

<b>Caterpillar Fin. Servs. Corp. v Spagnolo Constr., Inc.</b>
2009 NY Slip Op 32633(U)
October 27, 2009
Supreme Court, Nassau County
Docket Number: 016900-09
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  
**CATERPILLAR FINANCIAL SERVICES  
CORPORATION,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 016900-09  
Motion Seq. No: 1  
Submission Date: /30/09**

**SPAGNOLO CONSTRUCTION, INC. and  
FABRIZIO SPAGNOLO,**

**Defendants.**

-----X

**Papers Read on this Motion:**

- Order to Show Cause.....X**
- Affidavit of J. Anderson, Jr. in Support.....X**
- Affirmation in Support.....X**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits....X**
- Reply Affirmation and Exhibit.....X**
- Sur-reply Affirmation, Sur-reply Affidavit and Exhibit.....X**
- So-ordered Stipulation dated September 22, 2009.....X**

This matter is before the court on the Order to Show Cause filed by Plaintiff on August 20, 2009 and submitted October 8, 2009, for an Order, 1) pursuant to CPLR § 7102, directing the Sheriff of Nassau County or any other County where the property may be found, to seize certain collateral in which Plaintiff has a security interest; and 2) pursuant to CPLR §§ 6301 and 6311, restraining the Defendants, and persons or entities acting in concert with Defendants, from dismantling, removing, concealing, using, transferring or otherwise acting in any manner inconsistent with the Plaintiff's interest in that collateral. For the reasons set forth

below, the Court grants Plaintiff's application in part and denies it in part. Specifically, the Court 1) denies Plaintiff's application for an Order, pursuant to CPLR § 7102, authorizing the seizure of certain chattel; 2) grants Plaintiff's application for an Order, pursuant to CPLR §§ 6301 and 6311, restraining Defendants, and any persons or entities acting in concert with Defendants, from dismantling, removing, concealing, using, transferring or otherwise acting in any manner inconsistent with the Plaintiff's interest in the following property: a) an Excavator, Cat Model 313BCR, Serial Number BAS00257, and b) an Excavator, Cat Model 325CLCR, Serial Number BKW00395; and 3) denies as moot Plaintiff's application as to two (2) other pieces of equipment, in light of the so-ordered stipulation dated September 22, 2009 that resolves the Order to Show Cause with respect to this other equipment. The Court also requires Plaintiff to post an undertaking in the sum of \$25,000, pursuant to CPLR § 6312(b), as a condition of the injunctive relief granted herein.

### BACKGROUND

#### A. Relief Sought

Plaintiff Caterpillar Financial Services Corporation ("Caterpillar" or "Plaintiff") requests an Order 1) pursuant to CPLR § 7102, authorizing seizure of certain chattel; and 2) pursuant to CPLR §§ 6301 and 6311, restraining Defendants Spagnolo Contracting, Inc. ("Borrower") and Fabrizio Spagnolo ("Spagnolo") (collectively "Defendants"), and any persons or entities acting in concert with Defendants, from dismantling, removing, concealing, using, transferring or otherwise acting in any manner inconsistent with Plaintiff's interest in certain collateral.

By so-ordered stipulation dated September 22, 2009 ("Stipulation"), the parties resolved the Order to Show Cause with respect to the following equipment: 1) a Compactor, Cat Model CB214D, Serial Number IT201191, and 2) a Compactor, Cat Model CB114D, Serial Number C2700176.<sup>1</sup> Accordingly, this Decision will address only the remaining equipment at issue in the Order to Show Cause: a) an Excavator, Cat Model 313BCR, Serial Number BAS00257, and b) an Excavator, Cat Model 325CLCR, Serial Number BKW00395.

Defendants oppose Plaintiff's application.

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<sup>1</sup> Although the Stipulation lists the Serial Number of this piece of equipment as "C220176," the Sales Contract, Exhibit C to the Verified Complaint, reflects that the serial number is C2700176.

