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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

UNIVERSITY OF SOUTHERN
CALIFORNIA,

Plaintiff and Appellant,

v.

DOHENY EYE INSTITUTE,

Defendant and Respondent.

B241088

(Los Angeles County
Super. Ct. No. BC472246)

APPEAL from an order of the Superior Court of Los Angeles County, Abraham Khan, Judge. Affirmed.

Bingham McCutchen, Marshall B. Grossman and Seth M. Gerber; Greines, Martin, Stein & Richland, Robin Meadow, Cynthia E. Tobisman and Alana H. Rotter for Plaintiff and Appellant.

O'Melveny & Myers, Mark A. Samuels, Richard W. Buckner and Margaret A. Moeser for Defendant and Respondent.

I. INTRODUCTION

Plaintiff University of Southern California (“USC”) appeals an order denying its motion for a preliminary injunction against defendant Doheny Eye Institute (“Doheny”).

In the first amended complaint, filed on December 23, 2011, USC sued Doheny for declaratory relief, fraud and deceit, negligent misrepresentation, breach of contract and breach of implied covenant of good faith and fair dealing. Doheny cross-complained for breach of contract and declaratory relief. On April 3, 2012, USC filed a motion for preliminary injunction. On April 27, 2012, the trial court issued its order denying injunctive relief.

II. BACKGROUND

Doheny owns properties on the USC Health Sciences Campus (“Campus”). In 1985 it built a two-story eye hospital on one of its parcels located at 1450 San Pablo Street, Los Angeles, California. The hospital was built by Doheny so that the physician—faculty members of the USC Medical School’s Department of Ophthalmology would have a hospital and clinic to treat patients and perform eye surgeries. Construction was monitored by the statewide agency that oversees hospitals, the Office of Statewide Health Planning & Development (“OSHDP”). Upon completion of the building, the City of Los Angeles (“City”) issued a certificate of occupancy.

In 1989, Doheny applied to the City for permission to add four floors to the building. The application stated that the expanded building would house four types of uses: (1) research, teaching, and general laboratory; (2) administrative and information processing; (3) medical clinic and outpatient services; and (4) hospital and inpatient areas. The City determined that 291 parking spaces were required in connection with the addition. Doheny’s application stated that parking “will be provided as needed by covenant within the Health Sciences campus in conjunction with the other medical specialty buildings.” Doheny asked USC to provide and pay for the required parking.

In October 1989, the City conditionally approved plans for the addition, subject to certain conditions. One condition was “[t]hat Code required parking be provided by covenant within the Health Sciences campus to the satisfaction of the Zoning Administrator.” The conditional approval also noted that “the above approval of plans is from a zoning stand point only” and that “[a]ny necessary permits or certificate of occupancy must be obtained from the proper City departments, and the applicant must comply with all other public regulations.” In August 1990, OSHPD approved the plans for the four-story addition. The construction of the addition was completed in the early 1990s.

Doheny contends that in March 1991, the parking issue between USC and Doheny had been resolved. USC had years earlier agreed to include Doheny’s parking needs in its overall parking plans, but never recorded the parking covenant against its Health Sciences Campus, nor revealed this failure to Doheny.

USC claims that after the City conditionally approved Doheny’s expansion plans, Doheny asked USC to provide a parking covenant committing 291 spaces to Doheny for an unlimited period of time. USC responded that it had parking spaces that Doheny could use in the short term, but it would need them in the future in order to meet its own building requirements for its own expansion plans. USC proposed that the parties enter into a written agreement under which (1) USC would assign Doheny the spaces; (2) as to those spaces used by Doheny employees, Doheny would pay current parking rates; and (3) Doheny would fund the replacement costs for the 291 spaces as needed by USC in the future. Doheny never accepted USC’s offer. In August, 1990, OSHPD approved the plans for the four story addition but advised Doheny that compliance with local planning standards, including zoning still remain under the responsibility of the local jurisdiction. Doheny never arranged for the required parking. It added four stories to its building without complying with the condition imposed by the City.

Beginning in 1995, Tenet Health Systems (“Tenet”) leased space in the Doheny building under two separate leases with Doheny and took over all of the hospital operations. In 2004, OSPHD’s jurisdiction over the building ceased because Tenet was

no longer using it as an inpatient hospital. In 2009, USC assumed Tenet's leases with Doheny.

Shortly after the assignment, USC and Doheny began negotiating a new lease for most of the building. USC trustee, John Kusmiersky, and its vice-president of real estate, Kristina Raspe, negotiated the new lease with Doheny's chief operating officer, Marissa Goldberg, and its outside counsel, Patrick McGarrigle

In November, 2010, Doheny as landlord and USC as tenant entered into a written lease (the "Lease") for office, administrative, medical and clinical space in the six-story building. The Lease was for a 25-year term, with a base rent starting at \$3,658,545 per year and increasing annually. USC would occupy 71% of the building pursuant to the Lease.

USC planned extensive renovations for the building. The plans included upgrading clinical and office spaces to make them suitable for dermatology and plastic surgery, pain management, anesthesiology, education, and administration. USC also planned to relocate its clinical trials to the building and to develop a new transplant clinic and a diagnostic center. USC spent approximately \$890,000 on architectural and project management fees, plus \$35,452 in fees to relocate existing occupants in preparation for the renovations. The total estimated costs of the proposed improvements was \$9,650,000.

In March 2011, USC submitted its renovation plans for City approval. In May 2011, the City informed USC that it could not approve the plans because there was no certificate of occupancy for the four-story addition.

In May 2011, Ms. Raspe in an e-mail correspondence to USC Senior Vice President Todd Dickey, recommended that USC immediately serve Doheny with a notice of default and terminate the master lease. She also noted that this was an opportunity for USC to leverage an acquisition of the building. Ms. Raspe was confident that she could resolve the certificate of occupancy issue.

In August, 2011 Paul Coleman, Deputy Director, OSPHD wrote a letter to Ken Gill, Acting Assistant Chief, Engineering Bureau, Los Angeles, Department of Building

& Safety in which OSPHD certified that the four story addition to the building was completed in accordance with OSHPD's regulations and standards and that the building was certified for use and occupancy. OSHPD requested that the Los Angeles Department of Building and Safety (LADBS) establish a permanent record that the building has held and does hold a certificate of occupancy and that no other certificate of occupancy was required to be obtained from any other agency.

In September, 2011 Bill Christopher of Urban Concepts, a consultant of Doheny wrote a letter to Mr. Gill asking the City to verify that no City certificate of occupancy was required when OSHPD approved the addition and that the building's on-site parking was adequate to meet City requirements without a parking covenant. In October, 2011 Mr. Gill countersigned the letter indicating he had reviewed the letter and on behalf of LADBS agreed with its contents. In a March 2012 deposition Mr. Gill testified that buildings under OSHPD jurisdiction must comply with City zoning requirements, including parking; that he did not know how many parking spaces the City would have required when the addition was built; and that if a building has both hospital and non-hospital uses, the City has to issue its own certificate of occupancy with respect to the non-hospital uses.

USC continues to occupy the building pursuant to the Lease.

At the hearing on its motion for preliminary injunction, USC narrowed its requested relief. It sought to enjoin the continued enforcement of the Lease pending the outcome of the trial. Before oral argument, the trial court gave an indication of how it evaluated USC's motion. The trial judge stated: "Well just thumbnail, it appears that the court tends to agree with the opposition that there is a damage remedy available to moving party. [¶] And as to the issues that have been raised, it's not clear to the court that injunctive relief is clearly indicated to avoid any future harm as argued by moving party. [¶] And with regard to the issues raised in the opposition, it does appear that -- to the court that damages would be available as a proper remedy." By minute order dated April 27, 2012, the trial court denied USC's motion for preliminary injunction.

III. DISCUSSION

The decision to grant or deny a request for a preliminary injunction rests within the sound discretion of the trial court. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. (*Ibid.*)

“In determining whether to issue a preliminary injunction, the trial court considers two factors: (1) the likelihood that the plaintiff will prevail on the merits of the case at trial and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied as compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. (Citation.) ‘When a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to satisfy either or both of the “interim harm” and “likelihood of prevailing on the merits” factors. On appeal, the question becomes whether the trial court abused its discretion in ruling on *both* factors. Even if the appellate court finds that the trial court abused its discretion as to one of the factors, it nevertheless may affirm the trial court’s order if it finds no abuse of discretion as to the other.’” (Citation.) *Abrams v. St. John’s Hospital & Health Center* (1994) 25 Cal.App.4th 628, 635-636.

At the hearing on the motion for preliminary injunction, the trial court commented that there is a damage remedy available to USC and that there is no showing that injunctive relief is necessary to avoid any future harm that cannot be remedied by an award of monetary compensation. USC has not established that it would suffer irreparable harm. USC limited the relief it sought to only enjoining enforcement of the lease. Whatever legal injuries USC may sustain or may have sustained, USC may be adequately compensated by a judgment for money damages.

There is no abuse of discretion in denying extraordinary relief when the evidence shows that, if plaintiff prevails, the only loss would be pecuniary. (Code Civ. Proc., § 526; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 838-839.)

Having determined that there is no showing of irreparable harm to USC, the issue of the likelihood that plaintiff will prevail on the merits of the case at trial need not be addressed.

IV. DISPOSITION

The order denying the motion for preliminary injunction is affirmed. The parties are to bear their own costs on appeal.

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FERNS, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.