

**IRM Realty Corp. v Mukhamedov**

2007 NY Slip Op 32657(U)

August 2, 2007

Supreme Court, Queens County

Docket Number: 0009604/2005

Judge: Peter Joseph Kelly

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## M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK  
 COUNTY OF QUEENS - IAS PART 16

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IRM REALTY CORP.,

Plaintiff,

- against -

FARRYKH MUKHAMEDOV and RUSTAM ABILOV,

Defendants.

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BY: KELLY, J

DATED: August 2, 2007

INDEX

NUMBER: 9604/2005

MOTION

DATE: July 31, 2007

In this motion, the plaintiff seeks, inter alia, the issuance of an order of attachment pursuant to Article 62 of the CPLR permitting levy upon the property of the defendants and for a preliminary injunction.

This action stems from the defendants' purchase of a pizza restaurant business, located at 41-11 Main Street, Flushing, New York. Ilya Mikhailov ("Mikhailov"), the "manager" of the plaintiff corporation IRM Realty Corp. ("IRM"), avers in his affidavit that IRM provided the financing that enabled the defendants Farrykh Mukhamedov ("Mukhamedov") and Rustam Abilov ("Abilov"), who are apparently brothers, to purchase the business. In conjunction with the loan from the plaintiff, the defendants allegedly executed a promissory note, dated August 1, 2003, for the sum of \$140,000.00. Additionally, the plaintiff claims a security agreement was given by Mukhamedov in all the collateral of the business.

In addition to a copy of the promissory note and security agreement, the plaintiff annexed copies of checks Mikhailov avers constitutes the proceeds referred to in promissory note. One cancelled

check, a bank check issued by GreenPoint Bank in the amount of \$133,000.00 and dated August 1, 2003, states the remitter was Ilya Mikhailov and is made payable to Stephen S. Weintraub ("Weintraub"). It appears that the check was deposited by Weintraub into an attorney IOLA account. Mikhailov asserts in his affidavit that Weintraub represented the defendants in the purchase of the business.

Mikhailov claims that the defendants defaulted in the repayment of the loan and that after this action was commenced, the defendants sold the business to a non-party Fnu Leiyang ("Leiyang") for the sum of \$70,000.00.

In affidavits submitted in opposition, both defendants deny signing the promissory note at issue. Mukhamedov also denies borrowing any money from IRM. Abilov avers that he never "received any checks made by IRM Realty Corp." and that does not owe IRM "any funds". Abilov also claims that neither he nor his brother are "about to flee this jurisdiction" and that they are "not disposing of any of our assets".

"In order to obtain an order of attachment under CPLR 6201(3), the plaintiff must demonstrate that the defendant has or is about to conceal his or her property in one or more of several 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" (Mineola Ford Sales v Rapp, 242 AD2d 371). Moreover, the plaintiff must present evidentiary facts demonstrating the fraud and a likelihood of success on the merits of the underlying claim (CPLR §6212[a]; Societe Generale Alsacienne de Banque, Zurich v Flemingdon Dev. Corp., 118 AD2d 769, 772).

Contrary to their assertions, the defendants' intent to defraud and conceal assets from their creditors, namely the plaintiff, is evident from the transfer of the business at issue. Curiously, neither defendant denies or simply even comments about the plaintiff's allegation that the pizza restaurant at issue was sold during the pendency of this action. Only the defendant Abilov makes a cursory attempt to address the issue in his affidavit through a conclusory statement. The defendant Mukhamedov does not comment on this issue at all.

Further the defendants' secretive intent is also evident from their lack of cooperation in the discovery process in this litigation. The plaintiff claims, and the defendants do not deny, that they failed to appear for three scheduled depositions. On two of the scheduled dates, the defendants' counsel appeared, but the defendants defaulted.

The plaintiff has also demonstrated a probability of success on its causes of action related to the promissory note. A likelihood of success on the merits is demonstrated by "a prima facie showing of a right to relief . . . actual proof of the case should be left to further court proceedings" (McLaughlin, Piven, Vogel, Inc. v W. J. Nolan & Co., 114 AD2d 165). In other words, "conclusive proof is not required" (Ying Fung Moy v Hohi Umeki, supra) and "[t]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Egan v New York Care Plus Ins. Co., 266 AD2d 600, 601).

The plaintiff submitted documentary evidence in the form of the executed promissory note and security agreement as well as proof of the

payment of the funds to the defendants' attorney and the defendants' default in repayment of the money.

In opposition, the assertion by each defendant that they did not sign the promissory note constitutes nothing more than a "bald assertion of forgery" which is insufficient to establish the signatures are not genuine (Banco Popular North America v Victory Taxi Management, Inc., 1 NY3d 381, 384). Similarly, the defendants' conclusory denial of receipt of any funds from IRM is questionable based upon the plaintiff's submission of a cancelled check showing the receipt by defendants' attorney of \$133,000.00. At best, the defendants' affidavits establish an issue of fact for trial which does not preclude the requested relief.

With respect to Leiyang, the alleged present owner of the business at issue, although he is not a named party to the action, the collateral under the security agreement in his possession may be attached since Article 62 of the CPLR permits attachment of any debt or property of a garnishee no matter whom is in possession of the property (See, CPLR §6202; §5201).

Therefore, the branch of the plaintiff's motion for an order of attachment is granted upon the posting of an undertaking in the amount of \$10,000.00 to be appended to the order to be settled hereon.

With respect to the branch of the plaintiff's motion for an injunction against Leiyang, "[t]o be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (Ying Fung Moy v Hoho Umeki, \_\_\_\_ AD3d \_\_\_\_; 781 NYS2d 684; see also,

CPLR §6301).

The plaintiff's likelihood of success has already been addressed by the court. The potential of irreparable injury to the plaintiff is apparent based upon the defendants' transference of the collateral of the business that secured the note. Additionally, the equities favor restraining Leiyang from transferring or disposing of the business at issue as Leiyang failed to oppose the motion and demonstrate how he would be prejudiced by issuance of a stay.

Settle order.

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**Peter J. Kelly, J.S.C.**