Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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CARLOS MENDOZA,
Plaintiff,

-against-

Index No. 12550/09
Motion Date: 7/14/09
Motion Cal. No. 38

LENIN OLIVO,
Defendant.

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The following papers numbered 1 to 7 read on this application by Plaintiff, for Orders permitting Plaintiff to serve a Supplemental Summons and Amended Complaint adding Jose Gabriel Rodriguez as a Defendant herein; awarding Plaintiff $50,000.00 in liquidated damages for breach of the subject contract; granting a permanent restraining Order restraining defendant Olivo, and or Defendant Rodriguez, from servicing, maintaining and/or profiting from the use of a particular Tropicana Route; and ordering that the title to the subject Tropicana Route revert back to Plaintiff.

	PAPERS NUMBERED
Order to Show Cause-Affirmation-Exhibits.....	1-3
Affidavits of Service.....	4-5
Affirmation in Opposition.....	6-7

Upon the foregoing papers it is ordered that the application by Plaintiff, for Orders permitting Plaintiff to serve a Supplemental Summons and Amended Complaint adding Jose Gabriel Rodriguez as a Defendant herein; awarding Plaintiff $50,000.00 in liquidated damages for breach of the subject contract; granting a permanent restraining Order restraining defendant Olivo, and or Defendant Rodriguez, from servicing, maintaining and/or profiting from the use of a particular Tropicana Route; and ordering that the title to the subject Tropicana Route revert back to Plaintiff, is decided as follows:

Plaintiff seeks to add Jose Gabriel Rodriguez as a defendant based on his information and belief that Rodriguez purchased the Tropicana Route from defendant Olivo in breach of the agreements since Olivo had failed to make all payments due to Plaintiff for the sale of the Tropicana Route. Plaintiff does not offer any explanation for not having added Rodriguez and the related claims at the time of filing the original complaint. Plaintiff has submitted his affidavit wherein he states that, “on or about January 1, 2010 Defendant sold the subject Route to Jose Gabriel Rodriguez.”Defendant opposes this branch of the application by claiming Plaintiff has not established that the Tropicana Route was sold to Rodriguez.

It is well-settled that leave to amend pleadings is freely given "absent prejudice" or

surprise resulting directly from the delay." McCaskey Davies & Associates Inc. v. New York City Health and Hospitals Corp., 59 N.Y.2d 755 (1983.) Initially, there is no showing that Defendant will be prejudiced by the proposed amendments. Moreover, the court is satisfied that the Plaintiff has demonstrated that the proposed amendment states valid causes of action against defendant Rodriguez. At this stage of the litigation, the allegation by Plaintiff that the Route was sold to Rodriguez by defendant Olivo is sufficient to establish the validity of the claims. This is especially so given the opposition to the amendment which consists of an affidavit of defendant Olivo claiming the Route has not been sold. As such, the proposed amendment to the caption and the causes of action are not palpably insufficient or totally devoid of merit. This evidence also shows that the new Defendant is a necessary party to this action. *See*, Comsewogue Union Free School Dist. v Rovegna, 131 AD2d 534 (2d Dept 1987.) *Compare*, Heckler Elec. Co. v. Matrix Exhibits-New York, Inc., 278 A.D.2d 279 (2d Dept 2000.) Therefore, Plaintiff's motion is granted and both defendants shall be given an opportunity to conduct full discovery concerning all causes of action.

It is **ORDERED** that the title of the action shall be:
SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS
---------- x
CARLOS MENDOZO,
Plaintiff, Index No. 12550/09

- against-

LENIN OLIVO and JOSE GABRIEL RODRIGUEZ,
Defendants.
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; and it is further

ORDERED that a copy of this Order with Notice of Entry be served on all parties to the actions, the Clerk of Queens County and on the Clerk of the Trial Term Office.

The branch of the application seeking an Order awarding Plaintiff $50,000.00 in Liquidated damages for breach of the subject contract is granted. A contractual provision for liquidated damages will be upheld only if the amount fixed is a reasonable measure of the probable actual loss in the event of a breach, and the actual loss suffered is impossible or difficult to determine with precision. Central Irrigation Supply v. Putnam Country Club Assoc., LLC, 57 A.D.3d 934 (2d Dep't 2008.) If, however, the amount of actual damages that would be suffered upon a breach is readily ascertainable when the contract is entered, or the amount

fixed as liquidated damages is conspicuously disproportionate to the foreseeable losses, the liquidated damages provision is unenforceable as a penalty. Bates Adv. USA, Inc. v 498 Seventh, LLC, 7 NY3d 115, 120 2006.) Where a court finds a liquidated damages provision enforceable, the measure of damages for a breach will be the sum fixed in the clause, no more, no less. JMD Holding Corp. v Congress Fin. Corp., 4 NY3d at 380 (2004.) Where, however, a liquidated damages provision is found to be an unenforceable penalty, the recovery is limited to actual damages proven. Central Irrigation Supply v. Putnam Country Club Assoc., LLC, *supra.*

Whether a contractual provision "represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances" (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 379 [2005]). The party challenging the liquidated damages-in this case, Defendant- must demonstrate either that damages flowing from the failure to make payments pursuant to the Contract of Sale of the Tropicana Route were readily ascertainable at the time the parties entered into their Agreement of Sale or that the liquidated damages is conspicuously disproportionate to these foreseeable losses. Id. at 380.

