

<b>Trop It Up Citrus, Inc. v J &amp; A Citrus, Corp.</b>
2007 NY Slip Op 34310(U)
December 28, 2007
Supreme Court, Suffolk County
Docket Number: 0013665/2007
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 13665/2007

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

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

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TROP IT UP CITRUS, INC., FRANK P.  
 BASSI and LINDA A. MIRABELLA,

Plaintiffs,

-against-

J & A CITRUS, CORP. and ROBERT DUNN,

Defendants.

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ORIG. RETURN DATE: JULY 18, 2007  
 FINAL SUBMISSION DATE: AUGUST 2, 2007  
 MTN. SEQ. #: 001  
 MOTION: MD

**PLTF'S/PET'S ATTORNEY:**  
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 BRENTWOOD, NEW YORK 11717  
 631-951-3700

**DEFT'S/RESP ATTORNEY:**  
 WALTER D. LONG, JR., ESQ.  
 490 WHEELER ROAD - SUITE 165K  
 HAUPPAUGE, NEW YORK 11788  
 631-851-0604

Upon the following papers numbered 1 to 6 read on this motion \_\_\_\_\_  
 FOR A PRELIMINARY INJUNCTION \_\_\_\_\_

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

**ORDERED** that this motion by plaintiffs for an Order, pursuant to CPLR 6301, granting a preliminary injunction, and pursuant to CPLR 6313, granting a temporary restraining order preventing defendants from selling or otherwise disposing of residential real property and a Tropicana distribution route, is hereby **DENIED**.

This is an action for breach of contract and common law fraud stemming from an oral contract of sale entered into by plaintiff FRANK P. BASSI ("plaintiff") and defendant ROBERT DUNN ("defendant") on or about February 16, 2007, wherein defendant was to sell, and plaintiff was to purchase, a Tropicana route and truck owned by defendant. The oral agreement allegedly provided that the route and truck were to be sold for the amount of \$425,000.00, with a downpayment of \$10,000.00. Plaintiff alleges that on or about February 16, 2007, he tendered the downpayment of \$10,000.00 to defendant.

Plaintiff alleges that a closing was initially scheduled for March 16, 2007, but was cancelled by defendant due to the fact that defendant had failed to provide plaintiff with a detailed map of the route. The closing was then re-scheduled for March 23, 2007, but was again allegedly cancelled by defendant because his wife was ill. The closing was re-scheduled for March 30, 2007, but plaintiff alleges that one hour prior thereto he found out the closing would not proceed as he was no longer approved by Tropicana for the purchase. Plaintiff contends that defendant contacted a representative of Tropicana and informed the representative that he was no longer selling the route, and as such, plaintiff's approval was revoked. Plaintiff contends that he thereafter contacted Tropicana directly and reapplied for approval. Plaintiff submits that he obtained approval on or about April 20, 2007, and a "time of the essence" closing date was scheduled for April 27, 2007. On April 27, 2007, plaintiffs' counsel alleges that she received a telephone call from defendants' counsel advising that defendant would not be attending the closing.

Plaintiff now alleges that defendant refuses to return plaintiff's down payment. Further, plaintiff informs the Court that since the commencement of this action, defendant has listed his residence for sale, and has placed the subject route for sale in the newspaper. As such, plaintiff filed the instant application for a preliminary injunction, arguing that plaintiff will be irreparably harmed if defendant sells his assets, as plaintiff will be prevented from being able to collect on a judgment if he prevails in this action. Plaintiff also seeks this relief in order to prevent defendant from selling or otherwise transferring his assets in an attempt to defraud his creditors.

In opposition, defendant acknowledges the oral agreement of February 16, 2007, and the receipt of the downpayment of \$10,000.00, but claims that pursuant to a "downpayment letter" of even date, the downpayment was refundable only for ten days from the date of receipt. In addition, defendant alleges that on or about February 26, 2007, plaintiff made a counteroffer in writing to defendant that included additional terms to which defendant did not assent. Further, defendant refutes the reasons proffered by plaintiff for the delays in the closing, as well as the revocation of plaintiff's approval to purchase the route. Defendant contends that he has negotiated and dealt with plaintiff in good faith throughout the entire process, and is still willing to sell the route to plaintiff for \$425,000.00, if plaintiff can obtain approval from Tropicana.

Initially, plaintiffs' request, pursuant to CPLR 6313, for a temporary restraining order must be denied. CPLR 6313 provides in pertinent part, "if, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice" (CPLR 6313). Its purpose is to maintain the status quo while a motion for a preliminary injunction is being argued (McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C6313:1). Accordingly, plaintiffs should have sought this temporary relief within the Order to Show Cause granted on July 3, 2007 (Tanenbaum, J.), but failed to do so. As such, this branch of plaintiffs' application is **DENIED**.

Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be issued cautiously (see *Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236 [1992]; *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334 [2004]; *Bonnieview Holdings v Allinger*, 263 AD2d 933 [1999]). Thus, in order to obtain a preliminary injunction pursuant to CPLR 6301, a moving party must demonstrate: (1) a likelihood of success on the merits; (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (see *Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *Iron Mtn. Info. Mgt., Inc. v Pullman*, 2007 NY Slip Op 5469 [2d Dept]; *Gerstner v Katz*, 38 AD3d 835 [2007]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (see *Gagnon Bus Co., Inc. v Vallo Transp., Ltd.*, 13 AD3d 334, *supra*; *Dental Health Assoc. v Zangeneh*, 267 AD2d 421 [1999]; *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348 [1998]). Where the facts are in sharp dispute, a temporary injunction will not be granted (see *Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, *supra*).

The Court has weighed the elements necessary for the granting of a preliminary injunction, and finds that plaintiffs have not sustained their burden. The parties' submissions demonstrate that the underlying facts are in sharp dispute as to the terms of the agreement to sell the route, and the events that transpired thereafter. In addition, the Court finds that plaintiffs have not demonstrated an irreparable injury in the absence of an injunction, as plaintiffs seek only monetary damages in their complaint and not specific performance of the agreement to sell the route. Further, in balancing the equities, the Court finds

that the scale tips in favor of not issuing the injunction. Plaintiff's arguments in support of the application, i.e., that he will be prevented from enforcing a possible money judgment if he prevails in this action, is speculative and unpersuasive. Accordingly, this application for a preliminary injunction is **DENIED**.

Finally, defendants' request for an award of attorney's fees in the amount of \$1,500.00 for fees incurred in connection with the instant application is hereby **DENIED**. Defendants had not moved for this affirmative relief by way of notice of cross-motion (see CPLR 2215).

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2007

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court