.65 and upward per gallon, depending on the volume of gasoline sold. Like the Lease agreement, the Commission Contract provides that should the contract be extended, renewed, or the lessee holds over possession, with consent of

the Company, after the expiration of the term, that the terms and conditions of the Commission Contract shall continue and it should be considered a month to month tenancy.

On August 1, 2004 Montgomery, unbeknownst to PF&G, assigned the Lease of the Premises to One Pleasantville Road LLC, (“OPR”). PF&G has operated the gasoline station and received commissions from Montgomery over the term of the agreements without incident. On February 25, 2009 OPR sent a letter to PF&G reminding it that the Lease was set to expire on June 30, 2009, that it could stay on the Premises as a month to month tenant, and that if it did the monthly rent would be increased from \$5,850 to \$9,666 per month. The parties attempted to negotiate a new agreement with respect to the monthly rents, prior to the expiration of the Lease, but were unable to do so. After PF&G agreed to pay an increased amount for the July rent the parties again sought to negotiate new terms, again to no avail.

On July 29, 2009, OPR informed PF&G of its intent to terminate PF&G’s tenancy as of August 31, 2009. OPR subsequently sent PF&G an invoice for the August 2009 rent and taxes of approximately \$12,000. On August 14, 2009 PF&G’s attorney contacted OPR’s attorney seeking to renew the Lease for another five years and offering to pay OPR rent of \$7,500 for August. OPR rejected the offer and filed a Notice of Petition for Non-Payment in the Justice Court, Village of Pleasantville, (“Justice Court”) with a hearing to be held on August 18, 2009.

Plaintiffs filed the instant action for a preliminary injunction and seeking a Temporary Restraining Order (“TRO”) on August 27, 2009. This Court granted the TRO and ordered Plaintiffs to pay to Defendants \$9,000 a month for the use of the premises pending a hearing on the matter. Subsequently, Defendants filed a holdover proceeding in the Justice Court on September 1, 2009.

To date PF&G has remained in possession of and continued to operate the gasoline station located on the Premises. Montgomery has continued to supply PF&G with

gasoline. OPR contends that it has paid all commissions due and owing on sales made by PF&G as of August 31, 2009. However, PF&G alleges it is currently owed over \$2,000 in unpaid commissions.

Plaintiffs seeks a preliminary injunction enjoining OPR and Montgomery from prosecuting the Justice Court actions and terminating the Lease agreement and Commission Contract. Additionally, Plaintiffs seek to have the Justice Court actions consolidated with this action. Defendants argue that no common questions of law or fact exist allowing the Justice Court actions to be consolidated with this action and that the requests for preliminary injunction be denied.

### DISCUSSION

In accordance with CPLR §6301 the party seeking a preliminary injunction must show (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction.

With respect to the first requirement, Plaintiffs must demonstrate a likelihood of success on their claim under either the Petroleum Marketing Practices Act, (“PMPA”), or the New York State General Business Law, (“GBL”). Plaintiffs contend that Defendants violated the PMPA and GBL by failing to offer a renewal of the Lease and Commission Contract and failing to give the requisite notice regarding the termination and/or non-renewal of the Lease and Commission Contract.

PMPA was enacted to establish protection for franchisees from arbitrary and discriminatory termination or non-renewal of their franchises. (*Issa v Getty*, 18 Misc.3d 1107(A) [2007]). Under the PMPA a franchise includes:

“any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled

by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy.” 15 U.S.C. §2801(1)(B)(i)

In determining if a franchise relationship exists the courts will look for sufficient indicia of entrepreneurial responsibility and risk to be considered independent dealers and businessmen. *Issa*, supra. Here, as in *Issa*, the agreement between the parties designated Plaintiffs as an “independent businessperson”. Additionally, Plaintiffs are responsible for any losses incurred as a result of the shortages from “drive offs” and credit card chargebacks, as well as the cost of maintaining the premises including real estate taxes, general liability and environmental insurance. As a result, Plaintiffs have submitted sufficient evidence to support its claim that their relationship with Defendants is protected by the PMPA and GBL.

PMPA §2802 sets forth the grounds by which a franchisor can chose to either terminate or not renew a franchise. Grounds for termination under §2802(b)(1)(B)(2) include the franchisee’s failure to comply with material and reasonable terms of the franchise agreement or the occurrence of an event relevant to the franchise relationship that would make termination reasonable. Grounds for non-renewal under §2802(b)(1)(B)(3) are the failure of the parties to agree to changes or additions to provisions of the franchise that are made by the franchisor in good faith and aren’t for the purpose of transferring the operations of the premises to an employee or agent of the franchisor. In accordance with PMPA §2804 the franchisor is required to provide written notice of a decision not to renew or to terminate the franchise at least 90 days prior to the effective date of the non-renewal or termination. However, if the 90 day requirement is unreasonable under the circumstances, notice must be given at the earliest possible date.

Plaintiffs contend that Defendants did not act in good faith in negotiating a new lease term as evidenced by the \$3,800 increase to the monthly rent. Plaintiffs also argue that Defendants’ termination letters issued on July 29, 2009 and September 8, 2009 violated the notice requirements of PMPA §2804. Defendants argue that to date the

franchise has not been terminated as Plaintiffs continue to occupy and operate the premises, but that Plaintiffs' failure to pay rent could be an event of default allowing Defendants to terminate the franchise. Defendants also argue that the initial Justice Court suit is only for the non-payment of rent and does not seek the termination of the franchise, therefore the PMPA and GBL do not apply. However, Plaintiffs point to the provisions of the Notice of Petition that request a judgment of eviction and a transfer of possession of the premises to Defendant thus making the PMPA and GBL applicable.

Despite Defendants contention that the franchise has not been terminated, the two Notice of Termination letters along with the requested relief in the Justice Court actions show Defendants attempts to do just that. While the 90 day notice requirement of PMPA §2804 does not apply in situations where such notice would be unreasonable, the courts have held that the 90 day requirement should not be lightly excused. (*Zipper v Sun Company*, 947 F.Supp. 62 [E.D.N.Y. 1996]). Based on the evidence, provided Plaintiffs have shown a likelihood of success on their claim sufficient to grant the preliminary injunction.

Having satisfied the likelihood of success requirement we turn to the irreparable harm and balance of the equities requirements. Plaintiffs argue that these requirements are met because they will lose their business should the Justice Court suits be allowed to continue or the agreements terminated. However, Defendants would not be harmed if the injunction is granted because Plaintiffs would continue to operate the business thus generating rental and gasoline sale income to the Defendants. Therefore, Plaintiffs argue, any hardship to the Defendants resulting from the preliminary injunction would be significantly less than any hardship to the Plaintiffs should the injunction not be granted. The Court finds that Plaintiffs have satisfied the irreparable harm and balance of the equities requirements. For the forgoing reasons, the Court grants Plaintiffs' request for a preliminary injunction.

Pursuant to CPLR § 6312 (b)(2) an injunction staying proceedings to recover real

property requires an undertaking sufficient to cover damages and costs, including reasonable rents and profits. Defendants seek \$3,800 per month in additional rent on a month to month basis, there having been no lease for a term of years presented. Under these circumstances, and anticipating that the resolution of this action should not take longer than one year, the Court, as it is required to do, directs that Plaintiff post an undertaking in the amount of \$50,000, representing potential damages in the form of unpaid rent and possible costs of the Defendant recoverable at the termination of the action.

Plaintiffs also request that the two Justice Court actions initiated by Defendants be removed to this Court pursuant to CPLR §602. Under CPLR §602(b) the Supreme Court can remove an action or proceeding pending in another court for consolidation with the Supreme Court action. (*Spain v. 325 West 83<sup>rd</sup> Owners Corp*, 302 A.D. 2d. 587 [2<sup>nd</sup> Dept, 2003]). Generally, when common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion. (*Kally v. Mount Sinai Hospital*, 44 A.D. 3d. 1010 [2<sup>nd</sup> Dept, 2007]). The court in *Kally* held that the interests of judicial economy allowed the consolidation of a holdover proceeding and an action to rescind a commercial lease because both involved the same parties as well as common questions of law and fact regarding the lease. (*Id.*)

Here Plaintiffs are seeking to consolidate the non-payment and holdover proceedings with the instant action. All three actions involve the same parties and the same questions of fact and law regarding provisions of the lease agreement between the parties. As such, and absent a showing of prejudice to Defendants, the Court grants Plaintiffs' request to consolidate the proceedings.

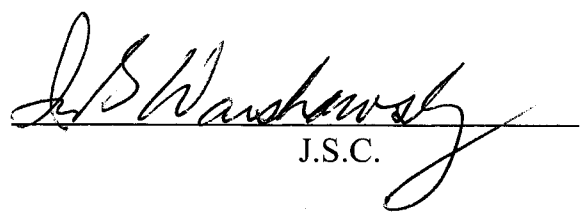
### **CONCLUSION**

For the foregoing reasons, the Court grants Plaintiffs' motion for preliminary injunction. Additionally, the Court removes the holdover and non-payment actions initiated in the Village Justice Court, Pleasantville, New York, to the Supreme Court,

Nassau County, and consolidates them with this action. Plaintiffs are directed to post an undertaking by a licensed insurer or bonding company in the amount of \$50,000.

This constitutes the Decision and Order of the Court

Dated: November 16, 2009

  
J.S.C.

**ENTERED**  
NOV 23 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE