

R.B. Williamson Inc. v Corner View Residence LLC

2016 NY Slip Op 32324(U)

October 17, 2016

Supreme Court, Bronx County

Docket Number: 301449/2015E

Judge: Douglas E. McKeon

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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R.B. WILLIAMSON INC. d/b/a CONGRESS
PHARMACY,

Plaintiff(s),

- against -

INDEX NO: 301449/2015E

CORNER VIEW RESIDENCE LLC, 548 GROCERY
DELI INC., XYZ CORPORATION, XYZ LLC and
XYZ LLP,

DECISION/ORDER

Defendant(s).

-----X

HON. DOUGLAS E. MCKEON

Plaintiff's motion for a preliminary injunction against defendants Corner View Residence, LLC, and 548 Grocery Deli Inc., is denied.

Plaintiff owns and operates a pharmacy on Southern Boulevard and East 149th Street in the Bronx. Plaintiff leases the premises from defendant Corner View Residence pursuant to a March 29, 2011 lease, the term of which does not expire until March 31, 2056. In addition to the demised premises, defendant Corner View Residence owns additional commercial lots on Southern Boulevard. Article II, section 4 of the lease contains the following restrictive covenant:

“So long as any portion of the Leased Premises is used as a pharmacy, Landlord shall not use or permit the use of any other portions of the Property as a pharmacy or for any retail pharmacy related services or for the sale of cigarettes, lottery tickets and any products and/or services found in a pharmacy and chain store operation such as Duane Reade, CVS, Rite Aide and/or Walgreens nor any other use which could conflict or compete with the business of Tenant, including the

sale of cigarettes and lottery tickets. The foregoing provisions of this [Section] shall not preclude Landlord's use of portions of the Property for the primary purpose of a medical office, dental office and/or optical office."

A memorandum of lease was filed with the City Register on March 29, 2011. The memorandum did not reflect the terms of the restrictive covenant.

By a lease dated August 1, 2013, defendant Corner View Residence leased another portion of its Southern Boulevard property to defendant 548 Grocery for use as a "grocery/deli store." According to plaintiff, defendant 548 Grocery sells products that fall within the ambit of the restrictive covenant.

Plaintiff commenced this action against the defendants seeking, among other relief, a permanent injunction enjoining them from leasing, subleasing or using any of defendant Corner View Residence's Southern Boulevard property for the purposes of selling items restricted by article II, section 4 of plaintiff's lease.

Plaintiff seeks a preliminary injunction against defendants enjoining and restraining them, pending a final determination of this action, from engaging in any of the conduct that plaintiff seeks to permanently enjoin. Plaintiff argues that a preliminary injunction is necessary to prevent plaintiff from suffering irreparable harm as a result of defendant Corner View's breach of plaintiff's lease; defendant 548 Grocery is selling products in contravention of article II, section 4 of plaintiff's lease, causing plaintiff to lose customers, revenue and business goodwill. Plaintiff asserts that it has satisfied the three-prong showing for a preliminary injunction: a likelihood of success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of the equities tipping in its favor.

In support of its motion, plaintiff offers its lease with defendant Corner View Residence, and the memorandum of lease. Also, plaintiff submits the affidavit of its president, who avers that defendant 548 Grocery is selling products sold by plaintiff, thereby directly competing with plaintiff, and that such conduct is proscribed by the restrictive covenant. Plaintiff's president states that defendant 548 Grocery has sold and continues to sell the following items (among others) that are covered by the restrictive covenant: cigarettes, soft drinks, health and beauty aids, baby diapers, batteries, razor blades, shaving cream, soap, paper towels, candy, window and other household cleaning products, and office supplies. Plaintiff's president also states that defendant Corner View Residence was notified in writing of the breach of the restrictive covenant, but that defendant failed to take any action to cure the breach. Plaintiff submits color photographs allegedly depicting defendant 548 Grocery's storefront and various products on that defendant's shelves.

Defendant 548 Grocery opposes the motion for a preliminary injunction, arguing that 548 Grocery had no notice of the restrictive covenant in plaintiff's lease and therefore is not bound by it; that 548 Grocery did not sell cigarettes or lottery tickets, the two specific goods listed in article II, section 4 of plaintiff's lease; and that plaintiff offered no evidence that it lost any business, revenue or business goodwill. Thus, says defendant 548 Grocery, plaintiff has not met its burden on the motion. Defendant 548 Grocery proffers the affidavit of its principal, who avers that he had no notice of the restrictive covenant invoked by plaintiff. He also avers that defendant 548 Grocery has never sold cigarettes or lottery tickets. Defendant 548 Grocery submits too its lease with defendant Corner View Residence; the contents of that

lease do not provide any notice of the restrictive covenant in plaintiff's lease.

Defendant Corner View Residence opposes the motion for the preliminary injunction. That defendant argues that the restrictive covenant is designed to prevent direct competition to plaintiff by another pharmacy and that defendant 548 Grocery is not a pharmacy or similar type establishment. Defendant Corner View Residence also argues that the restrictive covenant is vague and ambiguous, and should not be interpreted in plaintiff's favor so as to restrain the sale of items by defendant 548 Grocery that may be sold incidentally by plaintiff. In his affidavit, the agent of defendant Corner View Residence avers that plaintiff drafted the restrictive clause, that the clause's purpose was to prevent direct competition, and that defendant 548 Grocery competes with plaintiff only indirectly and incidently.

CPLR 6301 provides that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment in effectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 834 [2005]). The movant must demonstrate these elements by clear and convincing evidence (see Gilliard v Acquafredda Enterprises, LLC, 92

A.D.3d 19 [1st Dep't 2011]).

With respect to the first element, plaintiff failed to demonstrate, by clear and convincing evidence, a likelihood of success on the merits. The restrictive covenant¹ appears to prohibit the use of defendant Corner View Residence's property (1) as a pharmacy; (2) for any retail pharmacy-related services; (3) for the sale of cigarettes, lottery tickets and any products or services found in a pharmacy and chain store operation such as Duane Reade, CVS, Rite Aid or Walgreens; or (4) for any other use that could conflict or compete with plaintiff's business.

Defendant 548 Grocery does not operate a pharmacy. The first restricted use is therefore inapplicable. The second restricted use is similarly inapplicable because there is no evidence that defendant 548 Grocery provided retail pharmacy-related services, a phrase that is not defined or explained in plaintiff's lease and which the court construes to mean a quasi-pharmacy operation (see footnote 1).

The evidence on the motion suggests that defendant 548 Grocery sold neither cigarettes (although it did sell cigars) nor lottery tickets. Moreover, there is no suggestion (let alone evidence) regarding the products typically sold in a common pharmacy or one or more of the chain store operations specified in the restrictive

¹Any ambiguity in the restrictive covenant must, at least at this juncture, be construed against plaintiff, whom defendant Corner View Residence's agent claims drafted the covenant (see Highland Mechanical Industries, Inc. v. Herbert Construction Co., Inc. 216 A.D.2d 161 [1st Dep't 1996]). Additionally, a "covenant[] restricting the use of land [is] strictly construed against [the one] seeking its enforcement" (Blueberries Gourmet, Inc. v. Aris Realty Corp., 291 A.D.2d 520 [2d Dept 2002]).

covenant.² Thus, the third restrictive use is inapplicable.

Plaintiff did not offer any evidence specifying the products it sells, and the affidavit of its principal does not demonstrate persuasively the products sold by defendant 548 Grocery. (The principal does not disclose the basis of his statement that defendant 548 grocery is selling products prohibited under the restrictive covenant, and the photographs on which he relies have not been authenticated). In light of the absence of competent evidence identifying the products sold by plaintiff, and those sold by defendant 548 Grocery, the court cannot determine if defendant 548 Grocery is using the leasehold in a manner that conflicts or competes with plaintiff's business. The fourth restrictive use therefore cannot serve as the basis for granting a preliminary injunction.

Because plaintiff has not shown, by clear and convincing evidence, that defendants breached the restrictive covenant, plaintiff failed to demonstrate a probability of success on the merits.³

Plaintiff also failed to demonstrate, by clear and convincing evidence, a danger of irreparable injury in the absence of a preliminary injunction. As discussed

²None of the parties has asked the court to take judicial notice of the products typically sold by pharmacies and the court will not do so on its own accord (see Brown v. Muniz, 61 A.D.3d 526, 528 [1st Dept 2009]).

³Defendant 548 Grocery appears to have lacked notice of the restrictive covenant in plaintiff's lease, providing an additional reason to conclude that, as to that defendant, plaintiff is not likely to succeed on the merits (see Blueberries Gourmet, Inc v. Aris Realty Corp., 255 A.D.2d 348 [2d Dept 1998]). Although the memorandum of plaintiff's lease was filed with the City Register before defendant 548 Grocery executed its lease, that memorandum makes no mention of the restrictive covenant and plaintiff's lease was not publically available.

above, plaintiff did not offer any evidence specifying the products it sells and did not demonstrate persuasively the products sold by defendant 548 Grocery. The court therefore cannot determine whether defendant 548 Grocery is competing with plaintiff in contravention of the restrictive covenant, and, relatedly cannot determine whether plaintiff has sustained or will sustain any injury (let alone an irreparable one) as a result of a breach of that covenant.

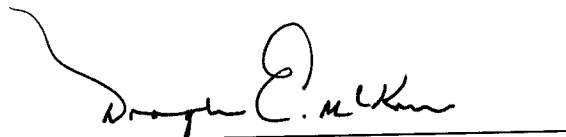
The last element of the preliminary injunction test has also gone unsatisfied. Plaintiff needed to demonstrate, by clear and convincing evidence, that a balance of the equities tips in its favor. Based on the evidence on the motion, it appears as though the harm to defendants (particularly defendant 548 Grocery) if the preliminary injunction is granted will be greater than the harm to plaintiff without the injunction (see Alexander, Practice Commentaries, McKinney's Cons Laws of N.Y., book 7B, C6301:2 at 13 ["the court should be able to conclude that the harm to the plaintiff without the injunction will be greater than the harm to the defendant if the injunction is granted"]). If the preliminary injunction was to be issued, defendant 548 Grocery might well be put out of business, a significant restraint being placed on its limited operation -- an operation that is necessarily limited by its lease, which restricts the use of the 548 Grocery leasehold to a "grocery/deli." Based on the motion record, the harm, if any, to plaintiff as a result of defendant 548 Grocery's operation cannot be accurately quantified. Maybe there has been no harm or only a minimal amount of harm, maybe there has been significant harm. The court cannot presume the latter (see Russian Church of Our Lady of Kazan v. Dunkel, 34 A.D.2d 799, 801 [2d Dept 1970] [preliminary injunction is "granted with great caution and

only when required by urgent situations or grave necessity and then only on the clearest evidence”]).

Accordingly, it is hereby ordered that plaintiff's motion is denied.

This constitutes the decision and order of the court.

Dated: 10/17/16

A handwritten signature in black ink, appearing to read "Douglas E. McKeon", is written above a solid horizontal line.

Douglas E. McKeon, J.S.C.