

DiMicelli v Corporate National Realty, LLC
2011 NY Slip Op 31774(U)
June 17, 2011
Supreme Court, Nassau County
Docket Number: 002825-11
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
**THOMAS B. DiMICELLI, DOUGLAS OMSTROM,
and REID J. BERCH,**

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

Plaintiffs,

Index No: 002825-11

Motion Seq. No: 1

Submission Date: 6/14/11

- against -

CORPORATE NATIONAL REALTY, LLC,

Defendants,

- and -

**CORPORATE NATIONAL REALTY, LLC, and
SAMUEL A. ROZZI,**

**Defendants and
Cross-Claimants,**

- against -

ROSA BUCKLEY,

**Additional Cross-Claim
Defendant,**

-----X

The following papers have been read on this motion:

- Order to Show Cause.....X**
- Affirmation in Support, Affidavits in Support and Exhibits.....x**
- Memorandum of Law in Support.....X**
- Affidavits in Opposition and Exhibits.....X**
- Defendant's Memorandum of Law.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiffs Thomas B. DiMicelli (“DiMicelli”), Douglas Omstrom (“Omstrom”) and Reid J. Berch (“Berch”) (collectively “Plaintiffs”) on May 27, 2010 and submitted on June 14, 2011. For the reasons set forth below, the Court denies the Order to Show Cause, except that the Court directs that the temporary restraining order previously issued by the Court, with the consent of the parties, shall remain in effect on the condition that Plaintiffs post a bond in the sum of \$5,000 within thirty (30) days of the date of this Order.

BACKGROUND

A. Relief Sought

Plaintiffs request an Order 1) pursuant to § CPLR § 6401, appointing a temporary receiver to a) take control of the funds of Defendant Corporate National Realty, LLC (“CNR” or “Defendant”) in the amount of \$473,300 pending the resolution of this action; and b) collect the commissions generated by any sales or leasing in which Plaintiffs provided any real estate brokerage services and which are received by CNR after May 27, 2011, the date on which Plaintiffs’ Order to Show Cause was signed; and/or 2) pursuant to CPLR § 6201(3), issuing an order of attachment over CNR’s funds totaling at least \$473,300.

Defendant opposes Plaintiffs’ application.

B. The Parties’ History

The Complaint (Ex. A to McGowan Aff. in Supp.) alleges as follows:

CNR employed Plaintiffs as commissioned real estate salesmen. DiMicelli and Omstrom worked for CNR, or its predecessor, for approximately twenty (20) years, and Berch worked for CNR, or its predecessor, for approximately four and one-half (4 ½) years.

During their employment by CNR, Plaintiffs received commissions for brokerage services they provided in connection with CNR’s sale and/or leasing of real property. The commissions were “historically and as a matter of agreement” (Compl. at ¶ 9) paid to Plaintiffs within days of the clearing of the commission check paid to CNR and deposited into CNR’s bank account (“Account”). Plaintiffs had an agreement with CNR, pursuant to which Plaintiffs received no less than 50% of the total commissions paid on real estate transactions in which they were the broker, and the commission rate rose to a maximum of 75% when the total annual

commissions paid exceeded \$800,000.

Plaintiffs stopped working for CNR in January of 2011 ("Departure"). Plaintiffs allege that, since their Departure, CNR has failed to pay them commissions due on commissions earned prior to and after their Departure, as well as commissions on previously consummated transactions such as leases for which commission payments were paid in installments to CNR.

Plaintiffs allege that, while employed by CNR, they 1) did not have authority to hire or fire personnel; 2) did not have supervision responsibilities; 3) did not have authority to promote, discipline, or establish pay rates of personnel; 4) did not have signatory authority on the Account; and 5) had no managerial responsibility. They allege that Samuel A. Rozzi ("Rozzi"), the managing member of CNR, had those responsibilities, and that it was Rozzi who made the decision not to pay the commissions allegedly due to Plaintiffs. Plaintiffs also allege that they were given minority interests in CNR, to induce them not to leave the employ of CNR. Plaintiffs were not subject to any non-compete or non-solicitation provisions in any agreement between CNR and Plaintiffs.

The Complaint contains three (3) causes of action. In the first, Plaintiffs allege that CNR breached its agreement with Plaintiffs to pay commissions due to Plaintiffs. In the second, Plaintiffs seek payment under a quantum meruit or unjust enrichment theory, in the event the Court concludes that no valid agreement existed between CNR and Plaintiffs. In the third, Plaintiffs allege that CNR violated New York Labor Law ("Labor Law") § 190(6) by failing to pay wages due to Plaintiffs.

In his Affidavit in Support, DiMicelli affirms, *inter alia*, that 1) CNR referred to him and the other Plaintiffs as "salesmen;" 2) during his employment, CNR paid him the appropriate commission within days of CNR's receipt, deposit and clearing of the commission check payable to CNR; 3) in 1999, he entered into an Operating Agreement (Ex. C to DiMicelli Aff. in Supp.) and received a minority interest in CNR; 4) the Operating Agreement did not alter his commissions or change his role at CNR; 5) prior to his Departure, he produced millions of dollars of income for CNR; 6) since his departure, CNR has withheld commissions owed to DiMicelli; 7) he cannot state the precise amount of commissions due to him, in part because of CNR's refusal to provide him with relevant records; 8) CNR is in financial distress, and a

4] salesman in a different CNR office, which has allegedly sought bankruptcy protection, has initiated similar litigation against CNR ("Related Claim"); and 9) he is concerned that CNR will divert or use Plaintiffs' share of the commissions for its own benefit before this action is resolved.

In his Affidavit in Support, Omstrom affirms, *inter alia*, that 1) although he entered into the Operating Agreement, pursuant to which he received a 7.5% interest in CNR, the Operating Agreement did not affect the commissions he received or his responsibilities at CNR; 2) CNR has refused to pay commissions owing to him; 3) on February 18, 2011, just days after Plaintiffs demanded that CNR provide the commissions owed, CNR transferred over \$248,000 from its Account to Corporate National Realty Inc. ("CNR Inc."), which is owned and operated by Rozzi, although there was no business relationship that necessitated this transfer; and 4) the general ledger provided by CNR reflects that Rozzi has been using funds in the Account for personal expenses, including country club dues and football tickets. Omstrom submits that, in light of this allegedly improper transfer, as well as the Related Claim, the appointment of a receiver is necessary to safeguard the monies at issue.

In his Affidavit in Support, Berch affirms, *inter alia*, that 1) although he entered into an Amendment to the Operating Agreement in 2006, pursuant to which he received a 5% interest in CNR, that Amendment did not affect his duties or compensation package; 2) pursuant to his agreement with CNR, each salesman received 50% of the commissions in connection with transactions that he brokered, and CNR paid those commissions to the salesman promptly; 3) since January of 2011, CNR has failed to pay commissions owed; 4) Rozzi has made it difficult for Plaintiffs to complete pending transactions on behalf of CNR by refusing to assist in the collection of monies due from tenants and terminating necessary staff; and 5) the appointment of a receiver or similar relief is necessary in light of CNR's reduced income, to ensure that CNR does not dissipate assets to which Plaintiffs may be entitled.

On June 14, 2011, with the consent of the parties, the Court issued a temporary restraining order ("TRO") which directed that, pending a hearing and determination of this motion, and further order of this Court, CNR, its agency, employees, representatives and counsel are restrained from making payments and/or encumbering, transferring or otherwise disposing of

[* 5]

CNR's funds other than in the ordinary course of business, except to the extent that Rozzi shall be permitted to use CNR's funds for personal expenses as previously expended in the normal course of business, which amount shall not exceed \$20,000 per month.

In his Affidavit in Opposition, Rozzi affirms that CNR has been in business, in various corporate forms, since 1988. Rozzi opened CNR as a sole proprietorship and then incorporated CNR Inc. in or about 1988. In or about 1991, CNR Inc. employed Omstrom and DiMicelli. In 1999, Rozzi, Omstrom, DiMicelli and two other salespersons formed CNR, a limited liability company and executed the Operating Agreement. Pursuant to the Operating Agreement, Rozzi received a 70% membership interest in CNR, and DiMicelli, Omstrom and the other two individuals each received a 7.5% membership interest. Berch began his association with CNR as an independent contractor in or about 2006. In or about 2007, Berch was granted a 5% membership interest in CNR.

Upon becoming members of CNR, Plaintiffs were compensated by "guaranteed payments to partners" (Rozzi Aff. in Opp. at ¶ 6), in accordance with the Internal Revenue Code. Those payments represented compensation for their performance of real estate brokerage services, as well as managerial and supervisory services they provided. After they became members, Plaintiffs assumed the role of Senior Directors, which included additional managerial and supervisory responsibilities ("Responsibilities") Plaintiffs did not have when they acted as independent contractors for CNR, pursuant to a separate agreement. That separate agreement terminated when Plaintiffs became members of CNR.

Plaintiffs' Responsibilities included 1) DiMicelli's drafting, reviewing and negotiating exclusive listing and brokerage agreements, including agreements for which he was not the salesperson involved in the particular transactions, 2) Berch's supervision of junior salespeople, 3) Plaintiffs' interviewing and hiring of prospective salespeople, and consultation regarding hiring decisions, and 4) Plaintiffs' independent decisions regarding which prospective purchasers and tenants to solicit.

Following Plaintiffs' Departure to work with a competing real estate firm ("Competing Firm"), Rozzi learned that Plaintiffs had been negotiating with the Competing Firm, and other firms, for over a year prior to their Departure. Although Rozzi agrees that Plaintiffs were entitled

to leave CNR, he submits that Plaintiffs engaged in conduct that constituted a breach of their fiduciary duty to CNR which they owed as members of CNR. Examples of that conduct included 1) DiMicelli's improper alteration of a template CNR exclusive agreement to provide that exclusive agreements for which DiMicelli or Omstrom were the primary contact between CNR and the client would expire if any of the Plaintiffs left CNR, 2) Plaintiffs' failure, upon their Departure, to provide CNR with accurate lists of pending transactions, as well as their attempts to provide misleading lists, 3) enlisting Cross-Claim Defendant Rose Buckley ("Buckley"), a broker coordinator for CNR, to perform services on behalf of Plaintiffs in furtherance of their Departure, including the creation of a directory containing information from CNR's databases to which Buckley was not provided access by CNR, and 4) Plaintiffs' alleged complicity in harassment by a third party, DiMicelli's brother-in-law, who sent numerous, threatening e-mails to Rozzi which led to that third party's arrest and the issuance of an order of protection on behalf of Rozzi (Ex. M to Rozzi Aff. in Opp.).

Rozzi affirms, further, that his use of funds from the Account for certain expenses is expressly permitted by the Operating Agreement. Specifically, ¶ 13.3 of the Operating Agreement entitles Rozzi to receive, as additional compensation above guaranteed payments and distributions, up to a maximum of \$300,000 of expense allowance annually. The expenses to which Plaintiffs refer, such as football tickets, were permitted under the Operating Agreement, and CNS purchased those tickets since 1988, as an ordinary and necessary business expense. Similarly, the credit card purchases to which Plaintiffs refer were expressly permitted, and Rozzi used that credit card for necessary business expenses of CNR, including entertaining current and prospective clients.

Rozzi also disputes Plaintiffs' claims that CNR has dismissed critical employees, and affirms that CNR employs the same number of employees that it did prior to the Departure. Rozzi also submits that Plaintiffs have overstated the significance of the Related Claim. He affirms that 1) CNR is solvent; 2) CNR Inc. was a separate entity that he established with an individual based in Pennsylvania, who was entrusted with the daily management of that office while Rozzi managed CNR in New York; and 3) the Related Claim, and bankruptcy filing of CNR Inc. in or about 2003, has no bearing on CNR's current solvency.

