Maklihon Mfg. Corp. v Dillulio
2010 NY Slip Op 34082(U)
March 18, 2010
Supreme Court, New York County
Docket Number: 108435/09
Judge: Richard B. Lowe III
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56
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MAKLIHON MFG. CORP.,

Plaintiff,

-against

Index No. 108435/09

DECISION AND ORDER

RAYMOND DILLULIO, LISA INTERDONATO, A.J. INDUSTRIES LLC, CAPITAL CAPITAL GROUP, CORP., and WEST CHELSEA DESIGN, LLC

Defendants.
---X

RICHARD B. LOWE III, J.:

Plaintiff Maklihon Manufacturing Corporation seeks an order of attachment, pursuant to CPLR 6201 (3) against the properties and assets held by Defendants Raymond Dillulio, Lisa Interdonato, A.J. Industries LLC, Capital Apparel Group Corporation, and West Chelsea Design LLC.

BACKGROUND

A.J. Industries LLC ("AJ") was a clothing manufacturer in which Raymond Dillulio ("Dillulio") and Lisa Interdonato ("Interdonato") served as principals. Dillulio and Interdonato (collectively, the "Individual Defendants") also formed West Chelsea Design LLC ("Chelsea") and Capital Apparel Group Corporation ("Capital") for the purpose of transacting business on a long-term basis with Plaintiff. Chelsea and Capital imported and sold garments manufactured by Plaintiff.

Plaintiff and AJ engaged in a series of transactions between May 2008 and January 2009 in which AJ accumulated a debt for goods sold and delivered by Plaintiff, in the

amount of $548,704.32 (Dillulio Aff. Ex. B). AJ made payments in the amount of $257,000 to Plaintiff during that same time period. AJ and Plaintiff also entered into a factoring agreement in November 2008 ("2008 Factoring Agreement") through which Plaintiff was assigned 40% of any amount requested by AJ from non-party Merchant Factors Corp ("Merchant") (Dillulio Aff., Ex. D [2008 Factoring Agreement]). The Individual Defendants claim that AJ accumulated a substantial debt to Merchant as a result of the 2008 Factoring Agreement. They explain that this debt ultimately contributed to AJ's shutdown. As a result, the Defendants assert that their $500,000 capital investment was lost while remaining liable for personal guaranties (Dillulio Aff. ¶¶ 18-19). The Individual Defendants claim that they made Plaintiff aware of AJ's financial troubles by notifying Plaintiff's principals, Pauline and John Mak (Dillulio Aff. ¶ 21).

Plaintiff disputes the notion that it was ever notified of AJ's inability to pay its debt (Mak Aff. ¶ 9). It claims that the shut down of AJ was a premeditated attempt by the Individual Defendants to avoid payment of AJ's outstanding debt. Plaintiff also claims that the Individual Defendants established Chelsea and Capital as means of divesting AJ of any funds or assets that could potentially satisfy its outstanding debt (Mak Aff. ¶¶ 12, 13). It asserts that the capital contribution the Individual Defendants made to AJ was actually removed prior to AJ's shutdown and used to form new enterprises, Chelsea and Capital (Mak Aff. ¶¶ 11-12).

The Individual Defendants argue that Chelsea and Capital were formed through negotiations with Plaintiff. They note that counsel for both the Plaintiff and the Individual Defendants were in the process of drafting loan and business structuring agreements through which the Plaintiff would become an investor in the new ventures (*see* Dillulio Aff. Ex. C). However, an agreement between the parties never materialized.

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Nonetheless, Plaintiff entered into an arrangement with Capital whereby Plaintiff continued to sell and deliver women's garments to the Individual Defendants (Mak Aff. ¶¶ 15-16). Plaintiff claims that it was never paid for those services, and as such is owed an additional $148,445.10 (Mak Aff. ¶ 1). Plaintiff alleges that the Individual Defendants, in their operation of Capital, improperly issued checks from Capital that were used to intentionally deplete the assets of Capital in the attempt to avoid the debts owed to Plaintiff (*see* Mak Supp. Aff., Exs. A-U).

However, the Individual Defendants show that Plaintiff and Capital entered into a Factoring Agreement in January 2009 ("2009 Factoring Agreement"), shortly after Capital's formation, in which Capital assigned 50% of all proceeds given to it by Merchant (Dillulio Aff., Ex. D [2009 Factoring Agreement]). As a result of the 2009 Factoring Agreement, the Individual Defendants claim that $215,885.00 was paid to Plaintiff. Furthermore, they claim that Capital never received approximately $125,000 worth of merchandise that it ordered because Plaintiff never authorized the release of that merchandise from FY Global Inc. ("FY"), a company which the Individual Defendants claim Plaintiff controls (Dillulio Aff. Ex F).

Chelsea and Capital have ceased operations and Plaintiff now brings this action against the Individual Defendants, AJ, Chelsea and Capital for breach of contract, fraud, accounts stated, and various violations of the New York Debtor-Creditor Law. By order of this Court, Plaintiff was granted an *ex parte* temporary restraining order restraining and enjoining, *inter alia*, the Individual Defendants, AJ, Capital, and Chelsea from disposing of any funds or assets. Plaintiff seeks a pre-judgment attachment of any and all assets possessed by AJ, Capital, and Chelsea, as well as attachment of the Individual Defendants primary residence at 236 W. 26th Street, New York County, New York,

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which is valued at approximately $3 million.

DISCUSSION

Plaintiff seeks relief under CPLR 6201 (3), which states that an order of attachment may be granted where "the defendant 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" (CPLR 6201 [3]). When confirming an order of attachment, CPLR 6212 provides that the plaintiff is required to show, by affidavit, (1) that there is a cause of action; (2) that the cause of action will likely succeed on the merits; (3) that one or more grounds for attachment provided in CPLR 6201 exist; and (4) that the amount demanded from the defendant exceeds all counterclaims known to plaintiff (*see* CPLR 6212 [a]).

Attachment is a harsh remedy (*see Glazer v. Gottlieb*, 234 AD2d 105, 105 [1st Dep't 1996]) and therefore it is incumbent upon the moving party to establish, with evidentiary facts, proof of the defendant's intent to defraud—it may not be "lightly inferred" (*Sylmark Holdings Ltd. v. Silicone Zone Int'l Ltd.*, 5 Misc 3d 285, 302 [Sup Ct., New York Co. 2004] [citing McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 6201:4]). "Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient" (*id.*). Moreover, it remains within this Court's sound discretion in considering whether to grant an order of attachment (*Merrill Lynch Futures Inc. v Kelly*, 585 F Supp 1245, 1259 [SD NY 1984] ["[A]ttachment is a discretionary remedy. It may be denied even when plaintiff otherwise satisfies the statutory requirements"]).

In this present case, the Plaintiff's Complaint pleads causes of action for breach of contract, accounts stated, common-law fraud, and violations of the New York Debtor Creditor Law §§ 273, 274, 276 (*see* Mak Aff., Ex. B [Plaintiff's Complaint]). There is no

contention by the Defendants that they have counterclaims in excess of the claims presented by the Plaintiff. The success of Plaintiff's motion is dependent upon whether the Plaintiff has satisfied both the requirement that the causes of action will likely succeed on the merits, and the requirement that there exists one ground for attachment within CPLR 6201.

Plaintiffs argue that the Defendants established Capital and West Chelsea solely as a means to secrete the remaining assets of A.J. in an attempt to avoid the debts owed to Plaintiff. However, neither the initial motion papers nor the September 10, 2009 Affidavit of Pauline Mak establish that any funds have been transferred to Capital or West Chelsea in furtherance of this purported scheme to defraud the Plaintiff. Even if it is true that some property had been transferred to Capital or West Chelsea, "mere removal or assignment or other disposition of property is not grounds for an attachment" (*Computer Strat. Inc., v. Commodore Bus. Mach., Inc.*, 105 AD2d 167, 173 [2d Dep't 1984]). "There must coexist an intent of the debtor to defraud his creditors. From disposition of . . . property no presumption of intent to defraud arises. Such intent must be proved, and the facts relied upon to prove it must be fully set out in the moving affidavits" (*Eaton Factors Co. v. Double Eagle Corp.*, 17 AD2d 135, 136 [1st Dep't 1962]). Simply starting a new company is insufficient evidence to show intent to defraud under the language of CPLR 6201 (3) (*see Mitchell v. Fidelity Borrowings LLC*, 34 AD3d 366 [1st Dep't 2006]).

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Plaintiff claims that fraudulent intent is shown whereby the defendants allegedly issued checks by Capital which were made payable to either the Individual Defendants or petty cash (*see* Mak Supp. Aff., Exs. A–U). Plaintiff claims these checks are proof that the Individual Defendants were depleting any assets from which a judgment against the Defendants could be satisfied. Defendants argue that the checks issued by Capital were for legitimate purposes such as payment to staff (*see* Dillulio Aff., Exs. G-1-5). The Individual Defendants have attached as exhibits to the Dillulio Affidavit corroborating documentation which they assert support the legitimate purposes of the checks (*cf. Azru v. Azru*, 190 AD2d 87 [1st Dep't 1993] [holding that attachment was appropriate under CPLR 6201[3] grounds because, *inter alia*, defendant failed to provide corroborating documentation for his purportedly legitimate use of plaintiff's assets]).

This Court may not grant an order of attachment based upon use of business assets for legitimate business expenses (*see* Weinstein-Korn-Miller, 12 N.Y. Civ. Prac.: CPLR P 6021.12). Defendants exhibits show that the checks were issued for a legitimate purpose, and that Plaintiff continued to receive payments pursuant to the 2009 Factoring Agreement (*see* Dillulio Aff. Ex. D) even after the issuance of the last check payable to either petty cash or to the Individual Defendants.

Furthermore, the Individual Defendants state that Plaintiff was aware of the financial difficulties the Individual Defendants were having with their business. As a result of these difficulties, the Plaintiff and the Individual Defendants attempted (through the help of their respective attorneys) to forge a new business structure, on or around March 17, 2009 (*see* Dillulio Aff. ¶ 25, Ex. C). Yet despite the risk of both dealing with a new company and with individuals who had just recently experienced a business's

failure, Plaintiff continued its business relationship with the Defendants by sending merchandise ordered by Capital. These facts vitiate Plaintiff's claim that it was an innocent vendor and that the Individual Defendants were creating nefarious business entities for the sole purpose of avoiding their debts to the Plaintiff (*see* Mak Aff. ¶¶ 4, 6, 9-19).

Because this Court finds that Plaintiff has failed to show that Defendants acted with an intent to defraud the Plaintiff or to frustrate any potential judgment in the Plaintiff's favor, it need not consider whether the Plaintiff satisfied its burden to show that its causes of action would have succeeded on the merits. Therefore Plaintiff's motion for attachment is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for an order of attachment is denied. This constitutes the decision and order of the Court

Dated: March 18, 2010

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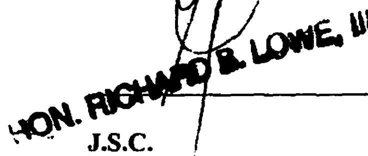

J.S.C.