

SFDS Dev. Corp. v Fecci
2009 NY Slip Op 31385(U)
June 16, 2009
Supreme Court, New York County
Docket Number: 103543/09
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

SFBS Development Corp. and
Lott Assisted Living Operating Corp.

INDEX NO. 103543/09

MOTION DATE _____

- v -

Eric J. Fecci, CPA, et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to/for Order of seizure.

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

PAPERS NUMBERED

1, 2, 3, 4

Answering Affidavits — Exhibits _____

8, 9

Replying Affidavits _____

5, 6, 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion* are decided in accordance with the attached memorandum decision.

PC on ~~6/20/09~~ 7/17/09 @ 10AM.

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

COUNTY CLERKS OFFICE
NEW YORK

JUN 24 2009

FILED

Dated: 6/15/09

JUSTICE DORIS LING-COHAN J.S.C.

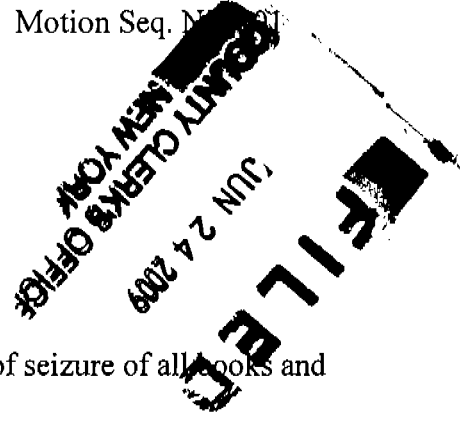
Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
 SFDS DEVELOPMENT CORPORATION and :
 LOTT ASSISTED LIVING OPERATING :
 CORPORATION, :
 :
 Plaintiffs, :
 :
 -against- :
 :
 ERIC J. FECCI, CPA, FECCI CONSULTING GROUP, :
 INC., and ALLWRITEUP.COM, INC., :
 :
 Defendants. :
 -----X

Index No. 103543/09
Motion Seq. No. 01



DORIS LING-COHAN, J.:

Plaintiffs move, pursuant to CPLR 7102, for: (1) an order of seizure of all books and records allegedly belonging to plaintiffs and their related entities, currently in the possession of defendants; (2) a preliminary injunction, pursuant to CPLR 7109(a), ordering that the books and records not be removed from the state, transferred, sold, pledged, assigned or otherwise disposed of during the pendency of this action or until further order of the court; and (3) legal fees, costs and disbursements of this action. Defendants cross-move for sanctions and attorneys' fees.

Background

In June 2006, plaintiff SFDS Development Corporation ("SFDS") entered into an agreement with defendants for them to provide accounting and business management services, including daily back office functions, rent collection and bill payment and recording for 14 related entities. Additionally, a separate agreement was entered between plaintiff Lott Assisted Living Operating Corporation ("Lott") and defendants for similar services.

In December 2008, plaintiffs terminated their contract with defendants. At that time,

plaintiffs requested that information, books, records, invoices and computer files related to their entities in the possession of defendants be turned over to Dan Forkell, the Chief Financial Officer of SFDS. Plaintiffs' attorney sent two follow-up letters on December 17, 2008 and February 13, 2009, demanding the return of all books and records, including but not limited to, information, books, records, general ledgers, receipts, invoices and electronic files in defendants' possession. Plaintiffs also informed defendants that the Department of Housing and Urban Development ("HUD") was conducting a review of various related entities and that they needed such books and records to comply with HUD's request.

Since then, defendants have turned over some of the books and records requested. Defendants informed plaintiffs that all of the remaining documents would be turned over upon payment of invoices that remained outstanding. Plaintiffs thereafter commenced this replevin action to recover the remaining documents and now seek an order of seizure or a preliminary injunction.

Discussion

Preliminary Injunction

In order to obtain a preliminary injunction, plaintiffs must establish: (1) a likelihood of success on the merits; (2) irreparable harm if the preliminary injunction is not granted; and (3) a balance of equities weighing in their favor. *Doe v Axelrod*, 73 NY2d 748, 750 (1988). Additionally, under CPLR 7109(a), movants must also establish the uniqueness of the chattel. Plaintiffs have moved for a preliminary injunction ordering that the property requested not be removed from the state, transferred, sold, pledged, assigned or otherwise disposed of during the pendency of this action or until further order of the court.

As for the first element, plaintiffs have shown a likelihood of success on the merits sufficient to warrant a preliminary injunction, at least with regard to some of the documents. Although there does not appear to be any binding authority on the matter at hand, New York courts have previously held that there is no such thing as an “accountant’s lien,” which would allow an accountant to retain documents of its clients until payment has been made, especially with regard to any documents that were not created by defendants. *See Hyer v Forte*, 87 Misc 2d 106 (Sup Ct Nassau County 1976); *Park-Place Dodge Corp. v Collins*, 75 Misc 2d 25 (Sup Ct NY County 1973). Additionally, defendants have not cited to any cases that would allow them to withhold documents being sought by plaintiffs.

In *Park-Place Dodge Corp.*, the plaintiff sought an injunction compelling its accountant to return the plaintiff’s books and records upon which the defendant asserted a retaining lien for alleged unpaid fees. In granting the injunction and finding that the defendant-accountant was not entitled to a retaining lien either at common law or under the Lien Law statute, that court stated: “[T]o permit an accountant to hold on to the books of account of a business client against the latter’s will, under any circumstances, would be to strike an onerous blow at commerce and to encourage overreaching and extortion on the part of a discharged functionary.” *Park-Place Dodge Corp.*, 75 Misc 2d at 32.

