

**Specialized Industrial Services Corp. v Dave Sandel,
Inc.**

2007 NY Slip Op 34308(U)

December 28, 2007

Supreme Court, Suffolk County

Docket Number: 0005511/2007

Judge: Joseph Farneti

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

INDEX NO. 5511/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SPECIALIZED INDUSTRIAL SERVICES
CORP.,

Plaintiff,

-against-

DAVE SANDEL, INC., DAVE SANDEL,
Individually, and LONG ISLAND CRANE &
RIGGING, INC.,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 27, 2007
FINAL SUBMISSION DATE: OCTOBER 11, 2007
MTN. SEQ. #: 003
MOTION: MD

PLTF'S/PET'S ATTORNEY:
LaREDDOLA, LESTER & ASSOCIATES, LLP
BY: ROBERT LA REDDOLA, ESQ.
600 OLD COUNTRY ROAD - SUITE 224
GARDEN CITY, NEW YORK 11530
516-745-1951

DEFT'S/RESP ATTORNEY:
BENJAMIN E. CARTER, ESQ.
220 ROANOKE AVENUE
RIVERHEAD, NEW YORK 11901
631-727-1666

Upon the following papers numbered 1 to 5 read on this motion _____
FOR AN ORDER OF ATTACHMENT

Order to Show Cause and supporting papers 1-3; Memorandum of Law 4; Answering
Affidavits and supporting papers 5; it is,

ORDERED that this motion by plaintiff for an Order, pursuant to CPLR 6201(3), 6210 and 6212, granting an order of attachment directing the Sheriff of Suffolk County to levy within his jurisdiction against the assets of defendants DAVE SANDEL, INC. and DAVE SANDEL, individually, and any interest of these defendants in person or real property or any debt owed to these defendants situated in the State of New York, based upon the alleged evidence of these defendants' attempts to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor in this action resulting from defendants' disbursement of, encumbering or secreting of, or removing of property from the State or that these defendants are about to do any of these acts, is hereby **DENIED** for the reasons set forth hereinafter.

The instant action, commenced on or about February 14, 2007, seeks to recover damages for breach of an alleged barter agreement between plaintiff and defendant DAVE SANDEL, INC. ("SANDEL, INC."). SANDEL, INC. was a commercial construction business which rented cranes and crane operators. Plaintiff is a trucking company with both trucks able to haul such machinery and a storage yard in Holbrook, New York. Under the barter agreement, plaintiff would provide trucking services to SANDEL, INC. to transport its man-lifts and equipment to construction projects throughout the New York area, and SANDEL, INC. would provide its equipment and operators to plaintiff.

The duration of the barter agreement is at issue. SANDEL, INC. alleges that the barter agreement ended in 1998, when SANDEL, INC. realized that the cost of the equipment and operators furnished to plaintiff exceeded the reasonable value of any storage charges incurred at plaintiff's storage yard. As such, SANDEL, INC. alleges that, starting in January of 1999, it began sending invoices to plaintiff for each job it did with a credit for the storage charges. SANDEL, INC. contends that in February of 2003, it moved all of its equipment out of plaintiff's yard, except for one man-lift. In contrast, plaintiff alleges that the barter agreement began in 1994 and continued through either 2003 or 2004. Plaintiff argues that at an Inquest on November 3, 2005 in a prior action entitled DAVE SANDEL, INC. v. SPECIALIZED INDUSTRIAL SERVICES CORP., under Index Number 16537/2004, SANDEL, INC. repudiated and unilaterally breached the barter agreement by procuring a judgment against plaintiff for the full amount of the services provided to plaintiff, without any offset for the services provided by plaintiff to SANDEL, INC. Plaintiff alleges that SANDEL, INC. fabricated invoices to support its claim, which resulted in an excessive money judgment awarded to SANDEL, INC. against plaintiff in the amount of \$412,366.98. SANDEL, INC. argues that the money judgment represented the rental charges and labor charges for the cranes furnished, as well as the value of the man-lift, less the storage charges owed by SANDEL, INC.

In the prior action, a default judgment was granted against the defendant (the plaintiff herein), and an Inquest was held on November 3, 2005. Plaintiff did not appear at the Inquest, alleging that its prior attorney never informed it of the date. The judgment after Inquest, entered on November 14, 2005, was vacated by Order dated January 27, 2006 (Werner, J.). That Order was then appealed to the Appellate Division, and by decision and Order dated

December 26, 2006, the Appellate Division reversed the Order on the law and denied the motion to vacate the judgment and for leave to serve a late answer (*Dave Sandel, Inc. v Specialized Indus. Servs. Corp.*, 35 AD3d 790 [2006]). The Appellate Division found that the defendant (the plaintiff herein) failed to proffer a reasonable excuse for its default given the history of neglect on the part of its prior attorney. Plaintiff's motion for leave to appeal to the Court of Appeals was thereafter dismissed upon the ground that the order sought to be appealed from did not finally determine the action within the meaning of the Constitution (*Dave Sandel, Inc. v Specialized Indus. Servs. Corp.*, 9 NY3d 914 [2007]).

The gravamen of plaintiff's complaint herein is that SANDEL, INC. repudiated a long-standing barter agreement of the parties when, at the Inquest on November 3, 2005, it relied on invoices which indicated the full value of the services rendered to plaintiff by SANDEL, INC. Plaintiff vehemently contests the validity of the invoices, which ultimately served as the basis for SANDEL, INC.'s money judgment against plaintiff.

By Order dated August 27, 2007, this Court denied a motion by defendants to dismiss the instant action and denied a cross-motion by plaintiff to disqualify BENJAMIN CARTER, ESQ. from representing defendants. Defendants had argued that the action is barred by both *res judicata* and collateral estoppel, and that the Second and Fourth causes of action failed to state a cause of action. Plaintiff had argued that Mr. Carter should be disqualified as he will be called as a witness by plaintiff and his testimony may be prejudicial to defendants.

Plaintiff then filed the instant application by Order to Show Cause, which was granted on September 10, 2007 (Pitts, J.). Within the aforementioned Order, the Court granted a temporary restraining order enjoining, restraining, staying and otherwise preventing SANDEL, INC. and its officers, agents, servants, employees, and all persons and entities acting in concert with them, or for or on their behalf from transferring, distributing or conveying any assets of SANDEL, INC. to any other person or entity except in the ordinary course of business, pending the return date of the motion. In addition, the Court ordered that pending the return date of the motion, the money paid by the Suffolk County Sheriff's Office on September 5, 2007, in the amount of \$477,638.52, to BENJAMIN E. CARTER, ESQ., as attorney for SANDEL, INC., be restrained and held in escrow by Mr. Carter until further Order of the Court.

The instant application was originally returnable on September 27, 2007. Pursuant to a telephonic conference with the Court on that date, the application was adjourned to October 11, 2007, and the temporary restraining order was continued in full force and effect. By Order dated October 11, 2007, the Court denied an oral application by plaintiff made on the record to continue the temporary restraining order beyond the return date of the instant motion.

Plaintiff now alleges that defendants are about to frustrate the enforcement of a judgment that has a "substantial probability" of being rendered in favor of plaintiff. Plaintiff contends that it has specific and credible information that defendant DAVE SANDEL is surreptitiously disposing, secreting, and removing assets, including real property located at 51 Tuthill Point Road, East Moriches, New York, and a 30' power boat, in advance of fleeing to the State of Florida. As such, plaintiff argues that it needs an immediate order of attachment.

SANDEL, INC. attempted to enforce its judgment by submitting a property execution to the Suffolk County Sheriff's Office, and a real property sale of the land where plaintiff housed its business operations and equipment was scheduled for August 14, 2007. However, on or about August 13, 2007, plaintiff prevented the sale by remitting a check to the Sheriff for the full amount of the judgment. Thereafter, on or about September 5, 2007, the Sheriff sent to Mr. Carter a check in the amount of \$477,638.52. Mr. Carter advises that he deposited the funds into his escrow account. Plaintiff alleges that it is highly probable that the money will be paid to Mr. Sandel individually, and that according to an affidavit of MARK FOSCOLO, president of CRANES FOR HIGHER, INC., Mr. Sandel appears to be preparing to leave New York. The affidavit of Mr. Foscolo indicates that his company regularly works with SANDEL, INC. and LONG ISLAND CRANE & RIGGING, INC., and that while perusing ebay.com, he noticed a 30' Kryptonite power boat for sale that he recognized as belonging to Mr. Sandel. Mr. Foscolo further indicates that the boat was photographed in Mr. Sandel's driveway of his home, and that the advertisement stated the seller was "moving to Florida" and "must sell." Mr. Foscolo avers that since then, he spoke to BRADLEY ALLEN, president of defendant LONG ISLAND CRANE & RIGGING, INC., who confirmed that Mr. Sandel told him that he was looking to sell his home and boat and leave Long Island permanently.

Plaintiff alerts the Court that in a buy/sell agreement in which Mr. Sandel agreed to sell, and Mr. Allen, agreed to buy, all the shares of stock of SANDEL, INC., Mr. Sandel reserved the right to prosecute three lawsuits, one of which was the prior suit against the plaintiff herein, and any monies received from the suits was to be the sole property of Mr. Sandel. Therefore, plaintiff contends that the money paid by plaintiff in satisfaction of the judgment is collectible by Mr. Sandel individually.

As discussed, plaintiff alleges that Mr. Sandel is attempting to dispose of his real and personal property, including his personal residence located at 51 Tuthill Point Road, East Moriches, New York, and a 30' Kryptonite power boat. Further, plaintiff alleges that it has a substantial probability of success on the merits, as it has documentation as to the alleged fraud committed by Mr. Sandel in order to obtain the judgment, as well as the monies owed to plaintiff. Moreover, plaintiff argues that the balancing of the equities weighs in favor of plaintiff, as plaintiff is the only party to come before the Court with "clean hands." As such, plaintiff seeks an Order directing that the following assets be attached: (1) the escrow account of Mr. Carter to the extent of \$477,638.52; (2) Mr. Sandel's personal residence in East Moriches, New York; and (3) the 30' Kryptonite power boat.

In opposition, Mr. Sandel alleges that he has no intention of leaving New York State, as his immediate and extended family live here; his friends and business contacts are here; and his doctors are located here who treat him for colon cancer. In addition, Mr. Sandel alleges that he has considered buying a small condominium in Florida to utilize in the winter months, but has no intention of moving there permanently, and his house is not listed for sale. Mr. Sandel alleges that plaintiff has no likelihood of success on the merits, arguing that in the matter wherein defendant obtained its judgment, the counterclaim interposed on behalf of plaintiff was \$42,349.94, not the hundreds of thousands of dollars it is seeking in the instant action. Mr. Sandel further argues that plaintiff has merely submitted hearsay statements in support of its application for an order of attachment, with no factual allegations whatsoever.

CPLR 6201(3) provides that 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 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 (CPLR 6201[3]). The moving papers must contain evidentiary facts—as opposed to conclusions—proving the fraud (*Mineola Ford Sales v Rapp*, 242 AD2d 371 [1997]; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769 [1986]; see also *Rothman v Rogers*, 221 AD2d 330 [1995]; *Vita v Spina*, 15 Misc 3d 1137[A] [Sup Ct, Suffolk County 2007]). In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action in order to obtain an order of attachment (see CPLR 6212[a]; *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, *supra*; *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167 [1984]). However, the mere removal, assignment or other disposition of property is not grounds for attachment (*Corsi v Vroman*, 37 AD3d 397 [2007]; *Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167, *supra*).

Here, the Court finds that the allegations regarding Mr. Sandel's impending sale of his residence and boat do not rise to the level of demonstrating an intent to defraud or frustrate enforcement of a judgment. Plaintiff relies on hearsay statements contained in an ebay.com advertisement, as well as double hearsay statements contained in the affidavit of Mr. Foscolo. In response, Mr. Sandel has represented to the Court that he has no intention of leaving the jurisdiction of the State of New York, and as discussed hereinabove, the mere disposition of property, i.e., selling the 30' boat, is not grounds for attachment. Therefore, the instant motion for an order of attachment is **DENIED** with leave to renew in the event plaintiff can demonstrate actions undertaken by Mr. Sandel designed to defraud plaintiff and/or frustrate enforcement of any money judgment. The temporary restraining order contained within the Order to Show Cause dated September 10, 2007 is hereby vacated and of no further force and effect.

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court