NY CLS CPLR § 6311

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

Article 63 Injunction (§§ 6301 — 6330)

§ 6311. Preliminary injunction.

1. A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment. A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed.

2. Notice of motion for a preliminary injunction to restrain state officers or boards of state officers under the provisions of this section must be upon notice served upon the defendant or respondent, state officers or board of state officers and must be served upon the attorney general by delivery of such notice to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1972, ch 752, eff May 30, 1972.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 818, 879, 882; CCP §§ 551, 558, 605, 608, 609, 638, 650; Code Proc §§ 183, 220, 221, 223, 227, 228, 236.

Commentary

PRACTICE INSIGHTS:

NOTICE IS REQUIRED FOR PRELIMINARY INJUNCTION

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INSIGHT

Contrary to temporary restraining order ("TRO") practice, CPLR 6311(1) explicitly states that a preliminary injunction "may be granted only upon notice to the defendant." The notice requirement makes the dynamics for obtaining an injunction entirely different from those for obtaining a TRO, which suggests that counsel should consider carefully whether the TRO immediacy standard can be met instead of seeking a preliminary injunction.

ANALYSIS

An action must be commenced.

The CPLR 6311(1) notice requirement helps to avoid possible misuse of the remedy, and it addresses obvious due process concerns. *See, e.g., LaCarruba v. Legislature of the County of Suffolk*, 225 A.D.2d 671, 640 N.Y.S.2d 130 (2d Dep't 1996); *Monroe v. Monroe*, 108 A.D.2d 793, 485 N.Y.S.2d 310 (2d Dep't 1985); *see also Soldiers', Sailors', Marines', & Airmen's Club,*

Inc. v. Carlton Regency Corp., 95 A.D.3d 687, 690, 945 N.Y.S.2d 40, 43 (1st Dep't 2012) (affirming dismissal of claim for preliminary injunctive relief, where defendant "was never put on notice" of claim). Unlike a TRO application, a preliminary injunction application requires a pending action (CPLR 6301), even though the summons may be served with the notice of motion under CPLR 6311(1). Further, the moving party must show that there is a cause of action under CPLR 6312(a). A preliminary injunction application therefore has considerably more structure than the minimum required for a TRO application.

Moving party can use order to show cause for TRO.

Unless the time period for the preliminary injunction motion return date is shortened by an order to show cause, the notice and service requirements of a motion in an action also dictate that there will be more deliberation and an effective opportunity to be heard on a motion for a preliminary injunction. Pending the preliminary injunction hearing, the defendant would not be restrained, and counsel would have time to prepare opposing papers. If an order to show cause is used, however, it does not take much additional effort to seek a TRO at the same time because the order to show cause would be submitted *ex parte* to obtain the accelerated return date. The moving party can use an order to show cause for a TRO and also to set a return time and service procedures for a preliminary injunction hearing, assembling the whole package and using both the TRO and preliminary injunction application to maximum advantage. This procedure is contemplated by CPLR 6313(a), but not necessarily required under CPLR 6301, which seems to permit a TRO application separate from a motion for a preliminary injunction, even though authorized in anticipation of such a motion.

A party seeking a TRO by order to show cause also must be mindful of 22 NYCRR 202.7(f), which requires the moving party to submit an affirmation demonstrating that there would be "significant prejudice" to the party seeking the TRO by giving notice or, absent that, showing that good faith efforts have been made to notify the adverse party and provide that party an opportunity to be heard. The intent clearly is to discourage the former practice of permitting TRO's to be obtained *ex parte*, and allows an *ex parte* TRO to be issued only upon the required

showing. The practical effect is to create a presumption against granting a TRO *ex parte*. This limitation also is set forth in Commercial Division Rule 20 and 22 NYCRR 202.8-e, which provides that a TRO will not be issued *ex parte* unless "the moving party can demonstrate that there will be significant prejudice by reason of giving notice." *See* 22 NYCRR 202.70(g), Rule 20; 22 NYCRR 202.8-e (effective Feb. 1, 2021) ("Unless the moving party can demonstrate significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort to provide notice, a temporary restraining order should not be issued *ex parte*.").

Hearing formalities and procedure.

The notice requirement to seek an injunction means that the motion for a preliminary injunction will be handled similarly to any other motion, in that papers will be submitted by both sides, and usually an opportunity to be heard will follow. The court has power to take testimony on a preliminary injunction hearing, but the facts more typically are presented by affidavit, similar to a motion for summary judgment. Unlike such a motion, however, there are times when the court should hold a hearing on a motion for preliminary injunction because, for purposes of the motion, the court needs to decide certain facts first, which will then enable the court to consider the merits of the motion. This requirement is set forth clearly in CPLR 6312(c). *See 116 St. Laundromat & Dry Cleaning Inc. v. 240-42 W. 116 St. Hous. Dev. Fund Corp.*, 215 A.D.3d 513, 188 N.Y.S.3d 25 (1st Dep't 2023); *Board of Mgrs. of the Colonnade Condominium v. 32F at 347 W.57th St., LLC*, 171 A.D.3d 682, 99 N.Y.S.3d 266 (1st Dep't 2019) (the court issued a TRO but found that disputed issues of fact required a hearing pursuant to CPLR 6312(c) to determine whether a preliminary injunction should issue);*1234 Broadway LLC v. West Side SRO Law Project, Goddard Riverside Community Ctr.*, 86 A.D.3d 18, 23-24, 924 N.Y.S.2d 35 (1st Dep't 2011). Consequently, a genuine hearing has its place on a motion for a preliminary injunction, even though the courts seem reluctant to handle such motions as evidentiary hearings.

Process value of notice requirement: preliminary injunction motion must be litigated.

The procedures discussed above flow from the notice requirement itself. Because notice is required, the preliminary injunction motion must be litigated. The pendency of an action, notice

service, exchange of papers, motion hearing and argument all lead toward a more deliberative and developed process to decide a preliminary injunction application. From this perspective, the contrast with purely *ex parte* TRO practice is very clear. Depending on the goals of a given party in litigation, these procedural differences dictate whether a TRO should be sought as much as the substantive difference between the TRO and injunction standards.

Advisory Committee Notes

The first sentence of this section is derived from CPA § 818 and the first sentence of § 882 with no substantive change intended. The remainder of former § 882, which concerned temporary restraining orders, is covered in § 6313(a).

The second sentence of this section is derived from CPA § 879 with no substantive change intended. In view of the provision for notice in the first sentence of this section, the final phrase of former § 879 has been deleted; its application to temporary restraining orders is covered by an exception in the final phrase of § 6313(a). See notes to § 6313(a).

CPA § 880 is omitted. Its first sentence, dating back to the Field Code (Code Proc § 218), is covered by the general provision abolishing the distinction between court and judges' orders. Its second sentence was added in 1913 (Laws 1913, c. 112). Its "not entirely clear" language has been construed to read as "Pending appeal to the Appellate Division or to the Court of Appeals from an order or judgment denying or vacating an injunction, an injunction order which, if granted, may be modified or vacated by the Appellate Division may also be granted or continued by the Appellate Division or a justice thereof." United States Title Guaranty Co. v Brown, 158 App Div 542, 544, 143 NY Supp 835, 837 (2d Dept 1913). So construed it is, like CPA §§ 66 and 132, simply declarative of the constitutional power, possessed by the Appellate Division but utilized sparingly, to exercise all the original jurisdiction of the Supreme Court. Const art V, § 2; see introduction to article 22. There is no reason to give this power undue prominence in the injunction situation by singling out that situation for treatment in the practice statutes, and the provision is accordingly omitted for the same reasons that former §§ 66 and 132 were omitted.

The phrase “state officer or board” has been replaced by “public officer, board or municipal corporation of the state,” since there is no reason to limit this provision to state officers.

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I. Under CPLR

1. In general

Relief by way of an injunction will not lie where there is an adequate remedy at law. Anonymous v Axelrod, 92 A.D.2d 789, 459 N.Y.S.2d 778, 1983 N.Y. App. Div. LEXIS 17157 (N.Y. App. Div. 1st Dep't 1983).

Plaintiff’s motion for preliminary injunction against prosecution of action commenced against him in Russia was properly denied; doctrine of comity militates against staying proceedings previously commenced in foreign court of competent jurisdiction, and additional expense and trouble of litigating in foreign court are insufficient to warrant injunction. Indosuez Int'l Fin. B.V. v National Reserve Bank, 263 A.D.2d 384, 693 N.Y.S.2d 33, 1999 N.Y. App. Div. LEXIS 7817 (N.Y. App. Div. 1st Dep't 1999).

The drastic remedy of a temporary injunction is not to be granted unless a clear right is established by the moving papers, and plaintiff’s rights must be certain as to the law and facts. Paulsen v Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501, 1968 N.Y. Misc. LEXIS 1132 (N.Y. Sup. Ct. 1968).

The loss by a party of monetary benefits does not, in and of itself, constitute irreparable injury warranting a temporary injunction. Bryant Westchester Realty Corp. v Board of Health, 91 Misc. 2d 56, 397 N.Y.S.2d 322, 1977 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1977).

Party may not unilaterally transform situation and then be heard to argue that preliminary injunction cannot be issued because it changes status quo. Kimm v Blue Cross & Blue Shield, 160 Misc. 2d 97, 608 N.Y.S.2d 385, 1993 N.Y. Misc. LEXIS 575 (N.Y. Sup. Ct. 1993).

Water district supervisor was entitled to a preliminary injunction enjoining the defendant from publishing and posting further defamatory remarks about the supervisor on social media, and directing him to remove and/or delete statements previously posted because the cited statements suggested that the supervisor regularly engaged in professional misconduct and the improper performance of his duties, and were tendered to impute criminal activity on the part of the supervisor and to reflect negatively on the supervisor in his profession and particular employment. Carey v Ripp, 60 Misc. 3d 1016, 77 N.Y.S.3d 863, 2018 N.Y. Misc. LEXIS 2909 (N.Y. Sup. Ct. 2018).

1.5. Venue

In a case in which petitioners sought a preliminary injunction and a temporary restraining order, enjoining respondents and those acting in concert with them from extending, implementing, or enforcing that portion of Executive Order 202.74 which implemented an operational curfew on restaurants and bars, respondents failed to establish their burden that Erie County was an improper venue for the action. Moreover, venue in Erie County was proper because respondents, New York State Liquor Authority and New York State Department of Health, had regional offices located in Erie County; the challenged curfew and its underlying directives were being enforced in Erie County; and most of the material witnesses were present in Erie County. Gallivan v Cuomo, 71 Misc. 3d 589, 143 N.Y.S.3d 816, 2021 N.Y. Misc. LEXIS 848 (N.Y. Sup. Ct. 2021), vacated, 2021 N.Y. App. Div. LEXIS 2340 (N.Y. App. Div. 4th Dep't Apr. 8, 2021).

2. Purpose

Preliminary injunction is extraordinary provisional remedy to which plaintiff is entitled only on special showing. 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).

Regardless of whether an Article 78 proceeding is available, the plaintiffs' resort to remedy of declaratory and injunctive relief is proper where constitutional relief is sought. Powlowski v Wullich, 81 Misc. 2d 895, 366 N.Y.S.2d 584, 1975 N.Y. Misc. LEXIS 2490 (N.Y. Sup. Ct. 1975).

3. Requirements

In order to become entitled to a preliminary injunction, plaintiffs who seek it must establish a prima facie right to relief, that irreparable injury will occur without the preliminary injunction, and that the balance of the equities is in their favor. McNulty v Chinlund, 62 A.D.2d 682, 406 N.Y.S.2d 558, 1978 N.Y. App. Div. LEXIS 10894 (N.Y. App. Div. 3d Dep't 1978).

To be granted a preliminary injunction, a movant must demonstrate: a likelihood of ultimate success on the merits, although it is enough if he makes a prima facie showing of his right to relief, since it is not for the court to finally determine the merits of an action upon a motion for a preliminary injunction, but, rather, the purpose of such interlocutory relief is to preserve the status quo until a decision is reached on the merits; irreparable injury absent granting of the preliminary injunction; and that a balancing of equities favors his position. Further, on an appeal from the granting of a preliminary injunction, the Appellate Division should not interfere with the exercise of discretion by Special Term and will review only to determine whether that discretion has been abused. Accordingly, where plaintiffs have set forth facts supporting their claim of breach of a branch manager contract by defendant in that defendant terminated the contract in bad faith and that, should a preliminary injunction not be granted, they will be unable to continue paying the salaries of the office staff, will lose contact with customers and temporary employees, who they are in the business of placing for employment, and, as a result of a restrictive covenant not to compete, lose the ability to work in the temporary business services field, Special Term did not abuse its discretion in granting a preliminary injunction. Gambar Enterprises, Inc. v Kelly

Services, Inc., 69 A.D.2d 297, 418 N.Y.S.2d 818, 1979 N.Y. App. Div. LEXIS 11354 (N.Y. App. Div. 4th Dep't 1979).

No action was pending between parties, and thus preliminary injunction to stay termination of lease was not available, where (1) jurisdiction over defendants had not been obtained pursuant to CLS CPLR § 2103 by service of summons and complaint on law firm which had represented defendants in underlying lease dispute, since § 2103 presupposes existence of pending action in which attorney has appeared, and (2) order to show cause for preliminary injunction, providing for service of accompanying papers on attorneys, could not be construed as authorization for expedient service of process under CLS CPLR § 308(5), since plaintiff had made no showing or request for such service. Happy Age Shops, Inc. v Matyas, 128 A.D.2d 754, 513 N.Y.S.2d 710, 1987 N.Y. App. Div. LEXIS 44439 (N.Y. App. Div. 2d Dep't 1987).

Petitioner was not entitled to injunctive relief where there was no pending action to support that relief. Church Mut. Ins. Co. v People, 251 A.D.2d 1014, 674 N.Y.S.2d 201, 1998 N.Y. App. Div. LEXIS 7036 (N.Y. App. Div. 4th Dep't 1998).

4. Effect of preliminary injunction

The grant of a preliminary injunction to a party does not decide the question of whether that party is entitled to a permanent injunction, which issue must be resolved at trial. Gambar Enterprises, Inc. v Kelly Services, Inc., 69 A.D.2d 297, 418 N.Y.S.2d 818, 1979 N.Y. App. Div. LEXIS 11354 (N.Y. App. Div. 4th Dep't 1979).