In *Hyer*, similar documents appeared to be at issue, although the motion in that case was one by the plaintiff-accountants for a protective order to prevent disclosure of “documents which plaintiffs ha[d] created for defendant, and for which plaintiffs ha[d] not been compensated.” 87 Misc 2d at 107. That court required the disclosure of such documents, holding that there was “no New York Authority which supports the assertion of [an accountant’s retaining] lien by the

plaintiff-accountants.” *Id.* However, beyond that statement, the *Hyer* court did not specifically address whether the accountants would have a right to a lien and/or whether the defendant had a right to possession of the accounting records, concluding instead that such would be a proper subject in a separate proceeding, but that disclosure of such documents was appropriate in that instance, given that such discovery was “necessary and proper” as a “litigation tool.” *Id.*

As for the second element to grant a preliminary injunction, the property sought by plaintiffs is unique and cannot be compensated by monetary damages as it contains all of the accounting records of the entities. Thus, it is irreplaceable, and irreparable harm will occur if the records are disposed of in any way. With regard to the final element, the balance of equities lies in plaintiffs’ favor since defendants will not be prejudiced in any way by being prevented from disposing of the property, yet plaintiffs would be severely prejudiced if the documents were destroyed. In addition, defendants have not opposed this portion of plaintiffs’ motion. Therefore, a preliminary injunction that the property requested not be removed or disposed of is appropriate and, thus, granted.

Order of Seizure

Plaintiffs also move for an order of seizure of their corporate books and records allegedly being improperly held by defendants. CPLR 7102 sets forth the procedure for a party to bring an action to recover the right to possession of a chattel. In order for an order of seizure to be granted, “[t]he movant must establish the probability of success on the merits and such application may be defeated by a showing of a good faith defense to movant’s claim.” *East Side Car Wash, Inc. v K.R.K. Capitol, Inc.*, 102 AD2d 157, 161 (1st Dep’t 1984).

At this juncture, the motion is denied without prejudice, as the proof set forth by the

movants does not provide an ample evidentiary basis upon which an order of seizure could be granted in that plaintiffs have not adequately shown that they are entitled to *all* of the documents that they now seek. Specifically, plaintiffs have not “differentiated between those items of books, records and documents which were left in [their accountant’s] possession in their capacity as [such], and those items which [the accountant] allegedly worked on and created or improved.” *Hyer*, 87 Misc 2d at 107. Nor have they asserted that all of the books and records they seek *have not been* improved, altered or produced by defendants, which would limit the documents to one category, namely, the actual books and records given to the accountant by plaintiff, which most likely should be returned to plaintiffs. However, in seeking an order of seizure, it is plaintiffs’ obligation to adequately differentiate and specify the documents they seek, since they are moving for an order of seizure and should “clearly identify the chattel to be seized,” which plaintiffs have failed to do. CPLR 7102(c).

Further, as indicated above, in addition to the actual books and records, which arguably belong to plaintiffs, the documents sought include ones that defendants produced using information from plaintiffs’ books and records. While defendants contend they should not be required to turn over any additional documents until they are paid for their services, defendants claim that their contention is even stronger with regard to the documents that they produced and created, as services rendered to plaintiffs. Defendants argue that by turning over such documents, plaintiffs would essentially get the benefit of defendants’ services without adequately compensating defendants for their work. As to these documents, and as plaintiffs have failed to specify the documents to which they are entitled, plaintiffs are not entitled to an order of seizure at this time.

Legal Fees

Plaintiffs also seek legal fees, costs and disbursements, which are likewise not appropriate at this time given the outcome of this motion. In any event, with regard to legal fees, unless authorized by agreement between the parties, by statute or by court rule, attorneys' fees are generally not available as an item of damages. *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989). Plaintiffs have not cited to any agreement, statute or court rule that would allow them to recover legal fees.

Sanctions

Defendants cross-move for an award of sanctions for plaintiffs' commencement of this purported frivolous action and for attorneys' fees. An action is frivolous if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." 22 NYCRR 130-1.1(c)(1). In light of the above, the cross motion for sanctions is denied, as it cannot be said that the complaint lacks merit as a matter of law.

Accordingly, it is

ORDERED that plaintiffs' motion is granted to the extent that the books and records of plaintiffs currently being held by defendants and sought in this action by plaintiffs are not to be removed from the state, transferred, sold, pledged, assigned or otherwise disposed of during the pendency of this action or until further order of the court, and it is otherwise denied without prejudice; and it is further

ORDERED that defendants' cross motion is denied; and

ORDERED that the parties shall appear on ~~July 28~~ ^{July 26}, 2009 at 10:00 AM, Room 428, 60

July 17, 2009

Centre Street, New York, NY for a preliminary conference; and it is further

ORDERED that within 30 days of entry of this judgment and order, plaintiffs shall serve a copy upon defendants with notice of entry.

Dated: 6/16/09


Hon. Doris Ling-Cohan, J.S.C.

J:\Seizure\SFDS Development.Fecci, seizure of records.wpd

FILED
JUN 24 2009
COUNTY CLERK'S OFFICE
SULLIVAN COUNTY NEW YORK