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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

Computer Horizons Corporation,
Plaintiff,

-v-

Gay Financial Network, Inc. (Now known as gfn.com, Inc.) GFN Holdings, LLC, GFN Financial, Inc., Walter B. Schubert Jr. (individually and as constructive trustee of the assets of Gay Financial Network, Inc.), Edward (a/k/a "Frits") Abell (individually and as a constructive trustee of the assets of Gay Financial Network, Inc.),
Defendants.

Index No.: 601443/04
Motion Date: 6/18//04
Motion Seq. No.: 001
Motion Cal. No.: _____

The following papers, numbered 1 to 390 were read on this motion for an attachment against property of defendants

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1-250
Answering Affidavits - Exhibits	251-349
Replying Affidavits - Exhibits	349-390

Cross-Motion: ☐ Yes ☒ No

Plaintiff moves by Show Cause Order pursuant to CPLR §§ 6210 and 6212 and Debtor and Creditor Law §§ 278 and 279 to restrain defendants from transferring their assets pending determination of this action or until the sheriff takes possession of such assets in satisfaction of a default judgment in the amount of $164,481.25 entered in its favor and against non-party Gay Financial Network, LLC. Defendants Walter

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Schubert, E. Frits Abell, Gay Financial Network, Inc. (now known as gfn.com, Inc), GFN Holdings, LLC, and GFN Financial, Inc. all oppose plaintiff's motion.[1]

To quote from the"the free encyclopedia" website known as wikipedia.org:

> "Dot-com (also dotcom or redundantly dot.com) companies were the collection of start-up companies selling products or services using or somehow related to the Internet. They proliferated in the late 1990s dot-com boom, a speculative frenzy of investment in Internet and Internet-related technical stocks and enterprises. The name derives from the fact that many of them have the '.com' DNS suffix built into their company name."

The genesis of the dispute before this court is the stock market "dot-com" company bubble burst that began in February 2000. On defendants' motion, the court judicially notices that beginning in 2000, many "dot-com" enterprises went bankrupt, and the investment dollars for technology and internet "start-up" issues plummeted.

Non-party Gay Financial Network, LLC, a New York limited liability company, incorporated in 1997 and defendant Gay Financial Network, Inc., a Deleware corporation chartered in 1999, were formed by defendant Walter Schubert, Jr., the first openly gay member of the New York Stock Exchange. The purpose of

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[1]On May 18, 2004, the court issued a temporary restraining order prohibiting defendants from transferring any assets to the extent of the amount of the default judgment pending the hearing that took place on June 10, 2004. The court declined to continue that temporary restraining order beyond the hearing date.

both companies was the creation of an internet website that provided online trading, banking, home mortgages, insurance and other resources, services and products targeted to the financial needs of the gay and lesbian community in the United States.

Plaintiff's predecessor in interest G. Triad Development Corporation entered into a contract dated August 5, 1999 with defendant Gay Financial Network, Inc. to provide computer consulting services with respect to the launching of its website. Plaintiff rendered services from January 2000 to March 2000 during the height of the dot-com bubble deflation. Plaintiff delivered invoices for the services to defendant Gay Financial Network, Inc. and there is no dispute that plaintiff was not paid one penny.

On October 28, 2002, plaintiff, which is a New Jersey domiciliary, commenced an action in New Jersey Superior Court, which entered a Judgment by Default in the amount of $164,481.25 against non-party to this action, Gay Financial Network, LLC, a New York limited liability corporation. Such judgment was docketed in New York State Supreme Court on May 14, 2003.

In the action now at bar, plaintiff seeks to enforce the judgment in the amount of $164,481.25. Plaintiff also avers that defendants are the constructive trustees of the assets of Gay Financial Network, LLC and pursuant to Debtor Creditor Law §§ 200 et seq. seeks to set aside three transfers made by one or more of

the defendants as attempts to hinder, delay and/or defraud plaintiff from collecting on its claim. The three transactions that plaintiff seeks to set aside are (1) defendant Gay Financial Network, Inc.'s issuance on June 13, 2001 of promissory notes and the conveyance of a security interest (Senior Secured Notes) to defendant Walter Schubert and several non-parties as consideration for loans of personal funds made to that company (2) the Agency Agreement of October 1, 2001 under which GFN Holdings, LLC, undertook, for a one year and two month period, to promote, solicit business for and generally manage the business operations of Gay Financial Network, Inc. and receive, as full consideration, 20% of the net profits of Gay Financial Network, Inc.; and (3) the February 12, 2003 assumption of possession of the assets of Gay Financial Network, Inc. by GFN Financial, Inc. pursuant to the foreclosure upon the June 13, 2001 security agreements.

Plaintiff preliminarily moves for an order of attachment upon the assets of defendants pending resolution of this action.

CPLR § 6201 sets forth the standards for such relief, in pertinent part:

> An order of attachment may be granted in any action,...where the 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, when:
> 1. The defendant is a non-domiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

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3. The defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.

Under New York Law, attachment is an extraordinary remedy that as a derogation of common law is strictly construed against the party seeking to invoke the remedy. Penoyar v Kelsey, 150 NY 77 (1896). Even if plaintiff sustains its burden of establishing all the statutory elements, the court may still deny the harsh provisional remedy of attachment in the exercise of its discretion. Sartwell v Field, 68 NY 341 (1877).

CPLR §6212 requires that plaintiff demonstrate by affidavit that it has a cause of action, that it will probably succeed on the merits of such cause, that at least one of the grounds provided in CPLR § 6201 exists, and that the amount it demands from defendants exceeds all counterclaims known to the plaintiff. Defendants challenge plaintiff with respect to its probability of success on the merits and the existence of CPLR § 6201 grounds.

Plaintiff essentially argues that quasi in rem jurisdiction is necessary with respect to non-domiciliary defendant Walter Schubert, individual defendant who resides in New Jersey. The court disagrees with plaintiff that there is any per se rule with respect to non-domiciliaries, since the granting of injunctive relief is always a matter of a careful exercise of the court's

discretion. Elliott v Great Atlantic & Pacific Tea Company, 11 Misc2d 133, aff'd 11 Misc2d 136 (App. Term 1st Dept. 1958.) Here, since defendant Walter Schubert's creditors, as such, would not have a claim against the assets of the corporate defendants, by analogy, a creditor of the corporate defendants would have no claim against defendant Walter Schubert's personal assets. Eaton Factors Co., Inc. v. Double Eagle Corp., 17 AD2d 135 (1st Dept. 1962.) Nor does plaintiff allege that any of the defendants corporate assets were ever transferred to defendant Walter Schubert, as an individual. Since plaintiff's claims of non-payment for services rendered and fraudulent conveyances are only against and as and between the corporate defendants, it has not stated a valid cause of action against defendant Walter Schubert, as an individual and no attachment lies against that defendant.

With respect to the application of CPLR 6201 (1) to the corporate defendants, specifically defendant Gay Financial Network, Inc., which was chartered in the State of Deleware, the temporary loss of its charter does not support a grant of attachment relief against its assets. New York State courts recognize the laws of sister states that govern the corporate existence and power of foreign corporations. See Sinnot v Hanan, 214 NY 454 (1915). Defendants are correct that the Deleware statutes provide that the forfeiture of the corporate charter for Gay Financial Network, Inc. for an inadvertent failure to pay

franchise taxes did not render defendant Walter Schubert personally liable for the corporation's debt. The court also concurs that under Deleware law the subsequent reinstatement of the charter validated the corporate acts taken after the charter was forfeited. Accordingly, there was no lapse in defendant Gay Financial Network, Inc.'s qualification to do business in New York. Nor is this a case where defendant corporation only belatedly applied for a license to do business in New York state. See Cf. Elton Leather Corporation v First General Resources Company, 138 AD2d 132 (1st Dept. 1988). In fact, throughout the existence of each corporate defendant, the same New York City address was listed as the principal office for each in every document submitted by the parties on this motion. Nor is the recent dissolution following reinstatement of the charter of Gay Financial Network, Inc., of any moment since the law requires the corporation to wind up its affairs after dissolution, including discharging or paying its liabilities. New York Business Corporation Law § 1005. Similar law pertains in Deleware. See Ross v Venezuelan-American Independent Oil Producers Association, Inc., 230 F. Supp. 761 (District Court Deleware 1964). Plaintiff has failed to establish CPLR § 6201 (1) as a ground for provisional relief against the corporate defendants.

The other ground that plaintiff alleges has been met is CPLR § 6201 (3), i.e. that the defendant, with intent to defraud his

creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts. Eaton, supra, at 136, sets forth the applicable law

> 'Fraud cannot be inferred, it must be proved.'***'The fact that the affidavits in support of an attachment contain certain allegations raising a suspicion of intent to defraud is not enough.' ...it must appear 'that such fraudulent intent really existed in the mind of the defendants, not merely in the ingenuity of the plaintiffs... 'Thus fraud is not presumed by a mere showing of the liquidation or disposal by the debtor of its business assets (citations omitted.)'

The record before this court does not support a finding of intent on the part of any of the defendants to defraud plaintiff judgment creditor by secreting and disposing of corporate assets. Such a finding is belied by the efforts of Gay Financial Network, Inc. to settle with plaintiff. Plaintiff failed to reject or even respond or acknowledge the settlement proposals that such defendant made in November 2000 and May 2002. Rather plaintiff did not begin collection efforts for more than two years after defendant's first proposal. It then failed to name defendant Gay Financial Network, Inc., the entity with whom it had the contract in its New Jersey action. It waited seven months more after deposing defendant Schubert pursuant to an information subpoena to commence the action now before the court. Contrary to its allegations, plaintiff has failed to show any intent on

the part of any of the defendants to frustrate the enforcement of any judgment, who, for more than two years after the final invoices of April 2000, received no communication from its creditor. Plaintiff has made no showing that any defendant secreted or disposed of any property with any intent to defraud creditors in the face of such silence, leaving the court to accept plaintiff's version of a stubborn, herculean, but perhaps ill advised mission on their part to continue to personally finance an insolvent enterprise.

Nor does plaintiff allege that there is any threat that the corporate defendant assets, such as funds in bank accounts, computers, website, or trademark will be or have been removed from this jurisdiction.

Plaintiff has not demonstrated any CPLR § 6201 grounds for an order of attachment against the assets of defendant Abell.

The court does not reach the question of the probability of plaintiff's success on the merits as its failure to meet its CPLR §6201 burden is dispositive. Moreover, the court concurs with defendants that Debtor and Creditor §§ 278 and 279 establish plenary actions, but do not supplant the prerequisites for the provisional remedy of attachment under CPLR § 6210.

Accordingly, it is

ORDERED that plaintiff's motion for an attachment against defendants is DENIED, the temporary restraining order having been

null and void since the date of the hearing on June 10, 2004; and it is further

ORDERED that defendants shall serve and file their Answers within twenty days of service of a copy of this Order with Notice of Entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 11, 2005, 9:30 A.M., Part 59, 111 Centre Street, Room 1254.

This is the decision and order of the court.

Dated: January 28, 2005 ENTER:

J.S.C.
HON. DEBRA A. JAMES