

Podstupka v Kolomick

2009 NY Slip Op 32726(U)

November 6, 2009

Supreme Court, Nassau County

Docket Number: 011363-09

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

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STEVEN PODSTUPKA,
Plaintiff,

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

-against-

Index No: 011363-09

DIANE KOLOMICK,
Defendant.

**Motion Seq. Nos. 1 & 2
Submission Date: 10/23/09**

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Papers Read on this Motion:

**Plaintiff's Order to Show Cause, Affirmation of Emergency,
Affirmation in Support, Affidavit in Support and Exhibits.....x
Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x**

**Defendant's Order to Show Cause, Affirmation of Emergency,
Affirmation in Support, Affidavit in Support and Exhibits.....x
Affidavit in Opposition, Affirmation in Opposition and Exhibits.....x**

This matter is before the court on the Order to Show Cause filed by Plaintiff Steven Podstupka and the Order to Show Cause filed by Defendant Diane Kolomick, both of which were submitted on October 23, 2009 and both of which seek certain injunctive relief. For the reasons set forth below, the Court denies both Orders to Show Cause, and thereby denies the injunctive relief sought by either party. The Court also vacates all temporary restraining orders previously issued.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order preventing Defendant from selling, assigning, transferring or interfering with a) two parcels of real property owned by Defendant; b) a 37 foot power boat owned by Defendant; c) motor vehicles titled in Defendant's name; and d) Defendant's interest in a limited liability corporation. Defendant seeks an Order a) requiring Plaintiff to make all payments falling due with respect to that power boat during the pendency of this action; b) requiring Plaintiff to maintain the boat in its present condition during the pendency of this action, c) directing Plaintiff to provide Defendant with access to all real property that DSSR Beverage, LLC ("DSSR") owns, leases or occupies, including the DSSR warehouse; d) directing Plaintiff to provide Defendant with access to all vehicles that DSSR owns, leases or uses for delivery purposes; e) directing Plaintiff to provide Defendant with access to all DSSR property in his possession, including books and records; f) directing Plaintiff to provide Defendant with a full accounting of DSSR revenues that Plaintiff has received since June 1, 2009; and g) enjoining Plaintiff from transferring, encumbering, dissipating or "wasting" any property, including bank accounts, inventory and DSSR assets, in which Plaintiff has any interest or ownership, or over which Plaintiff has any control. Defendant also seeks an Order cancelling two notices of pendency that Plaintiff filed with respect to two properties that Defendant owns.

Each party opposes the other's application.

B. The Parties' History

The parties are former romantic partners who also became involved in various business ventures during their relationship. Defendant provides an Affidavit in Support of the instant Order to Show Cause in which she affirms, *inter alia*, as follows:

In 2006, the power boat (the "Cruiser Boat") was purchased pursuant to a Retail Installment Contract and Security Agreement ("Boat Agreement") dated May 12, 2006 (Ex. A to D's Motion). The Boat Agreement reflects that \$322,837.00 was to be financed ("Loan"). It also reflects a down payment of \$154,386.89, consisting of a cash payment of \$25,000.89 and a trade-in allowance of \$129,386.00. Defendant's signature appears on the Boat Agreement in her capacity as Buyer. Plaintiff's signature does not appear on the Boat Agreement.

Defendant and Plaintiff signed an agreement on November 19, 2008 (“November Agreement”) in which the parties agreed that Plaintiff would reside on the Cruiser Boat until April 1, 2009, with the conditions that, by April 1, 2009: 1) Plaintiff would remove himself and his personal belongings; 2) Plaintiff would surrender the keys and all related paraphernalia; 3) all equipment, appliances and electronics would be intact, and Plaintiff would pay to replace or repair any item(s) not in good working order; 4) the Cruiser Boat would be prepared for summer use; 5) the Cruiser Boat would be surrendered in pristine condition and Plaintiff would pay for any necessary repairs; and 6) Plaintiff would pay a (promissory) note of \$2,501.01 to Plaintiff on the first day of each month, starting with November 1, 2008 through and including April 1, 2009. The November Agreement (Ex. B to D’s Motion) contains the purported signatures of Plaintiff and Defendant.

Plaintiff persuaded Defendant to assume sole personal liability on the Loan and then refused to make payments on the Cruiser Boat, despite Defendant’s requests. Plaintiff also failed to vacate the Cruiser Boat, and to deliver the Cruiser Boat to Defendant, in violation of the November Agreement. As a result, Defendant submits, Plaintiff continues to possess and enjoy the Cruiser Boat, valued at approximately \$500,000, while Defendant continues to make the payments on the Cruiser Boat.

Defendant also affirms that she and Plaintiff are 50-50 members of DSSR, with equal rights to its inventory and revenues. Plaintiff has allegedly changed the locks to the DSSR warehouse, thereby preventing Defendant from gaining access to DSSR inventory, including its delivery van. Defendant affirms that this has affected her ability to make DSSR deliveries, thereby adversely affecting her relationship with DSSR customers. Defendant also affirms that Plaintiff has improperly converted DSSR’s revenues to his own use, and failed to deposit those revenues in DSSR’s bank accounts. As a result, Defendant affirms, she has insufficient funds with which to make the finance, insurance and maintenance payments on the Cruiser Boat.

With respect to the notices of pendency, Defendant affirms that Plaintiff filed those notices with respect to properties that Defendant owns at 105 Lee Avenue, Great Neck, New York (“Lee Avenue Property”) and 484 Burkhard Avenue, Williston Park, New York (“Burkhard Avenue Property”). Defendant affirms that Plaintiff made no financial contribution to the Lee

Avenue Property, and that his only contribution to the Burkhard Avenue Property was to paint the house, remove flooring and mow the lawn on occasion. Thus, Defendant submits that Plaintiff has not demonstrated a sufficient connection to the Properties to warrant the notices of pendency.

Plaintiff disputes many of Defendant's allegations, and submits that Defendant has presented a misleading description of the parties' financial relationship. In his Affidavit in Opposition, Plaintiff alleges, *inter alia*, as follows:

Plaintiff affirms that the trade-in listed on the Boat Agreement referred to a boat that was the sole property of Plaintiff. This is corroborated by the Defendant, who testified at her deposition that the trade-in, which had a value of \$129,386, consisted of Plaintiff's boat (Tr. at p. 259). She also testified that she made no contribution to the equity in the Cruiser Boat at the time of the purchase, and that her only contribution to the Cruiser Boat was her signing the note (Tr. at p. 260). Thus, Plaintiff submits, his contribution to the Cruiser Boat exceeds any contribution that Defendant has made to date.

Plaintiff also disputes Defendant's claim that she purchased the Cruiser Boat under duress by Plaintiff. Plaintiff affirms that it was Defendant who urged Plaintiff to purchase the Cruiser Boat, in lieu of maintaining the smaller boat that was used as the trade-in, and that he will produce a witness at trial who will testify that he/she went boat shopping with Plaintiff and Defendant.

With respect to the November Agreement, Plaintiff admits that he signed a piece of paper that Defendant prepared on or about November 19, 2008 but affirms that he never received a copy of that paperwork. He also affirms that the signature on the November Agreement that is Exhibit B to Defendant's motion does not appear to be his signature, and he does not recall that document.

Plaintiff also disputes Defendant's assertion that she was involved in forming DSSR. Plaintiff affirms that he formed DSSR by himself, after he terminated his route contract with Coco-Cola. He also affirms that he invested \$25,000 of his own money as capital in DSSR. In support thereof, Plaintiff provides deposition testimony of Defendant in which she testified that 1) she made no initial financial contribution to DSSR; 2) Plaintiff alone handled the filing of

paperwork to establish DSSR; and 3) the truck owned by DSSR was the truck that Plaintiff used when he had his own Coca-Cola route. (Tr. at pp. 87-88, 92)

Plaintiff also submits that it is Defendant who has improperly diverted assets of DSSR. He affirms that she endorsed checks payable to DSSR and deposited those in her personal account. In support, he provides copies of checks dated in 2008, from entities including North Shore Country Club, Inc. (\$1,394.35), The Creek, Inc. (\$7,866.35 and \$7,438.55), Huntington Country Club (\$3,036.14) and North Hempstead Country Club (\$9,905.98, \$5,591.30 and \$4,399.85), payable to DSSR. The backs of those checks contain Defendant's endorsement and account number at Capital One Bank (Ex. 3 to P's Opposition). The parties subsequently executed a Release dated April 14, 2009 in which they, *inter alia*, released Capital One Bank from any liability arising out of the deposit of checks made out to DSSR into Defendant's personal account (Ex. 4 to P's Opposition) prior to the date of the Release.

With respect to the notices of pendency, Plaintiff disputes Defendant's assertion that Plaintiff never contributed to the maintenance of the Properties. Plaintiff affirms that he will produce witnesses at trial who will testify that Defendant routinely referred to the Lee Avenue Property as "our house" and stated that "we bought an investment property." He also provides a copy of the architect's floor plans for the Lee Avenue Property which refers to the project as the "Kolomick/Podstupka Residence" (Ex. 12 to P's Opposition). Similarly, Plaintiff affirms that he will produce witnesses at trial who will testify to the extensive time and effort that Plaintiff expended in shopping for the Burkhard Avenue Property, and performing repairs and maintenance for that Property.

C. The Parties' Positions

Plaintiff seeks injunctive relief, but his affidavit in support of his request establishes that all of the real and personal property at issue is owned by Defendant. Moreover, Plaintiff offers only conclusory allegations to demonstrate any contribution to the purchase of that property. Finally, Plaintiff's memorandum of law merely states the legal standards for the issuance of a preliminary injunction, without application of those standards to the facts of this case. In opposing the Plaintiff's application, Defendant points to the above weaknesses and also asserts that she purchased the real property with her own money and that she is the titled owner to all of

the property.

Defendant submits that injunctive relief is appropriate because, without it, Defendant will default on the Loan, which will destroy her credit and force her into bankruptcy. She affirms that, in addition to her liability on the Loan, she is also in debt in connection with \$40,000 that she borrowed to pay for DSSR inventory. Defendant also asks the Court to vacate the notices of pendency, based on Defendant's claim that Plaintiff lacks a connection to or interest in the Properties that would warrant the continuation of those notices of pendency.

Plaintiff opposes Defendant's application, submitting that 1) Plaintiff has contributed more to the Cruiser Boat than Defendant; and 2) Defendant has improperly diverted DSSR's assets for her own use. Plaintiff submits that the Court should permit Plaintiff to maintain the Cruiser Boat and leave the notices of pendency in effect until the final resolution of this matter.

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).

Here, the Plaintiff's request for a preliminary injunction appears defective on its face, as the Plaintiff's conclusory allegations do not establish any basis to restrain the Defendant from transferring property that she owns in her own name. Indeed, Defendant's ownership of these properties demonstrates that it is far from likely that Plaintiff will succeed on the merits of his claims for a constructive trust and a money judgment. Moreover, Plaintiff has not shown that any harm he might suffer cannot be redressed by money damages.

The Court also concludes that Defendant has not demonstrated a likelihood of success on the merits on his claim for injunctive relief, as the documentary evidence and Defendant's own deposition testimony appear to undermine some of her claims. Even assuming, *arguendo*, that Defendant had demonstrated a likelihood of success on the merits, the Court concludes that Defendant has not established a danger of irreparable harm unless the injunction is granted or a balance of the equities in her favor. The evidence regarding Defendant's numerous deposits undermines her claim of imminent bankruptcy and persuades the Court that the equities do not balance in favor of injunctive relief. Accordingly, the Court denies Defendant's applications for injunctive relief.

B. Notice of Pendency

CPLR § 6514(b) provides that the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith. The Court concludes that Defendant has not established that Plaintiff filed the notices of pendency in bad faith. Accordingly, the Court denies Defendant's application to vacate those notices of pendency.

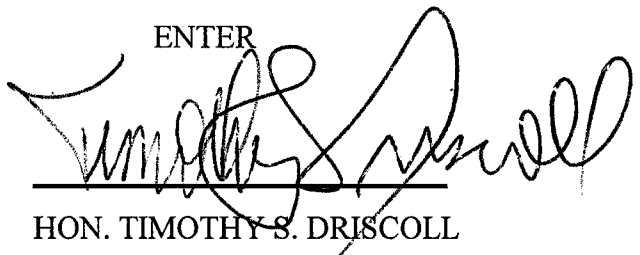
In light of the foregoing, the Court denies both Plaintiff's Order to Show Cause and Defendant's Order to Show Cause. All temporary restraining orders previously issued regarding either Order to Show Cause are hereby vacated.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance before the Court for a Preliminary Conference on December 2, 2009 at 9:30 a.m.

DATED: Mineola, NY
November 6, 2009

ENTER


HON. TIMOTHY S. DRISCOLL

J. C. **ENTERED**

NOV 12 2009
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**