SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

FLUSHING SAVINGS BANK, FSB,

Plaintiff,

INDEX NO.: 014380/2009
MOTION DATE: 09/17/2009
MOTION SEQUENCE: 001

-against-

MOTION IMAGING, INC., ROBERT THOMPSON, STEVEN D. NAVON, JOHN C. CONKLING and WILLIAM VIDRO,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavits & Exhibits Annexed 1
Plaintiff's Memorandum of Law in Support 2
Affirmation in Opposition of Andrew S. Muller, Esq. 3
Affidavit in Reply of Cynthia Boyer Okrent, Esq. 4

PRELIMINARY STATEMENT

Plaintiff moves pursuant to Civil Practice Law and Rules §6312 to preliminarily enjoin Defendants from dissipating, conveying, transferring or otherwise affecting Defendant Motion Imaging's assets pledged as collateral to Plaintiff. In addition to the preliminary injunction, Plaintiff also requests that (1) all money received by Defendants be placed in a separate account as security for the outstanding obligation, (2) Defendants assemble the Collateral and make it

available to Plaintiff, and (3) provide Plaintiff with documents relating to all of the outstanding receivables.

BACKGROUND

Defendant Motion Imaging, ("Motion") is engaged in the business of producing and selling products such as posters, cups and calendars bearing images that appear to move. Defendants Robert Thompson, ("Thompson") and Steven Navon, ("Navon"), are officers and shareholders of Motion while Defendants John Conkling, ("Conkling") and William Vidro, ("Vidro"), are shareholders of Motion.

Plaintiff Flushing Savings Bank, FSB, (the "Bank"), executed a line of credit note, (the "Note"), and a security agreement, (the "Agreement") with Motion on September 26, 2007 under which the Bank agreed to extend to Motion a line of credit up to the sum of $3,000,000. Pursuant to the Agreement, Motion granted the Bank a continuing security interest in its then owned or thereafter acquired assets, including, but not limited to, all accounts, chattel paper, deposit accounts, documents, general intangibles, goods (including inventory, equipment, fixtures and accessions), instruments, investment property, letter-of-credit rights, letters of credit, money, supporting obligations and proceeds and products of the foregoing, (the "Collateral").

Motion agreed that the Bank would have the right to collect accounts receivable and to the delivery of the Collateral should Motion fail to pay when due any obligation owed to the Bank under the Note. The Bank perfected its security interest in the Collateral by filing uniform commercial code financing statements with the appropriate authorities. In addition, Thompson, Navon, Conkling and Vidro, (the "Guarantors"), delivered to the Bank their Guaranty unconditionally guaranteeing payment when due to the Bank of all then existing and future obligations between Motion and the Bank.

Under the Note, the Bank advanced to Motion $1,631,336.55. The outstanding principal and interest of the advanced monies was to be paid in full on September 1, 2008, the termination date of the line of credit. In accordance with the provisions of the Note, failure to make full payment within ten days of the September 1, 2008 due date, constitutes a default of the Note.

Motion did not repay the principal or interest due under the Note on September 1, 2008 or

within the ten day grace period. Shortly after the repayment period expired, Thompson advised the Bank of Motion's attempt to obtaining financing from other sources and needed additional time to complete those discussions and satisfy the Note. The Bank began to draft a forbearance agreement which Navon, Conkling and Vidro, as guarantors, refused to sign.

On February 11, 2009 the Bank served a Notice of Default and demands for payment on Motion and the Guarantors. Thereafter, Thompson informed the Bank that he was in the process of obtaining financing from a new lender, Ashford Finance LLC, ("Ashford"), that wold allow Motion to satisfy its obligations to the Bank. The Bank and Ashford then began to negotiate terms of an inter-creditor agreement. However, after a state tax lien was filed against Motion, Ashford declined to provide the financing and the agreement was not executed.

After the negotiations with Ashford fell through, the Bank attempted to exercise its rights under the Agreement to collect the remaining accounts receivable and to liquidate the inventory. On July 20, 2009 the Bank informed the entities on Motion's accounts receivable report for which the Bank could find addresses that future payments should be made directly to the bank. The Bank also notified Motion that any payments it received were required to be held in trust for the Bank. The Bank alleges that Motion has failed to honor these contractual obligations and has continued to collect the accounts receivable and deplete the Collateral. The Bank points to the fact that in the last year Motion's accounts receivable balance has been reduced by more than one million dollars and the value of its inventory has dropped by almost two million dollars.

To date the Bank contends that Motion and the Guarantors have failed to pay any portion of the indebtedness and therefore are in default of the Note, the Agreement, and the Guaranty. As a result, the Bank filed an action seeking judgment in the amount of $1,631,336.55 plus interest and costs from July 20, 2009, which Defendants have so far failed to answer. Therefore, the Bank now requests a preliminary injunction preventing Motion from further depleting the Collateral while this case is decided. Defendants argue that no injunction is necessary because the parties have already entered into an agreement that all of Motion's remaining inventory will be sold with the proceeds remitted to the Bank. Additionally, Motion contends it is attempting to collect the receivables for the Bank. Therefore, Defendants argue the Bank will not suffer

irreparable harm if the injunction is not granted and requests that Plaintiff's motion be denied.

DISCUSSION

In accordance with the CPLR §6301, the party seeking a preliminary injunction must show (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction.

With respect to the first requirement, Plaintiff must demonstrate a likelihood of success on its claim that Defendants defaulted on the Note and that it is entitled to the Collateral. The courts have held that a party is likely to succeed on the merits where it has shown that it is vested with an absolute entitlement to repossess collateral upon the event of termination. (*Prudential Securities Credit Cor, LLC v. TeeVee Toons, Inc.*, 2003 NY Slip Op 50560U [N.Y. Sup. Ct. Feb. 7, 2003]). This vested right was found where the parties had a valid loan agreement, a security agreement collateralizing the loan and a management agreement detailing the management of the collateralized assets. *Id.*

Here, Motion is indebted to the Bank as evidenced by the Note that was signed by Thompson in his capacity as President of Motion. Under the terms of the Note, all balances are to be paid in full by September 1, 2008, and the failure to do so within ten days shall be considered an event of default. Plaintiff contends, and Defendants do not deny, that no payments have been made to pay down the $1,631,336.55 loan balance. Lastly, the Agreement gives Plaintiff a security interest in and lien against previously detailed Collateral. For these reasons, Plaintiff has shown a likelihood of success on its underlying claim against Defendants.

Having satisfied the likelihood of success requirement we turn to the irreparable harm and balance of the equities requirements. The courts have held that the uncontrolled sale or disposition of chattel that was the collateral of a loan would threaten to render ineffectual any judgment the creditor subsequently received. (*Robjudi Corp. v. Quality Controlled Products, Ltd.*, 111 A.D. 2d 156 [2nd Dept, 1985]).

Defendants have argued that Plaintiff will not be harmed if an injunction is not granted because it has agreed to remit the proceeds from all sales to the Plaintiff and that it is attempting to collect its receivables for the Plaintiff. Defendants also contend that the reason the accounts

receivable balance has declined was the result of a decrease in sales combined with collection of the amounts previously owed, not as a result of any bad faith on its part. By its own admission Defendants have collected money on accounts Plaintiff has an interest in, yet made no payments to Plaintiff. As a result, it is clear that Plaintiff will be irreparably harmed if an injunction is not granted and a separate account created to hold in trust any future amounts collected.

Similarly, the Plaintiff will be irreparably harmed if the information it seeks regarding the accounts receivables is not turned over. The courts have held where such information is held exclusively by the defendant who has a self interest in the information the court cannot presume the defendant's cooperation in the preservation and production of the information. (*Prudential*, supra).

Lastly, a balancing of the equities tips in favor of the Plaintiff. Preservation of the assets and providing Plaintiff with access to the information requested present no undue hardship to the Defendants but are essential to the preservation of Plaintiff's rights. *Id.*

The Court finds that Plaintiff has met its burden and grants its motion for a preliminary injunction prohibiting the dissipation, conveyance or transfer of the Collateral. The Court also orders that Defendants provide Plaintiff with the information requested regarding the outstanding receivables and that all monies received by Defendants with respect to those receivables be placed in trust for Plaintiff.

Plaintiff has also requested that Motion's assets be made available to Plaintiff. Such a request would constitute the ultimate relief sought in the action and would be an abuse of discretion on a motion for preliminary injunctive relief. *Id.* Therefore, the Court denies Plaintiff's request that Motion turn over its inventory.

CPLR § 6312 (b) mandates an undertaking by Plaintiff so as to reimburse Defendant for damages if it should finally be determined that an injunction was unwarranted. The Court recognizes that Defendants are able to retain their assets and have apparently continued to receive payment on accounts receivable, and further, that Plaintiff is a bank, for whom reimbursement, if necessary, would not pose a significant problem. Plaintiff is directed to give an undertaking in the amount of $100,000.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiff's motion for preliminary injunction, orders that a bank account be created to hold in trust all amounts received by Defendants and for Defendants to provide Plaintiff with the documents requested related to the outstanding accounts receivables. The Court denies Plaintiff's request that Defendants' inventory be turned over to Plaintiff.

This constitutes the Decision and Order of the Court

Dated: November 20, 2009

J.S.C.