

130-132 W. 29th St., LLC v Brisam W. 29 LLC
2008 NY Slip Op 32829(U)
October 7, 2008
Supreme Court, New York County
Docket Number: 104963/08
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GOODMAN
Justice

PART 17

130-132 WEST 29TH STREET, LLC

INDEX NO. 104963/08

- v -
BRISAN WEST 29 LLC,
ETAL

MOTION DATE _____

MOTION SEQ. NO. 001

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

is decided

attached

FILED

OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/7/08

[Signature]
EMILY JANE GOODMAN 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 17

-----x

130-132 WEST 29H STREET, LLC.

Plaintiffs,

-against-

BRISAM WEST 29 LLC. et al,

Defendants.

-----x

Emily Jane Goodman, J.S.C.:

Index No. 104963/08

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In this property damage action, plaintiff moves for a preliminary injunction under CLPR 6301, to prevent defendant Brisam West 29 LLC (Brisam), the owner of an adjacent building, from assigning, transferring or distributing the proceeds of the sale of its property under a contract of sale entered into June 9, 2006, which has not yet closed. Plaintiff is understandably concerned that if it prevails in this action against Brisam, the judgment may not be paid in light of the evidence of insurance disclaimers and plaintiff's concern, which has not been disputed, that the sole asset of Brisam is the adjacent property. The motion is opposed.

The party seeking a preliminary injunction must demonstrate a probability of ultimate success on the merits, irreparable injury in the event that injunctive relief is denied and a balancing of the equities in its favor (see Wall Street Garage Parking Corp v

New York Stock Exchange, Inc, 10 AD3d 223, 226 [1st Dept 2004]; Sterling Fifth Associates v Carpentille Corp, Inc, 5 AD3d 328 [1st Dept 2004]). Generally, a preliminary injunction is not warranted in cases where the movant cannot "demonstrate that its potential damages are not compensable in money and capable of calculation and, thus, that it will suffer irreparable harm absent the requested injunction" (see Credit Index, LLC v Riskwise Intern LLC, 282 AD2d 246 [1st Dept 2001]; White Bay Enterprises, Ltd v Newsday, Inc, 258 AD2d 520, 521 [2d Dept 1999]). More importantly, because CPLR 6301 is directed towards "plaintiff's rights respecting the subject of the action" the Court of Appeals has held that an unsecured general creditor has no pre-judgment remedy that will interfere with the debtor's use of its property, even where there is a threat of dissipation of the debtor's assets which would render a judgment uncollectible (Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 [2000]). The subject of the action is typically a specific res in which the plaintiff has a pre-existing interest (see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C6301:1).

Here, plaintiff formulates an argument that the injunction is directed towards plaintiff's rights respecting the subject of the action because the adjoining property is "the very property on


which BRISAM and other Defendants in this matter performed work that caused substantial damages to Plaintiff's adjacent property, which damages are directly at issue . . . and which damages are continuing." However, here the act which Brisam seeks to do (sell its property), is not in violation of "plaintiff's rights respecting the subject of the action" because plaintiff has no pre-existing interest in the adjoining building. Further, "an attachment is the more appropriate remedy to prevent a removal, transfer or disposition of property rather than an injunction" (see First Ntl Bank of Downsville v Highland Hardwoods, Inc., 98 AD2d 924, 926 [3d Dept 1983]). Given the fact that the contract of sale appears to have been entered into prior to this action and the damages alleged (occurring on "October 10, 2006 and for sometime prior and subsequent thereto"), no evidence has been proffered that Brisam had "intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor" which is necessary to obtain an attachment under CPLR 6201.

Plaintiff has cited no case where an injunction was granted under similar facts. Although there may be some extraordinary situation where an injunction may be warranted, plaintiff has not demonstrated it here. Accordingly, there is no need to address the likelihood of success or balance of the equities.

Accordingly, it is
ORDERED that plaintiffs' motion for a preliminary injunction
is denied; and it is further
ORDERED that the temporary restraining order is dissolved.
This Constitutes the Decision and Order of the Court.

DATED: October 7, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
OCT 16 2008
COUNTY CLERKS OFFICE
NEW YORK