SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **HON. STEPHEN A. BUCARIA**
Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

ATTILIO VELARDI,

Plaintiff,

INDEX No. 11479/07

MOTION DATE: Oct. 10, 2007
Motion Sequence # 001, 002, 003

-against-

RAMJEET RAMJATTAN and
SANIETA MOHESS,

Defendants.

The following papers read on this motion:

Order to Show Cause..... XX
Notice of Motion..... X
Affirmation in Opposition..... X
Reply Affirmation ..... X

This motion, by plaintiff, brought on by order to show cause, for an order pursuant to CPLR 3017, declaring that (a) plaintiff is the owner of the collateral made up of the shares and the other books and records of 3420 Long Beach Corp., JNJ Corp., 2831 Jerus Corp., JJ Nic Realty Corp., NJJ Grand Corp., 362 Sea Corp. and 1745 Pen Corp. (collectively the "Corporations") which secured the payment of the purchase price of the Corporations owned by defendants to plaintiff pursuant to certain promissory notes executed by the defendants in favor of plaintiff; (b) pursuant to CPLR 6301 et. seq., enjoining the defendants from (i) coming into possessing and/or operating the Corporations' stores located at 937 Atlantic

Avenue, Baldwin, New York 11510, 3620 Merrick Road, Seaford, New York 11783, 2831 Jerusalem Avenue, North Bellmore, New York 11710, 3444A Long Beach Road, Oceanside, New York 11572, 92 Long Beach Road, Island Park, New York 11558 and 1745 Peninsula Blvd., Hewlett, New York 11557 (the "Stores"); (ii) interfering with plaintiff's right to own, operate, possess and enjoy the shares of the Corporations, the Stores and/or the assets of the Corporations; and (iii) damaging, destroying, looting or stripping any of the Stores or removing any asset belonging to the Corporations from any of the Stores, including the books and records of the Corporations; and (c) pursuant to CPLR §6401, appointing a temporary receiver of the Corporation and the Stores to immediately take possession of the Stores and to operate and safeguard the Stores and all property and effects of each of the Corporations; and a motion, by defendants, brought on by order to show cause, for an order pursuant to CPLR 3017, declaring that (a) plaintiff's action is barred by an Arbitration Clause in the agreement between the parties, (b) pursuant to CPLR 6301 et. seq. enjoining the plaintiff's from (i) coming into possession and/or operating the Corporations' stores located at 937 Atlantic Avenue, Baldwin, New York 11510, 3620 Merrick Road, Seaford, New York 11783, 2831 Jerusalem Avenue, North Bellmore, New York 11710, 3444A Long Beach Road, Oceanside, New York 11572, 92 Long Beach Road, Island Park, New York 11558 and 1745 Peninsula Blvd., Hewlett, New York 11557 (the "Stores"); (ii) interfering with defendant's right to own, operate, possess and enjoy the shares of the Corporations, the Stores and/or the assets of the Corporations; and a motion, by plaintiff, for an order pursuant to CPLR 3212 directing the entry of judgment for the plaintiff and against the defendant in the amount of $540,138.97, plus attorneys fees and interest from September 1, 2007, and for such other and further relief as to this Court may seem just and proper, are **all** determined as hereinafter set forth.

## FACTS

These motions arise from six promissory notes between the plaintiff and the defendants in connection with the sale of shares in six corporations. The promissory notes required the defendants to make payments in various monthly installments in order to pay for one hundred percent of the shares in plaintiff's corporations. In connection with each purchase of the shares of the Corporations, the parties executed escrow agreements, pursuant to which, the shares of each of the Corporations, together with each corporation's stock ledger, unissued stock certificate and minute books were placed into escrow to secure the defendants' obligations to plaintiff under the promissory notes.

Commencing in December 2003 and continuing through the present, the

defendants have defaulted in payment in accordance with the six promissory notes and made only partial and sporadic payments. On June 22, 2007, the plaintiff served the defendants with written notice of the defendants' default under each of the promissory notes. The defendants have not cured their default of the promissory notes or made any payments to the plaintiff.

## PLAINTIFF'S CONTENTIONS

The plaintiff contends that the shares of the corporations and other corporate records should be reverted to him as the sole shareholder, president and director of each of the corporations in accordance with the terms of the escrow agreements.

The plaintiff states in his order to show cause that the agreement that contains an arbitration provision is not applicable to these proceedings because this action arose from a breach of the escrow agreements and the promissory notes. The plaintiff asserts, in his summary judgment motion, that the defendants are indebted to him in the amount of $540, 138.97, plus attorneys fees and interest from September 1, 2007.

Additionally, the plaintiff contends that the defendants are not entitled to sell the corporation and instead plaintiff is entitled to have the collateral of the Corporations returned to him. Because the defendants stated they desire to sell the Corporations, the plaintiff also requests a court-appointed temporary receiver of the Corporation and the Stores.

## DEFENDANTS' CONTENTIONS

The defendants refuse to surrender the premises or the shares and instead contend that the suit is subject to arbitration. The defendants state that the general agreement they reference to in their cross-motion is in conflict with the escrow agreement and that the court should follow the general agreement because inconsistency should be resolved against the maker of the agreement. The defendants have asked to sell the stores in order to pay the plaintiff the amount owed.

## DECISION

A declaratory judgment pursuant to CPLR 3017 (b) is permissible if the demand for relief in the complaint specifies the rights and other legal relations on which a

declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of such further relief. In plaintiff's order to show cause, he set forth sufficient evidence is showing that the shares of the Corporations should revert to him under the terms of the Escrow Agreement, paragraph 2, section (i).

The defendants' defense to the plaintiff's order to show cause is that there is an arbitration agreement that is applicable and therefore this court should compel arbitration. The promissory notes and the escrow agreements are distinct from the agreement referenced to by the defendants and stand on their own as separate agreements. As a result, the arbitration agreement is not binding because the plaintiff is asserting a breach of the escrow agreements and the promissory notes that do not include an arbitration provision nor incorporates, explicitly or by reference, the provisions of the contract referenced to by the defendants that require the parties to submit their dispute to arbitration (**Matter of Aerotech World Trade Ltd. V. Excalibur Systems, Inc.**, 236 A.D.2d 609, 654 NYS2d 386, 2nd Dept., 1997). Moreover, according to **Nachman v. Jenelo Corp.**, (25 AD3d 593, 807 NYS2d 408, 2nd Dept., 2006), the defendants have waived their right to arbitration because they never moved for relief under CPLR 7503(a) and instead answered the complaint and have moved, inter alia, for summary judgment dismissing the complaint. (see, **Granadeir Parking Corp. v. Landmark Associates**, 294 A.D.2d 313, 743 NY2d 95, 1st Dept., 2002).

Additionally, the defendants assert that the stores may be sold and that "[o]ut of the proceeds of the sale [of the stocks] the Escrow Agent…shall pay to the Seller an amount equal to the principal and interest then due" (Def.'s Ex. A, ¶ 8). This decision to sell is solely the plaintiff Seller's option to sell the defendants Purchasers' stock and is not a mandatory action as is evinced by the use of the phrase "…the Seller…*may*…cause the Escrow Agent to sell the Purchasers stock…" (Id. (emphasis added)). The escrow agreement states, in pertinent part, that "Escrow Agent will deliver [stock ledger, unissued stock certificates and minutes books as well as the stock certificates given to the defendants]…(i) To Seller upon the default of the Purchaser under the terms of the Promissory Notes…" (Plaintiff's Ex. B, | 2(ii)). Therefore, it is proper for the escrow agent to deliver the collateral to the plaintiff because the defendants are in default of the Promissory Notes. Also, the plaintiff has defeated the defendants' motion pursuant to CPRL 6301 by the foregoing.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v**

**Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

The defendants do not contest that they have defaulted under the six promissory notes they made to the plaintiff nor do they contest the fact that the defendants are indebted to plaintiff in the amount of $540, 138.97, plus attorneys fees and interest from September 1, 2007. Instead, the defendants interposed an arbitration clause defense to defeat the summary judgment motion but, as discussed previously, this arbitration clause defense fails. Additionally, in the defendants' application, the defendants stated that the amount of the monetary damages the plaintiff asserts is disputed and states that the plaintiff "had agreed to take lesser amounts and lengthen the notes" (¶ 5). This statement does not adequately create a triable issue of fact because "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion. (**A.H.A. General Const., Inc. v. New York City Housing Authority** , 92 N.Y.2d 20, 33, 677 N.Y.S.2d 9, 1998, quoting **Zuckerman v. City of New York** , 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 1980). As a result, the defendants do not raise any triable issues of fact.

The request for a temporary receiver is rendered moot because of the ruling herein. The appointment of a temporary receiver "is an extreme remedy" that is an unnecessary provisional remedy in this situation (**Modern Collection Assoc., Inc. v. Capital Group, Inc.**, 140 A.D.2d 649, 650, 528 NYS2d 649, 2nd Dept., 1988).

Accordingly, the plaintiff's motions pursuant to CPLR 3017 injunctive relief and for summary judgment are **granted**, and that part of plaintiff's motion for the appointment of a receiver is rendered moot and therefore **denied**. The defendants' motion pursuant to CPLR 3017 is also **denied**. This constitutes the decision, order and judgment of this Court.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

Dated NOV 26 2007

XXX J.S.C.

ENTERED

NOV 30 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE