

**Merchants Capital Access, LLC v South Shore
Motorsports, LLC**

2011 NY Slip Op 30901(U)

March 31, 2011

Supreme Court, Nassau County

Docket Number: 003755-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

SCAN

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
MERCHANTS CAPITAL ACCESS, LLC,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 003755-11
Motion Seq. No. 1
Submission Date: 3/23/11**

-against-

**SOUTH SHORE MOTORSPORTS, LLC,
FREDERICK IPPOLITO, SOLIVIA
POWERSPORTS, LLC and HARVEY
WEISMAN,**

Defendants.

-----X

The following papers having been read on this motion:

- Order to Show Cause, Affidavit in Support and Exhibits.....X**
- Affirmation in Support and Affirmation of Emergency.....X**
- Affidavit in Support of S. Giarusso and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff Merchants Capital Access, LLC ("MCA" or "Plaintiff") on March 11, 2011 and submitted on March 23, 2011. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) pursuant to CPLR § 6301 *et seq.*, a) enjoining Defendants, their agents, servants and employees from retaining, using, spending, diverting and/or distributing any more than seventy percent (70%) of South Shore Motorsports, LLC's ("SSM's") and/or Solivia Powersports, LLC's ("Solivia's") credit card receivables without MCA's written consent, and directing Solivia, its agents, servants and employees, to deliver and turn over to MCA credit card receivables accepted by Solivia ("Proceeds") which are to be remitted to MCA pursuant to written agreement; b) directing Defendants, their agents, servants and employees, to immediately assemble and pay Plaintiff 30% of all Proceeds from February 3, 2011, and continue to deliver and turn over 30% of all future Proceeds, until MCA recovers the sum of \$269,237.03, plus interest from February 3, 2011, all costs, reasonable attorney's fees and Sheriff's poundage; and c) directing Defendants, their agents, servants and employees, to immediately and forthwith provide Plaintiff access to Defendants' offices to perform an examination and inspection of SSM and Solivia's books and records; and 2) pursuant to CPLR § 6201 *et seq.*, directing the Sheriff of any county in the State of New York ("New York") to attach and levy upon 30% of the daily credit card receipts, up to an amount of \$269,237.03, plus interest from February 3, 2011, all costs, reasonable attorney's fees and Sheriff's poundage, to insure payment of any judgment rendered herein.

Defendants SSM, Frederick Ippolito ("Ippolito"), Solivia and Harvey Weisman ("Weisman") oppose Plaintiff's application.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Snead Aff. in Supp.), which contains sixteen (16) causes of action alleges as follows:

First Cause of Action

On or about October 26, 2010, SSM, a limited liability company that does business as Island Powersports, executed a Merchant Agreement (Ex. A to Compl.) that was counter executed by MCA on October 28, 2010. Pursuant to the Merchant Agreement, in consideration for MCA's capital advance to SSM in the amount of \$250,000.00 ("Purchase Price"), SSM sold a certain percentage of its future credit card receivables totaling \$312,500.00 ("Purchased

Amount”) to MCA.

The Merchant Agreement contained certain representations, warranties and covenants (collectively “Covenants”) regarding, *inter alia*, the credit card processor (“Processor”) approved by MCA for processing its credit card transactions and limitations on SSM’s transfer of its assets without MCA’s consent. Plaintiff alleges that SSM breached the Covenants and that, pursuant to the Merchant Agreement, Plaintiff is entitled to damages in an amount equal to the amount that the Purchased Amount exceeds the amount of cash received by MCA under the Merchant Agreement. Plaintiff requests damages in the sum of \$269,237.03, plus interest from February 3, 2011.

The remaining causes of action are: 2) against SSM for costs and expenses, including counsel fees, incurred by Plaintiff in enforcing the Merchant Agreement, 3) against Ippolito with respect to the personal guaranty (“Guaranty”) he executed, 4) against Ippolito for costs, expenses and attorney’s fees incurred by MCA in enforcing the Guaranty and Merchant Agreement, 5) against SSM for fraudulently conveying its assets to Solivia, 6) against Ippolito for fraudulently conveying his membership interest in SSM to Weinstein, 7) to restore title of fraudulently transferred assets to the transferors, rendering them available for execution of judgment by Plaintiff, 8) against Solivia and Weinstein for interfering with the Merchant Agreement and Guaranty and aiding and abetting the fraud by the other Defendants, 9) to proceed against Solivia and Weinstein in light of the fraudulent conveyances, and 10) a request for a permanent injunction enjoining Solivia and its agents from distributing more than seventy percent (70%) of SSM and/or Solivia’s credit card receivables without MCA’s written consent, and directing Solivia and its agents to deliver to MCA credit card receivables accepted by Solivia.

In his Affidavit in Support, John Snead (“Snead”), the President of MCA, affirms the truth of the allegations in the Complaint. He affirms, further, that SSM is in default of the Merchant Agreement by reason of its failure to continue processing credit card transactions with the same Processor, and may also be in default of the Merchant Agreement for selling all, or substantially all, of its assets without MCA’s prior written consent and without the new owner’s assumption of SSM’s obligations under the Merchant Agreement.

Snead submits that, if the Court denies Plaintiff's application for a Restraining Order, this motion is rendered moot because Defendants could continue to dispose of Plaintiff's property prior to a determination of Plaintiff's application by the Court. The Court notes that, on March 23, 2011, the Court denied Plaintiff's application for a temporary restraining order.

Snead affirms, further, that because SMS switched its processing services to a different bankcard processor, who is unknown to Plaintiff and presumably unaware of the Merchant Agreement and its Covenants, Plaintiff has been deprived of its right to collect on SSM's accounts receivable. Snead, without stating the source of the information, avers that he has been advised that the owner of SSM sold its assets to Solivia or Ippolito sold his membership units in SSM to Weisman. Thus, Snead submits, MCA is in imminent danger of being unable to collect any portion of the debt owed to it.

Snead affirms that Plaintiff is unaware of any defense or counterclaim to this action. He submits that, in light of his articulated concerns regarding MCA's ability to collect on its debt, the Court should grant the requested relief.

In his Affidavit in Support, Sal Giarusso ("Giarusso"), the Vice President of MCA, affirms as follows:

In or about January of 2010, MCA made a capital advance to SSM. As of the execution of the Merchant Agreement, SSM still owed MCA the sum of \$66,348.72 on this advance.

As a result of SSM's need for additional capital, MCA agreed to renew the balance owed, and advance SSM an additional \$183,651.28, for a total of \$250,000.00, as reflected in the Merchant Agreement. Giarusso provides a copy of the wire confirmation dated October 29, 2010 reflecting the advance of \$183,651.28.

On or about October 26, 2010, SSM executed a directive to its processor, IRN Payment Systems, LLC ("IRN") (Ex. B to Giarusso Aff. in Supp.) to forward thirty percent (30%) of SSM's bank card receivables to MCA. Giarusso alleges that, pursuant to his conversation with an unidentified representative of IRN, SSM has not processed a transaction with IRN since February 2, 2011. Giarusso obtained and provides a Deposit History File Inquiry from IRN (Ex. C to Giarusso Aff. in Supp.) supporting that assertion.

In his Affidavit in Opposition, Ippolito, a member of SSM, affirms as follows:

In October of 2010, Ippolito entered into discussions with MCA, a “hard money lender” (Ippolito Aff. in Opp. at ¶ 3), about borrowing working capital for SSM. Snead advised Ippolito that MCA would send SSM the sum of \$250,000.00 at 30% interest. Notwithstanding the high rate of interest, SSM agreed to the loan. The loan was secured only by a Uniform Commercial Code (“UCC”) financing statement (Ex. A to Ippolito Aff. in Opp.) filed by MCA.

Notwithstanding its obligation to advance the sum of \$250,000.00, MCA provided only \$183,651.28 following the execution of the agreement. Moreover, Ippolito denies that SSM ever changed its credit processor. In addition, SSM intends to interpose the defense of usury, as authorized if the interest rate of a loan to an LLC exceeds twenty five percent (25%).

Ippolito submits that the Snead Affidavit and Complaint establish that Plaintiff’s injury, if any, is compensable by money damages, rendering injunctive relief inappropriate. With respect to a balancing of the equities, Ippolito submits that SSM “does not come to this Court with clean hands” (Ippolito Aff. in Opp. at ¶ 9) in light of the fact that 1) MCA “unilaterally” determined that SSM was in breach of the Merchant Agreement (*id.* at ¶ 10) and a representative of MCA came to Ippolito’s home and “engaged in a heated conversation with my wife with regard to the alleged debt due by [SSM]” (*id.* at ¶ 11); 2) Ippolito received an email from Snead dated February 15, 2011 (Ex. B to Ippolito to Aff. in Opp.) in which Snead acknowledged visiting Ippolito’s home and stated “I don’t know what you were thinking when you turned off your processing but you are about to buy yourself some serious problems;” 3) Snead contacted Ippolito the following day and advised Ippolito that, unless Ippolito went to Snead’s office immediately, Snead could “no longer stop bad things from happening to me” (Ippolito Aff. in Opp. at ¶ 13); and 4) on February 26, 2011, Snead sent a representative of MCA to SSM’s former place of business to repossess motor vehicles, notwithstanding the fact that the Merchant Agreement was secured only by future credit card receivables. The police arrived and directed the MCA representatives to vacate the premises.

C. The Parties’ Positions

Plaintiff submits that it has demonstrated its right to injunctive relief. Plaintiff contends that it has demonstrated a likelihood of success on the merits by establishing that 1) MCA has a perfected interest in 30% of SSM’s accounts receivable generated from bankcard transactions;

2) SSM is in default of the Merchant Agreement, both because it owes money to MCA and because it switched its Processor without permission; and 3) the Proceeds are under the immediate threat of being disposed of, both because SSM has switched its Processor and because SSM and/or Ippolito fraudulently transferred assets, hampering MCA's ability to satisfy its debt pursuant to the Merchant Agreement. Plaintiff contends, further, that in light of its allegations that SSM and/or Solivia is using proceeds of the accounts receivable to pay unsecured obligations, and the fact that such conduct would impair Plaintiff's ability to satisfy Defendants' obligations to Plaintiff, the Court should grant the requested relief. Plaintiff apparently concedes that its allegation that Defendants have improperly transferred assets is based on hearsay, as it argues that "[t]he Snead Affidavit further notes that **he has been advised** that Powersports has sold its assets, or its principal, Ippolito sold his membership interest in [SMS] to Weisman" (emphasis added) (P's Memorandum of Law at p.2).

Plaintiff contends, further that 1) MCA will suffer irreparable harm without injunctive relief because Defendants will continue to dissipate assets that would otherwise be available to MCA to satisfy SSM's debt; and 2) a balancing of the equities favors MCA because injunctive relief would continue the parties' relationship pursuant to the Merchant Agreement, thus causing no harm to Defendants, and ensure that the bankcard receivables remain available to Plaintiff.

Defendants Solivia and Weisman oppose Plaintiff's application, arguing, *inter alia*, that 1) the Snead Affidavit is based on "unidentified hearsay insofar as its claims against Solivia and Weisman" (Bradley Aff. in Opp. at ¶ 8); 2) the Giarusso Affidavit makes no factual allegations of fraudulent actions by Solivia or Weisman; 3) the Plaintiff's submissions do not allege facts that demonstrate that Solivia or Weisman participated in conveyances that were fraudulent with respect to MCA or any other creditor; 4) in light of the above, Plaintiff has failed to establish a likelihood of success on the merits against Solivia or Weisman; 5) Plaintiff's injury is clearly compensable by money damages and, therefore, injunctive relief is inappropriate; and 6) the balancing of the equities favor Solivia and Weisman, as the proposed relief would adversely affect Solivia's business operations.

Defendants SSM and Ippolito oppose Plaintiff's application, arguing, *inter alia*, that 1) Plaintiff's injury is compensable by money damages, rendering injunctive relief inappropriate; 2) Plaintiff's application for an injunction and attachment is based on speculative allegations that

Plaintiff changed its Processor, and Ippolito denies that allegation; 3) some of the relief sought by Plaintiff constitutes mandatory injunctive relief, and Plaintiff has not met the high burden required to justify such relief; 4) as outlined in the Ippolito Affidavit, Plaintiff has engaged in improper conduct, which the Court should consider in ruling on Plaintiff's application; and 5) there is evidence that Plaintiff failed to comply with its obligations under the parties' agreement, by failing to provide SSM with all the funding promised.

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); see *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). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

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).

Mandatory injunctive relief should not be granted *pendente lite* without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 (2d Dept. 2007).

B. Attachment

CPLR § 6201(3) provides that an order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

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[.]

To obtain an order of attachment under CPLR § 6201(3), the plaintiff must demonstrate that the defendant has or is about to conceal his or her property in one or more of several enumerated ways, and has acted or will act with the intent to defraud his or her creditors, or to frustrate the enforcement of a judgment in favor of the plaintiff. The moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud. *Mineola Ford Sales v. Rapp*, 242 A.D.2d 371 (2d Dept. 1997).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's application based on its conclusion that 1) Plaintiff has not demonstrated a likelihood of success on the merits, or established that the Defendants have or are about to conceal assets with the intent to defraud Plaintiff, a creditor, in light of the conflicting affidavits and Plaintiff's reliance on hearsay and speculation in support of its allegations; 2) Plaintiff's injury, if any, is compensable by money damages; and 3) Plaintiff has not demonstrated that a balancing of the equities tilts in its favor. Accordingly, the Court denies Plaintiff's Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

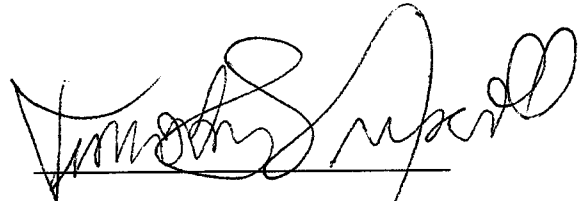
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on April 20, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

March 31, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 04 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**