

City of New York v Nike & Palina Enters., Inc.

2016 NY Slip Op 30227(U)

January 20, 2016

Supreme Court, Bronx County

Docket Number: 251631/2015

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS 7

Index No. 251631/2015
Motion Calendar No.
Motion Date:

THE CITY OF NEW YORK,

Plaintiff,

-against-

DECISION/ ORDER

Present:

Hon. Wilma Guzman

NIKE & PALINA ENTERPRISES, INC., THE
LAND AND BUILDING KNOWN AS 585 EAST
189th STREET, TAX BLOCK #3067, ET.AL.

MD

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed	
Answering Affidavits and Cross Motion.....	
Replying Affidavits	
Exhibits	
Other:	

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

This matter appeared before this Court with regards to an Order to Show Cause served by the plaintiff, City of New York, (hereinafter referred to as defendant "City") seeking an preliminary injunction order pursuant to §7-707; §7-709; and §7-710 of the Administrative Code and §6301 and §6311 of the CPLR with respect to commercial premises located on the ground floor located at 585 East 189th Street, in the Borough of The Bronx, City and State of New York, and a storefront business operating at the aforementioned premises as "Howl at the Moon." Plaintiff, City seeks to enjoin the defendants during the pendency of this action, and from the use and/or occupancy of said premises; directing that said premises be closed; and

further from conducting operating or permitting the subject premises to be used or occupied for the sale of alcoholic beverages to minors.

The Nuisance Abatement Law, Chapter 7, Title 7 New York City Administrative Code and Article 63 of the CPLR permit temporary relief pending a hearing on a motion for a preliminary injunction. A “public nuisance “ is defined to include “ [a]ny building, erection or place...used for of the unlawful activities described in section one hundred twenty-three of the alcoholic beverage control law “ (Administrative Code §7-703(h)), and “ [a]ny building, erection or place...wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law” (Administrative Code §7-703(I).) The Nuisance Abatement Law specifically authorizes both a temporary closing order and a temporary restraining order as requested by the City, but only after a finding “by clear and convincing evidence” that a public nuisance is being “conducted, maintained, or permitted,” and that “the public health, safety or welfare immediately requires” the granting of the orders. (Administrative Code §7-707(a), 7-709(a), 7-710(a).)

A Stipulation of Settlement was entered into on December 15, 2015 resolving the initial Order to Show Cause matter. Subsequently, defendant, Howl at the Moon made a motion returnable on January 11, 2016 to vacate the stipulation and deny plaintiff’s order to show cause. The stipulation was vacated upon consent of both sides, and the matter restored to the court calendar for an evidentiary hearing on the preliminary injunction. As a result of the vacatur of the Stipulation of Settlement, the original Order to Show Cause was re-instated together with the “temporary closing ” order in full force and effect, and an immediate evidentiary hearing was scheduled for January 13, 2016.

Upon granting the temporary restraining order and the issuance of the “closure” of the premises, and wherein the City seeks to permanently enjoin defendant from operating certain premises, based on the sale of alcohol to minors in violation of Alcoholic Beverage Control Law, a trial court is required to hold an evidentiary hearing on the city’s motion for preliminary injunctive relief. (See City of New York v. Untitled LLC, 859 N.Y.S.2d 20, 51 A.D.3d 509 (1st App. Div., 2008).

The party moving for the preliminary injunctive relief is required to demonstrate a

likelihood of success of the merits of its claim, irreparable harm in the absence of the injunctive relief, and a balancing of the equities in its favor. (See City of New York v. Untitled LLC, *supra*,

The evidentiary hearing commenced on January 13, 2016 and continued until its conclusion on January 14, 2016. The plaintiff, City of New York presented its evidence in support of its application as follows:

