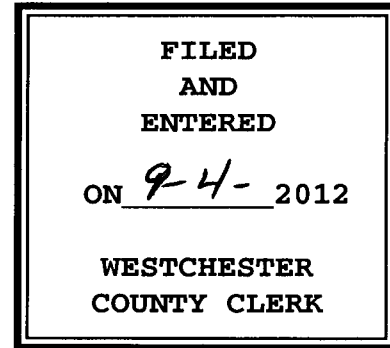


Le-Cadre v Lockwood Realty, LLC
2012 NY Slip Op 33920(U)
September 4, 2012
Supreme Court, Westchester County
Docket Number: 56875/2012
Judge: William J. Giacomo
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.



**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X
YANIQUE D. LE-CADRE, DDS, MS,
Plaintiff,

-against-

Index No. 56875/2012
Decision & Order

LOCKWOOD REALTY, LLC, GREENRIDGE
MANAGEMENT CORP., and MALKA SHALIT,,
Defendants.

-----X
The following papers numbered 1 to 15 were read on plaintiff's motion for a preliminary injunction.

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibit A-G _____	1-10
Memorandum of Law _____	11
Memorandum of Law In Opposition _____	12
Reply Affirmation/Exhibit A-B _____	13-15

Factual and Procedural Background

Since 2004, plaintiff, an orthodontist, has been a tenant of 110 Lockwood Avenue, New Rochelle, NY, medical/dental building. In December 2008, she renewed her lease for a period of five years. Section 72 of the lease agreement provides:

72. Exclusive Use: Notwithstanding any contrary provisions, herein, so long as Tenant is not in default of any terms, provisions or conditions hereof, Landlord shall not lease or cause to be occupied any other space in the premises for the purpose of Orthodontics.

In June of 2009, plaintiff discovered that there was another orthodontist in the building. Plaintiff contacted defendant Malka Shalit who, after investigation, learned that another dentist in the building, Dr. Lewis, employed an orthodontist in his office one day per week.

By letter dated October 13, 2010, plaintiff demanded that Shalit take action regarding this breach of lease. Shalit offered plaintiff a reduction in rent, which plaintiff did not accept.

On November 15, 2011, plaintiff's attorney contacted Shalit about the continuing breach of lease.

By letter dated December 7, 2011, defendants again offered plaintiff a rent reduction. Plaintiff did not respond to this letter.

On April 25, 2012, plaintiff commenced this breach of lease action and simultaneously made this motion seeking a preliminary injunction to restrain the defendant from permitting another orthodontist from practicing at 110 Lockwood Avenue. In support of her motion, plaintiff argues that she is entitled to a preliminary injunction because she will likely succeed on the merits of her claim since it is clear the lease prohibits the landlord from leasing space to another orthodontist. Plaintiff also claims that in the absence of the preliminary injunction she will suffer irreparable harm because she has lost "customer goodwill" and clients to her competitor. Plaintiff claims that she suffers injury each and every day the other orthodontist practices in the building as she is losing valuable patient referrals. According to plaintiff, the value of the exclusive agreement cannot be measured monetarily and therefore an injunction is appropriate. Finally, plaintiff states that the balance of equities is in her favor because she suffers greater harm than the defendants.

In opposition, defendants argue that plaintiff has not established she is entitled to a preliminary injunction because of the amount of time plaintiff allowed to elapse before making this application. Defendants note that plaintiff waited 3 years from the date of discovery of the other orthodontist in the building before she commenced this action. Defendants argue that where a plaintiff delays in seeking to protect their interests their claims are barred by the doctrine of laches. Defendants also argue that plaintiff cannot succeed on the merits since the landlord did not lease space to the other orthodontist nor did it "cause to be occupied" other space in the building used by an orthodontist. Moreover, plaintiff has not set forth any proof of damages other than conclusory statements like "lost referrals." Defendants also argue that what plaintiff really seeks is specific performance of the lease agreement for which a preliminary injunction is not proper interim relief because interim relief is supposed to maintain the status quo, not grant relief prior to trial.

With respect to irreparable harm, defendants note that plaintiff's damages are limited to monetary damages for loss of income due to fewer referrals caused by orthodontic competition in the building. Further, defendants argue that lost potential referrals is too speculative to be actionable.

With respect to balancing of the equities, defendants argue that a preliminary injunction will interfere with their relationship with Dr. Lewis. Further, defendants note that the equities do not weigh in plaintiff's favor since she waited more than three years from discovery of the other orthodontist to bring this action.

Discussion

To the extent relevant, CPLR 6301 provides that:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

It is settled law that a party seeking a preliminary injunction pursuant to CPLR 6301 "must prove three things: (1) likelihood of his ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) a balancing of equities" in her favor (*Albini v. Solork Associates*, 37 A.D.2d 835 [2d Dept. 1971]).

Moreover, "[t]he purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits" (306 *Rutledge, LLC v. City of New York*, 90 A.D.3d 1026, 1028, 935 N.Y.S.2d 619 [2nd Dept 2011], quoting *Icy Splash Food & Beverage, Inc. v. Henckel*, 14 A.D.3d 595, 596, 789 N.Y.S.2d 505 [2nd Dept 2005]).

As defendants point out, what plaintiff really seeks in this application is specific performance of the lease agreement and not maintenance of the status quo. Thus, it is not clear how a preliminary injunction is appropriate given the legal posture of this case. Accordingly, plaintiff's motion for a preliminary injunction is DENIED.

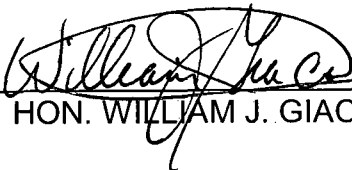
Nevertheless, even if an application for injunctive relief was appropriate under the facts of this case, the application would be DENIED.

At the outset, the Court notes that in view of the dearth of evidence regarding damages suffered by plaintiff, there is little likelihood of success on the merits. Other than plaintiff's conclusory statements regarding loss of "customer goodwill" and potential future referrals, there is no proof that plaintiff has been damaged. Plaintiff submits no evidence regarding loss of income or loss of clients due to the presence of another orthodontist in the building. Further, even if such damages were demonstrated, the damages suffered are monetary damages which do not constitute irreparable harm (see *DiFabio v. Omnipoint Communications, Inc.*, 66 AD3d 635 [2nd Dept 2009]).

Accordingly, since plaintiff has not established a likelihood of success on the merits and irreparable harm in this breach of lease case, her motion for a preliminary injunction is DENIED.

The parties are directed to appear in the Preliminary Conference Part on October 10, 2012 at 9:30 a.m. room 800 for further proceedings.

Dated: White Plains, New York
September 4, 2012


HON. WILLIAM J. GIACOMO, J.S.C.

cc: Levin Cyphers
700 Hooper Avenue
Toms River, NJ 08753

Meiselman Denlea Packman Carton & Erberz, PC
1311 Mamaroneck Avenue
White Plains, NY 10605