SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
---X
JENNIFER LEE and RICHARD LEE,

Plaintiffs, Index No. 503080/13

-against- **Affirmation in Opposition**

BROOKLYN BOULDERS, LLC Returnable: September 8, 2017

Defendant.
---X

James M. Carman, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the following upon information and belief and with knowledge of the penalties for perjury:

1. I am a member of the law firm of CARMAN, CALLAHAN & INGHAM, LLP, attorneys for Plaintiffs, Jennifer and Richard Lee, in connection with the above-captioned matter. As such, I am fully familiar with the facts and circumstances of this case based upon a review of the file maintained in our office and a study of the applicable law.

2. This Affirmation is submitted in opposition to Defendant's Order to Show Cause staying the entry of judgment until a decision and order are rendered on the Defendant's post-trial motion for a new trial, remittitur, and other relief, and until the decision and order is entered with the County Clerk. This Affirmation is further submitted in opposition to Defendant's application for an Order staying the entry or execution of judgment pending the hearing of this motion.

3. This is an action for serious personal injuries sustained by Plaintiff Jennifer Lee on March 15, 2013 at Defendant's rock climbing facility. The trial of this action started on January 24, 2017 and concluded on January 27, 2017. After deliberation, the jury returned a verdict in favor of

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Plaintiffs in the total amount of $1,250,000. See Exhibit "1" to the Affirmation of Nicholas Hurzeler dated August 16, 2017

4. As referenced by Defendant's counsel in Defendant's Affirmation in Support of its Order to Show Cause, after the verdict was read, counsel for Defendant requested permission "to reserve a motion to stay the judgment for 45 days and make a written motion to the court." See Exhibit "2" to Hurzeler Aff. Your Affirmant had no objection to Defendant's request. Your Affirmant, however, only agreed to a 45 day stay of the entry of the judgment and did not agree to a stay of the entry of the judgment for a period of time beyond 45 days.

5. In accordance with the agreement made in Court on January 27, 2017, Plaintiffs served a Proposed Judgment with Notice of Settlement on July 20, 2017, well after the 45 day period.

6. During the course of discovery, Plaintiffs were advised that Defendant maintains applicable insurance coverage in the amount of $1,000,000. Your Affirmant is unaware of any other applicable insurance available to Defendant to satisfy the verdict and judgment.

7. The $1,250,000 verdict exceeds Defendant's available insurance coverage by $250,000. Given the significant risk that Defendant may transfer or deplete its available assets to avoid payment of its $250,000 liability, it is necessary for Plaintiff to enter judgment as soon as possible.

A Temporary Restraining Order or Preliminary Injunction is Not Warranted

8. As set forth above, the jury returned a verdict for Plaintiffs in the amount of $1,250,000 - $250,000 above the $1,000,000 coverage available to Defendant. Accordingly, there is a significant risk to Plaintiffs that any further delay in the entry of the judgment may result in an inability to collect from Defendant the $250,000 in excess of the $1,000,000 insurance coverage.

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As a bond or undertaking has not been filed, entering judgment as soon as possible is necessary to protect Plaintiffs' interests. In light of the significant and continuing prejudice to Plaintiffs caused by the delay in entering judgment against Defendant, an injunction staying the entry of judgment against Defendant should not be issued.

9. Pursuant to CPLR §6301, a court may issue a preliminary injunction where the moving party demonstrated the likelihood of success on the merits, irreparable injury absent the injunction, and balancing of the equities in its favor. See Related Properties, Inc. v. Town Bd. Of Town/Village of Harrison, 22 A.D.3d 587, 590 (2nd Dep't 2005). However, a preliminary injunction is considered a "drastic remedy which should be issued cautiously" because it "prevents litigants from taking actions that they would otherwise be legally entitled to take". Id.

10. Defendant argues that it will suffer "irreparable harm" because it may incur additional litigation expenses should Plaintiffs enter a judgment prior to a decision on Defendant's post-verdict motion to set aside and/or reduce the verdict. Economic loss, however, does not constitute irreparable harm. DiFabio v. Omnipoint Comm's Inc. 66 A.D.3d 635, 637 (2nd Dep't 2009).

11. In addition, Defendant's claim that a "balancing of equities" favors an injunction staying entry of a judgment appears to rely on the possibility of "awkward" and "unnecessary" motion practice. It is respectfully submitted that this claim of inconvenience should not trump Plaintiffs' efforts to enter a judgment necessary to protect the $250,000 unsecured debt. While it is true that additional motion practice may be necessary should this Court grant Defendant's motion, Plaintiffs are willing to engage in such motion practice rather than risk the real possibility of being unable to recover that portion of the verdict in excess of insurance coverage if they are not permitted to enter a judgment.

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12. As Defendant's motion for injunctive relief does not establish irreparable harm and its claim of inconvenient motion practice should not outweigh Plaintiffs' right to enter judgment. Defendant's application must be denied in its entirety.

Defendant Should be Required to Post an Undertaking

13. "Because preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take . . . they should be issued cautiously and in accordance with appropriate procedural safeguards. Uniformed Firefighters Association of Greater New York v. City of New York, 79 N.Y.2d 236, 241 (1992). Where, as here, a litigant requests the issuance of preliminary injunction pursuant to CPLR 6301, the procedural safeguards found in CPLR §6312(b) (requiring the posting of an undertaking) and CPLR §6315 (establishing a procedure for assessment of "damages sustained . . . by reason of the preliminary injunction") must be utilized.

14. Pursuant to CPLR §6312(b), an undertaking is mandatory prior to the granting of a preliminary injunction and the requirement cannot be waived by the court. See Rourke Developers Inc. v. Cottrell-Hajeck Inc., 285 A.D.2d 805 (3rd Dep't 2001). Accordingly, should this Court determine that a preliminary injunction staying the entry of judgment against Defendant is warranted, Plaintiffs respectfully request that the Court also order Defendant to post an undertaking in the amount necessary to protect the plaintiffs' interest in "all damages and costs which may be sustained by reason of the injunction". Such an order will protect Plaintiffs from the risk inherent in delaying entry of judgment against Defendant and will maintain the status quo until a decision is rendered on Defendant's post-trial motion.

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A Stay is not Warranted

15. Pursuant to CPLR §2201, a court can only grant a stay "in a proper case." As noted in the Practice Commentaries for CPLR 2201 ("A Proper Case for a Stay"):

> "[a] stay of an action can easily be a drastic remedy, on the simple basis that justice delayed is justice denied. It should therefore be refused unless the proponent shows good cause for granting it. Nothing but good cause would make for a 'proper case.' Some excellent reason would have to be demonstrated before a judge is asked to bring to a halt a litigant's quest for a day in court." Practice Commentary C2201:7

16. Here, Defendant has not demonstrated a good cause for denying Plaintiffs' right to enter a judgment pursuant to the verdict rendered by the jury approximately 7 months ago. As set forth above, the verdict exceeds the coverage available to Defendant and thus, there is a continued and real risk that Plaintiffs will be unable to recover against the defendant the amount of the verdict that is in excess of the $1,000,000 coverage. The only way for Plaintiffs to mitigate the risk of being unable to recover the $250,000 in excess of insurance coverage, is with the entry of a judgment against Defendant and to attach assets of the defendant that will equal the value of the unsecured verdict.

17. Since the granting of a stay under CPLR §2201 is within its discretion, the court may condition the stay "upon such terms as may be just." See Ilton v. Stage Street Realty Corp., 212 A.D.2d 760, (2d Dep't 1995) (holding that the lower court properly granted stay of foreclosure sale on the condition that defendant pay the plaintiff $7,500.00 to defray part of her legal expenses). Accordingly, should the Court determine that a stay of the entry of Plaintiffs' judgment is warranted, Plaintiffs respectfully request that the Court condition the stay upon the posting of an undertaking.

18. At the present time, it is unknown when a decision on Defendant's motion to set aside the verdict will be rendered. Plaintiffs do know that they face the potential inability to

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