Here, Plaintiff has submitted, *inter alia*, a copy of the contract between Plaintiff and Defendant Olivo for the sale of the Tropicana Route, a copy of the Promissory Note signed by defendant Olivo, and his affidavit. Pursuant to the Agreement, the purchase price to be paid by Defendant to Plaintiff was $300,000.00. Defendant was to pay the sum of $85,000.00 upon the execution of the Agreement, $40,000.00 upon the execution of the Bill of Sale, and $175,000.00 by means of 2 Promissory Notes, one in the sum of $150,000.00 the other in the sum of $25,000.00. The $150,000 Note was to be paid in 75 consecutive monthly payments of $2,000.00 commencing on April 1, 2007 and to be completed on June 1, 2013. If all payments had not been made by that date, interest was to be charged on June 15, 2013, at a rate of 10% per annum for any outstanding principal balance. The $25,000.00 Note was to be paid in six months on September 22, 2007 and if it was not paid in full, interest was to be charged on September 23, 2007, at a rate of 10% per annum for any outstanding balance. According to Plaintiff's affidavit, Defendant has not made any payments since October 2008 and he seeks a Judgment in his favor in the sum of $50,000.00 in liquidated damages for this breach.

The Liquidated Damages Clause in the Agreement reads as follows"

> Any willful, capricious or other inexcusable default hereunder on the part of either party shall entitle the aggrieved party to the sum of $50,000.00 as liquidated damages for breach of this contract in addition to repayment in full of any sum paid hereunder as aforesaid, said amount being hereby agreed upon by reason of the difficulty in reducing the exact damages actually sustained to a mathematical certainty.

Defendant has not made any claim, or attempt to show that damages attributable to his failure to make payments to Plaintiff were readily ascertainable at the time the parties entered into the Agreement. Instead, Defendant claims that Plaintiff is not entitled to Liquidated Damages during the pendency of this proceeding since this is the "ultimate remedy and all the issues have not been litigated yet." Defendant does not dispute Plaintiff's claim that he failed to make payments on the Notes after October 2008, but does claim that he has not sold the Tropicana Route to Mr. Rodriguez or any other person.

This Court notes that the prospect of damages in the event of breach may always be said to encourage parties to comply with their contractual obligations. "Liquidated damages are not transformed into a penalty merely because they operate in this way as well, so long as they are not grossly out of scale with foreseeable losses." Bates Adv. USA, Inc. v. 498 Seventh, LLC, 7 N.Y.3d 115 (N.Y. 2006) In this case, the parties agreed that this amount was an appropriate amount for either party to recover from the other party in the event of that party willfully, capriciously or inexcusably defaulting under the Agreement. Both sides agreed that this amount was set due to the inability ascertain a sum certain amount for damages. Consequently, since Defendant has not demonstrated that the liquidated damages amount of $50,000.00 is conspicuously disproportionate to Plaintiff's foreseeable losses, the Court grants the branch of the application seeking a Judgment in this amount.

Regarding the branches of the application seeking a permanent restraining Order restraining defendant Olivo, and or Defendant Rodriguez, from servicing, maintaining and/or profiting from the use of a particular Tropicana Route; and ordering that the title to the subject Tropicana Route revert back to Plaintiff, Plaintiff relies upon the above evidence regarding Defendant's failure to make payments pursuant to the Note. The only evidence Plaintiff has submitted indicating Defendant sold the Tropicana Route to Rodriguez is Plaintiff's statement in his affidavit. Defendant opposes these branches of the application on the ground that Plaintiff has failed to establish the Tropicana Route was sold to Rodriguez or any other person.

On an application for a preliminary injunction movant must establish the likelihood of success on the merits, irreparable injury and the balancing of equities in its favor. (Aetna Ins. Co. v. Capasso, 75 NY2d 860, 862; W.T. Grant Co. v. Srogi, 52 NY2d 496.) The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. Dixon v. Malouf, 61 AD3d 630 (2d Dep't 2009.) The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court. *Id.*

Here, the Court finds that Plaintiff has not established the necessary elements to obtain injunctive relief. Regarding the likelihood of success on the merits, the Court notes that there are genuine issues of fact as to whether Defendant sold the business to Rodriguez or any other party. The mere fact that there may be questions of fact for trial does not preclude this Court

from granting an injunction, because conclusive evidence is not required at this stage of the litigation. Moy v Umeki, 10 AD3d 604 (2d Dept 2004.) However, Plaintiff still must establish that it is more likely to succeed on the merits than to lose on them. Based on the submitted evidence, this Court cannot find Plaintiff has met that burden. This Court is mindful that Defendant has made significant payments to Plaintiff pursuant to the Agreement and the Agreement is not clear if a default in payments requires that Defendant cease operating the Route. This is especially so given the existence of the Liquidated Damages provision in the agreement.

Moreover, Plaintiff has failed to show that absent an injunction, it will suffer irreparable injury. Any claims that Plaintiff's finances will be harmed is not irreparable injury since clearly money damages may eventually provide an adequate remedy. (See, Appio v. Mel Lyn Office Supplying, 222 AD2d 541; Equestrian Assocs. v. Freidus, 192 AD2d 572; Haulage Enters. Corp. v. Hempstead Resources Recovery Corp., 74 AD2d 863.) Finally, based on the above, the balance of equities cannot tip in Plaintiff's favor. It has failed to show Defendant has sold the business to another person and that breach of the Agreement required Defendant to stop. Accordingly, equity does not require an injunction and the plaintiff's motion for a preliminary injunction is denied. Similarly, given the amount of money expended by the Defendant and his counterclaims that Plaintiff failed to adhere to the Contract, this Court does not find it appropriate to order title to revert back to Plaintiff, at this time.

Dated: July 20, 2010 **.....**

ORIN R. KITZES, J.S.C.