

Bank v L.I. Fine Antique Gallery, Inc.

2009 NY Slip Op 31899(U)

August 11, 2009

Supreme Court, Nassau County

Docket Number: 003875-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
NARA BANK,
Plaintiff,

TRIAL/IAS PART: 25
NASSAU COUNTY

-against-

Index No: 003875-09

L.I. FINE ANTIQUE GALLERY, INC.,
MOSHEH KHODADADIAN and
JANET KHODADADIAN,

Motion Seq. No: 1

Submission Date: 6/15/09

Defendants.
-----X

Papers Read on this Motion:

- Order to Show Cause, Schedule of Collateral,**
- Affidavit in Support and Exhibits.....X**
- Affirmation Pursuant to Uniform Rule 202.7(f).....X**
- Emergency Relief Affirmation.....X**
- Plaintiff's Memorandum of LawX**

This matter is before the court on the motion by Plaintiff Nara Bank ("Nara" or "Plaintiff"), filed March 4, 2009 and submitted June 15, 2009, for an order of seizure and preliminary injunction related to collateral for a promissory note ("Note") executed by Defendant L.I. Fine Antique Gallery, Inc. ("L.I.") and guarantees executed by Defendants Mosheh Khodadadian ("M. Khodadadian") and Janet Khodadadian ("J. Khodadadian"). The collateral is listed on the Schedule of Collateral included with Plaintiff's Order to Show Cause and will be referred to herein as "Collateral." No opposition or other response to the motion has been submitted. The Court grants Plaintiff's motion to the extent set forth below.

BACKGROUND

A. Relief Sought

Nara seeks an Order 1) pursuant to CPLR § 7102(d)(1), directing the Sheriff of Nassau County or any other county where the collateral may be found (“Sheriff”) to a) seize the collateral and any identifiable proceeds thereof; b) break open, enter and search for the Collateral at any place where it may be found; and c) deliver the collateral to Nara or its representatives; and 2) pursuant to CPLR § 6301, enjoining L.I., M. and J. Khodadadian and their agents, pending a final judgment in this action, from transferring or otherwise disposing of the Collateral.

Defendants have not submitted any opposition to Plaintiff’s application.

B. The Parties’ History

In support of its application, Nara provides an Affidavit in Support of Henry Lee (“Lee”), a vice president of Nara, who affirms that he is fully familiar with the facts and circumstances of this matter based both on his personal knowledge and his review of books and records that Nara maintains in the course of its regular business. Lee affirms that, on or about June 15, 2007, L.I. duly executed and delivered the Note to Nara in the principal sum of \$100,000. Lee provides a copy of the Note which is signed by J. Khodadadian as President of L.I. and by M. Khodadadian as Secretary of L.I. The Note provides that sixty (60) payments of interest and principal are due every month, beginning July 15, 2007 and ending June 15, 2012.

Beginning on or about January 15, 2009 (“Default Date”), L.I. failed to make the payments due under the Note, thereby defaulting on the Note. Lee affirms that L.I. was notified of its default under the Note, but does not specify how that was done. Counsel for Nara affirms that, by letter dated March 2, 2009 and served via Federal Express upon all Defendants, he notified Defendants of Plaintiff’s intention to make the instant application. Counsel provides a copy of that letter which advised Defendants of Nara’s intention to file a motion for replevin by Order to Show Cause requesting a temporary restraining order with respect to the Collateral. The letter also provided Defendants with the date, time and location at which Plaintiff would be making the application. None of the Defendants appeared or submitted a response. Lee affirms that, at the time of default, L.I. owed Nara the sums of \$77,221.24 in unpaid principal, plus

interest at the default rate stated in the Note since the Default Date, together with late fees of \$869.47.

