

Kwatra v Mehta

2009 NY Slip Op 31992(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 107486/09

Judge: Judith J. Gische

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

PRESENT: Gische
Justice

PART 10

Pradeep Kwatra
Vishal Mehta

INDEX NO. 107486/09
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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

*and case scheduled for
a PC on October 8, 2009 @
9:30
am*

FILED
SEP - 2 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: AUG 31 2009

HON. JUDITH J. GISCHE 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: Part 10

-----X

Pradeep Kwatra,
Plaintiff,

-against-

Vishal Mehta,
Defendant.

Decision/Order

Index#107486/2009
Mot. Seq. # 001

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
OSC, CST affirm. PK affd., exhibits.....	1
Notice of Cross-motion, LNS affd., VM affd., exhibits.....	2
Defd's additional exhibits.....	3
CST affirm in opp to x-motion, etc., exhibits.....	4
LS reply affd.....	5

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff moves to preliminarily enjoin and restrain defendant from seeking to enforce a Judgement by Confession, entered by the defendant against the plaintiff on October 3, 2008, under Supreme Court, New York County Index Number 113406/2008. Defendant cross-moves to dismiss the action on the grounds that there is a prior identical action pending between the same parties in the Superior Court of the State of New Jersey.

On October 3, 2008 this Court entered a Judgment by Confession against plaintiff and in favor of defendant in the amount of \$71,325.00 plus \$225 costs and disbursements. According to plaintiff, defendant is attempting to enforce such

judgment by attaching assets and restraining bank accounts. Plaintiff has now brought this action, under a separate index number, to vacate the Confession of Judgment on the ground that it was "obtained due to the fraud, misrepresentation and/or other misconduct by the Defendant." The following facts are alleged by plaintiff in his complaint and contained in his affidavits on these motions:

Plaintiff claims that he and defendant were personal friends. On August 28, 2007 defendant loaned plaintiff the sum of \$71,000 which was to be paid back on February 18, 2008 with 8% interest. The loan was memorialized by a written promissory note. Executed simultaneously with the note was a Confession of Judgment. The note expressly provides:

"In the event that said sum, as set forth above, shall not be paid in full on February 18, 2008, the Borrower shall be responsible for the sum of Seventy Six thousand Three Hundred Twenty Five (\$76,325.00) as set forth in the Confession of Judgment executed herewith. Said Confession of Judgment shall be held by the attorney for the Lender in escrow and shall be of no force and effect in the event that Borrower shall pay the within sum in full on the date set forth above. Said judgment may be enforceable in any court in the states of New York or New Jersey."

On November 21, 2007 plaintiff's wholly owned corporation, Veshno Corp. Inc., entered into a contract to purchase the assets of a New Jersey restaurant for \$700,000 ("restaurant contract"). The restaurant contract required plaintiff to obtain financing, which was proving difficult for him. Plaintiff, thereafter, discussed with defendant the possibility that plaintiff would assign the restaurant contract to defendant for the sum of \$140,000, which would be paid in part with debt forgiveness of the promissory note and the balance in cash. According to plaintiff, an agreement was reached in principle. Admittedly, although a draft was prepared, no actual written agreement was ever

signed by either party.

Nonetheless, in August 2008, plaintiff signed an assignment of the restaurant contract over to defendant. Plaintiff claims that this assignment was made in order to facilitate defendant getting financing to complete the restaurant purchase. In reliance on their friendship and the agreement, plaintiff did not pay the monies due under the promissory note.

Unknown to plaintiff, defendant executed a wholly separate and new contract with the sellers under the restaurant contract for the sum of \$529,000 ("new restaurant contract"). Plaintiff alleges that the new restaurant contract was made to avoid paying him the \$140,000 due under the parties' oral understanding. Plaintiff claims that the new restaurant contract is also inappropriate because it gives defendant credit for sums he allegedly made, even though such sums were never paid by plaintiff to the seller.¹

Defendant denies that the promissory note and the restaurant contracts had anything to do with one another and/or that they were interrelated in any way. He claims that the sellers declared the first restaurant contract void and thereafter entered into the new restaurant contract with his designee. Defendant claims that when plaintiff defaulted on the note, he was well within his rights to enforce the note by entering the Confession of Judgment with this Court.

¹The new restaurant contract states in pertinent part:

"The purchase price to be paid by Buyer for the Assets is Five Hundred Twenty-Nine Thousand Dollars and No Cents (\$529,000.00), payable as follows:

(a) One Hundred Forty-Four Thousand Dollars (\$144,000.00) already paid to the Corporation by Buyer as part of a separate contract with Veshno Corp. Inc, to which Buyer was not a party..." Plaintiff claims he never paid \$144,000 to the seller.

In late 2008 or early 2009 an action was filed in the Superior Court of New Jersey's Chancery Division, Middlesex county (Docket No. C-281-08) ("New Jersey action"). The complaint in the New Jersey action is brought on behalf of plaintiff, his corporation and another against defendant and the sellers of the restaurant. The action seeks damages for breach of the restaurant contract (first count); breach of a loan agreement (second count) and breach of line of credit agreement (third count), unjust enrichment (fourth count), breach of duty of good faith and fair dealing (fifth count), misrepresentation and fraud (sixth count), negligent misrepresentation (seventh count) common law fraud (eighth count) tortious interference (ninth count) and declaratory judgment (tenth count). The gravamen of the New Jersey action is that the new restaurant contract violated plaintiff's rights under the original restaurant contract.

DISCUSSION

Before turning to the issue of whether plaintiff is entitled to a preliminary injunction, the court must first address the cross-motion seeking dismissal. Defendant argues that because the New Jersey action is identical to the instant action, this action should be dismissed pursuant to CPLR 3211(a)(4).

CPLR 3211(a)(4) provides:

"(a)...A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:...4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon such ground but may make such order as justice requires..."

In order for dismissal to be granted there must be a complete identity of issues.

Reliance Ins. Co., American Elec. Power Co., Inc., 224 AD2d 235 (1st dept. 1996).

While some of the parties are the same and some of the factual basis for the instant

action is also part of the New Jersey action, the causes of action are not and cannot be the same in the two actions. In this action plaintiff seeks to vacate a judgment entered in the courts of this State. This relief is not and cannot be sought in the New Jersey action. No other state can vacate this State's judgments. At most, they can only refuse to give it full faith and credit in their own state. Consequently, there is no basis for dismissing this action based upon the previously commenced New Jersey action.

Turning next to the issue of whether plaintiff is entitled to a preliminary injunction against the enforcement of the Confession of Judgment pending determination of the underlying action, the court decides as follows:

On a motion for a preliminary injunction, the movant must prove the likelihood of ultimate success on the merits, that it will suffer irreparable harm unless the relief is granted, and a balance of the equities in its favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1st Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). The purpose of a preliminary injunction is to maintain the *status quo* and prevent the dissipation of property that could render a judgment ineffectual. Moy v. Umeki, 10 AD3d 604 (2nd dept. 2004). . "Likelihood of success" need only be shown from the evidence presented; conclusive proof is not required. Thus even where there are facts in dispute, the court may, in its discretion, order such relief pendente lite to maintain the status quo. Moy v. Umeki, supra at 605. The granting of any preliminary injunction requires the posting of security. CPLR § 6312 (b).

The court denies the preliminary injunction because plaintiff has failed to show a likelihood of success on the merits. Plaintiff admits that it signed the note and Confession of Judgment. He also admits that he failed to pay the note according to its

terms, thereby triggering the right to file the Confession of Judgment. The success of his claim to vacate the judgment rests on his argument that the parties had a subsequent agreement that forgiveness of the debt underlying the note was to be part of payment plaintiff was to receive for assigning the restaurant contract to defendant. He admits that although a contract to that effect was drafted, it was never signed and that he nonetheless assigned the restaurant contract to defendant. There is very little likelihood under these facts that plaintiff can prevail on a claim that the note has been satisfied and the Confession of Judgment is, therefore, void.

In addition it appears that similar relief was requested in the New Jersey action, resulting in an order. In the New Jersey action Justice Berman has already ruled that certain receivables from an IHOP restaurant due plaintiff and/or its designee will be placed with a trustee pending further order. Such assets are thus put out of reach of defendant in connection with the enforcement of the Confession of Judgment.

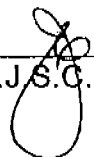
Conclusion

In accordance with the foregoing, the motion for a preliminary injunction is denied and the cross-motion to dismiss the case is denied. The matter is set down for a preliminary conference before this Court on October 8, 2009 at 9:30 a.m. Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, NY
August 31, 2009

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NEW YORK

SO ORDERED:



J.G.J.S.C.