NY CLS CPLR R 6312

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Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 63 Injunction (§§ 6301 — 6330)

R 6312. Motion papers; undertaking; issues of fact.

(a) Affidavit; other evidence. On a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either 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; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

(b) Undertaking. Except as provided in section 2512 and in actions brought under section two hundred sixty-five-a of the real property law, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including:

1. if the injunction is to stay proceedings in another action, on any ground other than that a report, verdict or decision was obtained by actual fraud, all damages and costs which may be, or which have been, awarded in the other action to the defendant as

well as all damages and costs which may be awarded him or her in the action in which the injunction was granted; or,

2. if the injunction is to stay proceedings in an action to recover real property, or for dower, on any ground other than that a verdict, report or decision was obtained by actual fraud, all damages and costs which may be, or which have been, awarded to the defendant in the action in which the injunction was granted, including the reasonable rents and profits of, and any wastes committed upon, the real property which is sought to be recovered or which is the subject of the action for dower, after the granting of the injunction; or,

3. if the injunction is to stay proceedings upon a judgment for a sum of money on any ground other than that the judgment was obtained by actual fraud, the full amount of the judgment as well as all damages and costs which may be awarded to the defendant in the action in which the injunction was granted.

(c) Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1996, ch 24, § 1, eff Jan 1, 1997; L 2019, ch 167, § 6, effective August 14, 2019.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 162, 816, 819, 877, 878, 884– 886, 889, 890, 892, 893; CCP §§ 557, 559, 568, 603, 604, 607, 611, 612, 613, 616, 617, 619, 620, 636, 637, 640, 683, 689, 1990; Code Proc §§ 181, 182, 205, 219, 220, 222, 227, 229, 230; ch 449 of 1876, § 11; 2 RS 188, § 139; 2 RS 189, §§ 140, 141, 144; 2 RS 190, §§ 145, 147.

Amendment Notes

The 2019 amendment by ch 167, § 6, added "and in actions brought under section two hundred sixty-five-a of the real property law" in the introductory language of (b).

Commentary

PRACTICE INSIGHTS:

EVALUATING THE UNDERTAKING REQUIREMENT

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INSIGHT

The undertaking requirement under CPLR 6312(b) for a preliminary injunction is in contrast to the discretion to require an undertaking for a temporary restraining order ("TRO") under CPLR 6313(c). The mandatory undertaking for an injunction further distinguishes preliminary injunction from TRO practice, and should be considered in deciding whether and when to move for an injunction.

ANALYSIS

Plaintiff must give undertaking before preliminary injunction can be granted.

CPLR 6312(b) requires that the plaintiff must give an undertaking in an amount fixed by the court before a preliminary injunction can be granted. *See Hofstra Univ. v. Nassau County, N.Y.*, 166 A.D.3d 863, 87 N.Y.S.3d 248 (2d Dep't 2018); *JY Not So Common L.P. v. P & R Bronx, LLC*, 2023 N.Y. Misc. LEXIS 1973 (Sup. Ct. Bronx County 2023) . This language suggests that the undertaking is a jurisdictional requirement, or at least a condition precedent to issuance of a preliminary injunction. There is authority, however, that if a preliminary injunction is issued without requiring an undertaking, it is not void, but merely voidable by a motion to vacate, and upon motion the court may allow an undertaking to be filed *nunc pro tunc*. *See Dutcher v. Allen*, 93 A.D.3d 1101, 91 N.Y.S.2d 323 (3d Dep't 2012); *Putter v. Singer*, 73 A.D.3d 1147, 901 N.Y.S.2d 382 (2d Dep't 2010); *Livas v. Mitzner*, 303 A.D.2d 381, 756 N.Y.S.2d 274 (2d Dep't 2003); *Wiederspiel v. Bernholz*, 163 A.D.2d 774, 558 N.Y.S.2d 739 (3d Dep't 1990); *Wasus v. Young Sun Oh*, 86 A.D.2d 753, 447 N.Y.S.2d 545 (4th Dep't 1982).

Undertaking requirement may be an obstacle if potential damage from improvident issuance of preliminary injunction is serious.

The undertaking requirement can be a significant hurdle in some cases, where the potential damage from the improvident issuance of a preliminary injunction could be large. The CPLR 6312(b) undertaking requirement states that the amount should be sufficient to cover "all damages" that the defendant may sustain from the injunction. *See 159 Smith, LLC v. Boreum [sic]* 159 Smith, LLC v. Boreum Hill Prop. Holdings, LLC , 191 A.D.3d 741, 141 N.Y.S.3d 486; *Doran & Assocs., Inc. v. Envirogas, Inc.*, 112 A.D.2d 766, 768, 492 N.Y.S.2d 504, 506 (4th Dep't 1985), appeal dismissed, 66 N.Y.2d 758, 497 N.Y.S.2d 1028, 488 N.E.2d 131 (1985) (damages resulting from an improperly granted TRO are limited to the amount of the undertaking). *See also Darwish Auto Group, LLC v. TD Bank,* N.A., 224 A.D.3d 1115, 1119, 206 N.Y.S.3d 736, 743 (3d Dep't 2024) (reasoning the amount of an undertaking "should bear some rational relation to the potential damages that the defendant would suffer if the preliminary injunction is ultimately deemed unwarranted"). This means that the parties have the incentive to argue the size of the undertaking, which typically is covered by a surety bond, and that since

such bonds are expensive, in some cases the moving party will be unable to afford a bond or it will not be in that party's interest to obtain a bond. In that case, without an undertaking, the motion should be dismissed because the court is without discretion to grant the preliminary injunction without the undertaking. *See Hofstra Univ. v. Nassau County, N.Y.*, 166 A.D.3d 863, 87 N.Y.S.3d 248 (2d Dep't 2018) (the court used its discretion in ordering a de minimis undertaking where the methodology used to calculate millions of dollars in damages had not been sufficiently established).

Court has discretion to grant TRO *ex parte* and without requiring undertaking.

In contrast to CPLR 6312(b), CPLR 6313(c) provides that, as to a TRO application, the court has discretion to require an undertaking under the CPLR 6312(b) criteria, but need not do so. *See Fisher v. Hauman*, 2022 N.Y. App. Div. LEXIS 2110 (1st Dep't 2022); *Doran & Assocs., Inc. v. Envirogas, Inc.*, 112 A.D.2d 766, 768, 492 N.Y.S.2d 504, 506 (4th Dep't 1985). As a result, the court may grant a TRO *ex parte* and without requiring any bond to be posted.

The reason for the court to have discretion not to require an undertaking for a TRO but to be mandated to require that an undertaking be provided for a preliminary injunction is not clear. The argument that the court could simply set the amount of the undertaking for a preliminary injunction at $1 as a fair exercise of its discretion as to the amount of the undertaking under CPLR 6312(b) does not resolve the issue. Rather, it is most likely that the expedited, "immediate," *ex parte* nature of the TRO suggests that there is no time for an undertaking in such situations. Another reason may be that a TRO is thought to last only a short time period, or otherwise be less drastic than a preliminary injunction, even though that is not necessarily the case.

Counsel should consider seeking TRO rather than preliminary injunction.

The flexible undertaking requirement for a TRO as compared to a preliminary injunction is thus another reason that counsel should consider seeking a TRO, and not converting to a preliminary injunction application any faster than necessary. It is quite possible that a TRO could be granted

without an undertaking being required but, on the same facts, once converted to a preliminary injunction, the mandatory undertaking would be prohibitively expensive.

Advisory Committee Notes

Subd (a) of this rule is derived from CPA §§ 816, 877 and 878(1). Cf. CPA § 881. See notes to § 6301. RCP 80 is omitted and no special filing requirement, such as the ten-day provision governing attachment orders (rule 6212(c)), is made for injunction orders. See notes to rules 6112(a), 6212(c). Thus, entry and filing of the order are governed by proposed rule 2220, which covers orders generally. CPA § 901, which provided that on the hearing of the motion for a temporary injunction, or to vacate or modify it, "a verified answer has the effect only of an affidavit," is omitted. The purpose is obscure (cf. Code Civ Proc § 630, note (Throop ed 1880)), since a verification is nothing more than an affidavit appended to the pleading attesting to its truthfulness.

Subd (b) of this rule is based upon CPA §§ 819, 884, 885, 886, 889, 890, 892 and 893. CPA §§ 887, 888, 891, 896 and 900 stated general rules with respect to security, and have been incorporated in article 25. Cf. CPA §§ 148– 162; RCP 25–27. Since there is no common law liability for damages from an injunction erroneously granted, other than liability for malicious prosecution, the undertaking "creates, and is the sole basis for, the liability." See 10 Carmody-Wait, Cyclopedia of New York Practice 624, 776 (1954). In the case of a municipal corporation, which is exempt from the giving of security under former § 162, liability was expressly provided by former § 820. CPA §§ 162 and 820 are covered in § 2512. The opening paragraph of this subdivision is derived from former § 893 which set forth the general condition of the undertaking, viz.: to pay the defendant the damages he sustained by the injunction if it is determined that the plaintiff was not entitled to it. Although the particular provisions of former §§ 884, 885, 886, 889, 890 and 892 were treated as exceptions to former § 893, in reality they were elaborations on the damages that a defendant could sustain in the particular situations outlined. The list of exceptions in former § 893 was indeed, unaccountably incomplete, containing former §§ 884 and 886, for example, and not former § 885. Subparagraph 1 of this subdivision is derived from

former §§ 884 and 885. The stay of proceedings in another action, which is treated here, should be distinguished from a stay of proceedings in the action in which the stay is granted. The latter is not an “injunction” and the court has wide discretion as to whether to require security. See CPA § 167. The exception for fraud cases in former § 892 has been incorporated into each of the subparagraphs of this subdivision. It was apparently designed to permit a court to set the amount of security at less than the amount of the judgment or award, where circumstances indicated that the posting of full security would be a hardship upon a defrauded defendant. Subparagraph 2 of this subdivision is derived from CPA §§ 889 and 890. Cf. CPA § 990. Although CPA §§ 889 and 890 were phrased in terms of an “action of ejectment,” the civil practice act has long utilized “action to recover real property” in preference to the older phrase. See CPA §§ 990– 1011. The reference in terms of an “action of ejectment” is therefore obsolete and the newer phrase has been substituted. Subparagraph 3 of this subdivision is derived from former § 886. Although former §§ 885 and 886 provided for a deposit of money, CPA § 891 permitted an undertaking to be utilized in lieu of a deposit. This subdivision has been drafted in terms of an undertaking, since § 2501 defines an undertaking to include a deposit. Section 2508 permits modification of security. Cf. CPA § 900; § 6314. The language “prior to the granting of a preliminary injunction” is used as the undertaking should be required, as formerly, only upon the granting of a preliminary injunction and not upon the making of a motion therefor. Cf. CPA § 819.

1996 Recommendations of Advisory Committee on Civil Practice:

The Committee, in conjunction with the Commercial and Federal Litigation Section and with the CPLR Committee of the New York State Bar Association, recommends the amendment of CPLR 6312, relating to preliminary injunctions, to add a new subdivision (c) thereto to provide that, provided the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff’s papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the

motion, and that, in such event, the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

Current law in New York provides that if in papers submitted on a motion for a preliminary injunction “key facts” are in dispute or if there is a “sharp dispute of fact” revealed, the motion must be denied. E.g., Price Paper and Twine Co. v. Miller, 582 N.Y.S.2d 746 (2d Dept. 1992); Hart Island Committee v Koch, 137 Misc.2d 521, 520 N.Y.S.2d 977, 982 (Sup. Ct. 1987). The CPLR does not set forth this as a standard to be applied on such motions, but the rule is well-established. The effect of this rule can be harsh in a significant number of cases. In some cases, the contest over a preliminary injunction will determine an entire legal controversy. In a case, for example, in which the defendant has allegedly copied a customer list and purloined trade secrets, the plaintiff’s opportunity ultimately to obtain damages at a trial may be of absolutely no consolation or use. Since many defendants can present affidavits in which some sort of challenge to the plaintiff can be mounted, the current rule effectively deprives plaintiffs of a realistic and adequate day in court in many cases. Furthermore, the existence of this caselaw on disputes of fact makes the plaintiff’s chance of obtaining meaningful appellate review of the denial of a motion illusory. These limitations upon the adequacy of the preliminary injunction tool are not logically compelled: there is no absolute correlation between sharp disputes of fact and an inability to establish a probability of success on the merits.

New York practice permits the holding of hearings in order to resolve disputes of fact on motions (CPLR 2218), notwithstanding the rule cited above. The caselaw is sufficiently substantial and well-embedded, however, that hearings on preliminary injunctions appear to be relatively rare. This New York approach contrasts notably with that followed by the Federal courts. Pursuant to Fed. R. Civ. P. 65, hearings are often held on applications for preliminary injunctive relief. To the extent possible, Federal judges decide such motions without holding hearings, but if a substantial issue of fact is presented, a hearing will be held. See 11 C. Wright & A. Miller, *Federal Practice and Procedure* , Sect. 2949 (1973). The results appear to be

greater fairness to applicants without the imposition of undue burdens on opponents of such motions or on the court system.

The Committee proposes to revise CPLR 6312 to make clear that a dispute of fact alone is not grounds for denial of a motion for preliminary injunctive relief. This is accomplished by the addition of a new subdivision (c). In addition, modest alterations are made to the caption of 6312 and to subdivision (a) to make clear the proof on such a motion may consist of testimony at a hearing pursuant to CPLR 2218. The Court, however, is by no means obliged in every instance to call such a hearing. If the disputes of fact are not material or substantial, the court may resolve the motion on the papers alone. The court also may deny a motion despite disputes of fact if it is apparent that the plaintiff has not met the burden fo proof. The changes to CPLR 6312 do not remove or weaken the traditonal obligations of the plaintiff to demonstrate a likelihood of success on the metis, irreparable harm and a balance of the equities in the plaintiff's favor.

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I. Under CPLR

1. In general

Preliminary injunction is drastic remedy, should be awarded sparingly and only when party seeking it has met its burden of proving both clear and right to ultimate relief sought and urgent necessity of preventing irreparable harm. Buffalo v Mangan, 49 A.D.2d 697, 370 N.Y.S.2d 771, 1975 N.Y. App. Div. LEXIS 10551 (N.Y. App. Div. 4th Dep't 1975).

Where many complex issues remained to be resolved before it could be determined whether city marshals would ultimately succeed on merits of action brought to enjoin enforcement of certain orders and laws regulating them and where marshals did not establish that they were being deprived of statutorily mandated fees, court would not enjoin enforcement of existing fee schedule or other regulations during pendency of action. Brand v Bartlett, 52 A.D.2d 272, 383 N.Y.S.2d 668, 1976 N.Y. App. Div. LEXIS 11993 (N.Y. App. Div. 3d Dep't 1976).

In an action for a permanent injunction and monetary damages, an order granting the plaintiff a preliminary injunction to prohibit the defendants from placing their signs over signs placed by plaintiff on security gates manufactured and installed by it on premises throughout New York City would be modified to the extent of prohibiting the defendants from covering the plaintiff’s signs only in those instances where the defendants had not been called to service the fences; since a bond is required by CPLR § 6312(1), the court had no power to dispense with it and the case would be remanded for the purpose of fixing the amount of the bond. City Store Gates Mfg. Corp. v United Steel Products, Inc., 79 A.D.2d 671, 433 N.Y.S.2d 876, 1980 N.Y. App. Div. LEXIS 14048 (N.Y. App. Div. 2d Dep't 1980).

Court would reverse order which denied without hearing plaintiff’s application to preliminarily enjoin defendant from breaching terms of covenant not to compete where such denial effectively

rendered application for permanent injunction academic, and although CLS CPLR § 6312(c) was not yet effective, court would adopt statute's rationale and decline to follow its prior decisions. Independent Health Ass'n v Murray, 233 A.D.2d 883, 649 N.Y.S.2d 616, 1996 N.Y. App. Div. LEXIS 13369 (N.Y. App. Div. 4th Dep't 1996).

Where defendant second landowner wished to construct a wooden walkway over an alleged easement located on plaintiff first landowner's property and the first landowner filed an action for a declaration that the easement had been extinguished, the trial court properly granted the first landowner a preliminary injunction pursuant to N.Y. C.P.L.R. 6312 to enjoin the second landowner from constructing the walkway in order to preserve the status quo pending determination of the action. Livas v Mitzner, 303 A.D.2d 381, 756 N.Y.S.2d 274, 2003 N.Y. App. Div. LEXIS 2098 (N.Y. App. Div. 2d Dep't 2003).

Where plaintiff first landowner filed an action for a declaration that an alleged easement over the first landowner's property had been extinguished, the trial court erred in treating the first landowner's motion for a preliminary injunction to enjoin defendant second landowner from constructing a walkway over the disputed easement as a motion for partial summary judgment on the issue of whether the easement had been extinguished by abandonment and in resolving that issue, as adequate notice was not provided to the parties that the trial court would treat the motion as one for partial summary judgment on the abandonment issue and nothing in the record indicated that the second landowner sought summary judgment pursuant to N.Y. C.P.L.R. 3212 so as to permit the trial court to search the record and grant the first landowner partial summary judgment; the trial court's resolution of the abandonment issue was procedurally premature. Livas v Mitzner, 303 A.D.2d 381, 756 N.Y.S.2d 274, 2003 N.Y. App. Div. LEXIS 2098 (N.Y. App. Div. 2d Dep't 2003).

Because an individual stated claims on several theories for fraudulent conveyance under the Debtor and Creditor Law, the trial court erred in dismissing the claims and denying the individual's N.Y. C.P.L.R. § 6312(c) motion for a preliminary injunction; the individual was not collaterally attacking a prior decision because he was not a party to that action. Gutierrez v

Bernard, 27 A.D.3d 377, 814 N.Y.S.2d 90, 2006 N.Y. App. Div. LEXIS 3705 (N.Y. App. Div. 1st Dep't 2006).

Trial court erred in holding a hearing, which was, in effect, a nonjury trial, because the shareholders were entitled to a jury trial where their motion for a preliminary injunction had already been granted, the issues of fact on the motion were the ultimate issues in the case, and they sought monetary relief on behalf of the corporation and a shareholder individually for breach of contract, which was a legal claim. KNET, Inc. v Ruocco, 145 A.D.3d 989, 45 N.Y.S.3d 126, 2016 N.Y. App. Div. LEXIS 8694 (N.Y. App. Div. 2d Dep't 2016).

In an action by residential subtenant against the landlord for a judgment declaring him to be a legal subtenant and entitled to continued occupancy of the apartment, for damages, and for an order enjoining the landlord from disturbing the subtenant’s possession and from instituting summary eviction proceedings against him in Civil Court, the landlord’s summary dispossess proceeding in Civil Court would be enjoined pending determination of the action in the Supreme Court since, although both courts were competent to adjudicate the possession issue, the subtenant’s first cause of action sought declaratory relief which was beyond the jurisdictional purview of the Civil Court and could only be adjuducated in the Supreme Court, and since the Supreme Court had been the first court of competent jurisdiction to acquire jurisdiction of the matter. Hayman v Pacht, 108 Misc. 2d 622, 438 N.Y.S.2d 207, 1981 N.Y. Misc. LEXIS 2254 (N.Y. Sup. Ct. 1981).

Newsstand franchise created by New York City, N.Y., Loc. Laws No. 64 was held constitutional and enforceable against newsstand owners and operators, therefore, the owners and operators were denied a preliminary injunction to enjoin enforcement of the law since a court found that the location, building, and disability accommodation requirements were content neutral, narrowly drawn, rational, and objective regulations that reasonably balanced the owners’ and operators’ rights to conduct business with a significant public interest. However, the owners and operators defeated summary judgment sought by the Department of Transportation, the City of New York, and other defendants, as to their taking claim, because whether or not a taking occurred under

N.Y. Const. art. 1, 8, which was subject to compensation, was an issue for trial. Uhlfelder v Weinshall, 810 N.Y.S.2d 275, 10 Misc. 3d 151, 234 N.Y.L.J. 43, 2005 N.Y. Misc. LEXIS 1812 (N.Y. Sup. Ct. 2005), aff'd, 47 A.D.3d 169, 845 N.Y.S.2d 41, 2007 N.Y. App. Div. LEXIS 11141 (N.Y. App. Div. 1st Dep't 2007).

2. Discretion of court

Preliminary injunction is addressed to court's discretion. Buffalo v Mangan, 49 A.D.2d 697, 370 N.Y.S.2d 771, 1975 N.Y. App. Div. LEXIS 10551 (N.Y. App. Div. 4th Dep't 1975).

Special Term did not abuse its discretion in directing employer to continue payment of employee's medical insurance premiums during pendency of employee's wrongful discharge action, especially since employee (who was suffering from lymphatic cancer) would have been unable to obtain alternate medical coverage; furthermore, employee was properly directed to post undertaking covering cost of premiums. Gibouleau v Society of Women Engineers, 127 A.D.2d 740, 511 N.Y.S.2d 932, 1987 N.Y. App. Div. LEXIS 43224 (N.Y. App. Div. 2d Dep't 1987).

Mere fact that there might be questions of fact for trial did not preclude a trial court from exercising its discretion in granting an injunction. Matter of Kalichman, 31 A.D.3d 1066, 820 N.Y.S.2d 648, 2006 N.Y. App. Div. LEXIS 9632 (N.Y. App. Div. 3d Dep't 2006).

3. Criteria for issuing injunction

Plaintiff-landlord began action seeking damages and injunctive relief based upon defendant-tenant's alleged destructive and violent behavior in building; plaintiff submitted affidavits, two violations issued by authorities as result of defendant's activities, two criminal complaints against defendant and two letters of complaints by other tenants; defendant did not controvert any of these factual allegations; IAS court denied motion for preliminary injunction on grounds plaintiff "failed to submit proof from civil authorities or the building Tenants Organization

substantiating the allegations"–this was improvident exercise of discretion; movant only is required to submit affidavits in support of application for preliminary injunction and "may" submit "other evidence" if it so chooses (CPLR 6312 [a]); uncontroverted affidavits established plaintiff's likelihood of success on merits in underlying action, and irreparable harm to plaintiff absent grant of such requested relief; balancing of equities favors such relief, since injunction would provide some security to building personnel and to other tenants while merely restraining defendant from continuing unlawful or wrongful activities. Park South Assoc. v Blackmer, 171 A.D.2d 468, 567 N.Y.S.2d 226, 1991 N.Y. App. Div. LEXIS 3315 (N.Y. App. Div. 1st Dep't 1991).

Injunction was denied under CPLR §§ 6301, 6312, where plaintiffs failed to show either acts done in violation of their rights which would render any judgment ineffectual, or acts in violation of such rights which would cause injury. Grossman v Rankin, 40 A.D.2d 595, 335 N.Y.S.2d 991, 1972 N.Y. App. Div. LEXIS 3857 (N.Y. App. Div. 1st Dep't 1972).

In an action arising out of a rent strike to enjoin defendants from interfering with contractual relations between plaintiff and its tenant by collecting rent from plaintiff's tenants, it was an abuse of discretion to deny a preliminary injunction where plaintiff had shown a likelihood that it would succeed in obtaining an injunction and where plaintiff had made a clear showing that it would suffer irreparable harm unless granted the temporary relief in that the loss of rental income would jeopardize plaintiff's ability to maintain services for the premises. Further, plaintiff's failure to serve a complaint would not bar the issuance of a preliminary injunction since the action had been properly commenced by service of the summons with notice (CPLR § 305, subd. [b], CPLR § 3012, subd. [b]), and since the notice and affidavit in support of the injunction established the existence of a cause of action for a permanent injunction (CPLR §§ 6301, 6312, subd. [a]). Fairfield Presidential Associates v Pollins, 85 A.D.2d 653, 445 N.Y.S.2d 229, 1981 N.Y. App. Div. LEXIS 16468 (N.Y. App. Div. 2d Dep't 1981).

In an action to permanently enjoin a former sales manager from soliciting or doing business with potential customers of his former employer, the former employer was entitled to the injunction where the former sales manager had knowledge of customers and proposed prices that would

enable him to undermine the former employer's sales by offering customers the same product at a lower cost. Refrigeration Alarm Systems Corp. v Olsen, 87 A.D.2d 648, 449 N.Y.S.2d 6, 1982 N.Y. App. Div. LEXIS 15979 (N.Y. App. Div. 2d Dep't 1982).

Provider of services for homeless persons with AIDS was not entitled to preliminary injunction restraining city from terminating its contracts, because equities did not lie in provider's favor even though it served important public service, where city could not be forced to extend expired contracts against its will, and investigation had revealed possibility that provider was misusing public funds. Housing Works, Inc. v City of New York, 255 A.D.2d 209, 680 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 12526 (N.Y. App. Div. 1st Dep't 1998).

In action for breach of covenant not to compete, plaintiff was entitled to preliminary injunction barring further breaches during pendency of action where (1) defendants did not contest reasonableness of covenant, as to either geographic scope or time, and thus plaintiff proved likelihood of success on merits, (2) because covenant was part of consideration for sale of existing business with its good will, element of irreparable injury was proved, (3) equities favored plaintiff because, within one month after individual defendant joined competing firm, plaintiff's 2 largest customers, representing nearly ? of business's income before its sale to plaintiff, transferred their business to competing firm, and (4) in light of CLS CPLR § 6312(c), existence of triable issues of fact no longer defeats application for preliminary injunction. Frank May Assocs. v Boughton, 281 A.D.2d 673, 721 N.Y.S.2d 154, 2001 N.Y. App. Div. LEXIS 2029 (N.Y. App. Div. 3d Dep't 2001).

In an action to permanently enjoin defendants from construction upon the common elements of a condominium, plaintiffs demonstrated that the proposed structure would encroach upon portions of the common elements of the condominium, which could require an easement defendants did not seek, and would deprive plaintiffs of the use and enjoyment of certain common elements, as well as portions of their own units. The status quo would not be preserved absent a preliminary injunction. Stockley v Gorelik, 24 A.D.3d 535, 808 N.Y.S.2d 282, 2005 N.Y. App. Div. LEXIS 14095 (N.Y. App. Div. 2d Dep't 2005).

Order which granted, without a hearing, a village's motion for a preliminary injunction enjoining defendant from, among other things, constructing any structure on subject property for which no permit had been issued by the village, or which was the subject of a stop work order issued by the village was proper because, under N.Y. Village Law § 7-714, the village was entitled to a preliminary injunction without satisfying the traditional three-pronged test for preliminary injunctive relief; the village was required to demonstrate only a likelihood of success on the merits and that the equities were balanced in its favor, but did not need to demonstrate irreparable harm. The trial court correctly determined that the village demonstrated a likelihood of success on the merits, and the record clearly established that the equities were balanced in the village's favor. Incorporated Vil. of Plandome Manor v Ioannou, 54 A.D.3d 364, 863 N.Y.S.2d 241, 2008 N.Y. App. Div. LEXIS 6436 (N.Y. App. Div. 2d Dep't 2008).

Court did not abuse its discretion in granting plaintiffs' request for a preliminary injunction because the court properly found that plaintiffs were likely to succeed on the merits as defendant's explanation for making the modifications to users' access to the bank accounts to prevent fraud did not affect plaintiffs' probability of success because he lacked the authority to make unilateral decisions, and plaintiffs established a danger of irreparable injury as, following defendant's bank modifications, the bank refused to recognize the authority of the governing bodies, and the treasurer's affidavit detailed the financial effects that this would have on plaintiffs. Darwish Auto Group, LLC v TD Bank, N.A., 224 A.D.3d 1115, 206 N.Y.S.3d 736, 2024 N.Y. App. Div. LEXIS 996 (N.Y. App. Div. 3d Dep't 2024).

Inventor that established a likelihood of prevailing on breach of contract and misappropriation of trade secret claims against the manufacturer with whom it contracted to make molds for its patented silicone products, that could be presumed to face an irreparable injury if the manufacturer continued to market its knock-off products, and whom the equities favored because it sought only to protect the status quo and because it sought relief against an unfaithful agent, was entitled to preliminary injunctive relief to prevent any further damage

pending trials in New York State and in Hong Kong. Sylmark Holdings Ltd. v Silicone Zone Int'l Ltd., 783 N.Y.S.2d 758, 5 Misc. 3d 285, 2004 N.Y. Misc. LEXIS 1222 (N.Y. Sup. Ct. 2004).

Trial court properly granted owner's motion for a preliminary injunction against the managers of the owner's property in the owner's suit for an accounting because the owner demonstrated a likelihood of ultimate success on its claims and the prospect of irreparable injury absent a preliminary injunction; the owner also showed that a balancing of the equities tipped in its favor. Matter of 1650 Realty Assoc., LLC v Golden Touch Mgt., Inc., 101 A.D.3d 1016, 956 N.Y.S.2d 178, 2012 N.Y. App. Div. LEXIS 8672 (N.Y. App. Div. 2d Dep't 2012).

4. —Irreparable harm

Plaintiffs in class action for declaratory judgment on validity of lease escalation clause were not entitled to injunction against defendant's prosecution of summary proceedings pending adjudication of plaintiffs' claim where affidavits of 3 out of 51 plaintiffs failed to demonstrate irreparable injury or a clear legal right to relief sought. Romance Bridals, Inc. v 1385 Broadway Co., 43 A.D.2d 544, 349 N.Y.S.2d 707, 1973 N.Y. App. Div. LEXIS 3060 (N.Y. App. Div. 1st Dep't 1973).

Preliminary injunction is drastic remedy, should be awarded sparingly and only when party seeking it has met its burden of proving both clear and right to ultimate relief sought and urgent necessity of preventing irreparable harm. Buffalo v Mangan, 49 A.D.2d 697, 370 N.Y.S.2d 771, 1975 N.Y. App. Div. LEXIS 10551 (N.Y. App. Div. 4th Dep't 1975).

Where fire department was able to operate each station with full complement of firemen and firemen would respond to emergency calls and would remain on job at end of their regular shift if requested to do so, firemen's union's resolution not to respond to voluntary call-ins did not present threat of injury to public or irreparable harm warranting preliminary injunction. Buffalo v Mangan, 49 A.D.2d 697, 370 N.Y.S.2d 771, 1975 N.Y. App. Div. LEXIS 10551 (N.Y. App. Div. 4th Dep't 1975).

Provider of services for homeless persons with AIDS was not entitled to preliminary injunction restraining city from terminating its contracts, even though eviction of such persons would qualify as irreparable harm, where city was prepared to rely on other vendors to house them, and there was no reason to discredit city's representations that such persons would not be neglected during any transition period. Housing Works, Inc. v City of New York, 255 A.D.2d 209, 680 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 12526 (N.Y. App. Div. 1st Dep't 1998).

Parking garage was not entitled to enjoin any conduct by a stock exchange in establishing a security zone around the stock exchange, as there was no need to enjoin any conduct by the stock exchange to avoid speculative future damages consequent to a continuing harm to the parking garage because it was clear that the parking garage's loss of business was predominantly caused by the city's construction work, a temporary condition that no longer existed. Wall St. Garage Parking Corp. v N.Y. Stock Exch., Inc., 10 A.D.3d 223, 781 N.Y.S.2d 324, 2004 N.Y. App. Div. LEXIS 10166 (N.Y. App. Div. 1st Dep't 2004).

Former employer was entitled to a preliminary injunction under CPLR 6312 to enforce a noncompetition clause against former employees because the lost goodwill and opportunity to the employer were difficult to quantify and the employer would suffer irreparable harm absent a preliminary injunction. Gundermann & Gundermann Ins. v Brassill, 46 A.D.3d 615, 853 N.Y.S.2d 82, 2007 N.Y. App. Div. LEXIS 12524 (N.Y. App. Div. 2d Dep't 2007).

Because a nominee agreement constituted a declaration of trust, it was irrelevant that the nominee retained ownership of a company's stock certificates; because money damages were insufficient, the principal was entitled to a preliminary injunction under N.Y. C.P.L.R. 6312(c) to enjoin the nominee from taking action regarding the company without consent. Yemini v Goldberg, 60 A.D.3d 935, 876 N.Y.S.2d 89, 2009 N.Y. App. Div. LEXIS 2302 (N.Y. App. Div. 2d Dep't 2009).

In enforcement action alleging that fence, erected by defendant to prevent timber rattlesnakes from coming onto its property, interfered with normal migration pattern of Bald Hill den rattlesnakes and thus constituted prohibited "taking" under CLS ECL § 11-0535, Department of

Environmental Conservation (DEC) met its burden of showing irreparable harm if defendant did not remove snake-proof fencing in that (1) DEC is charged with protection of all threatened species, including timber rattlesnake, and (2) harm to threatened species impacts on quality of life of all residents of New York and is not compensable by monetary damages. State v Sour Mt. Realty, 183 Misc. 2d 313, 703 N.Y.S.2d 854, 1999 N.Y. Misc. LEXIS 616 (N.Y. Sup. Ct. 1999), aff'd, 276 A.D.2d 8, 714 N.Y.S.2d 78, 2000 N.Y. App. Div. LEXIS 11344 (N.Y. App. Div. 2d Dep't 2000).

5. —Ultimate success

Where preliminary injunction would afford same relief as that which is ultimately sought, courts are especially loathe to grant application. Buffalo v Mangan, 49 A.D.2d 697, 370 N.Y.S.2d 771, 1975 N.Y. App. Div. LEXIS 10551 (N.Y. App. Div. 4th Dep't 1975).

In dispute which arose when New York Racing Association (NYRA) sought substantial increase in amount New York City Off-Track Betting Corporation (OTB) should be required to pay for simulcast signal of races to OTB parlors, teletheaters and for “in-home” cable television viewing, OTB failed to demonstrate likelihood of success on merits of its cause of action to compel NYRA to arbitrate dispute pursuant to CLS Racing & Wagering § 1013, because opt-out provision of § 1013(1) undermined OTB’s assertion that arbitration was compulsory; furthermore, CLS Racing & Wagering § 1003 expressly states that arbitration procedures contained in § 1013 “shall not apply” to in-home simulcasting agreements, and thus dispute over in-home cable television was clearly not arbitrable. New York City Off-Track Betting Corp. v New York Racing Ass'n, 250 A.D.2d 437, 673 N.Y.S.2d 387, 1998 N.Y. App. Div. LEXIS 8376 (N.Y. App. Div. 1st Dep't 1998).

Provider of services for homeless persons with AIDS was not entitled to preliminary injunction restraining city from terminating its contracts, on ground that city’s conduct was de facto debarment without due process, where (1) city did not issue blanket preclusion of contracts with provider but examined each contact on case-by-case basis, (2) even if city’s actions constituted debarment or suspension, there was no due process violation, because provider had meaningful

postdeprivation remedies, including administrative remedies under city charter and PPB Rules and commencement of Article 78 proceeding, and (3) thus, provider did not show likelihood of success on merits of debarment claim. Housing Works, Inc. v City of New York, 255 A.D.2d 209, 680 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 12526 (N.Y. App. Div. 1st Dep't 1998).

Requirement of likelihood of ultimate success, for issuance of preliminary injunction, does not compel showing that success on merits is practically certain; mere fact that there may be issues of fact for trial does not prelude court from exercising its discretion in granting injunction. Egan v New York Care Plus Ins. Co., 266 A.D.2d 600, 697 N.Y.S.2d 776, 1999 N.Y. App. Div. LEXIS 11244 (N.Y. App. Div. 3d Dep't 1999).

Where a mother made the requisite showing of a likelihood of success on the merits in her action to void a transfer and to enjoin her son from transferring or encumbering her interest in the property, the trial court properly granted her motion for a preliminary injunction; however, the matter had to be remitted for a determination of the amount of the undertaking pursuant to N.Y. C.P.L.R. 6312(b). Ying Fung Moy v Hohi Umeki, 10 A.D.3d 604, 781 N.Y.S.2d 684, 2004 N.Y. App. Div. LEXIS 10602 (N.Y. App. Div. 2d Dep't 2004).

Because a corporate president had authority to act on behalf of a corporation, and because the shareholders lacked authority to call a special meeting under N.Y. Bus. Corp. Law § 602(c), the trial court erred in granting the shareholders' N.Y. C.P.L.R. § 6312(c) motion for a preliminary injunction. Eklund v Pinkey, 31 A.D.3d 908, 819 N.Y.S.2d 586, 2006 N.Y. App. Div. LEXIS 9246 (N.Y. App. Div. 3d Dep't 2006), app. denied, 8 N.Y.3d 801, 828 N.Y.S.2d 292, 861 N.E.2d 108, 2007 N.Y. LEXIS 17 (N.Y. 2007).

Preliminary injunction to preclude property owners from finishing construction or using a racetrack on their property pending the outcome of a lawsuit that was filed, challenging the use thereof, was properly granted under N.Y. C.P.L.R. 6312, as it was based on counsel's affidavit in support of the application as well as a verified complaint and numerous exhibits that provided a factual basis for the claims made in the application. Matter of Granger Group v Town of Taghkanic, 77 A.D.3d 1137, 909 N.Y.S.2d 556, 2010 N.Y. App. Div. LEXIS 7545 (N.Y. App. Div.

3d Dep't 2010), app. denied, 16 N.Y.3d 781, 919 N.Y.S.2d 505, 944 N.E.2d 1144, 2011 N.Y. LEXIS 225 (N.Y. 2011).

Because it was unclear who the members of a non-profit corporation's board were, the first director was not entitled to a preliminary injunction under N.Y. C.P.L.R. 6312(c) as the director did not demonstrate a likelihood of ultimate success on the merits. Brach v Harmony Servs., Inc., 93 A.D.3d 748, 940 N.Y.S.2d 652, 2012 N.Y. App. Div. LEXIS 2054 (N.Y. App. Div. 2d Dep't 2012).

Trial court erred by denying plaintiffs a preliminary injunction preventing further construction on the property covered by the State's easement on Tribal land because plaintiffs were likely to succeed on their argument that the case presented the type of disruptive land claim that would be barred under the doctrine of City of Sherrill v Oneida Indian Nation of and, therefore, New York law likely applies to the property. Plaintiffs' expert averred that the proposed advertising signs would present an on-going hazard to the traveling public. Comm'r of the N.Y. State DOT v Polite, 225 N.Y.S.3d 106, 2024 N.Y. App. Div. LEXIS 6445 (N.Y. App. Div. 2d Dep't 2024).

Department of Environmental Conservation (DEC) established likelihood of success on merits in enforcement action alleging that fence erected by defendant to prevent timber rattlesnakes from coming onto its property interfered with normal migration patterns of Bald Hill den rattlesnakes although defendant's expert observed no rattlesnakes on defendant's property, where defendant's expert surveyed property at times of year when snakes were most likely to be found near their own den sites, defendant refused to allow DEC's experts to enter property to determine if it was part of Bald Hill den rattlesnakes' habitat, and fact that defendant built fence to keep rattlesnakes out supported, rather than rebutted, DEC's claim that property was part of habitat of Bald Hill den rattlesnakes. State v Sour Mt. Realty, 183 Misc. 2d 313, 703 N.Y.S.2d 854, 1999 N.Y. Misc. LEXIS 616 (N.Y. Sup. Ct. 1999), aff'd, 276 A.D.2d 8, 714 N.Y.S.2d 78, 2000 N.Y. App. Div. LEXIS 11344 (N.Y. App. Div. 2d Dep't 2000).

Pursuant to N.Y. C.P.L.R. art. 6312(b), in granting a temporary injunction, the court must fix the amount of an undertaking to compensate a respondent for damages in the event of a final

determination that a petitioner is not entitled to injunctive relief; in an action to compel the return of jewelry items, through a temporary injunction, that had been seized pursuant to a criminal investigation, the trial court granted the motion of various gem dealers and the jewelry owners for the return of jewelry an individual sought to pawn. Gerald Modell Inc. v Morgenthau, 196 Misc. 2d 354, 764 N.Y.S.2d 779, 2003 N.Y. Misc. LEXIS 624 (N.Y. Sup. Ct. 2003).

As a building owner established that if large number of people attended a proposed tenants meeting in a hallway of the building, they could obstruct access to the premises or facilities in violation of N.Y. Real Prop. Law § 230(2) and could obstruct the exits and corridors in violation of the city building and fire codes, it was entitled to a hearing on its motion for a preliminary injunction barring the meeting. 1234 Broadway LLC v West Side SRO Law Project, Goddard Riverside Community Ctr., 86 A.D.3d 18, 924 N.Y.S.2d 35, 2011 N.Y. App. Div. LEXIS 3900 (N.Y. App. Div. 1st Dep't 2011).

Likelihood of success on the merits was not established in an action regarding claims that New York State and federal procurement laws were violated by statutory amendments and issuance of a request for proposals (RFP) for a statewide fiscal intermediary because the statutory amendments and RFP were rationally related to legitimate government purposes of regulating the fiscal intermediaries industry, reducing administrative costs, and using the savings to benefit Medicaid consumers and did not violate separation of powers or equal protection. Save Our Consumer Directed Home Care Program, Inc. v New York State Dept. of Health, 227 N.Y.S.3d 886, 2025 N.Y. Misc. LEXIS 716 (N.Y. Sup. Ct. 2025).

6. Affidavits

On dentist’s motion for a temporary injunction to prevent dental society from requiring pre-publication submission to it of his manuscript, dentist was not required to submit affidavits in support of motion where his complaint sufficiently exposed the matters to be considered. Firestone v First Dist. Dental Soc., 24 A.D.2d 268, 265 N.Y.S.2d 525, 1965 N.Y. App. Div. LEXIS 2690 (N.Y. App. Div. 1st Dep't 1965).