Lee affirms, further, that by separate written agreement dated June 15, 2007, M. Khodadadian guaranteed L.I.'s payment and performance pursuant to the Note. Lee provides a copy of that guarantee, designated "Guarantee-1," which is signed and acknowledged by M. Khodadadian on June 15, 2007. J. Khodadadian also executed a separate written agreement dated June 15, 2007, guaranteeing L.I.'s payment and performance pursuant to the Note. Lee provides a copy of that guarantee, designated "Guarantee-2," which is signed and acknowledged by J. Khodadadian on June 15, 2007.

Lee affirms that M. and J. Khodadadian ("Individual Defendants") failed to comply with the terms of Guarantees 1 and 2 because they did not timely make the payments due and, therefore, are in default. Accordingly, the Individual Defendants, jointly and severally, owe Nara \$77,221.24, representing the unpaid principal balance of the Note, plus interest at the default rate since the Default Date, along with late charges of \$869.47.

In addition, Lee avers that, on or about June 15, 2007, L.I. entered into a commercial security agreement ("Security Agreement") with Nara that secured the indebtedness of the Note. Lee provides a copy of the Security Agreement which is signed by J. and M. Khodadadian as President and Secretary of L.I., respectively. Pursuant to the Note and Security Agreement, Nara expressly reserved a purchase money security interest in the Collateral, which is described in the Security Agreement. The Collateral includes inventory, equipment, accounts, money, tools, supplies, products and proceeds of L.I. in the amount of \$100,000, representing the indebtedness. In addition, L.I. granted Nara a security interest in the Collateral of L.I., and its proceeds, until the entire indebtedness that L.I. owed to Nara was paid.

Lee affirms that Nara perfected its security interest in the Collateral by filing a National Uniform Commercial Code ("UCC") Financing Statement (Form UCC-1), and provides a copy of that Financing Statement. The Note and Security Agreement provide that, in the event of a default, and any time thereafter, Nara shall have the rights and remedies of a secured party under the UCC and any other applicable laws, including the right to any deficiency remaining after the disposition of the Collateral. Thus, Lee submits, Nara is entitled to a judgment and order

enforcing its security interest and rights in the Collateral.

Lee affirms that, based on his over five years experience with this type of collateral, he estimates that the value of the Collateral to be replevied is over \$80,000. He avers, further, that he believes that the Collateral is located at L.I.'s place of business at 451 Old Country Road, Westbury, New York ("Address").

C. The Parties' Positions

Nara submits that the Note required L.I. to make 60 payments of interest and principal, commencing June 15, 2007 and continuing until June 15, 2012. M. Khodadadian and J. Khodadadian guaranteed L.I.'s payment and performance of obligations pursuant to the Note. In addition, pursuant to the Security Agreement, Nara secured the indebtedness of the Note. Nara expressly reserved a purchase month security interest in the Collateral, and a security interest in the proceeds, in the sum of \$100,000, representing the indebtedness. Nara perfected its security in the Collateral by filing the UCC financing statement with the appropriate authorities.

Nara submits, further, that the terms of the Note and Security Agreement provide that, in the event of a default, and any time thereafter, Nara shall have the rights and remedies of a secured party under the UCC and other applicable laws, including the right to any deficiency that remains after the disposition of the Collateral. Defendants are in default of the Note because they stopped making required payments on January 15, 2009. Moreover, Defendants have asserted no defense to this action. Thus, Nara submits that it is entitled to an order of replevin, order of seizure and preliminary injunction based on the terms of the Note and Security Agreement, and Defendants' default pursuant to those instruments.¹

As noted above, none of the Defendants has submitted a response to Nara's motion.

¹ The Court (Austin, J.) granted Nara's application in the Order to Show Cause for a temporary restraining order restraining Defendants from removing or transferring the Collateral, and that restraining order remains in effect. Nara has provided Affidavits of Service reflecting service of the Order to Show Cause and supporting papers upon the Defendants as directed by the Court in the Order to Show Cause.

RULING OF THE COURT

A. Legal Standards for Issuance of an Order of Seizure

CPLR § 7101 authorizes an action to try the right to possession of a chattel. The sole issue in an action pursuant to CPLR § 7101 is which party has the superior possessory right to the chattels. *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 419 (S.D.N.Y. 2002) (where defendants conceded default and promissory note gave plaintiff immediate right to foreclose on pledged property, plaintiff “undoubtedly” had superior right to collateral in amount provided by note).

CPLR § 7102(c) provides that the application for an order of seizure shall be supported by an affidavit which shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;
2. that the chattel is wrongfully held by the defendant named;
3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;
4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;
5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel, the place where the chattel is located and facts sufficient to establish probable cause to believe that the chattel is located at that place;
6. that no defense to the claim is known to the plaintiff; and
7. if the plaintiff seeks an order of seizure without notice, facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value.

Finally, CPLR § 7102(d)(1) provides:

Upon presentation of the affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found

to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place specified in the affidavit. The plaintiff shall have the burden of establishing the grounds for the order.

CPLR § 7102(d) permits the court, in a replevin action, to include a provision in an order of seizure directing the Sheriff to break open, enter and search for the chattels sought to be replevied at the place specified in the affidavit submitted on the application for an order of seizure. *Iovinella v. Sheriff of Schenectady County*, 67 A.D.2d 1037, 1038 (3d Dept. 1979).

B. Legal Standards for Issuance of a Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *E.g., Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

C. Application of Legal Standards to the Present Case

The Court concludes that the terms of the Promissory Note, Guarantees and Security Agreement establish Plaintiff's right under CPLR §§ 7101 and 7102 to an order of seizure that includes a provision directing the Sheriff to break open, enter and search for the chattels sought to be replevied at Defendant L.I. Fine Antique Gallery, Inc.'s place of business at 451 Old

Country Road, Westbury, New York 11590.² In addition, Plaintiff has demonstrated its likelihood of success on the merits, irreparable injury without the requested relief and a balancing of the equities in Plaintiff's favor. Indeed, the failure of Defendants to respond in any way to Plaintiff's Order to Show Cause further demonstrates Plaintiff's entitlement to the equitable relief that it seeks. Accordingly, it is hereby

ORDERED, that the Sheriff of Nassau County is directed to seize the collateral listed on Plaintiff's Schedule of Collateral, annexed to Plaintiff's Order to Show Cause dated March 4, 2009, and any identifiable proceeds of that collateral, from L.I. Fine Antique Gallery, Inc., 451 Old Country Road, Westbury, New York 11590; and it is further

ORDERED, that the Sheriff of Nassau County is authorized to break open, enter and search for the collateral listed on Plaintiff's Schedule of Collateral, and any identifiable proceeds thereof, at L.I. Fine Antique Gallery, Inc., 451 Old Country Road, Westbury, New York 11590; and it is further

ORDERED, that the Sheriff of Nassau County is directed to deliver such collateral to Plaintiff or its representatives; and it is further

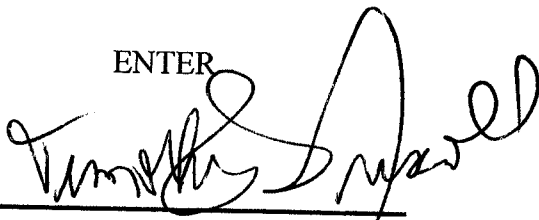
ORDERED, that Defendants L.I. Fine Antique Gallery, Inc., Mosheh Khodadadian and Janet Khodadadian, and all those acting in concert with and on behalf of them, pending a final judgment in this action, are enjoined from transferring, removing, assigning, selling, pledging, hypothecating, disposing of or otherwise interfering with Plaintiff's rights in the collateral set forth in the Schedule of Collateral.

² Plaintiff's moving papers and the attached exhibits do not, however, establish a basis for the Court to order the Sheriff to search for collateral outside L.I.'s place of business in Westbury. Plaintiff may seek the Court's permission for the Sheriff to search any additional locations upon providing a factual predicate that the collateral is present at those locations.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY
August 11, 2009

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

AUG 19 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE