

THE FACTUAL AND LEGAL BASIS UNDER FEDERAL
LAW FOR OPPOSING A CORPORATION'S DEMAND
FOR A PRELIMINARY INJUNCTION

by

Mitchell J. Kassoff*

The purpose of this article is to discuss the reasons and bases for opposing the demand of a corporation for a preliminary injunction. In today's legal environment knowledge of injunctive relief is critical in the business world.

THE REASONS AND BASES

*I. ESTABLISH THAT THE CORPORATION HAS FAILED TO
ESTABLISH A RIGHT TO PRELIMINARY INJUNCTIVE
RELIEF*

It is axiomatic that preliminary injunctive relief is an "extraordinary" remedy that should be granted sparingly.¹ A "prohibitory" or typical injunction is used to maintain the *status quo* pending a trial on the merits.² A party moving for such an injunction in the Second Circuit must show (a) irreparable harm, (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and (c) a balance of hardships tipping decidedly in its favor.³

*Professor of law and taxation at Pace University, New York City

A “mandatory” injunction, on the other hand, seeks to alter the *status quo* by commanding some positive act.⁴ A party moving for a mandatory injunction is required to make a more rigorous showing of a *clear or substantial* likelihood of success on the merits.⁵ This far greater remedy is that which is requested by the corporation and should not be granted.

II. SHOW THAT THE CORPORATION HAS UNCLEAN HANDS THAT WILL BAR THE RELIEF SOUGHT

On this basis alone the corporation is barred from seeking equitable relief. “[a] Court may deny injunctive relief based on the defense of unclean hands ‘where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party.’”⁶

“[o]ne who has defrauded his adversary to his injury in the subject matter of the action will not be heard to assert a right in equity.”⁷

“[i]t is one of the very first principles of equity that he who asks for equity must do equity; that a party coming into a Court of equity must come in with clean hands, free from wrong himself in relation to the matter in which they ask equitable relief.”⁸

III. SHOW THAT THE CORPORATION HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Regardless of what type of injunction relief (prohibitory or mandatory) the corporation seeks, show that it has failed to establish any likelihood of success on the merits of any of it

claims. This failure is fatal to its request for it requested preliminary injunction.⁹

If the corporation has asserted claims for breach of contract show that this is not sufficient. To state a viable claim for breach of contract under New York law, a complaint needs to allege: (i) the existence of an agreement; (ii) adequate performance of the contract by the corporation; (iii) breach of contract by the Defendant; and (iv) damages.¹⁰ Show that it is clear that the corporation fails as to defendant, Inc. and has failed to prove the facts for the Original Corporations.

If the corporation has asserted claims for fraud show that the claims are not sufficient. In order to succeed on a claim for fraud, the corporation must show that (1) the corporations misrepresented a material fact, (2) which the corporations knew to be false, (3) that such statement was made for the purpose of inducing the corporation to rely thereon, (4) that the corporation rightfully did so rely in ignorance of the statements' falsity, and (5) that the corporation was injured as a result of such reliance. Show that the corporation has failed to make this requisite showing here.

*IV. SHOW THAT THE CORPORATION WILL NOT SUFFER
IRREPARABLE HARM IF THE INJUNCTION IS NOT
GRANTED*

Show that the corporation request for injunctive relief must also be denied because it faces no irreparable harm. It is well settled that irreparable harm is "injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages."¹¹ Accordingly, show that the corporation's claim of irreparable injury is immediately not applicable to any causes of action that demand money damages. Even if the corporation stated a claim, any

damages would be readily calculable based upon past performance. Therefore, money damages would be sufficient in this case.

A corporation sought a preliminary injunction after its agreement had been terminated. In denying the corporation's request for a preliminary injunction, the court concluded the corporation faced no irreparable harm.¹²

In the seminal case on preliminary injunctions¹³ the party moving for a preliminary injunction alleged irreparable harm based on a "disruption of (Jackson's) sales and delivery relations with its customers."¹⁴

In refusing to grant the injunction, the Second Circuit Court of Appeals held:

Even if Jackson shows this injury, however, we do not see why it would not be rather readily compensable in monetary damages. We recognize that the parties provided for a long period of notice of termination of the underlying distributorship contract to give Jackson "sufficient time to provide substitute sources of supply." But this, we think, has little bearing on the compensability of that loss of customers or business in dollars and cents, the traditional requirement for injunctive relief.¹⁵

Based upon the foregoing, show that the corporation has failed to demonstrate that it will suffer any irreparable harm. This will require denial of its request for a preliminary injunction for this reason as well.¹⁶

V. SHOW THAT THE BALANCE OF THE HARDSHIPS DO NOT FAVOR THE CORPORATION

The final prerequisite for a preliminary injunction is a showing that a balance of hardships is in favor of the corporation.¹⁷ Show that the defendant has negotiated in good faith, made investments and begun operation of its business it should not lose its entire investment, especially prior to a full trial on the merits of the case. Thus, show that the balance of hardships clearly do not favor corporation seeking the injunction.

VI. EVEN IF THE COURT DETERMINES THAT GROUNDS FOR A PRELIMINARY INJUNCTION EXIST, SHOW THAT THE CORPORATION SHOULD BE REQUIRED TO POST A SUBSTANTIAL BOND PURSUANT TO RULE 65(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

A bond is required upon the issuance of a preliminary injunction “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”¹⁸

Consequently, if the Court determines that some form of injunctive relief is necessary, the corporation must be required to post a bond to cover any costs and damages that may be suffered by Corporations should the corporation not prevail in the underlying action in this matter.¹⁹

Since the scope of any injunctive relief ordered cannot be known at the time of request (and the defendant will submit that none is necessary), the face amount of the bond should be sufficient to cover any damages unjustly incurred as a result of the issuance of the preliminary injunction, plus an additional amount to account for potential consequential damages resulting from the injunction.

The bond should cover, at a minimum, the potential loss of goodwill, revenues and defendant's business opportunity.

CONCLUSION

By showing the proper facts and law it is quite possible for a defendant to defeat a corporation's demand for preliminary injunctive relief.

ENDNOTES

¹ *Jamaica Ash and Rubbish Removal, Inc. v. Ferguson*, 85 F. Supp. 2d 174 (E.D.N.Y. 2000); *Winner Intern, LLC v. Omori Ent.*, 60 F. Supp. 2d 62 (E.D.N.Y. 1999).

² *Tom Doherty Assoc., Inc. v. Saban*, 60 F.3d 27 (2d Cir. 1995).

³ e.g., *Forest City Daly Housing Inc. v. Town of North Hempstead*, 175 F.3d 1999 (2d Cir. 1999) (Pohorelsky, M.J.); *The Southland Corp. v. Froelich*, 47 F. Supp. 2d 227 (E.D.N.Y. 1999) (Pohorelsky, M.J.). (denying a corporation's motion for a preliminary injunction to revive an agreement).

⁴ *Forest City*, 175 F.3d at 12.

⁵ *Forest City, supra*; *Froelich, supra*.

⁶ *The Estate of John Lennon*, 934 F. Supp. 287 (S.D.N.Y. 1996)

⁷ *The Original Great Am. Chocolate Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273 (7th Cir. 1992)

⁸ *Beermart, Inc. v. The Stroh Brewery Co.*, 804 F.2d 409 (7th Cir. 1986)

⁹ *Froelich, supra.*

¹⁰ *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996).

¹¹ *Forest City*, 175 F.3d at 25.

¹² *Truglia v. KFC Corp.*, 692 F. Supp. 271 (S.D.N.Y. 1988)

¹³ *Jackson Dairy Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979)

¹⁴ *Jackson Dairy*, 596 F.2d at 72.

¹⁵ *Jackson Dairy*, 596 F.2d at 72-73 (footnotes omitted).

¹⁶ *Forest City, supra.*

¹⁷ *Wright v. Giuliani*, 230 F.3d at 545.

¹⁸ Rule 65(c) of the Federal Rules of Civil Procedure.

¹⁹ *First Jewellery Co. of Canada v. Internet Shopping Network, LLC*, 2000 WL 122175 (S.D.N.Y. 2000).