

When Mall Stores Move To Close, Simon Says Sue You

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In recent years, the demand for physical retail space has fallen precipitously as American consumers increasingly shop online. In an effort to keep retail tenants in its malls, mall giant Simon Property Group has taken an unusual approach: it has sued them. Facing a rash of potential store closures, Simon has repeatedly sued its own tenants to try to prevent them from vacating their stores before their leases expire.

In multiple cases, upon hearing that a retailer was planning to shutter stores and break its leases, Simon sued the retailer, seeking an injunction preventing the retailer from going dark. Three recent such suits – against fashion retailer Kenneth Cole, shoe retailer Wolverine and coffee and tea purveyor Starbucks – proceeded to evidentiary hearings, with mixed results for Simon. Simon lost against Kenneth Cole and Wolverine, but won against Starbucks. The lengthy judicial opinions explaining each result are instructive for retail landlords and tenants alike.

Injunctions Are Rare

Courts rarely impose injunctions in cases of premature store closure. Instead, courts typically require the tenant to pay the landlord for any lost rent and expenses. The rare cases in which courts have imposed injunctions against retailers have involved anchor tenants, the loss of which would have profoundly impacted an entire mall or shopping center. Until Simon's victory against Starbucks, no court had ever imposed a nationwide injunction prohibiting a non-anchor retailer from closing multiple stores.

Similar Suits

Simon's suits against Kenneth Cole, Wolverine and Starbucks were similar. In each case, Simon sought to enforce a clause in its store leases requiring the tenant to "continuously operate" its store during normal business hours over the lease term. Simon sought a preliminary injunction against each retailer, which would have prohibited the retailer from closing any stores in Simon malls – 43 outlet stores in *Simon v. Kenneth Cole*; 69 Hush Puppies, Stride Rite, Merrell and Sperry Top-Sider stores in *Simon v. Wolverine*; and 77 Teavana stores in *Simon v. Starbucks*. All three cases were decided by the same judge, in Indiana state court. (Simon is based in Indiana.) The stores at issue in all three cases occupied only a tiny fraction of the gross leasable area within the malls or shopping centers in which they were located. None of the closures would have triggered a co-tenancy provision in any other tenant's lease.

¹ The authors are partners at Morrison Cohen LLP and represented Kenneth Cole in *Simon Property Group, L.P. v. Kenneth Cole Consumer Direct, LLC*.

Different Results

In all three cases, Simon failed to present evidence as to how, if at all, the closure of a particular store would harm Simon. Instead of presenting such evidence, which would have required a mall-by-mall analysis of factors such as size, layout, location and demographics, Simon focused in all three cases on the potential consequences of store closures generally. Simon asserted that the premature closure of a store can have a “domino effect,” causing other retailers to prematurely close their stores as well. In *Kenneth Cole* and *Wolverine*, the court found that Simon had not presented sufficient evidence that such consequences were likely to occur and denied Simon’s request for an injunction.

In *Starbucks*, however, Simon’s domino theory prevailed. The key difference between *Starbucks* and the prior two cases was witness testimony. “The evidence at the hearing showed that if Starbucks is able to walk away from its Lease obligations to continuously operate its stores, it may increase the risk other tenants will seek to do so. . . . Indeed, the evidence showed that the fact [that] other stores were closing in malls was a driving factor behind Starbucks’ announcement that it was closing its Teavana stores.” By supporting Simon’s domino theory, the witness testimony in *Starbucks* filled the evidentiary holes that existed in Simon’s case in *Kenneth Cole* and *Wolverine*.

At the same time, the harm to Starbucks in keeping its Teavana stores open was found to be small. Teavana, unlike the stores at issue in *Kenneth Cole* and *Wolverine*, is a division within Starbucks and not a separate legal entity. As a result, the court looked at Starbucks’ company-level profitability and concluded that an injunction preventing Starbucks from closing its Teavana stores would not jeopardize the company’s survival. By contrast, in *Kenneth Cole* and *Wolverine*, the court looked solely at the financials of the operating subsidiaries and concluded that an injunction might bankrupt the subsidiaries. Starbucks’ financial wherewithal was a significant factor in the court’s decision to grant an injunction.

Retail Tenants Beware

Retail tenants with continuous operations provisions in their store leases need to be aware that such provisions can be used to prevent the retailer from vacating its store prematurely. The decisions in *Kenneth Cole*, *Wolverine* and *Starbucks* suggest practical steps retailers can take to mitigate the risk of an injunction in the event the retailer needs to close its store.