

**Coltown Props. LLC v D&A Equities LLC**

2010 NY Slip Op 30720(U)

March 26, 2010

Supreme Court, New York County

Docket Number: 001010/79

Judge: Joan M. Kenney

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

PRESENT: KENNEY  
Justice

PART 8

COLTOWN PROPERTIES, LLC,  
ET AL.

D + A EQUITIES, LLC,  
ET AL.

INDEX NO. 001010/19

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. —

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for sum. inj

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**  
APR 02 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/26/10

[Signature]  
**JOAN M. KENNEY** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----X  
COLTOWN PROPERTIES LLC., 1077 NY LLC, 1084  
NYA LLC, 939 ST. MARKS LLC, 947 ST. MARKS LLC,  
514 RKPY LLC and 2522 NEWKIRK LLC,

001010/79  
Index # 101979/10

Plaintiffs,

-against-

**DECISION & ORDER**

D&A EQUITIES LLC, NORTHSIDE DEVELOPMENT  
LLC, 1077 NEW YORK D LLC, 1077 NEW YORK N  
LLC, 1084 NEW YORK D LLC, 1084 NEW YORK  
LLC, 939 ST. MARKS D LLC, 947 ST. MARKS N LLC,  
514 ROCKAWAY N LLC, 514 ROCKAWAY D LLC,  
2522 NEWKIRK AVENUE D LLC, 2522 NEWKIRK  
N LLC, 7<sup>TH</sup> AVENUE MANAGEMENT LLC, 7<sup>TH</sup>  
AVENUE MANAGEMENT II LLC, and AARON  
WEXLER, PERSONALLY,

Defendants.

-----X  
**KENNEY, JOAN, M., J.S.C.**

**For Plaintiff:**  
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**For Defendants:**  
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**FILED**  
APR 02 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Papers considered in review of this motion seeking an Order of attachment and injunctive relief:

| <b>Papers</b>   | <b>Numbered</b> |
|---|-----------------|
| Order to Show Cause, Affidavit, Affirmation, and Exhibits   | 1-7             |
| Affidavit in Opposition with Exhibits and Memorandum of Law | 8-12            |

Plaintiffs' move by Order to Show Cause, seeking *inter alia*, an Order granting injunctive relief, attachment, and directing the imposition of a constructive trust.

**FACTUAL BACKGROUND**

This breach of contract litigation emanates from a real estate transaction that closed on December 4, 2007. Plaintiffs were the owners of a portfolio of real estate that included six separate parcels (the buildings). The sale price defendants paid for the buildings was \$16,500,000.00. Pursuant

to the terms of the contract of sale and the riders attendant thereto, plaintiffs retained the right to certain rent arrears (the arrears) that were owed by some of the tenants of the buildings purchased by defendants. The amount of the alleged arrears, and the calculation plaintiffs used to arrive at the total allegedly due and owing, are very much in dispute. Notably, paragraph 13 of the rider to the contract of sale, states in its entirety as follows:

The right and privilege is reserved by the [plaintiffs] to institute summary proceedings against any tenant based on a default or failure to perform by any such tenant prior to the time of closing of title. This paragraph shall survive closing.

Plaintiffs papers are silent as to what steps they have taken, if any, to exercise "the right and privilege" they reserved in the contract, to collect the arrearages in Housing Court after the closing occurred. Further, plaintiffs make bare allegations as to the amounts they recite are due for each of the buildings, and try to support these numbers with a spread sheet they prepared solely for use in this litigation.

### ARGUMENTS

Plaintiffs argue, without legal reference, that they are entitled to the relief sought because (1) the affiant merely states that "Defendants collected about \$100,000 in PAST RENTS that I know of (emphasis in original)," (2) the defendants are "about to assign, dispose of, encumber, or secrete (the buildings), in order to frustrate the satisfaction of a judgment that Plaintiffs, will probably obtain against defendant (sic)," (3) the contract of sale and its rider conferred the individual defendant with the status of a trustee, and therefore, he has breached his fiduciary duty by alleging that by refusing to turn over the arrears that he allegedly collected, and (4) the equities balance in plaintiffs favor. Defendants argue the following: (1) plaintiffs have not conclusively demonstrated that they are entitled to injunctive relief because, (a) they will not suffer irreparable harm in the event the temporary

restraining Order is not granted, (b) plaintiffs have not established that they have a likelihood of success on the merits of, *inter alia*, their fraud claim and (c) that the equities fall in favor of defendants, because the day-to-day management of the buildings will not be able to occur in the event the application is granted, and (2) as a result of plaintiffs' inability to sustain their burden to obtain the relief pursuant CPLR 6301, it is axiomatic that they have failed to meet their burden under CPLR 6212.

### DISCUSSION

The following are the pertinent parts of the statutes that are controlling herein. CPLR 6301 sets forth the grounds for preliminary injunction and temporary restraining order:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

A party seeking a preliminary injunction pursuant to CPLR Article 63 must establish, (1) a likelihood of success on the merits of the underlying claim; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in its favor (*Olympic Tower Condominium v Coccoziello*, 306 AD2d 159 [1<sup>st</sup> Dept 2003], citing, *Doe v Axelrod*, 73 NY2d 748, 750 [1988]). This Court finds that plaintiff has failed to satisfy the three-pronged test for the granting of a preliminary injunction. Furthermore, the court has a duty to maintain the status quo. At this point in the litigation it is clear that the status quo would be impeded by the granting of injunctive relief.

It is uncontested by plaintiffs that the buildings are all residential multiple dwellings that would not be able to operate on a daily basis if the instant motion is granted. The function of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Residential Bd. of Managers of the Columbia Condominium v Alden*, 178 AD2d 121, 122 [1<sup>st</sup> Dept 1991]).

Ultimately, plaintiffs have the burden of establishing that they would suffer irreparable harm should the relief not be granted. Moreover, a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in "unusual" situations, "where the granting of the relief is essential to maintain the status quo pending trial of the action" (citations omitted). *Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 (1<sup>st</sup> Dept 2009). While courts are generally "reluctant" to grant mandatory preliminary injunctions, such relief will be granted only where "the right [thereto] is clearly established." (*id.*). Plaintiffs have not persuaded this Court that the issues presented rise to the level necessary to sustain a provisional remedy.

Under New York law, to obtain an Order of attachment, the movant must show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendants exceeds all counterclaims known to plaintiff." CPLR 6212(a). The burden is on the moving party to establish the grounds for the levy. *Hotel 71 Mezz Lender LLC v. Falor*, --- N.E.2d ----, 2010 WL 519821 N.Y. February 16, 2010. The provisional remedy of attachment, which is governed by CPLR article 62, operates only against the property of the defendant, not on his/her person. One purpose of attachment is to provide security for a potential judgment against a nonresident debtor.

The Court of Appeals recently stated: "By means of attachment, a creditor effects the

prejudgment seizure of a debtor's property, to be held by the sheriff [actually or constructively], so as to apply the property to the creditor's judgment if the creditor should prevail in court. Attachment simply keeps the debtor away from his property or, at least, the free use thereof; it does not transfer the property to the creditor. It is frequently used when the creditor suspects that the debtor is secreting property or removing it from New York and/or when the creditor is unable to serve the debtor, despite diligent efforts, even though the debtor would be within the personal jurisdiction of a New York court (*see* CPLR 6201)" (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538 [2009]). Plaintiffs have not proffered anything but bare factual allegations, nor a single pertinent document, that would support the need for an Order of attachment. Plaintiffs have also failed to offer a scintilla of admissible proof, that the defendants are without any other assets that could be seized in supplementary proceedings, in the event the Order of attachment was not granted. In sum, it is undisputed that the defendants are not judgment-proof, and remain within the jurisdiction of this Court, along with the buildings they purchased from plaintiffs.

The Court has considered plaintiff's remaining arguments and find them to be without merit.

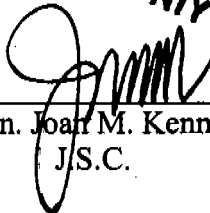
Accordingly it is,

**ORDERED** that plaintiffs' motion is denied in its entirety, and it is further

**ORDERED** that the parties are to appear in Part 8 at 10:00A.M. on May 20, 2010, for a preliminary conference.

Dated: March 26, 2010

ENTER:

  
\_\_\_\_\_  
Hon. Joan M. Kenney  
J.S.C.

**FILED**

APR 02 2010

NEW YORK  
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