

**Gang v Venegas**

2008 NY Slip Op 30709(U)

March 7, 2008

Supreme Court, New York County

Docket Number: 0602325/2007

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn  
Justice

PART 49m

Richard Gony et al

INDEX NO. 602328/07

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

George Venegas et al

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

MAR 11 2008

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: March 7 2008

A. Cahn

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
RICHARD GANG, WILFREDO PLANTYN and :  
BEST WAY CORPORATE SERVICES, LLC, :  
: Plaintiffs, :  
: - against - : Index No. 602325/2007  
: :  
GEORGE VENEGAS, CARL NICHOLAS and :  
SUCCESS EXPRESS, INC., :  
: Defendants. :  
-----X

**HERMAN CAHN, J.:**

Plaintiffs move for the appointment of an interim receiver for plaintiff Best Way Corporate Services, LLC (“Best Way”), and a temporary restraining order against the defendants to protect Best Way’s assets, CPLR §§ 6401 (a), 6301.

The individually named defendants, George Vegas and Carl Nicholas, have not responded to the instant motion. Defendant Success Express, Inc. (“Success”), opposes plaintiffs’ motion, and files its opposition solely on its own behalf.

**BACKGROUND**

This action concerns the sale of Best Way, a courier business, to defendant Success, which is also a courier service.

Plaintiffs allege in the complaint that the individually named plaintiffs and defendants were members in, with equal ownership of, Best Way. Success does not concede that the individual plaintiffs, Richard Gang and Wilfredo Plantyn, were in fact co-owners of Best Way.

There is no dispute, however, that the individual defendants sold Best Way to Success. Gang and Plantyn contend that the sale was made without their knowledge or consent. The sole

owner of Success, Allen Weitman, contends that Venegas and Nicholas represented to him that they had full authority to enter into the sales agreement and that he had no knowledge that Gang or Plantyn had any ownership interests of in Best Way.<sup>1</sup>

Venegas and Nicholas had a history of illegal business dealings. They had been convicted of a felony resulting from a scheme to over-bill the television network NBC for Best Way's messenger services.<sup>2</sup> Both Weitman and the individual plaintiffs were aware of Venegas' and Nicholas' actions in this regard.

Weitman claims that Venegas approached him about selling Best Way to Success, because Venegas was having financial difficulty meeting his restitution obligations to NBC. Success acquired Best Way, with compensation paid directly to Venegas and Nicholas, based on the Best Way customers and accounts they could retain for Success and new accounts they brought in. Weitman subsequently fired Venegas and Nicholas, when he discovered that they had allegedly stolen approximately \$50,000 from Success. Venegas was also arrested for grand larceny in connection with these allegations.

Plaintiffs contend that the sale had only illusory consideration and/or that the transfer was fraudulent in its intent and made without fair consideration. They argue that Best Way itself did not receive consideration, because all the compensation was paid to Venegas and Nicholas through consulting agreements with them as individuals. They further argue that Success only

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<sup>1</sup> In fact, Weitman knew Gang as the owner of yet another messenger service, Premier Messenger Service, and states that within the messenger business community, this was the only company the individual plaintiffs held themselves out as owning.

<sup>2</sup> Weitman notes that if Gang and Plantyn had been running or controlling Best Way at that time, they too would have been caught up in the over-billing scandal that both sides allege made newspaper headlines at the time.

committed to making payments to the individual defendants for their present and future service to Success, and that this is not consideration to Best Way. They claim that if the individual defendants do not perform under the consulting agreement or are fired, as they were, that they would receive little or no compensation, unjustly enriching Success with Best Way's assets.

Plaintiffs also allege that the sale of Best Way left Gang and Plantyn liable for Best Way's outstanding debt because the debts were not satisfied at the time of the sale and each plaintiff personally guaranteed them. The debt to which they refer consists of two lines of credit, one each from HSBC Bank USA and Citibank, in the amounts of approximately \$100,000 and \$8,000 respectively.

In the complaint, plaintiffs seek rescission of the sale, the return of Best Way's trade name and customer accounts to Best Way, an accounting from Success of the income it received from Best Way and monetary damages. Alternatively, plaintiffs allege that Best Way's property was converted by Success, and requests the imposition of a constructive trust.

## **DISCUSSION**

Success opposes the instant motion for the appointment of an interim receiver and a temporary restraining order to protect Best Way's assets.

### Interim Receiver:

An interim receiver may be appointed "where there is a danger that the property will be removed from the state, or lost, materially injured or destroyed." CPLR § 6401 (a). To establish the need for a temporary receiver, a plaintiff must have "adequately demonstrated his apparent interest in the property at issue herein and shown that there is a danger of irreparable loss and damage to such property." *Dolgoff v Projectavision, Inc.*, 235 AD2d 311, 312 (1st Dep't 1997)

Property:

In this case, not only is there an issue with regard to Gang and Plantyn's ownership of Best Way, but Success has raised issues regarding whether the particular customer accounts and clients, which constitute the majority of Best Way's assets, are property that can be bought or sold.

Success contends that messenger accounts and customers are not property that can be sold, as the accounts could be closed and the customers could leave at any time. It alleges that it was for this reason that the sale of Best Way was effectuated with payments based primarily on the collections from the Best Way accounts that Success was able to retain. Weitman notes that he had previously purchased three other messenger services with the same type of arrangement. He claims that, thus far, almost half of Best Way's customers have left, and do not do any business with Success, and that this is why he uses agreements based on customer retention to try to transfer accounts from one messenger service company to another.

Moreover, as part of its argument that the Best Way clients who chose to move to Success stay voluntarily, Success contends that if plaintiffs want these clients, they are free to solicit them.

Danger to Property:

Even if the clients and customer accounts do constitute property, plaintiffs have failed to demonstrate that Best Way's assets will be "removed from the state, or lost, materially injured or destroyed." Indeed, it is unquestionably in Success' best interest to protect and cultivate the accounts that had formerly been with Best Way, as they currently generate income for Success.

Cost of a Receiver:

Additionally, the specifics of this business make the appointment of a temporary receiver particularly burdensome. Success emphasizes that segregation of the accounts previously with Best Way through an interim receiver would cripple both itself and those accounts. It contends that its overhead and infrastructure precludes segregating the revenue derived from the Best Way accounts that remained with Success, because the profit margins are very small. As such, if the revenues these accounts generated were segregated and a portion was not allocated to overhead and operating expenses, Success could not continue to pay the overhead to service these clients. It further argues that the accounting and bookkeeping required to do so would itself be too costly for a business of its size, and this cost itself would bankrupt the company.

If Venegas and Nicholas were still employed at Success, plaintiffs could argue that transferring Best Way as they did manifests a “predisposition to take unilateral action in disregard of plaintiff[s]’ rights, thereby demonstrating a danger of material injury to the property” at issue. *Chaline Estates, Inc. v Furcraft Assoc.*, 278 AD2d 141, 142 (1st Dep’t 2000). However, Venegas and Nicholas no longer have access to either Success’ or Best Way’s assets. As such, even if Gang and Plantyn ultimately establish that they were co-owners of Best Way and were wronged by its sale without their knowledge or consent, there is still no indication that Success - - the only defendant that currently has control of Best Way’s former assets - - demonstrated a disregard of their rights and will not protect the assets at issue.

Further, the Court has carefully considered the cost/benefit analysis of the appointment of a temporary receiver. The Court feels that the case involved is excessive given the nature of the assets to be conserved, and the real likelihood that the assets would not be conserved, but would

be dissipated.

In view of the above, the motion for an appointment of an interim receiver for Best Way is denied.

Temporary Restraining Order:

A temporary restraining order may be granted “where it appears that immediate and irreparable, loss or damage will result unless the defendant is restrained before the hearing can be had.” CPLR § 6301. In order to obtain a temporary restraining order, it is necessary to show: (1) a likelihood of success on the merits; (2) irreparable harm if the order is denied; and (3) a balance of the equities in the movant’s favor. *Doe v Axelrod*, 73 NY2d 748, 750 (1988); *US Re Companies, Inc. v Scheerer*, 41 AD3d 152, 154 (1st Dep’t 2007).

Plaintiffs have not shown that they have a likelihood of success on the merits. Indeed, far from doing so, their own allegations indicate that Gang and Plantyn voluntarily relinquished control over Best Way<sup>3</sup> and provided Venegas and Nicholas with the ability to sell Best Way by allowing Venegas and Nicholas complete control over Best Way’s books, records and day to day operations. If that is true, plaintiffs might be estopped from denying that Venegas and Nicholas had authority to enter into the sales agreement with Success because Gang and Plantyn’s own actions gave rise to a reasonable belief that Venegas and Nicholas had authority to act on behalf of Best Way. *Cooper & Lybrant v Arol Dev. Corp.*, 210 AD2d 181, 182 (1st Dep’t 1994). *See also Hallock v State of New York*, 64 NY2d 224, 231 (1984).

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<sup>3</sup> Success questions whether Gang and Plantyn ever had ownership or control of Best Way, noting that plaintiffs’ purported operating agreement is undated, the notarization is not complete and Gang and Plantyn did not know that Best Way had vacated its former office space until four months thereafter.

Additionally, although plaintiffs make much of their contention that Gang and Plantyn, as individuals, and Best Way, as a corporation, did not receive adequate consideration for the agreement with Success, this argument does little to support a likelihood of success on the merits of their claims. The consideration of a contract is generally “not a proper subject for judicial scrutiny. *Spauding v Benenati*, 57 NY2d 418, 423 (1982). Simply, “the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value.” *Apfel v Prudential-Bache Sec., Inc.*, 81 NY2d 470, 475 (1993). Accordingly, although a resolution of the merits of the case remains for another day, at this time, plaintiffs have fallen short of establishing a likelihood of success.

Notwithstanding the above, Success is directed to maintain all records relating to services rendered for the former Best Way accounts, including payments received by it from those accounts.

Accordingly, it is

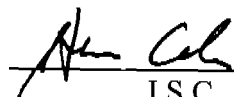
ORDERED that plaintiffs’ motion is denied; and it is further

ORDERED, that Success is directed to comply with the retention order contained herein; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: March 7, 2008

ENTER:

  
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J.S.C.

**FILED**  
MAR 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE