

**Gold Center, Inc. v B.A.W. Jewelry Manufacturing
Inc.**

2005 NY Slip Op 30236(U)

October 31, 2005

Supreme Court, New York County

Docket Number: 0601743/2005

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN
Justice

PART 11

GOLD CENTER, INC.

Plaintiff,

- v -

B.A.W. JEWELRY MANUFACTURING INC.

Respondent.

INDEX NO. :601743/05

MOTION DATE:

MOTION SEQ. NO.: 002

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PA PERS NUMBERED
FILED
NOV - 4 2005
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: [] Yes [x] No

Plaintiff moves, by order to show cause, for an order (1) granting leave to amend the complaint to include claims for conversion and fraudulent conveyance and for permission to serve and file a supplemental summons and complaint naming Baruch Alaiev ("Alaiev"), the President of defendant B.A.W. Jewelry Manufacturing Inc. ("BAW") as a defendant; (2) issuing an order of attachment of all assets owned or possessed by defendant Baruch Alaiev including, but not limited to, the inventory formerly in the possession and control of BAW, as well as the

key to a safe deposit box in a bank in New Jersey containing the inventory, (3) enjoining BAW and Alaiev and their agents, servants and employees from disposing of the assets or property owned by BAW, and (4) directing defendants to provide plaintiff with the books and records of BAW and receipts for fine gold. BAW opposes the motion, which is denied for the reasons below.

Plaintiff is a Manhattan jewelry merchant engaged in the purchase and sale of jewelry and precious metals. The underlying action seeks damages in the amount of \$49,049.46 for jewelry sold and delivered to BAW by the plaintiff. The original complaint contained causes of action against BAW for goods sold and delivered and for attorneys' fees.

BAW now moves for an order attaching the inventory in the possession and control of BAW and/or its President Alaiev, and to amend its complaint to include claims against Alaiev for conversion and fraudulent conveyance. In support of the motion, plaintiff submits an affidavit from its President and principal, Nick N. Deryahan ("Deryahan"). According to Deryahan, he was notified by BAW in May 2005, that BAW had ceased to conduct business and had vacated its business premises, and that shortly thereafter, plaintiff initiated this action. Deryahan states that prior to the commencement of this action, BAW had on displayed at its premises a substantial display of inventory of precious metal and jewelry. Deryahan also relies on the transcript of the oral argument of plaintiff's motion for a default judgment, which was subsequently denied by this court. The transcript reflects that during oral argument, counsel for plaintiff informed the court that Alaiev had removed BAW's inventory and placed it in a safe deposit box or vault in New Jersey and delivered the key to an individual named Alan Gromfeld, who is an accountant for BAW and Alaiev. Deryahan states that BAW has been unable to locate

an accountant by that name known in New York City or registered with the American Institute of Certified accountants.

Deryahan also states that his "anecdotal information is that BAW owes hundreds of thousands and perhaps millions to the trade and it appears that [Alaiev] have appropriated all of BAW's assets and has converted same to his own use in fraud of creditors of BAW."

In opposition, BAW argues that plaintiff has failed to make a prima facie showing required for an attachment since there is insufficient evidence of an intent to defraud. It also submits the affidavit of Alaiev who states that BAW paid plaintiff \$6,000 on March 18, 2005 and on that date BAW gave plaintiff three kilograms of fine gold having a reasonable value of approximately \$40,000. Deryahan denies that plaintiff has been paid for the jewelry at issue.

To obtain (or to confirm) an order of attachment, "a plaintiff must show probability of success on the merits, the existence of one or more grounds for attachment provided in CPLR 6201, and that the amount demanded exceeds all counterclaims known to plaintiff." Computer Strategies, Inc. v Commodore Business Machines, Inc., 105 A.D.2d 167, 172-173 (2d Dept 1984), appeal and reargument denied, 110 A.D.2d 743 (2d Dept 1985); see, also, Arzu v Arzu, 190 A.D. 2d 87 (1st Dept 1993). Here, while BAW apparently has no counterclaims, plaintiff has not shown probability of success on the merits of the underlying action or a ground for attachment under CPLR 6201. The affidavit of Deryahan, which is unsupported by any documentary evidence, is insufficient to demonstrate probability of success on the merits, particularly in view of the statements by Alaiev that BAW has been paid.