## B. The Parties' History

Borrower entered into contracts for the purchase of 1) an Excavator, Cat Model 313BCR, Serial Number BAS00257 ("Loan 2") and an Excavator, Cat Model 325CLCR, Serial Number BKW00395 ("Loan 4"). The Installment Sale Contract (Security Agreement) regarding Loan 2 ("Loan 2 Agreement") is dated March 18, 2005 and the Sales Contract regarding Loan 4 ("Loan 4 Agreement") is dated June 21, 2006. Caterpillar has provided copies of 1) an Assignment of Conditional Sale Contract and Security Agreement, and 2) an Assignment of Installment Sale Contract (Without Recourse), in support of its assertion that Caterpillar is the successor-in-interest to the sellers with respect to Loans 2 and 4.

The Loan Agreements contain certain provisions relevant to the Court's analysis, including the following:

### Loan 2 Agreement

¶ 3(c) provides that Borrower shall not:

sell, lease, assign or transfer, or create or suffer to exist any lien, claim, security interest or encumbrance on any of its rights hereunder or in [the equipment that is the subject of the Loan 2 Agreement].

¶ 7, titled "Events of Default," provides, *inter alia*, that Borrower's failure to make any payment to Seller when due constitutes an "Event of Default." ¶ 8, titled "Remedies," provides, in pertinent part, as follows:

If any Event of Default shall occur, Seller may, at its option, do any one or more of the following: (a) Declare all amounts due or to become due under this Contract, excluding any unearned portion of the Finance Charge, immediately due and payable; ... (c) enforce the security interest granted hereunder; (d) without notice, liability or legal process, enter upon the premises where [the Collateral] may be and take possession thereof; and (e) require [Borrower] to assemble the [Collateral] and additional security and make [it] available to Seller at a place designated by Seller which is reasonably convenient to both parties.

### Loan 4 Agreement

¶ 8 provides:

EXCEPT UPON WRITTEN CONSENT OF THE SELLER, no third party shall acquire any right to [the Collateral], either by purchase or as security, or by its being attached to the realty, nor without such written consent shall the

[Collateral] be allowed out of the Purchaser's possession or control, or be removed, during the life of the contract, from the county or filing district where the same is first delivered for use.

¶ 9, titled "Default," provides in pertinent part:

The unpaid purchase price...shall become immediately payable at Seller's option if the [Borrower] defaults on any payment...The Seller or its assigns, at its election, shall have the further right, without notice or liability, or legal process, except where required by law, to enter any premises of, or under control or jurisdiction of [Borrower]...and repossess the equipment.

In support of its Order to Show Cause, Caterpillar provides an Affidavit of John R. Anderson, Jr. ("Anderson"), a Special Accounts Representative for Caterpillar, dated July 27, 2009. Anderson affirms the following:

Caterpillar is a secured lender of Borrower on Loans 2 and 4. To secure the Loans, Borrower granted Caterpillar security interests in the collateral that is the subject of the Loan Agreements ("Collateral"). Caterpillar perfected its security interests in the Collateral by filing UCC Financing Statements known as Form UCC1, which are annexed as Exhibit E to the verified complaint ("Complaint").

Anderson affirms that Borrower has failed to make its required monthly payments to Caterpillar and, pursuant to the Loan Agreements, the total balance of the Loans has been accelerated and is now due and owing. He affirms that, as of June 19, 2009, the accelerated contract balance on Loan 2 was \$36,916.36 and on Loan 4 was \$283,921.82.

Anderson affirms, further, that Caterpillar has demanded the return of the Collateral and Borrower refuses to return the Collateral, or pay to Caterpillar the money owed. Thus, Anderson submits, as a result of Borrower's default, Caterpillar may repossess the Collateral. Anderson affirms, upon information and belief, that Borrower either has possession, or knows the location of, the Collateral, which Anderson believes is "most likely located" at 113 Sunset Road, Massapequa, New York 11758 (Anderson Aff., ¶ 12).

Anderson submits that, by virtue of the Collateral's portable nature and Borrower's failure to return the Collateral, there is a substantial risk that the Collateral will be transferred or removed prior to seizure.

Defendants oppose Plaintiff's application, and provide an Affidavit of Spagnolo dated September 17, 2009 in which Spagnolo affirms the following:

Spagnolo affirms that the Court's granting of the requested injunctive relief would prohibit Defendants from earning a livelihood and pursuing their business activities. If the Court does grant the requested injunctive relief, Spagnolo submits that the Court should require Plaintiff to post a bond in the amount of at least \$600,000.

Spagnolo affirms that Plaintiff notified Defendants that the Loans were in default in 2002. He affirms, further, that on or about August 20, 2009, an individual named Joseph Saccente contacted Borrower and offered to buy the Collateral that secures Loans 2 and 4. Spagnolo alleges that Plaintiff unreasonably withheld its consent to that sale, and affirms that the sales price would have "approximately paid Plaintiff in full" (Spagnolo Aff. at ¶ 12).

With respect to Loan 4, Defendants dispute the amount they owe to Plaintiff. Spagnolo provides copy of internal accounting calculations in support of Defendants' claim that they owe approximately \$220,000 on this Loan, not approximately \$280,000 as Plaintiff alleges. Spagnolo also disputes Plaintiff's claims that Defendants have not maintained the Collateral in an operable manner, or that the Collateral is easily disassembled.

In its Reply Affirmation, Plaintiff affirms that the delay in bringing suit is attributable to Plaintiff's efforts to replevin the Collateral without judicial intervention, and that Plaintiff only filed suit after it had exhausted its efforts to locate the Collateral. Plaintiff affirms that Defendants deliberately concealed the Collateral in an effort to pressure Plaintiff into releasing Defendants from the deficiency pursuant to the Loan Agreements.

Defendants, in their Sur-reply Affirmation, submit that the Court should disregard the representations of Plaintiff's counsel in this regard, as they are not based on counsel's personal knowledge. Defendants also provide an Sur-reply Affidavit of Spagnolo, in which he affirms that 1) Plaintiff never attempted to pursue its self-help remedies; and 2) Plaintiff refused to discuss with Defendants a reasonable disposition of the Collateral.

Defendants also disputes Plaintiff's claims regarding the value of the Collateral. Spagnolo affirms that he has been in the construction business for many years, and is unfamiliar

with the guide to which Plaintiff refers in his assessment of the value of the Collateral.

Defendants submit that Plaintiff has undervalued the Collateral, in part to convince the Court that any bond that the Court may set should be minimal.

### C. The Parties' Positions

Plaintiff submits that the Court should grant its application for a preliminary injunction and an order of seizure because, *inter alia*, 1) Plaintiff has submitted an affidavit identifying the chattels to be seized; 2) Plaintiff has established its right to those chattels by demonstrating that Defendants are in default of loans that Plaintiff made to Defendants; 3) the Loan Agreements entitle Plaintiff to repossess the collateral that is the subject of those Loans; 4) Defendants have acknowledged their debt to Plaintiff, although Defendants dispute the amount of that debt; 5) the Loan Agreements prohibit Defendants from selling the Collateral without Plaintiff's consent; and 6) Defendants' allegations that Plaintiff unreasonably withheld its consent to the sale of the Collateral is not a valid defense, as Defendants have no right to sell the Collateral under the Loan Agreements.

Defendants oppose Plaintiff's application on the grounds, *inter alia*, that 1) Plaintiff has failed to demonstrate that it will suffer irreparable harm if the Court does not grant injunctive relief; 2) Plaintiff has a duty of good faith and fair dealing that prohibits Plaintiff from unreasonably withholding its consent to sell the Collateral; 3) Plaintiff's delay in filing the lawsuit undermines its claim that it will suffer irreparable harm if the Court does not grant injunctive relief; and 4) the balance of hardships favors Defendants because Defendants need the Collateral to operate their business and to maintain their livelihoods.

## RULING OF THE COURT

### A. Standard for Issuance of 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. *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).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

#### B. Plaintiff has Demonstrated a Likelihood of Success on the Merits

Plaintiff has demonstrated a likelihood of success on the merits by establishing that Defendants owe Plaintiff money, pursuant to the Loan Agreements, and are in default of those obligations. Although Defendants dispute the sum that they owe to Plaintiff, Defendants concede that they have not met their obligations to repay Plaintiff pursuant to the Loan Agreements.

#### C. Plaintiff has Demonstrated Irreparable Harm

In analyzing the irreparable harm component of this analysis, the Court considers the clear provisions of the Loan Agreements that 1) limit Defendants' right to sell or transfer the Collateral; and 2) authorize Plaintiff's recovery of that Collateral under certain circumstances. Although neither party has provided specifics regarding the weight and construction of the Collateral, the Court infers from the nature of the Collateral that it could be moved to another

location, unknown to Plaintiff. The Court surmises that Plaintiff included the limitations in the Loan Agreements regarding transfer of the Collateral to ensure that Plaintiff had ready access to the property that serves as its security interest under the Loans. In light of the foregoing, the Court concludes that Plaintiff has demonstrated that it will suffer irreparable harm if the Court does not grant injunctive relief to the extent of limiting Defendants' transfer of the Collateral.

#### D. Balancing of the Equities

Defendants affirm that a loss of the Collateral will adversely affect their ability to operate their business and maintain their livelihood. Plaintiff argues that Defendants' argument in this regard, and the cases that Defendants cite, are irrelevant to Plaintiff's application, as Plaintiff's instant application is not a request for monetary relief, but rather a request for injunctive relief in connection with an application for an order of seizure. Plaintiff submits that Defendants have failed to cite a case supporting their contention that, where a complaint states a claim for money damages, Plaintiff may not obtain injunctive relief in connection with an application for an order of seizure. The Court believes that the equities balance in favor of the injunctive relief that Plaintiff seeks.

#### E. Order of Seizure

CPLR §§ 7102 (c) and (d)(1) provide as follows:

(c) Affidavit. 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.

(d) Order of seizure.

1. 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.

#### F. Conclusion

In light of the relevant provisions in the Loan Agreements, Defendants' concessions that they owe money to Plaintiff pursuant to the Loan Agreements, and the movable nature of the Collateral, the Court grants Plaintiff's application for an Order, pursuant to CPLR §§ 6301 and 6311, restraining Defendants, and any persons or entities acting in concert with Defendants, from dismantling, removing, concealing, using, transferring or otherwise acting in any manner inconsistent with the Plaintiff's interest in the following property: a) an Excavator, Cat Model 313BCR, Serial Number BAS00257, and b) an Excavator, Cat Model 325CLCR, Serial Number BKW00395.

CPLR § 6312(b) provides, in pertinent part, that, “[P]rior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that [it] was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction[.]” The amount of an undertaking is a matter within the sound discretion of the court. *Blueberries Gourmet v. Aris Realty*, 255 A.D.2d 348, 350 (2d Dept. 1998). Upon consideration of all the

circumstances, the Court directs Plaintiff to post an undertaking in the sum of \$25,000 as a condition of the injunctive relief granted herein.

In light of the issues raised regarding, *inter alia*, the value of the subject Chattel, however, the Court concludes that an order of seizure is inappropriate at this juncture. Accordingly, the Court denies Plaintiff's application for an Order, pursuant to CPLR § 7102, authorizing the seizure of the Chattel related to Loans 2 and 4.

All matters not decided herein are hereby denied.

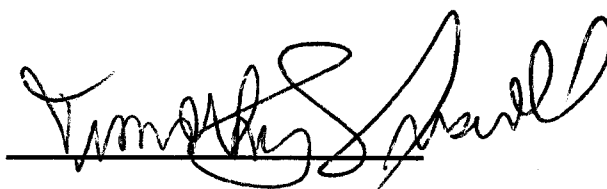
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on November 24, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 27, 2009



HON. TIMOTHY S. DRISCOLL

**ENTERED**

NOV 02 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**