

Century Ambulance Serv., Inc. v Aquino

2010 NY Slip Op 33276(U)

November 17, 2010

Supreme Court, Nassau County

Docket Number: 013427-08

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

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**CENTURY AMBULANCE SERVICE, INC. and
DOMENICK MARINARO,**

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

Plaintiffs,

**Index No: 013427-08
Motion Seq. No: 6
Submission Date: 11/5/10**

- against -

**ROBERT J. AQUINO a/k/a ROBERT J. AQUINO, JR.;
CAS ACQUISITION, LLC; CAS ACQUISITION I, LLC
d/b/a CENTURY AMBULANCE SERVICE; ABRAMS,
FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG,
FORMATO & EINIGER, LLP; MARK ZAFRIN, ESQ.;
BARBARA STEGUN PHAIR, ESQ.; PINNACLE HEALTH
CONSULTANTS, LLC; and ANDREW S. BLATT**

Defendants.

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The following papers have been read on the Order to Show Cause:

- Order to Show Cause, Affidavit in Support and Exhibits.....X**
- Affidavit in Opposition, Affirmation in Opposition and Exhibits.....X**
- Correspondence dated November 8, 2010.....X**
- Amended Exhibits to Plaintiffs' Opposition.....X**
- Plaintiffs' Memorandum of Law in Opposition.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Defendants on June 4, 2010 and submitted on November 5, 2010. For the reasons set forth below, the Court denies Defendants' Order to Show Cause.

BACKGROUND

A. Relief Sought

Defendants seek an Order, pursuant to CPLR § 6301 and paragraph 13.3 of the Operating Agreement between the parties, enjoining Plaintiffs from operating any ambulance company and interfering, in any manner, with CAS' management of the ambulance company pending the resolution of this lawsuit, and directing Plaintiff Domenick Marinaro to execute all documents necessary to enable Defendant CAS to operate the ambulance company pending the resolution of this lawsuit.

Plaintiffs oppose Defendants' application.

B. The Parties' History

1. Prior Decision

The parties' history is outlined in detail in prior decisions ("Prior Decisions") of the Court in which the Court denied the applications of both parties. Those Prior Decisions include 1) a decision dated November 20, 2009 ("2009 Decision") in which the Court denied the application by Plaintiffs Century Ambulance Service, Inc. ("Century") and Dominick Marinaro ("Marinaro") for injunctive relief, which included Plaintiffs' request for an Order directing the Defendants Robert J. Aquino a/k/a, Jr. ("Aquino") and CAS Acquisition, LLC and CAS Acquisition I, LLC d/b/a Century Ambulance Service ("CAS") to cease and desist from: a) exercising dominion and control over the assets of Century including, but not limited to, Century's ambulance and ambulance operating authority; and b) exercising control over Century's ambulance and ambulance operations, and 2) a decision dated June 14, 2010 ("2010 Decision") in which the Court denied both a) Plaintiffs' Order to Show Cause seeking partial summary judgment and certain injunctive relief, and b) Defendants' cross motion seeking an Order disqualifying Plaintiffs' counsel, directing Plaintiff Marinaro to return the ambulance that he had allegedly taken and awarding Defendant damages in the form of a sanction for Plaintiffs' allegedly frivolous conduct.

As set forth in the Prior Decisions, Marinaro is the owner of all of the issued and outstanding shares of Century, and has served as its sole director and only officer. Plaintiffs filed an Amended Verified Complaint dated September 26, 2008 that contains thirteen (13) counts. The Complaint relates to Marinaro's transfer of his interest in Century to Aquino and

CAS. In connection with that transfer, Marinaro and Century entered into an Asset Purchase Agreement (“Purchase Agreement”) with CAS dated July 12, 2007. In addition, Century, Marinaro and CAS entered into a Management Agreement (“Management Agreement”) on the same date. After execution of the Purchase and Management Agreements, but prior to Aquino obtaining the necessary agency approvals, Aquino operated Century through CAS, pursuant to the Management Agreement, which Aquino personally guaranteed. Plaintiffs alleged that, while managing the business during this transition phase, Defendants engaged in the wrongful acts and conduct described in the Complaint that, unless enjoined, would cause irreparable harm to Plaintiffs.

In the 2009 Decision, the Court denied Plaintiffs’ application for injunctive relief based on the Court’s conclusions that 1) in light of the factual disputes regarding the reasons that the proposed sale did not close, Plaintiffs did not establish a likelihood of success on the merits; 2) in the absence of documentation supporting Plaintiffs’ claim that there was a danger of revocation of their Operating Authorities, which they describe as Century’s primary assets, Plaintiffs’ injury was compensable by money damages and, therefore, injunctive relief was inappropriate; and 3) in light of the parties’ conflicting positions as to why the transaction did not close, and most especially in light of the Court’s conclusion that any harm to Plaintiffs could be redressed by money damages, the equities did not balance in Plaintiffs’ favor.

In the 2010 Decision, the Court denied Plaintiffs’ application for injunctive relief based on its determination that, in light of the factual disputes outlined at length in the 2009 Decision and the Court’s analysis in the 2009 Decision which was equally applicable to Plaintiffs’ application at issue, Plaintiffs had not demonstrated a likelihood of success on the merits, irreparable harm without injunctive relief or a balancing of the equities in their favor. The Court also concluded that these same factual disputes rendered summary judgment inappropriate and denied Plaintiffs’ motion for summary judgment.

In his Affidavit in Support of the Order to Show Cause *sub judice*, Aquino affirms as follows:

Aquino submits that Plaintiffs have been dissatisfied with the Court's Prior Decisions and "continues to engage in street tactics" (Aquino Aff. at ¶ 2).¹ Aquino alleges that Marinaro has purchased or leased a new ambulance under the name of Century Ambulance Service, transferred the permits to the new ambulance, and cancelled Defendants' permits. In addition, Marinaro notified the United States Postal Service ("USPS") to deliver the mail to him and has notified the telephone company to transfer the telephone lines to him. In support, Aquino provides a letter from USPS dated May 25, 2010 confirming that it received a request to forward mail for Century Ambulance Inc. Aquino submits that, by so doing, Marinaro has committed a fraud and created a life-threatening situation. It is unclear from this USPS documentation who made the request, the address from which the request was made, and the address to which the mail is to be forwarded.

Aquino outlines the factual background of this litigation and submits that, pursuant to the Management Agreement, Defendants are entitled to injunctive relief. Aquino also provides details regarding his conversation with a representative of the Department of Health ("DOH") but does not provide an Affidavit of this individual. Accordingly, the Court may not consider this hearsay information, and the arguments based on it, in ruling on Defendants' application.

In his Affidavit in Opposition, Marinaro argues, preliminarily, that the Court should not consider Defendants' Order to Show Cause because it is not signed by Defendants' attorney, and does not contain the necessary certification by the attorney.

Marinaro notes, further, that Aquino's Affidavit is legally insufficient both because it is based on hearsay, and because it is speculative and unsupported by probative evidence. Marinaro, *inter alia* 1) disputes Aquino's allegations regarding the circumstances under which applications for the renewal of Century's ambulance operating authority were submitted to the DOH; 2) disputes Aquino's claims regarding DOH's rulings on those applications; 3) notes that

¹ Aquino suggests that Plaintiffs are dissatisfied with the Court's prior denial of Plaintiffs' application for injunctive relief and makes reference to a then-pending motion for an Order directing Marinaro to return an ambulance that he allegedly stole. The Court, in its 2010 Decision, denied Defendants' motion for an Order directing Plaintiff Marinaro to return the ambulance that he had allegedly taken.

Aquino failed to provide an Affidavit from the DOH individual with whom he spoke; and 4) disputes Aquino's claim that if Defendants do not transport a patient in an ambulance for two consecutive weeks, the DOH will deem its operating certificate terminated.

C. The Parties' Positions

Defendants submit that the requested injunctive relief is appropriate in light of Marinaro's allegedly improper conduct and Aquino's claim that Defendants will suffer irreparable injury without the requested injunctive relief. Defendants provide no affidavits in support of their claims with respect to the DOH and its position regarding the operating certificates at issue.

Plaintiffs oppose Defendants' application submitting, *inter alia*, that 1) Defendants have produced no evidence in support of their claim that they will suffer irreparable injury without injunctive relief; and 2) Aquino's allegations are based on hearsay and "supported solely by uncorroborated anecdotal evidence" (Dinerstein Aff. in Supp. at ¶ 18). Plaintiffs also argue that the Court lacks the authority to order the transfer of Plaintiffs' ambulance and/or ambulance operating authority.

RULING OF THE COURT

A. 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).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

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).

B. Application of these Principles to the Instant Action

The Court notes that the Order to Show Cause at issue appears to be procedurally defective as it is neither signed nor certified by counsel for Defendants.

Turning to the merits of Defendants' application, the Court concludes that Defendants have provided vague, unsubstantiated assertions in support of their application, many of which are based on inadmissible hearsay. Thus, Defendants have failed to demonstrate a likelihood of success on the merits, and the Court need not address the remaining factors relating to the appropriateness of injunctive relief.

In light of the foregoing, the Court denies Defendants' Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

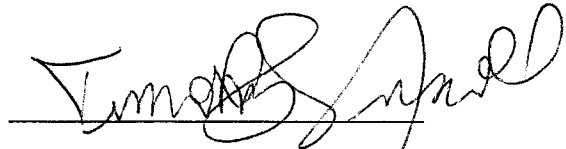
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on January 5, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

November 17, 2010

A handwritten signature in black ink, appearing to read "Timothy S. Driscoll", written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE