

Sala Corp. v DJ Duri Corp.

2007 NY Slip Op 30416(U)

March 14, 2007

Supreme Court, Queens County

Docket Number: 0022157

Judge: Lawrence Vincent Cullen

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

<u>SALA CORP.,</u>	x	Index
		Number <u>22157</u> 2006
Plaintiff,		
- against -		Motion
		Date <u>January 16,</u> 2007
DJ DURI CORP., et al.,		Motion
		Cal. Number <u>30</u>
Defendants.		
x		Motion Seq. No. <u>1</u>

The following papers numbered 1 to 15 read on this application by plaintiff for an order of seizure pursuant to CPLR 7102 and to enjoin defendants from disposing, wasting, transferring or selling any equipment subject to a security interest and cross motion by defendants for consolidation of the counterclaim interposed in a related action entitled Sala Corp. v D & J Duri Corp., et al., (Sup Ct, Queens County, Index No. 23349/05) with this action or, in the alternative, to discontinue that counterclaim and allow the similar counterclaim interposed in this action to proceed.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-9
Answering Affidavits - Exhibits.....	10-13
Reply Affidavits.....	14-15

Upon the foregoing papers it is ordered that the application and cross motion are determined as follows:

This controversy arises out of the sale by plaintiff of a business known as "Wik Lounge" located at 194-03/05 Northern Boulevard, Flushing, New York to D & J Duri Corp., as evidenced by a contract dated January 14, 2005. Thereafter, on February 18, 2005, defendants executed two promissory notes and security agreements for the sums of \$12,000 and \$68,000. Defendants are currently in default on the notes due on August 18, 2006.

In prior proceedings in the 2005 action, Justice Roger N. Rosengarten issued an order dated May 19, 2006 directing the release of the \$12,000 note being held in escrow by plaintiff's attorney to satisfy any outstanding violations or taxes that may have accrued prior to the date of closing. The order made no reference to the counterclaim interposed but provided for the resolution of the issue of attorneys' fees at the trial of the matter.

Although defendants characterize plaintiff's request as an attempt to foreclose a lien or an application under Article 62 for an attachment, plaintiff has asserted an action for replevin and currently seeks seizure under CPLR 7102. When requesting seizure, it is incumbent upon the movant to establish a probability of success on the merits, a superior possessory interest, a wrongful holding of the chattels and the lack of a known defense. (See, Red Apple Supermarkets v Malone & Hyde, Inc., 228 AD2d 176 [1996].) An affidavit clearly identifying the chattels to be seized as well as the value of the items claimed is required. (CPLR 7102[c].)

Plaintiff seeks the immediate possession of the equipment detailed in "Schedule A" annexed to the contract of sale as well as the collateral set forth in the UCC financing statement which includes "all machinery equipment, furnishings, lighting, inventory, fixtures, property, personal or otherwise, situated and located at 194-05 Northern Boulevard, Flushing, New York." Based on provisions in the contract, notes, security agreements and financing statement, plaintiff further states the items to be seized include all property acquired after the execution of the notes.

Although defendants contend after-acquired property was not within the contemplation of the parties, paragraph 3 of the January 14, 2005 contract provides,

"a security in all the goods and chattels and all other personal property mentioned in Schedule A hereof and all other personal property, goods and chattels thereafter-acquired used in connection with the aforesaid business, together with all proceeds thereof and all increases, substitutions, replacements, additions and accessions thereto."

However, even assuming for the purpose of this application that after-acquired property is subject to the security agreements, the low valuation provided by plaintiff of \$5,000 to \$7,500 for the chattels and the lack of a specific description of

the items to be seized, renders this application inadequate. Moreover, defendants have raised a defense/counterclaim in both the 2005 action and this matter as to plaintiff's creation of concealed building code violations that necessitated substantial construction alterations and generated losses in the approximate amount of \$100,000. In light of the foregoing, an order of seizure is not warranted. (See, Astrep Serv. Corp. v Banco Popular N. Am., 19 AD3d 341 [2005]; Zweng v Thompson, 283 AD2d 641 [2001].) However, injunctive relief is appropriate to preserve plaintiff's interest in the goods, chattels and personal property used in connection with the Wik Lounge. (Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2006]; Ying Fung Moy v Hohi Umeki, 10 AD3d 604 [2004].)

The court notes that the conclusory assertions of improper service raised by defendant Yoon are insufficient to raise a valid jurisdictional objection to this application.

Defendants' cross motion for consolidation is granted as these separate matters arise out of the same contractual agreement. Contrary to plaintiff's contentions no prejudice will result as no impediment exists to the enforcement of the May 19, 2006 order. The two actions are, therefore, consolidated under Index No. 22157/06. A new caption is not required as the two actions include the identical parties.

Accordingly, defendants are enjoined from selling, encumbering, transferring, assigning or otherwise dissipating or disposing of any chattels set forth in Schedule A, as well as any after-acquired property located at 194-03/05 Northern Boulevard, Flushing, except as necessary to maintain the normal operations of the business. Any other dispositions or changes in the status of the subject property by defendants shall require an order of this court. The foregoing is conditioned on plaintiff filing an undertaking pursuant to CPLR 6312, in the amount of \$500, within 30 days after service of a copy of this order with notice of entry.

Defendants' shall serve a copy of this order with notice of entry on the Clerk of Queens County who shall transfer the file in the action under Index No. 23349/05 into the file under Index No. 22157/06, in order to effectuate the requested consolidation.

Dated: March 14, 2007

LAWRENCE V. CULLEN, J.S.C.

