

Memorandum in Opposition

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #3

May 27, 2011

S. 4034
A. 6162

By: Senator Golden
By: M. of A. V. Lopez

Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: 30th day after it shall have
become a law.

AN ACT to amend the civil practice law and rules, in relation to temporary restraining orders.

LAW AND SECTION REFERRED TO: CPLR §6313

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES **OPPOSES THIS LEGISLATION**

This bill would amend CPLR 6313(a) to provide that the hearing on a preliminary injunction must be held within ten days of the granting of a temporary restraining order and that the restraint would be automatically vacated on the expiration of the ten-day period. The bill further provides that the hearing could not be further adjourned without the restrained party consenting to it, effectively limiting the court to imposing a temporary restraining order for no more than ten days. The bill further provides that once the hearing is held, if the court does not immediately issue a preliminary injunction, it could not further extend the temporary restraining order without a bond, nor could the court adjourn the hearing without the restrained party's consent. The provision would prohibit a new restraining order where the original restraint has been vacated.

While the Committee acknowledges that there are instances where temporary restraining orders are allowed to continue for unreasonably long periods of time, this bill would create rigid rules that would unduly constrict judicial discretion in those instances where temporary restraining orders are needed. In order to obtain a temporary restraining order under CPLR 6313(a), the movant "shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had. . . ."

Under this amendment, a movant with a legitimate and real need for protection of a temporary restraining order would find the order automatically terminated by operation of the proposed CPLR 6313. While the procedure for automatic expiration of temporary restraining orders may work well in federal courts, where judges have adequate time to address preliminary injunction motions in a timely fashion, given the larger number of preliminary injunction motions pending in New York State courts, a similar rule in State procedure is impractical and will lead to injustice and unfair prejudice. Unlike Fed. R. Civ. P. 65(b)(2), the proposed amendment would afford the court no discretion, even where the court finds there is good cause

for the extension. Only the party restrained (which is presumably threatening to take improper action in violation of the rights of the movant) can consent to extend the restraint --- the court would be powerless to do so.¹

CPLR 6313(a) now directs the court to set down the hearing on a preliminary injunction after a temporary restraining order “at the earliest possible time.” Generally, the return date is within a reasonable period of time but may be extended because of briefing schedules requested by the parties or the schedule of the court. Because the moving party on a preliminary injunction motion will generally have filed its papers to obtain the order to show cause, it is often the defendant or the court that may cause the delay. The proposed legislation, however, would lead to the automatic expiration of the temporary restraining order even where the delay was not the fault of the moving party and that party would face irreparable injury without the restraint.

Moreover, since 22 NYCRR § 202.7(f) now supplements the requirements of CPLR 6313(a) and requires that the party seeking the restraint must give the party to be restrained notice of “the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.” This generally affords the party seeking to be restrained the opportunity to be heard at the outset (except where the movant can show significant prejudice from giving such notice) and helps ensure that such restraints are only entered where they are warranted. The bill makes no distinction between those restraints issued after notice to the defendants and those that are issued with no notice whatsoever. Compare Fed. R. Civ. P. 65(b)(3) (requiring hearing at “the earliest possible time” where restraint issued “without notice”).

The bill also provides for a mandatory undertaking where the temporary restraining order is extended after the hearing but while the court is considering the preliminary injunction motion. CPLR 6313(c) now makes the undertaking within the discretion of the court on a temporary restraining order, and CPLR 6312(b) makes it mandatory on the issuance of a preliminary injunction. Often the undertaking presents a significant hurdle to the party needing relief and the amount of the undertaking is often highly contested. The Committee believes that the current structure of CPLR 6312(b) and 6313(c) is sound as it gives the court adequate time to consider the amount of the undertaking rather than being forced to make a decision without adequate time for due deliberation and consideration.

For the reasons stated above, the Committee on Civil Practice Law and Rules **OPPOSES** this legislation.

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Chair of the Committee: Hon. Stephen G. Crane

¹Fed. R. Civ. P. 65(b)(2) provides: “Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry — not to exceed 14 days — that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.”