

T&J 2006, LLC v Convenience on Columbus Corp.

2024 NY Slip Op 31618(U)

May 3, 2024

Supreme Court, New York County

Docket Number: Index No. 151698/2024

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

T&J 2006, LLC,

Plaintiff,

- v -

CONVENIENCE ON COLUMBUS CORPORATION,

Defendant.

-----X

INDEX NO. 151698/2024

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 2, 11, 12, 18, 19, 20, 21, 22, 23, and 24

were read on this motion for A PRELIMINARY INJUNCTION.

LOUIS L. NOCK, J.

Upon the foregoing documents, plaintiff’s motion for preliminary injunctive relief is denied, for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 18, 21, 22), and the exhibits attached thereto, as supplemented by oral argument held on April 11, 2024, in which the court concurs, as summarized herein.

Background

Plaintiff T&J 2006, LLC, the owner and landlord of the building known as 550 Columbus Avenue, New York, New York, brings this action against Defendant Convenience on Columbus Corporation, the tenant of part of the first floor and basement in the building (the “Premises”). Plaintiff claims that Defendant breached the lease, dated March 23, 2022, between the parties (the “Lease”) by selling tobacco, tobacco-related products, and cannabis without the proper licenses. Pursuant to Article 15 of the rider to the Lease, Defendant agreed to obtain all licenses necessary for the conduct of its business as a retail seller of tobacco and related products in the Premises (lease, NYSCEF Doc. No. 6 at 10 ¶ 15, 13 ¶ 33). According to a letter, dated January

9, 2024, to Plaintiff from the New York City Sheriff's Office (the "City"), the City issued a notice of violation to Defendant for the unlicensed sale of tobacco or cannabis products in the Premises (notice, NYSCEF Doc. No. 7). The letter also provides that "the City is empowered to request that the building owner or landlord initiate an action to remove tenants from the property pursuant to Real Property Actions and Proceedings Law § 715, which prohibits the use or occupancy of demised real property 'in whole or in part *for any illegal trade, business, or manufacture*' (emphasis supplied)."

Upon commencing this action on February 26, 2024, Plaintiff moved, by order to show cause, for a preliminary injunction: (i) compelling Defendant "to obtain all the necessary license(s) to sell tobacco or cannabis products" as required by Articles 15 and 33 of the rider to the Lease; and (ii) "enjoining and restraining Defendant from selling tobacco and cannabis products from the Premises in violation of New York City Administrative Code Section 7-703 until the necessary license(s) are issued" (order to show cause, NYSCEF Doc. No. 11). This request reflects the permanent injunctive relief sought in the complaint (NYSCEF Doc. No. 1, ¶ 20).

Standard

"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 ineffectual" (CPLR 6301). Preliminary injunctions "should be issued cautiously and in accordance with appropriate procedural safeguards" (*Uniformed Firefighters Assn. of Greater N.Y. v City of N.Y.*, 79 NY2d 236, 241 [1992]). "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 Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Unlike ordinary preliminary injunctions, mandatory injunctions, in which the court directs a party to perform some act to preserve the status quo rather than refrain from doing so, are disfavored (*Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 265 [1st Dept 2009] [“courts are generally reluctant to grant mandatory preliminary injunctions”] [internal quotation marks and citation omitted]). “A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite” (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 617 [1st Dept 2018]). The movant must satisfy a “heavy burden of proving a clear right to mandatory injunctive relief” (*Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 794 [2d Dept 1995]). Where the requested relief would effectively grant the movant the ultimate relief sought, or where the record establishes “sharp issues of fact, injunctive relief should not be granted” (*Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011] [internal quotation marks and citations omitted]).

“The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts” (*Nobu Next Door, LLC*, 4 NY3d at 840).

Discussion

Here, conflicting affidavits submitted by the parties raise issues of fact which can impede the issuance of injunctive relief at this time (*see, Lehey, supra*). An affidavit by Plaintiff’s property manager contends that Defendant engaged in the unlicensed sale of tobacco and cannabis, based on the above-referenced January 9, 2024, letter from the City regarding the

issuance of a notice of violation addressed to Defendant, as well as two summonses and seven notices of violation issued by the City to Defendant (Henderson affidavit, NYSCEF Doc. No. 4; notice, NYSCEF Doc. No. 7; summons and notices of violation, NYSCEF Doc. No. 8).

However, in an affidavit by its authorized agent, Defendant denies selling unlicensed products in the Premises and attests that it has a license to sell cannabidiol, CBD, and CBD-related products (Kassim affidavit, NYSCEF Doc. No. 18, ¶¶ 5, 18). Defendant also attests that it paid the City's fines pursuant to a settlement agreement with the NYC Department of Consumer and Worker Protection (the "DCWP"), to the tune of the not-insignificant sum of \$108,000 (Kassim affidavit, NYSCEF Doc. No. 18, ¶¶ 17, 23; settlement payment, NYSCEF Doc. No. 20). Thus, at this early stage of the case, the likelihood of Plaintiff's success on the merits is unclear (*see R&G Brenner Income Tax Consultants v. Fonts*, 206 AD3d 943, 944 [2d Dept 2022] ["While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits . . . to such a degree that it cannot be said that the plaintiff established a clear right to relief."] [internal quotation marks and citation omitted]).

Further, in the event of any default by Defendant "in fulfilling any of the covenants of this lease" (of which failure of licensure is one [Lease at 10 ¶ 15]), Plaintiff may serve Defendant a written notice of the default; Defendant has an opportunity to cure it; and failing to do so, Plaintiff may serve a notice of termination (lease, NYSCEF Doc. No. 6 at 3 ¶ 17). The court, at this time, does not identify any provision of the Lease authorizing compulsory process to enjoin Defendant to affirmatively procure the licenses it may or may not need to procure. Plaintiff

remains free to commence Lease termination efforts and any court proceedings designed to enforce such termination.¹

As for any finding of irreparable harm, Plaintiff has asserted that any unlicensed sale by Defendant of the subject products can produce lasting damage to its reputation in the neighborhood (Henderson affidavit, NYSCEF Doc. No. 4, ¶ 17). However, without more, Plaintiff fails to demonstrate that this alleged harm is imminent and not speculative (*see Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 716 [2d Dept], *appeal dismissed* 17 NY3d 875 [2011]).

Finally, balancing of the equities favors denying the requested relief. Plaintiff avers that absent the injunction, it “could be subject to fines and penalties from the City as well as long lasting damage to the Premises and Building” (Henderson affidavit, NYSCEF Doc. No. 4, ¶ 23). But as the City itself informed Plaintiff in its January 9, 2024, letter, “the building owner or landlord [can] initiate an action to remove tenants from the property pursuant to Real Property Actions and Proceedings Law § 715” (NYSCEF Doc. No. 7). Plaintiff would be hard-pressed to argue that it faces any imminent risk of harm from the City’s enforcement arm by following the very advice imparted by the City to it as to how it can deal with the situation of a tenant conducting business in alleged violation of licensing laws.

¹ The court notes that at oral argument, Defendant’s counsel expressed a willingness on Defendant’s part to cure any defaults that might exist, and Plaintiff’s counsel expressed an interest on Plaintiff’s part in working with Defendant in continuing the landlord-tenant relationship, as appropriate under the law (*see*, Lease at 10 ¶ 15 [“Landlord shall fully cooperate with Tenant in securing and maintaining Governmental licenses and permits . . .”]).

Accordingly, it is
ORDERED that the motion is denied.
This constitutes the decision and order of the court.

ENTER:



<u>5/3/2024</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE