

**43-42 162 St. Realty, LLC v Yoon Bae Kim**

2010 NY Slip Op 32537(U)

September 14, 2010

Supreme Court, Nassau County

Docket Number: 014682-10

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**

-----x  
**43-42 162 STREET REALTY, LLC,**

**Plaintiff,**

**-against-**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No: 014682-10  
Motion Seq. No: 1  
Submission Date: 8/26/10**

**YOON BAE KIM, CHRISTINA A. KIM,  
and KIMJIN CORP.,**

**Defendants.**

-----x

**Papers Read on this Motion:**

**Order to Show Cause, Affidavit in Support, Affirmation in Support and Exhibits..x**

This matter is before the court on the motion filed by Plaintiff 43-42 162 Street Realty, LLC ("Plaintiff") on August 3, 2010 and submitted on August 26, 2010, without opposition. For the reasons set forth below, the Court 1) denies Plaintiff's application for an Order of Seizure; and 2) grants Plaintiff's application for injunctive relief to the extent that the Court orders that Defendants, and their servants, employees, agents, representatives and all persons acting on behalf of or in concern with Defendants, are preliminarily restrained and enjoined from removing, assigning, transferring, dismantling, selling, pledging, conveying and/or otherwise disposing of the secured assets at 6214 Jericho Turnpike, Commack, New York 11725 except upon prior notice to Plaintiff and upon an Order of a court of competent jurisdiction. As a condition of this injunctive relief, the Court directs Plaintiff to post a bond in the sum of \$15,000.

## BACKGROUND

### A. Relief Sought

Plaintiff seeks an Order 1) directing the Sheriff of Nassau County (“Sheriff”) to seize, enter and search the premises occupied by Defendant Kimjin Corp. at 6214 Jericho Turnpike, Commack, NY 11725 (“Premises”) and at such other locations where the secured collateral may be located by the Sheriff for all inventory, equipment, machinery, furniture and fixtures, accounts, contract rights, leasehold and general intangibles presently owned or existing or hereinafter acquired, created or arising from any source whatsoever, together with all proceeds and any additions and accessions thereto or replacements or substitutions thereof, as more fully described in a certain Security Agreement between the Plaintiff as secured party and Defendant Kimjim Corp. as debtor, dated January 11, 2008; 2) restraining Defendants Yoon Bae Kim (“Yoon Bae”), Christina A. Kim (“Christina”) and Kimjim Corp. (collectively “Defendants”) from removing, transferring, dismantling, selling, pledging or otherwise disposing of the secured assets described above; 3) restraining Defendants from assigning, transferring, and/or conveying to any entity, the possessory rights of the Defendant Kimjim Corp. with respect to the Premises, and restraining Defendants or those acting on their behalf or any other entity from taking possession of said Premises or chattels located therein except upon prior notice to Plaintiff, and upon an Order of a court of competent jurisdiction; and 4) restraining Defendants from acting in a manner inconsistent with Plaintiff’s rights and interest herein.

### B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. 2 to OSC) alleges as follows:

Plaintiff is a New York limited liability company. Defendants Yoon Bae and Christina are individuals residing at 153 Acre Lane, Hicksville, New York. Defendant Kimjim Corp. is a New York corporation with its principal place of business at the Business.

In the section of the Complaint titled “Jurisdiction and Venue,” Plaintiff alleges that 1) this Court has jurisdiction over this matter because “virtually all of the occurrences giving rise to the Complaint took place “in the town of Commack, County of Nassau [sic], and State of New York;” 2) this Court has jurisdiction over the Defendants because they are “individuals and a business entity with their [principal] place of business located in the Town of Commack, County

of Nassau, and State of New York; and 3) venue is proper in this Court because the Defendants' [principal] place of business is located in the County of Nassau and State of New York."

The Court takes judicial notice of the fact that Commack is in the County of Suffolk, not the County of Nassau.

The Complaint alleges that on January 11, 2008, Defendant Kimjin Corp. executed and delivered to the Plaintiff a document titled "Promissory Note and Stock Pledge Agreement" ("Agreement"). Plaintiff filed a UCC-1 financing statement ("Financing Statement") on February 19, 2008 in connection with the Agreement. The Agreement and financing statement are annexed as Exhibit A to the Complaint.

Defendants Yoon Bae and Christina are principals and/or shareholders and/or officers and/or directors and/or agents of, and had an interest in, the financial viability of Kimjin. Pursuant to paragraph 3 of the Agreement, Yoon Bae and Christina personally guaranteed the repayment of the loans, which were for a total of \$300,000. Plaintiff provided those funds to Defendants by providing one check in the amount of \$240,000, payable to Christina, and a second check in the amount of \$250,000, payable to Yoon Bae (collectively "Checks"). Also pursuant to the Agreement, the Promissory Note was secured by 1) a mortgage executed by Yoon Bae and Christina on their home in Hicksville, and 2) certain collateral, including Kimjin Corp.

The Complaint alleges that the collateral pledged by Kimjin ("Kimjin Collateral") consists of "[Kimjin's] inventory and stock and trade and all other items of personalty, chattels, furniture, fixtures and equipment located at their place of business located at 6124 Jericho Turnpike, Commack, New York 11725." The Financing Statement describes the Kimjin Collateral as "[o]ne hundred percent shares of the common stock of [Kimjin], a New York corporation, and all equipments [sic], inventory, consumer goods, payment intangibles, accounts receivables [sic]; fixtures, chattels, proceeds, machineries, business accounts, customer accounts owned by such corporation[.]" The Agreement does not contain a description of the Kimjin Collateral.

The first, and only, count of the Complaint alleges that on January 11, 2008, as reflected by the Agreement, 1) Defendants acknowledged receipt of the Checks and guaranteed repayment by February 29, 2008; and 2) Kimjin pledged its Collateral as security under the Agreement; and

3) despite Plaintiff's repeated demands, Defendants have failed to repay the \$300,000, plus interest, or surrender the Kimjin Collateral. Accordingly, Kimjin Corp. is in default and Plaintiff is entitled to the immediate possession of the Kimjin Collateral. In addition, pursuant to paragraph 25 of the Agreement, Defendants are liable for all court costs, legal expenses and reasonable attorney's fees incurred by Plaintiff in collecting on the Note. The Financing Statement remains in full force and effect.

Plaintiff has given Defendants notice of default, and made demand for payment, but Defendants have failed to make the required payments. Accordingly, Plaintiff submits that it is entitled to immediate possession of the Kimjin Collateral and foreclosure of its security interest.

In his Affidavit in Support, Houngh Chul Yi ("Yi") affirms that he is the Managing Member of Plaintiff. Yi affirms the truth of the allegations in the Complaint regarding 1) the execution of the Agreement by Defendants, 2) Defendants Christina and Yoon Bae's receipt of the Checks totaling \$300,000, 3) Christina and Yoon Bae's personal guarantees of payment pursuant to the Agreement, 4) Plaintiff's secured interest in the Kimjin Collateral, and 5) the relevant provisions of the Agreement that require Defendants to pay all costs and expenses incurred by Plaintiff in collecting on the Agreement.

Yi avers, further, that Plaintiff has "extended every possible courtesy and accommodation to the defaulting and delinquent defendants so as to encourage them to find the means to continue in business" (Yi Aff. at ¶ 17). Defendants, however, have refused to address their financial obligations to Plaintiff or voluntarily surrender the Kimjin Collateral. Yi avers that there are no known meritorious defenses to Plaintiff's claims. Accordingly, Plaintiff filed the Complaint to foreclose on and recover immediate possession of the Kimjin Collateral.

Yi requests that the Court issue an Order of Seizure without requiring the posting of a bond. Yi also submits that, unless the Court grants an Order of Seizure, Defendants are likely to remove or destroy the Collateral, thereby depriving Plaintiff of the ability to protect its interests.

Yi also affirms that Plaintiff anticipated that, in the event that Kimjin Corp. defaulted on its obligations, Plaintiff could recoup its monies by obtaining possession of Kimjin Corp. as a going concern, and selling or assigning that business. Yi avers that the value of Kimjin Corp. as a going concern is greater than the aggregate value of the fixtures, equipment, etc. taken

separately. Therefore, any assignment or transfer of Kimjin Corp. by Defendants will reduce the value of Plaintiff's collateral.

On August 12, 2010, the Court issued a Temporary Restraining Order ("TRO") that ordered that, pending the hearing and determination of this application, Defendants, and their servants, employees, agent, representatives and all persons acting on behalf of or in concern with Defendants, are preliminarily restrained and enjoined from removing, assigning, transferring, dismantling, selling, pledging, conveying and/or otherwise disposing of the secured assets at 6214 Jericho Turnpike, Commack, New York 11725 except upon prior notice to Plaintiff and upon an Order of a court of competent jurisdiction.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested relief by 1) establishing Plaintiff's right to possession of the Kimjin Collateral pursuant to the Agreement executed by the Defendants and guaranteed by Yoon Bae and Christina; 2) providing a description of the Kimjin Collateral which is also set forth in the Agreement and Financing Statement; 3) affirming that Plaintiff is unaware of any defenses that Defendants have to Plaintiff's claims; and 4) demonstrating that, unless the Court grants the requested relief, the Kimjin Collateral will become unavailable for seizure because Defendants will transfer, conceal, dispose of or remove the Kimjin Collateral.

## RULING OF THE COURT

### A. Promissory Notes and Guarantees

To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002). Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008).

To establish an entitlement to judgment as a matter of law on a guaranty, plaintiff must prove the existence of the underlying obligation, the guaranty, and the failure of the prime

obligor to make payment in accordance with the terms of the obligation. *E.D.S. Security Sys., Inc. v. Allyn*, 262 A.D.2d 351 (2d Dept., 1999). To be enforceable, a guaranty must be in writing executed by the person to be charged. General Obligations Law § 5-701(a)(2); *see also Schulman v. Westchester Mechanical Contractors, Inc.*, 56 A.D.2d 625 (2d Dept., 1977). The intent to guarantee the obligation must be clear and explicit. *PNC Capital Recovery v. Mechanical Parking Systems, Inc.*, 283 A.D.2d 268 (1st Dept., 2001), *app. dismiss.*, 98 N.Y.2d 763 (2002). Clear and explicit intent to guaranty is established by having the guarantor sign in that capacity and by the language contained in the guarantee. *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961); *Harrison Court Assocs. v. 220 Westchester Ave. Assocs.*, 203 A.D.2d 244 (2d Dept., 1994).

#### B. Counsel Fee Provisions

Provisions or stipulations in contracts for payment of attorney's fees in the event it is necessary to resort to aid of counsel for enforcement or collection are valid and enforceable. *Roe v. Smith*, 278 N.Y. 364 (1938); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597 (2d Dept. 1977). Attorneys' fees may be awarded pursuant to the terms of a contract only to an extent that they are reasonable and warranted for services actually rendered. *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363 (2d Dept. 1999). The court should consider the following factors in determining the reasonable value of the services rendered: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, 2) the lawyer's experience, ability and reputation, 3) the amount involved and benefit resulting to the client from the services, 4) the customary fee charged for similar services, 5) the contingency or certainty of compensation, 6) the results obtained, and 7) the responsibility involved. *Diaz v. Audi of America, Inc.*, 57 A.D.3d 828, 830 (2d Dept. 2008). In making an award of attorney's fees, the court must possess sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered. *NYCTL 1988-1 Trust v. Shabbos, Inc.*, 37 A.D.3d 789, 791 (2d Dept. 2007), quoting *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986 (2d Dept. 2006).

#### C. Order of Seizure

CPLR § 7101 provides that "[A]n action under this article may be brought to try the right

to possession of a chattel.”

CPLR §§ 7102 (c) and (d)(1) provide as follows:

(c) Affidavit. The application for an order of seizure shall be supported by an affidavit which shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;
2. that the chattel is wrongfully held by the defendant named;
  
3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;
  
4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;
  
5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel, the place where the chattel is located and facts sufficient to establish probable cause to believe that the chattel is located at that place;
  
6. that no defense to the claim is known to the plaintiff; and
  
7. if the plaintiff seeks an order of seizure without notice, facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value.

(d) Order of seizure.

1. Upon presentation of the affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place specified in the affidavit. The plaintiff shall have the burden of establishing the grounds for the order.

Under CPLR § 7102(d), a court may grant an order of seizure upon the presentation of an affidavit and undertaking and upon a determination that the plaintiff will likely succeed on the merits and that the facts are as stated in the affidavit. *Amplicon, Inc. v. Information Management Technologies*, 1999 U.S. Dist. LEXIS 13464, p.3 (S.D.N.Y. 1999).

#### D. Standards for 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).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

#### E. Application of these Principles to the Instant Action

The Court denies Plaintiff's application for an Order of Seizure, in part because Plaintiff has not provided the value of the Kimjin Chattel, as required by the applicable statute. In addition, the Court has concerns regarding whether Plaintiff has clearly identified the Kimjin Chattel given the lack of detail provided about the nature of Kimjin Corp.'s business and the type of property comprising the Kimjin Collateral. Accordingly, the Court denies Plaintiff's application for an Order of Seizure without prejudice. The Court notes that, as the Kimjin Collateral is located in Suffolk County, Plaintiff may deem it more appropriate to file any future

application in that County.

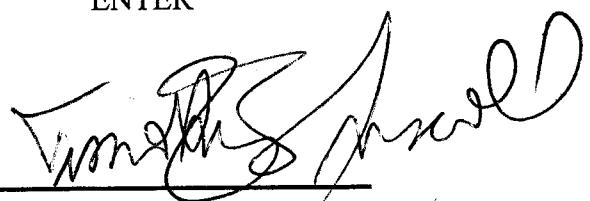
The Court concludes that Plaintiff has demonstrated its right to some measure of injunctive relief by establishing the Defendants' failure to make required payments pursuant to the Agreement, despite due demand, and in light of Plaintiff's concerns regarding Defendants' possible removal of the Kimjin Collateral. Accordingly, the Court directs that the relief granted in the TRO shall remain in effect and hereby orders that Defendants, and their servants, employees, agents, representatives and all persons acting on behalf of or in concern with Defendants, are preliminarily restrained and enjoined from removing, assigning, transferring, dismantling, selling, pledging, conveying and/or otherwise disposing of the secured assets at 6214 Jericho Turnpike, Commack, New York 11725 except upon prior notice to Plaintiff and upon an Order of a court of competent jurisdiction. As a condition of this injunctive relief, the Court directs Plaintiff to post a bond in the sum of \$15,000.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
September 14, 2010

  
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HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

SEP 15 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**