SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102041/08
Motion No.:006

ISLAND AUTO SEAT COVER COMPANY, INC.,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

VITO MINUNNI,
ESTELLE JANE MINUNNI, and
MICHAEL MINUNNI as Trustee of the
VITO AND ESTELLE JANE MINUNNI BAY STREET
TRUST AGREEMENT,

Defendants

The following items were considered in the review of the following order to show cause for prejudgment attachment.

Papers	Numbered
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
"Second" Affirmation of Gary W. Johnson, Esq.	4
Supplemental Affirmation in Reply	5
"Third" Affirmation of Gary W. Johnson, Esq.	
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves by order to show cause for an order granting it prejudgment attachment of the proceeds from the sale of 1183 Bay Street, Staten Island, New York ("1183 Bay Street) pursuant to CPLR § 6201(3). The plaintiff's motion is denied.

Facts

This is an action for specific performance on lease with an option to buy real property, as well as for monetary damages. The plaintiff entered into a lease agreement with Vito and Estelle Jane Minunni ("the Minunnis") in October 2000 for the premises located at 1183 Bay Street,

Staten Island, New York ("the Premises"). The terms of the lease agreement granted the plaintiff the option to purchase the property for $350,000. At the time the parties executed the lease in October 2000, the premises included two residential apartments, one leased to Jean Langworthy, the other to Louis Minunni; and a commercial tenant, Juan Carragsquillo that operated a delicatessen in addition to the plaintiff, who rented space for its own business.

After executing the lease agreement with the plaintiff in October 2000, the Minunnis executed additional lease agreements on August 7, 2005 with Michael and David Minunni for the front building of 1183 Bay Street, Staten Island, New York that is comprised of a street level commercial store and two apartments, one on the 2nd Floor and the other on the 3rd Floor, which included the basement, roof and hallway common areas. On that same day Michael and David Minunni sublet those properties to Juan Carragsquillo, Jean Langworthy and Louis Minunni. The defendants indicate that Louis Minunni no longer resides in the second floor apartment on the premises. On January 16, 2007 the Minunnis transferred the Premises to Michael Minunni as Trustee of the Vito & Estelle Jane Minunni Bay Street Trust (Minunni Trust).

On March 25, 2008, seven and one half years after the plaintiff entered in their lease, it exercised the option to purchase the Premises and communicated the same to Michael Minunni. Since the Minunnis transferred the property from their individual capacity into the irrevocable trust, the trustee refused to close title. However, this court granted summary judgment in favor of the plaintiff on the issue of specific performance on June 17, 2010, ruling that the trust held the real property subject to the existing leases, which included the plaintiff's option to purchase. This court left the issue of monetary damages for the two year delay in the sale for the trial. The order and judgment reflecting the summary judgment order was entered on August 2, 2010.

Thereafter, defendants' attorney contacted plaintiff's attorney by letter on September 10, 2010, September 30, 2010 and November 11, 2010 to effectuate the sale of the premises in conformance with the judgment of this court. The defendants provided the plaintiff with fully executed cancellations of the prior written lease agreements with Jean Langworthy, Juan Carragsquillo and Louis Minunni. Consequently, now they are month to month tenants.

The sale of the premises took place on November 17, 2010, but prior to the closing the plaintiffs brought the within order to show cause dated November 16, 2010 that included a temporary restraining order requiring the defendants to deposit the net proceeds of the sale of the premises with Gary Johnson, Esq., counsel for the defendants.

In support of its order to show cause the plaintiff directs the court to its decision granting the plaintiff summary judgment dated June 17, 2010 wherein the court stated, "[m]oreover, and examination of the terms of the transfer into trust dated January 16, 2007 states that the consideration thereof is "Ten Dollars and no Cents ($10.00), lawful money of the United States...thereby calling into question the bona fides of this transfer as a 'sale' of the premises . . ." In an attempt to demonstrate that the defendants have acted ". . . with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor..." the plaintiff submits the affidavits of its two principles: Lawrence Schau and Kathleen Schau.

Lawrence Schau avers that the two tenants at the subject property, Jean Langworthy and Juan Carrasguillo are currently paying "rents [that] are grossly less than comparable rentals for the area." He further states that, "[b]ased on the plaintiff's experience with respect to defendants, as well as the Court's opinion with respect to the acts of defendants, it is absolutely essential that the net proceeds of the sale be required to be deposited into Court to assure a fund for recovery..." Kathleen Schau avers to the truth of Lawrence Schau's statements and further avers that she was "advised that the delicatessen store which was rented to Juan Carrasguillo on August 7, 2005 for a ten (10) year period without any rent increase, had a reasonable value of $1,500 with 3% yearly increases. That lease has five (5) years to run (total lost rental income of $18,000)." Ms. Schau further states that, ". . . the apartment rented to Jean Langworthy which is a two (2) bedroom apartment was rented at $650 per month when the fair rental value is $1,150 with a resulting rental loss of $6,000."

It is also important to note that in opposition to the plaintiff's order to show cause defendants annex a portion of the October 2000 lease agreement between the plaintiff and the Minunnis, which sets forth the rent schedules from the period beginning November 1, 2000 and continuing through October 31, 2010. The schedule is as follows:

	Annual Rent	Monthly Rent
For the period 11-1-00 to and including 10-31-02	$10,200.00	$850.00
For the period of 11-1-02 to and including 10-31-05	$12,000.00	$1,000.00
For the period of 11-1-05 to and including 10-31-08	$14,400.00	$1,200.00
For the period of 11-1-08 to and including 10-31-10	$15,600.00	$1,300.00

The aforementioned schedule demonstrates that the defendants also leased the plaintiff's current location for what appears to be a significant discount from reasonable commercial value as quoted by Kathleen Schau.

The plaintiff alleges that pre-judgment attachment of the proceeds from the sale of 1183 Bay Street is justified because the defendants have ". . . with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts . . ."[1]

[1] CPLR § 6201(3).

Discussion

In order to obtain an order of pre-judgment attachment the plaintiff must demonstrate, ". . . that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors, or frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff. . . The moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud . . ."[2] The Appellate Division, First Department has elaborated on the intent element as follows: "[t]he 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."[3] This holding was adopted by the Appellate Division, Second Department, which further held that ". . . the mere removal, assignment or other disposition of property is not grounds for attachment."[4]

Here, the moving affidavits are conclusory in nature and fail to meet the heavy burden placed on a movant for pre-judgment attachment. The affidavit of Lawrence Schau cites "the plaintiff's experience with respect to the defendants" as a grounds to support pre-judgement attachment. But, Lawrence Schau fails to articulate the prior experience, or how they demonstrate intent to defraud.

Furthermore, merely listing the consideration as ten dollars for the transfer from the Minunnis into the trust administered by Michael Minunni is a common occurrence in transactional practice. The court takes judicial notice that many recorded documents merely list $10 as a nominal sum of consideration such transfers that are made in the normal course of estate planning, especially those involving family members.

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[2] *Benedict v. Browne*, 289 AD2d 433, [2d Dept 2001].

[3] *Abacus Federal Savings Bank v. Lim*, 8 AD3d 12, [1st Dept 2004].

[4] *Corsi v. Vronman*, 37 AD3d 397, [2d Dept 2007].

The affidavit of Kathleen Schau also asserts that the property in question is being leased for an amount below the market value. But, once again Kathleen Schau does not state how that constitutes any fraud. In fact, of the two disputed leases only the lease renting the property to Juan Carrasguillo references an execution date, which is August 7, 2005. But the date of that lease pre-dates the creation of the January 16, 2007 trust by over two years, and more importantly, it pre-dates plaintiff's March 25, 2008 exercise of the option to purchase by over 2 ½ years. No effective lease date has ever been cited with respect to the apartment leased to Jean Langworthy. Furthermore, the defendants have annexed agreements by which the leases between the defendants and the respective tenants were cancelled. Even more telling is the fact that the plaintiff's leased area was being leased to them at a rent that is lower than the market value as articulated by Kathleen Schau in her affidavit.

Absent terms to the contrary, the plaintiff has no control over the other tenants until it exercised its option to purchase and then closed title. In any event, the plaintiffs take the property subject to the existing month to month tenants. There appears to be no agreement, which bound the defendant/owner/landlord to deliver the premises free of tenants. Consequently, any claims for lost rent will be limited to the actual rental fees, not the speculative market value that plaintiff asserts, which have no reference in reality.

Conclusion

This court cannot divine fraudulent intent or intent to frustrate the collection of a judgment based on the affidavits submitted by the plaintiff. The affidavits of Kathleen and Lawrence Schau are conclusory at best, and fail to meet the plaintiff's heavy burden on a motion for prejudgment attachment. Here, leases for below market rent, with at least one that pre-dates the creation of the trust, and pre-dates the exercise of the option are not per se evidence of intent to defraud or frustrate the collection of a judgment. This is especially true as the plaintiff itself is a beneficiary of this supposed below market rate lease.

Accordingly, it is hereby:

ORDERED, that Island Auto Seat Cover Company, Inc.'s order to show cause for pre-judgment attachment is denied in its entirety, and it is further

ORDERED, that the temporary restraining order requiring Gary W. Johnson, Esq. to hold the net proceeds of the sale of 1183 Bay Street, Staten Island, New York is set aside and lifted; and it is further

ORDERED, that the parties return to **DCM Part 3 at 130 Stuyvesant Place, 3rd Floor**, **Staten Island, New York** for a pre-trial conference on **Monday, January 24, 2010 at 9:30 a.m.**

ENTER,

DATED: December 16, 2010

Joseph J. Maltese
Justice of the Supreme Court