Short Form Order(h)

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **DUANE A. HART** IAS PART 18
Justice

JOES WIENER, SHIRLEY WIENER, HOWARD MUEHLGAY, et al.,

Plaintiff(s),

-against-

LIFE STYLE FUTON, INC., L.A. HOLDING, LLC, ARTHUR NAZGINOV, et la.,

Defendant(s).

Index No.: 21907/05

Motion Date: April 11, 2007
Cal. No.: 29

The following papers numbered 1 to 15 read on this motion.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affs-Exhibits-Corrected Cross-Motion	5 - 8, 9 - 12
Replying Affidavits.....	13 - 15

Defendants seek an order:

-Requiring plaintiff to obtain and show proof of insurance;

-Directing plaintiffs to show that certain equipment, which serves as collateral, is in working condition;

-Present proof that they have permits for the machinery they operate on the premises;

-Attach law tags and licenses to items sold out of the premises;

-Requiring plaintiffs to properly maintain the exterior of the premises to make it free of debris, ice and snow;

-Sanction plaintiffs for failure to obey prior court orders directing that they stop using certain trade names while this action is pending.

Defendants, in support of their motion, argue that this motion is an attempt to prevent plaintiffs from evading their (plaintiffs') responsibility under the contract of sale and to

force them to abide by this court's orders, which, they say, plaintiffs are willfully violating.

Plaintiffs object to the motion and files a cross-motion in which they seek to:

-Have the awning over the loading dock reinstalled;

-Preclude defendants from "checking" labels on merchandise in plaintiffs' part of the premises when monthly inspections are made;

- Have all further inspections of the premise done solely by the Receiver, or, in the alternative, have plaintiffs submit monthly videos of the machinery and inventory;

-Preclude defendants from selling, in any venue or in any advertisement any futon cover, fabric and/or self covers, which do not cover the entire unit (of furniture) including the "entire frame and the units arms and legs;"

-Grant them (plaintiffs) exclusive access to the electric box, now located on the first floor of the building;

-Replace/repair leak in building's roof, broken and cracked side walk, stairs and missing emergency exit light immediately;

-Keep the existing preliminary injunction in place without a bond requirement and directing the Queens County Clerk to release and return the current bond;

-Direct defendants to immediately remove barriers placed in the air conditioning ducts because the barriers prevent the flow of air conditioning to the second floor.

Plaintiffs present various arguments in support of their opposition to defendants' motion and their (plaintiffs') cross-motion.

Upon review, the court decides as follows:

Defendants' request directing plaintiffs to get and show proof of insurance is denied, in part, because plaintiffs have submitted proof of insurance in their answer, and, in part, because this court is of the view, based on all the circumstances, that defendants had earlier gotten a copy of plaintiffs' insurance policy.

In light of the foregoing , plaintiffs are directed to forward a copy of the insurance policy and proof of payment to the Receiver when the policy is again renewed and each time it is renewed thereafter. The Receiver shall then send a copy to defendants.

In an issue related to the insurance coverage, plaintiffs contend that they have had some "problems" with their insurance carrier because of its call for repair of the side walk, stairs and emergency exit door lighting, which defendants will not repair. Another issue that may impact on the insurance question is the alleged roof leak. Plaintiffs say it is leaking and defendants claim that plaintiffs have not allowed them to inspect the roof.

The Receiver is directed to retain a contractor of his choosing to inspect the sidewalk, the stairs, the emergency light and the roof to determine what, if any, repairs are needed to each item. If the contractor determines that repairs are needed, then defendants are ordered to make the necessary repairs forthwith. Defendants are responsible for paying the cost of the inspection and the repairs, except that in the event there is no leak in the roof, plaintiffs shall pay the cost of said inspection. The Receiver shall determine, at his option, the contractor who shall do the repairs, if repairs are necessary.

Further, with respect to claims made by both sides as to the location of the electrical box and the continued issue of air conditioning, the Receiver is directed to have an electrical/air conditioning contractor determine the feasibility and cost of (a) separating the electrical service so that each floor has its own electrical box on its floor thus giving it access to and responsibility for its own electricity; and (b) installing separate air conditioners for each floor of the building so that each party will be responsible for its air conditioning.

Again, the Receiver shall select a contractor to conduct the feasibility study. The cost of the study shall be shared equally by the parties. The issue of whether to make any changes in the location of the electrical box and installation of a separate air conditioning system for the second floor is held in abeyance pending the report. This report shall be subject to the same time schedule outlined below, where the issue of inspections is discussed.

On the issue of whether certain equipment is in working order, the parties are poles apart. Plaintiffs state that the equipment is not being used because defendants failed to give them the agreed on training to operate the equipment. Defendants say that plaintiffs said that they (plaintiffs) would get in touch with them (defendants) when they were ready to be trained, but never did.

It may be safe to assume that the equipment is in working condition since it had been working when the last licensed operator, who had worked for defendants before the contract of

sale, left the job. Since plaintiffs say there is no licensed operator to show that the equipment works, an assertion which defendants do not deny, then the court orders that there shall be no demonstration to show that the equipment works. Doing so, without a licensed operator, would be in violation of law. In any event, the equipment shall not be removed from the premises. This branch of defendants' motion is therefore denied.

With respect to the debris, snow and ice around the building, both sides claim that it is the other who is not cleaning up. The parties should be mindful that in the event that someone is injured as a result of a failure to clean up, each might be found liable or, on a more prosaic level, the City's Sanitation Department may issue summons for which either or both may be liable.

The clean up issue is granted to the extent that the Receiver is directed to retain an individual and/or company to clean up around the building each day and in the event of snow accumulation, to have the same individual and/or company remove the snow. The cost of such a clean up shall be bourne equally by both sides. As noted earlier, the Receiver, in his sole discretion, shall determine who should be hired to do the cleaning.

The parties are also at loggerheads on the issue of law tags and licenses. Defendants say that plaintiffs are not obeying the laws, rules and regulations on use of the tags. Based on the evidence presented, the court cannot make a decision on whether there is a violation. Thus, all questions on this issue are reserved for trial, except that the parties are reminded that there are penalties for violating the tag laws and that each should act with that in mind.

The awning, which had been hanging over the loading dock when plaintiffs began to occupy the second floor, has become an issue between the parties. There is no firm proof as to how the awning was removed or by whom it was removed. The Receiver is directed to have the awning replaced by a contractor of his choosing with the cost of doing so shared equally by the parties.

Each side contends that the other is breaching this court's order with respect to the sale of futon covers. The court stands by its earlier decision on this issue and will not issue a injunction against either side. The court believes that this issue is somewhat technical and subject to some interpretation as to the meaning of the terms used in the contract. Therefore, the court will await the trial before determining the fate of this section and whether the contract should be reformed.

The branch of plaintiffs' motion which calls for keeping the preliminary injunction in place, but releasing the bond is denied

as is defendants' call for sanctions.

Finally, the issue of the monthly inspections appears to be a sensitive one for both sides. The court appreciates why neither side is willing to give on this issue. So, rather than make a determination on the question of whether a video tape version of the inspection can be used in lieu of the physical inspection, the court hereby directs the Receiver to write a report as to weather, based on the number of inspections he has attended thus far a)a video taped inspection would satisfy the needs of both sides; b)he or a third-party could conduct the inspection and still satisfy the needs of both sides.

The Receiver is to submit his report in thirty (30) days, which shall begin to run upon service of a copy of this order on him. After he has submitted his report, the parties shall have fifteen (15) days in which to file comments on his report with the court. The court will then issue an order on this branch of the motion forthwith along with an order on the air conditioning/electrical supply issue.

In the interim, monthly inspections are suspended pending the court's decision. This, hopefully, shall serve as a cooling off period for both sides. During the period, plaintiffs are directed to keep accurate and detailed records of any and all transactions related to the contract's provisions on security interest and shall not remove any machinery, which is part of the inventory, from the building, or in any way encumber same.

The court notes that this decision is based on arguments, motions and exhibits contained in the four corners of the written motions. Any other item submitted by either side was not considered.

Dated: June 27, 2007

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J.S.C.