In an action in which charges of breach of fiduciary obligations by plaintiff, an officer of a corporation, were made, a conclusory denial by plaintiff’s attorney would be insufficient to raise any issues of fact for the purpose of plaintiff’s motion for a preliminary injunction. Dubin v Muchnick, 87 A.D.2d 508, 447 N.Y.S.2d 472, 1982 N.Y. App. Div. LEXIS 15739 (N.Y. App. Div. 1st Dep't 1982).

Defendants were not entitled to dismissal of allegations that they committed deceptive trade practices in marketing and sale of residential homes in violation of New York City Consumer Protection Law, based on court's previous denial of plaintiffs' motion for preliminary injunction on ground that sales of real estate were not covered by consumer protection law, as determination of motion for provisional remedy is not "law of the case." Polonetsky v Better Homes Depot, Inc., 185 Misc. 2d 282, 712 N.Y.S.2d 801, 2000 N.Y. Misc. LEXIS 323 (N.Y. Sup. Ct. 2000), aff'd in part, modified, 279 A.D.2d 418, 720 N.Y.S.2d 59, 2001 N.Y. App. Div. LEXIS 651 (N.Y. App. Div. 1st Dep't 2001).

5. Effect of permanent injunction

Order granting preliminary injunction was superseded by order granting permanent injunction, and reversal of permanent injunction on appeal did not resurrect preliminary injunction. Bernstein v Spatola, 122 A.D.2d 97, 504 N.Y.S.2d 686, 1986 N.Y. App. Div. LEXIS 59166 (N.Y. App. Div. 2d Dep't 1986).

6. Effect of summary judgment

Inasmuch as preliminary injunction had been superseded by grant of partial summary judgment to plaintiff in declaratory judgment action, any error in denial of motion to change venue of injunction in application was rendered moot. Hurlbut v Whalen, 58 A.D.2d 311, 396 N.Y.S.2d 518, 397 N.Y.S.2d 586, 1977 N.Y. App. Div. LEXIS 12405 (N.Y. App. Div. 4th Dep't), app. denied, 43 N.Y.2d 643, 401 N.Y.S.2d 1028, 1977 N.Y. LEXIS 4964 (N.Y. 1977).

7. Notice

Preliminary injunction, which ordered board of education to continue teacher's salary pending determination of teacher's right to disability retirement benefits, was not issued in contravention of CLS CPLR § 6311 since relief requested in petition—that court maintain teacher's current status with and salary with board of education—constituted notice within contemplation of

statute. Dindas v Board of Educ., 185 A.D.2d 214, 586 N.Y.S.2d 259, 1992 N.Y. App. Div. LEXIS 9407 (N.Y. App. Div. 1st Dep't 1992).

Where the Teachers' Association had not received notice when the School Board moved for an injunction against the Association to halt a threatened teachers' strike, there was a jurisdictional defect in the proceedings to warrant vacating the injunction against the Association; likewise, the School Board's motion for the Association being held in contempt was denied. In re Utica Teachers Ass'n, 67 Misc. 2d 770, 325 N.Y.S.2d 587, 1971 N.Y. Misc. LEXIS 1187 (N.Y. Sup. Ct. 1971).

8. —Due process

Court erred in its sua sponte restraint of the defendant husband's disposition of marital property where plaintiff wife failed to move for such relief, in that due process requires written notice from the moving spouse that he or she seeks possession of marital assets or a restraint on their disposition. Leibowits v Leibowits, 93 A.D.2d 535, 462 N.Y.S.2d 469, 1983 N.Y. App. Div. LEXIS 17509 (N.Y. App. Div. 2d Dep't 1983).

Although Supreme Court has power to issue preliminary injunctions aimed at preserving marital assets pending equitable distribution, due process requires that party so enjoined receive notice that court will consider such remedy. Novick v Novick, 251 A.D.2d 385, 674 N.Y.S.2d 87, 1998 N.Y. App. Div. LEXIS 6651 (N.Y. App. Div. 2d Dep't 1998).

Blanket injunction prohibiting parties in divorce action from selling or otherwise disposing of marital assets was improper as violation of due process where no notice that court would consider such remedy was given. Novick v Novick, 251 A.D.2d 385, 674 N.Y.S.2d 87, 1998 N.Y. App. Div. LEXIS 6651 (N.Y. App. Div. 2d Dep't 1998).

9. —Degree of notice required

An order granting a permanent injunction against a corporation's stock dealings with its shareholders following a recapitalization would be modified to grant only a preliminary injunction where the court's order had treated the corporation's crossmotion to dismiss as a motion for summary judgment, and where the corporation was not advised that issues were being summarily decided and was not given the opportunity to show the existence of triable issues of fact. Puro v Purofied Down Products Corp., 87 A.D.2d 566, 448 N.Y.S.2d 193, 1982 N.Y. App. Div. LEXIS 15811 (N.Y. App. Div. 1st Dep't 1982).

10. —Abuse of process

Preliminary injunction granted to plaintiff in action for wrongful interference with contractual relationships would not serve as predicate for defendant's counterclaim of abuse of process where defendant failed to state elements essential to that cause of action in its pleading. Barrier Gasoline Service, Inc. v Shoreline Oil Co., 126 A.D.2d 692, 510 N.Y.S.2d 1023, 1987 N.Y. App. Div. LEXIS 41835 (N.Y. App. Div. 2d Dep't 1987).

11. —Jurisdiction

Where husband had been living and working in Florida and maintaining his residence, paying taxes and voting there, intending to remain in Florida, at the time of service of process upon him in Florida, the husband was not domiciliary of New York, thus the court never acquired jurisdiction in personam over him and the order granting the injunction to enjoin husband from suing for divorce was erroneously granted. Siev v Siev, 34 A.D.2d 1001, 312 N.Y.S.2d 795, 1970 N.Y. App. Div. LEXIS 4440 (N.Y. App. Div. 2d Dep't 1970).

Plaintiffs failed to obtain personal jurisdiction over defendants where they served summons, order to show cause, and accompanying papers which did not give notice of nature of underlying action, as required by CLS CPLR § 305(b), and thus plaintiffs' motion for preliminary injunction should have been denied; defendants were free to raise jurisdictional objection by motion or in response to order to show cause, and did not waive objection by filing notice of

appearance and demand for complaint. Sibley v Lake Anne Realty Corp., 136 A.D.2d 619, 523 N.Y.S.2d 865, 1988 N.Y. App. Div. LEXIS 432 (N.Y. App. Div. 2d Dep't 1988).

12. —Class action

In class action brought by association of rent-stabilized tenants against their landlords and various government agencies, challenging legality of rent increases, court lacked jurisdiction to grant preliminary relief to unnamed tenants prior to implementation of class certification order without first adding those tenants and their landlords as parties to action; thus, injunction previously issued, which affected named parties, did not affect unnamed, unjoined parties prior to implementation of class certification order by giving of notice to class members. Bryant Ave. Tenants' Ass'n v Koch, 131 A.D.2d 318, 516 N.Y.S.2d 211, 1987 N.Y. App. Div. LEXIS 47811 (N.Y. App. Div. 1st Dep't 1987).

Supreme Court did not have authority to preliminarily enjoin county from collecting late fee with regard to delinquent real property taxes or, pursuant thereto, to direct county to inform delinquent taxpayers that they could pay fee under protest, where relief requested in plaintiffs' motion was limited to class certification and "such other and further relief" as court might deem just and proper, and lacked specific request for preliminary injunction. LaCarruba v Legislature of Suffolk, 225 A.D.2d 671, 640 N.Y.S.2d 130, 1996 N.Y. App. Div. LEXIS 2683 (N.Y. App. Div. 2d Dep't 1996).

13. Burden of proof

Burden of persuasion on movant for preliminary injunction is even heavier when what is sought is a determination that a law, ordinance or regulation is unconstitutional. Bryant Westchester Realty Corp. v Board of Health, 91 Misc. 2d 56, 397 N.Y.S.2d 322, 1977 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1977).

In seeking preliminary injunction, movant must persuade court that it has a clear legal right to the relief sought upon undisputed facts and that it will suffer irreparable injury should the application be denied. Bryant Westchester Realty Corp. v Board of Health, 91 Misc. 2d 56, 397 N.Y.S.2d 322, 1977 N.Y. Misc. LEXIS 2235 (N.Y. Sup. Ct. 1977).

14. Expiration

Once decision on merits of case is made, need for provisional relief ends, and any order granting preliminary injunction expires. Heisler v Gingras, 238 A.D.2d 702, 656 N.Y.S.2d 70, 1997 N.Y. App. Div. LEXIS 3746 (N.Y. App. Div. 3d Dep't 1997).

15. Automatic stay on appeal

Filing of notice of appeal from Supreme Court preliminary injunction did not invoke automatic stay provisions of CLS CPLR § 5519(a)(1) so as to cloak defendant with legal protection from subsequent contempt charge for violating order. Ulster Home Care, Inc. v Vacco, 255 A.D.2d 73, 688 N.Y.S.2d 830, 1999 N.Y. App. Div. LEXIS 4222 (N.Y. App. Div. 3d Dep't 1999).

16. State officers

The trial court did not abuse its discretion in granting a town’s motion for a preliminary injunction enjoining the Commissioner of Mental Retardation and Developmental Disabilities from establishing a community facility at a proposed site pending determination of the action, where the town alleged it had been effectively denied its statutory right to participate in the site selection process and should be afforded a second opportunity to work with the Commissioner in the designation of potential sites complying with the new criteria issued by the commissioner, and where the town made a clear showing of irreparable injury should the injunction be denied. Pound Ridge v Introne, 81 A.D.2d 885, 439 N.Y.S.2d 53, 1981 N.Y. App. Div. LEXIS 11588 (N.Y. App. Div. 2d Dep't 1981).

In denying plaintiff’s motion for a preliminary and permanent injunction restraining defendant from receiving or in any manner exercising dominion over the proceeds of a lottery prize, the trial court improperly directed defendant state division of the lottery to pay to first defendant and her counsel “without restriction, the lotto prize funds” where the order denying the motion appeared to resolve the entire issue between the parties without a trial or other proceedings, and where the relief granted in said paragraph was not sought by the defendant, nor was she entitled to it. Pando v Daysi, 88 A.D.2d 540, 450 N.Y.S.2d 315, 1982 N.Y. App. Div. LEXIS 16683 (N.Y. App. Div. 1st Dep't 1982).

CLS Men Hyg § 7.17(e)(3) does not bar issuance of preliminary injunction where defendants are implementing “significant service reduction” without providing 12-month notice mandated by that statute. Civil Serv. Emples. Ass'n, Local 1000 v New York State Office of Mental Health, 245 A.D.2d 836, 666 N.Y.S.2d 351, 1997 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 3d Dep't 1997).

State Office of Mental Health’s 1991 and 1993 plans, published under CLS Men Hyg § 5.07, did not fulfill notice requirements of CLS Men Hyg § 7.17(e)(3) with respect to its 1996 “significant service reductions” at psychiatric center. Civil Serv. Emples. Ass'n, Local 1000 v New York State Office of Mental Health, 245 A.D.2d 836, 666 N.Y.S.2d 351, 1997 N.Y. App. Div. LEXIS 13203 (N.Y. App. Div. 3d Dep't 1997).

Application to restrain Governor of the State and a committee appointed by him from negotiating with Civil Service Employees Association on basis that Governor did not follow intent and purpose of Taylor Law § 207 when he publicly recognized the Association as representative for all purposes of collective negotiation of 124,000 state employees in one general negotiating unit of virtually all state employees, was denied, because court could not judge an executive decision of Governor which was made under legal and rightful power bestowed by constitution and statute. New York State Employees Council 50, etc. v Rockefeller, 55 Misc. 2d 250, 284 N.Y.S.2d 803, 1967 N.Y. Misc. LEXIS 1062 (N.Y. Sup. Ct. 1967).

Union, painting contractor and association of painting contractors were not entitled to a preliminary injunction to stop all work and payments under a contract to paint three subway stations, which contract was challenged as a void public works contract on the ground that public authority did not solicit competitive bids thereon, where the petition itself demanded the return of any monies paid under the contract, which would provide a sufficient remedy at law for any damage to the public purse, and where the damage to petitioners was at best speculative, as there was no assurance that they would directly benefit from any award of said contract and, in fact, it was more likely that the corporation presently performing the work would be the low bidder. District Council No. 9, International Brotherhood of Painters & Allied Trades v Metropolitan Transp. Authority, 115 Misc. 2d 810, 454 N.Y.S.2d 663, 1982 N.Y. Misc. LEXIS 3773 (N.Y. Sup. Ct. 1982), aff'd, 92 A.D.2d 791, 1983 N.Y. App. Div. LEXIS 17161 (N.Y. App. Div. 1st Dep't 1983).

Because the senators established a likelihood of success on the merits for their claim under N.Y. Const. art. IV, § 6 to preliminarily enjoin the governor’s appointee for lieutenant governor from presiding over the senate, a preliminary injunction under N.Y. C.P.L.R. 6311(1) was appropriate. Skelos v Paterson, 884 N.Y.S.2d 812, 25 Misc. 3d 347, 2009 N.Y. Misc. LEXIS 1968 (N.Y. Sup. Ct.), aff'd in part, 65 A.D.3d 339, 885 N.Y.S.2d 92, 2009 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 2d Dep't 2009).

17. —Elections

Refusal of an inspector of elections to accept an affidavit purporting to comply with § 168 of the Election Law on the ground that the instrument must be executed in the presence of the inspector would not warrant an injunction to prevent enforcement of a ruling of the Attorney General requiring a registrant to fill out and sign the affidavit in the inspector’s presence, since § 331 of the Election Law provided a complete and summary remedy to one whose registration had been unlawfully refused. Gournet v Lefkowitz, 27 A.D.2d 809, 277 N.Y.S.2d 800, 1967 N.Y. App. Div. LEXIS 4717 (N.Y. App. Div. 1st Dep't 1967).

Due to his failure to show the requisite immediate irreparable harm, the chairman of the New York Republican State Committee would not be entitled to a preliminary injunction enjoining implementation of an Executive Order directing the state agencies that had regular contact with the public to conduct voter registration projects to assist citizens in registering to vote, since the issue of the harm resulting from the initiation of voter registration by the executive rather than the legislative branch of government must await resolution following trial. Clark v Cuomo, 103 A.D.2d 244, 480 N.Y.S.2d 61, 1984 N.Y. App. Div. LEXIS 19271 (N.Y. App. Div. 3d Dep't), aff'd, 63 N.Y.2d 96, 479 N.Y.S.2d 971, 468 N.E.2d 1108, 1984 N.Y. LEXIS 4534 (N.Y. 1984).

18. —Attorney General

Action, inter alia, to prevent Attorney General from accepting amended cooperative conversion offering plan for filing was properly venued in Albany County. Newler v Abrams, 164 A.D.2d 361, 563 N.Y.S.2d 857, 1990 N.Y. App. Div. LEXIS 14816 (N.Y. App. Div. 3d Dep't 1990).

In action challenging constitutionality of “public charge” regulation, 18 NYCRR § 505.14(h)(7)(ii), Attorney General could be held in contempt for violating preliminary injunction which enjoined criminal prosecution of plaintiff licensed home care agency for allegedly violating challenged regulation. Ulster Home Care, Inc. v Vacco, 255 A.D.2d 73, 688 N.Y.S.2d 830, 1999 N.Y. App. Div. LEXIS 4222 (N.Y. App. Div. 3d Dep't 1999).

N.Y. C.P.L.R. 6311(1) did not present a jurisdictional bar to senators obtaining relief from the Supreme Court, Nassau County, in their suit challenging the governor’s appointment of a lieutenant-governor; either the appointee was the lawfully appointed lieutenant-governor or he was not, and, if he was not, then N.Y. C.P.L.R. 6311 did not apply because he was not a public officer. If he was the lawfully appointed lieutenant-governor, then the senators had proffered no grounds to restrain his performance of the duties of that office. Skelos v Paterson, 65 A.D.3d 339, 885 N.Y.S.2d 92, 2009 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 2d Dep't), rev'd, 13 N.Y.3d 141, 886 N.Y.S.2d 846, 915 N.E.2d 1141, 2009 N.Y. LEXIS 3578 (N.Y. 2009).

In school board member's action for temporary injunction against hearing by school board on charges of assault and unethical conduct by said school board member, it was not necessary that Attorney General receive notice, since state officers were not involved in such proceeding, even though school board member was a public officer within the meaning of Public Officers Law § 2. Komyathy v Board of Education, 75 Misc. 2d 859, 348 N.Y.S.2d 28, 1973 N.Y. Misc. LEXIS 1387 (N.Y. Sup. Ct. 1973).

Evidence that defendants sold investment contracts which constituted securities and that they had informed their investors that money had been lost but did not give the investors any indication as to how that conclusion was arrived at and evidence of possible fraud and financial instability on the part of defendants was sufficient to entitle Attorney General to preliminary injunction against defendants to preclude them from offering securities for sale and from transferring or disposing of their assets pendente lite. State v Kozak, 91 Misc. 2d 394, 398 N.Y.S.2d 15, 1977 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1977).

19. —State liquor authority

In an appropriate case and to prevent injustice, a court is empowered to intervene with respect to the performance of a statutory duty by a public board or authority. Oleshko v New York State Liquor Authority, 29 A.D.2d 84, 285 N.Y.S.2d 696, 1967 N.Y. App. Div. LEXIS 2697 (N.Y. App. Div. 1st Dep't 1967), aff'd, 21 N.Y.2d 778, 288 N.Y.S.2d 474, 235 N.E.2d 447, 1968 N.Y. LEXIS 1632 (N.Y. 1968).

The State Liquor Authority would not be enjoined from proceeding with a hearing to revoke respondent's liquor license on charges alleging gambling and bribery on the premises, facts which also resulted in a criminal indictment presently pending against the respondent. Rejecting the contention that the licensee feared the loss of his constitutional rights and of prejudice if the hearing were permitted, the court pointed out that since the gambling charge had been dismissed from the criminal action, there was no reason why the authority might not conduct a hearing in that respect; and as to the bribery charge, it was clearly within the scope of the

Authority’s duty to inquire as to whether it should temporarily suspend the license pending outcome of the indictment. Oleshko v New York State Liquor Authority, 29 A.D.2d 84, 285 N.Y.S.2d 696, 1967 N.Y. App. Div. LEXIS 2697 (N.Y. App. Div. 1st Dep't 1967), aff'd, 21 N.Y.2d 778, 288 N.Y.S.2d 474, 235 N.E.2d 447, 1968 N.Y. LEXIS 1632 (N.Y. 1968).

20. Colleges and universities

In an action by a bank against two debtor corporations and certain other parties, based on plaintiff’s allegations that defendants had entered into a series of transactions that had had the effect of removing, liquidating, and concealing the assets of the debtor corporations that had been pledged as security for plaintiff’s loans, the trial court properly denied plaintiff’s application for a preliminary injunction enjoining defendants from transferring certain inventory and equipment where plaintiff failed to show that it had an undisputed right to the assets sought to be enjoined, or that the assets in question were the subject matter of its action, and where, in any event, attachment, rather than an injunction, was the more appropriate remedy to prevent a removal, transfer, or disposition of property. First Nat'l Bank v Highland Hardwoods, Inc., 98 A.D.2d 924, 471 N.Y.S.2d 360, 1983 N.Y. App. Div. LEXIS 21245 (N.Y. App. Div. 3d Dep't 1983).

College professor claiming unlawful denial of tenure was not entitled to preliminary injunction where success in present action would not guarantee her tenure, and court was reluctant to intrude into field of educational and faculty appointments. Roufaiel v Ithaca College, 255 A.D.2d 818, 680 N.Y.S.2d 298, 1998 N.Y. App. Div. LEXIS 12503 (N.Y. App. Div. 3d Dep't 1998).

In Article 78 proceeding by area residents and community groups against university, city, and State Dormitory Authority to temporarily and permanently enjoin construction of new student center, court properly refused to accept as true petitioners’ allegation that site was subject to restrictions in urban redevelopment plan where (1) text and official maps of plan, submitted in support of respondents’ motion to dismiss petition, clearly showed that site was beyond geographical boundaries of plan, and (2) plan expired by its own terms in 1994 and thus did not

apply to construction begun in 1999. Comm. to Save Wash. Square Inc. v Dormitory Auth., 281 A.D.2d 770, 722 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2490 (N.Y. App. Div. 3d Dep't 2001).

In Article 78 proceeding by area residents and community groups against university, city, and State Dormitory Authority to temporarily and permanently enjoin construction of new student center, university's 1967 development plan did not effectively amend city's urban development plan so as to subject site to restrictions in city's plan where university's plan involved about 20 properties owned by university, including site at issue, and was created in accordance with Housing Act of 1949, 42 USCS § 1463(a), which allowed city to obtain federal credit for certain expenditures made by eligible institutions, such as university, for acquisition costs associated with properties located within or in immediate vicinity of urban renewal area. Comm. to Save Wash. Square Inc. v Dormitory Auth., 281 A.D.2d 770, 722 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2490 (N.Y. App. Div. 3d Dep't 2001).

In Article 78 proceeding by area residents and community groups against university, city, and State Dormitory Authority (SDA) to temporarily and permanently enjoin construction of new student center, project could proceed without environmental review, even though such review is required if state agency funds such project, where public bonds issued by SDA, as well as proceeds thereof, had nothing to do with construction of student center but, rather, with construction of residence halls and dining facilities and refinancing of university's preexisting debt. Comm. to Save Wash. Square Inc. v Dormitory Auth., 281 A.D.2d 770, 722 N.Y.S.2d 112, 2001 N.Y. App. Div. LEXIS 2490 (N.Y. App. Div. 3d Dep't 2001).

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

Order granting injunction prohibiting students and others from congregating, assembling, or creating noise so as to interfere with normal functions and activities of college would be modified

to allow peaceful protest, demonstration and assembly not otherwise in violation of order. Board of Higher Education v Marcus, 63 Misc. 2d 268, 311 N.Y.S.2d 579, 1970 N.Y. Misc. LEXIS 1577 (N.Y. Sup. Ct. 1970).

21. Illustrative cases

In action by sellers against buyer for rescission and cancellation of agreement to purchase stock, alleging fraud on part of buyer, though it was not clear whether sellers knew or should have known of fraudulent statements made when agreement was entered into, status quo should be maintained by issuance of preliminary injunction restraining buyer from selling or otherwise disposing of the stock, provided that sellers file undertaking in amount of $200,000, which represented approximately the amount of money received from buyer pursuant to agreements executed by parties. Davis v Generics Corp. of America, 58 A.D.2d 850, 396 N.Y.S.2d 480, 1977 N.Y. App. Div. LEXIS 13033 (N.Y. App. Div. 2d Dep't 1977).

Court properly enjoined majority shareholders from removing corporate president where their request, one year earlier, to remove president had been denied without appeal, they failed to advance any additional facts warranting removal, maintenance of status quo was sensible disposition because other significant aspects of parties' dispute remained to be litigated, and there was no showing of irreparable harm. Walker & Zanger v Zanger, 245 A.D.2d 144, 666 N.Y.S.2d 152, 1997 N.Y. App. Div. LEXIS 13028 (N.Y. App. Div. 1st Dep't 1997).

Action under CLS Gen Bus § 133 by Frank's Restaurant, Inc. for preliminary injunction, on theories of trademark infringement and unfair competition, against defendant's use of words "Frank's Steaks" in name of its restaurant was properly dismissed, absent conclusive evidence of defendant's intent to deceive or mislead. Frank's Rest., Inc. v Lauramar Enters., 273 A.D.2d 349, 711 N.Y.S.2d 433, 2000 N.Y. App. Div. LEXIS 7054 (N.Y. App. Div. 2d Dep't 2000).

Apart from CLS Gen Bus § 133, Frank's Restaurant, Inc. was entitled to preliminary injunction against defendant's use of words "Frank's Steaks" in name of its restaurant where plaintiff showed that defendant had adopted and was using name similar to plaintiff's name and

registered service mark and that such use had resulted in deception and confusion. Frank's Rest., Inc. v Lauramar Enters., 273 A.D.2d 349, 711 N.Y.S.2d 433, 2000 N.Y. App. Div. LEXIS 7054 (N.Y. App. Div. 2d Dep't 2000).

A partnership of certified public accountants was entitled to a preliminary injunction pendente lite enjoining a trust company from making any payment under a letter of credit issued by the trust company, including specifically enjoining the trust company from setting up a blocked account, and an order granting leave to serve a supplemental complaint pursuant to CPLR 3025 where the partnership had established its likelihood of eventual success on the merits at trial, irreparable injury absent the injunction and a balancing of the equities in its favor. Touche Ross & Co. v Manufacturers Hanover Trust Co., 107 Misc. 2d 438, 434 N.Y.S.2d 575, 1980 N.Y. Misc. LEXIS 2874 (N.Y. Sup. Ct. 1980).

In Attorney General’s proceeding under CLS Labor § 345 for preliminary injunction prohibiting manufacturer from shipping, delivering, or selling items of apparel allegedly manufactured in violation of CLS Labor Art 6 and CLS Labor Art 19, exception in CLS Labor § 345(10)(b) for retailers who acquire such apparel without notice that it was unlawful would not be judicially extended to manufacturer that allegedly did not know, when it purchased items, that Labor Law violations had occurred where manufacturer was strictly liable under CLS Labor § 345(10)(c), and retailer exception does not mention any exemption for contractors or manufacturers, who are more closely involved than retailers in compensation of laborers and thus are in better position to ensure compliance with Labor Law. People ex rel. Spitzer v 14 West Garment Factory Corp., 182 Misc. 2d 146, 697 N.Y.S.2d 458, 1999 N.Y. Misc. LEXIS 322 (N.Y. Sup. Ct. 1999).

22. —Breach of contract

Unsecured contract creditors, who sued defendants for money damages and also asserted cause of action for breach of fiduciary duty, were not thereby entitled to preliminary injunction against defendants’ further transfer of assets as part of relief requested because (1) fiduciary

duty claim was incidental to and purely for purposes of enforcement of primary relief sought, and (2) even if anticipated judgment might include permanent injunctive relief, defendants' dissipation of assets during pendency of action would not produce cognizable injury to plaintiffs. Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 708 N.Y.S.2d 26, 729 N.E.2d 683, 2000 N.Y. LEXIS 508 (N.Y. 2000).

Defendant in action for breach of contract was entitled to preliminary injunction prohibiting plaintiff from issuing obnoxious or offensive odors from its premises where defendant proved likelihood of success on merits, irreparable harm in absence of such relief, and balance of equities in its favor. Interpharm, Inc. v Fairchild Warehouse Assocs., 251 A.D.2d 546, 673 N.Y.S.2d 927, 1998 N.Y. App. Div. LEXIS 7509 (N.Y. App. Div. 2d Dep't), app. dismissed, 92 N.Y.2d 1002, 684 N.Y.S.2d 188, 706 N.E.2d 1212, 1998 N.Y. LEXIS 4942 (N.Y. 1998).

Boxing promotion contract, by which defendant foreign promoter agreed to share net profits from promotion of plaintiff boxer's fights with 2 copromoters licensed in New York and to switch site of plaintiff's upcoming title defense to New York, was not invalid per se under New York State Athletic Commission (NYSAC) regulations requiring that boxing promoter be licensed in New York in order to promote New York fight where (1) those regulations are merely malum prohibitum, (2) insertion of New York choice-of-law provision in contract had no effect on foreign fights, (3) fact that copromoter was not licensed in New York did not invalidate those aspects of contract pertaining to foreign fights, (4) as to sole fight that took place in New York, contract was properly filed with NYSAC by New York-licensed copromoter, (5) whether defendant functioned as silent copromoter of New York fight and engaged in promotional activities in New York in violation of NYSAC regulations were triable issues of fact, but only as to defendant's entitlement to share of New York bout proceeds, and (6) other, legitimate aspects of contract were severable and enforceable. Quartey v AB Stars Prods., S.A., 260 A.D.2d 39, 697 N.Y.S.2d 280, 1999 N.Y. App. Div. LEXIS 11393 (N.Y. App. Div. 1st Dep't 1999).

Defendant was entitled to neither preliminary injunction nor summary judgment dismissing action for breach of alleged oral agreement to assign to plaintiffs defendant's right to buy certain

mortgages from third party where (1) that agreement was governed by CLS Gen Oblig § 5-703(1), (2) there was triable issue of fact as to whether plaintiffs' payments to third parties, purportedly on defendant's behalf, constituted part performance of oral agreement, and (3) defendant did not prove that oral agreement was executory accord. Ognenovski v Wegman, 275 A.D.2d 1013, 713 N.Y.S.2d 594, 2000 N.Y. App. Div. LEXIS 9783 (N.Y. App. Div. 4th Dep't 2000).

Although defendant health insurers' prior practice of retroactive termination without advance notice violated parties' contract and CLS Gen Bus § 349, plaintiff insureds were not entitled, in class action, to injunctive relief from insurers' revised procedures where (1) insurers presently provided advance notice with their billing statements, (2) that notice included clear explanation of subscriber's right to remit any overdue payment during ensuing 30-day grace period and of fact that, if payment were not received, coverage would be terminated retroactive to end of day before premium due date, and (3) that notice was not sort of deceptive act that was likely to mislead reasonable consumer who was acting reasonably under circumstances. Makastchian v Oxford Health Plans, Inc., 281 A.D.2d 197, 721 N.Y.S.2d 351, 2001 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 1st Dep't 2001).

23. —Commercial transactions

Where both New York bank and Australia bank to which New York bank issued irrevocable letters of credit were apparently perfectly solvent and were in lawsuit and damages would appear to be adequate remedy if plaintiff's rights had been interfered with in any way by banks, there was no ground for granting preliminary injunction against payments under letters of credit. Foreign Venture Ltd. Partnership v Chemical Bank, 59 A.D.2d 352, 399 N.Y.S.2d 114, 1977 N.Y. App. Div. LEXIS 13929 (N.Y. App. Div. 1st Dep't 1977).

On a motion by shareholders, the court enjoined a change of control transaction because it purposefully undervalued defendant corporation and would have provided an inadequate control premium to shareholders, causing them to lose a potential opportunity to receive a superior

control premium, and forced them to vote on the proposed transaction despite defendant's failure to make timely, material disclosures regarding the transaction. Matter of Xerox Corp. Consol. Shareholder Litig., 61 Misc. 3d 176, 76 N.Y.S.3d 759, 2018 N.Y. Misc. LEXIS 1561 (N.Y. Sup. Ct.), rev'd in part, app. dismissed, 165 A.D.3d 501, 86 N.Y.S.3d 28, 2018 N.Y. App. Div. LEXIS 6826 (N.Y. App. Div. 1st Dep't 2018).

24. —Correctional facilities

Sheriffs who seek to enjoin the enforcement of regulations of the State Commission of Correction which concern prisoner correspondence, visitation, access to media, religion, packages, and printed material and publications (9 NYCRR Parts 7004, 7008, 7023, 7024, 7025, 7026), and whose complaint alleges facts which, if proven, would establish that those regulations create grave security risks, financial hardships, and health and fire hazards, and conflict with the Sheriffs' statutory duty of safekeeping of prisoners confined to their custody (Correction Law, § 500-c), are entitled to a preliminary injunction; they have established a reasonable probability of success in their action, and the security and financial implications indicate the probability of irreparable injury occurring if the preliminary injunction is not granted, nor does it appear that the granting of a preliminary injunction will adversely affect the commission. McNulty v Chinlund, 62 A.D.2d 682, 406 N.Y.S.2d 558, 1978 N.Y. App. Div. LEXIS 10894 (N.Y. App. Div. 3d Dep't 1978).

25. —Marital actons

Wife was not entitled to order enjoining husband from disposing of marital assets and property where there was no proof that husband was attempting or threatening to dispose of marital assets so as to adversely affect wife's ultimate rights in equitable distribution. Kasner v Kasner, 232 A.D.2d 528, 648 N.Y.S.2d 977, 1996 N.Y. App. Div. LEXIS 10426 (N.Y. App. Div. 2d Dep't 1996).

Wife in divorce action, who also was executor of deceased friend's estate, was entitled to vacatur of preliminary injunction and to distribution to her of accounts listed in name of that estate where postnuptial agreement providing for spouses' joint ownership of such property was void. Darius v Darius, 245 A.D.2d 663, 665 N.Y.S.2d 447, 1997 N.Y. App. Div. LEXIS 12574 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 921, 669 N.Y.S.2d 263, 692 N.E.2d 132, 1998 N.Y. LEXIS 159 (N.Y. 1998).

Plaintiff wife in divorce action was not entitled to pendente lite relief in nature of orders restraining husband from selling, transferring, borrowing against, hypothecating, or otherwise disposing of any marital assets where she failed to rebut his contention that such restraints would severely limit his continued management of parties' extensive marital estate, she had taken passive role in such management for over 40 years, there was no proof that he intended to defraud her, and there was no reason to disturb Supreme Court's discretion in denying injunction. MacKinnon v MacKinnon, 245 A.D.2d 676, 665 N.Y.S.2d 121, 1997 N.Y. App. Div. LEXIS 12547 (N.Y. App. Div. 3d Dep't 1997).

Court properly used injunction under CLS Dom Rel § 234 to preserve assets of family corporation alleged to be marital property for purposes of equitable distribution. Moss v Moss, 251 A.D.2d 937, 674 N.Y.S.2d 858, 1998 N.Y. App. Div. LEXIS 7734 (N.Y. App. Div. 3d Dep't 1998).

26. —Employment

Anesthesiologist was not entitled to preliminary injunction to enjoin hospital from suspending his privileges, notwithstanding contention that hospital acted unlawfully in suspending privileges by way of internal hospital memorandum which stated that he could not practice at hospital until further notice; anesthesiologist was required to initially present his claim to Public Health Council pursuant to CLS Pub Health § 2801-b. Mostafa v Aurelia Osborne Fox Memorial Hosp., 159 A.D.2d 922, 553 N.Y.S.2d 536, 1990 N.Y. App. Div. LEXIS 3577 (N.Y. App. Div. 3d Dep't), app.

dismissed, 76 N.Y.2d 888, 561 N.Y.S.2d 549, 562 N.E.2d 874, 1990 N.Y. LEXIS 3000 (N.Y. 1990).

In action to permanently enjoin defendant from holding himself out as employee of plaintiff corporation, where complaint was sufficient to state cause of action, Supreme Court erred in dismissing complaint without giving parties notice that it was, in effect, converting plaintiffs' motion for preliminary injunction into one for summary judgment. Ratner v Steinberg, 259 A.D.2d 744, 687 N.Y.S.2d 432, 1999 N.Y. App. Div. LEXIS 3163 (N.Y. App. Div. 2d Dep't 1999).

27. — —Covenant not to compete

In an action by an employer against a former employee, a podiatrist, it was a proper exercise of discretion to deny the employer's motion for a temporary injunction restraining the former employee from practicing podiatry at an office in town and anywhere within certain counties named in a restrictive covenant where the record before the trial court created issues of fact as to the employer's ultimate likelihood of success in enforcing the restrictive covenant. Seaman v Gines, 83 A.D.2d 667, 442 N.Y.S.2d 596, 1981 N.Y. App. Div. LEXIS 14969 (N.Y. App. Div. 3d Dep't 1981).

In action by limousine service to recover damages for unfair competition, service was not entitled to preliminary injunction to prevent competitor from soliciting service's business customers, since service's customer list did not qualify as trade secret due to apparent ease of identifying who service's customers were. American Executive Limousine Service, Ltd. v Nudo, 122 A.D.2d 755, 505 N.Y.S.2d 643, 1986 N.Y. App. Div. LEXIS 59281 (N.Y. App. Div. 2d Dep't 1986).

Despite showing of likelihood of success on merits, plaintiff was not entitled to preliminary injunction against defendants' using its client lists or servicing or soliciting its clients where it failed to prove that it would suffer irreparable injury absent injunction or that balance of equities was in its favor. Wallack Freight Lines, Inc. v Next Day Express, Inc., 245 A.D.2d 367, 666 N.Y.S.2d 452, 1997 N.Y. App. Div. LEXIS 12815 (N.Y. App. Div. 2d Dep't 1997).

Court properly denied motion to enforce restrictive covenant by enjoining physician from practicing medicine in county for 2 years where (1) in order to resolve proceeding to dissolve professional corporation, physician entered into stipulation of settlement by which he agreed that if he violated any of its terms, restrictive covenant would become effective, (2) physician's violation of stipulation was by his default in making payments on car leases, and (3) there was no evidence that such violation put professional corporation or its members at risk of unfair competition sufficient to justify restricting physician's practice of medicine. In re Long Island Gastrointestinal Disease Group, P.C., 251 A.D.2d 330, 673 N.Y.S.2d 738, 1998 N.Y. App. Div. LEXIS 6305 (N.Y. App. Div. 2d Dep't 1998).

Former employer of licensed beautician was not entitled to preliminary injunction to prevent her from breaching terms of restrictive covenants in her employment contract, even though she opened hair salon specializing in hair loss treatment within 50 miles of employer's operation of similar business, where employer did not show that enforcement of covenants was necessary to protect trade secrets, confidential customer lists, or good will, or that its services were unique or extraordinary, and its allegation that beautician was attempting to solicit its customers was conclusory without evidentiary detail. Genesis II Hair Replacement Studio v Vallar, 251 A.D.2d 1082, 674 N.Y.S.2d 207, 1998 N.Y. App. Div. LEXIS 7205 (N.Y. App. Div. 4th Dep't 1998).

Defendants' former employers were entitled to preliminary injunction prohibiting defendants from contacting or soliciting certain customers of plaintiffs pending resolution of action where there was strong evidence that defendants misappropriated and used proprietary information and trade secrets in competing with plaintiffs and that continued improper solicitation of their clients would cause irreparable harm greater than injury to defendants from imposition of injunction, and injunction was reasonably limited in scope in that it temporarily prohibited defendants from contacting or soliciting those customers of plaintiffs who previously were served by defendants when they were employed by plaintiffs. Laro Maintenance Corp. v Culkin, 255 A.D.2d 560, 681 N.Y.S.2d 79, 1998 N.Y. App. Div. LEXIS 12931 (N.Y. App. Div. 2d Dep't 1998), aff'd, 267 A.D.2d 431, 700 N.Y.S.2d 490, 1999 N.Y. App. Div. LEXIS 13341 (N.Y. App. Div. 2d Dep't 1999).

Preliminary injunction against enforcement of restrictive covenant in plaintiff's employment contract was properly denied where 12-month duration of limitation placed on plaintiff and geographic restriction to New York and New Jersey were reasonable, enforcement of covenant would not harm public, and compliance would not unduly burden plaintiff. Asness v Nelson, 273 A.D.2d 165, 711 N.Y.S.2d 717, 2000 N.Y. App. Div. LEXIS 7518 (N.Y. App. Div. 1st Dep't 2000).

No liability for breach of fiduciary duty and no right to injunctive relief arose from defendants' use of their former employer's customer information to compete with former employer where (1) bulk of former employer's departing clients were corporations whose identities and contact information were easily ascertainable, (2) individual clients were not identified by defendants from confidential client lists, (3) plaintiff's client information was scattered throughout its office in unlocked files and was not protected by any confidentiality agreements or protocols, and (4) there was no covenant between parties restricting defendants' solicitation of plaintiff's former clients. Fredric M. Reed & Co. v Irvine Realty Group, Inc., 281 A.D.2d 352, 723 N.Y.S.2d 19, 2001 N.Y. App. Div. LEXIS 3144 (N.Y. App. Div. 1st Dep't), app. denied, 96 N.Y.2d 720, 733 N.Y.S.2d 372, 759 N.E.2d 371, 2001 N.Y. LEXIS 3092 (N.Y. 2001).

Plaintiff's request for preliminary injunctive relief was moot where (1) plaintiff alleged that defendants were in breach of restrictive covenant that prohibited them from operating retail optical store within defined area for 2 years after expiration of parties' franchise agreement, (2) franchise agreement expired on January 31, 1999, and (3) defendants were no longer bound by terms of restrictive covenant. Sterling Vision, Inc. v Rieger, 281 A.D.2d 537, 721 N.Y.S.2d 809, 2001 N.Y. App. Div. LEXIS 2597 (N.Y. App. Div. 2d Dep't 2001).

In action for breach of covenant not to compete, plaintiff was entitled to preliminary injunction barring further breaches during pendency of action where (1) defendants did not contest reasonableness of covenant, as to either geographic scope or time, and thus plaintiff proved likelihood of success on merits, (2) because covenant was part of consideration for sale of existing business with its good will, element of irreparable injury was proved, (3) equities favored plaintiff because, within one month after individual defendant joined competing firm, plaintiff's 2

largest customers, representing nearly ? of business's income before its sale to plaintiff, transferred their business to competing firm, and (4) in light of CLS CPLR § 6312(c), existence of triable issues of fact no longer defeats application for preliminary injunction. Frank May Assocs. v Boughton, 281 A.D.2d 673, 721 N.Y.S.2d 154, 2001 N.Y. App. Div. LEXIS 2029 (N.Y. App. Div. 3d Dep't 2001).

In an action for specific performance of a subscription agreement to purchase shares of stock pursuant to a cooperative conversion plan, which had been rejected as untimely and because a corporation was an ineligible subscriber, a motion for a preliminary injunction to bar defendants from selling or offering for sale shares of stock to the subject apartment was properly denied, since the corporation had failed to meet the burden of demonstrating a likelihood of ultimate success on the merits, or that they would irreparably be harmed if the shares of stock were sold to a third party. Since the apartment was being utilized by employees of the corporation on a short-term itinerant basis, no one would lose his residence as contemplated by the Rent Stabilization Law; if it were later determined that the corporation should prevail, damages would be readily ascertainable in an action at law, where the damages could easily be calculated as the difference between what an insider would pay and the actual market value. After Six, Inc. v 201 East 66th Street Associates, 87 A.D.2d 153, 450 N.Y.S.2d 793, 1982 N.Y. App. Div. LEXIS 16127 (N.Y. App. Div. 1st Dep't), app. dismissed, 57 N.Y.2d 835, 455 N.Y.S.2d 763, 442 N.E.2d 60, 1982 N.Y. LEXIS 3732 (N.Y. 1982).

28. — —Law firms

There was genuine potential for conflict between interests of law firm's former and present clients, warranting preliminary injunction precluding latter representation under CLS Code of Prof Respons DR 5-108(A)(1), where adverse interests of clients made initial undertaking to represent present client violative of CLS Code of Prof Respons DR 5-105(A), and conflict would likely continue because present client might be required to indemnify former client. William Kaufman Org., Ltd. v Graham & James LLP, 263 A.D.2d 440, 694 N.Y.S.2d 32, 1999 N.Y. App.

Div. LEXIS 8433 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 876, 705 N.Y.S.2d 7, 726 N.E.2d 484, 2000 N.Y. LEXIS 41 (N.Y. 2000).

Court properly granted preliminary injunction compelling plaintiff to execute building permit application and any additional related forms where plaintiff was not enjoined from interfering with sublease if facts came to light tending to show that operation of sublease would violate lease agreement, and thus defendants were not awarded ultimate relief sought in their counterclaim. Serota v Mayfair Super Mkts., Inc., 273 A.D.2d 296, 710 N.Y.S.2d 532, 2000 N.Y. App. Div. LEXIS 6494 (N.Y. App. Div. 2d Dep't 2000).

29. —Real property

Where two groups were vying for exclusive right to use and occupy a particular church, granting of preliminary injunction was improper, and bodies should have been required to use the property at different times until the matter was resolved. Russian Church of Our Lady of Kazan v Dunkel, 34 A.D.2d 799, 311 N.Y.S.2d 533, 1970 N.Y. App. Div. LEXIS 4934 (N.Y. App. Div. 2d Dep't 1970).

Preliminary injunction against discontinuance of electrical service from defendants to plaintiff’s shopping center while application by plaintiff to stay arbitration was pending was properly denied since plaintiff had not demonstrated likelihood of success and irreparable injury in case in which defendants asserted that tenants of the shopping center would continue to be serviced if they paid for the electricity, and since the parties had selected arbitration for resolution of their controversies and in such circumstances equitable relief by the arbitrator might be appropriate. Park City Associates v Total Energy Leasing Corp., 58 A.D.2d 786, 396 N.Y.S.2d 377, 1977 N.Y. App. Div. LEXIS 12944 (N.Y. App. Div. 1st Dep't 1977).

In an action to recover a sum representing a downpayment made by plaintiffs in connection with the purchase of the home of defendants, plaintiffs’ motion for a preliminary injunction to restrain the escrow agent from disbursing the escrow funds to the defendants was improperly denied, since the status of the funds should not be altered during the pendency of the litigation and

since it was adequately demonstrated that the defendants were the subjects of several undischarged judgments, raising a question as to whether or not the defendants would be answerable for damages in the event the action terminated in favor of the plaintiffs. Bashein v Landau, 96 A.D.2d 479, 465 N.Y.S.2d 178, 1983 N.Y. App. Div. LEXIS 18981 (N.Y. App. Div. 1st Dep't 1983).

In an action by restaurant owners, whose restaurant was situated on a triangular shaped lot, the rear portion of which abutted a ten-foot strip of beach, to enjoin the mayor and board of trustees of a village from moving a beach fence that had been erected ten feet from the plaintiffs' property to within three feet of the plaintiffs' property, Special Term erred in granting a preliminary injunction and Trial Term erred when it continued the provisions of the preliminary injunction, where the relocated fence remained on the village property and never encroached on the plaintiffs' property, and where no right, easement or interest was granted in favor of the property under a 1950 agreement that gave plaintiffs' predecessor in title access to the beach for the purpose of dispensing refreshments from a stand to patrons on the beach, the permission granted being terminable at the will of the village. Bavaro v Parente, 96 A.D.2d 519, 464 N.Y.S.2d 825, 1983 N.Y. App. Div. LEXIS 19038 (N.Y. App. Div. 2d Dep't), app. dismissed, 60 N.Y.2d 963, 1983 N.Y. LEXIS 6552 (N.Y. 1983).

Expiring roof guaranty and deteriorating condition of defendant's apartment justified injunction giving housing cooperative access to apartment. Grinnell Hous. Dev. Fund Corp. v McClain-James, 240 A.D.2d 203, 658 N.Y.S.2d 33, 1997 N.Y. App. Div. LEXIS 6146 (N.Y. App. Div. 1st Dep't 1997).

Holder of deeded right-of-way across adjoining landowner's property was not entitled to preliminary injunction ordering adjoining owner to remove all obstructions from 2-rod width of right-of-way where (1) plaintiff admitted that he sought only to enforce original purpose of easement, which was ingress and egress to and from his property, (2) plaintiff's claim that adjoining owner's placement of timber and trees made his easement impassable was belied by his own photographs showing vehicles parked next to his house, (3) trucks and flatbed trailers

were able to access plaintiff's property for sewer excavation work, and (4) sand and gravel road, significantly smaller than 2 rods wide, had served as plaintiff's ingress and egress for 25 years without objection. Serbalik v Gray, 240 A.D.2d 999, 659 N.Y.S.2d 522, 1997 N.Y. App. Div. LEXIS 6970 (N.Y. App. Div. 3d Dep't 1997).

Equities favored grant, and denial of vacatur, of preliminary injunction under CLS CPLR § 6301 against landlord's termination of lease where tenant showed likelihood of success on merits, notice of default contained significant deficiencies, default was extremely tenuous, there was little likelihood that tenant's application for variance filed with Department of Buildings in 1980 would be found to be material violation of lease, extensive investigations by that department revealed no violations, and harm to tenant from losing lease might well be irreparable because damages probably could not adequately compensate tenant for value of 79 years remaining under lease and its potential renewals in building of such notable character as Empire State Building. Empire State Bldg. Assocs. v Trump Empire State Partners, 245 A.D.2d 225, 667 N.Y.S.2d 31, 1997 N.Y. App. Div. LEXIS 13422 (N.Y. App. Div. 1st Dep't 1997).

In combined Article 78 proceeding and action for judgment declaring null and void particular local law of town and any subdivision approval granted under that law, and for injunction against clearing of any land that had received such subdivision approval, petitioners' failure to join, as necessary and indispensable parties, all property owners to whom such approval had been granted would not be excused in interest of justice where such owners were few in number and easily identifiable from public records. Llana v Town of Pittstown, 245 A.D.2d 968, 667 N.Y.S.2d 112, 1997 N.Y. App. Div. LEXIS 13631 (N.Y. App. Div. 3d Dep't 1997), app. denied, 91 N.Y.2d 812, 672 N.Y.S.2d 848, 695 N.E.2d 717, 1998 N.Y. LEXIS 1054 (N.Y. 1998).

Tenant's complaint seeking preliminary injunction against residential cooperative association was properly dismissed where tenant failed to allege facts showing that association's board of directors acted in bad faith, so as to render business judgment rule inapplicable to its decision to renovate, and documentary evidence conclusively showed that renovation plans for building were legally adopted by shareholders in accordance with association's rules. Domingo v C. True

Bldg. Corp., 246 A.D.2d 337, 666 N.Y.S.2d 914, 1998 N.Y. App. Div. LEXIS 36 (N.Y. App. Div. 1st Dep't 1998).

Plaintiff was entitled to preliminary injunction barring alteration or resale of real property pending resolution of its action for specific performance and breach of its contractual right of first refusal regarding purchase of that property, even though it appeared uncertain whether plaintiff would ultimately prevail on merits, where there was danger of irreparable harm to plaintiff in absence of injunction, balance of equities favored plaintiff, and plaintiff's $300,000 undertaking afforded defendants adequate protection. Delta Props. v Fobare Enters., 251 A.D.2d 960, 674 N.Y.S.2d 817, 1998 N.Y. App. Div. LEXIS 7727 (N.Y. App. Div. 3d Dep't 1998).

Contract vendee of condominium units was not entitled to preliminary injunction against sale of those units by condominium's board where board had purchased units under right of first refusal provision in condominium bylaws, and board's actions were taken in good faith to further legitimate interest of condominium corporation, especially given corporation's start-up financial status. Soho Bazaar, Inc. v Board of Managers of Soho Int'l Arts Condo., 266 A.D.2d 65, 698 N.Y.S.2d 626, 1999 N.Y. App. Div. LEXIS 11612 (N.Y. App. Div. 1st Dep't 1999).

Condominium's board of managers did not waive its right to enforce "prior consent" rule, and thus board was entitled to injunctive relief and summary judgment declaring that unit owner and occupant violated condominium rules by installing black plexiglas over iron gates enclosing vestibule under stairway in front of door to their unit without obtaining board's prior consent, where 2 other units at which their owners were allowed to install black plexiglas over their gates involved gates that were flush with building wall, rather than at right angles with wall, and did not encompass vestibule, which was common element as to which no alterations could be made without board's prior consent. Board of Managers of Manhattan Valley Townhouses v Murovich, 273 A.D.2d 11, 708 N.Y.S.2d 111, 2000 N.Y. App. Div. LEXIS 6101 (N.Y. App. Div. 1st Dep't 2000).

Tenant was entitled to partial summary judgment declaring that its exercise of option to buy condominium apartment was valid and timely where (1) about 9 hours before option was due to

expire, IAS Court issued temporary restraining order stating that “the expiration of the option to purchase the Condo Unit...is hereby tolled and stayed,” (2) IAS Court’s vacatur of that order 6 days later did not affect validity of its original order or deprive tenant of its right to rely on original order and to forego compliance with terms of option pending determination of its summary judgment motion, (3) validity of original order was not affected by IAS Court later statement that it had not intended to grant extension of time to exercise option by “tacking on” time remaining on option, and (4) tenant properly exercised option within time remaining for such exercise after vacatur of temporary restraining order. Syndicom Corp. v Shoichi Takaya, 275 A.D.2d 676, 714 N.Y.S.2d 256, 2000 N.Y. App. Div. LEXIS 10032 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 792, 725 N.Y.S.2d 642, 749 N.E.2d 211, 2001 N.Y. LEXIS 679 (N.Y. 2001).

30. — —Leases

The trial court properly denied tenants’ motion for a preliminary injunction seeking to toll and stay the effect of a 10-day notice to cure and to enjoin landlords from commencing summary proceedings in the Civil Court, where the alleged default was the occupancy by tenants of the premises for residential purposes and there would be no practical way to cure this other than the tenants moving out and where, if for any reason it appeared that the jurisdiction of the Civil Court would be inadequate to give the parties full relief, the parties could move to consolidate the action with the declaratory judgment action in the Supreme Court. Childress v Lipkis, 72 A.D.2d 724, 443 N.Y.S.2d 63, 1979 N.Y. App. Div. LEXIS 13926 (N.Y. App. Div. 1st Dep't 1979).

A tenant who occupied the ground floor premises of a building was entitled to a preliminary injunction against defendants who operated a restaurant immediately above his premises and who from time to time had permitted kitchen wastes to pour into his premises with consequent damage, where plaintiff demonstrated a probability of success and that further injury might be irreparable and uncompensable. Wall Street Transcript Corp. v 343 East 43rd Street Holding Corp., 81 A.D.2d 783, 439 N.Y.S.2d 23, 1981 N.Y. App. Div. LEXIS 11421 (N.Y. App. Div. 1st Dep't 1981).

In an action brought by tenant and operator of a country club restaurant and its prospective vendee against the owners of the country club, it was error for Special Term to grant a preliminary injunction restraining defendants from instituting any action to evict the tenant, since the danager of impending judicial proceedings was not an injury justifying an injunction. Spellman Food Services, Inc. v Partrick, 90 A.D.2d 791, 455 N.Y.S.2d 398, 1982 N.Y. App. Div. LEXIS 19005 (N.Y. App. Div. 2d Dep't 1982).

Corporate overtenant was entitled to injunctive relief to prevent reletting of commercial premises, and to establish that it held reversionary interest, where (1) overtenant was nominee corporation formed by original individual tenant, (2) overtenant had assigned its interest in premises to third party, with landlord's knowledge and consent, as part of security arrangement involving sale of restaurant on premises to third party, (3) assignment was held in escrow pending payment of secured obligations and was never delivered to third party, (4) third party's successors, as undertenants, continued to make rent payments to over tenant until latest successor defaulted, and (5) landlord, in eviction action against defaulting successor, should have joined overtenant in order to determine overtenant's reversionary interest and liability for payment of rent to landlord. Reb Michael, Inc. v Southbridge Towers, Inc., 121 A.D.2d 962, 505 N.Y.S.2d 612, 1986 N.Y. App. Div. LEXIS 59051 (N.Y. App. Div. 1st Dep't 1986).

Landlord was not entitled to preliminary injunction against tenant' renovation of leased premises where lease specifically allowed minor alterations, including erection and removal of interior partitions, without landlord's permission and without triggering otherwise applicable notice and insurance requirements, and landlord did not show likelihood that alterations fell outside of lease's grant of permission. 401 Hotel, L.P. v MTI/The Image Group, Inc., 251 A.D.2d 125, 674 N.Y.S.2d 318, 1998 N.Y. App. Div. LEXIS 6933 (N.Y. App. Div. 1st Dep't 1998).

Tenant was not entitled to preliminary injunction to enforce alleged additional lease agreement to occupy and use premises adjacent to those already leased from landlords, because alleged agreement was void under statute of frauds, where parties' negotiations never resulted in documented agreement on all material lease terms, and there was no evidence of part

performance unequivocally referable to alleged agreement. 401 Hotel, L.P. v MTI/The Image Group, Inc., 251 A.D.2d 125, 674 N.Y.S.2d 318, 1998 N.Y. App. Div. LEXIS 6933 (N.Y. App. Div. 1st Dep't 1998).

Operator of “supermarket grocery store” under lease from owner of shopping center was not entitled to preliminary injunction against leasing of other space in shopping center for proposed bagel store, on ground of violation of restrictive covenant prohibiting leasing of space in center to any other tenant “engaged in the same or similar business” as that of plaintiff, because plaintiff failed to prove likelihood of success on merits, where there were disputed issues as to (1) language of restrictive covenant, which was partly handwritten, (2) nature of plaintiff’s business operation, (3) nature of proposed new tenant’s business operation, and (4) whether proposed new tenant had notice of covenant when it entered into lease. Blueberries Gourmet, Inc. v Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557, 1998 N.Y. App. Div. LEXIS 11837 (N.Y. App. Div. 2d Dep't 1998).

Plaintiff was not entitled to a temporary injunction restraining a landlord and its managing agent from interfering with the plaintiff’s access and occupancy of an apartment formerly occupied by plaintiff’s deceased aunt, uncle and mother, where although plaintiff contended that he paid the rent throughout, the record showed that from the time of his marriage in 1973 to the death of his uncle, the checks for the rent were, with one or two isolated exceptions, drawn to the order of the uncle and endorsed over to the landlord by the uncle, that plaintiff resided at another address with his wife and child, and that while he may have visited with his mother regularly and even stayed over night because of the mother’s failing health, the claim that plaintiff resided there rested on the slenderest of proof, so that plaintiff failed to show the likelihood of success and the irreparable injury necessary to warrant the invocation of the extraordinary preliminary relief sought by him. Kivlan v 230 E. 73rd Corp., 96 A.D.2d 499, 465 N.Y.S.2d 519, 1983 N.Y. App. Div. LEXIS 19006 (N.Y. App. Div. 1st Dep't 1983).

In an action regarding a sublease, a tenant and subtenant would be granted a preliminary injunction and declaratory judgment pursuant to CPLR §§ 6301, 6311, and 3001 restraining the

landlord from withholding consent to sublet a rent-stabilized apartment and declaring that the landlord's notices to cure and terminate were unreasonable withholding of consent under Real P Law § 226-b, where there would otherwise be irreparable injury, where a balance of the equities favored the tenant, and where the sublease was valid as a matter of law under Real P Law § 226-b. Medina v Brabert Realty Co., 114 Misc. 2d 816, 452 N.Y.S.2d 787, 1982 N.Y. Misc. LEXIS 3571 (N.Y. Sup. Ct. 1982).

Because the owners' refusal to renew a tenant's lease based on the tenant's immigration status violated Rent Stabilization Code § 2522.5(g)(1), 2523.5 and Administrative Code of the City of NY § 8-107(5)(a)(1), (2), and because the tenant would likely prevail on the tenant's claims, the tenant was entitled to a preliminary injunction under N.Y. C.P.L.R. 6301 and 6311. Recalde v Bae Cleaners, Inc., 862 N.Y.S.2d 781, 20 Misc. 3d 827, 240 N.Y.L.J. 20, 2008 N.Y. Misc. LEXIS 4397 (N.Y. Sup. Ct. 2008).

31. — —Yellowstone injunctions

It was error for Supreme Court to deny tenant's application for preliminary injunction and to dismiss declaratory judgment action on ground that tenant could obtain relief in Civil Court since Civil Court lacked jurisdiction to grant injunctive relief, and as matter of policy, courts have routinely granted "Yellowstone" injunctions in order to avoid forfeiture of tenants' interests. Lew-Mark Cleaners Corp. v De Martini, 128 A.D.2d 758, 513 N.Y.S.2d 245, 1987 N.Y. App. Div. LEXIS 44443 (N.Y. App. Div. 2d Dep't 1987).

In granting tenants' motion for Yellowstone injunction, court did not abuse its discretion in failing to place more stringent conditions on that relief where grant was on conditions that plaintiffs pay certain sums for past due and future use and occupancy, post $2,000 bond, and tender proof of insurance, all within deadlines set by court. 37th St. Enters. v37th St. Enters. v 500-512 Seventh Ave. Assocs., 266 A.D.2d 28, 697 N.Y.S.2d 601, 1999 N.Y. App. Div. LEXIS 11188 (N.Y. App. Div. 1st Dep't 1999).

Tenants were entitled to Yellowstone injunction, despite landlord's belated and apparently meritless claim that tenants had irremediably breached material obligation of lease by failing to obtain certain insurance, where tenants held commercial lease, received notice of default/cure from landlord, used due diligence in responding to that notice, applied for injunctive relief before termination of lease, and had desire and ability to cure alleged defaults. 37th St. Enters. v37th St. Enters. v 500-512 Seventh Ave. Assocs., 266 A.D.2d 28, 697 N.Y.S.2d 601, 1999 N.Y. App. Div. LEXIS 11188 (N.Y. App. Div. 1st Dep't 1999).

Nothing in First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630, limits grant of temporary injunctive relief solely to instances of commercial tenants seeking to stay running of period to cure. Syndicom Corp. v Shoichi Takaya, 275 A.D.2d 676, 714 N.Y.S.2d 256, 2000 N.Y. App. Div. LEXIS 10032 (N.Y. App. Div. 1st Dep't 2000), app. denied, 96 N.Y.2d 792, 725 N.Y.S.2d 642, 749 N.E.2d 211, 2001 N.Y. LEXIS 679 (N.Y. 2001).

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

The usual requirements for a preliminary injunction do not apply on a "Yellowstone" Motion (First Nat. Stores v Yellowstone Shopping Center, 21 N.Y.2d 630), which is an application to preserve the status quo and the court's jurisdiction in a tenancy dispute, and the injunction must issue unless the claim is totally lacking in merit. Demler v Bing & Bing Mgmt, Inc., 116 Misc. 2d 793, 456 N.Y.S.2d 624, 1982 N.Y. Misc. LEXIS 3960 (N.Y. Sup. Ct. 1982).

32. — —Easements

Owners and lessees of lakeshore property, over which defendants had easement for egress and ingress between state highway and boathouse, were not entitled to preliminary injunction

prohibiting defendants from parking or turning around vehicles on easement where deed granting easement described it as "being for foot travel and vehicles and is to be used for all purposes for which right[s] of way are commonly used," quoted language showed that plaintiffs did not prove likelihood of success on merits, plaintiffs' conclusory assertions that use of easement for parking or turning interfered with rental or development of their property were not sustained by limited record and did not support finding of irreparable harm absent injunction, and balance of equities did not necessarily favor plaintiffs. Bonnieview Holdings Inc. v Allinger, 263 A.D.2d 933, 693 N.Y.S.2d 340, 1999 N.Y. App. Div. LEXIS 8450 (N.Y. App. Div. 3d Dep't 1999).

Owners of easement across plaintiffs' lakeshore property for egress and ingress between state highway and boathouse were not entitled to preliminary injunction prohibiting plaintiffs from erecting additional fencing along easement during pendency of action so long as fencing did not impair defendants' use of easement. Bonnieview Holdings Inc. v Allinger, 263 A.D.2d 933, 693 N.Y.S.2d 340, 1999 N.Y. App. Div. LEXIS 8450 (N.Y. App. Div. 3d Dep't 1999).

33. —Zoning

In action by adjoining property owners to permanently enjoin defendants from maintaining and operating dog kennel in violation of town zoning ordinance, plaintiffs were entitled to preliminary injunction during pendency of action where (1) defendants allowed dogs, which they bred, to move freely between kennel building and outdoor runs, (2) whenever person or animal ventured within sight or hearing, numerous dogs would bark incessantly, preventing plaintiffs from enjoying peace and quiet of their home, (3) plaintiffs made strong showing that they would prevail on merits of action, (4) plaintiffs would suffer irreparable injury absent preliminary injunctive relief, and (5) balance of equities favored plaintiffs. Williams v Hertzwig, 251 A.D.2d 655, 675 N.Y.S.2d 113, 1998 N.Y. App. Div. LEXIS 7950 (N.Y. App. Div. 2d Dep't 1998).

Plaintiffs were not entitled to declaratory judgment enjoining defendants from using their adjoining property as horse farm where defendants had obtained special use permit to do so

from town planning board, and proper method to obtain review of board's decision was to commence Article 78 proceeding, which plaintiffs also did. Schneider v Eagan, 281 A.D.2d 408, 721 N.Y.S.2d 287, 2001 N.Y. App. Div. LEXIS 2114 (N.Y. App. Div. 2d Dep't 2001).

34. —Municipalities

Plaintiffs, including businesses, merchants, and residents, were not entitled to preliminary injunction prohibiting city from sheltering homeless families in hotels located in "Midtown South" section of Manhattan on ground that city had adopted "policy" of targeting this area as receptacle for such families and was therefore required to comply with State Environmental Quality Review Act (SEQRA) before undertaking such "action," for although 26 percent of city's homeless had been placed in Midtown South area, there was no evidence that city was engaged in steering people in disproportionate numbers to that section or had otherwise adopted plan or policy to that effect; moreover, finding shelter for homeless families is not type of "action" contemplated by SEQRA as requiring environmental impact statement. Midtown South Preservation & Dev. Committee v New York, 130 A.D.2d 385, 515 N.Y.S.2d 248, 1987 N.Y. App. Div. LEXIS 46391 (N.Y. App. Div. 1st Dep't 1987).

Regulation enacted by village which provided for traffic control device in form of barricade on public street at or near village boundary with second village discriminated against residents of second village, and thus was invalid and entitled second village to injunction. Bd. of Trs. of Mineola v Inc. Vill. of E. Williston, 648 N.Y.S.2d 170, 1996 N.Y. App. Div. LEXIS 14628 (N.Y. App. Div. 2d Dep't 1996).

City rule requiring fire department escorts for transportation of fireworks within city was invalid where city's administrative code contained separate provisions for transportation of explosives and transportation of fireworks, and code required fire department escort for all vehicles transporting explosives but contained no such requirement regarding fireworks; thus, fireworks company was entitled to preliminary injunction compelling return of fireworks confiscated for lack

of fire department escort. Bay Fireworks, Inc. v City of New York, 251 A.D.2d 359, 674 N.Y.S.2d 392, 1998 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 2d Dep't 1998).

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

In city's action for preliminary injunction against village's construction of multiuse bicycle trail on land located within city's watershed, city's claim that village neglected to submit Stormwater Pollution Prevention Plan required by 15 RCNY § 18-39(b)(3)(iv) was unavailing, because that regulation did not apply to trail, where § 39(b)(3)(iv) requires such plan for "[a] land clearing or land grading project, involving two or more acres, located at least in part within the limiting distance of 100 feet of a watercourse or wetland," and that language shows intent to protect watercourses and wetlands from harmful effects of clearing and grading projects involving contiguous 2-acre parcels; it did not matter that Department of Environmental Protection might have adopted different interpretation, because issue was one of purely legal interpretation, for which agency expertise was not required. City of New York v Village of Tannersville, 263 A.D.2d 877, 694 N.Y.S.2d 801, 1999 N.Y. App. Div. LEXIS 8475 (N.Y. App. Div. 3d Dep't 1999).

City was not entitled to preliminary injunction against village's construction of multiuse bicycle trail on land located within city's watershed, even though city was empowered by CLS Pub Health § 1102(3) to seek injunctive relief to prevent violations of its rules and regulations without having to show irreparable harm, where Supreme Court was justified in finding, on conflicting affidavits of project managers, that area to be graded and cleared for trail encompassed less than 2 acres, and thus that city did not prove prima facie violation of 15 RCNY § 18-39(b)(3)(iv), which requires submission of Stormwater Pollution Prevention Plan for "[a] land clearing or land grading project, involving two or more acres, located at least in part within the limiting distance

of 100 feet of a watercourse or wetland"; however, complaint stated cause of action and would not be dismissed where, assuming truth of allegations and according city every favorable inference, cognizable legal theory was alleged. City of New York v Village of Tannersville, 263 A.D.2d 877, 694 N.Y.S.2d 801, 1999 N.Y. App. Div. LEXIS 8475 (N.Y. App. Div. 3d Dep't 1999).

State was entitled to order temporarily restraining city from selling or physically altering about 750 community gardens, pending decision in state's action for permanent injunction against such sale or alteration without conducting full environmental review under State Environmental Quality Review Act, where imminent sale of those gardens would cause irreparable harm, denial of temporary injunction would render final judgment ineffectual, and thus required degree of proof of likelihood of success on merits would be reduced. State v City of New York, 275 A.D.2d 740, 713 N.Y.S.2d 360, 2000 N.Y. App. Div. LEXIS 9253 (N.Y. App. Div. 2d Dep't 2000).

Taxicab medallion owners were not entitled to preliminary injunction barring enforcement of financial disclosure requirements set forth in regulation promulgated by New York City Taxi and Limousine Commission where commission stipulated that it would not release private financial information (including addresses and telephone numbers of filers) contained in forms at issue and would notify filers of any request under Freedom of Information Law for information in such forms. Statharos v New York City Taxi & Limousine Comm'n, 198 F.3d 317, 1999 U.S. App. LEXIS 32213 (2d Cir. N.Y. 1999).

35. —Trademarks

In action by cemetery for declaration that its property was exempt from real property taxes, trial court, in granting cemetery's motion for preliminary injunction, erred in enjoining cemetery pendente lite from further development for cemetery purposes of certain of its property where taxing authorities failed formally to move or cross move for such relief. Pinelawn Cemetery v Cesare, 49 A.D.2d 584, 370 N.Y.S.2d 153, 1975 N.Y. App. Div. LEXIS 10423 (N.Y. App. Div. 2d Dep't 1975).

Although owner of senior mark need not prove actual or likely confusion in order to prevail on merits of trademark dilution claim against junior mark, absence of those factors is relevant to court's determination of whether injunction is needed before merits are decided. Federal Express Corp. v Federal Espresso, Inc., 201 F.3d 168, 2000 U.S. App. LEXIS 96 (2d Cir. N.Y. 2000).

Federal District Court was entitled to conclude that trademark dilution was not imminent and that preliminary injunction was not needed, given dissimilarity of parties' products (overnight delivery service, and coffee), disparity of parties' size (vast worldwide organization, and 3-person operation in one New York city), and tiny extent of overlap among customers of each party. Federal Express Corp. v Federal Espresso, Inc., 201 F.3d 168, 2000 U.S. App. LEXIS 96 (2d Cir. N.Y. 2000).

Seeming lack of urgency on part of plaintiff who has been denied interim relief in trademark dilution case tended to confirm view that irreparable harm was not imminent, and thus supported denial of plaintiff's prayer for preliminary injunction. Federal Express Corp. v Federal Espresso, Inc., 201 F.3d 168, 2000 U.S. App. LEXIS 96 (2d Cir. N.Y. 2000).

Several trademark dilution factors "seem to suggest" that owner of senior mark might win on merits, thus entitling it to preliminary injunction, where (1) fame and distinctiveness of its mark was not in dispute, (2) defendants (owners of junior mark) conceded that senior mark was entitled to protection, (3) District Court found that senior mark was "strong," that it had "acquired secondary meaning," and that it "is entitled to broad protection," (4) owner of senior mark regularly spent large sums of money ($35,000-$40,000 per month) to protect its marks against infringement and dilution, (5) it moved promptly against defendants both when it learned of their attempt to register name "Federal Espresso" with Patent and Trademark Office and when it learned of their conduct following date by which they had agreed to cease using "Federal Espresso" name, and (6) although District Court found that "Federal Express" and "Federal Espresso" were not substantially similar names, factfinder at trial might well find that marks are of "sufficient similarity so that, in the mind of the consumer, the junior mark will conjure an

association with the senior." Federal Express Corp. v Federal Espresso, Inc., 201 F.3d 168, 2000 U.S. App. LEXIS 96 (2d Cir. N.Y. 2000).

36. —Vacatur of preliminary injunctions

Defendant was entitled to vacatur of preliminary injunction entered on his default where court did not question defense counsel's excuse for not appearing at scheduled conference—that he never received any written or telephone notice of conference because court used outdated address and telephone number for his office. Simpson & Co. v Simpson Florist, Inc., 281 A.D.2d 329, 722 N.Y.S.2d 509, 2001 N.Y. App. Div. LEXIS 3149 (N.Y. App. Div. 1st Dep't 2001).

Plaintiff had little or no likelihood of success on its causes of action for breach of stipulation and trade name infringement, and thus defendants were entitled to vacatur of preliminary injunction, entered on their default, barring them from using name "Simpson" in their business, where (1) plaintiff Simpson & Co. was not in existence at time of stipulation in which defendant Berson agreed not to use trade names "Simpson & Co." or "Simpson & Co. Florist West," (2) defendants' use of trade name "Simpson Florist, Inc." predated plaintiff's use of trade name "Simpson & Co.," and (3) defendants were not required to agree, as condition of vacatur, to court's proposal that any use by them of name "Simpson" in their trade name be limit to "Berson & Simpson" rather than "Simpson Florist, Inc." Simpson & Co. v Simpson Florist, Inc., 281 A.D.2d 329, 722 N.Y.S.2d 509, 2001 N.Y. App. Div. LEXIS 3149 (N.Y. App. Div. 1st Dep't 2001).

Although not denominated as such, the part of an order restraining appellant from disposing freely of property she claimed to own granted a temporary restraint after hearing the parties, and thus in effect granted a preliminary injunction, making an undertaking mandatory; thus, trial court erred in refusing to vacate that part of the order granting a preliminary injunction or fix an undertaking. Matter of Rust v Turgeon, 295 A.D.2d 962, 746 N.Y.S.2d 223, 2002 N.Y. App. Div. LEXIS 6264 (N.Y. App. Div. 4th Dep't 2002).

37. —Violation of injunctions

Despite proper finding of civil contempt for defendants' violation of preliminary injunction, plaintiff was not entitled to hearing and accounting on issue of damages where damage caused by violation was chiefly to plaintiff's good will and reputation, and he failed to show existence of issue as to loss of business. Speirs v Leffer, 246 A.D.2d 590, 668 N.Y.S.2d 47, 1998 N.Y. App. Div. LEXIS 406 (N.Y. App. Div. 2d Dep't 1998).

38. —Preliminary injunction appropriate

Record showed no threat of immediate and irreparable injury justifying issuance of preliminary injunction preventing union from entering into contract with state pending hearing by court on alleged improprieties in manner in which union had conducted ratification ballot on such contract. Gilheany v Civil Serv. Emples. Ass'n, 59 A.D.2d 834, 395 N.Y.S.2d 717, 1977 N.Y. App. Div. LEXIS 13925 (N.Y. App. Div. 3d Dep't 1977).

In a proceeding for specific performance of a right of first refusal granted in 1967, the reviewing court would grant plaintiff's motion for preliminary injunctive relief, enjoining and restraining defendants during the pendency of the action from conveying, exchanging, encumbering or otherwise transferring the premises in question, notwithstanding the owner's contention that the right of first refusal contained in the agreement violated the rule against remoteness in vesting contained in EPTL § 9-1.1(b), since plaintiff only sought preliminary injunctive relief, and inasmuch as defendant's motion was to dismiss, the reviewing court's inquiry was limited to a determination whether the complaint stated a cognizable claim for relief, and not to determine whether the legal issues as to the applicable measuring life or lives in terms of the rule against perpetuities was unlimited in duration or was to be measured by the life of the grantor or grantee. Anasae Realty Corp. v Firestone, 103 A.D.2d 707, 478 N.Y.S.2d 8, 1984 N.Y. App. Div. LEXIS 19316 (N.Y. App. Div. 1st Dep't 1984).

Preliminary injunction will be granted syndicate against owner of yacht restraining owner from interfering with plaintiff's use of yacht in training for America's Cup race where plaintiff had been sanctioned by owner to use yacht and had contractual priority over another syndicate's

purported right to use yacht to train crew and raise funds for race. Courageous Syndicate, Inc. v People-to-People Sports Committee, Inc., 112 A.D.2d 916, 492 N.Y.S.2d 433, 1985 N.Y. App. Div. LEXIS 52129 (N.Y. App. Div. 2d Dep't 1985).

In homeowners' action for preliminary injunction against sewage disposal company's imposition of de facto rate increase without complying with procedural formalities required by CLS Trans Corp § 121 and CLS Gen Mun § 452(5)(a), homeowners showed probability of success on merits where (1) company announced that it would no longer continue to "gratuitously" maintain sewage grinder pumps, (2) there was evidence that cost of maintaining entire sewer system, including repair and replacement of grinder pumps, had been borne by company and its predecessor through sewer rents collected from all homeowners connected to system, and (3) injunction sought would merely maintain what appeared to have been status quo for about 24 years. Huff v C.K. Sanitary Sys., 246 A.D.2d 795, 667 N.Y.S.2d 766, 1998 N.Y. App. Div. LEXIS 304 (N.Y. App. Div. 3d Dep't 1998).

Insured, who was seeking preliminary injunction requiring health insurer to continue paying for intravenous antibiotic therapy for Lyme disease, showed extraordinary circumstances warranting grant of injunction where (1) he was personally unable to pay for such therapy, which was prescribed by his physician, and (2) if such therapy were discontinued, he would suffer dire physical consequences, including potentially irreversible neurological injury. Egan v New York Care Plus Ins. Co., 266 A.D.2d 600, 697 N.Y.S.2d 776, 1999 N.Y. App. Div. LEXIS 11244 (N.Y. App. Div. 3d Dep't 1999).

Court properly dismissed complaint sua sponte and enjoined plaintiff from initiating any further litigation against defendant without prior court approval in order to prevent plaintiff's further use of courts to harass and embarrass defendant where plaintiff had made many frivolous motions and had repeatedly disregarded court orders. Jones v Maples, 286 A.D.2d 639, 731 N.Y.S.2d 356, 2001 N.Y. App. Div. LEXIS 8870 (N.Y. App. Div. 1st Dep't 2001), app. denied, 97 N.Y.2d 716, 740 N.Y.S.2d 690, 767 N.E.2d 147, 2002 N.Y. LEXIS 596 (N.Y. 2002).

Office of Mental Health was enjoined under CLS CPLR §§ 6301 and 6311 from implementing "significant service reductions" at community-based state psychiatric facility until 12 months from such time as proper notification of proposed reductions was made to all persons and groups delineated by CLS Men Hyg § 7.17. Grant v New York State Office of Mental Health, 169 Misc. 2d 896, 646 N.Y.S.2d 1018, 1996 N.Y. Misc. LEXIS 293 (N.Y. Sup. Ct. 1996).

39. —Preliminary injunction not appropriate

The trial court erred in issuing a preliminary injunction, enjoining defendants from making any further sales, distribution, or printing of any reprinted hard cover copies of a certain book, where the terms of the agreement between plaintiff and defendant concerning the right of first refusal with respect to reprint rights for hard cover copies of the book was ambiguous and where, on the record, plaintiff had not clearly shown that it would be irreparably harmed in the absence of injunctive relief and that it had no adequate remedy at law. Gulf & Western Corp. v New York Times Co., 81 A.D.2d 772, 439 N.Y.S.2d 13, 1981 N.Y. App. Div. LEXIS 11412 (N.Y. App. Div. 1st Dep't 1981).

Radio communications company was not entitled to preliminary injunction against television station buyer's interference with its alleged right, under oral barter arrangement with former station owner, to maintain its radio antennae on station's tower where barter arrangement was void by virtue of statute of frauds, and thus there was no possibility that radio company could prove likelihood of its ultimate success on merits. A-1 Communs. v WTZA-TV Assocs., 245 A.D.2d 940, 666 N.Y.S.2d 810, 1997 N.Y. App. Div. LEXIS 13624 (N.Y. App. Div. 3d Dep't 1997).

Plaintiffs involved with defendants in business venture were not entitled to preliminary injunction against prosecution of 2 prior actions where plaintiffs (1) had adequate remedy at law under CLS CPLR § 3216 to seek dismissal for failure to prosecute but never availed themselves of that remedy, (2) failed use procedural remedies available to them to move prior actions forward and thus could not assert claim of laches, and (3) failed to submit any relevant documentary

evidence to support their claim that prior actions had been settled. Johnson v Shea, 251 A.D.2d 460, 673 N.Y.S.2d 602, 1998 N.Y. App. Div. LEXIS 6848 (N.Y. App. Div. 2d Dep't 1998).

Provider of services for homeless persons with AIDS was not entitled to preliminary injunction restraining city from terminating its contracts, on ground that city's conduct was de facto debarment without due process, where (1) city did not issue blanket preclusion of contracts with provider but examined each contact on case-by-case basis, (2) even if city's actions constituted debarment or suspension, there was no due process violation, because provider had meaningful postdeprivation remedies, including administrative remedies under city charter and PPB Rules and commencement of Article 78 proceeding, and (3) thus, provider did not show likelihood of success on merits of debarment claim. Housing Works, Inc. v City of New York, 255 A.D.2d 209, 680 N.Y.S.2d 487, 1998 N.Y. App. Div. LEXIS 12526 (N.Y. App. Div. 1st Dep't 1998).

Preliminary injunction enjoining defendant as to disposition of payments received from State Department of Social Services and requiring him to disclose bank records would be vacated, because those provisions were not supported by showing of probability of success on merits or showing that such relief was necessary to avoid irreparable harm, where defendant was likely to succeed on merits of underlying dispute over which party was entitled to operate methadone clinic, plaintiff's surviving claims sought only money damages, and plaintiff did not show that defendant probably would be unable to pay judgment if one were entered against him. East Harlem Mgmt. Group, Inc. v Silbermann, 263 A.D.2d 354, 692 N.Y.S.2d 377, 1999 N.Y. App. Div. LEXIS 7734 (N.Y. App. Div. 1st Dep't 1999).

Appellants' request to enjoin commencement of town's project to widen and overlay airport runway was properly denied by Supreme Court where they failed to move in Appellate Division for preliminary injunction to preserve status quo pending determination of present appeal, and thus they failed to preserve their rights pending judicial review. Gorman v Town Bd. of E. Hampton, 273 A.D.2d 235, 709 N.Y.S.2d 433, 2000 N.Y. App. Div. LEXIS 6229 (N.Y. App. Div. 2d Dep't 2000).

Plaintiff, a former second-year medical resident terminated from the residency program because of absenteeism, is not entitled to a preliminary injunction requiring defendant hospital to reinstate him as a third-year medical resident since he failed to sustain his burden of showing a reasonable likelihood of success on the merits (CPLR 6311). Easaw v St. Barnabas Hosp., 142 Misc. 2d 480, 537 N.Y.S.2d 944, 1989 N.Y. Misc. LEXIS 28 (N.Y. Sup. Ct. 1989).

Food vendors personally served with notices charging them with serious health violations, and notified of policy that unpaid violations would prevent renewal of their municipal vendor licenses, did not have property or constitutional right of license renewal, subject to full procedural due process protection, without clearing unpaid violations, and thus would be denied preliminary injunction enjoining enforcement of policy. Khalil v Spencer, 143 Misc. 2d 429, 541 N.Y.S.2d 301, 1989 N.Y. Misc. LEXIS 231 (N.Y. Sup. Ct. 1989).

II. Decisions Under Former Civil Practice Laws

40. Generally

An injunction order in the cases specified in CPA §§ 816 (Rule 6112(a), 6212(a), 6312(a), § 6214(e) herein), 877 (§ 6301, Rule 6312(a) herein), 878 (§ 6301, Rule 6312(a) herein) could have been granted before the commencement of the action to be served with or after the summons. People ex rel. Cauffman v Van Buren, 136 N.Y. 252, 32 N.E. 775, 136 N.Y. (N.Y.S.) 252, 1892 N.Y. LEXIS 1743 (N.Y. 1892).

A temporary injunction will not be granted where the complaint set out a contract with the defendant whereby in consideration of her employment by the plaintiff she agreed not to divulge to any third person the secrets of the business of the plaintiff and not to engage in the same business or enter the employment of any other person so engaged. The answer alleged that the business of the plaintiff was unlawful, consisting of usurious transactions carried on in evasion of the law. Tolman v Mulcahy, 119 A.D. 42, 103 N.Y.S. 936, 1907 N.Y. App. Div. LEXIS 3852 (N.Y. App. Div. 1907).

A temporary injunction can be obtained only in a pending action. Shotland v Mulligan, 134 A.D. 504, 119 N.Y.S. 576, 1909 N.Y. App. Div. LEXIS 2902 (N.Y. App. Div. 1909).

In an action brought by a taxpayer to restrain the municipal authorities from paying a claim for compensation to such person for performing said duties, where the complaint alleges an intention so to do, an injunction pendente lite should be granted. Beresford v Donaldson, 103 N.Y.S. 600, 54 Misc. 138, 1907 N.Y. Misc. LEXIS 378 (N.Y. Sup. Ct. 1907).

A temporary injunction may be granted pending an appeal, after judgment dismissing a complaint, where it is necessary to protect the rights of the appellant and save a judgment of reversal from being rendered ineffectual. Ocorr v Lynn, 173 N.Y.S. 518, 105 Misc. 489, 1918 N.Y. Misc. LEXIS 829 (N.Y. Sup. Ct. 1918), app. dismissed, 187 A.D. 963, 174 N.Y.S. 915, 1919 N.Y. App. Div. LEXIS 6249 (N.Y. App. Div. 1919).

Jurisdiction acquired by issuance of temporary injunction was lost by failure to serve order before return day fixed therein. New York v Staten I. M. R. Co., 181 N.Y.S. 124, 110 Misc. 695, 1920 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1920).

Jurisdiction given court by ad interim order for injunction gave court power to appoint a receiver and to exercise control over the assets of the defendant, notwithstanding that federal court has in the meantime appointed a receiver. New York v Staten I. M. R. Co., 181 N.Y.S. 124, 110 Misc. 695, 1920 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1920).

It was an improper exercise of the court's discretion to grant a temporary injunction under CPA § 882 in an action to enjoin a nuisance where a substantial dispute was presented as to plaintiffs' right to any injunction and where the granting thereof bore more heavily on the defendant than did a denial thereof upon the plaintiffs. Giordano v Dellwood Dairy Co., 275 N.Y.S. 193, 153 Misc. 54, 1934 N.Y. Misc. LEXIS 1778 (N.Y. Sup. Ct. 1934).

Special Term had jurisdiction to entertain motion for temporary injunction on theory of provisional remedy issued in advance of action to accompany summons. Dixon v Corrigan, 145 N.Y.S.2d 222, 208 Misc. 911, 1955 N.Y. Misc. LEXIS 3308 (N.Y. Sup. Ct. 1955).

41. Who may grant injunction

The fact that an injunction restraining members of the common council from overriding or disproving the mayor’s veto in an action in the supreme court, is issued by a county judge, it is nonetheless the mandate of the court. People ex rel. Negus v Dwyer, 90 N.Y. 402, 90 N.Y. (N.Y.S.) 402, 1882 N.Y. LEXIS 399 (N.Y. 1882).

Where the answer was not interposed when the preliminary injunction was granted by a county court ex parte, the discretionary power of the court in granting or refusing the injunction is for the first time exercised by the court, after issue joined, at special term. Allison Bros. Co. v Allison, 7 N.Y.S. 268, 54 Hun 634, 1889 N.Y. Misc. LEXIS 1045 (N.Y. Sup. Ct. 1889).

A county judge could grant the temporary injunction in the first instance in an action in the supreme court restraining defendants from interfering with plaintiff in actual possession of property pending suit to determine ownership. Morris v Mayor, etc., of New York, 7 N.Y.S. 943, 1889 N.Y. Misc. LEXIS 1393 (N.Y. Sup. Ct. 1889), rev'd, 8 N.Y.S. 763, 55 Hun 476, 1890 N.Y. Misc. LEXIS 1767 (N.Y. Sup. Ct. 1890).

Generally, an order for a temporary injunction may be granted, in a proper case, either by the court in which the action is brought or a judge thereof or a county judge. Buffalo v Kissinger, 40 N.Y.S.2d 188, 1943 N.Y. Misc. LEXIS 1632 (N.Y. County Ct. 1943).

A special county judge has power to grant an order, returnable before himself, to show cause why an injunction should not be granted, to hear and decide the application, and to enjoin the defendant until hearing. Babcock v Clark, 23 Hun 391 (N.Y.).

Where a county judge grants a temporary injunction order in an action pending in the supreme court, such order is a lawful mandate of the supreme court, and is not a mere act of the county judge, done independently of the supreme court. In such an action, the county judge has authority to decide whether or not plaintiff is entitled to an injunction order, and however erroneous his decision granting the order may be, it is obligatory upon all parties to the action

until reversed. If the injunction order was improvidently or erroneously granted, the remedy of an aggrieved party is by motion to vacate it, or by appeal; and the merits of such an order cannot be reviewed upon a proceeding to punish for a disobedience of its commands. People ex rel. Negus v Dyer, 27 Hun 548, 63 How. Pr. 115, 1882 N.Y. Misc. LEXIS 209 (N.Y. App. Term May 1, 1882), aff'd, People ex rel. Negus v Dwyer, 90 N.Y. 402, 90 N.Y. (N.Y.S.) 402, 1882 N.Y. LEXIS 399 (N.Y. 1882).

Special surrogate of Oneida county had power to issue an injunction under CPA § 817 (§ 6211 herein). 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).

An ex parte injunction could have been granted in New York City by a judge of the court of common pleas in an action in the superior court, such a judge being a county judge within the meaning of CPA § 817 (§ 6211 herein); also within the meaning of the term in actions brought under Laws 1881, ch 531. People ex rel. Roosevelt v Edson (1885) 52 Super Ct 53, revg 51 Super Ct 238.

An order to show cause why an injunction should not be continued previously granted preliminary, is properly made returnable before the same judge who granted the preliminary injunction, although the action be triable in another county, and in another judicial district from that in which the judge resides. Harold v Hefferman, 42 How. Pr. 241, 1871 N.Y. Misc. LEXIS 185 (N.Y. Sup. Ct. Dec. 18, 1871).

42. —Disqualification of judge

A judge cannot grant an injunction in an action in which he is related by affinity to one of the defendants, so that he could not be a juror. New York & N. N.Y. & New Haven R.R. v Schuyler, 28 How. Pr. 187, 1855 N.Y. Misc. LEXIS 123 (N.Y. Sup. Ct. Oct. 1, 1855).

43. —Second application for injunction

After one application has been denied, another application to another court on the same facts is wrong, and should not be sanctioned. Mayor v Conover, 5 Abb. Pr. 252, 1857 N.Y. Misc. LEXIS 278 (N.Y.C.P. Aug. 1, 1857); and see Harrington v Am. Life Ins. & Trust Co., 1 Barb. 244, 1847 N.Y. App. Div. LEXIS 88 (N.Y. Sup. Ct. Nov. 1, 1847).

A second injunction is irregular when procured ex parte from the same judge who had dissolved the first one and on the same papers, and subjects the attorney to costs. Schaughnessy v Reilly, 41 How. Pr. 382, 1870 N.Y. Misc. LEXIS 250 (N.Y. Super. Ct. Apr. 1, 1870).

44. —Appeal

Granting, refusing or continuing or disolving a temporary injunction is not appealable, as such granting or refusing is discretionary. Pfohl v Sampson, 59 N.Y. 174, 59 N.Y. (N.Y.S.) 174, 1874 N.Y. LEXIS 400 (N.Y. 1874); Calkin v Manhattan Oil Co., 65 N.Y. 557, 65 N.Y. (N.Y.S.) 557, 1875 N.Y. LEXIS 377 (N.Y. 1875).

45. Notice

An injunction pendente lite may be granted on an ex parte application. Bodenstein v Saul, 132 A.D. 628, 117 N.Y.S. 349, 1909 N.Y. App. Div. LEXIS 1563 (N.Y. App. Div. 1909).

The notice contemplated by CPA § 882 was a formal notice of the application in the action pending, or if the action was not pending, bearing the title of the action to be brought, either with or without the papers upon which the application was based, returnable forthwith or at such other time as the judge or court might direct. George F Stuhmer & Co. v Korman, 235 A.D. 856, 257 N.Y.S. 140, 1932 N.Y. App. Div. LEXIS 10106 (N.Y. App. Div. 1932).

Stay vacated where granted without notice and in violation of CPA § 819 (Rules 6112(b), 6212(b), 6312(b) herein). Kramm v Holloway, 237 A.D. 840, 261 N.Y.S. 931, 1932 N.Y. App. Div. LEXIS 5679 (N.Y. App. Div. 2d Dep't 1932).

A temporary injunction which restrained the members of a union from committing certain acts was void where granted without the notice required by CPA § 882. People ex rel. Sandnes v Sheriff of Kings County, 299 N.Y.S. 9, 1, 164 Misc. 355, 1937 N.Y. Misc. LEXIS 1798 (N.Y. Sup. Ct. 1937).

Where order to show cause with temporary stay pending determination of motion for temporary injunction was signed on the representation that a summons and complaint were in existence and available for service with the order, but on return day of motion it appeared that no summons and complaint were served with the order, or prior to the return date, the temporary stay was vacated and the motion was denied. Oyster Bay v Forte, 217 N.Y.S.2d 231 (N.Y. Sup. Ct. 1961).

A temporary injunction should not be granted without the usual notice of motion to the adverse party, except a pressing necessity is shown. ANDROVETTE v BOWNE, 4 Abb. Pr. 440, 1857 N.Y. Misc. LEXIS 185 (N.Y. Sup. Ct. May 1, 1857); Redfield v Middleton, 20 Super Ct 649.

46. —Supplemental injunction after answer

Where a temporary injunction was granted and after the answer was served, a “supplemental injunction” was applied for ex parte, it should be denied. Rhodes v Wheeler, 48 A.D. 410, 63 N.Y.S. 184, 1900 N.Y. App. Div. LEXIS 459 (N.Y. App. Div. 1900).

47. Substitution of parties

Where a plaintiff, suing a fraternal insurance association for an injunction to compel it to reinstate him as a member, has died, the defendant is entitled to notice of a motion to substitute persons claiming to be beneficiaries as coplaintiffs with the administrator of the insured. Pierce v Supreme Tent, K. M., 140 A.D. 730, 125 N.Y.S. 658, 1910 N.Y. App. Div. LEXIS 3025 (N.Y. App. Div. 1910).

48. Security

Upon an order to show cause and for temporary restraint, security may be required. Methodist Churches of New York v Barker, 18 N.Y. 463, 18 N.Y. (N.Y.S.) 463, 1858 N.Y. LEXIS 156 (N.Y. 1858).

49. Service of order

Jurisdiction acquired by issuance of temporary injunction was lost by failure to serve order before return day fixed therein. New York v Staten I. M. R. Co., 181 N.Y.S. 124, 110 Misc. 695, 1920 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1920).

The injunction order may be served contemporaneously with the summons. Leffingwell v Chave, 18 Super Ct 703; Mattice v Gifford, 16 Abb. Pr. 246; Morgan v Quackenbush, 22 Barb. 72.

50. Conflicting jurisdiction

Jurisdiction given court by ad interim order for injunction gave court power to appoint a receiver and to exercise control over the assets of the defendant, notwithstanding that federal court has in the meantime appointed a receiver. New York v Staten I. M. R. Co., 181 N.Y.S. 124, 110 Misc. 695, 1920 N.Y. Misc. LEXIS 1234 (N.Y. Sup. Ct. 1920).

51. Presumption on appeal

On appeal from an order denying a motion to vacate a temporary injunction, made since the 1930 amendment, the record did not show whether or not notice was given defendant and the action of the court was presumed proper in absence of contrary showing, and it was affirmed. Hunt v Stirone, 232 A.D. 262, 249 N.Y.S. 591, 1931 N.Y. App. Div. LEXIS 13784 (N.Y. App. Div. 1931).

52. Injunction to restrain state officers; application

One aggrieved by an order of the Commissioner of Agriculture and Markets made under section 258-m of the Agriculture and Markets Law must bring a certiorari proceeding in the third department. Dairy Sealed, Inc. v Ten Eyck, 248 A.D. 352, 289 N.Y.S. 85, 1936 N.Y. App. Div. LEXIS 6150 (N.Y. App. Div. 1936).

CPA § 879 was directory because it would contravene Const., Art. 6, § 1, if mandatory. Schieffelin v Komfort, 149 N.Y.S. 254, 86 Misc. 678, 1914 N.Y. Misc. LEXIS 1265 (N.Y. Sup. Ct.), aff'd, 163 A.D. 741, 149 N.Y.S. 65, 1914 N.Y. App. Div. LEXIS 7655 (N.Y. App. Div. 1914).

A Supreme Court justice at chambers has no power, on ex parte application, to restrain a State officer from performing any duties imposed by statute. Donnelly v Roosevelt, 259 N.Y.S. 355, 144 Misc. 687, 1932 N.Y. Misc. LEXIS 1245 (N.Y. Sup. Ct. 1932).

An order in the nature of an injunction cannot be granted at special term restraining state officers from the performance of any duty imposed upon them; or at another place than within the third judicial department. Comstock v Syracuse, 5 N.Y.S. 874, 1889 N.Y. Misc. LEXIS 2659 (N.Y. Sup. Ct. 1889), modified, 16 N.Y.S. 381, 60 Hun 576, 1891 N.Y. Misc. LEXIS 491 (N.Y. Sup. Ct. 1891), aff'd, Comstock v City of Syracuse, 129 N.Y. 643, 129 N.Y. (N.Y.S.) 643, 1891 N.Y. LEXIS 1219 (N.Y. 1891).

In some cases a party may be denied the right to an injunction and be put to his action at law for damages by reason of his delay in application; or because public protection requires denial. Vick v Rochester, 46 Hun 607, 13 N.Y. St. 31 (N.Y.).

Restrictions upon injunction to restrain state officers. Vick v Rochester, 46 Hun 607, 13 N.Y. St. 31 (N.Y.).

CPA § 879 applied only to such state officers as the comptroller, etc., and the boards which those officers compose. Moody v Fritcher, 24 NY Week Dig 474.

53. —Condemnation of land

Injunction to restrain condemnation of land held to lie in the third department though the land was located in another department, where it appeared that the defendant officers were required to advertise in the city of Albany and to make their reports to the legislature there sitting and to file their records in the office of the Secretary of State. Bunyan v Commissioners of Palisades Interstate Park, 167 A.D. 457, 153 N.Y.S. 622, 1915 N.Y. App. Div. LEXIS 8299 (N.Y. App. Div. 1915).

54. —City board of health

The board of health of the city of Amsterdam, constituted under the laws of 1885, chap. 70, are not state officers, and an injunction granted by a county judge set aside upon the ground that the board were such officers is properly vacated. Moody v Fritcher, 24 NY Week Dig 474.

55. —Mayor and common council

Where the legislature granted a charter to an elevated road, in which authority was given to build and operate its road upon certain streets of a city, and the mayor and common council were given the privilege of changing the streets to be occupied. Held, that when the mayor and common council acted upon the privilege it was in performance of municipal duty, and not to the state, and they were bound by an injunction in action to which city was a party. People ex rel. Negus v Dwyer, 90 N.Y. 402, 90 N.Y. (N.Y.S.) 402, 1882 N.Y. LEXIS 399 (N.Y. 1882).

56. —State Transit Commission

The venue of an action, in which the State Transit Commission is a defendant, was properly laid, under this section, in the Second Department, where it appeared that many of the duties of the Transit Commission in connection with the grade crossing elimination in question necessarily were performed in the borough of Brooklyn. Reimer v Fullen, 19 N.Y.S.2d 847, 174 Misc. 54, 1939 N.Y. Misc. LEXIS 2775 (N.Y. Sup. Ct. 1939).

57. —Notice of application

Disqualification of judge was not shown by his inadvertent error in granting stay without notice required by CPA § 879. People v Prior, 52 N.Y.S.2d 174, 183 Misc. 430, 1944 N.Y. Misc. LEXIS 2681 (N.Y. Sup. Ct. 1944), rev'd, 268 A.D. 717, 54 N.Y.S.2d 150, 1945 N.Y. App. Div. LEXIS 5296 (N.Y. App. Div. 1945).

Research References & Practice Aids

Cross References:

Order of attachment without notice, CPLR 6211.

Federal Aspects:

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

Requirement of findings of fact and conclusions of law in orders granting or refusing interlocutory injunctions in United States District Courts, Rule 52(a) of Federal Rules of Civil Procedure, USCS Court Rules.

Preliminary injunctions in United States District Courts, Rule 65(a) of Federal Rules of Civil Procedure, USCS Court Rules.

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

Treatises

Matthew Bender’s New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 6311, Preliminary Injunction.

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

Matthew Bender's New York CPLR Manual:

CPLR Manual § 15.01. Motions and orders — in general.

CPLR Manual § 28.19. Procedure for obtaining preliminary injunction.

Matthew Bender's New York Practice Guides:

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

1 New York Practice Guide: Domestic Relations § 11.07.

LexisNexis Practice Guide New York e-Discovery and Evidence § 10.13. CHECKLIST: Obtaining Preservation Order for ESI.

LexisNexis Practice Guide New York e-Discovery and Evidence § 10.15 .Obtaining Post-Commencement Preservation Order for ESI.

Matthew Bender's New York AnswerGuides:

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

Warren's Weed New York Real Property:

Warren's Weed: New York Real Property § 162.12.

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:

LexisNexis Forms FORM 140-719.3.— Order to Show Cause to Enjoin Public Nuisance (City of New York).

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

Hierarchy Notes:

NY CLS CPLR, Art. 63

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