In any event, even assuming arguendo that Deryahan's affidavit were sufficient, plaintiff

has not demonstrated that an order of attachment is warranted under CPLR 6201(3).¹ To obtain an attachment on this ground, “the plaintiff must demonstrate that the defendant has or is about to conceal his or her property in one or more enumerated ways, and has acted or will act with the intent to defraud his or her creditors, or to frustrate the enforcement of a judgment in favor of the plaintiff (citations omitted).” Mineola Ford Sales, Ltd. v Rapp, 242 A.D.2d 371 (2d Dept 1997). The plaintiff must also provide evidence of an intent to defraud or to frustrate the enforcement of any judgment rendered in its favor. See, Lago X-Ray Systems, Inc. v Fingerhut, 88 A.D.2d 425 (2d Dept 1982), appeal dismissed, 58 N.Y.2d 606 (1983). Thus, “[t]he mere removal or assignment or other disposition of property is not grounds for an attachment.” Id., at 429.

Plaintiff here submits no evidence to demonstrate that BAW is going out of business for the purpose of defrauding it or its other creditors or to frustrate the enforcement of any judgment plaintiff may obtain against defendant. And, Deryahan’s conclusory and unsupported statements to the contrary are insufficient to demonstrate an intent to defraud. Accordingly, plaintiff has not demonstrated sufficient grounds for granting an order of attachment.

¹CPLR 6201(3) provides that:

An order of attachment may be granted in any action ... where plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants: (3) the defendant, *with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor*, has assigned, disposed of, or encumbered or secreted property, or removed it from the state or is about to do any of these acts.

Plaintiff also has not shown that it is entitled to a preliminary injunction. A preliminary injunction is “drastic relief,” and thus “is appropriate only where a party has established (1) a likelihood of success on the merits of the pending action, (2) irreparable injury absent such relief, and (3) a balancing of equities in favor of the relief sought” The New York Automobile Ins. Plan v. New York Schools Ins. Reciprocal, 241 AD2d 313, 314 (1st Dept 1997)(citations omitted). Here, putting aside whether plaintiff has shown a likelihood of success on the merits, plaintiff has failed to show irreparable injury in absence of injunctive relief since this action is for money damages. Moreover, although plaintiff asserts that without an injunction it may not be able to collect on any judgment it eventually may obtain, this assertion does not provide a ground for granting injunctive relief. As the First Department recently explained:

Since under the substantive rule of equity, a general creditor has no cognizable interest in or right to interfere with the use of unencumbered property of a debtor until the creditor obtains a judgment, the debtor’s disposing of assets, even the rendering the anticipated judgment uncollectible, “will not have ‘produce[d] [cognizable] injury to the plaintiff’ and thus will not support a temporary injunction (CPLR 6301)”

Dinner Club Corp. v. Hamlet On Olde Oyster Bay Homeowners Association, Inc., ___ AD2d ___, 801 NYS2d 25, 26 (1st Dept 2005), quoting, Credit Agricole Indosuez v. Rossoyskiy Kredit Bank, 94 NY2d 541, 549 (2000).

BAW also seeks leave to amend its complaint to add Alaiev as a defendant and to include causes of action against him for conversion and fraudulent conveyance. Under CPLR 3025(b) motions to amend are freely granted in the absence of prejudice or unfair surprise resulting from delay. Martin v. Briggs, 235 AD2d 192, 199 (1st Dept 1997). “To conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated.” Zaid Theater

Corp. v Sona Realty Corp., 18 AD2d 352, 354-55 (1st Dept 2005). Defendants do not claim prejudice and unfair surprise in their opposition to plaintiff's motion to amend. Therefore, the issue is whether the proposed amendments are of sufficient merit.

