

Genesco Inc. v Thor Fifth Ave. LLC

2008 NY Slip Op 33671(U)

March 18, 2008

Sup Ct, NY County

Docket Number: 116638/07

Judge: Doris Ling-Cohan

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

PRESENT: LING COHAN
Justice

PART 36

GENESCO

INDEX NO. 116638/07

MOTION DATE _____

- v -
THOR FIFTH AVENUE LLC,
ET AL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for preliminary injunction

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2, 3

Answering Affidavits — Exhibits _____

4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff for a preliminary injunction is denied in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

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MAR 27 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/18/08

[Signature]
J.S.C.

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Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

-----X
GENESCO INC.,

Plaintiff,

-against-

Index: 116638/07
Motion Seq. No.: 001

**DECISION/
ORDER**

THOR FIFTH AVENUE LLC, *et al.*,

Defendants.
-----X

Plaintiff operates retail apparel stores under the trade names of "Journeys" and "Lids". The subject store is located on the ground floor of the building at 590 Fifth Avenue, New York, New York, owned by Defendants Thor Fifth Avenue LLC and 588-590 5 Ave LLC ("defendants").

On or about December 17, 2007, plaintiff filed the within order to show cause seeking a preliminary injunction pursuant to CPLR §6301: (1) prohibiting defendants, their agents, employees and all persons acting at their direction, from reinstalling a fence and construction shed covering the windows and access immediately in front of the commercial premises presently occupied by plaintiff; (2) requiring defendants, their agents, employees and all persons acting at their discretion or behalf, to remove any such fence and construction shed covering the windows and access immediately in front of commercial premises presently occupied by plaintiff; (3) enjoining defendants, their agents, employees and all persons acting at their direction or behalf, including its contractor, from restricting access and visibility to plaintiff's signage and premises by placing fences and construction sheds or other barriers immediately adjacent to or in front of the signage and the entrance to plaintiff's signage premises located at 590 Fifth Avenue, New York, New York; and (4) requiring defendants to replace signage or facsimiles thereof on the subject scaffolding in front of the premises.

By stipulation dated December 17, 2007, defendants consented to be "prohibited from reinstating or constructing the fence and construction shed covering the storefront to the premises, and the [parties agreed that the] status quo relating to such conditions shall remain".

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In seeking a preliminary injunction, plaintiff asserts that, in violation of the parties' lease, defendants are currently engaged in a construction project at the subject building, involving the installation of scaffolding, a fence and a construction shed, which has entirely covered the windows, signage and view of plaintiff's premises, and also restricts access. Plaintiff further maintains that it has suffered "serious economic damage" (§29, Affidavit in Support of Order to Show Cause), as a result of defendants' conduct, and that it will be irreparably harmed if this condition is not abated.

In opposition, defendants maintain that their actions with respect to the building renovation project are not in violation of the parties' lease and that any alleged harm suffered by plaintiff is purely economic and therefore the granting of a preliminary injunction is not warranted. Additionally, according to defendants, "even though plaintiff made no request for additional signage prior to making this motion, the landlord is in the process of affixing signage to the scaffold in accordance with the Lease". [¶3, Affidavit in Opposition].

Upon review of the submitted papers, it is ordered that plaintiff's motion for a preliminary injunction is denied, as detailed below.

A preliminary injunction is a drastic remedy which should only be granted where the movant has demonstrated in the moving papers a clear legal right to the relief demanded based upon the undisputed facts. *See Cohen v. Department of Social Servs.*, 37 AD2d 626, *aff'd* 30 NY2d 571(1972); *William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423, 424 (2nd Dept 2001). Being a provisional remedy, its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits. *Residential Board of Managers of the Columbia Condominium v. Alden*, 178 AD2d 121 (1st Dept 1991). To be entitled to a preliminary injunction, plaintiff must clearly demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in their favor. *See W.T. Grant Co. v. Srogi*, 52 NY2d 496, 517 (1981); *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 (1990); *Borenstein v. Rochel Props., Inc.*, 176 AD2d 171, 172 (1st Dept 1991). Irreparable injury has been held to mean an injury for which monetary

damages are insufficient. *See James v. Gottlieb*, 85 AD2d 572 (1st Dept 1981); *Klein, Wagner & Morris v. Klein*, 186 AD2d 631, 633 (2nd Dept 1992).

Here, plaintiff has failed in the moving papers to meet its burden of establishing such requirements. In particular, plaintiff has not demonstrated that it will suffer irreparable injury if defendants are not enjoined from continuing with the building renovation project. Throughout the moving papers, plaintiff makes various references to the economic harm it has and will be suffering - including a "shortfall of sales at the store in excess of \$10,000.00 per week" [¶30, Affidavit in Support], "lost sales, damage to inventory and incidental management cleanup costs, as well as lost property" [*id.* at 35], "Genesco sales have plummeted Genesco cannot salvage the lost sales" [*id.* at 45]; however, financial harm is not considered to be "irreparable" and therefore does not warrant the granting of an injunction at this time. *See Hoppmann v. Sargent Stein, Inc.*, 141 AD2d 332 (1st Dept 1988); *Pinnacle Equities New York, Inc. v. Zapco 1500 Investment, L.P.*, NYLJ, September 3, 1997, at 22, col 4 (Sup Ct, New York County). Moreover, even if plaintiff is able to prevail on any of its causes of action, plaintiff has an adequate remedy at law, and thus, the harsh equitable relief sought herein, is not justified. *See Schulte Realty Co. v. Pulvino*, 179 NYS 371 (App Term, 1st Dept 1919); *Pinnacle Equities New York, Inc. v. Zapco 1500 Investment, L.P.*, NYLJ, September 3, 1997, at 22, col 4 (Sup Ct, New York County).

Moreover, plaintiff has not sustained its burden of demonstrating that a balance of the equities favors the granting of injunctive relief it seeks. *See W.T. Grant Co. v. Srogi*, 52 NY2d 496, 51 7 (1981); *Hoppmann v. Sargent Stein, Inc.*, 141 AD2d 332 (1st Dept 1988); *Borenstein v. Rochel Props., Inc.*, 176 AD2d at 172. If an injunction were to be granted as plaintiff requests, defendants would be prohibited from embarking upon a building renovation project at a cost of several million dollars; parties wishing to improve real property should not be discouraged.

Should courts order that construction projects be halted every time a disgruntled tenant claims inconvenience, our City would be severely impacted, especially during this crucial time of rebuilding Downtown Manhattan in the aftermath of 9/11. "The threatened damage to plaintiff[s] is speculative and easily compensable while the hardship to defendants, the inability to commence construction...would be far more harmful." *Hoppman v. Sargent Stein, Inc.*,

141AD2d 332, 334 (1st Dept 1988).

Preliminary injunctions are drastic remedies which should be used sparingly. *See* 67A NY Jur 2d, Injunctions §47. Thus, this Court declines to issue a preliminary injunction. *Nevertheless, the parties are encouraged to work together to alleviate any inconveniences during the renovation period.*

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied; it is further

ORDERED that any and all stay issued by the signing of plaintiff's order to show cause dated December 18, 2007, and the parties' stipulation dated December 17, 2007, are hereby vacated forthwith; and it is further

ORDERED that, within thirty days of entry of this decision/order, defendants shall serve upon plaintiff a copy with notice of entry.

This constitutes the decision and order of the Court.

Dated: March 18, 2008


Doris Ling-Cohan, JSC

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