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Rozzi affirms that CNR has meritorious counterclaims, and submits that Plaintiffs have failed to provide evidence demonstrating the danger of dissipation or removal of CNR assets, or CNR's intent to defraud Plaintiffs. Thus, Plaintiffs have failed to sustain their burden to warrant the appointment of a receiver or order of attachment.

In his/her Affidavit in Opposition, Terri C. Fredericks ("Fredericks"), the Administrative Manager of CNR since 2000, affirms that her duties include the preparation and maintaining of CNR's books of account, preparation of invoices for collection of commissions due, and receipt and processing of payments received by CNR. CNR uses a particular accounting software to maintain its books and records. Fredericks is able to generate different reports, including a vendor list which is a list of CNR's payees. That list identifies each vendor by a unique identifier that is also used to identify the vendor on the general ledger maintained by CNR on its accounting software.

Following their Departure, Plaintiffs demanded that CNR pay them commissions of approximately \$250,000. In an effort to segregate and preserve the CNR funds that are in dispute in this action, Fredericks made an entry in CNR's Account register in the amount of \$248,101.56, payable to "Corporate National Realty," intended to refer to CNR, not CNR Inc. This transfer was merely a "paper transfer" (Fredericks Aff. in Opp. at ¶ 5), or accounting device, that provided Fredericks with an Account balance that was "not artificially inflated by funds which are in dispute in this litigation" (*id.*). Fredericks disputes Plaintiffs' assertion that this transfer was made surreptitiously and provides documentation (Exs. N and O to Fredericks Aff. in Opp.) in support of her claim that the payee of that transfer was CNR, not CNR Inc, and no transfer ever took place to CNR Inc. in February 2011, or at any time since the Departure.

In addition, Fredericks affirms that 1) Rozzi's receipt of expense and benefit compensation from CNR was appropriate; 2) as reflected by the Expense Distribution Reports provided (Ex. P to Fredericks Aff. in Opp.), and pursuant to the Operating Agreement, Plaintiffs received distributions to reconcile for Rozzi's receipt of benefit compensation from CNR; 3) CNR is solvent, as reflected by the balance sheet provided (*id.* at Ex. O), which reflects assets of \$451,016.73 and no liabilities; and 4) notwithstanding their cause of action under the Labor Law, based on their allegedly being employees, Plaintiffs were never employees of CNR, or

compensated as such, and CNR never withheld monies for the payment of payroll taxes on Plaintiffs' behalf, since Fredericks has worked at CNR.

C. The Parties' Positions

Plaintiffs submit that 1) they have demonstrated that CNR has failed to pay them commissions owed to them, which commissions constitute wages under the New York Labor Law, thereby entitling Plaintiffs to the remedies set forth in Labor Law § 198; 2) Plaintiffs have established the appropriateness of the appointment of a temporary receiver by establishing CNR's financial difficulties, diversion of commissions due to Plaintiffs, Rozzi's improper use of CNR funds towards expenses including country club memberships, CNR's failure to provide documentation relating to commissions allegedly owed to Plaintiffs, and the bankruptcy filing by a related CNR entity; and 3) alternatively, if the Court declines to appoint a receiver, the Court should issue an Order of Attachment against CNR's assets in light of the evidence submitted demonstrating CNR's secretion or dissipation of assets with the intent to deprive Plaintiffs of funds to which they are entitled, and establishing Plaintiffs' probability of success on the merits.

Defendant opposes Plaintiffs' application, submitting that Plaintiffs have not met the high burden of demonstrating that a temporary receiver is appropriate. Defendant submits that the allegedly improper transfer of funds to CNR Inc., on which Plaintiffs rely in support of their claim that Defendant may divert monies, never occurred. As elucidated by Fredericks in her affidavit, that alleged transfer was simply an accounting mechanism to provide CNR with an accurate Account balance. In addition, Plaintiffs' assertion regarding the financial instability of CNR is unsupported by the record, as the bank statements and other documentation provided demonstrate CNR's financial viability. Finally, the bankruptcy filing, nearly a decade ago, of a related entity in which Rozzi was a principal does not establish that CNR's assets are in danger of imminent dissipation. Defendant also submits that Rozzi's expenditure of CNR's assets on certain expenses was expressly authorized by the Operating Agreement, and notes that the expense distribution reports provided confirm that Plaintiffs received their portion of those expenses. Moreover, those expenses were ordinary and business expenses as defined by the Internal Revenue Code.

Defendants also contend that Plaintiffs have failed to make the required showing to warrant an Order of Attachment. The allegedly improper transfer of funds by CNS did not occur, and Plaintiffs have not shown that Rozzi's use of CNS assets for expenses was improper. Moreover, Plaintiffs have not demonstrated a likelihood of success on the merits.

RULING OF THE COURT

A. 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). In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action to obtain an order of attachment. *Id.*

B. Appointment of a Receiver

CPLR § 6401 provides as follows:

(a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

(b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.

(c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests. *Id.*, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). Indeed, in *Vardaris*, the Second Department reversed the trial court's order granting plaintiff's motion for appointment of temporary receiver in light of plaintiff's failure to make the required evidentiary showing. *Id.* at 631-632.

C. Application of these Principles to the Instant Action

The Court denies Plaintiffs' applications for the appointment of a temporary receiver and for an Order of Attachment. In so doing, the Court concludes that 1) Plaintiffs have not demonstrated that Defendant has or is about to conceal its property, and has acted or will act with the intent to defraud its creditors, or to frustrate the enforcement of a judgment in favor of the Plaintiffs; and 2) Plaintiffs have not made a clear evidentiary showing of a danger that CNR's assets will be removed from the state, or lost, materially injured or destroyed. With respect to Plaintiffs' reliance on the allegedly improper transfer of funds, there is a dispute as to the nature of that transfer, and Defendant has provided documentation in support of its claim that the alleged transfer never occurred. In addition, Defendant has provided support for its claim that CNR is financially viable. The bankruptcy filing by a related entity several years ago does not establish that CNR is currently in financial straits. Finally, there is a dispute as to the

appropriateness of Rozzi's use of CNR assets for certain expenses, and Defendant has produced documentation in support of its assertion that (1) these expenses were authorized, (2) Plaintiffs received compensation to offset those expenses, and (3) those expenses were ordinary and necessary business expenses. That dispute further demonstrates that Plaintiff has failed to carry its burden.

In light of the foregoing, the Court denies Plaintiffs' application for the appointment of a temporary receiver, or Order of Attachment. In light of the parties' consent to the TRO, the Court directs that the TRO entered by the Court on June 14, 2011 directing that "CNR, its agency, employees, representatives and counsel be, and hereby are restrained from making payments and/or encumbering, transferring or otherwise disposing of CNR's funds other than in the ordinary course of business, except to the extent that defendant Samuel Rozzi shall be permitted to use CNR's funds for personal expenses as previously expended in the normal course of business, which amount shall not exceed \$20,000 per month" shall remain in effect, and directs Plaintiffs to post a bond in the sum of \$5,000, within thirty (30) days of the date of this Order, as a condition of that continued injunctive relief.

All matters not decided herein are hereby denied.

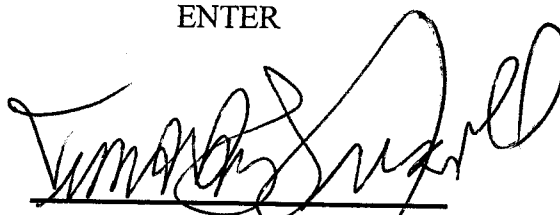
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on July 14, 2011.

DATED: Mineola, NY

June 17, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 23 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE