

Commercial division update

The high standard for mandatory preliminary injunctions

Thomas J. Hall and Judith A. Archer,^{*} *New York Law Journal* – October 11, 2019

Commercial litigants often seek interlocutory equitable relief by moving for preliminary injunctions to maintain the status quo and protect their rights pending final judgment. Preliminary injunctions may be prohibitory or mandatory in nature; whereas a prohibitory preliminary injunction seeks to enjoin a party from engaging in certain action during the pendency of the case, mandatory preliminary injunctions compel a party to perform an affirmative act while the action is pending.

Because mandatory preliminary injunctions have the significant potential to disturb the status quo, they are subject to a higher standard than their prohibitory cousins, and are rarely granted except under extraordinary or unique circumstances.

General Standard

To obtain a prohibitory preliminary injunction, the moving party must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in the movant's favor. CPLR § 6301; *Zoller v. HSBC Mortg. Corp. (USA)*, 135 A.D.3d 932, 933, 24 N.Y.S.3d 168 (2d Dep't 2016).

To obtain a mandatory preliminary injunction, the movant must establish all of the above, and more. A mandatory preliminary 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." *St. Paul Fire & Marine Ins. Co. v. York Claims Serv., Inc.*, 308 A.D.2d 347, 349, 765 N.Y.S.2d 573, 574 (1st Dep't 2003).

Although the function of any preliminary injunction is to maintain the status quo until there can be a determination on the merits, New York courts likewise grant mandatory preliminary injunctions only where such relief is "essential" to maintaining the status quo. *Lehey v. Goldburt*, 90 A.D.3d 410, 411, 933 N.Y.S.2d 281, 282 (1st Dep't 2011); *see also Matos v. City of New York*, 21 A.D.3d 936, 937, 801 N.Y.S.2d 610 (2d Dep't 2005). It may appear contradictory at first that issuing a mandatory injunction compelling affirmative action could maintain the status quo but, as the Court of Appeals observed more than a century ago, such relief is necessary where "the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury." *Bachman v. Harrington*, 184 N.Y. 458, 464, 77 N.E. 657, 659 (1906) (quoting *Toledo, A. A. & N.M. Ry. v. Pennsylvania Co.*, 54 Fed. 730, 741 (N.D. Ohio 1893)).

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The heightened standard for mandatory preliminary injunctions does not apply, of course, to final mandatory injunctions, where there is no prohibition against altering the status quo.

Commercial Division Cases

A recent Commercial Division case addressing mandatory preliminary injunctions comes from Justice Marguerite A. Grays of the Queens County Commercial Division in *SBA Monarch Towers I, LLC v Hirakis*, No. 708532/2016 (Queens Co. Jul. 2, 2019). There, a wireless communications company leased property to operate its antenna facilities. The company brought an action against its landlord to obtain a declaratory judgment that the landlord breached the lease by prohibiting plaintiff's unrestricted access to the premises and by interfering with its work on its antenna facilities. During the pendency of the litigation, the plaintiff needed to file applications with the New York Department of Buildings ("DOB") which required defendant, as owner of the property, to sign certain forms. The landlord refused, and the plaintiff sought a mandatory preliminary injunction directing the defendant landlord to sign. Justice Grays initially determined that the plaintiff had satisfied the preliminary injunction factors, including a likelihood of success on the merits and irreparable injury. Justice Grays then examined whether the circumstances warranted a mandatory injunction, finding such relief was appropriate because it was essential to preserve the status quo by ensuring "the existence of an ongoing business."

In another Commercial Division case, *Smile for Kids, Inc. v. Madison Square Garden Co.*, 52 Misc. 3d 629, 634, 32 N.Y.S.3d 866, 870 (N.Y. Co. May 20, 2016), ticket brokers purchased season tickets to Knicks and Ranger games at Madison Square Garden, which they resold to their clients. The brokers sued the Garden when it reduced the number of season tickets a customer could control. As the brokers allegedly controlled over 700 seats, the Garden informed them that it would enforce its ticket limit policy by limiting a customer to eight seats. When the Garden failed to renew the brokers' and their clients' annual subscriptions, plaintiffs sought a mandatory injunction compelling the Garden to renew. Following settlement of some of the claims, the court was faced with sixty season ticket holders that the Garden refused to renew on the grounds that they had done business through or obtained financing from the brokers. Justice Barry R. Ostrager found that the Garden's refusal to renew the season subscription of these ticket holders, who paid for their tickets independently of the brokers, to be arbitrary and unenforceable. While the opinion does not delve into the requirement that such an injunction

must be necessary to maintain the status quo, it does suggest that Justice Ostrager found the injunction necessary to preserve the status quo by maintaining ticket holders' options to renew season tickets, and otherwise to prevent harm to them.

A plaintiff will likely be unable to show entitlement to a mandatory preliminary injunction where the plaintiff seeks payment of funds, as New York courts generally find that money damages typically is the final relief awarded on the merits of the case. In *Heller v. Lewis*, 28 N.Y.S.3d 648 (Albany Co. Dec. 21, 2015), Justice Richard M. Platkin denied a mandatory preliminary injunction because it would grant plaintiff the ultimate relief it sought in the complaint. There, corporate directors allegedly discovered that defendants, the company's CEO and CFO, had engaged in misappropriation and self-dealing of company assets and sued for money damages. The plaintiff, the executor of a deceased shareholder, brought a shareholder derivative action and sought a preliminary injunction preventing further payment to defendants and mandatory relief directing the return of money already paid. Justice Platkin found that because the latter sought mandatory, affirmative action, it was impermissible because it would alter the status quo and provide plaintiff with the ultimate financial recovery it sought in the action.

In *Schneck v. Schneck*, 875 N.Y.S.2d 823 (Nassau Co. Dec. 2, 2008), Justice Stephen A. Bucaria of the Nassau County Commercial Division denied a plaintiff's request for a mandatory preliminary injunction because it demanded "affirmative, *status quo* altering relief." There, the petitioner, a 50% shareholder and director of various business entities, alleged that the respondent co-owner of the companies was engaged in self-dealing, and that one of his businesses, also a respondent, had stopped paying his salary. Plaintiff sought a prohibitory preliminary injunction enjoining respondent from taking action to compel plaintiff either to sell his stake in the business, or transferring, conveying or selling plaintiff's shares. Plaintiff also moved for a mandatory preliminary injunction seeking restatement of his salary and profit distribution. Justice Bucaria found that it was appropriate to grant the prohibitory injunction, because it would maintain the prevailing status quo, but that a mandatory injunction should be denied as it would alter the status quo. Justice Bucaria also found that the demand should be denied as it "effectively constitutes a component of the 'ultimate relief' sought in the amended petition."

Other cases have denied similar requests for mandatory preliminary injunctions seeking the ultimate relief. For example, in *Maestro W. Chelsea SPE LLC v. Pradera Realty*

Inc., 954 N.Y.S.2d 819, 830 (N.Y. Co. Oct. 9, 2012), a contract dispute arose over a real estate owner's failure to obtain a waiver from its bank needed to effectuate its sale of air rights to the owner of the neighboring property pursuant to their contract. Plaintiffs, the owners of the neighboring property, alleged breach of contract for defendant's failure to obtain the waiver, and sought specific performance and compensatory damages. Plaintiffs then sought a preliminary injunction (1) prohibiting defendant from selling its air rights, and (2) directing defendant to use its best efforts to obtain the waiver. Justice Eileen Bransten of the New York County Commercial Division found that, although a prohibitory preliminary injunction was warranted to prevent the sale of defendant's air rights, the mandatory aspect was not because it would effectively grant plaintiffs the ultimate relief.

Conclusion

Although rare, recent Commercial Division cases show that mandatory preliminary injunctions may be granted under extraordinary circumstances where affirmative action is needed to maintain the status quo pending final judgment. A common pitfall for commercial litigants who are denied a mandatory preliminary injunction is that they seek the ultimate relief in the absence of such extraordinary circumstances or where, as in *Maestro*, a prohibitory preliminary injunction provides relief sufficient to maintain the status quo.

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