

<b>Shake Shack Fulton St. Brooklyn LLC v Allied Prop. Group LLC</b>
2018 NY Slip Op 33635(U)
February 15, 2018
Supreme Court, Kings County
Docket Number: 500424/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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SHAKE SHACK FULTON STREET BROOKLYN LLC,  
Plaintiff, Decision and order

- against - Index No. 500424/18

ALLIED PROPERTY GROUP LLC,  
Defendant, February 15, 2018

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has filed a motion seeking a preliminary injunction pursuant to CPLR §6301. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On July 30, 2010 the plaintiff tenant entered into a twenty year lease with defendant owner concerning the rental of commercial space located at 409 Fulton Street in Kings County. Specifically, the location was a restaurant which included a sidewalk café and the plaintiff, a popular restaurant, likewise leased the property including the sidewalk café. Indeed, on February 22, 2011 the defendant signed a 'Consent Form' as part of the plaintiff's permit application with the New York City Department of Consumer Affairs [hereinafter 'DCA'] seeking to perform renovations of the sidewalk café. The 'Consent Form' informed that agency that the landlord consents to any

renovations to the sidewalk café. Further, the defendant signed, and thereby approved, architectural plans prepared by the plaintiff concerning the renovation of the sidewalk café. The DCA approved the sidewalk café along with any renovations and on May 12, 2015 the DCA and the plaintiff entered into an 'Enclosed Sidewalk Café Revocable Consent Agreement' for a period of two years. The Agreement acknowledged that the defendant landlord consented to such café and that the plaintiff would pay all necessary fees. Due to a filing error the 2015 Agreement expired prior to securing a new agreement, necessitating further consent from the defendant landlord. The defendant has refused to grant such consent precipitating this action. The plaintiff seeks to enjoin the defendant from withholding consent. The defendant counters such injunction is improper and the consent need not be provided.

#### Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success

on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009], Ricca v. Ouzounian, 51 AD3d 997, 859 NYS2d 238 [2d Dept., 2008]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994], Schneider Leasing Plus, Inc. v. Stallone, 172 AD2d 739, 569 NYS2d 836 [2d Dept., 1991], Fischer v. Deitsch, 168 AD2d 599, 569 NYS2d [2d Dept., 1990]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each of these three elements, namely 1) the likelihood of success on the merits 2) the prospect of irreparable injury absent the injunction and 3) a balancing of the equities in the movant's favor "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010], Berkoski v. Board of Trustees of the Incorporated Village of Southampton, 67 AD3d 840, 889 NYS2d 623 [2d Dept., 2009], Ginsburg v. Ock-A-Bock Community Assn., Inc., 34 AD3d 637, 825 NYS2d 119 [2d Dept., 2006]).

Regarding the first prong, for the plaintiff to establish a likelihood of success on the merits, he typically must

establish a prima facie case or cause of action (McLaughlin, Piven, Vogel, Inc., v. W. J. Nolan & Co., 114 AD2d 165, 498 NYS2d 146 [2d Dept., 1986]). It is true that the term 'sidewalk café' does not appear in the lease, however, that does not end the inquiry. There is also no dispute that the owner did sign a Consent Form. The defendant argues any consent they gave concerning the sidewalk café was merely temporary and did not evince a permanent condition. Consequently, the defendant argues the denial of the request at this stage is not a breach of the agreement. However, there is no indication the approval was temporary. The case of DMF Gramercy Enterprises Inc., v. Lillian Troy 1999 Trust, 123 AD3d 210, 994 NYS2d 605 [2014] is instructive. In that case the lower court accepted a stipulation wherein the parties agreed the words 'sidewalk café' did not appear in the lease and the Supreme Court held, nevertheless, that the owner could not withhold or revoke consent for the operation of the sidewalk café. The Appellate Division noted that lease in fact did contain a clause which required the owner to execute any consents concerning a sidewalk café and held that clause dispositive of the issue on appeal. The court noted the stipulation was "contrary to the very evidence submitted by the parties" and could not be bound by it (id). The court then stated that "in any event, we will address defendant's argument-based on the stipulated absence of the term 'sidewalk café' from

the lease-that they may terminate their consent absent a showing of good faith, to ensure that the parties have been sufficiently heard" (id). The court then engaged in two inquiries, first whether the lease gives the tenant the right to make use of the sidewalk area as a café. The court concluded that since the sidewalk café existed when the lease was executed "the parties contemplated the tenant's continued use of the sidewalk to operate the café" (id).

Likewise, in this case, the lease, although silent about a specific sidewalk café does provide that "Landlord consents to Tenant, performing, in accordance with all Legal Requirements, all structural and non-structural alterations to the Demised Premises to enable Tenant to build out the Demised Premises as a "Shake Shack" restaurant consistent in design and decor (i.e. painting, wall paper and coverings, floor tile, lighting, window blinds and carpeting) to Tenant's affiliate's location at 366 Columbus Avenue, New York, New York" (see, Rider to Lease ¶ 77A(9)(A)). There is no dispute that unlike Shake Shack affiliates in the Barclay's Center in Kings County or in Penn Station in New York County as urged during oral argument, the affiliate at Columbus Avenue does have a sidewalk café. The owner argues that notably absent from the list of items to which this Shake Shack may resemble the affiliate at Columbus Avenue is a sidewalk café and that the provision of the lease under discussion only refers to the "consistency of design and decor

elements" and that "it does not require that the physical appearance of the restaurant space is to be identical" (see, Memorandum of Law in Opposition, page 9). However, the provision stated that "all structural and non structural alterations" may resemble the Columbus Avenue affiliate rendering ambiguous the precise reach of the comparison. Therefore, as in DMF Gramercy Enterprises Inc., (supra) the court will look to the surrounding facts and circumstances to determine the intent of the parties. Therefore, the fact a sidewalk café existed prior to the execution of the lease and indeed the owner gave consent as expressed in the Consent Form, "the parties contemplated the tenant's continued use of the sidewalk as a café" DMF Gramercy Enterprises Inc., (supra). Therefore, the lease afford the tenant the right to the sidewalk café.

The second inquiry undertaken in DMF Gramercy Enterprises Inc., (supra) was whether the landlord could "withhold or revoke their consent to that use absent a good-faith basis" (supra). The court concluded the defendant owner could not deny the permission necessary since to do so "would destroy plaintiff's right to 'receive the fruits of the contract' inasmuch as those fruits are gained by operating the sidewalk café" (supra). Contrary to the arguments of the landlord in this case that DMF Gramercy Enterprises Inc., does not control because in that case "the lease there specifically provided for the sidewalk café, a fact not present here" (see, Memorandum of Law in Opposition,

page 15) the court in DMF Gramercy Enterprises Inc., held quite the opposite. The court stated that "because the stipulated facts demonstrate that the sidewalk café existed at the time of the lease's execution, plaintiff...was justified in understanding that the landlord promised to refrain from unreasonably withholding its consent to operate the sidewalk café" (supra) clearly basing the covenant of good faith and fair dealing upon "promises which a reasonable person in the position of the promisee would be justified in understanding were included (supra, quoting 511 W. 232<sup>nd</sup> Owners Corp., v. Jennifer Realty Co., 98 NY2d 144 [2002]) even though not actually expressed in any contractual language. Furthermore, the landlord in this case has not presented any good faith basis for refusing to grant the consent requested. Indeed, Michael Chera a member of Allied the owner of the premises states in an affidavit that "Landlord decided not to sign the consent form because the property, at the corner of Adams and Fulton Streets in Downtown Brooklyn, is a prime location for development" and the existence of the sidewalk café "but increasing the building's height could be significantly more difficult, and expensive-if not impossible- if the sidewalk café remains" (see, Affidavit of Michael Chera, ¶ 11) essentially conceding the denial of any consent is not in good faith. Therefore, the plaintiff has presented viable causes of action against the defendant which satisfy the first prong seeking an injunction.

To establish the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County 2009]). Thus, harm to one's business reputation is a sufficient harm seeking an injunction (see, Klein, Wagner & Morris v. Lawrence A. Klein P.C., 186 AD2d 631, NYS2d 424 [2d Dept., 1992]). In addition "it is well settled in New York that the loss of the business relationship which ostensibly took time and money to cultivate, constitutes irreparable harm that cannot be compensated by money damages" (see, Liberty Ashes, Inc., v. Taormina, 43 Misc3d 1213(A), 988 NYS2d 523 [Supreme Court Nassau County 2014]). The plaintiff's business model is based, in large measure, upon the sidewalk café and the relationship that has fostered with consumers. This relationship will surely be undermined if the consent is withheld. Therefore, the second prong has been satisfied.

Regarding the third and final prong, namely the balancing of the equities, it is true that this is a subjective test. The Second Department has stated that in balancing the equities, it "must be shown that the irreparable injury to be sustained... more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction" (McLaughlin, supra). The harm caused to the plaintiff is readily apparent. On the other hand, any harm caused to the defendant through the

imposition of the injunction is hard to quantify and difficult to assess. This is particularly true where there is no specific harm to which the defendant can point other than vague assertions of development costs. Therefore, considering the equities in this particular case it is clear that the balance of the equities favors the plaintiff.

Therefore, based on the foregoing, the motion of the plaintiff seeking an injunction is granted.

So ordered.

ENTER:

DATED: February 15, 2018  
Brooklyn NY

  
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Hon. Leon Ruchelsman  
JSC

  
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