

NY CLS CPLR § 6315

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

Article 63 Injunction (§§ 6301 — 6330)

§ 6315. Ascertaining damages sustained by reason of preliminary injunction or temporary restraining order.

The damages sustained by reason of a preliminary injunction or temporary restraining order may be ascertained upon motion on such notice to all interested persons as the court shall direct. Where the defendant enjoined was an officer of a corporation or joint-stock association or a representative of another person, and the amount of the undertaking exceeds the damages sustained by the defendant by reason of the preliminary injunction or temporary restraining order, the damages sustained by such corporation, association or person represented, to the amount of such excess, may also be ascertained. The amount of damages so ascertained is conclusive upon all persons who were served with notice of the motion and such amount may be recovered by the person entitled thereto in a separate action.

History

Add, L 1962, ch 308, eff Sept 1, 1963.

Annotations

Notes

Advisory Committee Notes

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This section replaces CPA §§ 894, 895 and 896. Those sections provided an expeditious method for ascertaining the damages caused by an injunction, upon motion in the same action in which the injunction was granted; that method was optional, however, and it was not a prerequisite to an action on the undertaking that the damages first be ascertained under those provisions. See 10 Carmody-Wait, Cyclopedia of New York Practice 782–83 (1954). CPA § 895, added by the authors of the Throop Code (see NY Code Civ Proc § 624, note (Throop ed (1880))), set up a class of persons in addition to the defendant who might have recovered damages caused to them to the extent that a surplus remained on the undertaking after deducting the defendant's damages. See *Benguat v Gotham Nat'l Bank of New York*, 261 App Div 199, 24 NYS2d 836 (2d Dept 1941).

Though the language of the three sections has been simplified, the only change of substance made is to require notice to all “interested persons.” This phrase is intended to include the surety as well as the persons specified in CPA § 895. The latter section corresponds to the second sentence of this section. Under the former sections, notice to the surety was not required, but he might have nevertheless been bound by the determination. See 10 Carmody-Wait, Cyclopedia of New York Practice 785, 787 (1954). Under this section the order is binding upon “all persons who had notice of the motion”; under CPA § 894 it bound “all the persons who have executed the undertaking.” The qualification “unless it is reversed on appeal” is omitted as unnecessary.

The phrase in CPA § 894 which specified the various methods of trial is omitted since trial of an issue of fact raised on a motion is covered by § 2218.

The last sentence of this section has been clarified to indicate that the persons intended are those who received notice by being served with a notice of motion, and not persons who might have received notice in another way.

Derivation Notes

Earlier statutes: CPA §§ 894–896; CCP §§ 623-625; Code Proc §§ 222, 224; 2 RS 190, § 145.

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I. Under CPLR

1. In general

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).

Where defendant's consent to grant of preliminary injunction was based on payment bond being posted and immediate trial being held, and since it was expeditious to have right to injunction

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tried fully by a trial court rather than determined on mere motion, defendant's consent to grant of preliminary injunction did not preclude it from later, after vacation of injunction, claiming damages based upon grant. *Schreiber v Republic Intermodal Corp.*, 57 A.D.2d 830, 394 N.Y.S.2d 59, 1977 N.Y. App. Div. LEXIS 12032 (N.Y. App. Div. 2d Dep't 1977).

Payment bond was in effect posted in support of plaintiffs' application for preliminary injunction, as well as continuance of temporary stay, and thus insurer which issued bond was liable for defendant's damage as result of stay and vacated injunction; if bond's coverage ended with grant of preliminary injunction as insurer contended, special term's condition that plaintiffs file valid and sufficient undertaking before preliminary injunction would be granted was never met and thus preliminary injunction never became effective and bond remained in effect. *Schreiber v Republic Intermodal Corp.*, 57 A.D.2d 830, 394 N.Y.S.2d 59, 1977 N.Y. App. Div. LEXIS 12032 (N.Y. App. Div. 2d Dep't 1977).

On appeal of order granting plaintiff's motion for preliminary injunction, court would not render advisory opinion regarding propriety of preliminary injunction to determine defendant's right to proceed against undertaking, where at oral argument court was informed that parties had stipulated to terminate injunction, but to continue undertaking during pendency of action; action had not been discontinued, thus right to recovery upon undertaking would be determined after trial. *Pilato v Veretta Enterprises, Inc.*, 122 A.D.2d 598, 505 N.Y.S.2d 11, 1986 N.Y. App. Div. LEXIS 59880 (N.Y. App. Div. 4th Dep't 1986).

Party who had been temporarily restrained pending appeal, by order of Justice of Appellate Division, was entitled to recover under bond posted by opposing party where it had been finally established on merits that opposing party was not entitled to injunction; right to recover on bond did not depend on showing that Justice abused discretion in granting temporary restraining order. *Technicare Corp. v New York City Health & Hospitals Corp.*, 131 A.D.2d 371, 516 N.Y.S.2d 937, 1987 N.Y. App. Div. LEXIS 47854 (N.Y. App. Div. 1st Dep't 1987).

In proceeding to determine whether defendants sustained any damage as result of issuance of preliminary injunction forbidding them from conducting mining operations, court improperly

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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 on whose behalf undertaking is not posted cannot recover thereon absent proof of malice even if that party opposed injunction and sustained loss by reason of its issuance; thus, in action involving question whether certain stock was pledged by plaintiffs to defendants as collateral for loan or sold outright, defendants were not entitled to recover damages sustained by reason of improperly issued temporary restraining order which enjoined transfer agent and persons acting in concert with it from transferring registration of stock, where undertaking named only transfer agent as indemnitee, court lacked authority to amend undertaking nunc pro tunc once temporary restraining order was vacated, and no malice was claimed or shown. *Thompson v Topsoe*, 237 A.D.2d 113, 654 N.Y.S.2d 363, 1997 N.Y. App. Div. LEXIS 2139 (N.Y. App. Div. 1st Dep't 1997).

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).

2. Attorney's fees

Award of counsel fees under CLS CPLR § 6315 was proper, even though defendant's application was brought by ordinary notice of motion rather than by order to show cause, where it was undisputed that plaintiff had actual notice of application and, in fact, had submitted papers

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in opposition. *Watmet, Inc. v Robinson*, 136 A.D.2d 947, 524 N.Y.S.2d 954, 1988 N.Y. App. Div. LEXIS 1272 (N.Y. App. Div. 4th Dep't 1988).

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).

Trial court did not err in granting the owner's application for damages sustained as a result of a temporary restraining order in an advocacy group's action for administrative relief because the mere fact that trial court denied the owner relief under the frivolous litigation standard in no way barred the owner's subsequent request for counsel fees and the advocacy group's Civil Rights Law claim lacked merit. *Matter of Citizens for St. Patrick's v City of Watervliet Zoning Bd. of Appeals*, 130 A.D.3d 1338, 15 N.Y.S.3d 492, 2015 N.Y. App. Div. LEXIS 6150 (N.Y. App. Div. 3d Dep't 2015).

3. No undertaking posted

Enjoined party was precluded from seeking damages sustained by reason of temporary restraining order, despite court's later denial of preliminary injunction, where temporary restraining order had not been conditioned on posting of undertaking, and enjoined party produced no proof of malice. *Gardino v Rescignano*, 152 A.D.2d 911, 544 N.Y.S.2d 392, 1989 N.Y. App. Div. LEXIS 9744 (N.Y. App. Div. 4th Dep't 1989).

In action for damages incurred as result of improperly issued temporary restraining order, plaintiff was without remedy where no undertaking was posted and there was no showing of malicious prosecution. *RS Paralegal & Recovery Servs., Inc. v Poughkeepsie Sav. Bank F.S.B.*,

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190 A.D.2d 660, 593 N.Y.S.2d 283, 1993 N.Y. App. Div. LEXIS 850 (N.Y. App. Div. 2d Dep't 1993).

4. Illustrative cases

Insurer, which issued payment bond in action for rescission of agreement for sale of certain stock and for permanent injunction and which, in its opposition papers and argument on motion by defendant to ascertain damages incurred as result of temporary restraining order and vacated preliminary injunction, submitted question of its liability on bond to motion court, subjected itself to judgment even though not a party to suit. CPLR 6315. *Schreiber v Republic Intermodal Corp.*, 57 A.D.2d 830, 394 N.Y.S.2d 59, 1977 N.Y. App. Div. LEXIS 12032 (N.Y. App. Div. 2d Dep't 1977).

Party who had been preliminarily enjoined in Supreme Court, pending hearing on Article 78 proceeding, could not recover from opposing party damages sustained by reason of preliminary injunction where Supreme Court's order granting preliminary injunction failed to designate dollar amount for undertaking, and consequently no bond was filed; in absence of undertaking, there is no right to recover damages from issuance of court process, except action for malicious prosecution. *Technicare Corp. v New York City Health & Hospitals Corp.*, 131 A.D.2d 371, 516 N.Y.S.2d 937, 1987 N.Y. App. Div. LEXIS 47854 (N.Y. App. Div. 1st Dep't 1987).

In action based on defendants' failure to honor letters of credit, wherein plaintiff initially obtained temporary restraining order prohibiting transfer of assets maintained by defendants in New York bank and defendants sought to recover damages resulting from restraint on asset transfers after plaintiff's complaint was dismissed on forum non conveniens grounds, record failed to sustain court's award of damages for full amount of plaintiff's undertaking, in absence of hearing as to propriety of counsel fees or findings with respect to nature and extent of damages incurred by defendants; there is no statutory provision for award of liquidated damages in amount of undertaking. *A & M Exports, Ltd. v Meridien Int'l Bank, Ltd.*, 222 A.D.2d 378, 636 N.Y.S.2d 35, 1995 N.Y. App. Div. LEXIS 13751 (N.Y. App. Div. 1st Dep't 1995).

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Upon a motion brought pursuant to CPLR § 6315 to ascertain the amount of damages sustained by reason of a preliminary injunction, defendants would not be entitled to an ascertainment of damages in excess of the surety bond which they posted, since the section is intended to provide a procedure to ascertain damages resulting solely from an improvidently obtained injunction, and such damages are limited to the amount of the bond; additionally, the statutory language does not prohibit the entry of a judgment for those damages against the party found liable since requiring the institution of a separate suit would result in a waste of judicial resources and be of no benefit to any party. *Apfelberg v East 56th Plaza, Inc.*, 112 Misc. 2d 680, 447 N.Y.S.2d 635, 1982 N.Y. Misc. LEXIS 3180 (N.Y. Sup. Ct. 1982).

II. Decisions Under Former Civil Practice

5. Generally

“Leave of the court” as described herein is a formal matter which may be supplied nunc pro tunc or assumed given until withdrawn. *Bolton v Thacher*, 214 N.Y.S. 290, 126 Misc. 675, 1926 N.Y. Misc. LEXIS 627 (N.Y. Sup. Ct. 1926).

Where party enjoined obeyed the injunction order although the undertaking required by the order was not filed until later he was not thereby precluded from moving for an assessment of damages on the theory that his act of refraining had been purely voluntary. *Application of Minett*, 21 Misc. 2d 740, 193 N.Y.S.2d 427, 1959 N.Y. Misc. LEXIS 2949 (N.Y. Sup. Ct. 1959).

6. Parties

When one defendant may sue alone upon an undertaking given to procure an injunction against himself and others. *Fourth Nat'l Bank v Scott*, 31 Hun 301 (N.Y.).

7. Real party in interest

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Where proceedings conducted by one party for his own benefit in the name of another are restrained by an injunction directed to the nominal party, the damages incurred by the real party in interest in procuring a discharge of the injunction will be presumed in law to have been incurred by the defendant on the record, and are recoverable in his name for the benefit of the real party in interest. *Andrews v Glenville Woolen Co.*, 50 N.Y. 282, 50 N.Y. (N.Y.S.) 282, 1872 N.Y. LEXIS 416 (N.Y. 1872).

8. Necessity for assessment of damages

An undertaking given as a condition of granting an injunction pendente lite to secure loss by reason thereof, and also as security for a debt for which the stock in litigation had been pledged as collateral, is more than a statutory undertaking, and no assessment of damages pursuant to § 894 need be shown to maintain an action thereon under § 896. *American Exchange Nat'l Bank v Goubert*, 135 A.D. 371, 120 N.Y.S. 397, 1909 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1909).

Action for damages proper where preliminary injunction was sustained in part only. *Tecla Corp. v Salon Tecla, Ltd.*, 226 A.D. 168, 234 N.Y.S. 544, 1929 N.Y. App. Div. LEXIS 8675 (N.Y. App. Div. 1929).

Without an action on the undertaking judgment cannot be rendered against the sureties. *Fitzpatrick v Flagg*, 12 Abb. Pr. 189; *TROXELL v HAYNES*, 49 How. Pr. 517, 16 Abb. Pr. (n.s.) 1, 1874 N.Y. Misc. LEXIS 194 (N.Y.C.P. June 1, 1874).

But payment may be enforced by order. *Patterson v Bloomer*, 37 How. Pr. 450, 6 Abb. Pr. (n.s.) 446.

Undertaking upon injunction whether with or without sureties is the only indemnity a defendant has, and can be enforced only by action. *Randall v Carpenter* (1881) 47 Super Ct 205.

9. Method of assessing damages not exclusive

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A motion for assessment of damages may be made otherwise in an injunction suit than in the manner prescribed in foregoing section. *Bolton v Thacher*, 214 N.Y.S. 290, 126 Misc. 675, 1926 N.Y. Misc. LEXIS 627 (N.Y. Sup. Ct. 1926).

A motion for assessment of damages in an injunction suit may follow other methods than as here described. *Bolton v Thacher*, 214 N.Y.S. 290, 126 Misc. 675, 1926 N.Y. Misc. LEXIS 627 (N.Y. Sup. Ct. 1926).

Sections 894 to 896 do not appear to outline an exclusive method of procedure and the right to a common-law action on an undertaking to recover damages suffered by reason of the continuance of a temporary injunction exists. *Fuller v American Surety Co.*, 275 N.Y.S. 113, 153 Misc. 432, 1934 N.Y. Misc. LEXIS 1763 (N.Y. App. Term 1934).

10. Want of jurisdiction

Want of jurisdiction, over the subject matter of the action, does not deprive defendant of the right to damages on the undertaking. *Cumberland Coal & Iron Co. v Hoffman Steam Coal Co.*, 15 Abb. Pr. 78.

11. Final decision

An order of reference to ascertain damages cannot regularly be made, until final judgment has been entered; but if the order is made with the consent of the plaintiff, the objection is obviated. *Lawton v Green*, 64 N.Y. 326, 64 N.Y. (N.Y.S.) 326, 1876 N.Y. LEXIS 76 (N.Y. 1876).

It is also waived if the other party does not object, or if through objecting he proceeds with the reference. *Roberts v White*, 73 N.Y. 375, 73 N.Y. (N.Y.S.) 375, 1878 N.Y. LEXIS 626 (N.Y. 1878).

Where, in an action in which a preliminary injunction was issued, judgment was rendered in favor of the defendant, and the plaintiff appealed therefrom, giving the proper undertaking, held, that the defendant was not entitled, pending the appeal, to an order to assess his damages by

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reason of the injunction, as there was no final decision that the plaintiff was not entitled thereto. *Musgrave v Sherwood*, 76 N.Y. 194, 76 N.Y. (N.Y.S.) 194, 1879 N.Y. LEXIS 483 (N.Y. 1879).

Where the court at special term decided that the plaintiff was not entitled to the injunction, and the general term affirmed that decision, and an appeal was taken to the court of appeals, held, that the decision of the court of appeals, when the remittitur should be sent down, would be the final determination of this court, as recited in the undertaking, and, until then, there could be no reference. *Musgrave v Sherwood*, 76 N.Y. 194, 76 N.Y. (N.Y.S.) 194, 1879 N.Y. LEXIS 483 (N.Y. 1879).

An order of reference, to ascertain the damages on an injunction, cannot be granted until it has been determined by a judgment or other decision that plaintiff was not entitled to an injunction. *Benedict v Benedict*, 76 N.Y. 600, 76 N.Y. (N.Y.S.) 600, 1879 N.Y. LEXIS 560 (N.Y. 1879).

In an action to enforce specific performance of a parol agreement, preliminary injunctions were granted. The referee found the agreement void, but that plaintiff had a lien for the purchase money and directed a sale. In neither the report nor the judgment entered thereon was any reference made to the injunctions. Held, that an order of reference to assess defendant's damages by reason of the injunctions was improperly granted, as it had not been decided by the court that plaintiff was not entitled thereto. *Benedict v Benedict*, 76 N.Y. 600, 76 N.Y. (N.Y.S.) 600, 1879 N.Y. LEXIS 560 (N.Y. 1879).

When an action brought to obtain a permanent injunction is pending, an order vacating the temporary injunction is not a final determination of the rights of the parties to an injunction within the meaning of § 893, and a reference to ascertain the damages of the defendant is premature. *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).

A reference to determine the damages sustained by a defendant by reason of an injunction should not be granted until it is finally determined that the plaintiff is not entitled to the injunction.

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Brown v Utopia Land Co., 118 A.D. 190, 103 N.Y.S. 53, 1907 N.Y. App. Div. LEXIS 641 (N.Y. App. Div. 1907).

When an order continuing an injunction pendente lite has been reversed and the plaintiff discontinues, the defendant is entitled to an order of reference to ascertain the damages; expenses incurred in endeavoring to vacate the injunction and by the issuance thereof are proper damages. *In re Reed*, 125 A.D. 884, 110 N.Y.S. 834, 1908 N.Y. App. Div. LEXIS 2924 (N.Y. App. Div. 1908).

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).

Where complaint is dismissed defendant is entitled to reference. *Jacobs v Miller*, 11 Hun 441 (N.Y.).

A dismissal of the complaint at the trial entitles the defendant to an order of reference. *Jacobs v Miller*, 11 Hun 441 (N.Y.).

Upon application to recover damages sustained by injunction, upon an undertaking providing for payment of the damages sustained, if the court should finally decide that plaintiff was not entitled thereto, held that the decision of the court in refusing to continue the injunction and dissolving it was a final decision that plaintiff was not entitled to it within the meaning of the undertaking. *Vanderbilt v Schreyer*, 28 Hun 61 (N.Y.), *aff'd*, 92 N.Y. 643, 92 N.Y. (N.Y.S.) 643, 1883 N.Y. LEXIS 214 (N.Y. 1883).

A reference to ascertain the damages resulting from a temporary injunction cannot be ordered until the plaintiff's right to it has been finally decided. *Kelley v McMahon*, 32 Hun 347 (N.Y.).

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A judgment of the court entered on stipulation vacating an injunction is not equivalent to a decision that plaintiff was not originally entitled to it does not render the sureties in the undertaking liable. *Prefontaine v Richards*, 47 Hun 418, 14 N.Y. St. 344 (N.Y.).

A dismissal of the plaintiff's complaint on the ground that he had no cause of action is equivalent to a final determination that he was not entitled to a temporary injunction granted pendente lite. *Grainger v Smyth*, 23 N.Y.S. 934, 70 Hun 9 (1893).

Where plaintiff during the progress of the cause serves a notice upon defendant, waiving the injunction, defendant is not then entitled to an order of reference to ascertain his damages, because the court must "finally decide that plaintiff was not entitled thereto." Until this point is reached in the progress of the action, the application for reference to ascertain damages is premature. *Shearman v New-York Cent. Mills*, 11 How. Pr. 269, 1855 N.Y. Misc. LEXIS 199 (N.Y. Sup. Ct. July 1, 1855).

It is not sufficient to support an application for a reference to assess damages caused by an injunction that it may have been held that plaintiff was not entitled to the injunction, but it must be finally so held, and that contemplates no less than a complete determination of the action. *Cassell v Fisk*, 16 NY Week Dig 112.

Where the defendants, after the dissolution of an injunction on their motion, were allowed by the court to put in a supplemental answer, setting up a fact occurring since the dissolution, which practically defeated the object of the action, and deprived the plaintiff of his right to relief, and as a condition of their being allowed to interpose the same, the plaintiff was allowed to discontinue without costs, which he did, held, that there had been no final determination that the plaintiff was not entitled to the injunction, and the defendants were not entitled to a reference to ascertain damages. *Neugent v Swan*, 61 How. Pr. 40, 1881 N.Y. Misc. LEXIS 164 (N.Y. Sup. Ct. May 1, 1881).

It seems that a reference is proper after a discontinuance as to some defendants and a subsequent removal to the United States court as to the others. *Benedict v Dixon* (1881) 47 Super Ct 477.

12. Discontinuance of action

There is no breach of the condition of the undertaking, unless the court finally decides that the plaintiff was not entitled to the injunction, or unless something occurs which is equivalent to such a decision. Therefore, where, in consequence of legislation, leave was given to the plaintiff to discontinue on payment of costs, but he did not do so, but subsequently discontinued under a stipulation on payment of \$100. Held, that there was no final decision and no right to damages, and an order of reference to ascertain them was improper. *Palmer v Foley*, 71 N.Y. 106, 71 N.Y. (N.Y.S.) 106, 1877 N.Y. LEXIS 474 (N.Y. 1877). *Kelley v McMahon* (1884, NY) 32 Hun 347; *Cassell v Fisk*, 16 NY Week Dig 112.

In an action to restrain defendant from entering upon certain lands and cutting timber, etc., a temporary injunction was granted; this was dissolved by stipulation on the termination of another suit determining the title of the land; after this, defendant died; on motion of his administratrix an order was granted requiring plaintiff to elect whether or not he would continue the action against her, and subsequently, upon her motion, the action was discontinued and judgment entered accordingly. Held that an order of reference to ascertain damages by reason of the injunction was improperly granted; that, as the action abated upon the death of defendant, and the cause of action did not survive, the court had no authority to direct a discontinuance. *Johnson v Elwood*, 82 N.Y. 362, 82 N.Y. (N.Y.S.) 362, 1880 N.Y. LEXIS 369 (N.Y. 1880).

Where the plaintiff, who has obtained a temporary injunction, enters an order vacating it, and subsequently, without the consent of the defendant, procures an ex parte order discontinuing the action, the two orders are equivalent to a decision that he was not entitled to the injunction, and the defendant is thereupon entitled to a reference, to ascertain his damages by reason of

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the injunction. *Pacific Mail S.S. Co. v Toel*, 85 N.Y. 646, 85 N.Y. (N.Y.S.) 646, 1881 N.Y. LEXIS 170 (N.Y. 1881).

Defendants could recover damages resulting from issuance of restraining order where employer, which had commenced action to restrain picketing, discontinued the action after the restraining order was vacated on motion of defendants but before final disposition and without defendants' consent. *Famous Beers, Inc. v Campbell*, 6 Misc. 2d 38, 162 N.Y.S.2d 422, 1957 N.Y. Misc. LEXIS 3331 (N.Y. Sup. Ct. 1957).

The granting of an order of discontinuance, where the motion therefor is opposed, is an adjudication that plaintiff was not entitled to the injunction issued in the action, so as to permit a reference to ascertain the damages sustained by the defendant by reason of such injunction. *Amberg v Kramer*, 8 N.Y.S. 821, 56 Hun 640, 1890 N.Y. Misc. LEXIS 1804 (N.Y. Sup. Ct. 1890).

Where injunction has been dissolved a discontinuance at instance of plaintiff will be such final determination that he was not entitled to injunction as will sustain action on undertaking for damages, and a reference may be had. *Amberg v Kramer*, 8 N.Y.S. 821, 56 Hun 640, 1890 N.Y. Misc. LEXIS 1804 (N.Y. Sup. Ct. 1890).

So where an order was obtained by the plaintiff vacating the injunction, and then one of discontinuance. *Park v Musgrave*, 6 Hun 223 (N.Y.).

Where the plaintiff procured a temporary injunction, and, on the return of an order to show cause, the court refused to continue it, and directed that the plaintiff have leave to discontinue the action without costs, and, on his so electing, ordered such a discontinuance, held, that the defendant was entitled to a reference to ascertain his damages. *Waterbury v Bouker*, 10 Hun 262 (N.Y.).

Judgment entered in accordance with a stipulation discontinuing the action is equivalent to a final decision that plaintiff was not entitled to the injunction. Orders vacating an injunction and discontinuing the action, whether entered voluntarily by the plaintiff or after leave granted by the court upon his application, are in effect a determination that the plaintiff was not entitled to the

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injunction granted. *New York City Suburban Water Co. v Bissell*, 28 N.Y.S. 938, 78 Hun 176 (1894).

Where the court has passed upon the right to an injunction, defendant, after discontinuance, is entitled to a reference to ascertain his damages. *Carpenter v Wright*, 17 Super Ct 655.

13. Removal of cause

After removal of a cause to the federal courts, state courts can proceed no further, and an assessment of damages on an injunction bond previously given can do longer be made by state courts. *Byrne v Lathrop, Shea & Henwood Co.*, 112 N.Y.S. 273, 60 Misc. 350, 1908 N.Y. Misc. LEXIS 698 (N.Y. Sup. Ct. 1908).

14. Reference

The merits of the proceedings restrained cannot be inquired into on a reference except perhaps in a case where the party claims as damages the loss of his demand. *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 limit of liability upon the undertaking is the sum specified therein, and the court has no power to allow any greater sum, even for disbursements. Referee's fees upon the reference are part of the damages allowed. The reference is not a proceeding in the action, and no costs can be allowed thereupon. A provision in the order, requiring the plaintiff to pay the sum ascertained upon the reference, is improper; the reference is conclusive upon the plaintiff and his sureties, but the only remedy to enforce payment is an action. *Lawton v Green*, 64 N.Y. 326, 64 N.Y. (N.Y.S.) 326, 1876 N.Y. LEXIS 76 (N.Y. 1876).

Where the parties stipulated that the question of damages upon the injunction should be determined by the referee who tried the issues, and jointly with the issues, and the referee found for the defendant, but found nothing upon the subject of damages, no evidence upon that subject having been given upon the trial, and the defendant appealed on that ground, held that

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the referee was right in allowing nothing, and that in the absence of proof of payment or liability, the defendant could not insist on an allowance for counsel fees. *Packer v Nevin*, 67 N.Y. 550, 67 N.Y. (N.Y.S.) 550, 1876 N.Y. LEXIS 434 (N.Y. 1876).

As to evidence on reference. See *Packer v Nevin*, 67 N.Y. 550, 67 N.Y. (N.Y.S.) 550, 1876 N.Y. LEXIS 434 (N.Y. 1876).

The referee's report, after confirmation, is, in the absence of fraud, conclusive upon the plaintiff's sureties, although they had no notice of the proceedings; but the safer and fairer course is to give them notice. A gross and wilful exaggeration of value, made by a party as a witness in the absence of the adverse party, is sufficient evidence of fraud to invalidate the assessment of damages. *Jordan v Volkenning*, 72 N.Y. 300, 72 N.Y. (N.Y.S.) 300, 1878 N.Y. LEXIS 511 (N.Y. 1878).

An order of reference, to ascertain the damages sustained by an injunction, is premature if made before filing the judgment roll, but the irregularity is waived if it is made by the consent of parties, or where proceedings thereunder have been taken without objection. *Roberts v White*, 73 N.Y. 375, 73 N.Y. (N.Y.S.) 375, 1878 N.Y. LEXIS 626 (N.Y. 1878).

The court may direct the evidence taken on the trial to be submitted to the referee, or authorized ex parte affidavits to be read. *Roberts v White*, 73 N.Y. 375, 73 N.Y. (N.Y.S.) 375, 1878 N.Y. LEXIS 626 (N.Y. 1878).

Error to deny motion for reference to ascertain damages where preliminary injunction was sustained in part only. *Tecla Corp. v Salon Tecla, Ltd.*, 226 A.D. 168, 234 N.Y.S. 544, 1929 N.Y. App. Div. LEXIS 8675 (N.Y. App. Div. 1929).

Assessment by official referee: see *Alexander's Dept. Alexander's Dep't Stores, Inc. v Ohrbach's, Inc.*, 269 A.D. 321, 56 N.Y.S.2d 173, 1945 N.Y. App. Div. LEXIS 2982 (N.Y. App. Div. 1945).

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The order of confirmation of a referee's report in proceedings to compute damages sustained by reason of an injunction should only fix the amount of such damages. *Harter v Westcott*, 32 N.Y.S. 111, 11 Misc. 180, 1895 N.Y. Misc. LEXIS 95 (N.Y. City Ct. 1895), *aff'd*, 155 N.Y. 211, 49 N.E. 676, 155 N.Y. (N.Y.S.) 211, 1898 N.Y. LEXIS 861 (N.Y. 1898).

Reference to ascertain damages sustained by injunction not granted after judgment dismissing action without any provision on the subject, nor will case be opened for reference to ascertain damages. *Delafield v Commercial Tel. Co.*, 3 N.Y.S. 921, 1889 N.Y. Misc. LEXIS 139 (N.Y.C.P. 1889).

Upon a reference to ascertain what, if any, damages defendants have sustained in consequence of an injunction, it is the duty of the party claiming to have sustained damages to establish the fact, and the amount, by satisfactory proof. If he fails to do so, and the referee, upon the evidence, finds that no damages have been sustained, his report will not be disturbed. *Dwight v Northern Ind. R.R.*, 54 Barb. 271, 1869 N.Y. App. Div. LEXIS 58 (N.Y. Sup. Ct. June 7, 1869).

On the reference, that the sureties were procured to sign the undertaking by fraud, cannot be set up as a defense. Such defense must be left to the action on the undertaking. *Bray v Poillon*, 2 Hun 383 (N.Y. 1874).

A reference can only be had against those who sign; and plaintiff is not liable to a reference unless he signs. *Patterson v Bloomer*, 9 Abb. Pr. (n.s.) 27, 1870 N.Y. Misc. LEXIS 35 (N.Y. App. Term Sept. 1, 1870).

As to form of order confirming report. See *Strong v De Forest*, 15 Abb. Pr. 427, 1863 N.Y. Misc. LEXIS 187 (N.Y. Sup. Ct. Feb. 1, 1863); *Willett v Scovil*, 4 Abb. Pr. 405, 1857 N.Y. Misc. LEXIS 240 (N.Y. Sup. Ct. Apr. 1, 1857).

Where a referee has reported the facts and not the damages which defendants have sustained by reason of an injunction, the report will not be confirmed. *Taaks v Schmidt*, 19 How. Pr. 413, 1860 N.Y. Misc. LEXIS 257 (N.Y. Sup. Ct. May 1, 1860).

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Before any action can be taken on the report of a referee the report must be confirmed by the court. *Griffing v Slate*, 3 NY Code R 213, *Griffing v Slate*, 5 How. Pr. 205, 1850 N.Y. Misc. LEXIS 78 (N.Y. Super. Ct. July 1, 1850).

15. —Motion for reference

A motion for the appointment of a referee to ascertain the damages sustained, by reason of an injunction granted in an action which was brought and prosecuted to final judgment in Queens county, must necessarily be made upon notice and be entitled in the action; under the provisions of Rule of Civil Practice 63, such motion cannot be made in the first judicial district. *Wilson v Dreyer*, 65 A.D. 249, 72 N.Y.S. 578, 1901 N.Y. App. Div. LEXIS 2124 (N.Y. App. Div. 1901).

A motion for the appointment of a referee to ascertain the damages sustained by reason of an injunction granted, in an action which was brought and prosecuted to final judgment in Queens county, must necessarily be made upon notice and be entitled in the action; under the provisions of rule 63, such motion cannot be made in the first judicial district. *Wilson v Dreyer*, 65 A.D. 249, 72 N.Y.S. 578, 1901 N.Y. App. Div. LEXIS 2124 (N.Y. App. Div. 1901).

The function of an order confirming a referee's report on reference to ascertain damages is limited to the ascertainment and fixation of the amount of damages, and no affirmative money judgment may be included in such order. *Kelly v Myrick*, 205 A.D. 637, 200 N.Y.S. 90, 1923 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 1923).

16. —Order confirming referee's report

The function of an order confirming a referee's report on the reference to ascertain damages is limited to the ascertainment and fixation of the amount of damages and no affirmative money judgment may be included in such order. *Kelly v Myrick*, 205 A.D. 637, 200 N.Y.S. 90, 1923 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 1923).

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The function of an order confirming a referee's report on reference to ascertain damages is limited to the ascertainment and fixation of the amount of damages and no affirmative money judgment may be included in such order. *Kelly v Myrick*, 205 A.D. 637, 200 N.Y.S. 90, 1923 N.Y. App. Div. LEXIS 5104 (N.Y. App. Div. 1923).

17. —Effect of report

The amount fixed by reference is conclusive, both upon the parties and his sureties, yet payment can only be enforced by action upon the undertaking, and not by order in the action. *Lawton v Green*, 64 N.Y. 326, 64 N.Y. (N.Y.S.) 326, 1876 N.Y. LEXIS 76 (N.Y. 1876).

But a gross exaggeration of value, knowingly and willfully made, is sufficient to invalidate the assessment. *Jordan v Volkenning*, 72 N.Y. 300, 72 N.Y. (N.Y.S.) 300, 1878 N.Y. LEXIS 511 (N.Y. 1878).

Report of referee as to amount of damages sustained by reason of injunction is conclusive as to amount but not as to liability of surety on bond. *Tannenbaum v North Star Park Corp.*, 184 N.Y.S. 338, 1920 N.Y. Misc. LEXIS 1726 (N.Y. Sup. Ct. 1920).

Unless it is shown that the assessment was fraudulent, the report is conclusive upon the sureties, though no notice of motion for reference or to confirm report was given them. *Poillon v Volkenning*, 11 Hun 385 (N.Y.), rev'd, 72 N.Y. 300, 72 N.Y. (N.Y.S.) 300, 1878 N.Y. LEXIS 511 (N.Y. 1878).

The amount of damages is determined by the reference, not the existence of a liability. *Palmer v Foley* 2 Abb NC 191, aff'd 42 Super Ct 365, rev'd (1877) 71 NY 106; *Leavitt v Dabney*, 32 Super Ct 613; *Carpenter v Wright*, 17 Super Ct 655.

Nor can judgment be entered against the sureties: there must be an action on the undertaking. *Hovey v Rubber Tip Pencil Co.*, 47 How. Pr. 289, 1874 N.Y. Misc. LEXIS 74 (N.Y. Sup. Ct. July 1, 1874).

18. Allowance of damages

Value of property taken in an action to establish title to chattels may be recovered. *Barton v Fisk*, 30 N.Y. 166, 30 N.Y. (N.Y.S.) 166, 1864 N.Y. LEXIS 76 (N.Y. 1864).

Where proceedings conducted by one party for his own benefit in another's name are restrained by injunction, which is not directed to the real party in interest, in dissolving the injunction, the latter's expenses are recoverable in defendant's name for the benefit of the party in interest. *Andrews v Glenville Woolen Co.*, 50 N.Y. 282, 50 N.Y. (N.Y.S.) 282, 1872 N.Y. LEXIS 416 (N.Y. 1872).

A party is entitled to damages not only for all expenses in removing the injunction, but for any damages to his business, or otherwise, necessarily resulting from it. *Hovey v Rubber-Tip Pencil Co.*, 50 N.Y. 335, 50 N.Y. (N.Y.S.) 335, 1872 N.Y. LEXIS 425 (N.Y. 1872).

The defendant is bound to do nothing to enhance and to do all that he reasonably can to diminish the damages, but he is not bound to incur any hazard, and may take such course as experienced men would deem proper, though the result shows that another course would have reduced the damages. *Roberts v White*, 73 N.Y. 375, 73 N.Y. (N.Y.S.) 375, 1878 N.Y. LEXIS 626 (N.Y. 1878).

Where an injunction prevents the completion of a building, held, that in estimating the damages under the undertaking, loss of rent, increased cost of labor and materials, and counsel fees, on a motion to dissolve the injunction and on an appeal from the order, are proper. *Roberts v White*, 73 N.Y. 375, 73 N.Y. (N.Y.S.) 375, 1878 N.Y. LEXIS 626 (N.Y. 1878).

As to damages sustained by reason of injunction, see *Holcomb v Rice*, 119 N.Y. 598, 23 N.E. 1112, 119 N.Y. (N.Y.S.) 598, 1890 N.Y. LEXIS 1129 (N.Y. 1890).

The word "damages" in § 884 does not include a recovery upon an equitable counterclaim interposed in an injunction suit in which the defendant is the actor and occupies the position of plaintiff, but relates to damages which the enjoined party may be able to show that he has

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sustained by reason of the injunction under § 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).

The right to assess damages on a reference under this section arises only when an undertaking has been required as a condition to the granting of injunctive relief. *Brooklyn Consol. Lumber Corp. v City Plastering Co.*, 236 A.D. 799, 259 N.Y.S. 561, 1932 N.Y. App. Div. LEXIS 7098 (N.Y. App. Div. 1932).

Costs and expenses of a reference may be recovered even where the damages equal the amount of the undertaking. *O'Connor v New York & Y. Land Imp. Co.*, 28 N.Y.S. 544, 8 Misc. 243, 1894 N.Y. Misc. LEXIS 429 (N.Y.C.P. 1894).

In the assessment of damages, the parties are estopped from litigating the issues determined by the judgment in the action in which the injunction was granted. *O'Connor v New York & Y. Land Imp. Co.*, 28 N.Y.S. 544, 8 Misc. 243, 1894 N.Y. Misc. LEXIS 429 (N.Y.C.P. 1894).

Nor is evidence, that the party enjoined might have entered into a speculation of the land in controversy and reduced the amount of the damages, inadmissible. *O'Connor v New York & Y. Land Imp. Co.*, 28 N.Y.S. 544, 8 Misc. 243, 1894 N.Y. Misc. LEXIS 429 (N.Y.C.P. 1894).

On dissolution of a temporary injunction no damages were awarded defendant, but question was held in abeyance until final determination. *Lockwood's Dollar Cleaners, Inc. v Lockwood*, 244 N.Y.S. 281, 137 Misc. 446, 1930 N.Y. Misc. LEXIS 1470 (N.Y. Sup. Ct. 1930).

Liability on undertaking not fixed until determination of damages by report of referee and confirmation by court. *Shea v National Surety Co.*, 258 N.Y.S. 202, 144 Misc. 613, 1932 N.Y. Misc. LEXIS 1434 (N.Y. City Ct. 1932).

The discontinuance of an action on motion of the plaintiff will not be deemed a determination that the plaintiff was not entitled to an injunction therein granted, where the discontinuance was for reasons arising after the issuance of the injunction. The defendant is not entitled to

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assessment of damages sustained by reason of the injunction under this section. *Wise Shoe Co. v Fischer*, 286 N.Y.S. 14, 158 Misc. 514, 1936 N.Y. Misc. LEXIS 988 (N.Y. Sup. Ct. 1936).

Expenses incurred in preparing and serving papers in action enjoined and in consequence discontinued are allowable. *Preuschl v Wendt*, 5 N.Y. St. 429.

Also expenses of proceedings to ascertain damages maintained by reason of injunction order. *Preuschl v Wendt*, 5 N.Y. St. 429.

So also the value of crops which the party has been prevented from harvesting. *Allen v Brown*, 1872 N.Y. App. Div. LEXIS 207 (N.Y. App. Term Mar. 1, 1872).

Rent has been allowed where summary proceedings were enjoined. *Bray v Poillon*, 2 Hun 383 (N.Y. 1874).

Damages directly caused by the injunction putting the property in receiver's hands are recoverable, but not those flowing from receiver's subsequent bad management. An allowance to receiver for management is not allowable, when the sum is no greater than what was paid before. Loss of property or diminution of profits caused by it is allowable. *Hotchkiss v Platt*, 8 Hun 46 (N.Y.).

Defendant not entitled to damages by reason of injunction, if properly granted, even though action be subsequently discontinued by plaintiff. *New York, W. S. & B. R. Co. v Omerod*, 29 Hun 274 (N.Y.).

On application to assess damages maintained by reason of injunction prohibiting the sale of certain stocks and bonds to secure certain notes, held, that interest on the notes which had accrued while injunction was in force was properly included in estimate of damages. *Friend v Mercantile Trust Co.* 21 NY Week Dig 332.

Where a preliminary injunction is vacated upon stipulation, the sureties on the undertaking are only relieved from liability for damages accruing subsequent to the time of its vacation; they are

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still liable for all damages which accrued prior thereto the same as if it had been vacated on motion or by a decision of the court. *Dickerson v Herman*, 10 NY Week Dig 268.

Not for damages resulting from the continuance of the injunction pending an appeal from an order vacating it, though a new stay was obtained. *Town of Guilford v Cornell*, 4 Abb. Pr. 220, 1857 N.Y. Misc. LEXIS 235 (N.Y. Sup. Ct. Feb. 1, 1857).

The value of the premises during an injunction forbidding defendants from proceeding against plaintiff's tenants to recover premises, claimed by both, cannot be recovered unless the rent was lost thereby. *McDonald v James* (1874) 38 Super Ct 76.

19. —Limitation to amount of undertaking

They cannot be exceeded under any pretense. Counsel fees on reference and referees' fees cannot be allowed either as costs "in the action" or otherwise, if beyond the sum named in the undertaking. *Lawton v Green*, 64 N.Y. 326, 64 N.Y. (N.Y.S.) 326, 1876 N.Y. LEXIS 76 (N.Y. 1876).

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).

If it develops that the injunction was improperly or improvidently granted, motion for reference for assessment of damages may be made, but damages cannot exceed the amount of the undertaking. *McColgan v Dodds*, 209 N.Y.S. 707, 125 Misc. 36, 1925 N.Y. Misc. LEXIS 794 (N.Y. Sup. Ct. 1925).

As far as sureties are concerned, damages cannot be recovered beyond the amount specified in the undertaking. *Pacific Mail S.S. Co. v Toel* (1880, NY CP Ct) 9 Daly 301, *affd* (1881) 85 NY 646; *Hovey v Rubber Tip Pencil Co.* (1874) 38 Super Ct 428.

20. —Costs and counsel fees

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costs of an unsuccessful motion to set aside an injunction may be allowed, where the denial of the motion was because the court preferred to retain the injunction until trial. *Andrews v Glenville Woolen Co.*, 50 N.Y. 282, 50 N.Y. (N.Y.S.) 282, 1872 N.Y. LEXIS 416 (N.Y. 1872).

Counsel fees are not allowable at the trial, unless a trial was necessary and the expense was caused or increased by the injunction. *Hovey v Rubber-Tip Pencil Co.*, 50 N.Y. 335, 50 N.Y. (N.Y.S.) 335, 1872 N.Y. LEXIS 425 (N.Y. 1872); *Disbrow v Garcia*, 52 N.Y. 654, 52 N.Y. (N.Y.S.) 654, 1873 N.Y. LEXIS 350 (N.Y. 1873); *Hotchkiss v Platt*, 8 Hun 46 (N.Y.); *Taacks v Schmidt*, 18 Abb. Pr. 307, 1864 N.Y. Misc. LEXIS 44 (N.Y. Sup. Ct. Nov. 1, 1864); *Strong v De Forest*, 15 Abb. Pr. 427, 1863 N.Y. Misc. LEXIS 187 (N.Y. Sup. Ct. Feb. 1, 1863); *Allen v Brown*, 1872 N.Y. App. Div. LEXIS 207 (N.Y. App. Term Mar. 1, 1872); see *Browne v Murdock*, 12 Abb. Pr. 360.

General costs in the action not taxable costs are recoverable. *Disbrow v Garcia*, 52 N.Y. 654, 52 N.Y. (N.Y.S.) 654, 1873 N.Y. LEXIS 350 (N.Y. 1873).

Nor are counsel fees on motion to dissolve proper. *Disbrow v Garcia*, 52 N.Y. 654, 52 N.Y. (N.Y.S.) 654, 1873 N.Y. LEXIS 350 (N.Y. 1873).

It is proper to allow counsel fees on the reference. *Rose v Post*, 56 N.Y. 603, 56 N.Y. (N.Y.S.) 603, 1874 N.Y. LEXIS 173 (N.Y. 1874).

Costs cannot be given on the reference. *Lawton v Green*, 64 N.Y. 326, 64 N.Y. (N.Y.S.) 326, 1876 N.Y. LEXIS 76 (N.Y. 1876).

Counsel fees for services in procuring the dissolution of an injunction, and in attending a reference to assess damages, are proper items of damages to be allowed; but counsel fees on the trial are not allowable, unless incurred solely or principally in consequence of the injunction. *Newton v Russell*, 87 N.Y. 527, 87 N.Y. (N.Y.S.) 527, 1882 N.Y. LEXIS 35 (N.Y. 1882).

Where the complaint did not ask for a permanent injunction, but the plaintiff procured an order to show cause why an injunction pendente lite should not be granted, and cause was shown by the

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defendant, but the temporary injunction was granted, and the defendant finally succeeded in the action, held, that the defendant was not entitled to his counsel fees, on showing cause, or on the trial, and, there being no other items of damage, that the plaintiff could not be required to pay the expenses of the reference to ascertain damages. *Randall v Carpenter*, 88 N.Y. 293, 88 N.Y. (N.Y.S.) 293, 1882 N.Y. LEXIS 104 (N.Y. 1882).

Counsel fees, incurred by defendant for services in an action other than those made necessary by a temporary injunction therein, cannot be assessed as damages upon the undertaking given on granting the injunction. So, also, fees for services of counsel in unsuccessfully resisting the allowance of the injunction are not allowable as damages by reason of the injunction. *Randall v Carpenter*, 88 N.Y. 293, 88 N.Y. (N.Y.S.) 293, 1882 N.Y. LEXIS 104 (N.Y. 1882).

Costs and expenses incurred on the return of an order to show cause why injunction to restrain foreclosure proceedings should not be continued, allowed as part of damages. *Holcomb v Rice*, 119 N.Y. 598, 23 N.E. 1112, 119 N.Y. (N.Y.S.) 598, 1890 N.Y. LEXIS 1129 (N.Y. 1890).

The costs and expenses of employing counsel to oppose a motion made upon an order to show cause why an injunction pendente lite should not be granted are recoverable as damages on a refusal to grant the injunction. *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).

The damages allowed by reason of an injunction pendente lite do not include counsel fees for preparing for trial and trying the case; but such fees are allowed where defendant is forced to trial to get rid of the injunction and fees are incurred solely for that purpose. *Brooks v Racich Asbestos Mfg. Co.*, 137 A.D. 280, 121 N.Y.S. 850, 1910 N.Y. App. Div. LEXIS 659 (N.Y. App. Div. 1910).

In action on injunction bond where it appeared that matter had been referred to referee to ascertain and report damages, plaintiff could recover from surety the expense of the reference as costs in addition to the penalty provided by the bond, but could not recover counsel fees

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incurred upon the reference in addition to the penalty of the bond. *Sarafian v United States Fidelity & Guaranty Co.*, 167 A.D. 597, 152 N.Y.S. 737, 1915 N.Y. App. Div. LEXIS 7424 (N.Y. App. Div. 1915).

A corporation making and repairing boats suffered no actual damages from being restrained from erecting its plant on land claimed to be prohibited from use for commercial purposes, but counsel fees in getting rid of the injunction and securing assessment of damages were allowed. *Rochester Yacht Club Co. v Rochester Boat Works, Inc.*, 230 N.Y.S. 731, 132 Misc. 887, 1928 N.Y. Misc. LEXIS 1056 (N.Y. Sup. Ct. 1928).

Reasonable attorney's fees are allowable as damages for services rendered in procuring dissolution of an injunction. *Huster v Notarantonio*, 239 N.Y.S. 89, 135 Misc. 569, 1930 N.Y. Misc. LEXIS 957 (N.Y. Sup. Ct. 1930).

Motion for order appointing referee to determine costs sustained by plaintiff, divorced wife of defendant, by reason of restraining order granted by appellate division pending its decision in proceeding by her to enforce payment of alimony, held proper where husband appealed to court of appeals without obtaining stay. *Viall v Viall*, 27 N.Y.S.2d 306, 176 Misc. 359, 1941 N.Y. Misc. LEXIS 1735 (N.Y. Sup. Ct. 1941).

Where Court of Appeals reverses without costs a judgment granting a permanent injunction, such determination applies only to the costs in that court, and has no relation to a motion to recover damages and expenses sustained by reason of a temporary injunction granted against appellant. *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).

Reasonable expenses of a reference to fix damages are not a part of the damages resulting from injunction, but are costs recoverable from surety in addition to amount of undertaking. *Tannenbaum v North Star Park Corp.*, 184 N.Y.S. 338, 1920 N.Y. Misc. LEXIS 1726 (N.Y. Sup. Ct. 1920).

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Attorney's fee on proceedings before referee cannot be allowed as a part of the expenses of the reference, but is part of damages resulting from injunction. *Tannenbaum v North Star Park Corp.*, 184 N.Y.S. 338, 1920 N.Y. Misc. LEXIS 1726 (N.Y. Sup. Ct. 1920).

Costs on motion to confirm referee's report are limited to \$10, besides necessary disbursements for referee's fees. *Tannenbaum v North Star Park Corp.*, 184 N.Y.S. 338, 1920 N.Y. Misc. LEXIS 1726 (N.Y. Sup. Ct. 1920).

Referee's fees, costs of motion to appoint referee, and of notice to surety may be recovered. *Allen v Brown*, 1872 N.Y. App. Div. LEXIS 207 (N.Y. App. Term Mar. 1, 1872).

It is not proper to allow counsel fees on an unsuccessful motion to set aside an injunction. *Childs v Lyons*, 26 Super Ct 704; *Allen v Brown*, 1872 N.Y. App. Div. LEXIS 207 (N.Y. App. Term Mar. 1, 1872).

The refusal of an extra allowance is no bar to a claim for damages. *Park v Musgrave*, 6 Hun 223 (N.Y.).

One counsel fee should be allowed. *Hotchkiss v Platt*, 8 Hun 46 (N.Y.).

On the hearing of an unsuccessful application to dissolve an injunction, the defendant's counsel confined his objections to alleged defects in the plaintiff's papers, and did not use the papers prepared by him on the merits. The defendant having succeeded, and a reference to ascertain damages having been ordered, held, that the sureties were not liable for costs and expenses on the unsuccessful motion to dissolve the injunction. *Langdon v Gray*, 22 Hun 511 (N.Y.).

After two motions to dissolve injunction had been denied, a third motion was made to vacate it, but before hearing thereof an order by consent vacating it was entered. Held, that expenses named in unsuccessful attempts to dissolve injunction were not allowable. *Lyon v Hersey*, 32 Hun 253 (N.Y.), *aff'd*, 100 N.Y. 641, 3 N.E. 797, 100 N.Y. (N.Y.S.) 641, 1885 N.Y. LEXIS 1083 (N.Y. 1885).

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That the personal expenses of defendants incurred in connection with the last motion to dissolve were properly included in the damages. *Lyon v Hersey*, 32 Hun 253 (N.Y.), *aff'd*, 100 N.Y. 641, 3 N.E. 797, 100 N.Y. (N.Y.S.) 641, 1885 N.Y. LEXIS 1083 (N.Y. 1885).

Counsel fees in procuring dissolution of injunction and expenses incurred for special train, there being no regular train by which general term could be reached that day, allowed as damages, although it had not been actually paid out at the time of the reference. *Crounse v Syracuse, C. & N. Y. R. Co.*, 32 Hun 497 (N.Y.), *aff'd*, 97 N.Y. 631, 97 N.Y. (N.Y.S.) 631, 1884 N.Y. LEXIS 230 (N.Y. 1884).

Nor can counsel fees at trial be allowed unless motion to dissolve be made before trial. *McDonald v James* (1874) 38 Super Ct 76.

The granting of an extra allowance is no bar to the recovery of damages upon an injunction undertaking, unless it is made so by the order which grants the allowance. *Howell v Miller* (N.Y.C.P. Jan. 21, 1884).

21. —Setoff

In an action upon an award of damages, upon an undertaking given to procure an injunction, brought by an assignee, demands held by the defendant against the assignee may be set off. *Newburger v Manneck Mfg. Co.*, 13 NY Week Dig 277.

In an action to recover an award of damages granted upon the dissolution of an injunction, brought by the assignee thereof upon the undertaking, claims held by the defendant against the assignor may be set off. *Newburger v Manneck, Mfg. Co.*, 13 Week Dig 277.

22. Cancellation of undertaking

On discontinuance of the action, an undertaking given on the procurement of an injunction cannot be cancelled without the knowledge or consent of a defendant enjoined. *Dry Dock, East*

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Broadway and Battery R.R. v Cunningham, 45 How. Pr. 458, 1873 N.Y. Misc. LEXIS 165 (N.Y. App. Term May 23, 1873).

And an undertaking, though joint as to the obligors, may be several where the obligees' rights are so, and cannot therefore be cancelled against a defendant whose rights are several, on discontinuance of the action by the consent of the other defendants, whether he has appeared or not. Cunningham v White, 45 How. Pr. 486, 1873 N.Y. Misc. LEXIS 164 (N.Y. Super. Ct. June 1, 1873).

23. Purchaser pendente lite

Nothing in this section, relating to damages suffered by a third party, justifies 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).

24. Actions against sureties

In an action against several defendants, the damages sustained by one of them by reason of the injunction may be recovered in a separate action against the sureties in the undertaking, where it appears by such undertaking that several as well as joint interests are to be protected by it. Fourth Nat. Bank v Scott, 18 NY Week Dig 412.

25. —Provisions of bond

Since Section 894 does not make its remedies exclusive, a surety company bond cannot make remedies under it exclusive. 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).

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26. Appeals

In proceedings to ascertain the amount of damages claimed by a defendant, by reason of a preliminary injunction, order authorizing and making allowance of counsel fees. etc., is a final order in a special proceeding affecting a substantial right and appealable to court of appeals. *Newton v Russell*, 87 N.Y. 527, 87 N.Y. (N.Y.S.) 527, 1882 N.Y. LEXIS 35 (N.Y. 1882).

Where Court of Appeals reverses without costs a judgment granting a permanent injunction, such determination applies only to the costs in that court, and has no relation to a motion to recover damages and expenses sustained by reason of a temporary injunction granted against appellant. *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).

Sureties who have not had notice of assessment of damages before a referee, but appear and oppose, may appeal to general term, though not parties to the action, where undertaking is not signed by plaintiff. *Hotchkiss v Platt*, 7 Hun 56 (N.Y.), *aff'd*, 66 N.Y. 620, 66 N.Y. (N.Y.S.) 620, 1876 N.Y. LEXIS 292 (N.Y. 1876).

Research References & Practice Aids

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, *New York Civil Practice: CPLR Ch. 6315, Ascertaining Damages Sustained by Reason of Preliminary Injunction or Temporary Restraining Order.*

Matthew Bender's New York CPLR Manual:

Matthew Bender's New York Civil Practice:

CPLR Manual § 17.01 .In general.

§ 6315. Ascertaining damages sustained by reason of preliminary injunction or temporary restraining order.

CPLR Manual § 28.19. Procedure for obtaining preliminary injunction.

CPLR Manual § 36.04. Seizures by federal authorities.

Matthew Bender's New York AnswerGuides:

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.

Matthew Bender's New York Checklists:

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

Forms:

Bender's Forms for the Civil Practice Form No. CPLR 6315:1 et seq.

LexisNexis Forms FORM 75-CPLR 6315:1.— Order to Show Cause in Support of Motion for Ascertainment of Damages.

LexisNexis Forms FORM 75-CPLR 6315:10.— Attorney's Affirmation in Opposition to Defendant's Application for Order Ascertaining Damages Sustained by Reason of Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6315:2.— Affidavit in Support of Motion for Ascertainment of Damages.

LexisNexis Forms FORM 75-CPLR 6315:3.— Order Ascertaining Damages Sustained by Reason of Preliminary Injunction When Court Makes Assessment.

LexisNexis Forms FORM 75-CPLR 6315:4.— Order Directing Reference to Ascertain Damages Sustained by Reason of Preliminary Injunction.

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LexisNexis Forms FORM 75-CPLR 6315:5.— Report of Referee Appointed to Ascertain Damages Sustained by Reason of Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6315:6.— Notice of Motion to Confirm Report of Referee Assessing Damages Sustained by Reason of Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6315:7.— Order Confirming Report of Referee Assessing Damages Sustained by Reason of Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6315:8.— Complaint in Action on Undertaking Given on Preliminary Injunction When Damages Have Been Ascertained.

LexisNexis Forms FORM 75-CPLR 6315:9.— Complaint in Action on Undertaking Given on Preliminary Injunction When Action is Brought Without Prior Ascertainment of Damages.

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 Body of Notice of Motion for Reference to Ascertain Damages

PLEASE TAKE NOTICE that, on the undertaking and proceedings in this action, a motion will be made, at a [motion] term of this court, to be held in the court house, in the City of _____, on the _____ day of _____, at

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_____ o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a reference to ascertain the damages sustained by defendant, by reason of the injunction granted in this cause, on the _____ day of _____, 20_____, by _____, one of the justices of this court; and for such other and further relief as may be just, besides the costs of this motion.

Form 2 Body of Order of Reference

On reading and filing notice of this motion, and on motion of _____, counsel for defendant, and after hearing _____, counsel for plaintiff;

ORDERED, that it be referred to _____, of the City of _____, to ascertain the damages sustained by defendant by reason of the injunction, and to report the damages to the court [and that _____ days' notice of the hearing be given _____ and _____, the sureties named in the undertaking on obtaining such injunction].

Form 3 Body of Order Confirming Report

On reading and filing the notice of this motion, and the report of _____, referee appointed herein to ascertain the damages incurred by defendant by reason of an injunction granted by _____, to which it has been finally decided that plaintiff had no right, and on motion of _____, counsel for defendant, and after hearing _____, counsel for plaintiff [and for sureties] in opposition thereto;

ORDERED, that the said report of the referee herein be and hereby is in all respects confirmed [except as to the item, etc., and as to that item, that it be reduced to _____ dollars, and that on the defendant's consenting to such reduction the report be thereon confirmed] with _____ dollars costs of this motion.

Form 4 Complaint in Action on Undertaking

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Complaint

[Title of court and action]

Index No. _____ [if original]

1. That on the _____ day of _____, 20_____, in an action in which this plaintiff was the defendant and the defendant herein, _____ was the plaintiff, a preliminary injunction order was made and issued out of the New York Supreme Court, _____ County and duly served upon this plaintiff, by virtue of which this plaintiff was restrained and enjoined from _____.

2. That upon the issue of the injunction in said action an undertaking was made and filed by _____ as principal, and the defendant, _____, as surety, in which _____ agreed as by the undertaking [a copy of which is hereunto annexed marked Exhibit "A"] will more fully appear.

3. That the said action so commenced by _____ against this plaintiff, finally resulted in a judgment therein, that _____ was not entitled to the injunction. And said final judgment was duly filed and entered in the office of the clerk of the County of _____, on the _____ day of _____, 20_____; and a copy of said judgment is hereunto annexed marked Exhibit "B" and made a part hereof.

4. That thereafter and on the _____ day of _____, 20_____, a reference was duly ordered pursuant to notice upon the defendant, to take proof of the damages sustained by this plaintiff by reason of said injunction and such proceedings were duly had thereon, that thereafter said referee duly reported that the plaintiff's damages, by reason of the injunction, amounted to the sum of _____ dollars; said report was upon motion duly confirmed by an order of the Supreme Court, duly filed and entered in the office of the clerk in the County of _____ on the _____ day of _____, 20_____, and now remains in full force and effect.

5. That the plaintiff has duly demanded of the defendants the sum of _____ dollars, and the defendants have failed and refused to pay the sums, and no part thereof has been paid.

[Demand for relief, indorsement, address and telephone number]

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