

**J.P. Fendt Contr. & Dev., Inc. v
Gaetano DiPlacidi & Assoc.**

2007 NY Slip Op 31425(U)

May 25, 2007

Supreme Court, New York County

Docket Number: 0101128/2007

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

J.P. Fenot Contracting & Development, Corp., Et Al.

INDEX NO.

101128/07

MOTION DATE

MOTION SEQ. NO.

1

MOTION CAL. NO.

Gaetano DiPlacini & ASSOC., Et Al.

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

1

2, 3

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached decision and order.

FILED

JUN 01 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: May 25, 2007

Check one: FINAL DISPOSITION

MARTIN SHULMAN

J.S.C.

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
J.P. FENDT CONTRACTING AND DEVELOPMENT,
INC. n/k/a RIVER CONSTRUCTION CORP.,

Index No: 101128/07

Decision and Order

Plaintiff,

-against-

GAETANO DIPLACIDI AND ASSOCIATES, INC.,
THE COMMUNITY PRESERVATION CORPORATION
and 2515 LLC,

Defendants.
-----X

Hon. Martin Shulman:

Plaintiff J.P. Fendt Contracting and Development, Inc. n/k/a River Construction Corp. ("plaintiff" or "Fendt") moves by order to show cause ("OSC") to enjoin defendant The Community Preservation Corporation ("CPC") from releasing funds in the amount of \$129,000.00 (the "Deposit") to defendant Gaetano DiPlacidi and Associates, Inc. ("GDA"). Fendt claims CPC is holding the Deposit pursuant to an alleged December 27, 2000 letter agreement between Fendt and GDA (the "letter agreement"). Pending the hearing of the OSC, this court granted plaintiff a temporary restraining order ("TRO") staying CPC from releasing the deposited funds conditioned upon plaintiff posting an undertaking in the amount of \$6,450.00. CPC and GDA oppose the OSC.

FILED
JUN 01 2007
NEW YORK
COUNTY CLERK

Background

On or about June 26, 2000, Fendt and GDA entered into a contract whereby Fendt, a sub-contractor, agreed to perform certain rehabilitation and reconstruction work (the "project") for GDA, the general contractor, at 2513/2515 Adam Clayton Powell, Jr.

Blvd., New York, New York (the "premises").¹ Defendant 2515 LLC ("owner")² is the owner of the premises. The owner posted the Deposit with CPC in connection with certain construction financing obtained from CPC.

In support of the OSC, plaintiff alleges that the parties' June 26, 2000 contract required plaintiff to post a letter of credit in the amount of \$129,000.00. Thereafter, Fendt contends that the parties entered into the December 27, 2000 letter agreement which provided that, in lieu of the letter of credit, plaintiff had deposited \$129,000.00 cash with GDA. Pursuant to the terms of GDA's contract with the owner, GDA was allegedly required to post the same amount of money with CPC. Upon CPC's release of this amount to GDA, plaintiff claims the letter agreement required GDA to release same to plaintiff. Fendt further alleges that GDA has been out of business since December 2004 and "that there is a very real threat that [Fendt] will not be refunded the monies to which it is entitled . . ." Fendt Aff. at ¶3.

GDA offers a substantially different account of the transactions between itself and Fendt. GDA does not dispute that the June 26, 2000 contract required plaintiff to provide a letter of credit in the sum of \$129,000.00 as security for its performance. On the same date, the parties entered into two other agreements with respect to construction projects at other locations.³ GDA alleges that: 1) Fendt failed to provide a

¹ Neither plaintiff nor GDA has provided a copy of the June 26, 2000 contract.

² The owner has not appeared in this action or submitted opposition to the OSC.

³ One such project was for the performance of work at 2053-63 Frederick Douglas Blvd. (the "Gateway project") and at 164 West 146th Street (the "Zaida project"). Gaetano Opp. Aff. at ¶6. The Zaida project is the subject of a separate action and virtually identical order to show cause also pending before this court under N.Y. County

letter of credit as agreed, or cash in lieu thereof; 2) the letter agreement represents the parties' failed attempt at settlement⁴ whereby GDA conveyed an offer which Fendt initially rejected and GDA subsequently withdrew; and 3) Fendt executed the letter agreement on April 25, 2002 (one year and four months after it was first offered and long after GDA had withdrawn the offer). Gaetano Opp. Aff. at ¶¶ 8-18. GDA takes the position that plaintiff has no interest or rights in the Deposit held by CPC.⁵

For its part, CDC's opposition to the OSC states that its financing agreement with the owner required the owner to deposit \$129,000.00 with CPC and that "[f]rom time to time . . . the Deposit was drawn down upon by CPC to cover financing expenses (i.e. interest payments) or was otherwise released by CPC to [the owner] or its designee . . ." Au Opp. Aff. at ¶2. As of February 26, 2007, CPC contends that the sum of \$58,399.29 remained on deposit, and such sum may continue to diminish by amounts due and owing to CPC pursuant to its loan documents with the owner. *Id.*

In response to GDA's opposition, Fendt concedes it did not provide GDA with a letter of credit or cash in lieu thereof. Rather, plaintiff now clarifies that "[t]he \$129,000.00 was taken out of the monies due and owing [Fendt] by [GDA] for work performed on both" the Zaida project and the Gateway project. Fendt. Reply Aff. at ¶7. In support, Fendt attaches statements provided by GDA in October and November 2000

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⁴ GDA alleges that Fendt defaulted under the contracts for the Zaida and Gateway projects. Gaetano Opp. Aff. at ¶19. Further, GDA claims, and plaintiff does not deny, that plaintiff never commenced work on the project. Gaetano Opp. Aff. at ¶29.

⁵ GDA alleges that it deposited the funds held by CPC. Gaetano Opp. Aff. at ¶39.

and GDA's final statement of account transmitted on December 27, 2000 (Exhs. A & B to Fendt Reply Aff.), which reflect that the total sum of \$266,000.00⁶ was deducted from amounts owed to plaintiff with the entry "Less Letter of Credit" to arrive at the net balance owed to Fendt for the Zaida and Gateway projects. In other words, GDA offset the amount of the unpaid deposit for this project against monies GDA owed to plaintiff for the Zaida and Gateway projects, with the understanding that GDA would ultimately pay plaintiff the deposit amount of \$129,000.00.

Discussion

To establish entitlement to a preliminary injunction in this action, plaintiff must demonstrate: 1) a likelihood of ultimate success on the merits; 2) irreparable injury if no preliminary injunction is issued; and 3) a balancing of the equities in plaintiff's favor. CPLR §6301; *Aetna Insurance Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990). It is a drastic remedy which may only be granted to a party with a clear legal right to such relief grounded on undisputed facts as to the harm sought to be enjoined. *First Nat. Bank of Downsville v. Highland Hardwoods, Inc.*, 98 A.D.2d 924, 926, 471 N.Y.S.2d 360, 363 (3rd Dept., 1983).

Fendt's OSC is denied and the TRO is hereby vacated on the grounds that Fendt has failed to demonstrate that it will suffer irreparable injury absent the issuance of a preliminary injunction. The complaint's sole cause of action seeks declaratory relief declaring that plaintiff is entitled to the Deposit. While denominated a request for a

⁶ Fendt alleges that the sum of \$266,000.00 represents the \$137,000.00 deposit required for the Zaida project plus \$129,000.00 for this project. Fendt Reply Aff. at ¶11. Exhibits A and B to the Fendt Reply Aff. actually indicate that the \$129,000.00 deposit applied to the Gateway project rather than this project.

declaratory judgment, the cause of action is essentially one for breach of contract seeking damages for money allegedly owed to plaintiff. Admittedly, Fendt never posted a letter of credit or cash in lieu thereof. Accordingly, the Deposit held by CPC is not property belonging to plaintiff.

Also admittedly, Fendt seeks a preliminary injunction based upon its concern that the Deposit will not be paid over to it upon CPC's release of same to GDA since GDA is no longer in business. In essence, plaintiff attempts to ensure that it will obtain an enforceable money judgment. However, "our courts have consistently refused to grant general creditors a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated judgment." *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 545, 708 N.Y.S.2d 26 (2000). As plaintiff has an adequate remedy at law in the form of a monetary judgment, irreparable injury is not established and the OSC must be denied. Accordingly, it is

ORDERED that plaintiff's OSC is denied and the TRO is hereby vacated; and it is further

ORDERED that the Department of Finance of the City of New York pay to J.P. Fendt Contracting and Development, Inc. n/k/a River City Construction Corp., residing at 3-1 Park Plaza Suite 168, Old Brookville, New York 11545, the undertaking posted in the sum of \$6,450.00, plus accrued interest, and less any lawful fees, without further court order.

The parties are directed to appear in IAS Part 1, Room 1127B, 111 Centre Street, New York County on June 26, 2007 at 9:30 a.m. for a preliminary conference.

This constitutes the decision and order of this court. Courtesy copies of the decision and order have been faxed to counsel for the appearing parties.

DATED: New York, New York
May 25, 2007



HON. MARTIN SHULMAN, J.S.C.

FILED

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