

**London Paint & Wallpaper Co., Inc. v Kesselman**

2015 NY Slip Op 31398(U)

July 27, 2015

Supreme Court, New York County

Docket Number: 152878/2015

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

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LONDON PAINT & WALLPAPER CO., INC. d/b/a  
LONDON TRUE VALUE HARDWARE and d/b/a  
LONDON PAINT AND HARDWARE CO., and  
LEONARD KESSELMAN,

Index Number: 152878/2015

Motion Sequence No.: 001

Plaintiffs,

Decision and Order

- against -

SIDNEY KESSELMAN and EVELYN KESSELMAN,  
As Trustees of KESSELMAN LIVING TRUST DATED  
OCTOBER 6, 1997, SIDNEY KESSELMAN, EVELYN  
KESSELMAN, and TERRI ZIMMERMAN,

Defendants.

-----X  
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on plaintiffs' motion for a preliminary injunction:

Papers Numbered:

Order to Show Cause – Affirmation – Affidavits – Exhibits .....	1
Affirmation in Opposition – Affidavits in Opposition – Exhibits .....	2
Reply Affirmation – Reply Affidavit – Exhibits .....	3
Sur-Reply Affirmation – Exhibits .....	4

Upon the foregoing papers, the motion for a preliminary injunction is granted.

Brief Background

Plaintiff Leonard Kesselman (“Leonard”) is the owner of plaintiff London Paint & Wallpaper Co., Inc. (“London”) (collectively “plaintiffs”), which occupies the ground floor and basement commercial space (the “Premises”) in the building (“the Building”) located at 191 Ninth Avenue, New York, NY 10011. Leonard’s father, defendant Sidney Kesselman (“Sidney”), founded London over 50 years ago. Sidney and defendant Evelyn Kesselman (“Evelyn”), Sidney’s wife and Leonard’s mother, are the trustees of defendant Kesselman Living Trust Dated October 6, 1997 (the “Trust”), which owns the Building. Defendant Terri Zimmerman is Sidney and Evelyn’s daughter and Leonard’s sister Terri.

In 1983, Leonard acquired London and commenced managing the Building for his family. Leonard alleges that the parties orally agreed (the “Family Agreements”) that Leonard would operate the store until (1) the Building was sold; or (2) Sidney and Evelyn die in which case the

Building would be bequeathed 50-50 to Leonard and Terri. According to plaintiffs, the oral Family Agreements provide in part that:

(a) Leonard would manage and operate the Building; (b) London would occupy the Premises; (c) Leonard would pay all rent derived from the Building to Sidney and Evelyn; (d) Until a sale of the Building, rents payable by London would remain at reasonable rates and would only be adjusted on agreement of all parties; (f) Upon Sidney and Evelyn's death, London would continue in possession at a fair market rent as fixed by real estate brokers.

Sidney disputes Leonard's account. He also claims that as the trustee of the Trust that owns the Building he has the ability to set the rental amount.

Starting in 1983, London paid Sidney \$1,000 per month for the Premises. In 1984, Sidney and Leonard entered into a ten-year lease. After the expiration thereof, Leonard allegedly asked Sidney to extend the lease and claims that they did not need a written lease. On October 11, 1997, Sidney, Evelyn, Terri, and Leonard entered into a "Rental Agreement" that states in part:

Should Sidney or Evelyn be in possession of the Building . . . or as an entity owned by the survivor at the time of the survivor's demise, it is agreed that London. . . or any other company or business occupying the store or any other rental space in the Building, will pay the "fair rental value" in exchange for occupying such space . . . .

What, exactly, this means is anybody's guess, but it seems to suggest that London need not pay fair rental value until the Building is sold (at which point the buyer presumably will demand full market value) and/or Sidney and Evelyn die (in which case the Building will be split equally between the siblings).

By a deed titled "Sidney and Evelyn Kesselman Living Trust, dated October 6, 1997" (the "Trust"), Sidney and Evelyn transferred the Building to a Trust in which they were the sole co-trustees.

In early 2003, Sidney and Leonard agreed to increase the rent from \$1,000 to \$2,000 per month, and since May 2003, London has paid \$3,000 per month.

On November 5, 2014, Sidney and Evelyn executed a Trust Restatement that granted Sidney the right to act unilaterally as to the trust. The Trust Restatement conveyed the Building 80% to Terri and 20% to Leonard. Leonard alleges that the changes to the Trust occurred after Sidney suffered a stroke, and Terri assumed the role of Sidney and Evelyn's primary decision-maker and caretaker.

In or around February of 2015, Sidney asked Leonard to start paying \$11,000 per month. Sidney claims that Leonard initially agreed to \$8,000. Leonard claims the oral contract prohibited

Sidney from raising the rent without the agreement of all parties and that he never paid the \$8,000.

On or about February 24, 2015, Sidney, as Trustee of the Kesselman Living Trust, served London a Thirty (30) Day Notice of Termination, purporting to terminate London's leasehold rights effective March 31, 2015. On March 23, 2015, plaintiffs commenced the instant action for specific performance and declaratory relief. Simultaneous with the commencement of this action, plaintiffs moved preliminarily to enjoin defendants from commencing any litigation to evict London from the Premises. This Court denied plaintiff a temporary restraining order, enjoining the Trust from commencing a summary holdover proceeding pending determination of the instant motion. London did not vacate the premises and, on or about April 10, 2015, the Trust commenced a summary holdover proceeding.

### Discussion

A party is entitled to a preliminary injunction upon showing (1) a likelihood of success on the merits, (2) irreparable injury in the absence of a preliminary injunction, and (3) a balance of equities in its favor. See J.A. Preston Corp. v Fabrication Enters., Inc., 68 NY2d 397 (1986).

#### I. Likelihood of Success on the Merits

"Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced." Ma v Lien, 198 AD2d 186, 187 (1<sup>st</sup> Dep't 1993).

London's motion for a preliminary injunction relies partly on heavily contested familial issues. However, "even when the facts are in dispute the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be conclusive" Id. (internal quotations omitted).

#### *Specific Performance*

"In an equitable action for specific performance founded upon part performance 'the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not... upon the contract itself.' The acts must . . . be unequivocally referable to the oral contract." Walter v Hoffman, 267 NY 365 (1935) (granting specific performance where plaintiff made improvements upon purchased property, in reliance upon oral promise of defendant to convey the property) (quoting Maddison v Alderson, 8 App Cas 467, 475 (1883)). Here, Leonard plausibly claims that he relied on certain promises by Sidney and on Sidney's manifestation of his acceptance of the Family Agreements. Leonard and Sidney's performances are unequivocally referable to the alleged Family Agreements. Since 2003, London's rent has increased from \$1,000 to \$3,000, an increase so disparate from what defendants claim is the current market value of the rent, \$17,500, that it could signify that the parties were honoring the Family Agreements.

In Uskokovic v Radunovich, 127 AD2d 830 (2<sup>nd</sup> Dep't 1987), the court stated that

prior to the commencement of this action, the plaintiff expended a great deal of labor and money in reconstructing the house, lived on

the property, and for five years paid the property taxes. These acts are inexplicable without reference to the alleged oral agreement, and, taken together, constitute part performance 'unequivocally referable' to the oral agreement.

Here, Leonard claims that he personally funded substantial improvements to the Building, which he would not have done if he did not believe that the Family Agreements guaranteed him affordable rent. Leonard also claims that he would have established his business and family elsewhere if he had known that Sidney would deny that the Family Agreements existed.

Additionally, payment and acceptance of monthly rental payments are unequivocally referable to the Family Agreements.

#### *Declaratory Relief*

"The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001.

Under *expressio unius est exclusio alterius*, "the specific mention of one person or thing implies the exclusion of other persons or thing [*sic*]. As otherwise expressed, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." People v Figueroa, 27 Misc3d 751 (Sup Ct, New York County 2010). As best this court can determine at this point, the Rental Agreement excludes Sidney from acting outside of those terms expressly provided. See Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs., 63 NY2d 396 (1984) (where "the court read the specification of certain permitted activities as implicitly prohibiting other alterations.")

"In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless." *Id.* Plaintiffs argue that terminating the Rental Agreement under circumstances not presented therein would violate this rule. Additionally, failure to consider the Family Agreements when reading the Rental Agreement would render some of the latter's clauses meaningless. At the very least, the terms of the Rental Agreement are ambiguous as to the rights and obligations of each party, and this creates a material issue of fact. If the Rental Agreement is deemed valid by this court, then the termination notice would be void for inconsistency.

#### *Capacity*

This court is uncertain as to whether Sidney has the capacity to act unilaterally on behalf of the Trust. Evelyn acknowledges that she signed an affidavit dated January 29, 2015, stating that she never agreed to being removed as a Co-Trustee. Now, Evelyn claims in an affidavit dated May 14, 2015, that she would not have signed the January affidavit if she knew what it entailed. This creates a material issue of fact as to whether Evelyn has consciously granted Sidney the right to act unilaterally under the Trust.

This case is not a simple landlord-tenant matter as it involves issues of undue influence and mental capacity, which this court should resolve. This court must examine the relationship

between Terri and her parents in order to assess whether Terri has unduly influenced her parents. Once a fiduciary relationship is found to exist between two parties, as to which there is some evidence here, “transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood, and that there was no fraud, mistake or undue influence. In such situations, if one party deals with another from a position of weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, [and] the transaction is presumed void.” Gordon v Bialystoker Ctr. & Bikur Cholim, Inc., 45 NY2d 692 (1978).

### *Promissory Estoppel*

Promissory estoppel requires (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise was made, and (3) an injury sustained in reliance on the promise. Rogers v Town of Islip, 230 AD2d 727 (2<sup>nd</sup> Dep’t 1996). The burden is on plaintiffs to prove at trial the specific details of each element. *Id.* In order to find a clear and unambiguous promise the court must first determine the validity of the Family Agreements and the Rental Agreement in the context of the declaratory judgment claim.

As to foreseeable reliance, Leonard claims he reasonably relied on Sidney’s promises in the Family Agreements and the Rental Agreement when he established and operated his business and sought to increase his goodwill in the community. Leonard claims he did not renew the 1984 Lease because Sidney assured him that family loyalties would protect him. As to injury, Leonard plausibly claims that he is likely to sustain an economic injury if London is evicted from the premises that it has occupied for over 30 years.

### II. Irreparable Harm

The second requirement for a preliminary injunction is irreparable harm. “The claims of a plaintiff that harm is imminent and irreparable must be clearly demonstrated to the Court.” Wright v Lewis, 873 NYS2d 516 (2008). When claims “are wholly speculative and conclusory,” they “are insufficient to satisfy the burden of demonstrating irreparable injury.” *Id.* If London is evicted from the premises via a summary proceeding, the damages Leonard will suffer will be actual and imminent, as he will lose his leasehold interest in real property. See Post v 120 East End Avenue Corp., 62 NY2d 19 (1984). “The threat of termination of a lease and forfeiture, standing alone, has been sufficient to permit maintenance of the status quo by injunction.” *Id.*

Plaintiffs also demonstrated that they will suffer damages other than monetary damages if this court declines their request. The irreparable harm Leonard would potentially suffer is not readily ascertainable. Leonard has invested his own funds and manual labor into expanding and maintaining London. These factors taken in the aggregate make it difficult to calculate a reasonable amount of damages.

Leonard will also suffer irreparable harm if the case proceeds in Civil Court. In summary proceedings disclosure is discretionary with the court. CPLR § 408. Here, as discussed above, several issues of fact must be addressed. The instant dispute does not lend itself well to a summary proceeding. The Supreme Court, on the other hand, is the best forum for full and complete disclosure. Moreover, “[t]he Civil Court of the City of New York is a court of limited jurisdiction, having no general equity jurisdiction except as specifically provided by law.” See

W.H.P. 20. Inc. v Oktagon Corp., 251 AD2d 58 (1<sup>st</sup> Dep't 1998). Civil court also does not have the subject matter jurisdiction to grant declaratory relief. Id. Therefore, to allow the summary proceeding to advance would deprive Leonard the potential to obtain full redress of his rights. Id.

### III. Balancing of the Equities

The third requirement for a preliminary injunction is a balancing of the equities in the movant's favor. "[I]t must be shown that the irreparable injury to be sustained \* \* \* is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction." See e.g. McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc., 114 AD2d 165 (2<sup>nd</sup> Dep't 1986).

If this court were to deny a preliminary injunction, London would face forfeiture of its leasehold. Leonard also may not be able to continue operating his business if evicted on such short notice.

The effect on Leonard of losing his business would be far worse to him than Sidney's receipt of less-than market rent for a finite period of time. This Court is persuaded that the balance of equities falls in favor of the plaintiffs, who merely seek to maintain the *status quo*. See Gramercy Co. v Benenson, 223 AD2d 497 (1<sup>st</sup> Dep't 1996) (In order to maintain status quo, Judge Martin Schoenfeld granted preliminary injunction against cutting of trees in Gramercy Park).

Defendants argue that a preliminary injunction will severely prejudice them because they will be deprived of their right to a summary adjudication of their claim. As defendants rightly claim, summary proceedings are designed to provide landlords with a simple, expeditious and inexpensive means of regaining possession of their premises in cases where the tenant refuses to pay rent, or where they wrongfully held over without permission after the expiration of the term. Reich v Cochran, 201 NY 450 (1911). However, in the instant case, the issues are complex and the parties intensely contest the facts. Justice will have to take somewhat longer in order that the result be correct.

In view of all of the foregoing, plaintiffs have demonstrated entitlement to a preliminary injunction.

### Conclusion

Plaintiffs' motion for a preliminary injunction is hereby granted conditioned upon plaintiff posting an undertaking in the sum of \$15,000, within fifteen (15) days hereof. See CPLR 6312. The Civil Court summary proceeding is stayed pending further order of this court.

Dated: July 27, 2015




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Arthur F. Engoron, J.S.C.