

City of New York v Jaquez

2011 NY Slip Op 32866(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 400418/11

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C. Justice

PART 5

Index Number : 400418/2011
CITY OF NEW YORK
vs.
JAQUEZ, CARMEN
SEQUENCE NUMBER : 002
OTHER RELIEFS

INDEX NO. 400418/11
MOTION DATE 7/12/11
MOTION SEQ. NO. 002
MOTION CAL. NO. 20

this motion to/for preliminary injunction

PAPERS NUMBERED

1
2
3,4

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

OCT 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/11
OCT 03 2011 OCT 04 2011

Barbara Jaffe
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 5

-----X
 THE CITY OF NEW YORK,

Index No. 400418/11

Plaintiff,

Argued: 5/10/11

- against -

DECISION AND ORDER

CARMEN JAQUEZ; ESTATE OF DAVID SHUCHAT;
 THE NEW YORK STATE LIQUOR AUTHORITY;
 THE LAND AND BUILDING KNOWN AS 200
 STANTON STREET, a/k/a 141 RIDGE STREET,
 TAX BLOCK 345, TAX LOT 29, COUNTY OF
 NEW YORK, CITY and STATE of NEW YORK;
 "JOHN DOE", "JANE DOE", fictitiously named parties
 true names unknown, the parties being the owners,
 lessees, operators or occupants of the commercial
 establishment operating as the "Stop 1 Deli" located
 at 200 Stanton Street, New York, New York, and any
 person claiming any right, title, or interest in the real
 property which is the subject of this action,

Defendants.

FILED
OCT 05 2011
 NEW YORK
 COUNTY CLERK'S OFFICE

-----X
 BARBARA JAFFE, JSC:

For plaintiff:

Allen F. Schwartz, Esq.
 Laura M. Mulle, Esq.
 Michael A. Cardozo
 Corporation Counsel
 S. Andrew Schaffer, Esq.
 Deputy Commissioner, Legal Matters
 N.Y.C. Police Department, Legal Bureau
 Civil Enforcement Unit
 2 Lafayette Street, 5th Floor
 New York, NY 10007-1307
 917-454-1135

For defendant Estate of David Shuchat:

Joel A. Drucker, Esq.
 90 Broad Street, 25th Floor
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 212-422-0488

By order to show cause dated February 17, 2011, City moves pursuant to CPLR 6301 and
 New York City Administrative Code §§ 7-707, 7-709, 7-710, and 7-711 for a temporary
 restraining order, preliminary injunction, closing order, and permanent injunction and to enjoin

and restrain defendants Estate of David Shuchat and the land and building known as 200 Stanton Street, a/k/a 141 Ridge Street, Tax Block 345, Tax Lot 29, County of New York, City and State of New York, from permitting a public nuisance at “Stop 1 Deli,” 200 Stanton Street, New York, New York 10002 (the premises), and prohibiting them from using the premises for the purpose of illegally selling alcohol. Defendant Estate of David Shuchat and the Estate of Nathan Shuchat (Shuchat Estates) oppose.

I. BACKGROUND

The Shuchat Estates have ownership interests in the premises. (Affirmation of Allen F. Schwartz, Esq., date Jan. 19, 2011 [Schwartz Aff.], Exh. 2; Affirmation of Joel A. Drucker, Esq., in Opposition, dated June 17, 2011 [Drucker Opp. Aff.]). Sometime before March 7, 2007, occupants of the premises petitioned for the appointment of an administrator pursuant to Article 7-A of the Real Property Actions and Proceedings Law to perform repairs the Shuchat Estates failed to make. (Affirmation of Laura M. Mulle, Esq., in Reply, dated July 11, 2011 [Mulle Reply Aff.]).

By order and judgment dated March 7, 2007, an administrator was appointed. (Drucker Opp. Aff., Exh. A). The order and judgment authorizes the administrator to, *inter alia*, rent vacant units in the premises, borrow funds from the New York City Department of Housing Preservation and Development (HPD) to repair the premises, and enter into contracts for such repairs, and it requires the administrator to keep accounting records, maintain various filings with HPD, and attend scheduled meetings with HPD. (*Id.*). It also provides that:

[t]he owner, the managing agent, any person acting under authority from the owner or managing agent, and any other person who does not have authorization from the [a]dministrator are hereby enjoined and restrained from (i) entering the [p]remises

without the prior knowledge and consent of the [a]dministrator, (ii) interfering in any way with the [a]dministrator's management, operation, and control of the [p]remises, (iii) making any attempts to collect rents from the tenants of the [p]remises, (iv) accepting rents from the tenants of the premises, or (v) harassing the tenants or the [a]dministrator in any way.

(*Id.*).

Sometime thereafter, the Shuchat Estates unsuccessfully sought to discharge the administrator and regain control of the premises. (*Id.*).

By affidavit dated January 19, 2011, New York City Police Officer Pierluisse states that on December 11, 2010, at approximately 11:00 p.m., he participated in an undercover investigation inside the premises in which he observed an undercover, underage auxiliary police officer enter the Stop 1 Deli and purchase beer without being asked for identification. (Schwartz Aff., Exh. 3).

By affidavit of the same date, New York City Police Officer Donnelly states that on December 16, 2010, at approximately 11:45 p.m., he participated in an undercover investigation inside the premises identical to that conducted by Pierluisse. (*Id.*, Exh. 6).

By affidavit of the same date, New York City Police Officer Diaz states that on December 20, 2010, at approximately 9:00 p.m., he participated in an undercover investigation inside the premises identical to that conducted by Pierluisse and Donnelly. (*Id.*, Exh. 7).

By affidavit dated February 2, 2011, New York City Police Officer Carbone states that on December 13, 2010, at approximately 9:00 p.m., he participated in an undercover investigation inside the premises identical to that conducted by Pierluisse, Donnelly, and Diaz. (*Id.*, Exh. 4).

On February 15, 2011, plaintiff commenced the instant nuisance abatement action pursuant to General City Law § 20, New York City Charter § 294, and New York City

Administrative Code §§ 7-704(a) and 7-706(a).

By order dated February 17, 2011, I issued a temporary restraining order enjoining defendants from permitting a public nuisance at the premises and prohibiting them from using the premises to sell alcohol illegally, and I set February 23, 2011 as the return date for the order to show cause.

On February 23, 2011, defendant Jaquez, the current tenant and operator of the Stop 1 Deli, failed to appear, and by order of the same date, I issued a preliminary injunction enjoining her from occupying the premises, using them to sell alcohol illegally, and removing or otherwise interfering with the furniture, fixtures, and moveable property therein, and closing the premises during the pendency of this action.

On June 21, 2011, City and Jaquez executed a stipulation of settlement, whereby City agreed to voluntarily discontinue the action against the New York State Liquor Authority, John Doe, and Jane Doe, and Jaquez agreed in pertinent part to be permanently and perpetually enjoined from using the premises to sell alcohol illegally. The stipulation also provides that my February 2011 preliminary injunction and closing order are vacated.

II. CONTENTIONS

Plaintiff claims that it is entitled to a preliminary injunction against Estate of David Shuchat, as it has demonstrated that the operator of the Stop 1 Deli repeatedly violated the Alcoholic Beverage Control Law, and thus, that a public nuisance exists on the premises. (Schwartz Aff.).

In opposition, the Shuchat Estates argue that City, not them, is permitting a public nuisance to exist on the premises, as City, through HPD and the administrator, has controlled and

operated the building since 2007, and that cases where City obtained injunctive relief against absentee landlords are inapplicable, as the premises in those cases were not controlled by an administrator. They also state that there are no reported cases in which City controls a building through an administrator and has obtained injunctive relief against the building and its owner on the basis of a public nuisance City permitted to exist. (Drucker Opp. Aff.).

