

Born To Build, L.L.C. v Saleh
2011 NY Slip Op 32571(U)
September 20, 2011
Supreme Court, Nassau County
Docket Number: 009558/2011
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

BORN TO BUILD, L.L.C.,

Plaintiff,

- against -

INDEX NO.: 009558/2011
MOTION DATE: 7/22/2011
SEQUENCE NO.: 01, 02, 03

IBRAHIM SALEH, 44 W. 37 STREET, LLC,
ALAN CHU YU MUNG, ZHANG FUAN WONG,
and JOHN DOES 1 through 10 (the persons intended
being other individuals or entities claiming interests
in 44 W. 37 Street, LLC,

Defendants.

The following documents were read on this Motion:

- Motion to Dismiss Complaint 1.
- Affirmation in Opposition to Motion to Dismiss 2.
- Affidavit of Zhang Fuan Wong 3.
- Order to Show Cause to Enjoin Plaintiff from filing Notice of Pendency 4.
- Affirmation in Opposition to Motion 5.
- Order to Show Cause to Direct Clerk of New York County to File
Notice of Pendency and Enjoin Transfer or Encumbrance 6.

PRELIMINARY STATEMENT

In Motion 01 defendants 44 W. 37 Street, LLC, Zhang Fuan Wong, and Alan Chu Ya Mung move to dismiss the complaint. Motion 02 seeks an injunction on behalf of 44 W. 37 Street, LLC precluding plaintiff from filing a lis pendens against the real property known as 44 and 46 W. 37 Street, New York, New York. Motion No. 3 is by plaintiff for an order compelling the Clerk of the County of New York to accept for filing the lis

pendens as annexed to their motion papers.

BACKGROUND

Plaintiff has filed a judgment for \$3,563,307.58 against Ibrahim Saleh, whose whereabouts are unknown, but who is believed to have left the country in the wake of an investigation by the F.B.I. involving unlawful importation and sale of clothing with falsified labels of well-known designers. Plaintiff performed construction services having a value of more than \$2.5 million without receiving any payment from Saleh. They are now seeking to extract funds from properties which they suspect are in fact beneficially owned or controlled by Saleh. 44 - 46 W. 37 Street, New York, New York is apparently among them.

DISCUSSION

Plaintiff claims to have purchased the interest of Ibrahim Saleh in 44 W. 37 Street, LLC at a City Marshal's sale on June 27, 2011, at which time they believed that Saleh possessed either a sole, or at least, a controlling interest. This belief was based upon his signing papers as "Manager" in connection with the acquisition of the property. Defendants Alan Chu Yu Mung and Zhang Fuan Wong assert that they are the sole members of the company, and that Saleh's former contingent interest was terminated by his failure to make payment to them under the terms of the agreement.

The plaintiff stipulated with Mung and Wong that they would not take certain steps pending the determination of the action, but that this did not preclude the filing of a Notice of Pendency. An effort to file such a document was rejected by the Clerk of New York County, with the proviso that such a document would be filed if a Court of competent jurisdiction ordered him to do so. This is the relief sought in Motion Sequence 03.

Motion Sequence 01 seeks dismissal of the complaint against 44 W. 37 Street, LLC, Alan Chu Yu Mung, and Zhang Fuan Wong. These parties were in the process of commencing an action against Born To Build, LLC when they learned that they were defendants in this action. It was this situation which produced the stipulation among the

parties to withhold action pending resolution of the action. (Exh. "C" to Wong affidavit). Among other commitments, Born to Build agreed not to "encumber, mortgage or use as security or collateral any and all assets, plant, and/or good will, of 44 W. 37 Street, LLC. The term "encumber" was specifically stated to exclude the filing of a Notice of Pendency with the Clerk of New York County, but 44 LLC did not concur in the filing of such a Notice and reserved the right to challenge such filing.

44 W. 37 Street, LLC acquired title to the premises by deed dated May 27, 2010. Mung and Wong do not deny their involvement with Saleh, but submit as Exh. "E" to the Wong affidavit a notarized statement from Saleh to the effect that Wung and Wong had expended the entire purchase price of \$4,209,116.10. They offered Saleh a 30% interest in the in 44 W. 37 Street, LLC upon payment to them the sum of \$1,262,734.83. Mung and Wong assert that the funds were never advanced by Saleh, and, as a consequence, the First Modification of the Operating Agreement substituted Zang Fuan Wong in place of Ibrahim Saleh as manager on April 1, 2011.

Born to Build does not claim title to all or a portion of the real property. Rather, it claims membership interest in the limited liability company which holds title. Membership interest in a limited liability company is personal property and does not give a member interest in specific property of the limited liability company. (Limited Liability Company Law § 601; *Sealy v. Clifton*, 68 A.D.3d 846, [2d Dept.2009]). Plaintiff is not entitled to file a Notice of Pendency against the real estate, and their motion for an Order directing the Clerk of New York County to accept and file a Notice of Pendency, and to preclude 44 W. 37 Street from transferring or encumbering the premises is denied.

The motion by Order to Show Cause on behalf of 44 W. 37 Street, LLC, Alan Chu Ya Mung, and Zhang Fuan Wong to preclude plaintiff Born to Build, LLC from filing a Notice of Pendency against the real property is granted for the same reason.

The foregoing defendants also move to dismiss the complaint of Born to Build, LLC. This motion is based upon CPLR § 3211 (a)(1), claiming that the defense is based

upon documentary evidence.

CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, “. . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim”. (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

There can be no question but that 44 W. 37 Street, LLC is the owner of the subject property. While the notarized statement of Saleh certainly leads to the likelihood that he did not exercise his option to acquire a 30% membership interest in the limited liability company, it cannot be said that it fully resolves all factual issues with respect to his interest in the company. Despite the language of the statement, coupled with the modification of the Operating Agreement, it is not factually impossible that Saleh somehow possesses a membership interest in 44 W. 37 Street, LLC. The documentary evidence is convincing, but not conclusive on the subject of the relationship between Saleh and 44 W. 37 Street, LLC.

While defendants are not entitled to dismissal of the complaint based upon documentary evidence, plaintiff is not entitled to injunctive relief limiting the company from transferring or encumbering the property has been denied. “To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction.” (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 6301, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

“Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient”. (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, “(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm”. (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073.

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court’s formidable equity power in cases where the moving party’s position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1st Dept. 2007]).

Under the facts of this case, the Court does not find that plaintiff has established a likelihood of success, could not be made whole by monetary damages, or that the equities weigh in their favor.

This constitutes the Decision and Order of the Court.

Dated: September 20, 2011


J.S.C.

ENTERED
SEP 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE