1414 Holdings, LLC v BMS-PSO, LLC
2013 NY Slip Op 31314(U)
June 13, 2013
Sup Ct, NY County
Docket Number: 652290/12
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN, Justice PART 63

1414 Holdings, LLC

-v-

BMS-PSO, LLC

INDEX NO. 652290/2012

MOTION DATE ______

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ No(s). ______

Answering Affidavits — Exhibits ______ No(s). ______

Replying Affidavits ______ No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

This constitutes the decision and order of the Court.

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

Dated: 6/13/13

______, J.S.C.

HON. ELLEN M. COIN

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

1414 HOLDINGS, LLC,

Plaintiff,

-against-

BMS-PSO, LLC,

Defendant.

Index No.652290/12
DECISION AND ORDER
Motion Seq. No. 002

ELLEN M. COIN, A.J.S.C.:

By decision and interim order dated May 30, 2013, this court denied plaintiff's motion for a preliminary injunction and granted defendant's motion for a preliminary injunction, conditioned upon the filing of an undertaking pursuant to CPLR 6312(b). The court invited counsel for the parties to submit their proposals for the amount of the undertaking; the respective proposals, together with supporting affidavits and affirmations of counsel, have been submitted.

"The fixing of the amount of an undertaking is a matter within the sound discretion of the court...." (*Leleakis v Kamamis*, 303 AD2d 380, 380 [2d Dept 2003]). The amount of the undertaking must be rationally related to the potential damages of the nonmoving party if the preliminary injunction later proves to have been unwarranted (*Cooperstown Capital, LLC v Patton*, 60 AD3d 1251, 1254 [3d Dept 2009]; *Madison/Fifth Assocs. LLC v 1841-*

1843 Ocean Parkway, LLC, 50 AD3d 533, 534 [1st Dept 2008]; *Access Med. Group, P.C. v Straus Family Capital Group, LLC,* 44 AD3d 975 [2d Dept 2007]; *Lelekakis,* 303 AD2d at 380). "Its sufficiency depends upon the circumstances of the particular case." (67A NY Jur2d Injunctions 172). "The amount of the undertaking must not be excessive, and the court must not consider the [enjoined party's] speculative or conclusory claims of potential financial losses." (*Ujueta v Euro-Quest Corp.,* 29 AD3d 895, 896 [2d Dept 2006]; *Donald Shaffer, Inc. v Shaffer,* 44 AD2d 725 [2d Dept 1974]; *7th Sense, Inc. v Liu,* 220 AD2d 215, 217 [1st Dept 1995]).

"'It is improper to require, as a condition of a preliminary injunction, an undertaking in an amount which would result in a denial of the relief to which the [movant shows itself] to be entitled.'" (*Peyton v PWV Acquisition LLC,* 35 Misc3d 1207(A) at *5 [Sup Ct, New York County 2012][citing 67A NY Jur2d Injunctions §172; *Zonghetti v Jeromack,* 150 AD2d 561, 563 [2d Dept 1989], *Modugno v Merritt-Chapman Scott Corp.,* 17 Misc2d 679 [Sup Ct, Queens County 1959] and *Barouh Eaton Allen Corp. v. International Business Machines Corp.,* 1980 WL 4693 [Sup Ct, Kings County 1980]).

However, the amount of the bond must not be insufficient. (*See, e.g. Weitzen v 130 E. 65th St. Sponsor Corp.,* 86 AD2d 511 [1st Dept 1982][$20,000 undertaking inadequate, increased to $150,000 where injunction prohibited demolition of 4-story

townhouse above 1st story and construction of 17-story building on the site]).

In the instant matter plaintiff's Vice President, Ephram Lustgarten, submits his affidavit in which he describes his expertise in economic models and forecasts and his experience in the development of 5 hotels. He explains that in light of the requirements of the New York City Department of Buildings that a hotel have an elevator that is ADA-compliant, the court's order dated June 4, 2013, which denied plaintiff's motion to modify the temporary restraining order to permit plaintiff to install the ADA elevator, prevents the Building[1] from functioning as a hotel. He alleges that the combined effect of the interim order and the June 4th order will delay the hotel opening, leading to a net operating loss of $15.172 million per year. Further, he alleges that plaintiff's plan was to open the hotel by the end of 2013. He urges that delay of conversion of defendant's premises into hotel suites will increase plaintiff's construction costs and lead to the loss of revenue from rooms on other floors that would have to be kept vacant because of construction noise and vibration.

As an alternative to an undertaking securing damages based on plaintiff's lost profits, Mr. Lustgarten proposes that the court impose an undertaking based on the annual amount of

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[1] 1414 Avenue of the Americas, New York, New York

plaintiff's real estate taxes, insurance and other general building operations costs in the amount of $2,111,304 plus its annual interest expense of $1,440,883.

Defendant's principal, Dr. Joshua Brickman, submits his affidavit in which he proposes that the injunction be secured by $163,208.84 (accrued rent to date) plus ongoing payment of use and occupancy at the rate of defendant's monthly rent of $16,320.84 per month. He contends that requiring a bond in millions of dollars would destroy defendants' endodontics practice and undermine the decision granting defendants' motion for a preliminary injunction.

The purpose of an undertaking is to secure plaintiff's ability to recover damages if it is finally determined that defendant was not entitled to the preliminary injunction granted by the court. (CPLR 6312(b)). The injunction granted prevents plaintiff from closing access to defendant and its invitees to the Building and from stopping electrical and plumbing service to defendant.

In its decision and order of June 4, 2013 (Mot. Seq. 007) this court denied plaintiff's motion to modify the temporary restraining order (TRO) entered by the court which had prevented plaintiff from closing access to the Building and from failing to deliver electrical and plumbing service to defendant. The court noted that in its motion plaintiff sought not only temporary

access to defendant's premises to effectuate ADA compliance of an existing elevator, but permanent conversion of a portion of defendant's leased premises in connection with the elevator expansion, all in the absence of any underlying pleading seeking eviction or some other form of permanent taking.

In its proposal for the undertaking plaintiff seeks to secure not only the damages it may incur as a result of the preliminary injunction, but also its potential damages arising from the court's denial of its motion to modify the TRO to effectuate the temporary and permanent taking. While the court's rulings may have the combined effect plaintiff posits--the prevention of its use of the Building as a hotel because of plaintiff's inability to install an ADA-compliant elevator--there is no provision in the CPLR for requiring an undertaking by the opponent (here, defendant) of an unsuccessful motion.[2]

The court's analysis must, therefore, be confined to the potential damage plaintiff may incur as a result of the granting of an injunction preventing it from closing defendant's access to the Building and shutting its utilities. Plaintiff's alternate proposals do not take this aspect of prospective damage into account.

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[2]In its papers in support of its various proposals for the undertaking plaintiff asks the court to "reconsider" its motion to modify the TRO, notwithstanding the absence of a formal motion to reargue. Obviously, such relief cannot be granted without proper notice to opposing counsel.

Defendant likens the granting of its preliminary injunction motion to the grant of a Yellowstone injunction, on which it premises its position that use and occupancy is the appropriate measure of plaintiff's potential damage. Of course, use and occupancy (i.e., defendant's rent) are what defendant should be paying in view of its continued occupation of the premises with continued access to the Building and to utilities. Indeed, the requirement that the movant also pay "outstanding and prospective use and occupancy fees" in addition to a bond may not be excessive. (*Sportsplex of Middletown, Inc. v Catskill Regional Off-Track Betting Corp.*, 221 AD2d 428 [2d Dept 1995], citing *61 West 62 Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372, 373 [1st Dept 1991]).

There is no factual issue regarding the amount of defendant's arrears or the rent required under the Lease (*cf. Noble Drew Ali Plaza Tenants Ass'n v Noble Drew Ali Plaza Housing Corp.*, 29 AD3d 549, 550-551 [2d Dept 2006]). Thus, it is appropriate that defendant be required to include in its undertaking the amount of its arrears ($162,208.84) and to pay to plaintiff use and occupancy as same comes due under the Lease. The question remains as to whether the court should require further sums in the undertaking.

Plaintiff's claim of potential lost profits due to its inability to operate the Building as a hotel arises solely as a

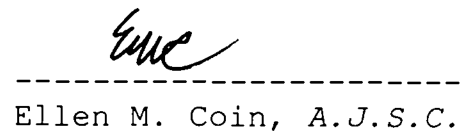
result of this court's denial of plaintiff's motion to modify the TRO. Similarly, plaintiff's claim that it should be indemnified against loss for its operating expenses fails to arise out of the injunction granted. Indeed, plaintiff would incur its carrying costs (insurance, interest expense, etc.) whether the injunction were granted or not. Plaintiff makes no claim that requiring it to continue to provide access to the premises and utilities to defendant, without more, would increase its expenses. Moreover, plaintiff's current contentions of its potential damages are undercut by its allegation upon its own preliminary injunction motion that conversion of the Building to a hotel will be feasible even if plaintiff cannot immediately include defendant's premises as part of the hotel. (Aff. of Gavin A. Middleton sworn to June 28, 2012, ¶18 at 8).

Accordingly, upon review of the submissions of the parties, it is hereby ORDERED that the undertaking is fixed in the sum of $162,208.84, together with the sum of any other arrears since the filing of the undertaking proposals, conditioned that the defendant, if it is finally determined that it was not entitled to an injunction will pay to the plaintiff all damages and costs which may be sustained by reason of this injunction; and that for the duration of the injunction defendant will pay use and occupancy to plaintiff monthly in the sum of $16,320.84; and it is further

[* 9]

ORDERED that plaintiff, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiff, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of plaintiff or otherwise, any of the following acts: closing access to defendant, its employees, guests, licensees and invitees to the Building known as 1414 Avenue of the Americas, New York, New York; shutting down the electrical and plumbing services to defendant's premises; and/or in any other way interfering with, or preventing, access to and use of the premises by defendant, or any guest or licensee of defendant, in accordance with the terms of the Lease between plaintiff's predecessor and defendant.

Dated: June 13, 2013



Ellen M. Coin, *A.J.S.C.*