

**Dover Gourmet Corp. v Nassau Health Care Corp.**

2010 NY Slip Op 33353(U)

November 23, 2010

Supreme Court, Nassau County

Docket Number: 020706-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
Justice Supreme Court

-----x  
**DOVER GOURMET CORPORATION,**

**Plaintiff,**

**-against-**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No: 020706-10  
Motion Seq. No: 1  
Submission Date: 11/17/10**

**NASSAU HEALTH CARE CORPORATION a/k/a  
NuHEALTH,**

**Defendant.**

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**Papers Read on this Motion:**

- Order to Show Cause, Emergency Affirmation, Affidavit in Support,  
Affirmation in Support and Exhibits.....X**
- Affidavit in Opposition.....X**
- Memorandum of Law in Opposition and Exhibits.....X**

This matter is before the court on the Order to Show Cause filed by Plaintiff Dover Gourmet Corporation ("Dover" or "Plaintiff") on November 4, 2010 and submitted on November 17, 2010. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause.

**BACKGROUND**

**A. Relief Sought**

Plaintiff seeks an Order 1) enjoining the Defendant Nassau Health Care Corporation a/k/a NuHealth ("Hospital" or "Defendant") and its agents, pending determination of the instant action, from continuing the prosecution/pursuit of a Request for Proposals issued by Defendant and dated September 3, 2010 ("RFP"), staying the RFP Process and barring the consideration or

approval of any responses/bid/proposals which may be submitted regarding the RFP; 2) enjoining Defendant and its agents from taking any steps to terminate a certain Concession License Agreement dated October 30, 2001 entered into between the parties ("Agreement"), pending determination of the instant action; and 3) enjoining Defendant and its agents from permitting persons and/or entities other than Plaintiff from selling food and/or gift items, including but not limited to hot and cold food, ice cream, non-alcoholic beverages, confections and sundry items, gifts, flowers, candy clothing and other articles normally dispensed at operations in the nature of the gift shop operated by Plaintiff at the Defendant's hospital premises, pending determination of the instant motion.

Defendant opposes Plaintiff's motion.

**B. The Parties' History**

The Verified Complaint ("Complaint") (Ex. C to Deegan Aff. in Supp.) alleges as follows:

Plaintiff is a New York corporation and Defendant is a public benefit corporation located at 2201 Hempstead Turnpike, East Meadow, New York 11554. On or about October 30, 2001 the parties entered into the Agreement, pursuant to which Plaintiff had the exclusive right to operate a coffee shop ("Coffee Shop") and gift shop ("Gift Shop"), and to sell items, including flowers and candy, at the Hospital. The Agreement was renewed in 2006 and remains in effect until October 31, 2011, allegedly subject to a further automatic renewal and extension for an additional five (5) years, to and including October 31, 2016.

On or about September 3, 2010, Defendant issued a RFP in which it sought applications from other entities interested in contracting with Defendant to operate the businesses that are currently operated by Plaintiff pursuant to the Agreement. Plaintiff alleges that Defendant's issuance of the RFP is in violation of Plaintiff's rights under the Agreement.

Plaintiff alleges that in 2009, Defendant and Plaintiff discussed the expansion of the Gift and Coffee Shops and that the parties entered into an amendment ("2009 Amendment") reflecting their agreement regarding that expansion. Plaintiff alleges that it agreed to complete new construction and institute certain improvements in exchange for the extension of its rights under the Agreement to October 31, 2019. In reliance on Defendant's representations, Plaintiff

expended over \$60,000 in making these changes. On March 22, 2010, Defendant advised Plaintiff that Defendant decided not to exercise its option to renew the Agreement beyond October 31, 2011. Plaintiff contends that the Agreement is automatically renewed for an additional five (5) year period, to October 31, 2016, and expires on October 31, 2019, pursuant to the 2009 Amendment. Plaintiff alleges that Defendant has refused to allow Plaintiff to move the Gift Shop to its new proposed location, and to continue construction of the new Coffee Shop.

The Complaint contains five (5) causes of action: 1) a request for a declaratory judgment declaring that the Agreement remains in effect until October 31, 2019, and that Defendant's prosecution of the RFP is a breach of the agreements between the parties, 2) a request for injunctive relief enjoining Defendant from pursuing the RFP, 3) breach of the Agreement, for which Plaintiff seeks monetary damages, 4) breach of the 2009 Amendment for which Plaintiff seeks specific performance, and 5) breach of the 2009 Amendment for which Plaintiff seeks money damages.

In its Affidavit in Support, Butch Yamali ("Yamali"), the President of Dover, affirms as follows:

Yamali affirms the truth of the allegations in the Complaint. Yamali submits that the effect of the RFP is to negate Plaintiff's contractual rights pursuant to the Agreement which, he contends, grants Plaintiff the exclusive right to operate the Coffee Shop and sell food and beverages at the Hospital. Yamali provides a copy of the RFP and its Amendments (Ex. A to Yamali in Supp.) reflecting that Plaintiff requested proposals "from qualified food service operators and/or management companies to construct, equip and operate a Restaurant" at the Hospital (RFP at p. 2). Businesses wishing to be considered must submit their proposal by November 30, 2010.

Section 3, paragraph 2 of the Agreement provides as follows:<sup>1</sup>

At the expiration of the Term of this Agreement, if this Agreement shall then be in full force and effect, and LICENSEE [Dover] shall on that date have fully complied with and performed all of the terms and conditions of this Agreement, upon mutual agreement of both parties there shall be an option to renew and extend this Agreement

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<sup>1</sup> Although Yamali sets forth a portion of this provision in his Affidavit in Support, he does not include the language that the option to renew must be "upon mutual agreement of both parties."

for two (2) consecutive periods of five (5) years each beginning with the expiration of the original Term. Each option period shall automatically take effect unless HOSPITAL gives written notice to LICENSEE by certified mail, return receipt requested, not less than 180 days prior to the expiration of the term, of its intent not to renew and extend this Agreement and its reason for not doing so. LICENSEE shall have sixty (60) days to cure deficiencies stated by HOSPITAL in its notice. If LICENSEE fails to cure these deficiencies to the satisfaction of HOSPITAL, LICENSEE shall have an additional thirty (30) days after notification by HOSPITAL of its failure to comply. If, after the second period in which LICENSEE fails to comply, HOSPITAL is dissatisfied, HOSPITAL, in its sole discretion, can decline to renew and extend the Agreement.

Yamali affirms that the renovations that Dover undertook in 2009, to which the Complaint makes reference, were undertaken “in express collaboration with representatives of the Hospital’s President and CEO” (Yamali Aff. in Supp. at ¶ 18). He alleges, however, that in early 2010, the Hospital stopped cooperating with Dover with respect to these renovations and advised Plaintiff in March of 2010 that it wished to explore other options for providing food service at the Hospital.

Yamali also avers that the Hospital permitted third party vendors to sell gifts and similar products on the grounds of the Hospital, in contravention of the Agreement. These included 1) vendors selling items including perfume, jewelry and handbags in the auditorium of the Hospital in a “flea market” type operation (“Yamali Aff. in Supp. at ¶ 36), and 2) vendors selling items including plants, books and jewelry on tables set up by the Hospital.

Yamali submits that the Agreement remains in force and effect and characterizes the Hospital’s actions as an effort “to prematurely terminate the [Agreement]” (Yamali Aff. in Supp. at ¶ 24). Yamali also contends that the RFP violates Plaintiff’s rights under the Agreement and the Court should award injunctive relief to protect Plaintiff from the Hospital’s allegedly improper actions.

In her Affidavit in Opposition, Karen M. Benrubi (“Benrubi”), Special Assistant to the President/CEO of Defendant, affirms as follows:

Benrubi characterizes Plaintiff’s motion as a “strong-arm tactic to avoid participation in an ongoing request for proposals” (Benrubi Aff. in Opp. at ¶ 2) and contends that Plaintiff is attempting to extend the Agreement for another five year term.

Benrubi affirms that in 2008, the Hospital began plans to renovate and expand its emergency department which required it to use space then operated by its employee cafeteria (“Cafeteria”), an area separate from the Coffee Shop, and to close the Cafeteria as a result. Following the closing of the Cafeteria, Defendant received complaints from staff and visitors who said that the lines at the Coffee Shop were extremely long and that the food was of poor quality. The Hospital established two additional temporary locations with food service for their employees, but the employees’ union (“Union”) advised the Hospital that these alternatives were not acceptable.

The Hospital approached Plaintiff in 2009 in an effort to address these concerns. Plaintiff, however, “expressed concern with the Hospital’s request because it had only approximately a year and a half remaining under the [Agreement]” (Benrubi Aff. in Opp. at ¶ 16). Benrubi surmises that Plaintiff hoped to leverage the Hospital’s concerns to its own benefit.

The Hospital provided preliminary approval for Plaintiff to pursue potential renovations and in June of 2009, Plaintiff submitted a preliminary plan of renovation. The parties also discussed a possible amendment that would include extension of the term of the Agreement. An amendment was drafted but never signed by the Hospital (“Unsigned Amendment”). Despite the Hospital’s immediate need for additional seating, Plaintiff continued to press the Hospital with respect to the Unsigned Amendment, and delayed construction. The Hospital never formally approved Plaintiff’s renovations, which included modifications to which the Hospital did not consent. To date, the Hospital has never executed an amendment or extension of the Agreement.

In November of 2009, Plaintiff began construction but soon encountered difficulties, including the fact that its plans violated local building codes. By late 2009/early 2010, the Hospital realized that Plaintiff could not accommodate its needs and notified Plaintiff by letter dated January 29, 2010 that Plaintiff had materially breached the Agreement by failing to pay proper commissions in the sum of \$37,009.25. The Hospital also determined that it would need to create a single restaurant, rather than two food operations with limited seating, and notified Plaintiff by letter dated March 22, 2010 that it would not agree to renew or extend the Agreement. The Hospital confirmed its decision by letters dated April 6, 2010 and October 1, 2010 (Exs. R, T and Y to Yamali Aff. in Supp.).

Due to the Hospital's need for an expanded restaurant, it issued the RFP on September 3, 2010. The winning bidder would commence operations after the expiration of the Agreement, and the Hospital does not intend to terminate the Agreement prior to its expiration date of October 2011. Thus, Benrubi argues, there is no threat of irreparable harm to Plaintiff that would warrant injunctive relief.

Benrubi also affirms that the Hospital, and the general public, would be irreparably harmed if the Court grants the requested injunctive relief. The Hospital would suffer from the inherent delay in meeting its food service needs because, if injunctive relief were granted, the Hospital would be prevented from locating and negotiating with a vendor who would then need to submit final construction plans, construct the restaurant and obtain approval from certain municipal agencies. That delay would inevitably affect the Hospital's ability to provide food services to its employees and the public. Moreover, in light of the grievance filed by the Union with respect to the Cafeteria, the Hospital must take action to establish a larger and higher quality food service operation. Finally, the Hospital has invested significant resources into developing and implementing the RFP and those efforts would be rendered ineffectual if the Court were to award injunctive relief.

The Hospital is a public benefit corporation that is required to comply with the New York General Municipal Law which mandates that it pursue RFPs before executing certain types of contracts. These requirements exist to ensure that the Hospital uses its funds in a way that is in the best interests of taxpayers.

Benrubi also affirms that the Hospital's understanding of Paragraph 3 of the Agreement, set forth *supra*, is that the Agreement may be automatically renewed unless the Hospital declines such renewal, upon notice, for any stated reason. Although deficiencies with Plaintiff's establishment did become apparent, there is no requirement that a deficiency exist before the Hospital may decline renewal. Rather, Paragraph 3 provides that the option to renew is based on the "mutual agreement of both parties" which precludes a scenario in which Plaintiff controls the renewal of the Agreement. The Hospital declined renewal based both on its need to expand its dining facilities and Plaintiff's breaches and deficiencies as outlined herein. Benrubi notes, further, that the Agreement contains no provision prohibiting the Hospital from pursuing an RFP,

or establishing an alternative restaurant prior to the expiration of the Agreement.

Benrubi submits that Plaintiff would not suffer irreparable harm without injunctive relief, both because the Agreement does not expire until late 2011, and because Plaintiff may participate in the RFP process. Moreover, Plaintiff may continue its operations until the expiration of the Agreement. Benrubi also contends that it would be inappropriate to grant Plaintiff's request for injunctive relief with respect to seasonal or periodic vendors because 1) there is no provision in the Agreement restricting vendors from selling farm produce, clothing or other accessories that are not in direct competition with Plaintiff; and 2) Plaintiff made no prior complaints about these vendors.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to injunctive relief. First, Plaintiff argues that it has demonstrated a likelihood of success on the merits by establishing, *inter alia*, that 1) the effect and/or purpose of the RFP is to negate Dover's contractual rights pursuant to the Agreement; 2) the Hospital has permitted certain individuals and entities to sell gifts and food products in violation of Plaintiff's rights under the Agreement; 3) in reliance on the Hospital's approval of the proposed renovations, Plaintiff incurred expenses in connection with those renovations; 4) notwithstanding its approval of Plaintiff's proposed renovations, the Hospital sought to repudiate its purported agreement with Plaintiff; 5) the Hospital was not permitted to terminate the Agreement based on alleged payment deficiencies without first giving Plaintiff notice of those deficiencies and an opportunity cure; 6) contrary to its position in the March 22, 2010 letter, the Hospital does not have the right to elect not to exercise its option to renew or extend the Agreement; rather, the Agreement renews automatically; and 7) the RFP "remains illegal because the [Agreement] remains in effect, not only until October 31, 2011 but automatically renews to October 31, 2016" (Deegan Aff. in Supp. at ¶ 24).

Plaintiff also contends that it does not have an adequate remedy at law because it will be difficult to establish the damages it will sustain as a result of the Hospital proceeding with the RFP. Moreover, permitting the RFP to proceed will result in the construction of a food service facility by a third party bidder whom the Hospital has no right to engage. Finally, Plaintiff argues that the equities balance in its favor because the Hospital has persisted in pursuing its RFP

despite Plaintiff's request that it cease and desist from doing so.

Defendant opposes Plaintiff's application. First, Defendant submits that Plaintiff has not demonstrated a likelihood of success on the merits because 1) there is no provision in the Agreement that prohibits the Hospital from issuing an RFP; 2) there is no automatic renewal or extension of the Agreement except "upon mutual agreement of the parties;" and 3) the Hospital may permit other vendors to sell items that do not compete with Plaintiff.

Defendant also submits that Plaintiff has not demonstrated irreparable injury because its breach of contract claim is compensable by money damages. Finally, the balancing of the equities favors Defendant because 1) the Hospital would be irreparably harmed if it were prevented from providing adequate food service to its unionized personnel and its daily visitors; and 2) the Hospital must be permitted to continue with the RFP process to ensure that it can provide a food service facility, without a gap, following the expiration of the Agreement.

#### RULING OF THE COURT

##### A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258

A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

**B. Application of these Principles to the Instant Action**

The Court concludes that Plaintiff has not demonstrated its right to injunctive relief. First, the Court determines that Plaintiff has not demonstrated a likelihood of success on the merits in light of, *inter alia*, 1) the language in Paragraph 3 of the Agreement which provides for an extension "upon mutual agreement" of the parties, suggesting that the Hospital was within its rights in declining to renew the Agreement, 2) the fact that the Hospital did not execute an amendment to the Agreement extending its term, and 3) factual disputes regarding Plaintiff's claims as to the sale of items by other vendors, allegedly in contravention of the exclusivity provisions in the Agreement. The Court also concludes that Plaintiff has not demonstrated a threat of irreparable harm without injunctive relief, particularly in light of the fact that the Agreement does not expire until October of 2011 and Plaintiff continues to enjoy its rights under the Agreement until that time. Moreover, it appears that any injury that Plaintiff may suffer is compensable by money damages.

Finally, the Court finds that the equities balance in favor of the Hospital. Given the lengthy RFP process, and the Hospital's need to provide a food service facility for its employees and the public, the Hospital would be adversely affected if the Court prevented it from locating and entering into an agreement with a food service vendor who could begin its services immediately following the expiration of the Agreement. In addition, Plaintiff may apply under the RFP to be awarded the food service contract with the Hospital following the expiration of the Agreement.

In light of the foregoing, the Court denies Plaintiff's application in its entirety.

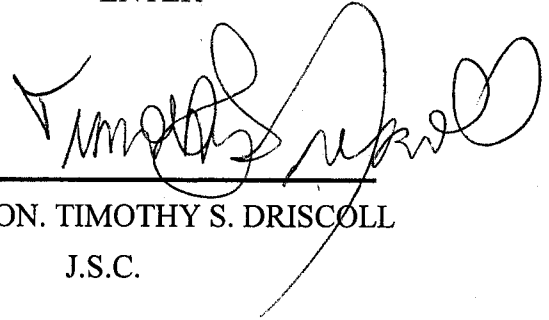
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on December 6, 2010 at 9:30 a.m.

DATED: Mineola, NY  
November 23, 2010

ENTER



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
NOV 29 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE