

## NY CLS CPLR § 6314

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

*Article 63 Injunction (§§ 6301 — 6330)*

### **§ 6314. Vacating or modifying preliminary injunction or temporary restraining order.**

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A defendant enjoined by a preliminary injunction may move at any time, on notice to the plaintiff, to vacate or modify it. On motion, without notice, made by a defendant enjoined by a temporary restraining order, the judge who granted it, or in his absence or disability, another judge, may vacate or modify the order. An order granted without notice and vacating or modifying a temporary restraining order shall be effective when, together with the papers upon which it is based, it is filed with the clerk and served upon the plaintiff. As a condition to granting an order vacating or modifying a preliminary injunction or a temporary restraining order, a court may require the defendant, except where the defendant is a public body or officer, to give an undertaking, in an amount to be fixed by the court, that the defendant shall pay to the plaintiff any loss sustained by reason of the vacating or modifying order.

### **History**

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

Annotations

### **Notes**

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## **Derivation Notes**

Earlier statutes: CPA §§ 897, 898, 900; CCP §§ 626, 627, 629; Code Proc §§ 225, 226.

## **Commentary**

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### **PRACTICE INSIGHTS:**

### **VACATING OR MODIFYING PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER**

By Harold A. Kurland, Ward Greenberg Heller & Reidy LLP

Updated By Hodgson Russ LLP

General Editor, David L. Ferstendig, Law Offices of David L. Ferstendig, LLC

### **INSIGHT**

The discretion granted to the court to entertain applications to vacate or modify a preliminary injunction or a temporary restraining order (“TRO”) is an important counterbalance and antidote to the power to grant such orders in the first place. This provision allows an application to the court when circumstances change, or if the injunction hearing is adjourned or otherwise too delayed, and it provides useful flexibility that counsel to any party affected by a preliminary injunction or TRO should consider.

### **ANALYSIS**

#### **Court has broad discretion to modify TRO or preliminary injunction.**

CPLR 6314 provides that a defendant enjoined by a preliminary injunction may move the court, on notice, to modify or vacate the order at any time. A party affected by a TRO also may move to vacate the TRO under CPLR 6314, and may do so, without notice, to the same judge who granted the original TRO, if available. In either case, the court may require the moving party to give an undertaking to cover any loss arising from lifting the order in question.

As would be expected, it is strictly within the court's discretion whether to grant a motion to vacate or modify a TRO or a preliminary injunction, and on appeal, the appellate court will only overturn the ruling if it finds an abuse of that discretion. See *Cade v. New York Cmty. Bank*, 18 A.D.3d 489, 795 N.Y.S.2d 270 (2d Dep't 2005); *Town of Stanford v. Donnelly*, 131 A.D.2d 465, 516 N.Y.S.2d 96 (2d Dep't 1987); *Rosemont Enters., Inc. v. Irving*, 49 A.D.2d 445, 375 N.Y.S.2d 864 (1st Dep't 1975), appeal dismissed, 41 N.Y.2d 829, 393 N.Y.S.2d 392, 361 N.E.2d 1040 (1977). A TRO or preliminary injunction should be modified whenever continuing it in force would not serve the objectives of the remedy it was designed to achieve. See, e.g., *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 398 N.Y.S.2d 877, 368 N.E.2d 1243 (1977).

In addition, a TRO or preliminary injunction should not be continued when the plaintiff is no longer in danger of suffering irreparable injury during the pendency of the action, or has an adequate legal remedy to protect his or her interests. See *White Bay Enters., Ltd. v. Newsday, Inc.*, 258 A.D.2d 520, 685 N.Y.S.2d 257 (2d Dep't 1999); *O'Neill v. Poitras*, 158 A.D.2d 928, 551 N.Y.S.2d 92 (4th Dep't 1990); *Allied-Crossroads Nuclear Corp. v. Atcor, Inc.*, 25 A.D.2d 643, 268 N.Y.S.2d 400 (1st Dep't 1966).

**CPLR 6314 authorizes *ex parte* modification of TRO.**

The authorization under CPLR 6314 to obtain an *ex parte* modification or vacatur of the TRO is striking. Although this right may seem just as appropriate as allowing the TRO to have been sought *ex parte* from the start, the difference is that the party seeking to vacate the TRO already has an adversary in place who is known to that party. One would expect that such an *ex parte* application to vacate or modify would be rare for that reason and because the typical setting would be in the context of an upcoming preliminary injunction hearing, which should be scheduled to come up quickly.

If counsel proceeds in an *ex parte* manner in the motion to vacate or modify a TRO, the court may impose a higher standard as to why that approach is *ex parte* than would have been applied at the outset. The court is, in most situations, unlikely to allow the motion to vacate to be heard *ex parte* when counsel for the plaintiff, who just applied to the same judge to obtain the

TRO, was available. Further, there is no case law explaining the circumstances where this procedure is likely to succeed.

**Motions to vacate preliminary injunctions should be based on changed factual circumstances.**

Because the issues justifying the issuance of the preliminary injunction would recently have been fully litigated in opposing the motion for the original preliminary injunction, there would have to be new or changed facts that moot the harm to the plaintiff and obviate the plaintiff's right to continued injunctive relief. See, e.g., *Dan's Hauling & Demo, Inc. v GMMM Hickling, LLC*, 218 A.D.3d 1248, 193 N.Y.S.3d 798 (4th Dep't 2023) (vacating preliminary injunction on grounds that circumstances had changed because plaintiff did not file required undertaking); *De Carlo v. Sanese*, 65 A.D.2d 945, 410 N.Y.S.2d 490 (4th Dep't 1978); see also *Wynkoop v. 622A President St. Owners Corp.*, 169 A.D.3d 1103, 94 N.Y.S.3d 170 (2d Dep't 2019). CPLR 6314 authorizes the parties to make exactly such applications, however, and presumably they would do so based on changed facts. It also is quite possible that the party against whom the injunction was obtained will make an application under CPLR 6314 on essentially the same facts, but try to package them differently or take advantage of any other change in circumstances so as to try to convince the court to reconsider the original grant of the motion.

**Counsel should explore standing to seek modification.**

The text of CPLR 6314 limits the motion to vacate or modify to the "defendant enjoined" by the order, but there may be situations where an order affects others acting in concert with the defendant, or even unforeseen third parties. Counsel should explore whether even as a non-defendant, there may be standing to move to vacate the injunction order. See *Rosemont Enters., Inc. v. Irving*, 49 A.D.2d 445, 375 N.Y.S.2d 864 (1st Dep't 1975), appeal dismissed, 41 N.Y.2d 829, 393 N.Y.S.2d 392, 361 N.E.2d 1040 (1977). Furthermore, counsel should apply for relief under CPLR 6314 broadly, and should move to "vacate or modify" the order, because it may be easier to obtain a modification of the injunction or TRO rather than vacating the order

entirely. See, e.g., *Town of Pound Ridge v. Introne*, 81 A.D.2d 885, 439 N.Y.S.2d 53 (2d Dep't 1981).

### **Advisory Committee Notes**

Two sections of the civil practice act specifically dealt with applications to vacate or modify preliminary injunctions: § 897 governed applications without notice and § 898 governed applications upon notice.

CPA § 897 required the motion to be made on the original papers and “to the judge or justice who granted the order or who held the term of court where it was granted.” The restriction to the original papers was a reiteration of the first sentence of CPA § 822 while the restriction to the original judge was the same as that prescribed by CPA § 131 for vacating or modifying an order other than one for a provisional remedy.

