

New York Design Ctr. Inc. v Les Migrateurs, Inc.
2008 NY Slip Op 30888(U)
March 25, 2008
Supreme Court, New York County
Docket Number: 0102507/2008
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: 6750485 TowB
Justice

PART 10

NY DESIGN CONCEPT INC

INDEX NO. 102507/08

MOTION DATE _____

- v -

LES MIGRATEURS INC

MOTION SEQ. NO. 1

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/28/08

[Signature]
Justice

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
NEW YORK DESIGN CENTER INC.,

Plaintiff,

Index No. 102507/08
Mtn Seq. 001

-against-

LES MIGRATEURS, INC., and
HENRY PERSONNAZ

Defendants.
-----x

WALTER B. TOLUB, J.:

This motion by Plaintiff, New York Design Center Inc., (NYDC), is for an Order of Attachment pursuant to CPLR §§6201(1), 6201(3) and 6210.

FILED
MAR 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

Facts

On or about March 25, 2005, Defendant Migrateurs entered into a written lease with the Plaintiff (Lease). The Lease provided that Migrateurs would rent suite 1516 in the building located at 200 Lexington Avenue, New York, New York (Premises) from the Plaintiff for a term of 5 years beginning May 1, 2005 and ending April 30, 2010.

Plaintiff claims that Migrateurs was in possession of the Premises on June 1, 2007 and continues to be in possession of the Premises despite not paying rent. Plaintiff claims that it demanded the rent from the Defendant and that the Defendant is in default of its obligations in the amount of \$32,918.56. The

Plaintiff does not seek the payment of future rent in this action.

Plaintiff claims that Migrateurs, a New York Corporation, licensed to do business in New York, induced it to enter the Lease by having Defendant Henry Personnaz, a Connecticut resident, execute a Guaranty. Plaintiff claims that Mr. Personnaz personally and individually guaranteed the obligations of Migrateurs, including the payment of rent and expenses incurred by the Landlord in enforcing the performance and observance of the Lease.

Plaintiff further claims that it is more than likely to succeed in its action for rent and that an order of attachment is necessary because Mr. Personnaz may return to Paris and because he lives outside the state. Most significantly, Plaintiff claims that an Order of Attachment is necessary because Defendants have exhibited an intent to defraud and frustrate the proceedings by delivering at least 16 checks that have been dishonored due to insufficient funds and misdirecting a wire transfer.

Defendants do not deny that the checks were dishonored or that they owe Plaintiff money. Defendants argue that an Order of Attachment is inappropriate here because Defendants have attempted to negotiate a settlement of the rent, because Defendants have no intention of returning to Paris and because Defendants will not be able to pay Plaintiff anything until the

Temporary Order of Attachment is lifted from its bank accounts and inventory.

Discussion

CPLR §6201 provides in relevant part that:

An order of attachment may be granted in any action, except a matrimonial 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:

1. The defendant is a nondomiciliary residing without the state, **OR** is a foreign corporation not qualified to do business in the state; **OR**

3. The defendant, with the intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed or, or encumbered or secreted property, or removed it from the state or is about to do any of these acts;

(emphasis added)

CPLR §6210 provides that:

Upon a motion on notice for an order of attachment, the court may, without notice to the defendant, grant a temporary restraining order prohibiting the transfer of assets by a garnishee as provided in subdivision (b) of section 6214. The contents of the order of attachment granted pursuant to this section shall be as provided in subdivision (a) of section 6211.

Attachment is a provisional remedy in which the objective is the securing of a debt by a preliminary levy upon the property of the debtor to conserve it for eventual execution. (Siegal v. Northern Boulevard & 80th St. Corp., 31 AD2d 182 [1st Dept 1968]). Attachment secures the preservation of defendant's property pending a judgment and does not attempt to deplete funds or pay out the property or its proceeds. (Matthews v. Matthews, 210 AD 652 [1st Dept 1924]; Sutton v. Garcia, 80 Misc.2d 690 [N.Y. Sup 1974]). Due to its harsh nature, the statutory remedy of attachment is strictly construed in favor of the Defendant. (Elton Leather Corp. v. First General Resources Co., 138 AD2d 132 [1st Dept 1988]). Allegations in the complaint are not deemed true, rather, the Plaintiff has the burden of proving that it is entitled to the remedy of attachment. Plaintiff must also prove by affidavit or written evidence that there is a cause of action that the Plaintiff will succeed on the merits. (Faberge Intern. Inc. v. Di Pino, 109 AD2d 235 [1st Dept 1985]).

Plaintiff's motion for an order of attachment must be and is denied. Under CPLR 6201(1), the Plaintiff is unable to have an order of attachment issued against Defendant Les Migrateurs, Inc., because it is a New York corporation which is qualified to do business in the State. (CPLR 6201(1)). Furthermore, Plaintiff has not offered evidence sufficient to establish the need for attachment against Mr. Personnaz personally under CPLR 6201(1).

A prejudgment order of attachment under CPLR 6201(1) requires a showing that drastic action is required for security purposes. (Reading & Bates Corp. v. Nat'l Iranian Oil Co., 478 F.Supp. 724 [SDNY 1979] *internal citations omitted*). Even though it is possible to have an order of attachment issued against Mr. Personnaz because he falls within the ambit of CPLR 6201(1) by being a nondomiciliary of New York, mere statements that he may go back to Paris are insufficient to prove that attachment is necessary. The Plaintiff has not established that the drastic action of freezing Mr. Personnaz's personal bank account is required under CPLR 6201(1), especially in light of the fact that an order of attachment cannot be issued against the Defendant corporation.

Plaintiff has also not established that under CPLR 6201(3) the Defendants are attempting to defraud creditors or ultimately frustrate an order of judgment that may be rendered in Plaintiff's favor. (Rotham v. Rogers, 2221 AD2d 330 [2d Dept 1995]). Fraudulent intent must be proven, not simply alleged or inferred. (Abacus Fed. Sav. Bank v. Lim, 8 AD3d 12 [1st Dept 2004]). Dishonored checks alone are insufficient to prove fraudulent intent. (Ryan v. Hunton & Williams, 2000 WL 1375265 [EDNY 2000]). Here, the Plaintiff has not shown that the Defendants intend to defraud or frustrate an order of judgment and therefore an attachment is not appropriate under CPLR

6201(3).

Although Plaintiff has demonstrated that there is a cause of action for unpaid rent under the Lease and that the Plaintiff is more likely to succeed in the action, an Order of Attachment is not necessary to protect Plaintiff's interests. It follows that the Plaintiff has not met the requirements of CPLR Article 62 and the motion for an order of attachment must be and is denied.

Accordingly it is

ORDERED that Plaintiff's motion for an order or attachment is denied, and it is further

ORDERED that Defendants' accounts be released from attachment and that Defendants' merchandise be released from attachment.

Counsel for the parties are directed to appear in Part 10 at 80 Centre Street, room 122 at 9:30 a.m. on April 17, 2008 for a preliminary conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/27/08

FILED
MAR 28 2008 HON. WALTER B. TOLUB, J.S.C.
NEW YORK
COUNTY CLERK'S OFFICE