

Lamar Adv. of Penn, LLC v First Bronx LLC
2012 NY Slip Op 33983(U)
September 11, 2012
Supreme Court, Bronx County
Docket Number: Index No.: 21085/2012E
Judge: Alexander W. Hunter Jr.
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A**

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Lamar Advertising of Penn, LLC d/b/a Lamar
Outdoor Advertising,

Index No.: 21085/2012E

Decision and Order

Plaintiff,

-against-

First Bronx LLC,

Defendant.

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HON. ALEXANDER W. HUNTER, JR.

The motion by order to show cause by plaintiff for an order pursuant to C.P.L.R. §6301, preliminarily enjoining defendant and its agents from using, altering or removing or causing or allowing any other person or entity to use, alter or remove the sign structure located on the roof of the premises known as 700 East 134th Street in Bronx County is granted.

The cause of action was brought by plaintiff, a commercial tenant against its landlord for injunctive and declaratory relief and specific performance to prevent the forfeiture of an outdoor advertising structure and for a money judgment for attorney’s fees pursuant to a lease agreement. By order dated June 8, 2012, Justice Stanley Green, granted plaintiff a Temporary Restraining Order (TRO), directed that plaintiff not remove the sign structure to maintain the status quo and directed that plaintiff continue to pay as use and occupancy, the sum of \$10,175.00 per month pending the outcome of plaintiff’s motion for a preliminary injunction.

Plaintiff asserts that it is an outdoor advertising company that builds and operates billboards and other advertising signs in New York City and in other localities. Plaintiff avers that it and its predecessors-in-interest have erected, owned, operated and maintained a billboard advertising sign and sign structure on the roof of the premises located at 700 East 134th Street in Bronx County, owned by defendant. In support of its preliminary injunction, plaintiff submits an affidavit from Peter Costanza, the Vice-President and General Manager of plaintiff. In his affidavit, Mr. Costanza asserts that plaintiff seeks to enforce its explicit lease right to remove its property from the real property owned by defendant upon expiration of the lease between the parties. Mr. Costanza further states that he seeks to prevent defendant from taking plaintiff’s valuable property for its own purposes without any justification.

Mr. Costanza asserts that plaintiff and its predecessors-in-interest erected, owned, operated and maintained the billboard advertising sign structure on the roof of the subject premises continuously since in or about 1975, including throughout the period of eleven years, ten months since the commencement date of the term of the lease at issue herein. Plaintiff asserts that on or about January 21, 1975, the then owner of the subject premises, 700 East 134th Street Corporation and Seaboard Outdoor Advertising Co, Inc., (hereinafter “Seaboard”) as tenant, entered into a lease for the entire roof of the subject premises for a term of ten (10) years commencing on March 1, 1975. Pursuant to that lease, Seaboard was granted permission to paint, illuminate, erect and maintain a painted sign on the roof of the subject premises for advertising purposes. Further, that lease expressly provided that any fixtures or materials or other apparatus installed by the tenant, Seaboard, shall remain the property of the tenant at all times during the continuation of the lease or at its termination. (Exhibit C). That lease was renewed

several times by the parties to that agreement with the final renewal being exercised pursuant to a notice of renewal dated December 22, 1994 for a ten (10) year term commencing March 1, 1995.

According to Mr. Costanza, Seaboard was acquired by Vista Media Group (hereinafter "Vista") in or about 1999. In or about June 2001, Vista, as lessee, and 700 East 134th Street Corporation, as lessor, entered into a rental agreement dated June 11, 2001 for the continued operation and maintenance of the sign structure then owned by Vista as successor-in-interest to Seaboard, on the roof the premises then still owned by 700 East 134th Street Corporation. A copy of that lease is annexed to the moving papers as Exhibit E. Mr. Costanza avers that said lease replaced the lease entered into with Seaboard, which was then in the midst of the ten (10) year renewal term that had commenced on March 1, 1995. The subject premises was then sold by 700 East 134th Street Corporation to Bronx Realty LLC pursuant to a deed dated September 10, 2004. Thereafter Bronx Realty LLC sold the premises to an entity known as 70 East LLC pursuant to a deed dated September 21, 2004. Subsequent to that, 70 East LLC sold the premises to defendant herein, First Bronx LLC. Copies of the aforesaid deeds are annexed to plaintiff's moving papers.

Mr. Costanza avers that by Certificate of Merger dated December 29, 2009, Vista, the original lessee under the lease, was merged into Lamar on December 29, 2009, thereby making plaintiff the successor-in-interest to the original lessee under the lease. The initial term of the lease commenced on August 1, 2000 and expired on July 31, 2005. The renewal term of the lease commenced on August 1, 2005 and expired on July 31, 2010. Plaintiff and defendant extended the term of the lease on a month-to-month tenancy commencing August 1, 2010. Defendant then terminated plaintiff's month-to-month tenancy under the lease, effective as of May 31, 2012.

As successor-in-interest to both Seaboard and Vista, plaintiff alleges that it is the owner of the sign structure and has the right to remove it from the premises. Plaintiff refers to paragraph 8 of the lease entered into between Vista and 700 East 134th Street Corporation which indicates that the lessee remains the owner of all advertising signs, structures and improvements erected or made by lessee. Plaintiff then engaged in periodic discussions with defendant as the renewal term of the lease was coming to an end with respect to the renewal or extension of the lease or a "perpetual easement to operate its Sign Structure." (Costanza Aff., para. 22). Throughout said discussions, plaintiff advised defendant that it owned the sign structure and would remove it if the lease was terminated. During said discussions, defendant sent plaintiff an initial thirty (30) day notice of termination dated February 27, 2012. However, said notice of termination was abandoned by defendant as negotiations between the parties continued and plaintiff tendered the rent due for the month of April 2012. In April 2012, plaintiff made a formal offer to purchase an easement over the roof of the premises for its sign structure but defendant failed to respond.

Plaintiff contends that on April 23, 2012, defendant sent plaintiff a second thirty (30) day notice of termination, thereby terminating plaintiff's tenancy as of May 31, 2012. Plaintiff attempted to reach a new agreement with defendant after the issuance of that notice of termination but was unsuccessful. Thereafter, on May 22, 2012, plaintiff sent defendant a letter notifying it that plaintiff intended to remove the sign structure on May 29, 2012. Counsel for defendant then sent plaintiff's counsel a letter claiming that plaintiff does not own the sign structure or have any right to remove the sign structure from the premises and legal action was threatened against plaintiff if it attempted to remove the sign structure from the premises. Defendant has denied plaintiff access to remove the sign even though plaintiff claims it has the explicit right to do so pursuant to the terms set forth in the lease.

Plaintiff asserts that defendant will likely contend that the basis for its position is a

Tenant's Estoppel Certificate executed on November 29, 2006 by Vista as tenant. Plaintiff claims that reliance upon said document is misplaced and the estoppel certificate, drafted by defendant, is ambiguous. Specifically, paragraph 8 of the certificate which states that, "The Tenant has no option, ownership interest in, or right of first refusal to purchase the leased premises or the premises or any portion thereof or fixture thereon whatsoever..." contradicts the language of paragraph 1 which states that "The Lease...is presently in full force and effect and has not been amended, supplemented, modified or otherwise changed." (Exhibit O). Plaintiff further asserts that any contention that plaintiff's sign structure is covered by paragraph 8 of the Tenant's Estoppel Certificate is belied by the next paragraph of that document which is not numbered and which makes it apparent that the purpose of the tenant's estoppel was to facilitate a loan to the landlord, since that loan was to be secured by certain real property which includes the premises and fixtures leased to tenant. Thus, plaintiff argues that the ownership rights of plaintiff in the sign structure are in no way nullified by the Tenant's Estoppel Certificate, as the sign structure is not a part of the real estate owned by defendant and leased to tenant.

Plaintiff also refers to an "Illumination Agreement" dated May 29, 2007, entered into between Vista and defendant as lessor, with respect to the sign structure on the premises. Pursuant to that agreement, the parties explicitly acknowledged and agreed that exactly six (6) months after the November 29, 2006 date of the Tenant's Estoppel Certificate, the lessee, Vista, would pay the lessor, defendant herein, \$2,100.00 per year in order for the lessee to, "...be entitled at lessee's sole expense, to connect to the electrical system on the above-referenced location for the sole purpose of supplying power to all of Lessee's outdoor advertising structures." (Exhibit P). Plaintiff contends that said agreement expressly acknowledged the ownership of the sign structure by plaintiff.

Plaintiff additionally asserts that the sign structure is a trade fixture and is not part of the real property owned by defendant. As such, it is subject to removal by plaintiff. The sign structure was not leased to the tenant /lessee under the lease and was erected by plaintiff's predecessor-in-interest, was owned, operated and maintained by plaintiff. As such, plaintiff is entitled to injunctive relief to prevent the unjustifiable taking of plaintiff's valuable sign structure.

Plaintiff claims that it has demonstrated a likelihood of success on the merits and that it will suffer irreparable harm if injunctive relief is not granted. Plaintiff contends that only through injunctive relief will the status quo be maintained pending an ultimate determination of plaintiff's rights under the lease and as owner of the sign structure. Mr. Costanza asserts that money damages will not suffice to compensate plaintiff and will completely ignore the rationale for including provisions regarding the right to remove outdoor advertising sign structures in leases concerning outdoor advertising assets. He further states that, "[a]n outdoor advertising company that invests in the cost of constructing and maintaining a sign structure or acquires such a valuable asset from a predecessor-in-interest should not be required to aid a competitor by being compelled to leave that sign structure in place at the end of a lease term." (Costanza Aff., para. 42). Moreover, outdoor advertising companies regularly contract for the right to remove their sign structures even if they cannot use the sign structure elsewhere, to ensure that a competitor must expend the resources necessary to construct a new sign structure.

Finally, plaintiff asserts that the balance of the equities favor plaintiff since it is the owner of the sign structure, it negotiated with defendant concerning a renewal of the lease or perpetual easement in good faith, and acted promptly to remove the sign structure in accordance with its contractual right to do so as soon as defendant refused to discuss the easement or extend the

lease. Accordingly, a preliminary injunction should be granted.

Defendant opposes the preliminary injunction and argues that at the time defendant purchased the subject property there was a sign already erected and in place on the roof and that Vista rented the sign. Vista entered into possession of the roof sign with the landlord's predecessor in interest pursuant to a rental agreement dated June 11, 2001 for a term of five (5) years commencing August 1, 2000 through July 31, 2005 with an option to renew for an additional five (5) years expiring July 31, 2010. Vista's predecessor in renting the roof sign was Seaboard, which had a rental agreement for the sign on the roof of the subject premises for a five-year term commencing in January 1975 and was renewable for another five-year term. Defendant contends that, it appears that Seaboard inappropriately attempted to renew its rental agreement by letter dated December 22, 1994 for a ten-year term commencing March 1, 1995. Vista then acquired Seaboard in 1999 and Vista then entered into its own rental agreement with the landlord and did not obtain an assignment of Seaboard's rental agreement.

On or about November 29, 2006, following defendant's purchase of the subject property, defendant requested that Vista, its tenant, make specific representations to defendant's bank regarding the roof sign in order for defendant to obtain a loan which was secured by the subject property. Vista then made those specific representations in a Tenant's Estoppel Certificate providing that, "The Tenant has no option, ownership interest in, or right of first refusal to purchase the Leased Premises or the Premises any portion thereof or fixture thereon whatsoever, but is presently in its final five (5) year term through 7-31-10 pursuant to its sole extension right as exercised, without further extension of rights." (Exhibit E). Said estoppel certificate also provides that the real property which is securing the loan includes the premises and fixtures leased to tenant.

Defendant admits that it notified plaintiff's counsel that the advertising sign and its supporting structures and improvements belonged to defendant. Defendant argues that the language in the lease clearly demonstrates that the roof sign is not owned by plaintiff unless plaintiff erected or made it. Since plaintiff does not own the advertising sign and its supporting structures and improvements but merely rented it, plaintiff cannot demonstrate a likelihood of success on the merits. Moreover, the documents submitted by plaintiff refutes its own claims as they show that neither plaintiff nor its predecessor, Vista, erected or made the advertising sign and its supporting structures and improvements.

Additionally, defendant asserts that the roof sign is not a trade fixture removable by the tenant and not part of the real property owned by defendant. Defendant cites to case law and argues that even the definition of a trade fixture first and foremost requires that the property was annexed to the leased realty by the tenant and neither plaintiff nor Vista erected or made the roof sign. Even if plaintiff had claimed that Seaboard and not Lamar or Vista erected or made the roof sign, plaintiff's argument would fail because neither plaintiff nor Vista obtained an assignment of any of Seaboard's rights under the Seaboard rental agreement from January 21, 1975. Instead, when Vista acquired Seaboard, Vista entered into a new rental agreement which explicitly provided that Vista would only have ownership to the roof sign if it was erected or made by the lessee, which clearly it was not.

Defendant further contends that the language in the Tenant Estoppel Certificate further demonstrates that the roof sign is owned by defendant and not plaintiff. Defendant asserts that regardless of plaintiff's contentions that the language in that document is ambiguous or contradicted, it is not. The estoppel certificate was to establish the terms of the rental agreement

to the lender, borrower and tenant and case law provides that such a certificate may be enforced. The Illumination Agreement was merely an agreement to allow the tenant to use and pay for the electricity to illuminate the roof sign and may be enforced for that purpose only. Thus, since plaintiff has not met the requirements for a preliminary injunction, the order to show cause must be denied.

Defendant argues that it is currently involved in a pending sale to a third party in an amount not less than \$1,400,000.00 which has been jeopardized by the instant order to show cause and threat of a preliminary injunction. If plaintiff is prevented from removing the roof sign structure, at most, if it prevails herein, its damages will be the value of the sign which is minimal in comparison to what it recoverable. Since C.P.L.R. §6312 provides for an undertaking in the event a preliminary injunction is issued, defendant asserts that \$1,400,000.00 is an appropriate undertaking to be fixed by the court.

In reply, plaintiff contends that defendant's arguments are predicated upon "blatant misrepresentations and the concealment of relevant facts." (Costanza Reply Aff., para. 2). Plaintiff alleges that the sign structure was erected by Vista's immediate predecessor in interest, Seaboard, that Vista is the successor-in-interest to Seaboard and that plaintiff is the successor-in-interest to Vista. Therefore, whatever ownership rights Seaboard had in and to the sign structure passed to Vista and those same rights passed from Vista to plaintiff. Plaintiff argues that defendant's papers in opposition ignore the relevant terms and conditions of the Seaboard lease and erroneously allege, in conclusory fashion, that Seaboard was purportedly Vista's predecessor in renting the roof sign. Plaintiff contends that those allegations are false and are couched solely upon information and belief by defendant without any evidentiary support whatsoever.

Plaintiff refutes defendant's contention that the Seaboard lease had an initial term of five (5) years and a renewal term of five (5) years but instead had an initial term of ten (10) years and a renewal term of ten (10) years taking it from March 1, 1975 to February 28, 1995. Plaintiff submits copies of Stock Purchase Agreements which purportedly show that the sign structure at issue was included among the various designated structures sold by Vista to plaintiff. Plaintiff contends that the documentary evidence incontrovertibly establishes that the sign structure covered by the Vista lease was among the designated structures acquired by plaintiff when it acquired Vista pursuant to the Stock Purchase Agreement. Vista was merged into plaintiff Lamar pursuant to a Certificate of Merger dated December 29, 2009 filed with the Delaware Secretary of State on that date and one day later, on December 30, 2009, Seaboard was also merged into plaintiff Lamar pursuant to a Certificate of Merger filed with the New York State Department of State. A copy of same is annexed to the reply papers as Exhibit D. Therefore, it is evidence that upon the mergers of Vista and Seaboard into plaintiff Lamar, plaintiff became the actual record owner of the subject sign structure and there is no merit to defendant's arguments.

C.P.L.R. §6301 states that, "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do...an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual..." Courts have held that, "The decision to grant or deny such a request lies within the sound discretion of the trial court." **After Six, Inc. v. 201 East 66th Street Assoc.**, 87 A.D.2d 153 (1st Dept. 1982). A party who seeks to obtain a preliminary injunction must demonstrate, "(1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the injunction is not issued; and (3) a balance of the equities in the movant's favor..." (citations omitted). **Housing Works, Inc. v. City of New York**, 255 A.D.2d 209 (1st Dept. 1998).

In the case at bar, plaintiff asserts that it is entitled to a preliminary injunction as it is the owner of the subject sign structure, it has performed all obligations under the lease, including payment of rent, and defendant has wrongfully claimed that plaintiff does not own the sign structure nor does it have the legal right to remove it from the premises. Plaintiff submits numerous documents with its moving papers and its reply papers. This court finds that, at best, the documents present issues of fact for the fact-finder to resolve. At issue, in particular, is the Tenant Estoppel Certificate which defendant claims is proof that plaintiff does not own the sign structure.

It has been established that, "A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits..." (citations omitted). **Residential Board of Managers of the Columbia Condominium v. Alden**, 178 A.D.2d 121 (1st Dept. 1991). Courts have held that, "...the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction..." (citations omitted). **Egan v. New York Care Plus Ins. Co.**, 266 A.D.2d 600 (3rd Dept. 1999).

This court finds that in order to maintain the status quo a preliminary injunction should be granted until all issues of fact are resolved at trial. However, C.P.L.R. §6312(b) provides that, "...prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction..." Defendant herein requested that an undertaking be fixed by this court in the amount of \$1,400,000.00 based upon the fact that a pending sale of the property to a third party in the amount of \$1,400,000.00 will be jeopardized if a preliminary injunction is granted. Plaintiff did not oppose that amount nor did plaintiff counter with another amount which it believed would be more appropriate.

Accordingly, plaintiff is directed to give an undertaking in the amount of \$1,400,000.00 and plaintiff's motion for a preliminary injunction is hereby granted.

Plaintiff is directed to serve a copy of this order with notice of entry upon defendant and file proof thereof with the clerk's office.

This constitutes the decision and order of the court.

Dated: September 11, 2012

J.S.C.

ALEXANDER W. HUNTER JD