

Dembeck v 220 Central Park South, LLC

2005 NY Slip Op 30335(U)

December 30, 2005

Supreme Court, New York County

Docket Number: 120532/03

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC
Justice

PART 36

Louise E. Ben Reck

INDEX NO. 120532/05

220 Pennon Park South LLC

MOTION DATE _____

MOTION SEQ. NO. 007

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided*
pursuant to attached Ben

FILED
JAN - 6 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/30/05

HON. MARILYN SHAFER, JSC
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 36

LOUISE DEMBECK,
Plaintiff,
-against-

INDEX NO. 120532/03
MOTION DATE _____
MOTION SEQ. NO. 007

220 CENTRAL PARK SOUTH, LLC,
Defendant.

The following papers, numbered 1 to 7, were read on this motion to renew:

	<u>PAPERS NUMBERED</u>
Order to Show Cause — Affidavits — Exhibits	1, 2, 3
Answering Affidavits — Exhibits	4
Supplemental Affirmation — Exhibits	5
Affirmation in Opposition to Supplemental Affirmation	6
Transcript of Oral Argument dated August 25, 2005	7

Cross-Motion: **Yes** **No**

Upon the foregoing papers, it is ordered that plaintiff's Order to Show Cause is decided as follows:

In an Order dated October 13, 2004 ("Prior Order"), this Court granted defendants' motion for partial summary judgment to dismiss and dismissed plaintiff's first, second and fifth causes of action. The first and second causes of action were based upon fraud. Plaintiff now brings this Order to Show Cause for: (1) leave to renew her opposition to defendants' motion for

summary judgment to dismiss counts one and two of the complaint; (2) an order preventing defendant from interposing further motions for summary judgment prior to the completion of discovery; (3) an order compelling defendant to comply with plaintiff's Requests for Documents; (4) a preliminary injunction or an order of attachment to prevent defendant from conveying defendant's building; and (5) an order directing defendant and its counsel to provide sworn affidavits that they have not destroyed or withheld any documents since service of plaintiff's two document requests.

Plaintiff seeks renewal based upon documents produced by defendant subsequent to the issuance of the Prior Order. These documents indicate plans by defendant to renovate the service elevator prior to plaintiff's renewal of her lease with defendant, and therefore, plaintiff argues, establishes fraud by defendant. A motion for leave to renew under CPLR § 2221 is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and, therefore, not brought to the court's attention (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]; *see also Dankner v Szurzan and Dorf, Inc.*, 226 AD2d 669 [2d Dept 1996]). Plaintiff's application for leave to renew is granted. Upon renewal, however, this Court finds that these documents do not sufficiently raise material questions of fact as to whether defendant willfully or intentionally concealed the plans for the elevator renovation in order to induce her to sign the lease. In order to demonstrate defendant's intent to deceive, plaintiff must first establish that defendant had a duty to disclose this information, thereby making such information material to the renewal of her lease. Absent a special relationship of trust and confidence, defendant is under no duty to disclose to plaintiff its plans to renovate the elevator (*See Wender v Gilberg Agency Inc.*, 304 AD2d 311 [1st Dept 2003]). Here, plaintiff has failed to sustain her burden in establishing that defendant willfully or

intentionally concealed any information that it had a duty to disclose. Accordingly, upon leave for renewal, plaintiff's motion is denied.

Preclusion of defendant from interposing further motions for summary judgment

This Court finds no basis to preclude defendant from interposing further motions for summary judgment. Defendant has not objected to the continuation of discovery while its second motion for summary judgment was *sub judice* and there is no evidence that defendant has moved for summary judgment in an effort to obstruct or delay discovery. Accordingly, this branch of plaintiff's motion is similarly denied.

Compel discovery

In view of the fact that defendant has already produced documents relevant to plaintiff's apartment related to asbestos and/or mold removal, and there are no allegations as to mold and/or asbestos in other apartments in the building, plaintiff's request is denied. However, defendant is directed to provide an affidavit by Ms. Welsh indicating that a search was made, what efforts were made to search for superintendent notebooks, internal emails, employee memorandum or phone logs concerning plaintiff and/or the premises, and that such items do not exist. Defendant is further directed to produce copies of the doormen log books related to plaintiff and/or the premises.

Preliminary Injunction

Pursuant to CPLR §6301 “[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the *subject of the action*, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act,

which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.” In general, a creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor prior to obtaining judgment. Where, as here, the action is for money damages, and said monetary damages are not “the subject of the action,” a preliminary injunction is not appropriate (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]). Even assuming, *arguendo*, plaintiff could make a sufficient showing that defendant is dissipating its assets in an effort to render plaintiff’s anticipatory judgment ineffectual, this branch of plaintiff’s Order to Show Cause would still be denied. It is well established that in order to prevail upon a motion for a preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence that 1) the moving party will succeed on the merits of the action, 2) the moving party will suffer irreparable injury absent the issuance of a preliminary injunction, and 3) a balancing of equities favors the movant’s position (*see* CPLR 6301; *Price Paper & Twine Co. v Miller* 182 AD2d 748 [2nd Dept 1992]; *Karl v Wood*, 137 AD2d 22 [2nd Dept. 1988]). Since plaintiff’s claims are for money damages only, plaintiff cannot satisfy the second prong necessary in order to succeed in a motion for a preliminary injunction. It is well established that monetary damages do not constitute irreparable injury (*ERS Enterprises, Inc. v Empire Holdings, LLC*, 286 AD2d 206 [1st Dept 2001]). Accordingly, this branch of plaintiff’s Order to Show Cause is denied.

Order of Attachment

Since attachment is a drastic provisional remedy, the courts have strictly construed the attachment statute in favor of those against whom it may be employed (*Michaels Electrical Supply Corp. v Trott Electric, Inc.*, 231 AD2d 695 [2d Dept 1996]). Plaintiff has not made a sufficient showing that the sale of the building is an attempt by defendant to defraud plaintiff.

“The mere removal or assignment or other disposition of property is not ground for attachment. There must coexist an intent of the debtor to defraud his creditors . . . Such intent must be proved, and the facts relied upon to prove it must be fully set out in the moving affidavits” (10 Carmody-Wait, New York Practice, p.51). In the instant matter, plaintiff merely raises allegations of defendant’s intent to defraud in a supplemental affirmation. The intent to defraud must be proved. Even affidavits containing allegations raising a suspicion of an intent is not enough (*Rosenthal v Rochester Button Co., Inc.*, 148 AD2d 375, 376 [1st Dept 1989]). Accordingly, this branch of plaintiff’s Order to Show Cause is similarly denied.

Affidavits from defendant

This portion of plaintiff’s Order to Show Cause is denied. There is no evidence that defendant or its counsel has destroyed or withheld any documents since service of plaintiff’s two document requests. As all parties are aware, CPLR § 3101(h) requires that a party amend/supplement its response to a request for disclosure promptly upon obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, is no longer correct and complete, and that the circumstances are such that a failure to amend or supplement the response would be materially misleading. CPLR §3101 makes clear each party’s continuing obligation in the discovery process.

For all the foregoing reasons, it is

ORDERED that the portion of the Order to Show Cause for leave for renewal is granted, and upon renewal, plaintiff’s request for modification to the Prior Order is denied; and it is further

ORDERED that plaintiff’s request to preclude defendant from interposing further motions for summary judgment is denied; and it is further

ORDERED that plaintiff's request to compel defendant to comply with plaintiff's Request for Documents is granted to the extent that defendant is directed to provide copies of the doormen logs within 45 days of service of this order and decision with notice of entry; and it is further

ORDERED that defendant is directed to provide an affidavit by Ms. Welsh within 20 days of service of this order and decision with notice of entry; and it is further

ORDERED that portion of plaintiff's motion requesting a preliminary injunction is denied; and it is further

ORDERED that the branch plaintiff's request for an order of attachment is denied; and it is further

ORDERED that plaintiff's request for affidavits from defendant and its counsel is denied. This reflects the decision and order of this Court.

Dated: Dec. 30, 2005

HON. MARILYN BRAYER, J.S.C.

J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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