

Nobu Next Door, LLC v. Fine Arts Hous., Inc.

Court of Appeals of New York

April 5, 2005, Decided

No. 106 SSM 7

Reporter

4 N.Y.3d 839 *; 833 N.E.2d 191 **; 800 N.Y.S.2d 48 ***; 2005 N.Y. LEXIS 772 ****

Nobu Next Door, LLC, Plaintiff and Nobu Corp., Appellant, v. Fine Arts Housing, Inc.,
Respondent.

Prior History: [****1] APPEAL, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered January 8, 2004. The Appellate Division order, insofar as appealed from, (1) modified, on the law, orders of the Supreme Court, New York County (Richard Braun, J.), which had granted injunctive and *Yellowstone* relief to Nobu Corp., tolling its time to exercise the renewal option in its lease on condition that it post a \$ 10,000 bond, and denied defendant's cross motion to compel plaintiffs to replace an exhaust stack, and (2) otherwise affirmed. The modification consisted of striking the bond and vacating the preliminary injunction. The following question was certified by the Appellate Division: "Was the order of this Court, which modified the orders of Supreme Court, properly made?"

Nobu Next Door, LLC v. Fine Arts Hous., Inc., 3 A.D.3d 335, 771 N.Y.S.2d 76, 2004 N.Y. App. Div. LEXIS 133 (N.Y. App. Div. 1st Dep't, 2004), affirmed.

Disposition: On review of submissions pursuant to section 500.4 of the Rules, order, insofar as appealed from, affirmed, with costs, and certified question answered in the affirmative, in a memorandum.

Counsel: *Wagner Davis, P.C.*, New York City (*Bonnie Reid Berkow* of counsel), for appellant.

Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C., New York City (Jeffrey R. Metz of counsel), for respondent.

Judges: Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Opinion

[**192] [***49] [*840] MEMORANDUM:

The order of the Appellate Division, insofar as appealed from, should be affirmed, with costs; the certified question should be answered in the affirmative.

The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts. Our power to review such decisions is thus limited to determining whether the lower courts' discretionary powers were exceeded or, as a matter of law, abused (*Doe v Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]). The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable [****2] injury in the absence of an injunction and a balance of equities in its favor (see CPLR 6301; see *generally Doe*, 73 N.Y.2d at 750).

Here, in addition to a *Yellowstone* injunction, plaintiff Nobu Corp. also sought a preliminary injunction tolling its time to exercise the renewal option in its lease (see *Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assoc.*, 85 N.Y.2d 600, 650 N.E.2d 1299, 627 N.Y.S.2d 298 [1995]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 [1968]). The Appellate Division considered appropriate equitable factors in determining that the balance of the equities did not tip in Nobu Corp.'s favor. Accordingly, that Court did not exceed or abuse its equitable powers in vacating the preliminary injunction.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur in memorandum.

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order, insofar as appealed from, affirmed, etc.

Decided [****3] April 5, 2005