Downtown Barre Development v. C&S Wholesale Grocers, Inc., No. 669-10-02 Wncv
(Teachout, J., Mar. 1, 2007)

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DOWNTOWN BARRE DEVELOPMENT	)	**WASHINGTON SUPERIOR COURT**
A Limited Partnership	)	**Docket No. 669-10-02 Wncv**
	)	
v.	)	
	)	
C & S WHOLESALE GROCERS, INC.,	)	
GU MARKETS, LLC.,	)	
GU MARKETS OF BARRE, LLC	)	
	)	
MAXI DRUG, INC., Intervenor	)	

RULINGS ON PENDING MOTIONS

This case is on remand from a decision of the Vermont Supreme Court entered May 28, 2004. The Court reversed the trial court decision, and vacated the permanent injunction that the trial court had entered. On remand, judgment has been entered for Intervenor and Defendants. Pursuant to the opinion of the Court, the trial court is directed to consider Intervenor's claim for damages resulting from "the wrongful issuing of the injunction" pursuant to 12 V.S.A. § 4447. Several motions are pending.

DBD's Jury Demand, filed September 17, 2004

DBD filed a demand for trial by jury on all issues so triable. Maxi objects and argues that the Intervenor is seeking enforcement of equitable rights in the context of a wrongful issuance of an equitable remedy to Plaintiff, and there is no right to a jury trial in equitable actions.

The case as a whole combined equitable and legal claims, and was tried to the court. The only remaining issue is a claim resulting from the issuance of an injunction, an equitable remedy based on Plaintiff's claim for equitable relief from the court. The present remaining claim is founded on a statute that applies only to causes of action in equity, and the statute does not provide for trial by jury. "Once invoked, equity retains jurisdiction over the entire action to see that complete relief is administered." *Soucy v. Soucy Motors, Inc.*, 143 Vt. 615, 617 (1983). Thus, there is no right to a jury trial.

For the foregoing reasons, the court *strikes Plaintiff's jury demand.*

DBD's Motion for Relief from Judgment, filed October 1, 2004

DBD seeks an amendment of the Judgment of August 19, 2004 in the form of adding a provision that Maxi Drug may not cut, remove, or replace structural systems without prior written agreement from DBD. The request is based on the argument that the Vermont Supreme Court did not reverse that portion of the trial court decision concerning structural work to the property.

The cutting, removal, and replacement of structural systems that was the subject of the Plaintiff's complaint was all related to the division of the leased premises into two parts. The Court did not address in detail the issue of disturbing structural systems in general; it addressed the issue only as it related to the plan to divide the leased premises. In vacating the injunction, the Court vacated it in its entirety, including Paragraph 3: "[Defendants] are hereby enjoined from cutting into, removing, or replacing structural systems on the premises without prior written agreement of Downtown Barre Development." Thus, the Court decided the issue as it relates to structural work undertaken for the purpose of dividing the leased premises.

DBD essentially asks this court for a new injunction in relation to cutting, removing, or replacing structural systems for purposes other than dividing the leased space in two. This is either an attempt to renew its prior claim, which is no longer before this court, or an attempt to raise a new claim on new facts. This court will not entertain a new claim in the form of a post-judgment motion for relief from judgment.

The court further notes that DBD has filed a new case, Docket # 225-4-05 Wncv, in which it seeks declaratory relief regarding the parties' respective rights and responsibilities with respect to structural aspects of the real estate on matters other than the division of the leased premises into two spaces. Plaintiff will have the opportunity to raise such issues in that case.

For the foregoing reasons, Plaintiff's Motion for Relief from Judgment is *denied.*

DBD's Motion for Summary Judgment filed January 15, 2005

Maxi seeks the following injunction damages from DBD under 12 V.S.A. § 4447:

Construction increase	118,000
Lost profits	735,000
Attorneys' fees	84,000
	$ 937,000

DBD seeks summary judgment on this claim on a variety of grounds. The facts are set forth in DBD's Statement of Undisputed Facts and Maxi's Response, and are undisputed.

DBD first argues that it is entitled to terminate the lease as a result of structural and mechanical work performed by Maxi, and pursuant to a clause in the GUMB/Maxi assignment agreement and Maxi's sublease to Lenny's Shoe and Apparel. As Maxi points out in its responsive memo, judgment has been entered in this case dismissing DBD's claim of termination of the lease. The only issue left in the case is Maxi's claim for damages based on the issuance of the injunction. This court does not have the authority in this case to reconsider any claim of entitlement to terminate the lease.

DBD argues that 12 V.S.A. § 4447 only applies if the trial judge dissolves a preliminary injunction in the final judgment at the trial court level, and that since that did not happen in this case, the statutory basis for Maxi's claim is inapplicable. As Maxi argues, a judgment is not final until an appeal is resolved. In this case, the final judgment for purposes of 12 V.S.A. § 4447 was the judgment issued on August 19, 2004 as a result of the Supreme Court reversal and as directed by the Supreme Court. Therefore, this argument fails.

DBD argues that Maxi is only entitled to damages for the time period during which the preliminary injunction was in effect, from November 22, 2002 to March 17, 2003, and not for the time period after the trial court decision, starting March 18, 2003. 12 V.S.A. § 4447 does not describe such a limitation. The statute provides that upon dissolution by final judgment, an enjoined party is "entitled to recover his actual damages caused by the wrongful issuing of the injunction." The court cannot conclude as a matter of law that any claim is limited to the time period of a preliminary injunction only.

DBD argues that any damage claim may not exceed the amount of the bond required of Plaintiff at the time of the issuance of the preliminary injunction, which has remained unchanged throughout the case, pursuant to an "injunction bond rule." As Maxi notes, the issue is governed by the holding in *Houghton v. Grimes*, 103 Vt. 54 (1930). "Thus it is seen that the assessment of injunction damages between the parties is no longer limited in amount by the penalty of the bond." *Id.* at 68.[1] This is consistent with the provisions of V.R.C.P. 65(c), which provides that the court determines the amount of security, or may waive it. There is no necessary relationship

[1]This principle was again used as part of the analysis for the result reached in *Town of Milton v. Brault*, 132 Vt. 377 (1974).

between what the court may determine to be appropriate at the time of a preliminary injunction hearing and an amount that later may be shown to "caused by the wrongful issuing of the injunction."

Alternatively, DBD asks the court to exercise its discretion and limit damages to the amount of the bond. Maxi is entitled under 12 V.S.A. § 4447 to recover damages in an amount that it can prove. *ADE Software Corp. v. Hoffman*, 172 Vt. 259 (2001). Thus, the amount to be determined is not a matter of discretion. The court declines to put a limit on any damage award as a matter of exercise of discretion.

DBD also argues that Maxi is estopped from seeking more than the bond amount in damages because it never asked for the bond amount to be increased during the litigation. While the bond provides security for an amount of injunction damages that may be determined later, the law, set forth above, is that injunction damages are not limited by the amount of the bond. Therefore, Maxi was under no obligation to continually update its bond request in order to preserve a right to claim injunction damages. It is subject to the requirement that its claim must be proved, but it is not estopped from claiming an amount in excess of the bond.

DBD claims that 12 V.S.A. § 4447 mandates recovery for successful defendants, and therefore violates various constitutional doctrines because it chills access to the courts. This argument ignores the requirement that the enjoined party must prove its claim. *ADE Software Corp. v. Hoffman*, 172 Vt. 259 (2001); *Houghton v. Grimes*, 103 Vt. 54 (1930). Recovery is not automatic by legislative mandate. The statute supplements the common law by specifying a basis for a claim, but as with any claim, it must be proved. The fact that a successful enjoined defendant has an opportunity to assert and prove a claim does not violate the constitutional provisions cited by Plaintiff.

What remains are undisputed facts and arguments relating to Maxi's claim for $937,000, consisting of three categories: construction increase, lost profits, and attorneys' fees.[2] Maxi's claim is for damages resulting from "the wrongful issuing of the injunction." 12 V.S.A. § 4447.

The first inquiry is the meaning of the element "wrongful issuing." In *Sykas v. Alvarez*, 126 Vt. 420 (1967), the court explained the purpose of injunction damages as an adjustment of the equities following invocation of the court's equitable power. The example used was a plaintiff who obtains an ex parte injunction that causes irreparable loss to a defendant, but that

[2]Maxi's response to DBD's Paragraph 50 in the Statement of Undisputed Facts suggests that Maxi does not completely confirm DBD's identification of the dollar amounts of Maxi's claim, but the response is not sufficient to overcome the establishment of them as fact pursuant to Rule 56(c)(2): "All material facts set forth in the statement . . . will be deemed to be admitted unless controverted by the statement" of the opposing party. The court has evaluated Maxi's response and the contents of Exhibits 15, 16, and 17, and does not find DBD's statement to be controverted.

turns out to be without basis once a hearing is held at which both parties are present. *Id*. at 421–22. Subsequent cases, as well as the language of the statute, show that such claims are not limited to damages incurred as a result of an injunction issued ex parte. *ADE Software Corp. V. Hoffman*, 172 Vt. 259 (2001).

The question arises in this case, however, as to the extent of a plaintiff's responsibility for the issuance of an injunction that was 'wrongful' in the sense that it was based on a legal interpretation by the trial court that was reversed on appeal, but not wrongful in the sense of being incautiously or recklessly obtained. Both the preliminary injunction and the final injunction issued only after extensive hearings and legal briefing, and the entitlement to an injunction turned on an interpretation of a lease in a manner that required close legal analysis. Despite the fact that the Supreme Court ultimately determined that the controlling language was "unambiguous," the reconciliation of that language with other lease terms was challenging. It is not necessarily obvious what the result of contract interpretation should be, even when the language is determined to be unambiguous. *Colgan v. Agway, Inc.*, 150 Vt. 373, 375 (1988). This was not a situation in which Plaintiff obtained an injunction that was based on inaccurate or incomplete facts, or was clearly inconsistent with established law.[3]

In these circumstances, equity favors subjecting the enjoined party's claim for damages to careful scrutiny to avoid penalizing Plaintiff or giving a windfall to the successful enjoined party. At the same time, the court is mindful that it was Plaintiff who chose to seek injunctive, as opposed to simply declaratory, relief. Thus, Plaintiff undertook some measure of risk that it would be responsible for costs resulting from an injunction if the ultimate ruling was that it was not entitled to it. In sum, while DBD should be responsible for damages flowing directly from its decision to pursue an injunction, Maxi's claim must be scrutinized closely in accordance with the equitable nature of the claim and in context of the particular circumstances of the case.

The burden is on Maxi to establish a right to injunction damages. *Sykas,* 126 Vt. at 422. Maxi must prove causation as to any damages it claims, and it must prove the amount of damages.

The first category is $118,000 of increased construction costs due to the delay in Maxi's ability to proceed with its alteration of the leased premises between November 2002 and the time when the project could be resumed in 2004 after the Supreme Court decision. In Exhibit 15, Maxi's increased costs of construction are sufficiently supported, and DBD does not dispute this

[3] In this case, the opinion of the Court did not address in a comprehensive way the issue in the case that was larger than the one concerning the division of the store space: to what extent can the tenant change structural systems for which DBD maintains responsibility as landlord? The problem of clarifying respective rights and responsibilities of the parties under the lease continues to plague the parties and has resulted in a second action in which declaratory relief on the issue has been requested. *Downtown Barre Development v. GU Markets of Barre, LLC*, 225-4-05 Wncv.

amount. By choosing to seek injunctive relief, DBD clearly undertook responsibility for increased construction costs due to delay arising directly from an injunction. This is a reasonable component of injunction damages to which Maxi is entitled.

The second category is described by DBD as lost profits in the amount of $735,000. The components of this portion of the claim are set forth in Exhibit 16. They include foregone profit from operating a store at the leased premises ($135,601), higher rent of operating at other locations rather than moving to the leased premises ($28,011), increase in rent at old store ($11,002), cost of lease at old store to retain presence in market area ($88,024), holdover penalty under lease at old store ($141,317), cost of employing an additional pharmacist ($64,992), loss of rent from ability to rent the second of the subdivided spaces ($234,500), cost of rent for insuring options ($19,740), and real estate taxes and "CAM" paid for old store for period after anticipated closing date ($12,029).

DBD argues that lost profits at a new store location are speculative and not recoverable. Maxi argues that it is well able to predict its lost profits because of its extensive experience in a large number of stores and its maintenance of reliable data. DBD has asserted no facts to controvert this.

DBD also argues that Maxi took a risk when, after it knew DBD filed the lawsuit requesting an injunction to prohibit subdividing the lease premises, it proceeded to purchase an assignment of the lease from GUMB. Therefore, it voluntarily assumed as a matter of business risk the costs associated with any injunction that might result from the suit.

Injunction damages were formerly determined by chancellors, who were the ones who determined whether principles of equity called for equitable injunctive relief in the first instance, and subsequently had the opportunity to adjust the equities by addressing injunctive damages claims if the injunction was wrongfully obtained. *Sykas*, 126 Vt. at 422. The power to enforce remuneration for losses under an injunction was an inherent power of courts of chancery and Defendants' requests for injunction damages under 12 V.S.A. § 4447 are "addressed to this power." *Couture v. Lowery*, 122 Vt. 505, 508 (1962).

The facts show that it was Maxi's own decision to accept the risks associated with entering a business situation in which there was inherently a high likelihood of litigation over rights under a lease, with a clear prospect of the issuance of an injunction that would affect business profits. Maxi did not even acquire its interest in the lease until after it knew of the distinct possibility of an injunction. Even though it was not a named defendant, it sought to intervene in the lawsuit and thereby made itself an "enjoined party." Equitable considerations do not favor liberal damages under such circumstances. This is especially so when the claim must be subject to careful scrutiny to avoid a penalty to a plaintiff and a windfall to an enjoined party.

Even if the issue is analyzed on purely legal, as opposed to equitable, principles, Maxi's claim for economic damages fails for two reasons. First, based on the undisputed facts, the

burden of proof by a preponderance of the evidence is not met as to the element of proximate causation of Maxi's claimed business damages. Maxi's own strategic choices were the direct cause of its claimed economic losses. As assignee under the lease, it controlled leased premises with an extremely advantageous rental value. During the pendency of the injunction, it had the opportunity to use that space in a single store design or sublease it. It did neither, but now seeks compensation for the effect of the decision it made instead. It cannot prove that Plaintiff caused these damages.

Even if causation were found, DBD has raised the legal affirmative defense of mitigation of damages. The undisputed facts show that DBD had the opportunity to mitigate economic losses by subleasing or seeking DBD's consent to proposed alterations for a single store design during the period the injunction was in effect. The affidavit of Howard Nobleman attached to Maxi's Response to the Motion is so generalized that it is insufficient to create a genuine issue of material fact as to whether Maxi sought consent and was denied by DBD. The undisputed fact is that Maxi did not contact DBD to pursue alterations for a single store project. Neither did it lease the store during the injunction period to minimize economic expense. Therefore, based on the undisputed facts, DBD prevails on its affirmative defense of failure to mitigate damages.

Thus, whether the claim for economic losses is analyzed on the basis of equitable considerations, or is treated as a legal claim for damages, Maxi has not proved its claim. The case is similar to *Houghton v. Grimes*, in which the enjoined party claimed economic loss as a result of the issuance of an injunction later dissolved, but was not able to prove that loss on the facts.

The third component claimed is attorneys' fees. Maxi cannot show a basis for recovery of attorneys' fees as injunction damages in this case for several reasons. The American Rule generally requires parties to pay their own fees unless an exception applies. In enacting 12 V.S.A. § 4447, the legislature did not expressly include attorneys' fees as an element of a claim for injunction damages. However, attorneys' fees may be recoverable if they result solely from the wrongful issuance of the injunction. *Sykas*, 126 Vt. At 422.

There could be factual situations in which attorneys fees represent actual damages from a wrongful injunction. A claim of this sort must be examined carefully. In *Sykas v. Alvarez*, the Court held that "where the only impact of the injunction is represented by legal expenses comparable to those faced by a defendant obtaining dismissal of an action at law, there will be a much stronger insistence on a showing that the injunction was indeed wrongfully issued." *Id.* at 423. In this case, there is the initial circumstance that Maxi chose to acquire the lease after the suit seeking an injunction was filed, and intervened to make itself an enjoined party. Furthermore, with or without an injunction, Maxi would have incurred comparable attorneys' fees. Plaintiff's claim for declaratory relief with respect to dividing the lease premises was a large part of the case. Maxi would have incurred attorneys' fees to litigate that issue even if no injunction had issued.

Plaintiff also asserted contract and ejectment claims and other related legal claims, and a claim for punitive damages. Maxi, having entered the case by intervening on its own initiative, undertook primary responsibility for defending all claims. Thus, as in *Sykas*, the legal expenses incurred are comparable to those that would have been faced by a party with Maxi's status who sought to intervene and defend, even if no injunction had issued.

For the foregoing reasons, DBD's Motion for Summary Judgment is *granted* as to Maxi's claim for injunction damages, except for Maxi's claim for increased construction costs. As to that portion of the claim, summary judgment is *granted* to Intervenor Maxi. The amount of $118,000 for increased construction costs was calculated in August 2004. Maxi is also entitled to prejudgment interest of $35,400 ($118,000 x .01 = $1,180 x 30 months = $35,400).

DBD's Motion to Compel Upon GUMB, filed July 15, 2005

DBD's discovery request is not relevant to any matter pending before the court.

Accordingly, the motion is *denied.*

DBD's Motion to Compel Upon Maxi Drug, Inc., filed September 8, 2006

DBD's requests are moot.

Accordingly, the motion is *denied.*

Order

For the foregoing reasons,

1. The court enters the rulings on pending motions as stated above, and

2. At such time as DBD pays to Maxi the sum due on the Judgment issued this day for injunction damages, DBD is entitled to terminate the bond required in December 2002.

Date at Montpelier, Vermont this 1st day of March 2007.

Mary Miles Teachout

Superior Court Judge