Plaintiff called Officer Shirley Gutierrez who testified on direct examination that on September 11, 2015 she was assigned to the Underage Drinking Operation together with an Auxiliary Officer, whose name she did not recall other than "Diana." They went to Howl at the Moon. Officer Gutierrez did not know the Auxiliary Officer's date of birth, however, she knew she was 19 years of age. It was only through the aid of Exhibit 1 marked only for Identification, which the officer recognized as the Auxiliary Officer's affidavit, that Officer Gutierrez was able to provide the underage Auxiliary Officer's name and date of birth. Officer Gutierrez testified that they both went to the subject bar. When the undercover Auxiliary and Gutierrez entered the premises they were never asked for identification. She did not see any security. They went straight to the bar area and the undercover Auxiliary ordered two beers, however, Officer Gutierrez did not recall what kind of beer. Officer Gutierrez testified that no bartender asked for identification or age. from the undercover Auxiliary. The undercover Auxiliary paid for the two beers and they remained in the premises for approximately 30-40 minutes. They never drank the beers.

Officer Gutierrez described the premises as a bar with a bar and a couple of tables for people. Officers Gutierrez further testified that on October 10, 2015 she returned to the premises with same undercover Auxiliary. They entered around approximately 11:30 P.M. Again they were not asked to provide any form of identification at the door. They entered and went to the bar, where the undercover Auxiliary ordered two beers. Officer Gutierrez did not recall what kind of beer. The undercover Auxiliary paid for the beers, and Officer Gutierrez again testified that she did not hear any bartender ask for identification or age. They remained in the premises for approximately 30-40 minutes. They never drank the beers

Officer Gutierrez further testified that she knew the undercover Auxiliary Officer was 19 years old because she saw her New York State Identification and her Auxiliary Officer's

Identification, and examined and compared them both on September 11, 2015 and October 10, 2015.

On cross examination Officer Gutierrez testified that both she and Auxiliary Officer went to the subject bar around approximately 11:30 P.M. on September 11, 2015. She did not remember the day of the week. Officer Gutierrez testified at the door there was no request for identification made either of the Auxiliary Officer or herself, there was no bracelet provided and she did not remember seeing any security staff at the door. They went directly to the bar and the Auxiliary Officer ordered two beers, paying in cash. Officer Gutierrez did not remember the bartender who served them. They did not drink the beer. They remained in the premises for approximately 30 to 40 minutes and then left. Again, on October 10, 2015, Officer Gutierrez and the Auxiliary Officer made another visit to Howl at the Moon, and Officer Gutierrez testified to the same identical series of events. Further, Officer Gutierrez testified that neither she nor the Auxiliary Officer prepared any reports.

The undercover Auxiliary officer was not produced and the affidavit of the Auxiliary Officer marked as Exhibit 1 for identification was not admitted into evidence as it was not in admissible form as determined by the Court. The City introduced 2 photos in evidence, depicting the subject bar. Although the Plaintiff, City, attempted to explain the Auxiliary Officer's absence, no evidence in admissible form was submitted to the court for consideration.

The defendant, Howl at the Moon, call the following individuals to testify:

Mr. Gabriel Texidor testified that he is employed as Head of Security for the establishment and as such his duties include standing at the door and checking everyone's Identification, particularly for underage of 21 years. His work days are Fridays and Saturdays. Mr. Texidor testified that the method used is that everyone makes a line and the identifications are checked one by one. Those individuals over the age of 21 get a wrist band or bracelet; those individuals under 21 year of age get a stamp on their hand. The individuals wearing the wrist band or bracelet are able to purchase alcoholic beverages and anyone without a wrist band or bracelet or a stamp on your hand cannot purchase alcoholic beverages. Mr. Texidor further testified that since the establishment is also a restaurant, people come in to eat and do not drink, they get a stamp on their hands, although they are of age to drink. In addition the bracelet comes in ten

different colors, and the color of the bracelet changes every day. The bracelet has a sticky tab which makes it difficult to come off or be pulled off. Mr. Texidor further testified that he did not recall what day of the week September 11, or October 10, 2015 was, but if it was either a Friday or Saturday he was working. Mr. Texidor testified that the procedure is the same. He starts his normal post outside the door in charge of security and check identification, and knows fake identification. There are camera always watching and the purpose of the bracelet is to show the bartender who is 21 years of age.

On cross examination Mr. Texidor testified he had no independent recollection of September 11, 2015 or October 10, 2015, however, he has not missed work the past two years and he performs the security procedure every time. He is at the door, therefore, he does not know what happens at the bar.

Mr. Bibia Kajtazi testified that he is the manager of Howl at the Moon and oversees the staff. His duties include making sure staff follows the rules, ordering food and supplies for the kitchen, training staff as to fake bills, rules on over drinking, and under age drinking. Security has been hired to do identification check of people who are underage and cannot drink or sit at the bar. The identification system at the door entitles providing the patron with a "tamper proof" wrist ban for over 21 years of age and a stamp for under 21. They have 10 colors available. The tamper proof wrist band has a "special glue" which does not allow the wrist band to come off unless it is cut off. Once cut the wrist bank will show signs of being tampered. Security begins at 10 P.M. and Gabriel is the licensed head of security guards. Mr. Kajtazi testified that everyone that walk in must be identify and that no one will be served alcoholic beverage without a wrist band. Mr. Kajtazi described that premises as 60' by 25' and a 16" long bar, with a dinning area with tables for approximately 102 people to eat.

On cross examination Mr. Kajtazi testified that Elizabeth Kajtazi was the CEO and owner of the business of Howl at the Moon and hold the liquor license.

Upon hearing all the testimony submitted by plaintiff in support of the preliminary injunction and defendants' opposing testimony, the evidentiary hearing was concluded.

A Preliminary injunction may only be granted if defendant City proves a probability of

success on the merits, danger of irreparable injury in the absence of injunction and a balance of equities in its favor. (See Nobu Next Door LLC v. Fine Arts Housing, Inc. 4 NY3d 839 [2005]; City of New York v. West Winds Convertibles Intl. Inc., 16 Misc. 3d 646, 837 N.Y.S.2d 555 [2007]).

A review of the evidence submitted indicates the defendant City has failed to meet the three prong test for the granting of a preliminary injunction. The first prong requires that plaintiff proves “a probability of success on the merits.” When viewed in the totality, the testimony of Officer Gutierrez, makes insufficient inference of the evidence. Without the testimony of the undercover, underage Auxiliary Officer who made the actual purchase, the plaintiff, City, has failed to demonstrate a probability of success on the merits. Second, the plaintiff, City, must prove “irreparable injury in the absence of injunction.” At no time did Officer Gutierrez makes mention of the “public health, safety or welfare.” (See Administrative Code §§7-707[a], 7-709[a], 7-710[a].)

There has been no showing that the community and neighboring businesses have severely suffered and/or continue to suffer as a result of any sale, consumption and/or warehousing of alcoholic beverages within the subject premises. Nor has there been any showing that the subject premises is a serious “public nuisance, and as such should not be allowed to remain open one more day”. (See City of New York v. Tokyo Pop LLC, 967 N.Y.S.2d 866 (2013 N.Y. Slip Op. 50126(U)) Third, the plaintiff, City, must prove a balance of equities in its favor. Again, the plaintiff has failed to show a balance in its favor. The Nuisance Abatement Law is remedial, not punitive in nature , and the defendants have already been punished by the closing order in effect since January 11, 2016, well over eight days. (See City of New York v. Tokyo v. Pop LLC., supra.)

Accordingly, it is

ORDERED, that the Plaintiff's City of New York, application seeking a preliminary injunction order pursuant to §7-707; §7-709; and §7-710 of the Administrative Code and §6301 and §6311 of the CPLR is hereby denied, and it is further

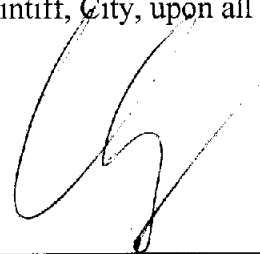
ORDERED that the Temporary Restraining Order and Temporary Closing Order in effect as of January 11, 2016, is hereby vacated, and it is further

ORDERED, that a copy of this Order shall be served by the Plaintiff, City, upon all parties herein within thirty (30) days from the date of entry.

This constitutes the decision and order of this court.

Dated: Bronx, New York

January 20, 2016



HON. WILMA GUZMAN, J.S.C.