Don Bautista Food, Inc. v King Jerome Realty, Inc.
2012 NY Slip Op 33858(U)
September 7, 2012
Supreme Court, Bronx County
Docket Number: 311436/11
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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DON BAUTISTA FOOD, INC. d/b/a C-TOWN, SUPERMARKET,

Plaintiff,

-against-

KING JEROME REALTY, INC., S & H BONDI'S DEPART. STORE, INC. and FAMILY DOLLAR,

Defendants.

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Index No. 311436/11
Submission Date: 3/12/12
DECISION and ORDER
Present:
Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion/Order to Show Cause and Exhibits Annexed	1
Affirmation in Opposition	2, 3
Reply Affirmation	

Upon the foregoing papers the Decision and Order on the motion are as follows:

This Order to Show Cause by plaintiff C-Town Supermarket ("C-Town") seeks, pursuant to CPLR § 6301, to preliminarily enjoin defendants from operating a retail establishment engaged in the sale of food, food products and beverages at a shopping center located at 1412-1424 Jerome Avenue, Bronx, New York ("the premises"), an order declaring the restrictive covenant contained in the deed as valid and enforceable, a restraining order against defendant S&H Bondi's Department Store ("Bondi") from operating in violation of the restrictive covenant, and granting C-Town legal fees and costs for these proceedings. Written opposition was submitted. The Order to Show Cause is granted in part and denied in part.

C-Town is a supermarket operating out of 1434 Jerome Avenue, Bronx, New York. Defendant King Jerome Realty, Inc. ("King Jerome") owns the adjacent building, 1412-1424 Jerome Avenue. Defendants Bondi and Family Dollar are tenants of King Jerome at 1412 Jerome Avenue.

In support of its Order to Show Cause, C-Town submitted, inter alia, a cease and desist letter to the defendants dated February 6, 2012, the deed for 1412 Jerome Avenue, the Bill of Sale dated April 6, 2004, showing the sale of Villa Trina Food Corp's ("Villa Trina") interest to C-Town, and the affidavit of Lazar Berkovits, the president of B & K Realty Management Corp., the partnership that owns 1434 Jerome Avenue. In support of their opposition, defendants King Jerome and Bondi submitted, inter alia, the affidavit of Solomon Kafif, the president of King Jerome and Bondi, and their lease agreement with defendant Family Dollar, dated June 9, 2011.

On February 1, 1991, King Jerome purchased the premises 1412-1424 Jerome Avenue from 1412 Jerome Associates of which Mr. Berovits was a partner. After purchasing the property, King Jerome built a commercial structure on the lot, known as the 1412 Building and formed a company, Bondi, a general merchandise discount store, which operates therein. The duly recorded deed to King Jerome contains a restrictive covenant which states in pertinent part:

> For good and valuable consideration, the party of the second part covenants that neither it nor its successors or assigns shall at any time hereafter **lease any space in the subject property**, nor in any manner permit any space therein, **to be used as a supermarket, grocery store, meat market, beverage distribution store or to be used by any food store selling food primarily for off-premises consumption** ... It is understood that this restrictive covenant is to run with the land and bind all future owners hereof. [Emphasis added]

In 1992, Villa Trina leased the premises located at 1434 Jerome Avenue from B & K Realty Management Corp. where it operated C-Town. In April 2004, Villa Trina sold its interest in C-Town to Don Bautista Food Inc.

In June 2011, King Jerome leased the ground floor and basement area of the 1412 Building to Family Dollar. The Family Dollar lease which states in pertinent part:

> 3. USE OF PREMISES. **Landlord agrees that the Demises Premises may be used for the conduct of a variety store, discount store, dollar store or variety discount store** ... Tenant will not change its use to a business other than a variety store,

> discount store, dollar store, variety discount store or discount clothing store if (i) such other use would **be substantially the same as another business located in the Building** being operated at the time Tenant gives notice of its intent to change its use of the Demised Premises, or (ii) **such other use would violate any exclusive use rights granted to any tenant in the Building** who has an existing lease with Landlord and is open for business at te time Tenant notifies Landlord ... [Emphasis Added]

In November 2011, Family Dollar began building on the leased premises with the intention of operating a retail establishment. However, construction has been halted as a result of this proceeding.

To obtain a preliminary injunction, the moving party must demonstrate a likelihood of success on the merits, irreparable harm if relief is not granted, and that the equities are balanced in the movant's favor. *Harbor View Ass'n of N. Haven v. Sucher*, 237 A.D.2d 488, 490, 655 N.Y.S.2d 97 (2d Dept. 1997). A preliminary injunction which seeks the same relief as a final judgment "is plainly inappropriate unless the undisputed facts are such that a trial is a futility." *Yome v. Gorman,* 242 N.Y. 395, 401-402, 152 N.E. 126 (1926); *Diesel Constr. v. Wolff & Munier, Inc.*, 37 A.D.2d 934 (1st Dept. 1971).

Preliminarily, a restrictive covenant will be enforced when the parties' intent is clear and the limitation is reasonable and not offensive to public policy. *Forest Hills Gardens Corp. v. Velonskis*, 309 A.D.2d 732, 765 N.Y.S. 2d 267 (2d Dept. 2003) citing *Chambers v. Old Stone Hill Road Assocs.*, 303 A.D.2d 536, 757 N.Y.S.2d 70 (2d Dept. 2003). Here, the intent of the restrictive covenant is to prohibit competition between C-town and an adjacent store selling food items for off-premises consumption. In fact, King Jerome and Bondi concede in their opposition papers that Family Dollar is precluded under its lease from operating as a supermarket, grocery store, meat market, beverage distribution store or food store. Restrictions on the type of business conducted or products sold by tenants are enforceable where such restrictive covenants are reasonable and not offensive to public policy. *See L.I.R. Management Corp. v. Mid-City*

Associates, 184 A.D.2d 235, 584 N.Y.S. 2d 559 (1st Dept. 1992); *Bethpage Theatre Co., Inc. v. Shekel*, 133 A.D.2d 62, 518 N.Y.S. 2d 408 (2d Dept. 1987); *Dennis & Jimmy's Food Corp. v. Milton Co.*, 99 A.D.2d 477, 470 N.Y.S. 2d 412 (2d Dept. 1984); *72nd & Broadway Gourmet Restaurant, Inc. v. Stahl Real Estate Co.*, 118 Misc. 2d 372, 460 N.Y.S. 2d 408 (NY County 1981).

A tenant of a successor party to a deed is entitled to enforce a restrictive covenant contained in the deed as a third-party beneficiary. *Brothers 3 Inc. v. Scappaticci*, 199 A.D.2d 234, 604 N.Y.S.2d 965 (2d Dept. 1993). A party may assert third-party beneficiary rights under a contract if a valid and binding contract existed between two parties, said contract expressly or impliedly intended to benefit the purported third-party, and the immediate benefit indicates an assumption that the contracting parties would compensate the third-party if the benefit is lost. *Mendel v. Henry Phipps Plaza West, Inc.*, 6 N.Y.3d 783, 786, 844 N.E.2d 748, 811 N.Y.S.2d 294 (2006).

Here, C-Town has standing to enforce the restrictive covenant in the deed as C-Town is a third-party beneficiary. *Brothers 3 Inc. v. Scappaticci*, 199 A.D.2d at 234. The deed to the premises is a valid and binding contract. The deed expressly intends to benefit C-Town as indicated in Mr. Berkovits's affidavit, which states that the restrictive covenant expressly intends to benefit C-Town by eliminating competition. Further, the immediate benefit indicates an assumption that C-Town would be compensated if the benefit is lost as Mr. Berkovits would not have sold the building without the inclusion of the restrictive covenant. Therefore, C-Town may seek to enforce the restrictive covenant as a third-party beneficiary.

While the restrictive covenant contained in the deed to the premises is binding and enforceable, the branch of C-Town's Order to Show Cause which seeks a declaration that the

restrictive covenant is enforceable against Bondi and Family Dollar is denied as it would have an effect of a final judgment as there would be nothing to try. *Yome v. Gorman,* 242 N.Y. at 401. Since all parties concede that the restrictive covenant would be enforceable against the defendants regarding food distribution, the Court is then left with the issue as to whether the defendants intended use violates the covenant, which is an issue of fact not law and a decision of it would have an effect of a final judgment.

The branch of C-Town's Order to Show Cause seeking to enjoin the defendants is granted as C-Town has established the likelihood of success on the merits, irreparable harm if relief is not granted and that the equities are balanced in its favor. *Weiss v. Mayflower Doughnut Corp.*, 1 N.Y. 2d 310 (1956).

A preliminary injunction cannot be granted without the filing of a sufficient undertaking that the C-Town will pay defendants if it is ultimately determined that C-Town was not entitled to the injunction. CPLR § 6312(b); *Litwa v. Litwa*, 89 A.D. 2d 581, 452 N.Y.S. 2d 241 (2d Dept. 1982) citing *Smith v. Boxer*, 45 A.D.2d 1054, 358 N.Y.S.2d 174 (2d Dept. 1974); *Blumberg v. Thomaston-Spruce Corp.*, 46 A.D. 2d 671, 360 N.Y.S.2d 43 (2d Dept. 1974); *Olechna v. Town of Smithown*, 51 A.D. 2d 1036, 381 N.Y.S.2d 321(2d Dept. 1976); *City Store Gates Mfg. Corp. V. United Steel Prods.*, 79 A.D. 2d 671, 433 N.Y.S. 2d 876 (2d Dept. 1980). Further, the purpose of an undertaking is to protect the defendant if the preliminary injunction was erroneously granted. *Honeywell Inc. v. Technical Building Services*, 103 A.D. 2d 433, 480 N.Y.S. 2d 627 (2d Dept. 1984). Here, the issuance of the injunction may interfere with King Jerome's anticipated rental income from Family Dollar of $280,000 per year. Thus, an undertaking of $280,000.00 is required to protect King Jerome from potential loss of rental income if it is ultimately determined that C-Town was not entitled to an injunction.

Costs and attorney's fees are not awarded as the making of the motion was not futile or frivolous and the request is denied. *115 West 21st Street, LLC v. McMullan*, 61 A.D. 3d 497, 877 N.Y.S. 2d 56 (1st Dept. 2009).

Accordingly, this Order to Show Cause is granted in part and denied in part. It is hereby

ORDERED, that defendants King Jerome and Bondi, their agents, servants, employees, tenants and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of the defendants or otherwise from operating a retail establishment engaged in the sale of food, food products and beverages located at 1412-1424 Jerome Avenue, Bronx, New York; it is further

ORDERED, that an undertaking is fixed in the sum of $280,000.00 conditioned that C-Town, if it is finally determined that it is not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED, that the C-Town serve a copy of this Decision and Order with Notice of Entry on the defendants.

Dated: September 7, 2012

SHARON A. M. AARONS, J.S.C.