

JDF Realty, Inc. v Kim
2010 NY Slip Op 30076(U)
January 6, 2010
Supreme Court, New York County
Docket Number: 111701/09
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

JDF Realty

- v -

Brian Kim, et al.

INDEX NO. 111701/09
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 TO DISMISS WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

JAN 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/6/10

Luy
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----x
JDF REALTY, INC.

Plaintiff,

-against-

**BRIAN KIM, LIQUID CAPITAL FUND, L.P., and
R.J. O'BRIEN & ASSOCIATES, an interested party,**

Defendants.
-----x

Index No. 111701/09

DECISION

FILED

JAN 15 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Louis B. York, J.S.C.:

This is an action relating to money awarded to Plaintiff under an arbitration award that was confirmed by the Hon. Eileen A. Rakower on April 20, 2009. The Plaintiff seeks to set aside and void several allegedly fraudulent conveyances made by Defendants under NY Debtor & Creditor Law.

Plaintiff ("JDF") is a New York real estate brokerage company hired by Defendant Kim ("Kim"), as principal of Liquid Capital Fund, L.P. ("LC Fund"), collectively "Defendants", on December 11, 2007. Under the brokerage contract, JDF acquired the exclusive right to sell Defendants' commercial premises located at 154 Stanton Street until March 1, 2008. This real estate was the sole asset owned by LC Fund. The contract further stated that commissions earned within 180 days after its expiration were to be attributed to JDF even though the transaction may be concluded after March 1, 2008. According to JDF, Defendants breached the brokerage agreement by executing an exclusive brokerage agreement with Massey Knakal, another brokerage company, prior to March 1, 2008. Further, JDF states that Defendants Kim and LC

Funds sold the real property through the other broker, closing on or about April 10, 2008.

Pursuant to the arbitration clause in JDF's brokerage agreement, an arbitration was held under the Commercial Arbitration Rules of the American Arbitration Association. On October 17, 2008, the arbitrator awarded \$98,400.00 to JDF, and allocated administrative and arbitrator fees evenly among the parties with LC Funds reimbursing JDF in the amount of \$1,275.00 for prior costs. Defendants did not make payment within the 60 days prescribed by the arbitration award. As a result, JDF filed a Petition to Confirm Arbitration Award. On May 4, 2009, the Petition was granted and judgment was entered against LC Holdings for \$105,103.34, including costs and accrued interest at 9% per annum from October 17, 2008. The judgment remains unsatisfied in whole.

For the reasons that follow, the Court denies JDF's motion for a preliminary injunction and ~~grants~~^{denies} JDF's motion for attachment.

Preliminary Injunction

A preliminary injunction under C.P.L.R. 6301 is not available where money judgment is the sole relief sought. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 545 (2000). That is, the preliminary injunction is a remedy appropriate only in actions with a specific subject matter. Money is not a "subject matter" within the scope of C.P.L.R. 6301. VMVS Associates v. Consolidated Equities, Inc., 496 N.Y.S.2d 753 (1st Dept. 1986). There is an exception, however, for claims to a specific fund. Credit Agricole Indosuez at 548. In the present case, JDF essentially seeks to enforce its money judgment against the Defendants. Money damages are the sole relief requested, which need not be satisfied out of a specifically identified

fund. The central object of this action is the recovery of a money judgment. The proper relief in this case, therefore, is not a preliminary injunction, but rather an order of attachment.

Prejudgment Attachment

To attach a defendant's property under C.P.L.R. 6212, the movant must affirmatively demonstrate that: 1) a cause of action exists, 2) a probability of success on the merits, 3) grounds for attachment under C.P.L.R. 6201, and 4) movant's claim exceeds all known counterclaims or offsets.

1. Cause of Action

JDF's Complaint alleges that Defendants engaged in a series of fraudulent conveyances under NY Debtor and Creditor Law §§ 273, 275, and 276. Primarily, the Complaint seeks that this Court void these conveyances up to the amount of the outstanding Judgment in JDF's favor. JDF has therefore sufficiently presented a cause of action.

2. Probability of Success on Merits

Causes of action under NY Debtor and Creditor Law §§ 273, 275, and 276 deal with a conveyance without fair consideration that leaves the transferor insolvent, a conveyance made by a transferor who intends or believes he will be unable to satisfy debts as they mature, and a conveyance made with the intent to defraud creditors, respectively. With regard to § 273, JDF has established, and Defendants have affirmed, that the transfer of all funds out of Liquid Capital Holdings immediately following the April 2008 closing left the entity wholly insolvent. Under §§ 275 and 276, JDF also asserts that Defendants had knowledge of obligations to JDF under the original brokerage agreement at the time of the conveyances, and therefore transferred these funds

with the belief or intention to leave debts unsatisfied and defraud creditors. Consequently, JDF has sufficiently established a probability of success on the merits on its causes of action.

3. Grounds Under C.P.L.R. 6201

To attach a defendant's property, the movant must establish at least one of the five bases for attachment set forth in C.P.L.R. 6201. Here, JDF asserts a right to attach the Defendants' property under C.P.L.R. 6201(3). This provision allows attachment based on the assignment, disposal, or secretion of property with the intent to defraud creditors or frustrate creditors' claims to a debt. Two elements comprise C.P.L.R. 6201(3): 1) defendant has assigned, disposed of, encumbered or secreted property, or removed it from the state, or is about to do any of these things, and 2) defendant has acted or will act with an intent to defraud his creditors or to frustrate the enforcement of a judgment that might be rendered in plaintiff's favor.

JDF submits evidence that Defendants withdrew almost all Liquid Capital Holdings' assets arising from the sale of the property shortly after closing, and then closed the account completely. JDF further alleges that the recipient of these funds, approximately \$350,000, was Defendant Liquid Capital Fund, an entity also wholly owned and controlled by Defendant Kim. This transfer is a disposal within the first prong of C.P.L.R. 6201(3). By Defendants' own admission, Liquid Capital Holdings began winding down operations after the sale of its real property. Naked transfers, however, do not alone warrant attachment without a further showing of an intent to defraud or frustrate a creditor's claims.

The plaintiff carries the burden of presenting evidentiary facts to make an adequate showing of intent to defraud or frustrate. "Fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth in the moving affidavits."

Abacus Fed. Savings Bank v. Lim, 778 N.Y.S.2d 145, 146 (1st Dept. 2004). Furthermore, “affidavits raising mere suspicions of an intent to defraud are not a sufficient ground for [attachment under C.P.L.R. 6201(3)].” Shisgal v. Brown, 770 N.Y.S.2d 622 (1st Dept. 2004). The plaintiff, however, need not negate all possible honest explanations for the defendant’s conduct, but rather proffer sufficient evidence to make a rational inference of intent to defraud or frustrate. Schoonmaker v. Spencer, 54 N.Y. 366 (1873). In the present case, JDF asserts that under the parties’ contract and through actual notification by JDF representatives, Defendants were aware of possible contractual obligations extending beyond the March 1, 2008 expiration date. Additionally, JDF alleges affirmative acts by Defendants to circumvent these contractual obligations. For example, Massey Knakal advertised itself as the exclusive broker for the property as early as January 2008, even though Defendants signed the Massey Knakal brokerage agreement one day after the JDF contract expired in March 2008. In this light, Defendants’ hasty transfer of all assets after selling the property to an alias entity, leaving only the insolvent, bare corporate shell of Liquid Capital Holdings, sufficiently supports an intent to defraud JDF as a creditor.

4. Movant’s Claim Exceeds All Known Counterclaims or Offsets

Defendants have not interposed any counterclaims nor brought any offsets to the attention of this Court.

JDF has set forth a facially sufficient demand for prejudgment attachment. However, without specific identification of the defendants’ property to be levied there is no basis for relief.

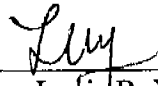
C.P.L.R. 6214 (referring to “property to be levied upon ... in the defendant’s possession or custody.”). JDF must identify a bank account in defendants’ name or personal property

belonging to the defendants, for example, in order for this Court to properly direct the Sheriff to carry out the levy. JDF has several discovery tools available to reveal such information, including a deposition subpoena, an information subpoena, and a subpoena duces tecum.

For the reasons given above, the motion for preliminary injunction is denied, and the plaintiff's motion for an order of attachment is denied with leave to renew.

Dated: 1 | 6 | 10

ENTER:



Louis B. York, J.S.C.
LOUIS B. YORK
J.S.C.

FILED
JAN 15 2010
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