

Wiener v Life Style Futon, Inc.

2006 NY Slip Op 30427(U)

April 12, 2006

Supreme Court, Queens County

Docket Number: 21907

Judge: Duane A. Hart

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

JOEL WIENER, et al. x Index
2005 Number 21907

- against - Motion
2006 Date March 22,

LIFE STYLE FUTON, INC., et al. Motion
_____ x Cal. Number 35

The following papers numbered 1 to 10 were read on this order to show cause by the plaintiffs, pursuant to CPLR article 63, for an order preliminarily enjoining and directing the defendants to perform or refrain from performing certain acts; and, cross motion by the defendants, pursuant to CPLR article 63, for an order preliminarily enjoining and directing the plaintiffs to perform or refrain from performing certain acts.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-3
Notice of Cross Motion - Affidavits - Exhibits ...	4-7
Answering Affidavits - Exhibits	8-10

Upon the foregoing papers it is ordered that the order to show cause and cross motion are determined as follows:

I. Background

On or about June 10, 2004, the defendant Life Style Futon, Inc. (Life Style) sold to the plaintiffs Joel and Shirley Wiener (the Wieners) and to Howard and Michelle Muehlgay (the Muehlgays), a portion of its futon cover business operated at 58-25 Laurel Hill Boulevard in Woodside, Queens (the premises).

The Wieners and Muehlgays formed the plaintiff H&J Futon,

LLC d/b/a Life Style Futon Covers and Life Style Covers (H&J) to assume the purchased portion of Life Style's business (the Wieners, Muehlgays and H&M are collectively referred to herein as the purchasers).

The purchase price was \$750,000.00, payable partially in cash and partially by a \$400,000.00 promissory note, which was personally guaranteed by the Wieners and Muehlgays.

The defendant L.A. Holdings, LLC (Holdings) owns the premises where Life Style's business is located on the first floor. Both Life Style and Holdings, as well as the defendant Easy Fit, Inc., are owned and controlled by the defendants Arthur and Lillian Nazginov (Nazginovs) (collectively, the defendants or Sellers).

Pursuant to the contract of sale and lease, the purchasers agreed to rent the second floor of the premises to conduct the business purchased from Life Style. The Wieners and Muehlgays also guaranteed that lease.

This action centers on a dispute over the exact nature of the business purchased, the provision of air conditioning pursuant to the lease, and the right to use the name "Life Style."

A. Relevant Terms of the Contract and Lease

The contract of sale defines the assets sold by Life Style as follows:

"The manufacture and wholesale distribution of a zippered mattress cover defined as a "Futon Cover", fabric and pillows. It does not include Seller's futon furniture, futon mattresses, sale of Futon Covers to direct users (retail sales to individuals or on-line retail web orders) conducted by Seller in the five boroughs of New York City."

In connection therewith Life Style sold, inter alia, its inventory, equipment, furniture, fixtures and leasehold improvements, the trade name "Life Style Covers," good will, customer lists, computer software, telephone and fax numbers, and accounts payable and receivable.

The contract also provides:

"Purchaser understands and agrees that Seller owns and operates a retail business for the sale of futon furniture, futon mattresses, the sale of futon covers

to direct users (individuals) through Internet's Virtual Store(s) and through physical retail locations and that this sale does not include such business. Seller will continue in said business without restrictions applying to any retail operations now owned by Seller or hereafter purchased or operated by Seller. . . . Purchaser agrees, that Seller may continue to manufacture Futon Covers for its own use and retail sales and on-line sales to direct users. Purchaser has been informed and accepts without reservation, that the principal shareholders of Seller, Arthur and Lillian Nazginov, currently own and operate a business, which manufactures and distributes furniture slipcovers, coveralls, cushion covers and pillows through other entities. Purchaser acknowledges and agrees that Seller's other entities' products, are not Futon Covers, in that the product line is primarily covers for the complete unit, not just the mattress, and that the same does not interfere with the Business being sold herein. Seller may continue to sell such products whether wholesale or retail, without restriction. . . . There shall be no restrictions on Seller's manufacture of Futon Covers in accordance with the covenant not to compete set forth below and the Purchaser shall permit the Seller to manufacture futon covers related to the retail sales of furniture as described above. For this purpose, the term Seller includes Arthur and Lillian Nazginov."

* * *

"Purchaser agrees that during the period of the first six (6) years, following the closing of the sale . . . , it will not engage in the retail sale of futon furniture, futon mattresses and Futon Covers to direct users (individuals), in the five boroughs of New York City. Purchaser may engage in the retail sale of Futon Covers, fabric and pillows but not mattresses or furniture, on the Internet, to any person or entity, provided that Purchaser does not use the name Life Style in advertising or promotions and does not identify the factory address in any such material."

In the representations and warranties section of the contract, the Seller represented that it would pay all accounts payable within sixty (60) days after the date of the closing.

In a covenant not to compete the Seller and its principals, the Nazginovs, agreed that from the date of closing and for six (6) years thereafter, they would not, without the purchasers'

prior written consent, own, share in the earnings of or invest in the stock of any firm or business engaged in the manufacture of Futon Covers within the United States, except as permitted by the contract. The purchasers and their principals agreed that for the same time period they would not, without the prior written consent of the Seller, open any retail business for the sale of futon furniture, Futon Covers or related products to direct users (individuals) within the five boroughs of New York City, except as permitted by the contract.

The purchasers also agreed not to use the name "Life Style" or to provide the address of the leased premises in connection with retail sales on the Internet, or in advertising or promotional material connected therewith, or to open a retail business in the leased premises.

The contract provided that the business being sold was operated on the second floor of a premises owned by Holdings, and the Seller would provide the purchaser with a five-year lease for that second floor, with an option to extend for an additional five years, provided there was no default under the lease or the financing documents. After setting forth the rent and real estate tax escalations to be paid, the contract obligated the purchasers to obtain all purpose liability insurance coverage naming the Seller as an insured, which would protect the purchasers and the Seller from all occurrences arising out of or in connection with the purchasers' operation of the business at the premises.

The lease, rider and supplemental rider provide, inter alia, that the purchasers would be responsible for the payment of 50% of the monthly calculated cost of electricity for air conditioning during the summer months of June, July, August, September and October, then currently estimated at \$700 per month, so the purchasers share would be \$350.00 per month.

The lease rider also provides for early termination of the lease by the purchasers provided, inter alia, that: (1) there is no default in payment of rent and additional rent; (2) the purchasers provide a 90-day notice of the early termination and forfeit one-half of the security deposit; and, (3) the purchasers fully pay the principal balance on the promissory note due and payable to Life Style, including interest to the date of payment, or post a bond equal to no less than 150% of the unpaid principal balance of the promissory note.

B. Original Complaint and Answer

In early August, 2005, the purchasers commenced an action against the defendants in the Supreme Court, Kings County (Index

No. 24044/05). The complaint interposes 12 causes of action based upon breach of the implied covenant of good faith and fair dealing, fraud and other legal theories, and seeks damages and other legal and equitable relief.

The purchasers allege that Life Style and other defendants continue to operate a futon-related business on the first floor of the premises which creates certain problems because: (1) the air conditioning system is controlled solely from the first floor premises; (2) the defendants shut off or refused to operate the air conditioning; (3) the defendants received all mail for both floors, but did not regularly distribute the purchasers' mail to them; (4) while diverting the mail, the defendants misappropriated checks payable to the purchasers and deposited the checks in Life Style's account; (5) the defendants continued to use the name "Life Style" and "Life Style Futon, Inc." and continued to remain in the futon business, even though the trade name "Life Style Covers" was transferred to the purchasers; (6) the defendants failed to give Life Style customers credits for refunds owed by Life Style within 60 days after the closing; and, (7) the defendants continue to sell futon covers and fabric.

The defendants generally denied the allegations of the complaint, interposed numerous affirmative defenses including that the action should be transferred to Queens County, and interposed six counterclaims based on breach of contract and other legal theories.

In their answer the defendants assert, *inter alia*, that: (1) Life Style sold only that portion of its business that engaged in the manufacture and wholesale distribution of zippered futon covers, fabric and pillows; (2) the remaining parts of the Life Style business and other Nazginov-controlled businesses such as the defendant Easy Fit Inc. were specifically excluded from the contract of sale, and Life Style and those Nazginov-controlled businesses are permitted to engage in the retail sale of futon covers, and in the manufacture and distribution of furniture coverings; and, (3) the purchasers agreed that they would not engage in the sale of mattresses or furniture on the internet, would not use the name Life Style, would not identify the factory address, and would not use any logo or other identifying words or images used in the past by the sellers.

In their six counterclaims, the defendants allege that the purchasers breached the agreement by: (1) using the business names "Life Style Futon Cover," "Life Style Futon, Inc." and "Life Style Futon" in advertisements; (2) defaulted under the lease by failing to obtain the requisite insurance naming them as additional insureds; (3) made intentional and wrongful accusations about the defendants; and, (4) took the defendants'

mail and checks.

C. Transfer

Simultaneously with the filing of the summons and complaint, on August 8, 2005, the purchasers filed an order to show cause seeking preliminary injunctive relief. In conjunction therewith they obtained from the Supreme Court, Kings County (Kramer, J.), a temporary restraining order (TRO) which: (1) preliminarily enjoined the defendants and all persons acting in concert with them from interfering with the plaintiffs' mail and checks; and, (2) directed the defendants to immediately operate the second floor air conditioning and keep it operating Monday through Friday from 9 A.M. to 6 P.M.

In response to the summons, complaint and order to show cause, the defendants cross-moved to transfer the action to Queens County and also sought preliminary injunctive relief.

By order dated September 27, 2005 the Supreme Court, Kings County (Saitta) determined the order to show cause and cross motion only to the extent of directing the Clerk of Kings County to transfer all papers to the Clerk of this court.

By separate order of the same date, the same court (Saitta, J.) directed that the order to show cause and cross motion be transferred to Queens County and extended the TRO to the date of the hearing on the order to show cause and cross motion.

II. Order To Show Cause and Cross Motion

In their order to show cause, the purchasers seek a preliminary injunction directing the defendants to: (1) turn on and refrain from interfering with the operation of the air conditioning for the second floor of the premises at all times during the months of June through October of every year of the lease, on Monday through Friday, from 9 A.M. to 6 P.M. and to keep the air conditioning in good repair and working order; (2) cease interfering with the purchasers' mail, including any mail addressed to "Life Style Futon" and/or "Life Style Futon Covers" and/or "Life Style Covers;" (3) change their corporate name to delete the words "Life Style;" (4) refrain from taking or depositing any checks made payable to "Life Style Covers" and to turn those checks over to the purchasers; (5) refrain from any wholesale sale of futon covers or fabric; (6) refrain from interfering with the purchasers' use of the names "Life Style" and/or "Life Style Futons," and/or "Life Style Futon Covers" and "Life Style Covers;" and, (7) make all payments to Life Style's former customers that are owed by Life Style as a result of credits, adjustments, accounts payable or returns.

In addition, the purchasers seek an order declaring the lease null, void and cancelled, directing the return of their down payment, and allowing them six (6) months to move.

In support of their order to show cause the purchasers assert, inter alia, that: (1) the defendants failed to comply with the TRO issued in the Kings County action which directed them to operate the air conditioning; (2) the defendants are demanding several thousands of dollars for air conditioning, even though they failed to provide air conditioning continually from August through October, 2005; (3) as a result, there is a dispute about the amount of air conditioning provided and the cost thereof to be paid by them; and, (4) the defendants have advised them that if payment is not received for the air conditioning, they will commence an eviction proceeding.¹

The defendants oppose the order to show cause and cross-move for an order preliminarily enjoining the purchasers from: (1) utilizing the names "Life Style Futon Covers," "Life Style Futon, Inc." and "Life Style Futon" or variations thereof, with the exception of "Life Style Covers;" and, (2) disparaging defendants through the publication of false statements to non-parties, pending a trial.

In support, they contend that: (1) the purchasers refuse to accept that they purchased only a portion of Life Style, namely, the manufacture and wholesale distribution of zippered futon covers, fabrics and pillows and the brand name "Life Style Covers;" (2) due to the purchasers' mistaken belief that they own Life Style itself, they have improperly used that name on letterhead, identified themselves as officers of Life Style, published advertisements with references to "Life Style Futon" and used the trade name "Life Style Futon Covers" at trade shows; (3) they ceased providing air conditioning when the purchasers refused to pay their electricity bill; (4) they suggested that the purchasers install their own air conditioning for the second floor of the premises but the purchasers refused; (5) they properly applied all customer credits; (6) the purchasers can exercise the lease provision permitting early termination; and, (7) the purchasers improperly complained to vendors that the defendants were stealing mail and depriving them of rights under the contract.

The purchasers reply, inter alia, that the defendants should be required to change the corporate name "Life Style Futon Inc." to delete the words "Life Style," should be precluded from the wholesale sale of futon covers and fabric, and should be enjoined from using the use of the names "Life Style," "Life Style Futons," "Life Style Futon Covers" and "Life Style Covers."

III. Decision

Pursuant to CPLR 6301, a party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (see Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 [2005]; Church of God Pentecostal Fountain of Love, MI v Iglesia de Dios Pentecostal, MI, ___ AD3d ___, 2006 NY App Div LEXIS 3719 [2d Dept., Mar. 28, 2006]; Happy Dragon Wholesale, Inc. v Young, ___ AD3d ___, 810 NYS2d 351 [2006]).

The parties' contract expressly provides that the purchasers obtained only the right to wholesale manufacture and distribution of zippered mattress covers defined as a "Futon Cover[s]," fabric and pillows. Also, the purchasers purchased only the right to utilize the name "Life Style Covers."

Expressly excluded from the sale was Life Style's futon furniture, futon mattresses, and sale of Futon Covers to direct users (retail sales to individuals or on-line retail web orders) in the five boroughs of New York City. Also excluded were other types of furniture covers manufactured and distributed by entities owned by the Nazginovs, such as Easy Fit. Finally, the June 10, 2004 contract contains mutual six-year non-competition clauses related to these rights and, therein, the purchasers are permitted to sell their futon covers, fabric and pillows retail or on the internet, provided they do not use the term "Life Style" or identify the factory address.

As a result, the purchasers have demonstrated a probability of success on the merits, a danger of irreparable injury and a balancing of the equities in their favor only with respect to their right to utilize the name "Life Style Covers," or "Life Style Covers, Inc." when selling futon covers wholesale. Therefore, the purchasers are entitled only to checks and mail bearing those names. Contrary to the purchasers' contentions, they are not entitled to any other checks or mail containing the term "Life Style."

For the same reasons, Life Style is permitted to use the term "Life Style" in connection with the portions of its business that were not sold to the purchasers and which it was permitted to continue for six years from the date of the contract; however, the defendants are not to utilize the terms "Life Style Covers" or "Life Style Covers, Inc." in connection with those sales.

As a result, that branch of the defendants' cross motion seeking to enjoin the plaintiffs from utilizing the trade names "Life Style Futon, Inc." and "Life Style Futon" is granted.

Finally, the lease obligates the defendants to provide air conditioning to the purchasers at a stated cost during the months of June through October. The defendants are obligated to provide such air conditioning at that cost during those months, Monday through Friday, 9 A.M. to 6 P.M.

Because the parties contest the charges for electricity and air conditioning, and contend that the others are violating the terms of the contract, both the purchasers and the defendants shall post an undertaking in the amount of \$75,000.00, as a condition of obtaining the preliminary injunctive relief herein granted.

In view of the undertaking to be posted by the plaintiffs, the defendants shall continue to be enjoined from pursuing any eviction proceeding or other litigation relating to air conditioning at the premises or any payments for same.

All remaining issues, including those relating to the amount of credits due to the purchasers, the electricity and air conditioning charges, and the purchasers' alleged failure to procure insurance, are reserved for trial.

Conclusion

Based upon the papers submitted to the court and the determinations set forth above, it is

ORDERED that the plaintiffs' order to show cause seeking preliminary injunctive relief is granted to the extent that during the pendency of this proceeding: (1) the defendants are directed to turn on and refrain from interfering with the operation of the air conditioning for the second floor of the premises at all times during the months of June through October of every year of the lease, on Monday through Friday, from 9 A.M. to 6 P.M. and to keep the air conditioning in good repair and working order; (2) the defendants are enjoined from interfering with any mail addressed to "Life Style Covers" and "Life Style Covers, Inc." and are directed to immediately turn over such mail to the plaintiffs; (3) the defendants are enjoined from taking or depositing any checks made payable to "Life Style Covers," and "Life Style Covers, Inc.," and are directed to immediately turn over such checks to the purchasers; (4) the defendants are enjoined from interfering with the plaintiffs' use of the name "Life Style Covers" or "Life Style Covers, Inc." and are enjoined from selling wholesale the zippered mattress cover, fabric and pillows sold to the plaintiffs; (5) the defendants shall continue to be enjoined from pursuing any eviction proceeding or other litigation relating to air conditioning at the premises or any payments for same; and, otherwise, the plaintiffs' order to show

cause is denied; and it is further

ORDERED that the defendants' cross motion seeking preliminary injunctive relief is granted only to the extent that during the pendency of this proceeding the plaintiffs are preliminarily enjoined from: (1) utilizing the trade names "Life Style Futon Covers," "Life Style Futon, Inc." and "Life Style Futon;" (2) utilizing the term "Life Style" when making retail sales of mattresses or furniture on the internet; and, (3) utilizing the factory address or any logo used in the past by the defendants in connection with the retail and internet sales of mattresses and furniture; and, otherwise, the cross motion is denied; and it is further

ORDERED that the preliminary injunctive relief granted to the plaintiffs and defendants is conditioned upon the plaintiffs posting an undertaking in the amount of \$75,000.00 within 30 days of the date of this order, and upon the defendants posting an undertaking in the amount of \$75,000.00 within 30 days of the date of this order.

Dated: April 12, 2006

1

Pending a hearing on the order to show cause and cross motion this court (Hart, J.) stayed the defendants from pursuing any eviction proceeding or other litigation relating to air conditioning at the premises or any payments for same.