CPA § 897 applied only if the order attacked was granted without notice. With respect to an injunction granted upon notice, the defendant had already had an opportunity to oppose it or to ask a modification and there did not seem to be any justification for a subsequent motion without notice to vacate or modify. An order to show cause could have been used if speed is essential. Prior to 1930, a preliminary injunction could be granted without notice before the defendant answered. In that year, § 882 was amended to require notice for all preliminary injunctions. Laws 1930, c. 378. A further amendment in 1940 qualified this requirement, permitting notice to be dispensed with for a temporary restraining order granted to enjoin the defendant until a hearing could be had on the application for a preliminary injunction. Laws 1940, c. 659. Thus, since 1930, a preliminary injunction without notice, to which CPA § 897 applied, has been prohibited. CPA § 897, which was derived from § 626 of the Code of Civil Procedure without change, was only meaningful as applied to temporary restraining orders.

There may be occasions where relief from a temporary restraining order cannot await the hearing on the motion for a preliminary injunction. CPA § 897, read in the light of CPA § 882 to apply to temporary restraining orders, would have permitted a motion without notice to vacate or

modify the temporary restraining order. It has therefore been retained in this limited application in the second and third sentences of this section. The additional alternative was CPA § 897—that the motion may be made to a term of the Appellate Division of the Supreme Court—seems unnecessary, since the section permitted application to another judge if the judge who granted the order was absent or disabled. The motion before the Appellate Division has therefore been deleted, while that before another judge in the absence or disability of the original judge has been retained. Since this absence or disability permits a motion without notice it adds an alternative to rule 2221(2) (requiring a motion on notice to vacate an order made by another judge).

A further provision of CPA § 897 required the affidavit showing the absence or disability to show that “the applicant will be exposed to great injury by the delay required for an application upon notice.” This provision was not directed to the solution of any practical problem. A temporary restraining order is only operative until a hearing on the application for a preliminary injunction may be had—which CPA § 882 required to be set down “at the earliest possible time and [to] take precedence of all matters except older matters of the same character.” Thus an application upon notice to vacate or modify a temporary restraining order would require a hearing held after the temporary restraining order expires. See notes to § 6313(a). Moreover, where application was made under CPA § 897 to the judge who granted the order, the defendant was expressly restricted to the original papers, while before another judge in case of disability or absence, he had the burden—and hence the opportunity—of showing by affidavit, that he “will be exposed to great injury.” While the provision of CPA § 897 for a showing of “injury by the delay required for an application on notice” thus appeared obsolete, there seems no reason why the defendant could not have gone beyond the original papers and shown that continuation of the order would unnecessarily injure him; the judge who granted the restraining order had discretion to modify or vacate it accordingly. To give the judge flexibility, the power to require security as a condition, contained in the last sentence of CPA § 900, has been retained as the last sentence of this section, except where the defendant is a public body or officer.

CPA § 898, which governed a motion upon notice to vacate or modify, also remained virtually unchanged since the Code of Civil Procedure. It was restricted to “injunction orders” granted either without notice or with notice where leave to apply to vacate or modify was given. The first restriction is thus wholly obsolete for, as previously noted, the only “injunction order” which may be granted without notice is a temporary restraining order, which is only effective until a hearing, which is to be held “at the earliest possible time.”

The second restriction of CPA § 898—that a motion to vacate or modify an order granted upon notice may only be made if the order was granted with leave to apply to vacate or modify—was added to the Code of Civil Procedure in 1879. Laws 1879, c. 542. The section previously began:

Where the injunction order was granted upon notice, the party enjoined may also apply, upon notice, to the judge who granted it, or to the court . . . [NY Code Civ Proc § 627 (1878).].

This paralleled the opening of the previous section (which survived virtually verbatim as CPA § 897):

Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge who granted the order, or who held the term of the court where it was granted; or to . . . [NY Code Civ Proc § 626 (1878).].

It is difficult to discover the reason for the 1879 amendment. The leave of court contemplated is apparently that granted at the time the order was granted, and would seem to represent the court’s anticipation of changed circumstances. Yet changed circumstances, anticipated or not, may dictate vacating or modifying an injunction, and so long as the motion is made upon notice, no one can be prejudiced. Therefore the requirement that a motion to vacate an order granted upon notice may only be made if leave to so move was granted, has been deleted. The first sentence of this section states the essence of CPA § 898, with the changes noted.

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**I. Under CPLR**

**1. In general**

Trial court properly granted the attorney general's motion pursuant to N.Y. C.P.L.R. 6314 to vacate the preliminary injunction that enjoined the attorney general from prosecuting the medical care provider under a regulation on the ground that it was unconstitutional; when the regulation was declared to be constitutional, this negated the basis for granting the preliminary injunction. *Ulster Home Care, Inc. v Vacco*, 100 N.Y.2d 556, 763 N.Y.S.2d 788, 795 N.E.2d 13, 2003 N.Y. LEXIS 1674 (N.Y. 2003).

Special Term's grant of motion for assistance in compelling delivery to and restoration of defendants-respondents to physical possession of garage premises was a proper extension of Appellate Division's affirmance of order denying plaintiffs' motion for preliminary injunction enjoining defendants from interfering with plaintiffs' operation of the premises, but the order of restoration should have been conditioned on posting an appropriate bond to cover any loss plaintiffs might sustain as result of the order appealed from if they ultimately prevailed; a bond in amount of \$25,000 would be adequate. *Park Swift Parking Co. v Panfil Parking Corp.*, 56 A.D.2d 807, 393 N.Y.S.2d 11, 1977 N.Y. App. Div. LEXIS 11101 (N.Y. App. Div. 1st Dep't 1977).

In a matrimonial action a preliminary injunction to prohibit the sale, transfer or assignment of art work would be vacated where plaintiff failed to make an adequate showing that defendant was seeking to dispose of marital assets so as to prejudice her right to an equitable distribution. *Steinberg v Steinberg*, 87 A.D.2d 782, 450 N.Y.S.2d 369, 1982 N.Y. App. Div. LEXIS 16216 (N.Y. App. Div. 1st Dep't), app. dismissed, 57 N.Y.2d 673, 1982 N.Y. LEXIS 7318 (N.Y. 1982).

In action to recover for breach of contract, fraud, and nonpayment of promissory note, temporary restraining order prohibiting defendants from alienating cooperative apartment and Rolls Royce pending outcome of suit should not have been granted since (1) apartment and car were not subject of suit based on fraud in inception of textile purchase guaranty contract, and (2) wrongs were entirely remediable in damages. *Shapiro v Shoreinstein*, 157 A.D.2d 833, 551 N.Y.S.2d 535, 1990 N.Y. App. Div. LEXIS 1007 (N.Y. App. Div. 2d Dep't 1990).

Property owner was entitled to vacatur of preliminary injunction and dismissal of complaint brought by village to enjoin construction on his property where (1) owner commenced

construction after receiving building permit from village and town, (2) all matters of zoning and land use within village—as matter of law pursuant to county charter—were exclusively under control of town, (3) any application of State Environmental Quality Review Act to building project was for town to determine and village had no authority to request that defendant submit environmental impact statement as prerequisite to issuance of building permit, (4) owner met all applicable building code requirements and required no zoning variances, and (5) there was no governmental “action” requiring preparation of Environmental Impact Statement. *Atlantic Beach v Gavalas*, 183 A.D.2d 750, 583 N.Y.S.2d 491, 1992 N.Y. App. Div. LEXIS 6814 (N.Y. App. Div. 2d Dep’t 1992), app. dismissed, 80 N.Y.2d 924, 589 N.Y.S.2d 311, 602 N.E.2d 1127, 1992 N.Y. LEXIS 3166 (N.Y. 1992), aff’d, 81 N.Y.2d 322, 599 N.Y.S.2d 218, 615 N.E.2d 608, 1993 N.Y. LEXIS 1165 (N.Y. 1993).

Defendant did not establish reasonable excuse for its default on motion for preliminary injunction where defendant’s attorney claimed that his failure to appear was due to fact that he did not know case had been assigned to particular justice, but he offered no explanation for his failure to be at courthouse on day and hour when order to show cause was returnable, or why he did not contact court by telephone until 20 minutes later. *Northeastern Harness Horsemen's Ass'n v Saratoga Harness Racing*, 216 A.D.2d 746, 628 N.Y.S.2d 436, 1995 N.Y. App. Div. LEXIS 6587 (N.Y. App. Div. 3d Dep’t 1995).

Trial court properly entered judgment in favor of a company in a breach of construction contract action against a restaurant; the trial court did not inappropriately overrule a judge of coordinate jurisdiction by vacating a stay of judgment, as the court had inherent power to modify its equitable directives pursuant to N.Y. C.P.L.R. 6314. *Wellbilt Equip. Corp. v Red Eye Grill, L.P.*, 308 A.D.2d 411, 765 N.Y.S.2d 490, 2003 N.Y. App. Div. LEXIS 9917 (N.Y. App. Div. 1st Dep’t 2003).

Pursuant to N.Y. C.P.L.R. 6314, a party enjoined by a preliminary injunction may move at any time to vacate or modify it, upon notice to the other party. Hence, court erred in denying a tenant’s motion to dissolve a preliminary injunction enjoining the tenant from operating an

unlicensed business in a building and restricting any performance of live music to string instruments and piano. *Morris v 702 E. Fifth St. HDFC*, 8 A.D.3d 27, 778 N.Y.S.2d 20, 2004 N.Y. App. Div. LEXIS 7591 (N.Y. App. Div. 1st Dep't 2004).

Trial court providently denied defendants' motion to modify the preliminary injunction prohibiting defendants from operating a specific bus route, as defendants failed to allege facts showing compelling or changed circumstances that would have rendered continuation of the injunction in its present form inequitable. *Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 A.D.3d 806, 850 N.Y.S.2d 516, 2008 N.Y. App. Div. LEXIS 496 (N.Y. App. Div. 2d Dep't 2008).

Preliminary injunction preventing transfers or encumbrances pending action for specific performance or damages would be vacated where plaintiff, by serving papers on Secretary of State and not transmitting them to corporate defendant until well after motion for summary judgment was submitted, failed to comply with court order that all papers be personally served on defendant. *Herskowitz v 508 West 172nd Street Realty Corp.*, 149 Misc. 2d 185, 563 N.Y.S.2d 962, 1990 N.Y. Misc. LEXIS 626 (N.Y. Sup. Ct. 1990).

Court would vacate so much of temporary restraining order as directed husband to retain wife in her position with trucking business that he owned since it was not reasonable to expect that parties would be able to continue in close association in business given breakup of their marriage. *Rosen v Rosen*, 161 Misc. 2d 795, 614 N.Y.S.2d 1018, 1994 N.Y. Misc. LEXIS 290 (N.Y. Sup. Ct. 1994).

## **2. Review**

Where plaintiff sought, and was denied, a modification of an existing preliminary injunction, and where the remedy requested was equitable in nature, the question whether to award relief was committed to the discretion of the Supreme Court, and perforce, to the Appellate Division; and since the issue was within the discretionary power of the Appellate Division, inquiry by the Court of Appeals could proceed no further, for no abuse of discretion was claimed or shown.

Rosemont Enterprises, Inc. v Irving, 41 N.Y.2d 829, 393 N.Y.S.2d 392, 361 N.E.2d 1040, 1977 N.Y. LEXIS 1872 (N.Y. 1977).

Where Appellate Division decision could turn, either exclusively or alternatively, on the exercise of discretion, any question of law certified could not be considered decisive. Rosemont Enterprises, Inc. v Irving, 41 N.Y.2d 829, 393 N.Y.S.2d 392, 361 N.E.2d 1040, 1977 N.Y. LEXIS 1872 (N.Y. 1977).

### **3. Release for payment of debts**

In divorce action in which preliminary injunction had been imposed against certain monies held in escrow, court improperly conditioned its determination of intervenors' application to release funds sufficient to satisfy parties' debts upon parties' willingness to comply with discovery proceedings in their divorce action. Rosen v Rosen, 126 A.D.2d 628, 511 N.Y.S.2d 64, 1987 N.Y. App. Div. LEXIS 41760 (N.Y. App. Div. 2d Dep't 1987).

In divorce action in which preliminary injunction had been imposed against husband respecting proceeds of sale of parties' real estate held in escrow, it was error to deny creditors' application for release of funds to pay parties' debts in connection with preparation of their joint tax return and unpaid storage fees, as well as debts directly related to subject property; payment of such debts would benefit parties since it would result in substantial interest savings, while adequate sum would remain in escrow to satisfy wife's distributive share. Rosen v Rosen, 126 A.D.2d 628, 511 N.Y.S.2d 64, 1987 N.Y. App. Div. LEXIS 41760 (N.Y. App. Div. 2d Dep't 1987).

Trial court erred in granting an assailant's current law firm's motion for release of a portion of funds that were held in escrow and were preliminarily enjoined from disbursement in a club patron's personal injury action, seeking recovery for injuries sustained by the assailant having shot her in the face, as there was no showing how compelling or changed circumstances rendered it equitable to release funds for the law firm's fee when the prior firm still had outstanding bills, there was no showing that the fee request was reasonable, and the assailant had unclean hands for having dissipated some of the funds despite the injunction and having

motions pending against him due to his inequitable conduct. *Thompson v 76 Corp.*, 37 A.D.3d 450, 830 N.Y.S.2d 564, 2007 N.Y. App. Div. LEXIS 1516 (N.Y. App. Div. 2d Dep't 2007).

#### **4. Illustrative cases**

An injunction was properly entered to enforce a distiller's fair trade law prices, since there was no proper basis for a determination that judicial enforcement of the distiller's fixed retail prices should be withheld on some future date if the distiller failed to revise its schedule of retail prices in compliance with the 1964 amendments to the Alcoholic Beverage Control Law. *Heublein, Inc. v R. H. Macy & Co.*, 25 A.D.2d 825, 269 N.Y.S.2d 819, 1966 N.Y. App. Div. LEXIS 4287 (N.Y. App. Div. 1st Dep't 1966).

In an action by a tenant against a landlord arising out of an agreement in which the parties contemplated that the leased premises would be converted into a restaurant and they were aware that substantial alterations would be required to accomplish this end, and in which the landlord covenanted that it would execute all necessary applications in connection therewith and the tenant was required to use due diligence to obtain all the permits and licenses necessary to perform such work, the mandatory temporary injunction issued by Special Term requiring the landlord to specifically perform all provisions of the lease including execution of the application forms would be modified, where the landlord refused to approve the plans for alterations submitted to him by the tenant, in that the only issue in dispute was the refusal to approve the plans required to secure the permits and licenses, and the temporary injunction should have been tailored to meet this exigency. *Tri-Beca Foods, Inc. v Hanover River House, Inc.*, 92 A.D.2d 777, 459 N.Y.S.2d 615, 1983 N.Y. App. Div. LEXIS 17145 (N.Y. App. Div. 1st Dep't 1983).

It was error to grant defendants' motion to modify permanent injunction on ground that their counsel had no authority to consent to anything more than preliminary injunction where they waited 9 months to move to correct putative errors of their counsel, and only after plaintiffs

purchased third party's property in reliance on provisions of injunction. *Barber v Waite*, 151 A.D.2d 933, 543 N.Y.S.2d 205, 1989 N.Y. App. Div. LEXIS 8881 (N.Y. App. Div. 3d Dep't 1989).

Law firm's motion for release of funds was properly denied because, under N.Y. C.P.L.R. 6314, such a motion was addressed to the trial court's discretion and was properly granted on compelling or changed circumstances that rendered continuation of the injunction inequitable and the trial court providently exercised its discretion in denying the motion. *Thompson v 76 Corp.*, 54 A.D.3d 844, 865 N.Y.S.2d 233, 2008 N.Y. App. Div. LEXIS 6830 (N.Y. App. Div. 2d Dep't 2008).

Granting individual shareholders' motion to modify a preliminary injunction enjoining them from acting on behalf of the corporation was proper because, subsequent to the issuance of the injunction, the individuals were elected to the corporation's board of directors, which rendered it inequitable to enjoin them from acting on behalf of the corporation and constituted changed circumstances. *Wynkoop v 622A President St. Owners Corp.*, 169 A.D.3d 1103, 94 N.Y.S.3d 170, 2019 N.Y. App. Div. LEXIS 1415 (N.Y. App. Div. 2d Dep't 2019).

Injunction prohibiting city defendants from placing homeless families with pregnant women or children under 6 months of age in barracks-style shelters without private accommodations would be modified to include state, which is responsible for supervision of all social services work as administered by local units of government under Social Services Law. *Slade v Koch*, 136 Misc. 2d 119, 517 N.Y.S.2d 389, 1987 N.Y. Misc. LEXIS 2393 (N.Y. Sup. Ct. 1987).

## **II. Decisions Under Former Civil Practice Laws**

### **A. Application Without Notice Under CPA § 897**

#### **5. Where motion made and heard**

No judge except the judge granting the injunction can vacate or modify it, and no motion can be made outside the county of New York for vacation of injunction granted in action pending in supreme court first judicial district. *Koehler v Farmers' & Drovers' Nat'l Bank*, 6 N.Y.S. 470, 53 Hun 637, 1889 N.Y. Misc. LEXIS 638 (N.Y. Sup. Ct.), *aff'd*, 117 N.Y. 661, 22 N.E. 1134, 117 N.Y. (N.Y.S.) 661, 1889 N.Y. LEXIS 1545 (N.Y. 1889).

## **6. Powers of appellate division**

Where the special term refuses to modify or set aside an injunction, the appellate division has power to grant the desired relief. *Marty v Marty*, 66 A.D. 527, 73 N.Y.S. 369, 1901 N.Y. App. Div. LEXIS 2441 (N.Y. App. Div. 1901).

Where the injunction order was merely preliminary to an order to show cause why the injunction should not be continued, and that order is still pending before the special term, the order of the general term should not interfere to prevent the hearing thereof. On such hearing, the parties may present additional facts, affecting the right to the injunction and its continuance. 61 How. Pr. 105, 1881 N.Y. Misc. LEXIS 186.

## **7. Notice**

Appellate division should not vacate temporary injunction *ex parte* where it is not clear that papers upon which the order was granted do not make out a case for a temporary restraining order. *Godfrey v Matzene*, 173 A.D. 913, 158 N.Y.S. 530, 1916 N.Y. App. Div. LEXIS 5975 (N.Y. App. Div. 1916).

Under this and the following section application may be with or without notice. *Gordon v Hirsch*, 228 A.D. 651, 238 N.Y.S. 841, 1929 N.Y. App. Div. LEXIS 11450 (N.Y. App. Div. 1929).

It is within the power of a supreme court judge or county judge to vacate or modify *ex parte* an injunction order made by himself; but such power should be exercised with caution, and not without notice except where necessary to guard against serious loss. *Nat'l Gaslight Co. v*



O'Brien, 38 How. Pr. 271, 1869 N.Y. Misc. LEXIS 179 (N.Y. Super. Ct. Oct. 1, 1869); Peck v Yorks, 41 Barb. 547, 1863 N.Y. App. Div. LEXIS 159 (N.Y. Sup. Ct. June 2, 1863); Bruce v Del. & Hudson Canal Co., 8 How. Pr. 440, 1853 N.Y. Misc. LEXIS 76 (N.Y. Sup. Ct. Dec. 1, 1853).

An ex parte application to vacate an injunction under this section should be granted only in special cases where there is necessity for immediate action, and where delay would cause evil which could not be remedied. Gere v New York C. & H. R. R. Co., 38 Hun 231 (N.Y.).

Not a case in which such an application might under this section be made at the general term without notice. Gere v New York C. & H. R. R. Co., 38 Hun 231 (N.Y.).

An appeal from an order granting a provisional remedy can only be taken when the order was made upon notice, and the remedy of a party seeking to review such an order granted ex parte, is by an application under §§ 897, 901, and not by appeal. Aldinger v Pugh, 10 N.Y.S. 684, 57 Hun 181, 1890 N.Y. Misc. LEXIS 931 (N.Y. Sup. Ct. 1890), aff'd, 132 N.Y. 403, 30 N.E. 745, 132 N.Y. (N.Y.S.) 403, 1892 N.Y. LEXIS 1208 (N.Y. 1892).

Under this section, the application to vacate an injunction must be always ex parte, and wholly based upon the papers upon which the injunction was granted. The code does not contemplate a hearing of both parties on such an application. 61 How. Pr. 105, 1881 N.Y. Misc. LEXIS 186.

## **8. Requisites and validity of order**

A judgment permanently restraining the burning of soft coal is too broad, being unlimited as to time and circumstances. McCarty v Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549, 189 N.Y. (N.Y.S.) 40, 1907 N.Y. LEXIS 1099 (N.Y. 1907).

## **9. Final determination**

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 within

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the meaning of § 893. *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).

## **10. Irregularities**

Irregularity on motion to vacate injunction may be corrected on appeal where such irregularity involves no substantial right. *In re Bean*, 207 A.D. 276, 201 N.Y.S. 827, 1923 N.Y. App. Div. LEXIS 5947 (N.Y. App. Div. 1923), app. dismissed, 238 N.Y. 552, 144 N.E. 888, 238 N.Y. (N.Y.S.) 552, 1924 N.Y. LEXIS 720 (N.Y. 1924), *aff'd*, 238 N.Y. 618, 144 N.E. 916, 238 N.Y. (N.Y.S.) 618, 1924 N.Y. LEXIS 802 (N.Y. 1924).

As to necessity for motion. See *Kelly v Jeroloman* (1867) 30 Super Ct 158.

## **11. Cited**

Cited on motion to modify temporary injunction enjoining defendants from conducting bar for sale of liquor on premises, in violation of the National Prohibition Act. *United States v Myers*, 211 N.Y.S. 465, 125 Misc. 556, 1925 N.Y. Misc. LEXIS 939 (N.Y. Sup. Ct. 1925).

## **B. Application Upon Notice Under CPA § 898**

## **12. Application**

Where parties do not desire to obey an order, they should move to vacate or modify it; they cannot legally determine for themselves that it is void and refuse to obey it. *Geller v Flamount Realty Corp.*, 260 N.Y. 346, 183 N.E. 520, 260 N.Y. (N.Y.S.) 346, 1932 N.Y. LEXIS 698 (N.Y. 1932).

## **13. Grounds for vacation or dissolution**

Order vacating injunction restraining abutting owner from obstructing and diverting highway to enable him to remove stone thereunder reversed and injunction reinstated with leave to defendants to apply at Special Term for modification of the injunction order on terms outlined in the order of reversal. *Albion v Ryan*, 201 A.D. 717, 194 N.Y.S. 261, 1922 N.Y. App. Div. LEXIS 6398 (N.Y. App. Div. 1922).

On motion to vacate a temporary restraining order, defendant failed to show laches on plaintiff's part or that he was thereby harmed. *R. Prescott & Son, Inc. v Nye*, 223 A.D. 356, 228 N.Y.S. 156, 1928 N.Y. App. Div. LEXIS 6214 (N.Y. App. Div. 1928).

There being nothing in the act which deprives the court of jurisdiction if an application for injunction is not decided within twenty days, it does not affect the validity of the injunction. *Watson v Coe*, 5 N.Y.S. 614, 53 Hun 630, 1889 N.Y. Misc. LEXIS 2548 (N.Y. Sup. Ct. 1889).

Injunction against maintaining railroad not vacated to enable defendants to acquire plaintiffs' property in a legal manner, they having had ample opportunity to do so before issuance of injunction. *Eno v Metropolitan E. R. Co.*, 8 N.Y.S. 197, 56 N.Y. Super. Ct. 313, 1889 N.Y. Misc. LEXIS 2232 (N.Y. Super. Ct. 1889).

Where injunction is granted upon complaint alone and the answer denies all the equities, it should be dissolved. *Kuntz v C. C. White Co.*, 8 N.Y.S. 505, 55 Hun 609, 1890 N.Y. Misc. LEXIS 1645 (N.Y. Sup. Ct. 1890).

Plaintiff sought to enjoin defendant from emptying its sewage into a creek, alleging injury to his ice in a pond some miles below by reason of overflow. *Finger v Kingston*, 9 N.Y.S. 175, 56 Hun 639, 1890 N.Y. Misc. LEXIS 73 (N.Y. Sup. Ct. 1890).

Injunction did not issue to restrain son to whom property was devised from maintaining summary proceeding to dispossess brother living on the premises, though summary proceeding was not proper remedy, since plaintiff could be compensated in money damages. *Smith v Smith*, 174 N.Y.S. 747 (N.Y. Sup. Ct. 1919).

The courts are loath to sustain a temporary injunction which anticipates the relief sought in the action where the rights of the parties seeking the injunction are not entirely clear. *Rochester v Rochester Girls' Home*, 194 N.Y.S. 236, 1922 N.Y. Misc. LEXIS 1218 (N.Y. Sup. Ct. 1922).

An injunction in a stockholder's action will be dissolved, if it is denied that he is a stockholder. *Blathford v N.Y. & New Haven R.R.*, 5 Abb. Pr. 276, 1857 N.Y. Misc. LEXIS 282 (N.Y. Sup. Ct. Sept. 1, 1857), rev'd, *BLATCHFORD v NEW YORK & NEW HAVEN RAILROAD CO.*, 7 Abb. Pr. 322, 1858 N.Y. Misc. LEXIS 245 (N.Y. Sup. Ct. May 1, 1858).

An injunction must be dissolved when all the equities of the complaint are positively denied, and it is doubtful whether plaintiff will ultimately be entitled to the relief demanded. *Steinberg v O'Conner*, 42 How. Pr. 52; *Finnegan v Lee*, 18 How. Pr. 186; *Blatchford v New York & N. H. R. Co.* 5 Abb Pr 276, aff'd 7 Abb Pr 322; *Durant v Einstein*, 28 Super Ct 423; *Secor v Weed* (1868) 30 Super Ct 67.

Injunction will be continued where denials are evasive and suspicious. *Storer v Coe*, 15 Super Ct 661; *LITCHFIELD v PELTON*, 6 Barb. 187, 1849 N.Y. App. Div. LEXIS 194 (N.Y. Sup. Ct. Mar. 1, 1849); *Secor v Weed* (1868) 30 Super Ct 67.

Injunction dissolved for vagueness and uncertainty. *Lyon v Botchford*, 25 Hun 57 (N.Y.).

Temporary injunction to prevent erection in street in front of plaintiff's lot of a pole to sustain wire of electric motor system, denied where it did not appear that irreparable injury would be done by allowing defendant to continue work until trial. *Tracy v Troy & L. R. Co.*, 7 N.Y.S. 892, 54 Hun 550, 1889 N.Y. Misc. LEXIS 1364 (N.Y. Sup. Ct. 1889).

An injunction will not issue where the only ground on which it can be sustained is denied in the answer. *Gould & Palmer v Jacobsohn*, 18 How. Pr. 158, 1859 N.Y. Misc. LEXIS 310 (N.Y. Sup. Ct. Nov. 1, 1859).

An injunction will be refused where material allegations are denied. *Pidgeon v Oatman*, 26 Super Ct 706.

Where equities are denied and plaintiff's case is overborne by plaintiff's proofs, injunction should not issue or be maintained. *Cent. Cross-Town R.R. v Bleecker St. & Fulton Ferry R.R.*, 49 How. Pr. 233, 1875 N.Y. Misc. LEXIS 91 (N.Y. Sup. Ct. July 1, 1875).

A denial by defendant under oath of the material facts alleged in the affidavit relied upon by plaintiff to sustain an injunction, will generally defeat the injunction. *Cassell v Fisk*, 2 Civ Proc (Browne) 94; *American Grocer Publ'g Ass'n v Grocer Publ'g Co.*, 51 How. Pr. 402, 1876 N.Y. Misc. LEXIS 188 (N.Y. Sup. Ct. June 1, 1876); *Decker v Decker*, 52 How. Pr. 218, 1876 N.Y. Misc. LEXIS 239 (N.Y. Sup. Ct. Nov. 1, 1876).

Where an injunction will be prejudicial to one while it is not necessary to the other, it will be dissolved, where fraud is denied. *M'Cafferty v Glazier*, 10 How. Pr. 475, 1854 N.Y. Misc. LEXIS 203 (N.Y. Sup. Ct. June 1, 1854).

The pleadings are regarded in the nature of affidavits; and, as a general rule, where the facts upon which the injunction is based are so far overcome by the opposing facts that it is rendered probable that the party who procured the injunction will not succeed, the injunction should be dissolved yet it not infrequently happens that, while the facts upon which the injunction is granted are in form denied, yet the judicial mind is satisfied that the real equity of the case is not overcome. *Ludvigh v Dusseldorf* 8 NY Week Dig 490.

The injunction may be retained where immediate relief is demanded to prevent irreparable injury, even where there is a full denial. *CARPENTER v DANFORTH*, 19 Abb. Pr. 225, 1865 N.Y. Misc. LEXIS 73 (N.Y. Sup. Ct. June 1, 1865); *Dubois v Budlong*, 23 Super Ct 700.

An injunction will be continued in spite of defect of parties. *Schulten v Lord*, 4 E.D. Smith 206.

An injunction against a foreign consul must be vacated when his position appears, as a state court has no jurisdiction of the person of such consul. *Sippile v Albites*, 5 Abb. Pr. (n.s.) 76, 1868 N.Y. Misc. LEXIS 63 (N.Y.C.P. 1868).

Where upon all the evidence disclosed, the court would not have granted the order in the first instance, it should be vacated. *Moser v Polhamus*, 4 Abb. Pr. (n.s.) 442, 1868 N.Y. Misc. LEXIS 53 (N.Y. Sup. Ct. Sept. 1, 1868).

An injunction will be maintained when, upon the argument of an appeal from an order granting it, *pendente lite*, it is conceded that since the appeal was taken the case has been tried and resulted in favor of plaintiffs, who succeeded on the merits, and that their rights to this injunction were maintained. *Hazard v Caswell*, 8 NY Week Dig 492.

Where it is positively denied by affidavit that all and each of the allegations of the complaint as to the acts of the defendants against which relief is sought have been committed, a preliminary injunction will not be granted. Nor will a preliminary injunction be granted against prospective acts under the above circumstances not yet contemplated. *Reiff v Western U. Tel. Co.* 5 Month L Bull 12.

#### **14. —Conflicting injunctions**

If an injunction has been duly granted and served, a counter injunction obtained from another judge in a cross action, if conflicting with the first and only enforceable by a violation of the first, should be vacated irrespective of the merits. *People's R. Co. v Syracuse, B. & N. Y. R. Co.* 22 Abb NC 427.

#### **15. —Removal of cause**

An order for the removal of a cause from a state court into United States circuit court, may provide that it shall not operate of itself to dissolve an injunction already granted by the state court. United States statute now provides that it shall continue. 12 How. Pr. 294, 1856 N.Y. Misc. LEXIS 350.

#### **16. —Dismissal of complaint**

Where the complaint is dismissed after the allowance of an injunction, the injunction ipso facto falls with it. A reversal of the judgment only will restore it. But where an appeal has been taken from judgment of dismissal, application can be made to the court by plaintiff, on notice, to restrain the proceedings of defendant until decision of the appeal. *Hoyt v Carter*, 7 How. Pr. 140, 1851 N.Y. Misc. LEXIS 2 (N.Y. Sup. Ct. 1851).

#### **17. —Dissolution of attachment**

In action for obtaining goods by fraudulent representations, an attachment was granted on affidavit showing that debtor had offered to allow judgment to be taken in another action in which property was sold; and an injunction was also granted to restrain payment of proceeds to judgment creditor, the attachment having been set aside. Held, that the injunction fell with it. *Stein v Levy*, 8 N.Y.S. 934, 55 Hun 609, 1890 N.Y. Misc. LEXIS 1870 (N.Y. Sup. Ct. 1890).

#### **18. —Nonprosecution**

Where the defendant might himself proceed, the court would not vacate the injunction for neglect of plaintiff to prosecute the action. *Schermerhorn v Merrill*, 1 Barb. 511, 1847 N.Y. App. Div. LEXIS 117 (N.Y. Sup. Ct. Sept. 1, 1847).

In the former practice a want of due diligence in presenting the action, was a cause for dissolving the injunction. *DEPEYSTER v GRAVES*, 1816 N.Y. LEXIS 199 (N.Y. June 15, 1816); *Higgins v Woodward*, 1 Hopk. Ch. 342; *Seebor v Hess*, 1835 N.Y. LEXIS 258 (N.Y. Mar. 3, 1835).

#### **19. —Judgment as superseding injunction**

In action for divorce, injunction was granted restraining interference by defendant with plaintiff's possession of a certain house. Final judgment granting divorce was entered which contained no reference to injunction, and granted no other. Held, that as the judgment covered the whole

case, it superseded the injunction, and an appeal taken therefrom would not restore it. *Gardner v Gardner*, 87 N.Y. 14, 87 N.Y. (N.Y.S.) 14, 1882 N.Y. LEXIS 1 (N.Y. 1882).

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).

## **20. Notice**

Under this and the preceding section application may be with or without notice. *Gordon v Hirsch*, 228 A.D. 651, 238 N.Y.S. 841, 1929 N.Y. App. Div. LEXIS 11450 (N.Y. App. Div. 1929).

## **21. Motion after answer**

The fact that a motion to dissolve an injunction has been made and denied before issue joined presents no obstacle to a motion made after the interposition of a sworn answer. *Lyon v Botchford*, 13 NY Week Dig 68. But a motion to dissolve made before answer. *Middleton v Rondout & O. R. Co.*, 43 How. Pr. 144, 12 Abb. Pr. (n.s.) 276.

## **22. Who may move**

A person, not a party to the action, whose rights are affected by the injunction, may move to vacate it, and may appeal from the order refusing to vacate it, e. g., a person to whom the defendant is enjoined from paying money. *Landers v Fisher*, 24 Hun 648 (N.Y.).

Party in contempt may move to vacate. 6 How. Pr. 124, 1851 N.Y. Misc. LEXIS 74; *Smith v Austin*, 1 NY Code R NS 137; *Field v Chapman*, 13 Abb Pr 320, 22 How Pr 329, *aff'd* 15 Abb Pr 434, 24 How Pr 463; *Gurnee v Odell*, 13 Abb Pr 264; *contra*, *Krom v Hogan*, 4 How Pr 225, 2 NY Code R 144; see *Evans v Van Hall*.



### **23. Motion**

An injunction should not be vacated on a motion to punish for a violation thereof when the dissolution is no part of the plaintiff's motion and defendant has not served a counter notice that such relief will be asked. *Jones v Burgess*, 109 A.D. 888, 96 N.Y.S. 873, 1905 N.Y. App. Div. LEXIS 3684 (N.Y. App. Div. 1905).

### **24. —Motion papers**

The complaint and the affidavit upon which an injunction order was made were verified by the Belgium consul in New York, and all of the allegations thereof were upon information and belief. Upon the hearing of a motion to vacate the injunction, which was made upon the original papers only, plaintiff was allowed to read depositions taken in Belgium, they being the sources from which the consul had derived his information and formed his belief as to the facts set forth in the complaint and affidavit. Held, no error. *Zellenkoff v Collins*, 23 Hun 156 (N.Y.).

Where the notice of a motion to vacate an injunction was entitled in an action, stating that the application would be founded on the copy of the injunction and the papers served on the defendant. Held, that this was sufficient, and that it was not necessary to make and serve affidavits to the effect that a suit was pending in the case. *Newbury v Newbury*, 1 NY Code R NS 409, *Newbury v Newbury*, 6 How. Pr. 182, 1851 N.Y. Misc. LEXIS 15 (N.Y. Sup. Ct. 1851).

### **25. —Complaint**

When the right to an injunction depends upon the nature of the action it is indispensable that the complaint show that the plaintiff is entitled to judgment awarding the injunction. But it would be idle for the defendant to contest the motion upon affidavits upon his part, if the test of decision is whether the complaint shows a *prima facie* case entitling the plaintiff to judgment awarding the

injunction. The test must be, what does sound discretion require upon the entire case. *Finger v Kingston*, 9 N.Y.S. 175, 56 Hun 639, 1890 N.Y. Misc. LEXIS 73 (N.Y. Sup. Ct. 1890).

When the injunction is granted without the aid of a complaint the question whether upon the facts alleged plaintiff is entitled to judgment may be considered upon a motion to vacate after the complaint appears and founded upon it; unless it appears that plaintiff is entitled upon the facts alleged to judgment for some relief, the injunction is not supported. *Kerr v Dildine*, 6 N.Y. St. 163.

Where the papers upon which a preliminary injunction is granted are unaccompanied by a complaint, and the action is one where the right to injunctive relief must appear from the complaint, the injunction should be vacated. *Roosevelt v Edson* (1885) 51 Super Ct 227.

## **26. —Affidavits**

As to the effect of a verified answer under the former equity practice. See *Ward v Van Bokkelen*, 1828 N.Y. LEXIS 363 (N.Y. June 6, 1828); *Apthorpe v Comstock*, 1 Hopk. Ch. 143; *Wakeman v Gillespy*, 1835 N.Y. LEXIS 198 (N.Y. Mar. 17, 1835); *AG v COHOES CO.*, 1836 N.Y. LEXIS 226 (N.Y. Aug. 2, 1836); *Rodgers v Rodgers*, 1829 N.Y. LEXIS 374 (N.Y. Mar. 3, 1829); *ROBERTS v ANDERSON*, 1816 N.Y. LEXIS 239 (N.Y. Oct. 11, 1816); *Bank of Monroe v Schermerhorn*; *Clark v Law*, 22 How. Pr. 426, 1860 N.Y. Misc. LEXIS 195 (N.Y.C.P. 1860); *Perkins v Warren*, 6 How. Pr. 341, 1851 N.Y. Misc. LEXIS 128 (N.Y. Sup. Ct. Dec. 1, 1851); *Schermerhorn v Merrill*, 1 Barb. 511, 1847 N.Y. App. Div. LEXIS 117 (N.Y. Sup. Ct. Sept. 1, 1847).

A verified answer may be read as an affidavit on a motion to vacate. *Schoonmaker v Reformed Protestant Dutch Church*, 5 How Pr 265; 4 How. Pr. 225, 1850 N.Y. Misc. LEXIS 29; *MINOR v TERRY*, 6 How. Pr. 208, 1851 N.Y. Misc. LEXIS 92 (N.Y. Sup. Ct. Aug. 1, 1851).

A defect of parties may be considered on a motion to vacate an injunction, if the objection has been taken in the answer. An injunction will not be dissolved upon affidavits made on

information and belief. *ASTIE v LEEMING*, 53 How. Pr. 397, 1877 N.Y. Misc. LEXIS 226 (N.Y. Super. Ct. Aug. 1, 1877).

## **27. —Additional affidavits**

Plaintiff may read new affidavits in answer, where defendant's affidavits set up new matters as explanatory, or in confession and avoidance. *Soc'y for the Reformation of Juvenile Delinquents v Diers*, 60 Barb. 152, 1871 N.Y. App. Div. LEXIS 81 (N.Y. Sup. Ct. Feb. 6, 1871).

Upon the hearing of a motion by the plaintiff for the continuance of a temporary injunction, he will not generally be allowed to read additional affidavits, not in answer to new matter introduced by the defendant, but corroborative of the matters alleged in the complaint. *Jacobs v Miller*, 10 Hun 230 (N.Y.).

The right to sustain an injunction by new affidavits when the motion to vacate is supported by affidavits made by defendant, under this section is confined to motion to vacate only, and not to the case of a motion to continue an injunction previously granted. *Cagney v Fisher*, 34 Hun 549 (N.Y. 1885).

The moving party may use additional affidavits to contradict new matter introduced by his opponent, but he is not allowed to introduce new matter in avoidance of that set up by his opponent. *Shearman v Hart*, 14 Abb. Pr. 358, 1862 N.Y. Misc. LEXIS 370 (N.Y.C.P. Aug. 1, 1862); *Childs v Fox*, 25 Super Ct 650.

It is discretionary to allow defendant to read affidavits in reply. *Childs v Fox*, 25 Super Ct 650.

## **28. —Questions considered and determined**

On a motion to dissolve an injunction, the court must decide, on all the motion papers, whether the plaintiff has or has not a right to the injunction. *Secor v Weed* (1868) 30 Super Ct 67; *HARTT v HARVEY*, 32 Barb. 55, 1860 N.Y. App. Div. LEXIS 123 (N.Y. Sup. Ct. May 7, 1860); *Schaefer v Herb* (1867) 30 Super Ct 222.

The burden of proof is on the party having the affirmative. *Shearman v Hart*, 14 Abb. Pr. 358, 1862 N.Y. Misc. LEXIS 370 (N.Y.C.P. Aug. 1, 1862).

A motion to dissolve an injunction may be opposed on affidavits of any number of witnesses; it is, therefore, a matter of judicial discretion, upon balancing the evidence adduced, to dissolve it or not. *Crocker v Baker*, 3 Abb. Pr. 182; *Malcolm v Miller*, 6 How. Pr. 456, 1852 N.Y. Misc. LEXIS 41 (N.Y. Sup. Ct. Mar. 1, 1852); *MINOR v TERRY*, 6 How. Pr. 208, 1851 N.Y. Misc. LEXIS 92 (N.Y. Sup. Ct. Aug. 1, 1851).

## **29. —Appeal**

When an injunction restraining police officers from trespassing upon private premises involves questions of public interest, the court will entertain on appeal by the defendants new affidavits, although guilty of laches. *Devlin v McAdoo*, 116 A.D. 224, 101 N.Y.S. 546, 1906 N.Y. App. Div. LEXIS 2641 (N.Y. App. Div. 1906).

## **30. Removal or disposal of property**

Attorney though not a party to the injunction proceeding under the Martin Act (General Business Law, Art 23-a), as assignee of the sole general partner, had a legal right to move to vacate the injunction and restrain the receiver, appointed in the injunction proceedings, from taking shares of stock which allegedly had been the personal property of the sole general partner, and which had been assigned to the attorney. *People v Gordon*, 5 N.Y.2d 834, 181 N.Y.S.2d 507, 155 N.E.2d 403, 1958 N.Y. LEXIS 727 (N.Y. 1958).

The only question to be considered upon a notice to dissolve an injunction granted under the last clause of § 219 (now § 878, subd. 2) is that of fraudulent intent. Affidavits denying the debt sworn to by plaintiff cannot properly be received. *Brewster v Hodges*, 8 Super Ct 609.

## **31. Waiver of objections**

An irregularity in obtaining an injunction is not waived by a motion to dissolve it. *Wilkie v Rochester & S. L. R. Co.*, 12 Hun 242 (N.Y.).

Proceeding to a hearing without objecting that due notice is not given, is a waiver of the objection. *Health Dept. of New York v Police Dept. of New York* (1876) 41 Super Ct 323.

### **32. Correction of irregularities**

Irregularity on motion to vacate injunction may be corrected on appeal where such irregularity involves no substantial right. *In re Bean*, 207 A.D. 276, 201 N.Y.S. 827, 1923 N.Y. App. Div. LEXIS 5947 (N.Y. App. Div. 1923), app. dismissed, 238 N.Y. 552, 144 N.E. 888, 238 N.Y. (N.Y.S.) 552, 1924 N.Y. LEXIS 720 (N.Y. 1924), *aff'd*, 238 N.Y. 618, 144 N.E. 916, 238 N.Y. (N.Y.S.) 618, 1924 N.Y. LEXIS 802 (N.Y. 1924).

## **Research References & Practice Aids**

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### **Federal Aspects:**

Power of federal appellate court to suspend, modify, restore, or grant injunction pending appeal, Rule 62(g) of Federal Rules of Civil Procedure, USCS Court Rules.

Appeal from three-judge courts to United States Supreme Court from orders granting or denying interlocutory or permanent injunctions in any civil action, suit or proceeding, 28 USCS § 1253.

Appeals from United States District Court orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, 28 USCS § 1292.

### **Jurisprudences:**

42 Am Jur 2d, Injunctions §§ 302.– 314.

14A Am Jur PI & Pr Forms (Rev ed), Injunctions, Forms 71 et seq.

### **Treatises**

§ 6314. Vacating or modifying preliminary injunction or temporary restraining order.

**Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 6314, Vacating or Modifying Preliminary Injunction or Temporary Restraining Order.

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 § 28.21. Motion to vacate or modify preliminary injunction or temporary restraining order.

CPLR Manual § 36.04. Seizures by federal authorities.

**Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Civil Litigation § 14.20. Vacating or Modifying Preliminary Injunction or Temporary Restraining Order (TRO).

**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.

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 6314:1 et seq.

LexisNexis Forms FORM 140-723.9(2).— Undertaking Given by Defendant as Condition of Vacating Temporary Injunction.

§ 6314. Vacating or modifying preliminary injunction or temporary restraining order.

LexisNexis Forms FORM 75-CPLR 6314:1.— Order to Show Cause in Support of Motion to Vacate or Modify Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6314:2.— Affidavit in Support of Motion to Vacate or Modify Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6314:3.— Order Vacating or Modifying Preliminary Injunction.

LexisNexis Forms FORM 75-CPLR 6314:4.— Affidavit in Support of Ex Parte Motion to Vacate or Modify Temporary Restraining Order.

LexisNexis Forms FORM 75-CPLR 6314:5.— Order Vacating or Modifying Temporary Restraining Order.

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

### **Hierarchy Notes:**

NY CLS CPLR, Art. 63

## **Forms**

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### **Forms**

#### **Form 1**

#### **Provision in Order Vacating Injunction on Condition That Defendant Execute Undertaking**

Upon condition that defendant execute an undertaking with sufficient surety, for the sum of \_\_\_\_\_ dollars, conditioned to indemnify plaintiff against any loss sustained by reason of vacating such injunction order.

#### **Form 2**

### **Particular Clauses in Undertaking Given as Condition for Vacating Injunction**

Whereas an application has been made by defendant to vacate [or “modify”] the injunction order granted herein on \_\_\_\_\_, 20\_\_\_\_\_, by \_\_\_\_\_, and it appears that the alleged wrong or injury sought to be enjoined is not irreparable and is capable of being adequately compensated for in money, and an order having been granted by \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, vacating [or “modifying”] such injunction order on the defendant executing an undertaking in this form in the sum of \_\_\_\_\_ dollars with surety [or as the case may be] conditioned as hereinafter provided now therefore the condition of this obligation is such that if the principal and surety hereto shall indemnify the plaintiff against any loss sustained by reason of vacating such injunction order to an amount not to exceed the sum of \_\_\_\_\_ dollars, then this obligation to be void, otherwise to be in full force and effect.

### **Form 3**

#### **Body of Notice of Motion to Vacate Injunction**

PLEASE TAKE NOTICE that on \_\_\_\_\_ [designate the moving papers], a motion will be made at a [motion] term of this court, to be held at the court house, in the city of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock in the forenoon, or as soon thereafter as counsel can be heard, [or “before \_\_\_\_\_ (designating the judge who granted the order) at the judge’s office,” etc.], to dissolve the injunction issued in this action [or “to modify the injunction issued in this action so as to permit the defendant to,” etc.], with costs, and for such order or further relief as may be just.

### **Form 4**

#### **Particular Allegations in Affidavit Where Application Cannot Be Made to Judge Who Granted Injunction and Is ex Parte**



That Hon. \_\_\_\_\_, Justice of the Supreme Court [or as the case may be], by whom the said injunction order was granted, is absent from \_\_\_\_\_ [or state facts to show other disability of judge who granted the order] and will not return to the County of \_\_\_\_\_, in the State of New York, until about \_\_\_\_\_, 20\_\_\_\_\_, as deponent is informed by \_\_\_\_\_, as more fully appears from the affidavit of \_\_\_\_\_ hereto annexed.

That deponent will be exposed to great injury by the delay required for an application upon notice for the reason that \_\_<sup>8</sup>\_\_\_ [state facts to show reason].

That no previous application, etc.

## Form 5

### Body of Order on Motion to Vacate or Modify Injunction

On reading and filing \_\_\_\_\_ [recite motion papers], and on motion of \_\_\_\_\_, counsel for defendant, and after hearing \_\_\_\_\_, counsel for plaintiff [or, "and on proof of due service of notice of motion, and no one appearing"] in opposition thereto;

ORDERED, that the injunction granted by \_\_\_\_\_, justice of this court on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, against the above-named \_\_\_\_\_ be vacated and dissolved [with \_\_\_\_\_ dollars costs to abide the event of the action].

[Or: On motion of \_\_\_\_\_, attorney for the plaintiff, it is hereby

ORDERED that said motion be and hereby is in all respects denied and the injunction order made by Justice \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, is hereby continued in full force and effect pending the final determination of

this action and that the plaintiff recover of the defendant ten dollars costs of this motion, and it is further

ORDERED, that plaintiff be required, within two days from the service of a copy of this order on plaintiff's attorney, with notice of entry, to file a new undertaking in the sum of \_\_\_\_\_ dollars, [duly approved by the court], and to serve a copy thereof on the attorney for defendant, and in the event of the failure of plaintiff to file such new undertaking then said motion to vacate shall be granted and either party may apply for further relief, in the event of the failure of plaintiff to file such new undertaking.]

## **Form 6**

### **Provision in Order Granting Injunction as to Motion to Modify or Dissolve**

Defendant has leave to move to vacate or modify this injunction on the same papers, or on additional papers presented on his behalf, as he may be advised.

## **Form 7**

### **Notice of Motion to Vacate Based on Original Papers**

[As in ordinary notice of motion and add:] for an order vacating and setting aside an injunction order previously made in the above-entitled action by Justice \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, on the papers on which that injunction order was granted on the ground that \_\_\_\_\_, and for such other, further and different relief as may be proper, with the costs of this motion.

## **Form 8**

### **Body of Order to Show Cause Why Injunction Order Should Not Be Vacated Where Application Based in Part on Proof of Defendant**

On the annexed affidavit of \_\_\_\_\_, sworn to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and on the original injunction order issued herein by

Justice \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and on the summons, complaint, affidavits of \_\_\_\_\_ and \_\_\_\_\_, sworn to \_\_\_\_\_, 20\_\_\_\_\_, and the undertaking given when such order was granted, all of which papers were previously filed in the office of the clerk of the County of \_\_\_\_\_, let plaintiff show cause at a [motion] term [Part \_\_\_\_\_], of the Supreme Court, to be held in and for the County of \_\_\_\_\_, at the county court house therein on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at the opening of court on that day, or as soon thereafter as counsel can be heard, why an order should not be made vacating and setting aside said injunction order made by Justice \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, on the ground that \_\_\_\_\_ and why defendant should not have such other, further and different relief as may be equitable, with the costs of this motion.

Sufficient reason appearing therefor service of this order with the affidavit on which it was granted, on the attorney for the plaintiff, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, shall be sufficient.

## **Form 9**

### **Ordering Part of Order on Motion to Vacate Injunction**

ORDERED that said motion to vacate the injunction herein is hereby granted, and said injunction is hereby dissolved on the ground among others that \_\_\_\_\_ [necessary if ground is irregularities] with \_\_\_\_\_ dollars against plaintiff [to abide the event of the action] upon condition that \_\_\_\_\_ [if granted on condition].

[Where motion denied.] ORDERED that said motion to vacate the injunction herein dated \_\_\_\_\_, 20\_\_\_\_\_, is hereby denied, with \_\_\_\_\_ dollars costs against defendant [to abide the event of the action], on condition that \_\_\_\_\_ [if denial is on condition].

## Form 10

### Ordering Part of Order Modifying Injunction

ORDERED that the injunction herein dated \_\_\_\_\_, 20\_\_\_\_\_, is hereby modified by \_\_\_\_\_ [state how modified], and otherwise that said injunction remain as originally granted, with \_\_\_\_\_ dollars costs against \_\_\_\_\_ [to abide the event of the action].

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