

**Gristede's Operating Corp. v Scarsdale Shopping
Ctr. Assoc., LLC**

2014 NY Slip Op 33466(U)

January 5, 2014

Supreme Court, Westchester County

Docket Number: 53040/12

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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.

Disp _____ Dec x Seq. #s 4-5 Type SJ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
GRISTEDE'S OPERATING CORP., NAMDOR,
INC. and GRISTEDES FOODS, INC.,

Plaintiffs,

Index No. 53040/12

DECISION AND ORDER

-against-

SCARSDALE SHOPPING CENTER ASSOCIATES,
LLC, WALGREEN CO. and WALGREEN
EASTERN CO., INC.,

Defendants.

-----X

The following papers numbered 1 to 14 were read on these motions:

Notice of Motion, Affidavit and Exhibits	1
Exhibits	2
Exhibits	3
Affirmation and Exhibits	4
19-a Statement	5
Memorandum of Law	6
Notice of Motion, Affidavit, Affirmation and Exhibits	7
Memorandum of Law	8
Response to 19-a Statement	9
Response to 19-a Statement	10
Affirmation and Exhibits in Opposition	11
Memorandum of Law in Opposition	12
Reply Memorandum of Law	13

Walgreens Co. and Walgreens Eastern Co., Inc. (collectively, "Walgreens") and Scarsdale Shopping Center Associates, LLC ("Scarsdale") each bring a motion for summary judgment seeking to dismiss this action in its entirety. The amended complaint contains six causes of action, three against each movant. Plaintiffs have already agreed to dismiss the sixth cause of action, against Walgreens.

The remaining causes of action are: (1) against Scarsdale, damages from lease violations and actual constructive eviction; (2) against Scarsdale, a permanent injunction to bar it from reducing the number of parking spaces; (3) against Scarsdale, damages from Scarsdale's interference with a prospective agreement with Walgreens; (4) against Walgreens, an injunction barring Walgreens from entering an agreement with Scarsdale concerning a building not yet built; and (5) against Walgreens, an injunction based on a breach of the Confidentiality Agreement.

The Facts

There are several facts which are not in dispute. First, in 2006, plaintiffs and Walgreens entered into a Confidentiality Agreement (which was extended by the parties until January 1, 2015). This Agreement prohibits Walgreens from discussing, whether by itself or through an agent, any possible lease or other issues with the owner or agent of any premises in which plaintiffs are located. Plaintiffs and Walgreens did this

[*3]

because Walgreens was contemplating buying certain stores (or the leaseholds for those stores). To that end, plaintiffs and Walgreens entered into a "contract of sale" dated May 2007. There were many conditions set forth in this agreement. There is no dispute that Walgreens opted against taking over the lease for the store in question.

There is also no dispute that in the spring of 2011, an independent real estate agent who often worked for Walgreens, Alfred J. Callegari - whether with Walgreens' knowledge and consent or entirely on his own¹ - contacted Scarsdale about the possibility of Walgreens entering into a lease for the premises that were then occupied by plaintiffs. There is no dispute that Walgreens visited the premises in May 2011, and thereafter declined the proposal.

There is also no dispute that at some point after Walgreens and plaintiffs had entered into their agreements, Scarsdale began to explore the idea of building another structure in the parking lot of the shopping center that is the focus of this litigation. There is no dispute that in the summer of 2011, Mr. Callegari contacted Scarsdale about the possibility of Walgreens leasing this building. There is further no dispute that in September 2011, Walgreens visited the proposed site, and thereafter declined the proposal.

¹Whether Mr. Callegari acted with or without Walgreens' knowledge and/or consent initially is irrelevant at this juncture.

There is no dispute that Scarsdale did not begin construction for this building. Indeed, as of this writing, construction has still not yet begun. There is also no dispute that the lease between plaintiffs and Scarsdale ends on April 30, 2015, with no right of renewal. Scarsdale has represented to this Court in its papers that it will not begin construction before May 1, 2015 - after the lease between Scarsdale and plaintiffs has expired.

Discussion

The Court first examines the First and Second Causes of Action concerning the alleged violations of the lease by Scarsdale. The First Cause of Action seeks damages for the inconvenience, and reduction in parking spaces, caused by construction which has not yet occurred - and which will not occur, if at all, until **after** the lease between the parties has expired. As the damages posited by plaintiffs cannot occur, as a matter of law, the First Cause of Action is dismissed.

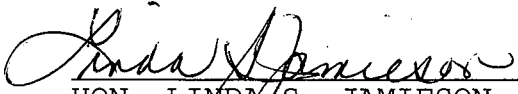
The Second Cause of Action similarly seeks an injunction preventing Scarsdale from commencing construction during its lease. Since Scarsdale has represented that it will not commence construction until at least the expiration of the lease, this cause of action is moot and is dismissed.

The remaining causes of action, the Third, Fourth and Fifth, all concern the contacts between Scarsdale and Walgreens (and Mr. Callegari) regarding the possibility of Walgreens leasing two

different spaces in the shopping center. These claims are all heavily fact-driven, and are not appropriately dismissed at this juncture. However, to the extent that the Fourth Cause of Action, which alleges that Walgreens violated the Confidentiality Agreement, seeks an injunction preventing Walgreens from entering into any discussions with Scarsdale going forward, this claim is moot, as the Confidentiality Agreement between the parties expires, by its terms, on January 1, 2015.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
~~December~~ 2014
JANUARY 5


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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