Where the Civil Service Commission, after several candidates had successfully brought an Article 78 proceeding to compel it to allow an alternate answer to one of the multiple choice questions on a promotional examination had rerated the examination papers of all candidates who selected the alternate choice, a complaint seeking a preliminary injunction was legally insufficient since it not only failed to show irreparable injury but also failed to indicate any impropriety on the defendants' part. Dammers v Hoberman, 35 A.D.2d 515, 312 N.Y.S.2d 1, 1970 N.Y. App. Div. LEXIS 4155 (N.Y. App. Div. 1st Dep't 1970).

In an action for a permanent injunction to enjoin alleged violations by a landlord of a lease to certain property used for shopping center purposes, a judgment dimissing the action as moot was improper where it was based on allegations and an affidavit as to an issue raised by the landlord with respect to restoration of the subject property, which allegations and affidavit were made dehors the record and after conclusion of the trial and where a motion to reopen the trial to hear evidence on such issue had never been decided by the court. Grand Union Co. v Equitable Life Assurance Soc., 100 A.D.2d 535, 473 N.Y.S.2d 227, 1984 N.Y. App. Div. LEXIS 17506 (N.Y. App. Div. 2d Dep't 1984).

Court erred in denying landlord's motion for preliminary injunction to restrain tenant from assaulting other tenants and landlord's employees, on ground that landlord failed to submit proof from civil authorities or building tenants' organization substantiating allegations, since pursuant to CLS CPLR § 6312, movant is only required to submit affidavits in support of application for preliminary injunction, and "may" submit "other evidence" if it so chooses. Park South Assoc. v Blackmer, 171 A.D.2d 468, 567 N.Y.S.2d 226, 1991 N.Y. App. Div. LEXIS 3315 (N.Y. App. Div. 1st Dep't 1991).

Preliminary injunction would be granted without hearing, on motion papers, where affidavit showed unlawful occupation of college buildings by students, destruction of college property, and interference with rights of other students, faculty and administration, despite contention that unlawful activities had ceased. Board of Higher Education v Marcus, 63 Misc. 2d 268, 311 N.Y.S.2d 579, 1970 N.Y. Misc. LEXIS 1577 (N.Y. Sup. Ct. 1970).

Ultimate rights of parties should not be decided upon affidavits in advance of trial, but failure to make denials or to make them convincingly will influence a court to exercise its discretion in favor of granting a preliminary injunction, particularly where any loss or inconvenience resulting therefrom is comparatively small. Powlowski v Wullich, 81 Misc. 2d 895, 366 N.Y.S.2d 584, 1975 N.Y. Misc. LEXIS 2490 (N.Y. Sup. Ct. 1975).

Buyers' were not entitled to a preliminary injunction pursuant to N.Y. C.P.L.R. 6301 on their claim of breach of a contract to sell a cooperative apartment because, inter alia, the complaint contained no allegation as to the "uniqueness" of the apartment or as to the inadequacy of a remedy at law or irreparable injury, and affidavits submitted failed to allege facts; a contract for the purchase and sale of the ownership interest in a cooperative apartment was governed, as a contract for the sale of goods, by N.Y. U.C.C. Law art. 2, including art. 2's remedy provisions, but no other evidence offered that would have supported an inference that suitable alternatives were not available in the market to allow cover or a reasonably certain determination of damages based upon the market price/contract price differential under N.Y. U.C.C. Law § 2-713(1). The buyers thus failed to demonstrate a likelihood of success on the merits of their specific performance or irreparable injury claims. Lezell v Forde, 891 N.Y.S.2d 606, 26 Misc. 3d 435, 2009 N.Y. Misc. LEXIS 2820 (N.Y. Sup. Ct. 2009).

7. Undertaking

Plaintiffs were not entitled to order discharging bond posted to obtain preliminary injunction since Appellate Division's prior affirmance of trial court's grant of preliminary injunction was not a final determination as to plaintiffs' right to injunction within meaning of CLS CPLR § 6312; Appellate Division's prior order determined only that plaintiffs had made sufficient showing to warrant provisional relief but did not foreclose possibility that plaintiffs would fail to establish entitlement to injunction, and therefore did not authorize discharge of undertaking. J. A. Preston Corp. v Fabrication Enterprises, Inc., 68 N.Y.2d 397, 509 N.Y.S.2d 520, 502 N.E.2d 197, 1986 N.Y. LEXIS 20853 (N.Y. 1986).

In an action for a declaratory judgment and permanent injunction enjoining defendant from widening a temporary easement of way, plaintiff's motion for an order restraining defendant from performing any work relative to the easement over his land except as routinely necessary to maintain the right-of-way should have been granted pending entry of judgment in the instant action. The motion would be granted on condition that plaintiff file an undertaking pursuant to CPLR § 6312 in the sum of $1,000 and serve a copy of the same upon the defendant. Kraemer v T.C.R. Services, Inc., 93 A.D.2d 808, 460 N.Y.S.2d 609, 1983 N.Y. App. Div. LEXIS 17652 (N.Y. App. Div. 2d Dep't 1983).

Special Term erred in failing to require plaintiff to post undertaking as prerequisite to granting of preliminary injunction as mandated by CPLR 6312(b), in action, inter alia, for permanent injunction based on alleged breach of covenant not to compete contained in employment agreement. Family Affair Haircutters, Inc. v Detling, 110 A.D.2d 745, 488 N.Y.S.2d 204, 1985 N.Y. App. Div. LEXIS 48650 (N.Y. App. Div. 2d Dep't 1985).

Plaintiff who has been granted preliminary injunction is not entitled to order discharging undertaking solely because of success on appeal from order granting preliminary injunction. J. A. Preston Corp. v Fabrication Enterprises, Inc., 117 A.D.2d 997, 499 N.Y.S.2d 542, 1986 N.Y. App. Div. LEXIS 53241 (N.Y. App. Div. 4th Dep't), aff'd, 68 N.Y.2d 397, 509 N.Y.S.2d 520, 502 N.E.2d 197, 1986 N.Y. LEXIS 20853 (N.Y. 1986).

Supreme Court was not empowered to grant, on interim motion, kennel owner's motion, in action for breach of employment agreement, to compel employee, inter alia, to vacate business premises and deliver all business records to owner, since court should have deemed motion to have been one for preliminary injunction; on remittal, court would be required to fix amount of undertaking to be posted by owner, as required by CLS CPLR § 6312(b). Country Kennel, Inc. v Booth, 150 A.D.2d 418, 541 N.Y.S.2d 28, 1989 N.Y. App. Div. LEXIS 6468 (N.Y. App. Div. 2d Dep't 1989).

In action concerning disputed partnership interest in diner business, plaintiff had previously been awarded preliminary injunction essentially restraining defendants from disposing of business, its

records or its assets; defendants thereafter moved to direct plaintiff to file undertaking, and court denied application; this was error–language of statute is clear and unequivocal; upon granting of preliminary injunction, plaintiff shall give undertaking in amount to be fixed by court, that plaintiff, if it is finally determined that he was not entitled to injunction, will pay to defendant all damages and costs which may be sustained by reason of injunction (CPLR 6312 [b]); accordingly, matter must be remitted to Supreme Court to fix amount of undertaking. Carter v Konstantatos, 156 A.D.2d 632, 549 N.Y.S.2d 131, 1989 N.Y. App. Div. LEXIS 16434 (N.Y. App. Div. 2d Dep't 1989).

Interlocutory order of Appellate Division which vacated preliminary injunction was not final order within meaning of CLS CPLR § 6312(b), and thus defendant was not entitled to summary ascertainment of damages on undertaking posted by plaintiff, where underlying action for equitable relief, inter alia, had not yet been decided, since order which vacated preliminary injunction did not determine that plaintiff could not prevail on request for equitable relief, but only determined that plaintiff had not made requisite showing of probabilities. Straisa Realty Corp. v Woodbury Assoc., 185 A.D.2d 96, 592 N.Y.S.2d 745, 1993 N.Y. App. Div. LEXIS 346 (N.Y. App. Div. 2d Dep't 1993).

Trial court properly denied defendants' cross-motion for summary judgment as to plaintiff's action for a declaration that a deed was in fact a usurious mortgage loan, as defendant failed to demonstrate that the transaction did not in fact constitute a usurious loan, and properly determined the amount of an undertaking under N.Y. C.P.L.R. 6312(b) in relation to an injunction granted to plaintiff, as the trial court providently exercised its discretion in declining to consider defendants' speculative claims of potential damages. Ujueta v Euro-Quest Corp., 29 A.D.3d 895, 814 N.Y.S.2d 551, 2006 N.Y. App. Div. LEXIS 6918 (N.Y. App. Div. 2d Dep't 2006).

Supreme court did not err in granting plaintiffs' motion vacate that portion of a prior order which directed plaintiffs to post a bond; since plaintiffs neither moved for, nor were granted, a preliminary injunction, the requirement of an undertaking was a matter of discretion, N.Y.

C.P.L.R. 6312(b). Gallagher v Roman, 36 A.D.3d 661, 826 N.Y.S.2d 584, 2007 N.Y. App. Div. LEXIS 464 (N.Y. App. Div. 2d Dep't 2007).

Injunction prohibiting various objectionable conduct by a tenant was proper because the cooperative demonstrated the likelihood of succeeding on the merits, irreparable injury, and the balance of equities in the cooperative's favor; however, the injunction did not indicate all the acts the tenant was restrained from doing, and did not require the cooperative to post an undertaking. Trump Plaza Owners, Inc. v Weitzner, 47 A.D.3d 525, 849 N.Y.S.2d 554, 2008 N.Y. App. Div. LEXIS 407 (N.Y. App. Div. 1st Dep't 2008).

Owners should have been required to post an undertaking during the pendency of an action under N.Y. C.P.L.R. 6312(b as a first order finding an easement appurtenant running with the land and enjoining a neighbor from interfering with it constituted a preliminary injunction since an order reserving determination of the owners' request for a direction that the neighbor remove certain encroachments from the right-of-way made clear that the first order was not intended to be a permanent injunction. Dutcher v Allen, 93 A.D.3d 1101, 941 N.Y.S.2d 323, 2012 N.Y. App. Div. LEXIS 2364 (N.Y. App. Div. 3d Dep't 2012).

Trial court erred in releasing an undertaking previously imposed in connection with a preliminary injunction that was granted to property owners with respect to their dispute with their neighbors, as there was no final determination on the merits regarding the injunctive relief. Schillaci v Sarris, 122 A.D.3d 1085, 997 N.Y.S.2d 504, 2014 N.Y. App. Div. LEXIS 8081 (N.Y. App. Div. 3d Dep't 2014).

The New York State Environmental Facilities Corporation is a public benefit corporation, and must file an undertaking before the issuance of a preliminary injunction to restrain property owners from interfering with the carrying out of its duties by the corporation. New York State Environmental Facilities Corp. v Young, 66 Misc. 2d 299, 320 N.Y.S.2d 821, 1971 N.Y. Misc. LEXIS 1646 (N.Y. Sup. Ct. 1971).

8. —Purpose

Purpose and function of undertaking by plaintiff pursuant to statute prior to granting of preliminary injunction is to reimburse defendant for damages sustained if it is later finally determined that preliminary injunction was erroneously granted Margolies v Encounter, Inc. Margolies v Encounter, Inc., 42 N.Y.2d 475, 398 N.Y.S.2d 877, 368 N.E.2d 1243, 1977 N.Y. LEXIS 2359 (N.Y. 1977).

Statute requiring that undertaking be furnished before preliminary injunction is granted means, in its reference to final determination, final determination that plaintiffs were not entitled to preliminary injunction, rather than determination with respect to their right to permanent injunction or other favorable outcome on merits of main action; proper focus is on propriety of issuance of preliminary injunction when it was granted at commencement of action. Margolies v Encounter, Inc., 42 N.Y.2d 475, 398 N.Y.S.2d 877, 368 N.E.2d 1243, 1977 N.Y. LEXIS 2359 (N.Y. 1977).

Under CPLR 6312 (subd [b]), which provides that prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court and that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, the ultimate denial of a permanent injunction to plaintiff or a determination that a plaintiff is not entitled to prevail in the final outcome does not constitute a determination that plaintiff was not entitled to a preliminary injunction; a finding must appear, either expressly or by implication, in the trial court’s decision prior to the granting of damages, that plaintiff was not entitled to the preliminary injunction. Accordingly, where the court, upon vacatur of a preliminary injunction, implicitly found that plaintiff was not entitled to said preliminary relief, counsel fees are available only insofar as they pertain to vacating the preliminary injunction and presenting evidence to prove said damages caused by the injunction, and not to the underlying issue or trial; moreover, the party seeking such damages bears the burden of proof on each element of his claim. Cross Properties, Inc. v Brook Realty Co., 76 A.D.2d 445, 430 N.Y.S.2d 820, 1980 N.Y. App. Div. LEXIS 11772 (N.Y. App. Div. 2d Dep't 1980).

9. —Amount

Employer should not have been required to post $740,000 undertaking as prerequisite to granting of relief enjoining its former bookkeeper from selling or transferring any of her assets pending completion of suit in which employer alleged that bookkeeper converted sums from its checking account to purchase luxury goods totalling at least $740,000; posting of undertaking in amount of $100,000 would be appropriate. Zonghetti v Jeromack, 150 A.D.2d 561, 541 N.Y.S.2d 235, 1989 N.Y. App. Div. LEXIS 7043 (N.Y. App. Div. 2d Dep't 1989).

Order granting employee’s motion for preliminary injunction against enforcement of unduly restrictive covenant not to compete would be modified to require employee to post $10,000 bond. Crippen v United Petroleum Feedstocks, 245 A.D.2d 152, 666 N.Y.S.2d 156, 1997 N.Y. App. Div. LEXIS 13044 (N.Y. App. Div. 1st Dep't 1997).

In an action for specific performance of an option agreement to purchase real property where the tenant obtained a preliminary injunction against the landlords, and an undertaking was fixed at $200,000, the undertaking was reduced to $108,000 or the three-year rental value of the premises at an average cost of $3,000 per month, as it was not rationally related to the amount of the landlords’ potential liability. Lelekakis v Kamamis, 303 A.D.2d 380, 755 N.Y.S.2d 665, 2003 N.Y. App. Div. LEXIS 2095 (N.Y. App. Div. 2d Dep't 2003).

While fixing the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court, N.Y. C.P.L.R. 6312(b) clearly and unequivocally requires the party seeking an injunction to give an undertaking. Hightower v Reid, 5 A.D.3d 440, 772 N.Y.S.2d 575, 2004 N.Y. App. Div. LEXIS 2517 (N.Y. App. Div. 2d Dep't 2004).

Amount of an undertaking, $216,585, was appropriate as a condition of a preliminary injunction enjoining a capital call made by limited liability companies (LLCs); the trial court struck a balance and set an amount equal to the difference between the requested capital call and the estimated net income of one of the LLCs. The amount of the undertaking, together with the net income,

would have permitted the LLCs to pay the underlying notes, and, while not necessarily equal to the potential damages of the LLCs and the individual owners, the trial court did not abuse its discretion in setting that amount. Cooperstown Capital, LLC v Patton, 60 A.D.3d 1251, 876 N.Y.S.2d 186, 2009 N.Y. App. Div. LEXIS 2226 (N.Y. App. Div. 3d Dep't 2009).

Undertaking set by the motion court on a tenant's preliminary injunction - in the amount of the tenant's arrears and continuing use and occupancy - was not rationally related to the potential damages recoverable if the preliminary injunction was later determined to have been unwarranted. 1414 Holdings, LLC v BMS-PSO, LLC, 116 A.D.3d 641, 985 N.Y.S.2d 13, 2014 N.Y. App. Div. LEXIS 2819 (N.Y. App. Div. 1st Dep't 2014).

Trial court properly granted an owner’s motion for a preliminary injunction restraining the its president and a women’s institute from continuing with the prosecution of a holdover proceeding, and denied their cross-motion to dismiss the owner’s declaratory action as time-barred because the owner established that, absent the preliminary injunction, the president would evict students who were residing in the premises, in contravention of the owner’s mission, a balancing of the equities likewise favored the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action, but, there was no evidence in the record that the trial court fixed an amount for the requisite undertaking. Chana v Machon Chana Women's Inst., Inc., 162 A.D.3d 635, 80 N.Y.S.3d 61, 2018 N.Y. App. Div. LEXIS 3953 (N.Y. App. Div. 2d Dep't 2018).

Upon the grant of a temporary injunction staying enforcement of a judgment where it has been established prima facie that the stayed judgment was obtained by fraud, the court may fix the undertaking at less than the amount awarded in the stayed judgment. Overmyer v Eliot Realty, 83 Misc. 2d 694, 371 N.Y.S.2d 246, 1975 N.Y. Misc. LEXIS 2965 (N.Y. Sup. Ct. 1975).

Court would set undertaking at $1 on granting of preliminary injunction to jail inmates in their action to compel New York City hospitals and jails to provide discharge planning for mentally ill inmates. Brad H. v City of New York, 185 Misc. 2d 420, 712 N.Y.S.2d 336, 2000 N.Y. Misc.

LEXIS 305 (N.Y. Sup. Ct.), aff'd, 276 A.D.2d 440, 716 N.Y.S.2d 852, 2000 N.Y. App. Div. LEXIS 11046 (N.Y. App. Div. 1st Dep't 2000).

Trial court erred in granting a preliminary injunction ordering a lender to fund certain draw requests related to a construction project without also ordering the buyer to post an undertaking pursuant to N.Y. C.P.L.R. 6312(b); the amount of the undertaking was fixed at $15 million. Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp., 69 A.D.3d 212, 889 N.Y.S.2d 793, 2009 N.Y. App. Div. LEXIS 8119 (N.Y. App. Div. 4th Dep't 2009).

Bond of $50,000 was proper following an order granting an owner’s motion for a preliminary injunction against the managers of the owner’s property. Matter of 1650 Realty Assoc., LLC v Golden Touch Mgt., Inc., 101 A.D.3d 1016, 956 N.Y.S.2d 178, 2012 N.Y. App. Div. LEXIS 8672 (N.Y. App. Div. 2d Dep't 2012).

On the ground that the plaintiff tenants lacked the necessary standing to raise the question of the unconstitutionality of § 6312(b) of New York CPLR, the court rejected the plaintiff’s contention that the particular section, requiring the posting of an undertaking “prior to the granting of a preliminary injunction,” was discriminatory on the basis of financial status. King v McCaffrey, 321 F. Supp. 344, 1970 U.S. Dist. LEXIS 11443 (S.D.N.Y. 1970).

10. —Failure to file

A preliminary injunction was properly vacated upon plaintiff’s failure to file the undertaking required by the order granting the injunction, which was in an amount entirely reasonable under the circumstances. Diamond v Kingston, 32 A.D.2d 587, 299 N.Y.S.2d 94, 1969 N.Y. App. Div. LEXIS 4211 (N.Y. App. Div. 3d Dep't 1969).

Purchaser who sought preliminary relief enjoining yacht manufacturer from advertising in state pursuant to CLS Gen Bus § 350-d would not be required to post bond, provided he proceeded expeditiously in his action for false advertising, since purchaser, as representative of all consumers affected by advertising at issue, stood in shoes of Attorney General who is not

required to post bond. McDonald v North Shore Yacht Sales, Inc., 134 Misc. 2d 910, 513 N.Y.S.2d 590, 1987 N.Y. Misc. LEXIS 2128 (N.Y. Sup. Ct. 1987).

11. —Effect of no provisions for undertaking

Granting of preliminary injunction against enforcement of town ordinance and local law without provision for an undertaking, was unwarranted. Rockland County Builders Asso. v McAlevey, 29 A.D.2d 975, 289 N.Y.S.2d 452, 1968 N.Y. App. Div. LEXIS 4255 (N.Y. App. Div. 2d Dep't 1968).

Order in action on claim for trust funds, seeking recovery for work, labor, and materials furnished public contractor, restraining public agency, without posting of bond by plaintiffs, from paying contractor pending determination of plaintiffs' claims appeared to be improper and would be stricken with direction that case, which had been pending for ten years, be disposed of in immediate future. Frontier Excavating, Inc. v Sovereign Constr. Co., 45 A.D.2d 926, 357 N.Y.S.2d 576, 1974 N.Y. App. Div. LEXIS 4495 (N.Y. App. Div. 4th Dep't 1974).

In an action for an injunction restraining defendants from interfering with an alleged right-of-way, the grant of an injunction pendente lite without provision for an appropriate undertaking was unwarranted. Smith v Boxer, 45 A.D.2d 1054, 358 N.Y.S.2d 174, 1974 N.Y. App. Div. LEXIS 4328 (N.Y. App. Div. 2d Dep't 1974).

Granting of preliminary injunction without provision for suitable undertaking was improper. Blumberg v Thomaston-Spruce Corp., 46 A.D.2d 671, 360 N.Y.S.2d 43, 1974 N.Y. App. Div. LEXIS 3902 (N.Y. App. Div. 2d Dep't 1974).

In an action seeking a preliminary injunction, any issue regarding the failure to require an undertaking would be moot where the preliminary injunction had been vacated on appeal. Quandt's Wholesale Distributors, Inc. v Giardino, 89 A.D.2d 669, 452 N.Y.S.2d 329, 1982 N.Y. App. Div. LEXIS 17794 (N.Y. App. Div. 3d Dep't 1982).

Supreme Court erred in ordering stay of mortgage foreclosure where purchasers of trailer park had executed purchase-money mortgage with vendors, vendors exercised what they contended

was right of assignment of rents granted to them in mortgage, purchasers responded by commencing action for tortious interference with contract, vendors began foreclosure of mortgage by advertisement pursuant to CLS RPAPL Art 14, and purchasers sought relief from foreclosure in notice of motion requesting “preliminary injunction” and in supporting affidavit requesting “stay”; CLS CPLR § 2201 was inapplicable since foreclosure by advertisement is not judicial proceeding, and requirements of CLS CPLR Art 63 were not met since no undertaking was ordered. Griffiths v Jefferds, 125 A.D.2d 949, 510 N.Y.S.2d 42, 1986 N.Y. App. Div. LEXIS 63128 (N.Y. App. Div. 4th Dep't 1986).

Court erred in granting preliminary injunction without requiring plaintiffs to post undertaking. Sutton, DeLeeuw, Clark & Darcy v Beck, 155 A.D.2d 962, 547 N.Y.S.2d 773, 1989 N.Y. App. Div. LEXIS 14832 (N.Y. App. Div. 4th Dep't 1989).

Failure of court to require posting of bond by plaintiff as required by CLS CPLR § 6312(b) did not require vacation of preliminary injunction granted to plaintiff. Wiederspiel v Bernholz, 163 A.D.2d 774, 558 N.Y.S.2d 739, 1990 N.Y. App. Div. LEXIS 8574 (N.Y. App. Div. 3d Dep't 1990).

Court erred in granting preliminary injunction, with serious financial consequences for defendants, without requiring posting of undertaking by plaintiff. Scotto v Mei, 219 A.D.2d 181, 642 N.Y.S.2d 863, 1996 N.Y. App. Div. LEXIS 4664 (N.Y. App. Div. 1st Dep't 1996).

Because the plaintiffs failed to give an undertaking prior to seeking a preliminary injunction, as required by N.Y. C.P.L.R. 6312(b), the trial court erred in granting the motion and in denying the defendant’s motion to dismiss. Griffin v 70 Portman Rd. Realty, Inc., 47 A.D.3d 883, 850 N.Y.S.2d 603, 2008 N.Y. App. Div. LEXIS 634 (N.Y. App. Div. 2d Dep't 2008).

Because the excavation on the contractors’ property damaged the owner’s building, and because the owner’s experts testified that there would be additional irreparable harm, the trial court properly granted a preliminary injunction to the owner under N.Y. C.P.L.R. 6312(c); however, the matter had to be remanded to fix the amount of the undertaking required by §

6312(b). Winzelberg v 1319 50th Realty Corp., 52 A.D.3d 700, 860 N.Y.S.2d 185, 2008 N.Y. App. Div. LEXIS 5606 (N.Y. App. Div. 2d Dep't 2008).

12. —Injunction voidable

Although an undertaking should have been required in connection with preliminary injunction restraining defendants from interfering with plaintiff's use of deeded right-of-way, absence thereof only rendered the injunction voidable; defendants could apply for an undertaking or could move to vacate the injunction but special term could order that the required undertaking be filed nunc pro tunc in order to preserve the injunction. Olechna v Smithtown, 51 A.D.2d 1036, 381 N.Y.S.2d 321, 1976 N.Y. App. Div. LEXIS 11836 (N.Y. App. Div. 2d Dep't 1976).

In an action for a permanent injunction brought by the operator of a store in a shopping plaza against the lessor to restrain interference with display and storage of goods at the rear of the operator's premises, the absence of an undertaking in connection with the grant of a preliminary injunction rendered the injunction voidable. Duane Sales, Inc. v Hayes, 87 A.D.2d 730, 449 N.Y.S.2d 333, 1982 N.Y. App. Div. LEXIS 16075 (N.Y. App. Div. 3d Dep't 1982).

Application to vacate preliminary injunction due to plaintiff's failure to post undertaking under CLS CPLR § 6312(b) was denied since absence of undertaking only rendered injunction voidable, not void; defendant's remedy was remittal to Supreme Court for purpose of fixing amount of undertaking. Rourke Developers Inc. v Cottrell-Hajeck Inc., 285 A.D.2d 805, 727 N.Y.S.2d 667, 2001 N.Y. App. Div. LEXIS 7416 (N.Y. App. Div. 3d Dep't 2001).

13. — —Remand to fix amount

In granting preliminary injunction, court was required to order plaintiff to post undertaking, and thus case would be remitted for fixing of amount of bond. Egan v New York Care Plus Ins. Co., 266 A.D.2d 600, 697 N.Y.S.2d 776, 1999 N.Y. App. Div. LEXIS 11244 (N.Y. App. Div. 3d Dep't 1999).

Where there was no evidence in the record that plaintiff first landowner, in accordance with N.Y. C.P.L.R. 6312(b), submitted an undertaking in conjunction with the first landowner's successful motion for a preliminary injunction to enjoin certain activity by defendant second landowner regarding an easement, the case was remitted to the trial court where the first landowner had to file the required undertaking in an amount to be fixed by the trial court in order to preserve the injunction. Livas v Mitzner, 303 A.D.2d 381, 756 N.Y.S.2d 274, 2003 N.Y. App. Div. LEXIS 2098 (N.Y. App. Div. 2d Dep't 2003).

Plaintiffs were entitled to a preliminary injunction enjoining defendant from disposing of or encumbering property and staying an eviction proceeding, but as the trial court erred by not requiring plaintiffs to give an undertaking as required by N.Y. C.P.L.R. 6312(b), the matter was remanded to that court for the fixing of an appropriate undertaking. Gaentner v Benkovich, 18 A.D.3d 424, 795 N.Y.S.2d 246, 2005 N.Y. App. Div. LEXIS 4773 (N.Y. App. Div. 2d Dep't 2005).

Order granting a preliminary injunction without requiring plaintiff to give an undertaking was error because, although fixing the amount was a matter within the sound discretion of the trial court, the language of N.Y. C.P.L.R. 6312(b) was "clear and unequivocal," and it required the party seeking the injunction to give an undertaking. Gerstner v Katz, 38 A.D.3d 835, 835 N.Y.S.2d 203, 2007 N.Y. App. Div. LEXIS 4016 (N.Y. App. Div. 2d Dep't 2007).

On a distributor's successful petition to enjoin a manufacturer from terminating their exclusive agreement pending arbitration (N.Y. CPLR 7502[c]), the distributor should have been required to post an undertaking under N.Y. CPLR 6312[b]. Matter of Rockwood Pigments NA, Inc. v Elementis Chromium LP, 124 A.D.3d 509, 2 N.Y.S.3d 94, 2015 N.Y. App. Div. LEXIS 616 (N.Y. App. Div. 1st Dep't 2015).

14. —Yellowstone injunctions

Plaintiffs were entitled to Yellowstone injunction by evidence as to threat of forfeiture and ability to cure by means short of vacatur of occupancy agreement in event they were found to be in default of their obligations thereunder; however, it was improper for court not to direct plaintiffs

to file suitable undertaking. Cohn v White Oak Coop. Hous. Corp., 243 A.D.2d 440, 663 N.Y.S.2d 62, 1997 N.Y. App. Div. LEXIS 9623 (N.Y. App. Div. 2d Dep't 1997).

In commercial tenant's action for judgment declaring that it was not in breach of lease, tenant was entitled to Yellowstone injunction enjoining landlord from terminating lease pending resolution of action, and case would be remitted for fixing of proper undertaking under CLS CPLR § 6312, where tenant showed desire and ability to cure alleged defaults listed in landlord' notice to cure. Lee v TT & PP Main St. Realty Corp., 286 A.D.2d 665, 729 N.Y.S.2d 775, 2001 N.Y. App. Div. LEXIS 8427 (N.Y. App. Div. 2d Dep't 2001).

Order declaring that a tenant did not breach the subject lease, and directing the discharge of its bond posted as a condition of a Yellowstone injunction was proper because the tenant established that it provided the landlord with a proper estoppel certificate during the pendency of the Yellowstone injunction and, in opposition, the landlord failed to raise a triable issue of fact. Barsyl Supermarkets, Inc. v Avenue P Assoc., LLC, 86 A.D.3d 545, 928 N.Y.S.2d 45, 2011 N.Y. App. Div. LEXIS 5816 (N.Y. App. Div. 2d Dep't 2011).

15. —Appeal

Defendants were entitled to appeal from order of Supreme Court, which discharged undertaking provided by plaintiffs to obtain preliminary injunction, notwithstanding that defendants had not appealed to Court of Appeals from their previous unsuccessful challenge in Appellate Division to Supreme Court order which had originally granted preliminary injunction, since granting or refusal of temporary injunction did not constitute law of the case or adjudication on merits; moreover, original injunction order lay in discretion of Special Term and Appellate Division, and decision thereon was not appealable to Court of Appeals. J. A. Preston Corp. v Fabrication Enterprises, Inc., 68 N.Y.2d 397, 509 N.Y.S.2d 520, 502 N.E.2d 197, 1986 N.Y. LEXIS 20853 (N.Y. 1986).

16. —Illustrative cases

In an action for a permanent injunction and monetary damages, an order granting the plaintiff a preliminary injunction to prohibit the defendants from placing their signs over signs placed by plaintiff on security gates manufactured and installed by it on premises throughout New York City would be modified to the extent of prohibiting the defendants from covering the plaintiff's signs only in those instances where the defendants had not been called to service the fences; since a bond is required by CPLR § 6312(1), the court had no power to dispense with it and the case would be remanded for the purpose of fixing the amount of the bond. City Store Gates Mfg. Corp. v United Steel Products, Inc., 79 A.D.2d 671, 433 N.Y.S.2d 876, 1980 N.Y. App. Div. LEXIS 14048 (N.Y. App. Div. 2d Dep't 1980).

In an action, inter alia, to declare that the plaintiff tenant's maintenance of a dog in her apartment was not a violation of her lease and to enjoin the defendant landlord from commencing any proceeding to terminate plaintiff's lease, trial court erred in granting defendant's cross motion for summary judgment where there were issues of fact presented which could not be determined on conflicting affidavits. On appeal, plaintiff's motion for a preliminary injunction would be granted on condition that she post an undertaking in the amount of $500 pursuant to CPLR § 6312 and that she continue to pay all maintenance and other charges due and owing under the lease. The trial court should have granted a preliminary injunction in order to preserve plaintiff's right to cure a default under the lease, in the event of an adverse decision in the declaratory judgment action. Somekh v Ipswich House, Inc., 81 A.D.2d 662, 438 N.Y.S.2d 362, 1981 N.Y. App. Div. LEXIS 11189 (N.Y. App. Div. 2d Dep't 1981).

In an action brought by residential tenants against their landlord alleging a cutback on certain essentials, including elevator service and lighting, tenants would be required to deposit with the court all past-due rents where they had sought injunctive relief, and where they had withheld rent for more than two years. McCabe v Advent Properties, Inc., 89 A.D.2d 548, 453 N.Y.S.2d 185, 1982 N.Y. App. Div. LEXIS 17596 (N.Y. App. Div. 1st Dep't 1982).

Compliance with the provisions of CPLR § 6312(b) is not a prerequisite to obtaining an order restraining a spouse from disposing of marital assets during the pendency of a matrimonial

action. Leibowits v Leibowits, 93 A.D.2d 535, 462 N.Y.S.2d 469, 1983 N.Y. App. Div. LEXIS 17509 (N.Y. App. Div. 2d Dep't 1983).

In action for damages and permanent injunction in which Special Term granted plaintiff's motion for preliminary injunction enjoining defendants, operators of gravel pit who had obtained mining permit from DEC following negative declaration that no environmental impact statement was needed, from additional mining, upon condition that plaintiff, which utilized water from aquafier underneath pit, post $500,000 undertaking pursuant to CPL 6312(b), Special Term erred in terminating liability of plaintiff's surety without determining plaintiff's liability to defendants, where defendants' mining permit was annulled by Appellate Division in separate proceeding and DEC ultimately denied defendant's permit application. Schenectady Chemicals, Inc. v Flacke, 113 A.D.2d 168, 495 N.Y.S.2d 761, 1985 N.Y. App. Div. LEXIS 52345 (N.Y. App. Div. 3d Dep't 1985).

In action, inter alia, for fraud and breach of contract in connection with plaintiff's purchase of trademark rights, it was not improper for court to grant plaintiff's motion to enjoin executors of seller's estate from distributing purchase price to seller's beneficiaries, pending resolution of parties' dispute, inasmuch as (1) plaintiff established that seller had agreed to transfer ownership of trademark, despite being cognizant of his inability to do so, (2) distribution of purchase price to seller's beneficiaries would tend to render judgment for plaintiff ineffectual, and (3) court rejected executors' claimed inability to effectively administer seller's estate and pay taxes thereon, and thus balance of equities favored plaintiff; however, court should not have issued preliminary injunction without requiring plaintiff to furnish security as prerequisite. Burmax Co. v B & S Industries, Inc., 135 A.D.2d 599, 522 N.Y.S.2d 177, 1987 N.Y. App. Div. LEXIS 52540 (N.Y. App. Div. 2d Dep't 1987).

In proceeding to stay arbitration of dispute concerning interpretation of employment agreement, which involved breakdown of relationship between 2 families that were equal shareholders in corporation, Supreme Court could properly grant petitioners' request for preliminary injunction to extent that respondents were directed to withdraw certain banking resolutions filed with banks

designating themselves as sole signatories on corporate bank accounts of corporation; however, petitioners should have been required to provide suitable undertaking pursuant to CLS CPLR §§ 6312(b) and 7502(c). Feeley v Ballirano, 154 A.D.2d 531, 546 N.Y.S.2d 154, 1989 N.Y. App. Div. LEXIS 12737 (N.Y. App. Div. 2d Dep't 1989).

In action by operator of “supermarket grocery store” under lease from owner of shopping center for preliminary injunction against leasing of other space in shopping center for proposed bagel store, on ground of violation of restrictive covenant, $112,000 amount of undertaking required to compensate defendants for damages incurred “by reason of the injunction” in event of final decision that plaintiff was not entitled to injunctive relief was adequate where, at time when amount was fixed, it was rationally related to amount of potential damages proved by defendants, and court properly declined to consider defendants’ speculative claims for lost profits in fixing amount. Blueberries Gourmet, Inc. v Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557, 1998 N.Y. App. Div. LEXIS 11837 (N.Y. App. Div. 2d Dep't 1998).

Although a trial court properly granted a church’s request for a preliminary injunction in a dispute concerning title to real property and although fixing the amount of an undertaking when granting a motion for a preliminary injunction was a matter within the sound discretion of the trial court, N.Y. C.P.L.R. 6312(b) clearly and unequivocally required the party seeking an injunction to give an undertaking; thus, the cause was remitted to the trial court for the fixing of an appropriate undertaking. Glorious Temple Church of God in Christ v Dean Holding Corp., 35 A.D.3d 806, 828 N.Y.S.2d 442, 2006 N.Y. App. Div. LEXIS 15873 (N.Y. App. Div. 2d Dep't 2006), dismissed, 2013 N.Y. Misc. LEXIS 6996 (N.Y. Sup. Ct. Oct. 4, 2013).

In an action by plaintiffs seeking to set aside a conveyance of property based upon incompetence of the owner and fraud, because N.Y. C.P.L.R. 6312(b) clearly and unequivocally required the party seeking an injunction to post an undertaking, the trial court should have required plaintiffs to post an undertaking. Buckley v Ritchie Knop, Inc., 40 A.D.3d 794, 838 N.Y.S.2d 84, 2007 N.Y. App. Div. LEXIS 6198 (N.Y. App. Div. 2d Dep't 2007).

Trial court properly vacated a temporary restraining order and denied the application of a disabled and retired city police officer (PO) for waiver of the requirement of an undertaking for a preliminary injunction in the PO's action, alleging that the city wrongfully denied payment for him to receive an increased level of care for his spinal cord injury, as the court lacked discretion and authority to waive the undertaking. Vassenelli v City of Syracuse, 160 A.D.3d 1412, 75 N.Y.S.3d 724, 2018 N.Y. App. Div. LEXIS 3016 (N.Y. App. Div. 4th Dep't 2018).

Supreme court providently exercised its discretion in denying that a county's motion to set an undertaking and to fix damages because the county had yet to decide upon or adopt any methodology by which sewer service charges authorized by an ordinance would be calculated; thus, the amount of damages was not then ascertainable. Hofstra Univ. v Nassau County, N.Y., 166 A.D.3d 863, 87 N.Y.S.3d 248, 2018 N.Y. App. Div. LEXIS 7967 (N.Y. App. Div. 2d Dep't 2018).

17. Constructive trusts

In an action to impose a constructive trust on real property, the trial court properly issued a preliminary injunction because (1) the property's alleged owner established a likelihood of success on her claim; (2) denying the motion for an injunction would have been inconsistent with the purposes of the equitable doctrine of constructive trust, which was to prevent a breach of trust and restore to the owner her real property; and (3) the balance of the equities favored the alleged owner as the corporations in whom title was vested would suffer no great hardship if the injunction issued to preserve the status quo, as long as the undertaking required by N.Y. C.P.L.R. 6312(b) was filed. Hightower v Reid, 5 A.D.3d 440, 772 N.Y.S.2d 575, 2004 N.Y. App. Div. LEXIS 2517 (N.Y. App. Div. 2d Dep't 2004).

18. Damages and costs

Where the Appellate Division did not specifically hold that a temporary injunction was improperly issued, but held that the plaintiff was entitled to some relief and substituted the provisional

remedy of a receivership, the defendant was not entitled to an assessment of damages pursuant to CPLR 6312. The court also pointed out that an assessment of damages at this stage of the proceedings would be premature, since a permanent injunction against defendants could possibly be issued, which enjoined the activity forbidden by the preliminary injunction and in that event would have to be considered in determining whether and to what extent damages could be assessed. Copake Lake Development Corp. v Zasuly, 29 A.D.2d 755, 287 N.Y.S.2d 892, 1968 N.Y. App. Div. LEXIS 4526 (N.Y. App. Div. 1st Dep't 1968).

Judgment in defendant’s favor with respect to certain claims and vacatur of preliminary injunction is equivalent to final determination that plaintiff was not entitled to preliminary injunction with respect to claims where plaintiff’s entitlement to preliminary injunction is based upon same factual allegations as those involved in determination of plaintiff’s right to permanent injunction; under circumstances, defendant is entitled to recover damages sustained as result of issuance of preliminary injunction. Forest Laboratories, Inc. v Lowey, 118 A.D.2d 828, 500 N.Y.S.2d 313, 1986 N.Y. App. Div. LEXIS 54679 (N.Y. App. Div. 2d Dep't 1986).

Supreme Court properly directed forfeiture of plaintiff’s undertaking, posted in connection with preliminary injunction preventing defendants from transferring shares allocated to apartment pending determination of plaintiff’s right to have such shares specifically transferred to him, where defendants later acknowledged plaintiff’s right to shares, but plaintiff refused to execute agreement he had been seeking to specifically enforce by way of action; refusal to sign was functional equivalent of discontinuance of action without defendants’ consent and determination that he was not entitled to injunction. Finesod v Uzan, 182 A.D.2d 571, 582 N.Y.S.2d 431, 1992 N.Y. App. Div. LEXIS 6364 (N.Y. App. Div. 1st Dep't 1992).

Determination of whether defendants were entitled to damages as result of improvidently granted preliminary injunction had to await final disposition of plaintiff’s claim for equitable relief where Appellate Division’s conclusion that plaintiff had not shown probability of success on merits was not “final determination” under CLS CPLR § 6312(b) that would entitle defendants to summary ascertainment of “damages...sustained by reason of the [preliminary] injunction.”

Blueberries Gourmet, Inc. v Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557, 1998 N.Y. App. Div. LEXIS 11837 (N.Y. App. Div. 2d Dep't 1998).

Under plaintiff’s undertaking, posted as a condition for granting of preliminary injunction, that he would pay to defendants all damages and costs which might be sustained by reason of the injunction if it was finally determined that he was not entitled to an injunction, defendants were entitled to their legal fees and expenses incurred and to be incurred in making their application to assess their damages. Bausch & Lomb, Inc. v Hydron Pacific, Ltd., 82 Misc. 2d 576, 371 N.Y.S.2d 292, 1975 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1975).

Under plaintiff’s undertaking, posted as a condition for granting of preliminary injunction, that it would pay to defendants all damages and costs which might be sustained by reason of the injunction if it was finally determined that plaintiff was not entitled to an injunction, defendants who were successful at trial were not entitled to legal fees and expenses incurred by them in opposing application for the preliminary injunction. Bausch & Lomb, Inc. v Hydron Pacific, Ltd., 82 Misc. 2d 576, 371 N.Y.S.2d 292, 1975 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1975).

Where trial represented for defendants the only available means remaining for which preliminary injunction could be dissolved, and issues and questions on trial were precisely the same as those previously presented on motion for temporary injunction and decided adversely to defendants pending trial of action, defendants’ necessary expenses incurred in preparing for and on the action were damages sustained in consequence of the injunction, and were thus recoverable under plaintiff’s undertaking, posted as a condition for granting of preliminary injunction, that he would pay to defendants all damages and costs which might be sustained by reason of the injunction if it was finally determined that he was not entitled to an injunction. Bausch & Lomb, Inc. v Hydron Pacific, Ltd., 82 Misc. 2d 576, 371 N.Y.S.2d 292, 1975 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1975).

To determine whether expense of a trial is necessary and proximate result of an injunction pendente lite for purpose of determining whether such expense is recoverable under bond given as condition for granting the injunction, one should regard the problem it presents to particular

defendant; the question is whether the defendant was constrained to try the present case to vacate the injunction or for the sake of a favorable determination of the issues themselves; to determine that, the defendant's predicament in the matter must be considered. Bausch & Lomb, Inc. v Hydron Pacific, Ltd., 82 Misc. 2d 576, 371 N.Y.S.2d 292, 1975 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1975).

A plaintiff who was determined to be not entitled to a previously granted preliminary injunction would be liable to defendants for lost interest on the employment benefits which were the subject of the injunction and such lost interest could be recovered from plaintiff's undertaking; interval for which lost interest could be recovered commenced with the granting of the preliminary injunction and terminated when the employment benefit proceeds were actually received by the beneficiaries, and defendants would only be entitled to the difference between the interest the benefits were earning during this period and the applicable legal rate of interest established by statute. Sweets v Behrens, 118 Misc. 2d 1062, 462 N.Y.S.2d 398, 1983 N.Y. Misc. LEXIS 3442 (N.Y. Sup. Ct. 1983).

An Appellate Division decision dismissing plaintiff's complaint and reversing an order of Special Term granting a preliminary injunction implicitly decided that plaintiff was not entitled to the preliminary injunction and upon this implicit finding defendants could seek from the undertaking damages and costs sustained by reason of the injunction. Sweets v Behrens, 118 Misc. 2d 1062, 462 N.Y.S.2d 398, 1983 N.Y. Misc. LEXIS 3442 (N.Y. Sup. Ct. 1983).

Defendant was properly found to be entitled to damages by virtue of jury's verdict after trial on merits in its favor, which necessarily established that plaintiff was not entitled to injunction against defendant. Republic of Croatia v Trustee of the Marquess of Northampton 1987 Settlement, 232 A.D.2d 216, 648 N.Y.S.2d 25, 1996 N.Y. App. Div. LEXIS 9948 (N.Y. App. Div. 1st Dep't 1996).

19. —Damages resulting from preliminary injunction

Defendant may be indemnified not only for damages resulting from improvident action of court in erroneously granting preliminary injunction, but also for damages resulting from preliminary injunction providently granted in first instance, but which finally proves to be unwarranted. J. A. Preston Corp. v Fabrication Enterprises, Inc., 117 A.D.2d 997, 499 N.Y.S.2d 542, 1986 N.Y. App. Div. LEXIS 53241 (N.Y. App. Div. 4th Dep't), aff'd, 68 N.Y.2d 397, 509 N.Y.S.2d 520, 502 N.E.2d 197, 1986 N.Y. LEXIS 20853 (N.Y. 1986).

In proceeding to determine whether defendants sustained any damage as result of issuance of preliminary injunction forbidding them from conducting mining operations, court improperly determined that question of whether preliminary injunction was improvidently granted was not relevant because defendants did not have mining permit during period in question, since defendants contended that they could have mined up to 1,000 tons of minerals per year without permit under CLS ECL § 23-2711(1); under circumstances, order terminating plaintiff’s liability and exonerating its surety on its bond would be reversed, and matter would be remitted to give defendants chance to prove their claim. Schenectady Chemicals, Inc. v Flacke, 145 A.D.2d 678, 535 N.Y.S.2d 220, 1988 N.Y. App. Div. LEXIS 12350 (N.Y. App. Div. 3d Dep't 1988).

Party damaged as result of wrongful injunction may recover only on undertaking plaintiff was required to post to obtain injunctive relief, or on basis of action for malicious prosecution, unless granting of injunction benefited plaintiff materially or financially at expense of defendant by using or prohibiting use of subject of action while injunction was in force. Gross v Shields, 130 Misc. 2d 641, 496 N.Y.S.2d 894, 1985 N.Y. Misc. LEXIS 3254 (N.Y. Sup. Ct. 1985).

20. —Bad faith

In ascertaining damages sustained by reason of a preliminary injunction to which plaintiff was subsequently determined to be not entitled, such damages could be recovered despite the defendants’ failure to show that plaintiff obtained the judgment in bad faith. Sweets v Behrens, 118 Misc. 2d 1062, 462 N.Y.S.2d 398, 1983 N.Y. Misc. LEXIS 3442 (N.Y. Sup. Ct. 1983).

21. —Vacation of preliminary injunction

Where vacation of preliminary injunction had been granted on ground that the injunction rested on no foundation at all and such decision to vacate stood undisturbed, it constituted final determination that plaintiffs were not entitled to preliminary injunction, and, particularly where discontinuance of underlying action by consent had been expressly made without prejudice to defendant's rights, if any, that might exist to recover damages on undertaking, it was error to discharge undertaking; payment of damages to extent of full liability on undertaking should have been ordered in view of finding that defendant sustained damages in excess of the undertaking. Margolies v Encounter, Inc., 42 N.Y.2d 475, 398 N.Y.S.2d 877, 368 N.E.2d 1243, 1977 N.Y. LEXIS 2359 (N.Y. 1977).

Attorney's fees incurred in successful efforts to vacate restraining orders would be proper elements of damages occasioned by reason of the injunction in an action to recover for damages caused by the temporary restraining orders. Hanley v Fox, 90 A.D.2d 662, 456 N.Y.S.2d 251, 1982 N.Y. App. Div. LEXIS 18740 (N.Y. App. Div. 3d Dep't 1982).

Vacatur of temporary restraining order does not, without more, constitute "final determination" within meaning of CLS CPLR § 6312(b) justifying assessment of damages under injunction bond. 401 Hotel, L.P. v MTI/The Image Group, Inc., 271 A.D.2d 228, 705 N.Y.S.2d 364, 2000 N.Y. App. Div. LEXIS 3842 (N.Y. App. Div. 1st Dep't 2000).

22. —Interest

On motion by defendant for damages sustained as result of preliminary injunction which restrained defendant from proceeding with construction of building in which defendant was awarded full amount of undertakings filed by plaintiff, defendant was not entitled to prejudgment interest since surety is only liable to pay undertaking from date of its default, and surety cannot default prior to final determination of liability. Sunrise Plaza Assocs. v International Summit Equities Corp., 212 A.D.2d 690, 622 N.Y.S.2d 596, 1995 N.Y. App. Div. LEXIS 1750 (N.Y. App. Div. 1st Dep't 1995).

Award of interest was necessary to indemnify defendant for losses suffered when it was deprived of certain antiquities by plaintiff, which had secured injunction against defendant to which it was not entitled. Republic of Croatia v Trustee of the Marquess of Northampton 1987 Settlement, 232 A.D.2d 216, 648 N.Y.S.2d 25, 1996 N.Y. App. Div. LEXIS 9948 (N.Y. App. Div. 1st Dep't 1996).

23. —Attorney's fees

Where a first company did not establish that an employee was not an officer of a second company, the second company was entitled to indemnification for the employee's legal fees under N.Y. Bus. Corp. Law § 722(a); pursuant to N.Y. C.P.L.R. 6312(b), all damages and costs that were sustained by reason of an improperly imposed injunction should have been considered. Marietta Corp. v Pac. Direct, Inc., 9 A.D.3d 815, 781 N.Y.S.2d 387, 2004 N.Y. App. Div. LEXIS 10035 (N.Y. App. Div. 3d Dep't 2004).

Counsel fees on trial of main action are allowed, in case in which an undertaking has been posted as a condition for granting of preliminary injunction, where a trial is necessary to get rid of preliminary injunction and when principal issue upon the trial involves the right to injunctive relief. Bausch & Lomb, Inc. v Hydron Pacific, Ltd., 82 Misc. 2d 576, 371 N.Y.S.2d 292, 1975 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1975).

In determining damages resulting from a preliminary injunction which plaintiff was subsequently determined to be not entitled to, although defendant would be entitled to all reasonable and necessary legal fees incurred after the imposition of the injunction and which related to her efforts to terminate the injunction, defendant would not be entitled to any legal fees incurred in opposing the application for the preliminary injunction since no undertaking was ordered on the granting of the prior temporary restraining order, and defendant would not be entitled to legal fees incurred on the motion by the stakeholders seeking to discharge themselves and interplead the monies held; however, defendant would be entitled to the monies paid from the stakeholder funds to the interpleading defendants for their counsel fees and disbursements since this

reduced the amount which defendant received and the reduction was attributable to the preliminary injunction. Sweets v Behrens, 118 Misc. 2d 1062, 462 N.Y.S.2d 398, 1983 N.Y. Misc. LEXIS 3442 (N.Y. Sup. Ct. 1983).

Defendant was entitled to counsel fees incurred in successful defense of action in which plaintiff had obtained injunction against defendant to which it was not entitled, not only in relation to injunction itself, but also for litigation of issues at trial and appeal, since such issues were inseparable from issues pertaining to injunction; indeed, trial was sole means by which defendant was able to remedy injunction. Republic of Croatia v Trustee of the Marquess of Northampton 1987 Settlement, 232 A.D.2d 216, 648 N.Y.S.2d 25, 1996 N.Y. App. Div. LEXIS 9948 (N.Y. App. Div. 1st Dep't 1996).

Defendant is awarded $100,000 in damages for reimbursement of costs it sustained following temporary restraining order (TRO), even though charterer of apparently unseaworthy ship that secured TRO disputes notion that vacatur of TRO, initially issued in contemplation of pending hearing on related motion for order of attachment, gives rise to sustainable claim for damages, because case law is persuasive that attorney’s fees and related costs associated with TRO improperly sought pursuant to CPLR § 6210 may be recoverable under CPLR § 6312. Contichem LPG v Parsons Shipping Ltd., 170 F. Supp. 2d 416, 2001 U.S. Dist. LEXIS 17506 (S.D.N.Y. 2001).

24. —Illustrative cases

Defendant was entitled to damages sustained as result of issuance of preliminary injunction where plaintiff’s entitlement to preliminary injunction was based on same factual allegations involved in determination of plaintiff’s rights to permanent injunction, and thus judgment in favor of defendant and vacatur of injunction were equivalent to determination that plaintiff was not entitled to preliminary injunction. Sunrise Plaza Assocs. v International Summit Equities Corp., 212 A.D.2d 690, 622 N.Y.S.2d 596, 1995 N.Y. App. Div. LEXIS 1750 (N.Y. App. Div. 1st Dep't 1995).

On motion by defendant for damages sustained as result of preliminary injunction which restrained defendant from proceeding with construction of building, court failed to supply sufficient rationale for departing from valuations of defendant's experts where (1) defendant's experts presented evidence that damages greatly exceeded $125,000 in undertakings filed by plaintiff, and (2) court awarded damages in amount of about $82,000 based on its statement that it recognized state of economy in area, and excess of office and real estate available, which would account for reduced cost of construction. Sunrise Plaza Assocs. v International Summit Equities Corp., 212 A.D.2d 690, 622 N.Y.S.2d 596, 1995 N.Y. App. Div. LEXIS 1750 (N.Y. App. Div. 1st Dep't 1995).

Trial court properly denied a motion by a town to preclude a concrete company from seeking damages arising from a preliminary injunction entered against the company, as the action had been terminated in the company's favor through a final affirmed judgment, and thus N.Y. C.P.L.R. 6312(b) permitted the company to pursue recovery against the town, and the trial court properly limited the town's potential liability to $250,000, because under N.Y. C.P.L.R. 2512(1), the town's liability was limited to amount of the amount of the undertaking required of the other defendants pursuant to N.Y. C.P.L.R. 2501. Bonded Concrete, Inc. v Town of Saugerties, 42 A.D.3d 852, 841 N.Y.S.2d 152, 2007 N.Y. App. Div. LEXIS 8745 (N.Y. App. Div. 3d Dep't 2007).

Where relief sought by plaintiff is solely a permanent injunction, so that preliminary injunction proceedings and trial present same question, trial fees may be recovered by defendant who has exhausted all available remedies by motion to get rid of the temporary injunction and is forced to go to trial on same issues to obtain a dissolution thereof. Bausch & Lomb, Inc. v Hydron Pacific, Ltd., 82 Misc. 2d 576, 371 N.Y.S.2d 292, 1975 N.Y. Misc. LEXIS 2735 (N.Y. Sup. Ct. 1975).

II. Decisions Under Former Civil Practice Laws

A. In General

25. Necessity for undertaking or deposit

Former CPA § 1446 required that an injunction order be made conditional upon the filing of the undertaking specified in CPA § 893 which was applicable to an injunction order in ejectment. Potter v Potter, 59 A.D. 140, 69 N.Y.S. 183, 1901 N.Y. App. Div. LEXIS 353 (N.Y. App. Div. 1901).

In an action to restrain the foreclosure of a chattel mortgage, an injunction pendente lite should not be granted without requiring an undertaking by the plaintiff. Leonard v Schmidt, 109 A.D. 549, 96 N.Y.S. 491, 1905 N.Y. App. Div. LEXIS 3600 (N.Y. App. Div. 1905).

Security must be given on the issuance of an injunction, except by certain public officials and municipal corporations. Howley v Press, 127 A.D. 646, 111 N.Y.S. 1080, 1908 N.Y. App. Div. LEXIS 4070 (N.Y. App. Div. 1908).

Order granting injunction pendente lite modified by requiring plaintiff to furnish undertaking pursuant to CPA §§ 819, 893. Aerial Upholstering Co. v Blum, 226 A.D. 743, 233 N.Y.S. 686, 1929 N.Y. App. Div. LEXIS 9699 (N.Y. App. Div. 1929).

Individual or corporate security at plaintiff’s election required in injunction pendente lite. Manhattan Co. v Rom, 263 A.D. 821, 32 N.Y.S.2d 138, 1941 N.Y. App. Div. LEXIS 5139 (N.Y. App. Div. 1941).

Policy of law is to require bond or undertaking to protect party enjoined or to preserve status quo, as condition of granting temporary injunction or restraining order. Leeds v Guaranty Trust Co., 85 N.Y.S.2d 70, 193 Misc. 681, 1948 N.Y. Misc. LEXIS 3710 (N.Y. Sup. Ct. 1948).

Where temporary injunction was granted restraining pile-driving operations between hours of 6:00 P. M. and 7:00 A. M., plaintiffs were required to post an undertaking. Modugno v Merritt-Chapman Scott Corp., 17 Misc. 2d 679, 187 N.Y.S.2d 30, 1959 N.Y. Misc. LEXIS 3885 (N.Y. Sup. Ct. 1959).

The supreme court of New York could not by order stay proceedings in an action pending in the surrogate's court, but such relief could only be had by injunction, on security being given as required by CPA § 893. Deyo v Morss, 14 N.Y.S. 841, 60 Hun 580, 1891 N.Y. Misc. LEXIS 2526 (N.Y. Sup. Ct. 1891).

An order restraining defendant from interfering with partnership property pending action for dissolution cannot be made unless plaintiff gives security. Such order is no less an injunction because made part of the order appointing a receiver than if it was separate, and the security given by the receiver will not take the place of the required undertaking to protect defendant against injury produced to him by preventing his interference with the partnership assets. Pratt v Underwood, 30 Hun 82 (N.Y. 1883).

Where an injunction is issued as an incident to an order appointing a receiver, to prevent interference with the assets of a corporation and to preserve the fund, an undertaking is not required. Phoenix Foundry & Machine Co. v North River Constr. Co., 33 Hun 156 (N.Y.).

26. —Prior to enactment of Civil Practice Act

In an action by a resident and taxpayer of a municipal corporation against the comptroller of such corporation, under chap. 531 of 1881, it was held that the bond therein required must be given in addition to the bond called for by Code Civ. Proc. §§ 620, 621. Tappen v Crissey, 64 How. Pr. 496.

27. Power of court

An order of the court which had appointed a receiver to conserve the assets of a partnership pending disposition of a suit for an accounting, restraining the defendant, one of the partners, from interfering with the receiver's possession of such assets, was made in the exercise of the inherent power of the court to protect its receiver and the funds in his possession and was not a creature of the Civil Practice Act, and hence would not be set aside because of noncompliance

with former CPA § 821 requiring an order for an injunction to state the grounds upon which it was issued, or of CPA § 819 and CPA §§ 884–895 (Rule 6312(b), §§ 2209, 2501, 2502(b), 6315 herein), requiring the filing of security by the receiver. Dhembi v Carameta, 209 N.Y.S. 158, 124 Misc. 452, 1925 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct.), rev'd, 215 A.D. 759, 213 N.Y.S. 789, 1925 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 1925).

Court or judge is at liberty to nominate the amount of the security according to circumstances and if the amount proves to be insufficient it may be increased on motion. McColgan v Dodds, 209 N.Y.S. 707, 125 Misc. 36, 1925 N.Y. Misc. LEXIS 794 (N.Y. Sup. Ct. 1925).

28. Compelling security

Order granting injunction pendente lite modified by requiring plaintiff to furnish undertaking pursuant to CPA §§ 819, 893, Aerial Upholstering Co. v Blum, 226 A.D. 743, 233 N.Y.S. 686, 1929 N.Y. App. Div. LEXIS 9699 (N.Y. App. Div. 1929).

The collateral allegations immaterial to the main issue did not transform an action into a labor dispute or into an action to restrain unfair labor practices and where irreparable harm would ensue to the plaintiff if defendants continued to violate no strike provision of a contract, plaintiff’s application for a temporary injunction was granted on condition that plaintiff proceed diligently to trial of issue and upon further condition that plaintiff file an undertaking pursuant to CPA § 893. Anchor Motor Freight N. Y. Corp. v Local Union No. 445 of the International Brotherhood of Teamsters, 12 Misc. 2d 757, 171 N.Y.S.2d 506, 1958 N.Y. Misc. LEXIS 4055 (N.Y. Sup. Ct.), aff'd, 5 A.D.2d 869, 171 N.Y.S.2d 511, 1958 N.Y. App. Div. LEXIS 6829 (N.Y. App. Div. 2d Dep't 1958).

29. Undertaking is measure of liability

The undertaking is the measure of liability for damages. Bedell Co. v Harris, 228 A.D. 529, 240 N.Y.S. 550, 1930 N.Y. App. Div. LEXIS 12214 (N.Y. App. Div. 1930).

30. Form and requisites of undertaking

Individual or surety company security at plaintiff's election required in injunction pendente lite. Manhattan Co. v Rom, 263 A.D. 821, 32 N.Y.S.2d 138, 1941 N.Y. App. Div. LEXIS 5139 (N.Y. App. Div. 1941).

In proceeding by stockholder of life insurance company against such company and others to restrain them, mutualization of such company undertaking was increased to $25,000 as condition of granting temporary injunction. Young v Farmers & Traders Life Ins. Co., 282 A.D. 1010, 125 N.Y.S.2d 528, 1953 N.Y. App. Div. LEXIS 5669 (N.Y. App. Div. 1953), aff'd, 306 N.Y. 888, 119 N.E.2d 591, 306 N.Y. (N.Y.S.) 888, 1954 N.Y. LEXIS 1205 (N.Y. 1954).

If undertaking was given in aid of order staying plaintiff from doing some act in violation of defendant's rights, then CPA § 893 specifying the type of undertaking to be given applied, and damages sustained by restraining order are determined as provided in CPA § 894. Viall v Viall, 27 N.Y.S.2d 306, 176 Misc. 359, 1941 N.Y. Misc. LEXIS 1735 (N.Y. Sup. Ct. 1941).

Nor was any particular form required; a substantial compliance with the requirements of CPA § 893 was sufficient. Episcopal Church of St. Peter v Varian, 28 Barb. 644; Town of Guilford v Cornell, 4 Abb. Pr. 220, 1857 N.Y. Misc. LEXIS 235 (N.Y. Sup. Ct. Feb. 1, 1857).

It was not necessary that the undertaking contain any provision for a reference. Higgins v Allen, 6 How. Pr. 301.

As to practice in New York superior court, see Sheldon v Allerton, 3 Super Ct 700.

The undertaking given on injunction to restrain summary proceedings to recover lands was the one prescribed by CPA § 893, not by CPA § 886. Gilman v Prentice.

31. —Corporation

An undertaking executed by the president in his official character, in an action by a corporation, not professing to act as agent for the corporation, will be regarded as the act of the corporation, and will bind it, and not the officer. Episcopal Church of St. Peter v Varian, 28 Barb. 644.

32. Undertaking for whose benefit

Damages incurred by the real party in interest are recoverable in the name of the party on the record. Andrews v Glenville Woolen Co., 50 N.Y. 282, 50 N.Y. (N.Y.S.) 282, 1872 N.Y. LEXIS 416 (N.Y. 1872).

The damages caused by a preliminary injunction contained in an order to show cause why an injunction pendente lite should not be granted consist of the expenses incurred in retaining counsel, etc. Sargent v St. Mary's Orphan Boys' Asylum, 190 N.Y. 394, 83 N.E. 38, 190 N.Y. (N.Y.S.) 394, 1907 N.Y. LEXIS 1393 (N.Y. 1907), reh'g denied, 191 N.Y. 536, 84 N.E. 1120, 191 N.Y. (N.Y.S.) 536, 1908 N.Y. LEXIS 1154 (N.Y. 1908).

Obligation under an injunction bond, issued pursuant to this section, is for the benefit of the party enjoined and the limited represented class enumerated in CPA § 895 (§ 6315 herein). Nothing in the language of CPA § 895 (§ 6315 herein), relating to damages suffered by a third party, justified a construction that it was intended to include a vendee who purchased the subject matter of the injunction after the injunction was issued. Benguiat v Gotham Nat'l Bank, 261 A.D. 199, 24 N.Y.S.2d 836, 1941 N.Y. App. Div. LEXIS 7284 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 733, 39 N.E.2d 939, 287 N.Y. (N.Y.S.) 733, 1942 N.Y. LEXIS 1744 (N.Y. 1942).

Where manufacturer sought to enjoin purchaser of shotgun ammunition at manufacturer’s closing out sale from advertising it for resale at 25% off list price in violation of Fair Trade Law, plaintiff was required to provide undertaking pursuant to CPA § 893 in sum of $500. Remington Arms, Inc. v Harris Berger, Inc., 144 N.Y.S.2d 751, 208 Misc. 561, 1955 N.Y. Misc. LEXIS 3246 (N.Y. Sup. Ct. 1955).

The undertaking is for the benefit of all defendants affected by the injunction, whether served or not, and he may without appearance have a reference to assess his damages. Cumberland Coal & Iron Co. v Hoffman Steam Coal Co., 15 Abb. Pr. 78.

Or for that purpose set aside an order entered without his knowledge or consent. Cunningham v White, 45 How. Pr. 486, 1873 N.Y. Misc. LEXIS 164 (N.Y. Super. Ct. June 1, 1873); Dry Dock, East Broadway and Battery R.R. v Cunningham, 45 How. Pr. 458, 1873 N.Y. Misc. LEXIS 165 (N.Y. App. Term May 23, 1873).

33. Effect of failure to file undertaking or deposit security

It seems that without some security given before the granting of an injunction order, or without an order requiring some act on the part of plaintiff equivalent to giving security, such as a deposit in court, or unless there is ground for an action for malicious or vexatious prosecution, the defendant has no remedy for any damages he may sustain from an injunction. Palmer v Foley, 71 N.Y. 106, 71 N.Y. (N.Y.S.) 106, 1877 N.Y. LEXIS 474 (N.Y. 1877).

34. Vacation of injunction

Where on appeal a permanent injunction, which was granted after a temporary injunction had been granted, is vacated, the temporary injunction, even though not specifically referred to, is similarly vacated. Dooley v Anton, 24 Misc. 2d 1030, 205 N.Y.S.2d 700, 1960 N.Y. Misc. LEXIS 2339 (N.Y. Sup. Ct. 1960), aff'd, 14 A.D.2d 60, 217 N.Y.S.2d 170, 1961 N.Y. App. Div. LEXIS 9703 (N.Y. App. Div. 4th Dep't 1961).

It is ground for vacating the injunction, where the security upon the issuing of it is inadequate, unless the security is increased. Ryckman v Coleman, 21 How. Pr. 404, 1861 N.Y. Misc. LEXIS 138 (N.Y. Sup. Ct. Aug. 1, 1861).

But where the sureties become insolvent, it is in the discretion of the court to order the substitution of other sureties. Willett v Stringer, 13 Super Ct 686.

A defendant is entitled to have injunction dissolved by an omission to file same. Johnson v Casey, 26 Super Ct 710; O'Donnell v McMurn, 3 Abb. Pr. 391.

Where the undertaking has not been filed and the omission was by oversight or accident, plaintiff must pay costs of a motion to have the injunction vacated on such ground. O'Donnell v McMurn, 3 Abb Pr 391; Leffingwell v Chave, 18 Super Ct 703.

35. Liability of party

Where party obtaining an injunction does not sign the undertaking, he is not liable under it. Snyder v Snyder, 174 N.Y.S. 729, 106 Misc. 440, 1919 N.Y. Misc. LEXIS 944 (N.Y. Sup. Ct. 1919).

36. Liability of sureties

The undertaking given, on a temporary injunction, had to conform in terms or substance to CPA § 893, and the liability of the sureties was according to those terms. Palmer v Foley, 71 N.Y. 106, 71 N.Y. (N.Y.S.) 106, 1877 N.Y. LEXIS 474 (N.Y. 1877).

When action to restrain the owner of bank account from making withdrawals was dismissed on the ground that a prior action was pending, the surety company which undertook to pay damages caused by temporary injunction became liable for enjoined defendant's attorney's fee but not any further damages caused by acquiescence of defendant and the bank in assertion by the plaintiff's attorney that the injunction applied also to a third action presented against defendant. Humber v National Surety Corp., 9 Misc. 2d 264, 169 N.Y.S.2d 681, 1957 N.Y. Misc. LEXIS 1872 (N.Y. City Ct. 1957).

Where, upon a motion to dissolve an injunction, staying proceedings to dispossess the plaintiff, the order was so modified as to allow the defendant to bring an action to recover the property, on condition of his giving an undertaking for costs against waste, etc., and such an undertaking was given, held, in an action upon the undertaking, that although it was not warranted by CPA §

893, yet it was not unlawful, or void as taken colore officii, and the defendant and his sureties, having voluntarily given it, as a condition upon which they received a favor, could not object to its validity. Candee v Wilcox, 26 Hun 666 (N.Y.).

Surety in undertaking on application for injunction against several distinct acts becomes liable if injunction as to any one or more acts be refused. Pierson v Ells, 46 Hun 336, 12 N.Y. St. 201 (N.Y.).

37. —Abatement of action by death

Where the action abates by death there is no breach of the undertaking, which provides for the payment of damages in case the court should finally decide that plaintiff was not entitled to the injunction, as there can be no such decision. Johnson v Elwood, 82 N.Y. 362, 82 N.Y. (N.Y.S.) 362, 1880 N.Y. LEXIS 369 (N.Y. 1880).

38. —Costs

The fact that an undertaking has been given does not affect the right of defendants to have security for costs of action. Such undertaking applies only to such damages as defendant may sustain by reason of the injunction, and the costs of the action cannot be recovered from the sureties therein. McCall v Frith, 2 Civ Proc (Browne) 9.

39. —Final decision

There is no breach of the condition of the undertaking on injunction unless the court finally decides that plaintiff was not entitled to an injunction, or unless something occurs equivalent to such decision. Palmer v Foley, 71 N.Y. 106, 71 N.Y. (N.Y.S.) 106, 1877 N.Y. LEXIS 474 (N.Y. 1877).

Where a preliminary injunction is issued and judgment is rendered in favor of defendant, and plaintiff appeals, the defendant is not entitled, pending appeal, to an order to assess his

damages by reason of the injunction, there being no final determination of the cause. Musgrave v Sherwood, 76 N.Y. 194, 76 N.Y. (N.Y.S.) 194, 1879 N.Y. LEXIS 483 (N.Y. 1879).

When an action brought to obtain a permanent injunction is pending, an order vacating a temporary injunction is not a final determination of the rights of the parties to an injunction. Slingerland v Albany Typographical Union, 115 A.D. 15, 100 N.Y.S. 569, 1906 N.Y. App. Div. LEXIS 3606 (N.Y. App. Div. 1906).

Before an order of reference can be granted to ascertain damages sustained by a defendant on injunction to restrain him pending the action, there must be, in effect, a decision that plaintiff was not entitled to the injunction. Discontinuing the action by plaintiff or dismissal of his complaint on defendant’s motion are not sufficient. Hall v Sexton, 3 N.Y.S. 549, 1888 N.Y. Misc. LEXIS 904 (N.Y. Super. Ct. 1888).

Injunction, vacation of, when held to be upon final decision against plaintiff. Jordan v Donnelly, 11 N.Y.S. 836, 58 Hun 605, 1890 N.Y. Misc. LEXIS 2391 (N.Y. Sup. Ct. 1890).

Pending appeal from judgment granting permanent injunction, a motion to cancel bond filed upon obtaining injunction pendente lite is premature. Vitagraph Co. of America v Stewart, 170 N.Y.S. 527 (N.Y. Sup. Ct. 1918).

A discontinuance granted on the motion of a defendant for want of prosecution, and which motion was not contested by plaintiff, is equivalent to a final decision that plaintiff was not entitled to injunctive relief and authorizes the bringing of an action on the undertaking given by plaintiff. Manufacturers' & Traders' Bank v Folk, 21 N.Y.S. 806, 67 Hun 44, aff'd, 138 N.Y. 635, 33 N.E. 1084, 138 N.Y. (N.Y.S.) 635, 1893 N.Y. LEXIS 914 (N.Y. 1893).

The decision of the court of appeals when the remittitur is sent down is made the judgment of the supreme court when an appeal has been taken to the court of appeals, and is deemed to be the final decision intended by the undertaking of the sureties. Ninth Ave. R. Co. v New York El. R. Co. 3 Abb NC 22.

40. Amount of undertaking

$2500 fixed as undertaking pendente lite to protect name of plaintiff engaged in sale of used automobiles. Smiling Irishman, Inc. v Juliano, 45 N.Y.S.2d 361, 1943 N.Y. Misc. LEXIS 2624 (N.Y. Sup. Ct. 1943).

Sum of $1500 fixed as condition of injunction against competitive business. Tenenbaum v Meltzer, 81 N.Y.S.2d 365, 1948 N.Y. Misc. LEXIS 2791 (N.Y. Sup. Ct. 1948).

Single joint and several bond for $500 fixed as condition of injunction pendente lite against union. Barker v Barile, 96 N.Y.S.2d 535, 1950 N.Y. Misc. LEXIS 1566 (N.Y. Sup. Ct. 1950).

41. Cited

See Alpert v Koonin, 269 A.D. 1051, 58 N.Y.S.2d 757, 1945 N.Y. App. Div. LEXIS 5224 (N.Y. App. Div. 1945).

Cited in discussing requisites of bond in taxpayer’s action under § 51 of the General Municipal Law. Burns v Watertown, 213 N.Y.S. 90, 126 Misc. 140, 1925 N.Y. Misc. LEXIS 1175 (N.Y. Sup. Ct. 1925).

B. To Stay Proceedings in Action Before Trial

42. Application in general

CPA § 884 referred to actions in which a judgment for a sum of money only was demanded, and unless it was such an action the plaintiff in an action stayed by injunction was not entitled to an undertaking. Seaboard Nat'l Bank v Reid, 172 A.D. 135, 158 N.Y.S. 250, 1916 N.Y. App. Div. LEXIS 10299, 1916 N.Y. App. Div. LEXIS 5946 (N.Y. App. Div. 1916).

43. Effect of noncompliance

An order of the court which had appointed a receiver to conserve the assets of a partnership pending disposition of a suit for an accounting, restraining the defendant, a former partner, from interfering with the receiver's possession of such assets, was made in the exercise of the inherent power of the court to protect its receiver and the funds in his custody and was not a creature of the Civil Practice Act, and hence would not be vacated because of noncompliance with former CPA § 821, requiring an order for an injunction to state the grounds upon which it was issued, or of CPA § 819 and §§ 884 to 895, requiring the giving of security by the receiver. Dhembi v Carameta, 209 N.Y.S. 158, 124 Misc. 452, 1925 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct.), rev'd, 215 A.D. 759, 213 N.Y.S. 789, 1925 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 1925).

44. Joinder of issue

The trial of an action should not be stayed until issue has been joined, for until then it cannot be determined whether there be any necessity for the stay, as the plaintiff's claim may not be contested. International Post Card Co. v Lithograph & Mfg. Co., 144 A.D. 72, 128 N.Y.S. 780, 1911 N.Y. App. Div. LEXIS 1625 (N.Y. App. Div. 1911).

CPA § 884 did not apply where it did not appear that issue had been joined. Richards v Goldberg, 27 N.Y.S. 919, 7 Misc. 388, 1894 N.Y. Misc. LEXIS 197 (N.Y.C.P. 1894).

45. Insolvency of plaintiff

Where on appeal from an order granting an injunction to restrain the foreclosure of a chattel mortgage, it appeared that plaintiff was entitled to the injunction, but was insolvent and no security had been given, the order was affirmed on condition of filing security within ten days. New York Attrition Pulverizing Co. v Van Tuyl, 2 Hun 373 (N.Y.).

46. Liability of sureties

Failure to observe the formalities of statutes relating to bonds or undertakings furnished thereunder does not relieve the surety of his common-law obligation where the instrument is supported by a valid consideration. Cohen v Fidelity & Deposit Co., 229 N.Y.S. 296, 132 Misc. 193, 1928 N.Y. Misc. LEXIS 1290 (N.Y. City Ct. 1928).

47. Effect of insolvency of surety

The insolvency of one of the sureties to an undertaking given by plaintiff, upon procuring an injunction, furnishes no ground for the granting of an order staying generally all proceedings on the part of plaintiff in the action; the order should direct that the injunction be dissolved, unless plaintiff file a new undertaking within a specified period. Randall v Carpenter, 22 Hun 571 (N.Y.).

48. Damages

The word “damages” did not include a recovery upon an equitable counterclaim interposed in an injunction suit in which the defendant was the actor, and occupied the position of plaintiff, but related to damages which the enjoined party might be able to show that he had sustained by reason of the injunction under CPA § 894. W. H. Brace Co. v Kraft, 196 N.Y. 468, 89 N.E. 1093, 196 N.Y. (N.Y.S.) 468, 1909 N.Y. LEXIS 840 (N.Y. 1909), reh'g denied, 197 N.Y. 590, 91 N.E. 1122, 197 N.Y. (N.Y.S.) 590, 1910 N.Y. LEXIS 1161 (N.Y. 1910).

49. Staying action in another court

One cannot in a motion in one action obtain an order staying the trial of another action, but he should proceed in an independent action for an injunction. Indestructible Metal Products Co. v Summergrade, 197 A.D. 199, 188 N.Y.S. 642, 1921 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 1921).

Injunction cannot be granted in one action against the maintenance of an action in another court unless an undertaking is given. Indestructible Metal Products Co. v Summergrade, 197 A.D. 199, 188 N.Y.S. 642, 1921 N.Y. App. Div. LEXIS 7430 (N.Y. App. Div. 1921).

C. To Stay Proceedings After Trial and Before Judgment

50. Necessity for security

An order staying the enforcement of an injunction pending the decision of an appeal without security, is an abuse of discretion. Ziegfeld v Norworth, 140 A.D. 414, 125 N.Y.S. 504, 1910 N.Y. App. Div. LEXIS 2952 (N.Y. App. Div. 1910).

D. To Stay Proceedings After Judgment

51. Application in general

The corresponding provisions of the R. S., § 141, applied only to actions between the parties to the judgment and not an action by a judgment creditor to have a prior judgment canceled as having been paid. Packer v Nevin, 67 N.Y. 550, 67 N.Y. (N.Y.S.) 550, 1876 N.Y. LEXIS 434 (N.Y. 1876).

CPA § 886 had no application to a temporary stay of proceedings upon judgment in an ordinary action pending a motion therein. Carter v Hodge, 150 N.Y. 532, 44 N.E. 1101, 150 N.Y. (N.Y.S.) 532, 1896 N.Y. LEXIS 999 (N.Y. 1896).

Under CPA § 886 the condition of staying proceedings upon a judgment for a sum of money was that the full amount of the judgment be paid into court or an undertaking in lieu thereof, as well as an undertaking to secure the payment of the damages. Ingalls v Merchants' Nat'l Bank, 51 A.D. 305, 64 N.Y.S. 911, 1900 N.Y. App. Div. LEXIS 1192 (N.Y. App. Div. 1900).

Where, in an action to vacate a judgment, undertakings are given, the plaintiff was entitled to an injunction pendente lite, restraining payment of moneys obtained by executions in the prior action to prior plaintiff; the payment of that money into court satisfied CPA § 886. New York & New Jersey Tel. Co. v Rosenthal, 128 A.D. 220, 112 N.Y.S. 612, 1908 N.Y. App. Div. LEXIS 431 (N.Y. App. Div. 1908).

Injunction restraining prosecution of pending supplementary proceedings required security before stay. Pine v M. E. Conran Co., 268 A.D. 783, 48 N.Y.S.2d 768, 1944 N.Y. App. Div. LEXIS 3460 (N.Y. App. Div.), reh'g denied, 268 A.D. 822, 50 N.Y.S.2d 179, 1944 N.Y. App. Div. LEXIS 3635 (N.Y. App. Div. 1944).

In action to declare judgment satisfied and to discharge it of record, plaintiff's motion to stay proceedings to enforce judgment was granted, on condition that plaintiff file undertaking to secure payment of judgment with interest. Zapryluk v Milau, 279 A.D. 756, 108 N.Y.S.2d 711, 1951 N.Y. App. Div. LEXIS 3670 (N.Y. App. Div. 1951).

To obtain injunction to restrain enforcement of a judgment the undertaking must provide for the payment absolutely of the judgment with interest and costs. FULLAN v HOOPER, 66 How. Pr. 75, 1883 N.Y. Misc. LEXIS 212 (N.Y. Sup. Ct. Nov. 1, 1883).

After a money judgment, if a party desired a stay to enable him to apply to general term for leave to appeal to court of appeals, he had to comply with CPA § 886. Roberts v Mekell, 7 NY Week Dig 225.

Failure to give bond is fatal on appeal. Carpenter v Keating, 10 Abb. Pr. (n.s.) 223, 1870 N.Y. Misc. LEXIS 97 (N.Y.C.P. Dec. 1, 1870).

Court would not restrain the collection of a judgment for a sum of money in behalf of parties who were liable to pay the same, or who had property upon which the same was a lien unless an undertaking was given as prescribed in this section, or the amount of the judgment, etc., was paid into court. Rossow v Bank of Commerce, 22 NY Week Dig 448.

52. Necessity

A provision in an order to show cause bringing on a motion to vacate a default judgment, restraining plaintiff from enforcing the judgment was not warranted in the absence of compliance with the provisions of CPA § 886. Walton Foundry Co. v A. D. Granger Co., 203 A.D. 226, 196 N.Y.S. 719, 1922 N.Y. App. Div. LEXIS 7164 (N.Y. App. Div. 1922).

CPA § 501 (§ 5018(a), (c) herein) authorized court to dispense with security. Okyle v Highbridge Family Laundry Service, 40 N.Y.S.2d 690, 179 Misc. 987, 1942 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1942).

53. Amount of security

In action to vacate confessed judgment for $7,025 wherein court ordered pending trial stay of proceedings conditioned on filing surety bond for $2,000 and, at later date, another bond for $5,275, stay was improperly granted without requiring security to pay both bonds totaling $7,275. Shipman v Bennett, 2 A.D.2d 759, 152 N.Y.S.2d 1022, 1956 N.Y. App. Div. LEXIS 4782 (N.Y. App. Div. 2d Dep't), app. denied, 2 N.Y.2d 795, 158 N.Y.S.2d 578, 139 N.E.2d 535, 1956 N.Y. LEXIS 646 (N.Y. 1956).

An injunction in a creditor’s action, although it stays the enforcement of confessed judgments intended to secure illegal preference, does not require the giving of full security. Sweetser v Smith, 5 N.Y.S. 378, 1889 N.Y. Misc. LEXIS 2996 (N.Y. Sup. Ct.), rev'd, 5 N.Y.S. 951, 51 Hun 642, 1889 N.Y. Misc. LEXIS 2732 (N.Y. Sup. Ct. 1889).

54. Validity of order

Even though a stay order is issued without the required security, it is only voidable and must be obeyed by the defendants until vacated. Deichmiller v Grindle, 225 N.Y.S. 171, 130 Misc. 752, 1927 N.Y. Misc. LEXIS 1186 (N.Y. Sup. Ct. 1927).

55. Effect of discharge under two-thirds act

Where the defendant pending this action, procured at special term of common pleas a discharge under the “two-thirds act” (Debt. & Cred. Law, §§ 50 et seq.), which on the plaintiff’s motion, was vacated by order of court as fraudulent, from which order the defendant appealed to the general term, and the plaintiff having taken judgment in this action, the defendant applied to the supreme court for an order to stay the proceedings upon the judgment pending the appeal in the common pleas. Held, that such a stay was subtantially an injunction, and could be granted only upon giving security or making a deposit as prescribed in CPA § 886. Eastman v Starr, 22 Hun 465 (N.Y. 1880).

56. Insolvent corporations

It was not necessary for a judgment creditor of an insolvent corporation suing to restrain others under 2 R. S., 466, to give bond or make deposit. Hutchinson v New York Cent. Mills, 2 Abb. Pr. 394.

57. Restraining sheriff from paying over money

To enjoin sheriff’s act in paying over money collected by execution security must be given. BOKER v CURTIS, 1833 N.Y. LEXIS 184 (N.Y. Sept. 16, 1833); Cook v Dickerson, 4 Super Ct 691.

58. Stay to prevent condemnation

Stay of proceedings after judgment in action to recover possession of land, not proper to give time for exercise of right of eminent domain. Strong v Brooklyn, 12 Hun 453 (N.Y.).

59. Deposit with gas company

A consumer who refuses to make a deposit as security for the payment of gas is not entitled to an injunction restraining the company from shutting off his supply. Pollits v Consolidated Gas Co., 118 A.D. 92, 102 N.Y.S. 1017, 1907 N.Y. App. Div. LEXIS 618 (N.Y. App. Div. 1907).

E. To Stay Proceedings on Ground of Fraud

60. Fraud dispensing with security

The court may dispense with security and deposit where a judgment is confessed to keep property away from creditors as such judgment is fraudulent. BURNS v MORSE, 1836 N.Y. LEXIS 215, 1836 N.Y. Misc. LEXIS 94 (N.Y. July 19, 1836).

A failure to perform a promise or condition upon which a judgment was given is not a fraud, such as a false statement, a substitution of one paper for another or the like, the latter being the fraud in the recovery of a judgment which enables the court to dispense with a deposit and bond. Cook v Dickerson, 4 Super Ct 691.

61. Necessity for issue joined

The trial of an action should not be stayed until issue has been joined, for until then it cannot be determined whether there be any necessity for the stay, as the plaintiff's claim may not be contested. International Post Card Co. v Lithograph & Mfg. Co., 144 A.D. 72, 128 N.Y.S. 780, 1911 N.Y. App. Div. LEXIS 1625 (N.Y. App. Div. 1911).

F. Damages in Action to Recover Real Property or for Dower

62. Counsel fees

When a motion for an injunction pendente lite has been denied and a preliminary injunction vacated and set aside, the defendant, on a reference to ascertain the damage sustained by

reason of the injunction, is entitled to counsel fees incurred on the return to the order to show cause, if the injunction might have remained in force had the defendant failed to appear. Reeves v Sullivan, 117 A.D. 814, 102 N.Y.S. 1003, 1907 N.Y. App. Div. LEXIS 349 (N.Y. App. Div. 1907).

Research References & Practice Aids

Cross References:

This rule referred to in § 6313.

Competency of inhabitants as justices or jurors; undertakings not required of village, CPLR 4110-a.

Injunction for unlawful manufacturing, sale or consumption of liquor, wine or beer, CLS Al Bev Cont § 123.

Injunction proceedings; when authorized, CLS Agr & M § 172-a.

Injunction, CLS Bus Corp § 1115.

Action for injunction and for damages, CLS Civ R § 51.

Rights of creditors whose claims have not matured, CLS Dr & Cr § 279.

Injunction against joint-stock association, CLS Gen Assn § 10.

Investigation by the attorney general, CLS Gen Bus § 343.Examination of witnesses and preliminary injunctionl, CLS Gen Bus § 354.

Prosecution of officers for illegal acts, CLS Gen Mun § 51.

Houses of prostitution: injunction and abatement, CLS Pub Health §§ 2320 et seq.

Action to restrain, CLS Pub Lands § 91.

Actions to restrain nuisances, CLS Sec Cl Cities § 152.

Violations of ordinances, CLS Town § 135.

Zoning board of appeals, CLS Town § 267.

Zoning board of appeals, CLS Vill § 7-712.

Federal Aspects:

Service and notice of hearing of motion in United States District Courts, Rule 6(d) of Federal Rules of Civil Procedure, USCS Court Rules.

Particularity of grounds for motions in United States District Courts, Rule 7(b) of Federal Rules of Civil Procedure, USCS Court Rules.

Security for injunctions in United States District Courts, Rule 65(c) of Federal Rules of Civil Procedure, USCS Court Rules.

Form and scope of injunction in United States District Courts, Rule 65(d) of Federal Rules of Civil Procedure, USCS Court Rules.

Security to stay judgment pending review by United States Supreme Court, 28 USCS § 2101(f).

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 6312, Motion Papers; Undertaking; Issues of Fact.

3 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 39.04.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 17.01. In general.

CPLR Manual § 18.01. Property paid into court — introduction.

CPLR Manual § 28.18. Temporary restraining order; grounds.

CPLR Manual § 28.19. Procedure for obtaining preliminary injunction.

CPLR Manual § 36.04. Seizures by federal authorities.

Matthew Bender's New York Practice Guides:

3 New York Practice Guide: Business and Commercial § 16.21.

1 New York Practice Guide: Domestic Relations § 11.07.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 14.17 .Meeting Procedural Requirements for Temporary Restraining Order.

LexisNexis AnswerGuide New York Civil Litigation § 14.19. Meeting Procedural Requirements for Obtaining Preliminary Injunction.

LexisNexis AnswerGuide New York Civil Litigation § 14.21 .Moving on Notice to Ascertain Preliminary Injunction or Temporary Restraining Order.

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 154.03.

Matthew Bender's New York Checklists:

Checklist for Obtaining, Vacating, or Modifying Attachment LexisNexis AnswerGuide New York Civil Litigation § 14.02.

Checklist for Obtaining, Vacating, or Modifying Temporary Restraining Order (TRO) or Preliminary Injunction LexisNexis AnswerGuide New York Civil Litigation § 14.15.

Checklist for Filing or Canceling Notice of Pendency LexisNexis AnswerGuide New York Civil Litigation § 14.29.

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 6312.1 et seq.

LexisNexis Forms FORM 140-723.9.— Undertaking on Motion for Injunction Order Staying Proceedings in Another Action After Trial and Before Judgment.

LexisNexis Forms FORM 140-723.9(1).— Undertaking for Amount of Judgment on Motion for Temporary Injunction to Stay Proceedings in Action After Judgment.

LexisNexis Forms FORM 140-723.9(4).— Undertaking for Temporary Restraining Order and Preliminary Injunction.

LexisNexis Forms FORM 140-723.9(5).— General Form of Order Granting Preliminary Injunction.

LexisNexis Forms FORM 380-51B:101.— Notice of Petition in Special Proceeding for Judgment Directing Deposit of Rents for Purpose of Remedying Conditions Dangerous to Life, Health or Safety.

LexisNexis Forms FORM 380-51B:102.— Petition in Special Proceeding for Judgment Directing Deposit of Rents for Purpose of Remedying Conditions Dangerous to Life, Health or Safety.

LexisNexis Forms FORM 380-51B:103.— Petition by Tenants Alleging Contaminated Water Supply, Defective Air Conditioning and Defective Incinerator Shaft.

LexisNexis Forms FORM 380-51B:104.— Affidavit of Service of Notice of Petition and Petition.

LexisNexis Forms FORM 380-51B:105.— Notice of Pendency of Proceeding Under RPAPL Art. 7-A.

LexisNexis Forms FORM 380-51B:201.— Notice of Petition to Substitute Tenants as Petitioners in Place of Commissioner of Housing Preservation and Development.

LexisNexis Forms FORM 380-51B:202.— Petition to Substitute One-Third or More Tenants of Dwelling as Petitioners in Place of Commissioner of Department of Housing Preservation and Development of New York City.

LexisNexis Forms FORM 380-51B:203.— Order Substituting One-Third or More Tenants of Dwelling as Petitioners in Place of Commissioner of Department of Housing Preservation and Development of New York City.

LexisNexis Forms FORM 380-51B:301.— Answer Containing Affirmative Defenses in Proceeding by Tenants of Dwelling for Judgment Directing Deposit of Rents for Use in Remedying Conditions Dangerous to Life, Health or Safety.

LexisNexis Forms FORM 380-51B:401.— Judgment Appointing Administrator and Directing Deposit of Rents for Purpose of Remedying Conditions Dangerous to Life, Health or Safety.

LexisNexis Forms FORM 380-51B:402.— Judgment Denying Deposit of Rents.

LexisNexis Forms FORM 380-51B:403.— Affidavit of Service of Certified Copy of Judgment Upon Nonpetitioning Tenants.

LexisNexis Forms FORM 380-51B:404.— Affidavit of Service of Certified Copy of Judgment Upon City of New York.

LexisNexis Forms FORM 380-51B:405.— Affirmative Defense to Summary Proceeding for Nonpayment of Rent.

LexisNexis Forms FORM 380-51B:501.— Notice of Application for Permission to Perform Necessary Work in Lieu of Judgment.

LexisNexis Forms FORM 380-51B:502.— Affidavit in Support of Application for Order Permitting Mortgagee to Perform Necessary Work in Lieu of Judgment.

LexisNexis Forms FORM 380-51B:503.— Order Permitting Mortgagee to Perform Necessary Repairs in Lieu of Judgment.

LexisNexis Forms FORM 380-51B:504.— Notice of Application for Hearing to Determine Whether Judgment Directing the Appointment of an Administrator Should Be Rendered Immediately.

LexisNexis Forms FORM 380-51B:505.— Affidavit in Support of Application for Hearing to Determine Whether Judgment Directing the Appointment of an Administrator Should Be Rendered Immediately.

LexisNexis Forms FORM 380-51B:506.— Order Granting Application for Hearing to Determine Whether Judgment Directing the Appointment of an Administrator Should Be Rendered Immediately.

LexisNexis Forms FORM 380-51B:601.— Notice of Motion of Owner for Presentation of Accounts.

LexisNexis Forms FORM 380-51B:602.— Affidavit in Support of Motion of Owner for Presentation of Accounts.

LexisNexis Forms FORM 1434-19334.— CPLR 2214, 6311: Notice of Motion for Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6312:1.— Notice of Motion for Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6312:10.— Affidavit in Support of Motion for Preliminary Injunction Compelling Specific Performance of Lease and Directing Defendant to Sign Permit Forms Required to Alter Premises.

LexisNexis Forms FORM 75-CPLR 6312:11.— Affidavit in Support of Motion for Preliminary Injunction to Preserve Status Quo Pending Adjudication as to Contract.

LexisNexis Forms FORM 75-CPLR 6312:12.— Complaint in Action for Permanent Injunction Enjoining Defendants From Making Payment on Bank Guaranties Under Letter of Credit.

LexisNexis Forms FORM 75-CPLR 6312:13.— Order to Show Cause for Preliminary Injunction with Temporary Restraining Order Enjoining Defendant From Interfering with Plaintiff's Medical Practice.

LexisNexis Forms FORM 75-CPLR 6312:14.— Affidavit in Support of Motion for Preliminary Injunction with Temporary Restraining Order Enjoining Defendant From Interfering with Plaintiff's Medical Practice.

LexisNexis Forms FORM 75-CPLR 6312:15.— Complaint in Action for Permanent Injunction to Enjoin Defendant From Interfering with Plaintiff's Medical Practice.

LexisNexis Forms FORM 75-CPLR 6312:16.— Order to Show Cause for Preliminary Injunction Enjoining Picketing by Dissatisfied Automobile Purchaser.

LexisNexis Forms FORM 75-CPLR 6312:17.— Affidavit in Support of Motion for Preliminary Injunction Enjoining Picketing by Dissatisfied Automobile Purchaser.

LexisNexis Forms FORM 75-CPLR 6312:18.— Order Granting Preliminary Injunction Enjoining Picketing by Dissatisfied Automobile Purchaser.

LexisNexis Forms FORM 75-CPLR 6312:19.— Complaint in Action for Permanent Injunction Enjoining Defendant From Unjustified Interference with Plaintiff's Business.

LexisNexis Forms FORM 75-CPLR 6312:2.— Order to Show Cause for Preliminary Injunction Prohibiting Union From Picketing and Urging Consumer Boycott.

LexisNexis Forms FORM 75-CPLR 6312:20.— Complaint in Action for Permanent Injunction Enjoining Demonstration on Private Property of Building.

LexisNexis Forms FORM 75-CPLR 6312:21.— Complaint in Action for Permanent Injunction Enjoining Use of Plaintiff's Name for Advertising Purposes.

LexisNexis Forms FORM 75-CPLR 6312:22.— Affidavit in Opposition to Motion for Preliminary Injunction to Prevent Defendant From Acting as Sales Representative.

LexisNexis Forms FORM 75-CPLR 6312:23.— Attorney's Affirmation in Opposition to Motion for Preliminary Injunction Restraining Trading Stamp Company From Operating.

LexisNexis Forms FORM 75-CPLR 6312:24.— Complaint in Action to Enjoin Defendant From Demolishing Premises and Constructing New Building on Same Site.

LexisNexis Forms FORM 75-CPLR 6312:25.— General Form of Order Granting Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6312:26.— Order Granting Preliminary Injunction Enjoining Defendant From Use of Name.

LexisNexis Forms FORM 75-CPLR 6312:27.— Decretal Paragraph in Order Granting Preliminary Injunction Enjoining Defendant From Proceeding Under Lease.

LexisNexis Forms FORM 75-CPLR 6312:28.— Decretal Paragraph in Order Granting Preliminary Injunction Enjoining Retirement Board From Paying Salary to Officer Not Legally Appointed.

LexisNexis Forms FORM 75-CPLR 6312:29.— Decretal Paragraph in Order Granting Preliminary Injunction Enjoining Defendant From Unlawfully Exhibiting Plaintiff's Picture for Trade Purposes.

LexisNexis Forms FORM 75-CPLR 6312:3.— Affidavit in Support of Motion for Preliminary Injunction Enjoining Voting or Selling Stock.

LexisNexis Forms FORM 75-CPLR 6312:30.— Decretal Paragraph in Order Granting Preliminary Injunction Enjoining City From Proceeding Against Plaintiff for Claimed Violation of Unconstitutional Ordinance.

LexisNexis Forms FORM 75-CPLR 6312:31.— Decretal Paragraph in Order Granting Preliminary Injunction Enjoining Subsequent Purchaser of Property From Violating Restrictive Covenant in Deed.

LexisNexis Forms FORM 75-CPLR 6312:32.— Undertaking on Motion for Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6312:32A.— Amended Answer With Counterclaim for Damages and Costs Resulting From Improperly Issued Injunction.

LexisNexis Forms FORM 75-CPLR 6312:33.— Answer Containing Counterclaim for Value of Use and Occupancy and Damages for Waste in Action in which a Preliminary Injunction is Sought to Stay Proceedings to Recover Real Property.

LexisNexis Forms FORM 75-CPLR 6312:34.— Judgment Decreeing Permanent Injunction.

LexisNexis Forms FORM 75-CPLR 6312:4.— Affidavit in Support of Motion for Preliminary Injunction; Solicitation of Customers by Former Employee.

LexisNexis Forms FORM 75-CPLR 6312:5.— Complaint in Action for Permanent Injunction; Solicitation of Customers by Former Employee.

LexisNexis Forms FORM 75-CPLR 6312:6.— Affidavit in Support of Motion for Preliminary Injunction and Stay in Action Against Former Employee for Conversion of Funds.

LexisNexis Forms FORM 75-CPLR 6312:7.— Order to Show Cause for Preliminary Injunction Restraining Tenants' Organization from Collecting Rents During Rent Strike.

LexisNexis Forms FORM 75-CPLR 6312:8.— Affidavit in Support of Motion for Preliminary Injunction Restraining Tenants' Organization From Collecting Rents During Rent Strike.

LexisNexis Forms FORM 75-CPLR 6312:9.— Order to Show Cause for Preliminary Injunction Compelling Specific Performance of Lease and Directing Defendant to Sign Permit Forms Required to Alter Premises.

3 Medina's Bostwick Practice Manual (Matthew Bender), Forms 36:101 et seq .(injunction).

Texts:

Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York (Matthew Bender) § 7.16[1][b][iv].

Hierarchy Notes:

NY CLS CPLR, Art. 63

Forms

Forms

Form 1 Notice of Motion for Preliminary Injunction

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____, Notice of Motion

Plaintiff,

-against- Index No._____

_____,

Defendant

_____

PLEASE TAKE NOTICE that at an Individual Assignment Term of the above-named court to be held at the Court House in the City of _____, _____ County, on _____, 20_____, plaintiff herein will make a motion at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, for a preliminary injunction forbidding and restraining and enjoining defendant, defendant's agents, attorneys, servants, or employees from _____ [state concisely act or acts sought to be restrained] until the issues

in this action between plaintiff and defendant shall have been finally determined by this court, and for such other and further order as may be just.

That the motion will be made on the complaint herein served and upon the affidavit of plaintiff, sworn to _____, 20_____, hereto attached and served on you, and upon the files and records of this court.

Dated: _____, New York

_____, 20_____

_____, _____, _____,

& _____, P.C.

Attorneys for Plaintiff

[Office address and phone

number]

To: _____, Esq.

Attorney for Defendant

[Office address and phone

number]

Form 2 Order to Show Cause Why Preliminary Injunction Should Not Issue

PRESENT: Hon. _____, Justice

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Order to Show Cause

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

Upon the summons herein and the annexed complaint, duly verified _____, 20_____, and on the affidavit of _____, sworn to _____, 20_____, [and the undertaking dated _____, 20_____], let the defendant show cause before this court to be held in and for the County of _____ at the county court house therein"] at _____, on _____, 20_____, at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel can be heard, why an order should not issue herein pending the trial of this action enjoining the defendant from _____ [state the matters as to which the injunction is requested], and why the plaintiff should not have such other, further and different relief as may be equitable.

And it appearing to my satisfaction that a proper case is presented for the issuance of an order to show cause in the place and stead of the usual eight days' notice of motion, I do hereby order and direct that service of this order to show cause and the papers upon which the order has been granted upon the defendant or his attorney, either personally or at his office or at his residence, on or before _____ o'clock in the _____ noon on _____, 20_____, shall be held sufficient notice of motion herein and of the application for a preliminary injunction herein.

Signed this _____ day of _____, 20_____ at _____, New York.

E N T E R

_____

[Print name below signature]

Justice, Supreme Court

_____ County

Form 3 Skeleton Form of Affidavit of Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Affidavit

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

State of New York

ss.:

County of _____

_____, being duly sworn, deposes and says:

1. That I am the plaintiff [or “one of the plaintiffs”] in the above-entitled action.

2. This action was commenced by the filing of a summons and complaint with the Clerk, _____ County on _____, 20_____, the summons and complaint being served personally [or otherwise] upon the defendant on _____, 20_____.

3. That _____ [state condition of cause].

4. That _____ [state evidential facts to support all of material allegations of complaint, other than those made on information and belief, in this and following separately numbered paragraphs].

5. That the facts stated in the complaint herein on information and belief as to _____ are true as deponent is informed by _____ [state source of information], which deponent verily believes to be true.

6. That _____ [repeat, as in Paragraph 5, as to other allegations in complaint on information and belief].

7. That _____ [state any further facts to show that commission or continuance of act sought to be enjoined, during the pendency of the action, would produce injury to plaintiff].

_____

[Print name below signature]

[Jurat]

Form 4 Another Form of Affidavit

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Affidavit

Plaintiff,

-against-

Index No. _____

_____,

Defendant

_____

State of New York

ss.:

County of _____

_____, being duly sworn, deposes and says:

1. That I am the plaintiff in the above-entitled action.

2. That I have read the complaint in this action, that I am familiar with all the material matters therein stated on the information and belief of the plaintiff, and I have actual knowledge thereof. That from such knowledge I know that the matters therein so stated are true.

3. That _____ [state the source of information].

_____

[Print name below signature]

[Jurat]

Form 5 Supporting Affidavit of Attorney for the Plaintiff

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Affidavit

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

State of New York

ss.:

County of _____

_____, being duly sworn, deposes and says:

1. That I am the attorney for plaintiff in the above-entitled action.

2. This action was commenced by the filing of a summons and complaint with the Clerk, _____ County on _____, 20_____, said summons and complaint being served personally [or otherwise] upon the defendant on _____, 20_____.

3. That defendant has not answered nor appeared herein.

4. That _____ [if affidavit made by plaintiff states any information received from attorney as ground of belief for an allegation in complaint on information and belief, state facts to show knowledge of attorney in regard thereto].

_____

[Print name below signature]

[Jurat]

Form 6 Affidavit of Attorney in Fact

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Affidavit

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

State of New York

ss.:

County of _____

_____, being duly sworn, deposes and says:

1. That I am the attorney in fact for the above-named plaintiff, for the purpose of bringing the action stated in the complaint herein, by virtue of a power of attorney, for that purpose duly executed.

2. That said plaintiff is now absent from the state, and that the plaintiff left the City of _____ for _____ in _____, on _____, 20_____, and, as deponent verily believes, has not yet returned to this country.

3. That deponent has read the complaint in this action, and knows the contents thereof, and that I have actual knowledge [or “information”] of all the material allegations therein stated, and from such knowledge [or “information”] believe such matters to be therein truly stated and such complaint to be true.

4. [If based on information, add:] That the sources of deponent’s information are as follows: _____.

_____

[Print name below signature]

[Jurat]

Form 7 Affidavit on Motion to Restrain Violation of Agreement Not to Engage in Business

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Affidavit

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

State of New York

ss.:

County of _____

_____, being duly sworn, deposes and says:

1. That I am the President of the _____ Company, the plaintiff above-named; that I have been connected with the corporation ever since its organization, and before its organization was interested in and had general knowledge of all the affairs of the concern referred to in the annexed complaint, known as the _____.

2. That prior to the organization of the plaintiff which occurred on or about _____, 20_____, the defendant _____ and one _____ were engaged in the business of dealing in milk, cream, butter, eggs, and other dairy products at No. _____ Avenue _____, New York, and that associated with them were the defendants

_____, the husband of _____, and _____, the husband of _____.

3. That the business, which was started in a very small way without much capital had, at the time of the organization of the plaintiff, become very profitable; the gross business was at that time many thousands of dollars a year, and the profit thereon upwards of $_____ annually. A large part of the business consisted of delivery of milk, cream, and other products to customers at their homes in the Village of _____; a large amount of business had been built up in this way and was of such a character that the customers might reasonably be expected to continue trading with whoever should succeed the concern known as the _____.

4. Shortly prior to the incorporation of the plaintiff, it was decided that the business of this old concern had become of such magnitude that to be properly protected, and to guard against the death of any of the persons interested in it, a corporation should be formed for the purpose of taking over the property and business. It was in pursuance of this plan that the plaintiff corporation was organized, and after its organization all of the property, good will, and business of the old concern, known as the _____, were by instruments of transfer executed by the defendants, and also by _____ and _____, duly transferred to the plaintiff above-named. Deponent is familiar with such instruments of transfer, and the copies annexed to the accompanying complaint are true copies thereof as the same were executed and delivered. Upon the transfer of the property, good will, and business, stock of the corporation to the amount of $_____ was duly issued by order of the board of directors in payment of the property, good will, and business, and _____ shares of the stock were issued and delivered to the defendant _____ by the direction of the _____ and the defendant _____ whose interest was also represented in the stock also issued to _____.

5. After the organization of the plaintiff and the transfer of the property, good will, and business to it, the plaintiff entered upon the business of dealing in milk, cream, and other dairy products,

among others to and among the former customers of the old concern known as the _____, and still continues to retain a large majority of the customers. The plaintiff has also, since the taking over of the property, good will, and business of the said old concern, succeeded in largely adding to its business, and now has in the Village of _____ a very large business both from its home deliveries and in its store in said village.

6. On or about _____, 20_____, the defendants _____ and _____ disposed of all their holdings of the capital stock of the plaintiff and thereupon ceased to have any interest in its property or business. That for some time the defendants were not engaged in business of any kind, but that late in the month of _____, deponent heard a rumor that the defendants expected to start again in the business of dealing in milk, cream, butter, eggs, and other dairy products in the Village of _____, notwithstanding the covenants contained in the instruments of transfer hereinbefore referred to.

7. That on or about _____, the defendants, at No. _____ Street, in Village of _____, opened a store for the sale, and are now there engaged in the business of selling milk, cream, butter, eggs, and other dairy produce. Defendants are also going about among the customers of the plaintiff, including the former customers of the old concern known as the _____, and soliciting the business of the customers and exerting themselves in every way to effect the transfer to them of the accounts of plaintiff's customers, and that they have already succeeded in inducing some of plaintiff's customers to transfer their accounts from the plaintiff to the defendants, and unless restrained from so doing, they will cause the loss by the plaintiff of a considerable portion of its business.

8. The business of the defendants which they have started, and which they are now conducting, is being conducted under the name of _____. In the conduct of their business, the defendant _____ acts as solicitor and general manager, as he formerly did of the business of the old concern known as the _____,

and he is using in his present position the information and acquaintance he had and made while representing the old concern to help him in his effort to divert the business of the customers of the old concern from the plaintiff to the defendants, and that the defendant _____ in new business is acting as the store representative, and is there engaged in soliciting business and in making sales of milk, cream, butter, eggs, and other produce over the counter, which is a position similar to the one she had when the old concern was in existence, and both the defendants pretend and claim that their present business is a continuation of their old business and that therefore they have the right to the customers of said old concern.

9. A controversy over the plaintiff's customers between the defendants and plaintiff will inevitably result not only in a division of the business which is now the exclusive property of the plaintiff, but also in a loss by both the plaintiff and defendants of a large part of plaintiff's customers, because deponent knows from his experience in the milk business that customers, to avoid taking sides in a controversy between two individuals interested, or formerly interested, in a business, will transfer their business to some third person. That the milk business as conducted by plaintiff in _____ is of such a character that it would not admit of proof in many cases where customers were lost to the plaintiff by reason of the actions of the defendants, or either of them, that the loss of such customers was the result of such acts, and that, in the nature of things, it would be impossible in such a business, where the customers number many hundreds, to show the damage sustained by reason of the wrongful acts of the defendants, and, for that reason, unless the defendants are restrained from violating their agreement not to engage in such business, the plaintiff will never be able to prove or recover its losses.

10. The defendants, and each of them, are financially irresponsible and unable to respond for the damages which their wrongful acts have caused and will cause the plaintiff. The purchase price paid by the plaintiff for the property, good will, and business was to a very large extent paid for the good will of the business; if the defendants are suffered to destroy the good will, they will

in effect deprive the plaintiff of the principal part of the property for which $_____ of its stock was issued.

11. No previous application for an injunction or for any other provisional remedy against this defendant in this action has been made.

12. An order to show cause is asked for, returnable in less than _____ days, for the reason that the defendants are now daily carrying on the business at No. _____ Street in the Village of _____, which is a business in all respects similar to that of the plaintiff which the defendants sold to the plaintiff and covenanted not to engage again in, and that every day of the continuance of the business by the defendants is an additional injury to the plaintiff.

13. Deponent, who has verified the complaint in this action, further states that the facts recited in the complaint are all true to his own knowledge.

_____

[Print name below signature]

[Jurat]

Form 8 Affidavit on Personal Knowledge in Support of Allegations on Information and Belief

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Affidavit

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

State of New York

ss.:

County of _____

_____ of _____ [address], _____ County, being duly sworn, says that I have read the complaint in this action, that I am familiar with all the material matters therein stated on the information and belief of the plaintiff, and have actual knowledge thereof. That from such knowledge I know that the matters therein so stated are true.

_____

[Print name below signature]

[Jurat]

Form 9 Order to Show Cause in Taxpayer's Action

PRESENT: Hon. _____, Justice

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Order to show Cause

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

Upon the undertaking dated _____, 20_____, approved by this court and filed in the office of the Clerk, _____ County, and upon the summons and verified complaint herein, duly verified _____, 20_____, and upon the annexed affidavit of _____ sworn to _____, 20_____, and on motion of _____, attorney for the plaintiffs.

Let the defendants show cause at an Individual Assignment Term of the Supreme Court of the State of New York, for the hearing of motions, in and for the County of _____, at the County Court House at _____, _____ County, State of New York, on _____, 20_____, at _____ o'clock in the _____ noon of that day, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining and restraining the defendant, _____, individually and as Treasurer of the City of _____, from paying any sums of money out of the treasury of the City of _____, for salaries, wages or compensation to the defendants, _____, _____ and _____, and enjoining and restraining the defendants, _____, _____ and _____ from receiving or accepting any moneys for salaries, wages or other compensation out of the treasury of the city of _____, and restraining the other defendants from going or performing in any manner, directly or indirectly, any and all of the other acts threatened or intended to be done or performed, and compelling the defendants to perform the acts and duties, all referred to in the annexed moving papers, pending the determination of this action, and why the plaintiffs should not have such other and further relief in the premises as may be just and proper.

Sufficient reason appearing therefor, it is hereby

Ordered, that service of this order, and the accompanying papers, if made upon one of the defendants, on or before _____, 20_____, be deemed sufficient.

Signed this _____ day of _____, 20_____ at _____, New York.

E N T E R

_____

[Print name below signature]

Justice, Supreme Court

_____ County

Form 10 Order Denying Injunction in Taxpayer's Action

PRESENT: Hon. _____, Justice

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Order

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

Plaintiffs above-named having duly moved this court for an order herein, enjoining and restraining the defendant, _____, individually and as Treasurer of the City of _____, from paying any sums of money out of the treasury of the City of _____, for salaries, wages, or compensation to the defendants, _____, _____, and _____, and enjoining and restraining the defendants, _____,

_____, and _____ from receiving or accepting any moneys for salaries, wages, or other compensation out of the treasury of the City of _____, during the pendency of this action, and after hearing _____, attorney for plaintiff, in support of the motion, and _____, attorneys for defendants, in opposition thereto,

NOW, on reading and filing the order to show cause, dated _____, 20_____, the affidavit of _____, sworn to _____ _____, 20_____, the summons herein dated _____, 20_____, plaintiffs' complaint duly verified _____, 20_____, and the exhibits annexed thereto, together with due proofs of service of the papers, all submitted in support of said motion; and the affidavit of _____, sworn to _____, 20_____, together with the exhibits annexed thereto, all submitted in opposition to said motion, and upon the filing of the opinion of this Court,

NOW, on motion of _____, attorneys for defendants, it is

ORDERED that plaintiffs' motion for a preliminary injunction herein, enjoining and restraining the defendant, _____, individually and as treasurer of the City of _____, from paying any sums of money out of the treasury of the City of _____, for salaries, wages, or compensation to the defendants, _____, _____, and _____, and enjoining and restraining the defendants, _____, _____, and _____ from receiving or accepting any moneys for salaries, wages, or other compensation out of the treasury of the City of _____ during the pendency of this action, and preventing the defendant from paying or receiving any sums of money out of the treasury of the City of _____ for salaries, wages, or compensation to the defendants, _____, _____, and _____, for the fiscal year of 20_____, be, and the same is hereby denied.

Signed this _____ day of _____, 20_____ at _____, New York.

E N T E R

_____

[Print name below signature]

Justice, Supreme Court

_____ County

Form 11 Bond Furnished by Plaintiff Taxpayer

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Bond

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

WHEREAS, the above-named plaintiff, whose assessment upon the assessment roll of the town of _____ amounts to $1,000, or more, and who is liable to pay a tax on such assessment roll in the town of _____, New York, a municipal corporation and who has been assessed and paid taxes upon an assessment of $1,000, or more, within one year from the commencement of this action, is about to bring a taxpayer's action against the defendants to prevent an illegal act of the defendant, the Board of Supervisors of _____ County, in levying and issuing a warrant for the collection of an illegal and unlawful tax levied against him and to prevent the waste and injury of plaintiff's property, and to prevent sale of plaintiff's property and the property of other taxpayers upon an illegal tax and a warrant unlawfully levied against plaintiff's property and the property of

the other taxpayers of the town of _____, and to have canceled and set aside the tax and the levy thereof as a cloud upon the title of plaintiff's property, and a cloud upon the title of the property of the other taxpayers of the town of _____, New York.

Now, therefore, know all men by these presents, that pursuant to statute, we, _____, residing in the town of _____, New York, by occupation _____ [describe], and _____, residing in the town of _____, New York, by occupation _____ [describe], are jointly and severally firmly bound unto the defendants in the above-entitled action in the sum of $_____ to be paid to the defendants or to their certain attorneys, executors, administrators, and assigns.

For which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents.

The condition of this bond is such that if the above-bounden plaintiff, his heirs, executors, or administrators shall and do well and truly pay or cause to be paid unto the above-named defendants, their certain attorneys, executors, administrators, or assigns all costs that may be awarded the defendant in the action if the court shall finally determine the same in favor of the defendants, not exceeding the sum of $_____ without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

_____

[Name printed below signature]

[Acknowledgments]

[Venue]

_____, one of the sureties in the foregoing undertaking, being duly sworn, says that he is a resident and freeholder within the state of New York and is worth

$_____ over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

_____

[Name printed below signature]

[Jurat]

[Repeat for other surety]

I hereby direct that the penalty of the bond to be given by the plaintiff in the above-entitled action shall be $_____, and I hereby approve of the foregoing bond, the penalty thereof and the sufficiency of the sureties thereon.

Dated: _____, 20_____.

_____

[Print name below signature]

Justice, Supreme Court

_____ County

Form 12 Undertaking Prior to Granting of Preliminary Injunction

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Undertaking

Plaintiff,

-against-

Index No._____

_____,

Defendant

_____

The above-named plaintiff, _____, having applied [or "being about to apply"] to one of the Justices of the Supreme Court [or as the case may be] for an injunction in the above-entitled action restraining the defendant, _____, from _____,

Now, therefore, pursuant to Rule 6312(b) of the Civil Practice Law and Rules, the undersigned, _____, residing at No. _____, _____ Street, _____, New York, does hereby undertake that the plaintiff, _____, will pay to the defendant, _____, so enjoined, such damages and costs, [if injunction is to stay proceedings in another action on grounds other than the obtaining of a report, verdict or decision by actual fraud] including all damages and costs which may be or have been awarded in the action of [describe action or proceedings to be enjoined] as well as in this action,

[or]

[if action is to stay proceedings in an action to recover real property or for dower, on grounds other than those stated above] including all damages and costs which may be awarded or which have been awarded to the defendant in this action, including the reasonable rents and profits of, and any waste committed upon, the real property which is sought to be recovered in the action of [describe action which is sought to be enjoined] after the granting of this injunction,

[or]

[if the injunction is to stay proceedings upon a judgment for money on grounds other than those stated above] including the full amount of the judgment obtained [describe judgment upon which proceedings are sought to be enjoined] and all damages and costs which may be awarded to the defendant in this action, not exceeding the sum of $_____ as he may sustain by reason of the injunction if the court finally decides that the plaintiff is not entitled thereto.

Dated: _____, 20_____

_____

[Print name below signature]

[Acknowledgment]

Form 13 Order Granting Preliminary Injunction Where Right to Injunction Depends on Nature of Action

PRESENT: Hon. _____, Justice

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Order

Plaintiff,

-against- Index No._____

_____,

Defendant

_____

The plaintiff herein having regularly made a motion for a preliminary injunction pending the final determination in the above-entitled action, on the ground that _____, and the motion having come on regularly to be heard,

NOW, on reading and filing the notice of motion [or "order to show cause herein made by Justice _____"] dated _____, 20_____, and the complaint duly verified _____, 20_____, and the affidavit of _____, sworn to _____, 20_____, and _____ [recite other motion papers, if any], together with due proof of service of the papers on defendant, _____, and the undertaking given by plaintiff, filed in the office of the Clerk of the County of _____ on _____ [date], in favor of the motion, and after reading and filing [the answer herein duly verified _____, 20_____, and] the affidavit of _____, sworn to _____, 20_____, in

opposition thereto, and after hearing _____, attorney for plaintiff in favor of the motion, and _____, attorney for defendant in opposition thereto, and due deliberation having been had, and it appearing to the satisfaction of this court, by the verified complaint herein and the affidavit of _____, sworn to _____, 20_____, that plaintiff herein demands and is entitled to a final judgment restraining defendant herein from _____, on the ground that _____, and that the commission or continuance of the acts during the pendency of this action would produce injury to plaintiff by _____ [set forth the manner of the injury], and plaintiff having given an undertaking as required by law:

NOW, on motion of _____, attorney for plaintiff, it is

ORDERED that defendant, his agents, servants, employees and attorneys, are hereby enjoined during the pendency of this action, from _____; and in case of disobedience to this order you will be liable to the punishment therefor prescribed by law.

Signed this _____ day of _____, 20_____ at _____, New York.

E N T E R

_____

[Print name below signature]

Justice, Supreme Court

_____ County

Form 14 Order Granting Preliminary Injunction Where Right Thereto Depends on Acts of Defendant

PRESENT: Hon. _____, Justice

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____,

Order

Plaintiff,

-against- Index No._____

_____,

Defendant

_____

A motion having duly come on to be heard before this court on _____, 20_____, upon a notice of motion dated _____, 20_____ [or "upon an order to show cause granted herein by Hon. _____, one of the Justices of this court, on _____, 20_____"] for an order enjoining and restraining defendants _____ and _____, pending the trial and determination of this action, from _____ [state acts sought to be restrained], and after reading and filing the notice of motion [or "order to show cause"], the summons and the complaint herein verified _____, 20_____, and the affidavits of _____ and _____, sworn to _____, 20_____, with proof of due service thereof, in support of the motion, and affidavit of _____, sworn to _____, 20_____, in opposition thereto, and after hearing _____, attorney for plaintiff in support of said motion, and _____, attorney for defendants, in opposition thereto,

And it appearing to the satisfaction of this court that defendants _____ and _____ threaten and are about to _____ [recite the acts threatened to be done], in violation of plaintiff's rights respecting the subject of this action, and that the commission or continuance of the acts during the pendency of this action would tend to render the judgment herein ineffectual;

And plaintiff having duly filed an undertaking in the penal sum of $_____ to defendants _____ and _____, as prescribed by Rule 6312(b) of the Civil Practice Law and Rules; now, upon filing the opinion of this court and upon motion of _____, attorney for plaintiff, it is

ORDERED that pending the trial and determination of the above-entitled action, defendants _____ and _____, and their servants, agents and employees, be and they hereby are, enjoined and restrained from _____ [for instance, “selling, assigning, transferring, or otherwise disposing of, or removing, any of his property either real or personal, except what is by law exempt from execution with intent to defraud, hinder, or delay creditors, or from in any manner interfering therewith with such intent”].

Signed this _____ day of _____, 20_____ at _____, New York.

E N T E R

_____

[Print name below signature]

Justice, Supreme Court

_____ County

Form 15 Statement in Order of Grounds for Injunction

The grounds of this injunction order are that defendant entered into an agreement with plaintiff that he would not, directly or indirectly, engage in a similar business to that formerly carried on by _____, in any place within the State of New York, where _____ had its stores on _____, 20_____, while plaintiff remained the owner thereof.

Form 16 Statement in Order as to Persons Enjoined Where Defendant a Corporation

ORDERED that the defendant, _____ company, and its officers, agents, servants and employees, and each of them, be, and they hereby are, enjoined and restrained from _____.

Form 17 Statement in Order as to Scope of Injunction as to Acts of Defendant as Principal or Otherwise

From at any time hereafter, directly or indirectly, engaging in or becoming associated with any business of _____ or of like character other than that of plaintiff, as principal, agent or employee, or in any other relation or capacity, or as stockholder, director, trustee, agent, officer or employee of any corporation other than plaintiff, engaged in the business of _____, or in any similar business in any State or Territory in the United States.

Form 18 Enjoining Prosecution of Action

From commencing, continuing or prosecuting any action or actions in this or any other court in the State of New York or elsewhere, relative to _____ mentioned in the complaint.

Form 19 Enjoining Acts of Police

From maintaining such alleged post within plaintiff's place of business and upon plaintiff's premises, occupied by plaintiff at _____ Avenue, _____, New York, and also from keeping, stationing and maintaining within plaintiff's place of business and upon plaintiff's premises any of the officers under plaintiff's command, against plaintiff's will, or otherwise continuing to trespass upon the premises occupied by plaintiff.

Form 20 Enjoining Disclosure of Secret Process

From disclosing to any person or persons information concerning the various secret processes following, to wit: _____, which are articles mentioned in the complaint

hereto annexed, and which were purchased by plaintiff from one _____; from disclosing to any person, any information concerning the improvement in the above-mentioned articles, which defendant made while in plaintiff's employ, as mentioned in the complaint hereto annexed, and also the process for making _____, which defendant discovered while in plaintiff's employ; and also from disclosing to any person or persons information concerning a certain size called _____, how to color _____, how to make _____, all of which are secret processes which defendant learned from plaintiff's employees as mentioned in the complaint hereto annexed.

From manufacturing, or in any way aiding in the manufacture of any and all of the articles above-mentioned.

Form 21 Enjoining Violation of Contract of Employment

Ordered that defendants herein be, and they hereby are, restrained and enjoined, during the pendency of this action, from continuing in the employ of _____ in the business of selling _____ within the corporate limits of _____ and from soliciting customers therefor, and from engaging directly or indirectly, in the business of selling _____ at retail or wholesale as principal, agent, servant, employee or otherwise, in the City of _____, or soliciting or attempting to solicit customers or orders for another without the written consent of plaintiff.