

ITS Recovery Group, LLC v Tzanides

2009 NY Slip Op 31298(U)

June 8, 2009

Supreme Court, New York County

Docket Number: 112260/06

Judge: Charles E. Ramos

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

PRESENT: Ramos
Justice

PART 33m

Its Recovery Group

INDEX NO. 112260/06

MOTION DATE _____

- v -

MOTION SEQ. NO. 009

Andrew Iznardes

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

_____ is decided in accordance with
_____ accompanying memorandum decision and order.

FILED
JUN 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/8/09

[Signature]
HON. CHARLES E. RAMOS
J.S.C.

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: COMMERCIAL DIVISION

-----X
ITS RECOVERY GROUP, LLC and ANTHONY J. FLAX,

Plaintiffs,

-against-

Index No.
112260/06

ANDREW TZANIDES,

Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Defendant Andrew Tzanides moves to compel plaintiffs ITS Recovery Group, LLC (ITS) and Anthony J. Flax (together, Plaintiffs) to abide by the terms of an oral stipulation of settlement agreement (Settlement) entered into in open court during the trial of this action.

This Court denied a temporary restraining order pending resolution of the motion.

Background

According to defendant, this application was precipitated by Plaintiffs' statement of intent to repudiate a settlement obtained in this action, by failing to disburse approximately \$100,000 in sums allegedly due to be paid to Tzanides.

ITS assists law and accounting firms recover for their clients tax refunds for their loss pursuant to the Internal Revenue Code. Flax is the founding member and current managing member of ITS. Tzanides is a thirty percent member and former employee of ITS.

In 2006, Plaintiffs commenced this action by a motion for a preliminary injunction to restrain Tzanides from interfering with

ITS's business relationships. This Court granted the preliminary injunction on November 8, 2006.

On March 20, 2008, during a trial of the action, the parties agreed to settle all claims and counterclaims (Settlement).

Tzanides moves for a preliminary injunction on the basis that Plaintiffs' proposed disbursement of the first revenues received since the Settlement violate its terms. Specifically, Tzanides alleges that ITS violated the Settlement by increasing its obligatory share to Law Finance Group¹ (Law Finance) from 33% to 50%, thus decreasing the share to be paid to Tzanides and other creditors under the Settlement.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm if the injunctive relief is not granted, and (3) a balancing of the equities in its favor (*City of New York v Untitled LLC*, 51 AD3d 509, 511 [1st Dept 2008]).

A. Likelihood of Success on the Merits

Tzanides argues that he is likely to succeed on the merits of his claim for breach of contract based upon Plaintiffs' alleged anticipatory breach of the Settlement by increasing its obligatory share to Law Finance from one-third to one half of ITS's proceeds, and inflating the cost side of the ledger to diminish distributions to Helen Tzanides and George Stavropoulos, thereby decreasing the share to be paid to Tzanides under the

¹ Law Finance is a secured creditor of ITS.

Settlement.

Conversely, Plaintiffs argue that due to ITS's present financial circumstances, additional loans were secured from Law Finance post-Settlement in order to keep ITS afloat, and as a consequence, Law Finance is now entitled to 50% of each receivables.² Additionally, Plaintiffs assert that nothing in the Settlement Agreement limits ITS's ability to repay its obligations to Law Finance.

Defendant is correct that the Settlement, dictated in open court and on the record, is an enforceable contract. An oral stipulation made in open court and stenographically recorded is enforceable as a contract, and is governed by general contract principles for its interpretation and effect (*Flannery v Flannery*, 54 AD3d 804, 804 [2d Dept 2008]).

The plain terms of the Settlement require Plaintiffs to repay a \$109,000 loan to Helen Tzanides and a \$50,000 loan to George Stavropoulos, and that these would be repaid as a "priority obligation of ITS, behind solely that portion of each receivable that is pledged to Law Finance Group (Law Finance)" (Transcript: 2: 10-16, Exhibit D, annexed to the Feerik Aff.).

Further, the Settlement provides that after the Loans are repaid in full, the parties "shall thereafter divide any proceeds on any case less what has to be paid on each receivable to Law Finance in the percentage that existed between them at the time that the claim was filed" (Transcript: 2: 17-25, 3:2-25).

² Exhibit 1, Flax Affidavit, Plaintiffs' Aff. In Opp.

There is no language in the Settlement that limits the amount that ITS may repay to Law Finance to one third of receivables, as Tzanides argues. Interpreting the Settlement in the manner that Tzanides urges, namely, by implying a limitation of one-third percentage of receivables that ITS may pay to Law Finance would be to impermissibly alter its plain terms.

Moreover, Tzanides has no standing to challenge Plaintiffs' disbursements of ITS receivables on behalf of two non-party creditors, Helen Tzanides and George Stavropoulos.

Consequently, Tzanides has failed to demonstrate a likelihood of success on the merits of its claim for breach of contract by anticipatory repudiation.

B. Irreparable Harm if Injunction is Denied

Tzanides argues that if injunctive relief is not granted, he will suffer irreparable harm because his prospect of recovering the sum due him under the Settlement is being minimized by the manner in which Plaintiffs are distributing ITS's receivables.

Notwithstanding that the Settlement does not contain the limitation concerning disbursements to Law Finance as Tzanides asserts, Tzanides fails to demonstrate that money damages would be insufficient to remedy any injury he suffered as the result of a breach of the Settlement (*EdCia Corp. v McCormack*, 44 AD3d 991, 994 [2d Dept 2007]).

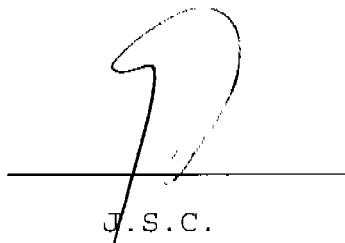
Thus, Tzanides has failed to demonstrate that he will suffer irreparable harm absent an injunction.

C. Balance of Equities

Finally, Tzanides has not demonstrated that the equities balance in his favor, particularly in light of his failure to demonstrate a likelihood of success on the merits and the compensability of his alleged injury by money damages. Therefore, the motion for a preliminary injunction is denied.

ORDERED that defendant's motion for a preliminary injunction is denied.

Dated: June 8, 2009



J.S.C.

HON. CHARLES E. RAMOS

FILED
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