To demonstrate merit, the "proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as matter of law." Daniels v. Empire-Orr, Inc., 151 AD2d 370, 371 (1st Dept. 1989)(citations omitted). When the proponent meets this initial burden, "the merit of the alleged pleading must be sustained ...unless the alleged insufficiency or lack of merit is clear and free from doubt." Id.

The proposed second cause of action alleges that Alaiev "took physical possession of the entire inventory of [BAW] from the State of New York to a safe deposit box in that State of New Jersey," and that these acts constitute "conversion of the assets of [BAW] and were made in violation of Article 10 of the Debtor and Creditor Law, and specifically those provisions which prohibit transfers with the intent to defraud creditors." These allegations are insufficient to satisfy plaintiff's burden of demonstrating that it has a prima facie cause of action against Alaiev, the President of BAW, for conversion and fraudulent conveyance of property belonging to BAW.

To properly plead a cause of action for conversion, it is incumbent upon plaintiff to allege facts establishing that he owned or had a superior right to the materials in question, that he demanded their return, and that defendant refused to deliver them. See Weider v Chemical Bank, 202 AD2d 168 (1st Dept), lv denied 83 NY2d 759 (1994). "A conversion action cannot predicated on an equitable interest or a mere breach of a contractual obligation." Traffix Inc. v.

Herold, 269 FSupp2d 223 (SD NY 2003). As plaintiff has failed to plead that he had actual ownership of the jewelry at issue but, instead, alleges that it was entitled to money based on the contractual obligations, the proposed amended complaint fails to state a cause of action for conversion.

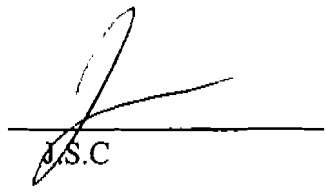
“A fraudulent conveyance is a transfer made without fair consideration by a debtor when he or she is insolvent or which renders him and her insolvent (*see* Debtor and Creditor Law §273), or by a defendant in an action for money damages who is unable to satisfy a judgment that plaintiff finally obtains (*see* Debtor and Creditor Law §273-a).” Palermo Mason Construction, Inc. v. Aark Holding Corp., 300 AD2d 458, 460 (2d Dept 2002). Here, there is no allegation that the alleged transfer of property to Alaiev was made without fair consideration or that BAW was insolvent when the transfer was made or that the transfer rendered BAW insolvent such that would state a claim under Debtor and Creditor Law § 273. Moreover, as plaintiff has not obtained a judgment against defendants, it is not entitled to relief under Debtor and Creditor Law § 273-a. *See Frybergh v. Weissman*, 145 AD2d 531 (2d Dept 1988)(holding that the existence of an unsatisfied judgment is an essential element of a claim under Debtor and Creditor Law § 273-a). Next, as the allegations in the proposed amended complaint are insufficient to demonstrate actual intent, plaintiffs have not stated a claim under Debtor and Creditor Law § 276. *See Maine Midland Bank v. Murkoff*, 120 AD2d 122 (2d Dept 1986), appeal dismissed, 69 NY2d 875 (1987)..

Finally, plaintiff’s request for the books and records of BAW and other documentary evidence is denied as plaintiff can obtain these items during discovery.

Conclusion

Accordingly, it is
 ORDERED that plaintiff's motion for an order of attachment is denied; and it is further
 ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further
 ORDERED that plaintiff's motion for leave to amend the complaint to include claims for
 conversion and fraudulent conveyance and for permission to serve and file a supplemental and
 summons naming Baruch Alaiev as a defendant is denied; and it is further
 ORDERED that plaintiff's request for the books and records of BAW and other
 documentary evidence is denied.

DATED: October 31, 2005



J.S.C

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

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