In reply, City maintains that it is entitled to a preliminary injunction notwithstanding the appointment of an administrator, as it is seeking an injunction against the building itself, and Estate of David Shuchat remains an owner of the building notwithstanding its inability to control, operate, and occupy it, and as it has made the requisite showing for injunctive relief by demonstrating that alcohol was repeatedly sold illegally. (Mulle Reply Aff.). City also contends that it is entitled to injunctive relief under CPLR 6301. (*Id.*).

In sur-reply, the Shuchat Estates claim that City provides no authority for the proposition that it is entitled to injunctive relief against a building owner who has no control over the premises, and they argue that City has failed to demonstrate entitlement to relief under CPLR 6301, as it would be inequitable for them to face punishment for conduct and activity they cannot control. (Affirmation of Joel A. Drucker, Esq., in Sur-Reply, dated July 18, 2011).

III. ANALYSIS

New York City Administrative Code § 7-707(a) provides in pertinent part that “[p]ending an action for a permanent injunction . . . , the court may grant a preliminary injunction enjoining a public nuisance within the scope of this article and the person or persons conducting, maintaining, or permitting the public nuisance from further conducting, maintaining or

permitting the public nuisance”

Pursuant to New York City Administrative Code § 7-703(h) and (i), a public nuisance includes:

(h) Any building, erection, or place, including one- or two-family dwellings, used for any of the unlawful activities described in section one hundred twenty-three of the Alcoholic Beverage Control Law.

(i) Any building, erection or place including one- or two-family dwellings, wherein there exists or is occurring a criminal nuisance as defined in § 240.45 of the penal law.

Alcoholic Beverage Control Law § 123(1)(a) provides, in pertinent part, that

[i]f any person shall engage or participate in the manufacturing or sale of liquor, wine, or beer in this state without obtaining the appropriate license therefor, or shall traffic in liquor, wine or beer contrary to any provision of this chapter, or otherwise unlawfully, or shall traffic in illegal liquor, wine or beer, or, operating a place for profit or pecuniary gain, with a capacity for the assemblage of twenty or more persons, shall permit a person or persons to come to such place of assembly for the purpose of consuming alcoholic beverages without having the appropriate license therefor pursuant to section 64-b of this chapter, the liquor authority or any taxpayer residing in the city . . . may . . . petition . . . a justice of the supreme court . . . for an order enjoining such person engaging or participating in such activity or from carrying on such business.

Pursuant to Penal Law 240.45:

[a] person is guilty of Criminal Nuisance in the second degree when:

1. By conduct either unlawful in itself or unreasonable under all circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or
2. he knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

The Corporation Counsel for the City of New York may petition for a permanent injunction (New York City Administrative Code § 7-706[a]), and the owner of the building in which alcohol is being illegally sold may be joined in the action as a respondent. (Alcoholic Beverage Control Law § 123[1][b]).

To be entitled to a preliminary injunction pursuant to Administrative Code § 7-707(a), Corporation Counsel need not show irreparable harm but must demonstrate by clear and convincing evidence that the prohibited conduct or activity occurred on the premises. (*City of New York v Bilynn Realty*, 118 AD2d 511 [1st Dept 1986]; *City of New York v Castro*, 143 Misc 2d 766 [Sup Ct, New York County 1989], *aff'd* 160 AD2d 651 [1st Dept 1990]). As a court's jurisdiction on an application for preliminary injunctive relief is *in rem*, the injunction is enforced against the premises, and as “[t]he personal fault of the owner is not a material consideration upon such an application” (*City of New York v Partnership 91, L.P.*, 277 AD2d 164, 165 [1st Dept 2000]; *Castro*, 160 AD2d at 651), injunctive relief is not rendered moot when the premises' owner regains legal possession of the premises from the offending tenant before the commencement of an action for such relief (*Partnership 91, L.P.*, 277 AD2d 164; *City of New York v 924 Columbus Assocs., L.P.*, 219 AD2d 19 [1st Dept 1996]), or even if the owner is out of possession and unaware of the nuisance (*Castro*, 143 Misc 2d 766).

Moreover, although an administrator appointed pursuant to Real Property Actions and Proceedings Law § 778(1) “is put in the position of the owner for some purposes, [] [he] does not fully stand in the shoes of the owner” (*Abdul v Hirschfeld*, 2008 NY Slip Op 28375, 21 Misc 3d 764 [Sup Ct, Kings County 2008], *mod on other grounds* 71 AD3d 707 [2d Dept 2010]), and “shall be liable only in his official capacity for injury to persons and property by reason of conditions of the premises in a case where an owner would have been liable” Rather, where the owner may be held strictly liable for injuries caused by conditions on the premises, it is not absolved of liability solely by virtue of the appointment of an administrator. (*See id.* [as Labor Law § 240(1) imposes strict liability on building owners, notwithstanding appointment of administrator, owner may be held liable for injuries worker sustained while performing repairs on

building even though owner had no notice of or control over contract with worker or repairs]).

Here too, as Administrative Code § 7-707(a) requires only that prohibited conduct constituting a public nuisance be shown, an owner's liability for a nuisance, like the liability imposed by Labor Law § 240(1), is strict, and as the owner in *Abdul* remained an owner for the purposes of Labor Law § 240(1) notwithstanding the appointment of an administrator, so too does the Shuchat Estates for the purposes of New York City Administrative Code § 7-707(a).

Here, the parties do not dispute that a public nuisance existed on the premises. Although the order and judgment prohibits the Shuchat Estates, as the owners of the premises, from occupying or operating the building or interfering with the administrator's control and operation of the building, it does not divest them of their ownership interests or connection to the building. Absent authority for the proposition that a premises owner cannot be enjoined where an administrator has been appointed, City has demonstrated entitlement to preliminary injunctive relief against Estate of David Shuchat.

In light of this determination, whether City would be entitled to relief under CPLR 6301 need not be considered.

As City's stipulation of settlement with defendant Jaquez provides that my February 23, 2011 order closing the premises and preliminarily enjoining her from maintaining a nuisance on the premises is vacated, that branch of City's order to show cause seeking a closing order as against Estate of David Shuchat and the building is moot.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that City's motion for a preliminary injunction against defendants Estate of David Shuchat and the land and building known as 200 Stanton Street, a/k/a 141 Ridge Street,

Tax Block 345, Tax Lot 29, County of New York, City and State of New York, is granted; and it is further

ORDERED, that defendants Estate of David Shuchat and the land and building known as 200 Stanton Street, a/k/a 141 Ridge Street, Tax Block 345, Tax Lot 29, County of New York, City and State of New York are prohibited from removing or in any manner interfering with the furniture, fixtures, and movable property used in conducting, maintaining, operating, or permitting the public nuisance complained of in City's order to show cause; and it is further

ORDERED, that defendants Estate of David Shuchat and the land and building known as 200 Stanton Street, a/k/a 141 Ridge Street, Tax Block 345, Tax Lot 29, County of New York, City and State of New York are enjoined from conducting, maintaining, operating, or permitting the subject premises to be used, operated, and/or occupied for the illegal sale of alcoholic beverages, for any other activity as defined in Section 123 of the Alcoholic Beverage Control Law; and it is further

ORDERED, that service of a copy of this Order be made upon defendants Estate of David Shuchat and the land and building known as 200 Stanton Street, a/k/a 141 Ridge Street, Tax Block 345, Tax Lot 29, County of New York, City and State of New York personally; or by leaving a copy thereof with a person of suitable age and discretion at the subject premises; or by posting a copy thereof at the subject premises, on or before October 12, 2011, and that be deemed good and sufficient service on defendants, provided, however, that if service is not made personally, a copy of the Order will be mailed to such defendants at either the last known business address or residential address by overnight mail on or before October 12, 2011; and it is further

ORDERED, that the parties are directed to jointly contact Part 5 to schedule trial within three business days of the date of entry of this order.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: October 4, 2011
New York, New York

OCT 04 2011

FILED

OCT 05 2011

NEW YORK
COUNTY CLERK'S OFFICE