SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

PM & JP CAR WASH, LLC,

Plaintiff,

-against-

NU FINISH CAR WASH, LTD., JOSEPH CAPPARELLI, NICHOLAS CAPPARELLI, MARGARET CAPPARELLI and CAPPARELLI PROPERTIES, LTD.,

Defendants.

Decision and Order

MOTION SUBMITTED:
March 21, 2012
MOTION SEQUENCE:01
INDEX NO. 000493-12

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Opposition	2

In this action for breach of contract, etc., the Plaintiff, PM & JP Car Wash, LLC, moves, *inter alia*, pursuant to CPLR 6301 for a preliminary injunction: 1) enjoining and prohibiting Defendants "from taking actions to enforce the terms of the Note . . . until (I) the Defendants cure their material misrepresentation set forth in the Contract, and (ii) a determination is made calculating Plaintiff's damages arising from Defendants' breach of the Contract"; and 2) enjoining and prohibiting Defendant Capparelli Properties, Ltd. ("owner/landlord") "from taking any actions to terminate the Lease and/or declare Plaintiff in default of the Lease" based on the Plaintiff's failure to make payments under the note until the Defendants cure their material misrepresentations and a determination is made as to Plaintiff's damages arising from Defendants' breach of contract. The Plaintiff also seeks: a declaration "that Defendants are in default" of a contract of sale entered into between the Plaintiff and Defendant Nu Finish Car

Wash, LLC ["Nu Finish"] and "ordering that the Defendants specifically perform their obligations under the Contract and obtain all permits, approvals and licenses to operate the Plaintiff's business at the premises"; a "ruling" that the notice of default served by the Defendants based upon the Plaintiff's failure to make payments under the promissory note securing the Contract is "improper under the terms of the Contract and Note and a nullity."[1]

Discussion

The Plaintiff is the owner and operator of Miami Car Wash located in East Meadow, New York. The Plaintiff purchased the business from Nu Finish on February 2, 2007 for a total price of $3.2 million dollars (Ex. "K" at ¶¶ 8, 10).[2] The Plaintiff paid half of the purchase price in cash and executed a promissory note in favor of Nu Finish for the balance (Ex. "C" to Plaintiff's Motion). Pursuant to the Contract of Sale ("Contract"), Nu Finish made certain representations and warranties, including that:

> [Nu Finish] is in compliance with all Federal, State and Municipal laws, rules and regulations; that [Nu Finish] has all permits and licenses required by all governmental agencies in order to operate a business of the type which is currently being operated by [Nu Finish] and that it has received no violation or notice of violation with regard to any of the same.
>
> [Nu Finish] has operated the Business in accordance with all laws, ordinances, and rules applicable to the Business.
>
> The Certificate of Occupancy and or equivalents, authorize the use of the Premises as a carwash. [Nu Finish] represents that to the best of its knowledge, there are no additional licenses and/or permits required to use the Premises as it is currently used by [Nu Finish].
>
> [Nu Finish] has all permits, licenses, orders, franchises and approvals of all Federal, state or local regulatory bodies required for it to carry on its Business as currently conducted; all such permits, licenses, orders, franchises and approvals

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[1] Defendants Joseph Capparelli, Nicholas Capparelli, and Margaret Capparelli were principals of Nu Finish. Defendant Capparelli Properties, Ltd. is the owner/landlord of the property upon which the car wash is located. Members of the Capparelli family are shareholders of both Caparelli Properties and Nu Finish (Affidavit in Opposition at ¶ 7).

[2] At the same time the Contract was executed, the Plaintiff also entered into a lease with Capparelli Properties, Ltd. (Ex. "B"; Ex. "K" to Motion at ¶ 9).

> are in full force and effect, and no suspension or cancellation of any of them is threatened; and [Nu Finish] is in compliance in all material respects with all requirements, standards and procedures of all Federal, state or local regulatory bodies which issued such permits, licenses, orders, franchises and approvals (Ex. "A" at ¶¶ 10, 20[E], [I] and [O]).

The above representations survive the closing for the statute of limitations period (Ex. "A" at ¶ 20[Q]).

In the event of default, the Contract provided:

> In the event of any willful, capricious or other inexcusable default hereunder on part of the Seller, Buyer shall be entitled to specific performance of this Agreement, together with any equitable relief to maintain status quo pending resolution of such litigation without posting any bond or other security. Furthermore, if the representations of Seller in this Agreement, including, but not limited to, as set forth in Paragraph 20, are mistaken, fraudulent, reckless, or in any manner incorrect, Buyer's damages shall include the cost of any claims, judgments, encumbrances, liens and court costs, attorneys fees and incidental expenses related to Buyer's ability to satisfy Seller's obligations under Paragraph 20 and related paragraphs of this Agreement (Ex. "A" at ¶ 16).

After the Contract was executed, the Plaintiff was issued violations by the Town of Hempstead with respect to, *inter alia*, signage and the detail center of the car wash (Exs. "E", "G" and "K" to Motion at ¶¶ 16, 17).[3] The violations were purportedly in existence at the time of closing.

As of November 1, 2011, the Plaintiff began to withhold the monthly note payment "pending the Seller's resolution of the misrepresentations under the Contract" (Ex. "H" to Motion). On December 12, 2011, Nu Finish notified the Plaintiff that it was in default (Ex. "I" to Motion) ("default notice"). The default notice stated in relevant part:

> Please be advised that under the terms of a certain promissory note signed February 2, 2007, between PM & JP Car Wash LLC (Maker), and Nu Finish Car Wash (As Holder), installment payments of $12,404.78 are due on the 1st of each month.

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[3] The violations were for the following: tent being used for car detailing, illegal signage, illegal interior alteration, illegal game room, outside storage vacuum, and construction and enclosure for the vacuum (Exs. "E" and "G" to Motion).

Please allow this to serve as written notice of the following

PM & JP Car Wash LLC has failed to make a payment on November 1, 2011
PM & JP Car Wash LLC has failed to make a payment on December 1, 2011

In the event the monthly payments noted above are not received by Nu Finish Car Wash within TEN (10) days after this notice, the maker PM & JP Car Wash LLC will be in default of the above referenced note (Ex. "I" to Motion).

On December 19, 2011, the Plaintiff rejected Nu Fault's default notice on the ground that Nu Finish was in default of the Contract for "failing to obtain and maintain all required permits, licenses, certificates and approvals to operate the car wash Business" (Ex. "J" to Motion). In rejecting the "default notice", the Plaintiff also demanded that Nu Finish cure and remove the violations on the Business to ensure that the Plaintiff "may operate the Business as provided in the Contract" (Ex. "J" to Motion).

On January 13, 2012, the Plaintiff made the instant motion seeking declaratory relief and a preliminary injunction pursuant to CPLR 6301.

The Court's Determination

For the reasons that follow, the Plaintiff's motion is denied.

A party moving for a preliminary injunction must demonstrate by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of the moving party (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]). An injunction is a provisional remedy to maintain the status quo until a full hearing can be held on the merits. As such, the decision whether to grant or deny a preliminary injunction is within the sound discretion of the court (*Id.*; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

In support of its application, the Plaintiff argues that it has made a *prima facie* showing for relief with respect to each of the causes of action asserted in the complaint and that a balance of the equities "tips" in its favor.[4] In addition, the Plaintiff argues that it "is facing the imminent

[4] The causes of action asserted in the complaint are breach of contract, declaratory judgment, fraudulent inducement, stay of enforcement of the note, and specific performance (Ex. "K" to Motion).

loss of its Business" and that [s]uch harm cannot be adequately remedied by a future award of monetary damages" (Affirmation in Support at ¶ 28).

Contrary to the Plaintiff's contentions, a preliminary injunction is not warranted where, as here, a breach of contract claim which may be adequately compensated by monetary damages (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d at 740, *supra* [no irreparable harm if the movant can be compensated with money damages]; *Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Ass'n, Inc.*, 21 AD3d 777 [2d Dept 2005]). Moreover, the Plaintiff has failed to adduce sufficient evidence in support of its claim that the loss of "its Business" is imminent. To the contrary, the motion papers refer to the loss of Business as pertains to the detail center and not the actual car wash itself (Affidavit in Support at ¶ 13 ["I have been advised that the Town of Hempstead will have to shut down parts of the Business, including the detail center, if the violations are not immediately resolved"]). Additionally, the 'loss of business', at this juncture, is speculative, as the car detail center is still operating, despite the existence of the violations (*Id.* at 739 [irreparable harm must be imminent, not remote or speculative]).

It is noted that the possibility that the owner/landlord may terminate the lease, without more, does not warrant a preliminary injunction. There is no evidence before the court that the owner/landlord seeks to terminate the lease or has expressed, in words or actions, a desire to terminate the lease. In fact, Nicolas Capparelli, the Property Manager for the owner/landlord, stated in his affidavit that "Capparelli Properties has NO INTENTIONS of taking any action to terminate the lease, on any grounds. Plaintiff has not been served with any notices, nor are there any notices anticipated" (Affidavit in Opposition at ¶ 51) (emphasis in original).

With respect to the Plaintiff's request for an order "[d]eclaring that Defendants are in default" of the Contract and "[r]uling" that the default notice is "improper" under the terms of the Contract", the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed (CPLR 3001).

The branch of Plaintiff's motion seeking an order declaring the Defendants to be in default of the Contract, in effect seeking summary judgment on its declaratory judgment claim, is denied given that the Plaintiff has an adequate alternative remedy in an action for breach of contract (*Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983] [court may exercise its discretion in not affording declaratory relief when other remedies are available and adequate]; *Alizio v Feldman*, 82 AD3d 804 [2d Dept 2011]; *BGW Development Corp. v Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America*, 247 AD2d 565 [2d Dept 1998] ["'cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action

such as breach of contract'", quoting *Apple Records v Capital Records*, 137 AD2d 50, 54 [1st Dept 1988]; *Wells Fargo Bank v GSRE II, Ltd.*, 92 AD3d 535 [1st Dept 2012] [plaintiff may not seek declaratory relief when other remedies are available, such as a breach of contract action]; *Niagara Falls Water Board v City of Niagara Falls*, 64 AD3d 1142 [4th Dept 2009]; *Main Evaluations, Inc. v State*, 296 AD2d 852 [4th Dept 2002] [cause of action seeking a declaration that defendant breached the contract was dismissed as unnecessary and inappropriate where the plaintiff had an adequate alternative remedy in an action for breach of contract]).

In addition, the Plaintiff's request for a "ruling" that the December 12, 2011 default notice was improper, does not constitute a justiciable or actual controversy, and, accordingly, the court declines to make such a ruling (*Chanos v MADAD, LLC*, 74 AD3d 1007 [2d Dept 2010]; *United Water New Rochelle, Inc. v City of New York*, 275 AD2d at 464, *supra* [courts may not issue advisory opinions which can have no immediate effect]; *Long Island Lighting Co. v Allianz Underwriters Insurance Co.*, 35 AD3d 253 [1st Dept 2006]; Siegel, McKinney's Practice Commentaries, CPLR C3001:3 [declaratory judgment requires an actual controversy and may not be used as a vehicle for an advisory opinion]). A "justiciable controversy" involves "a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Chanos v MADAD, LLC*, 74 AD3d 1007 [2d Dept 2010]). The court will not, under the circumstances, presented "entertain a declaratory judgment action when any decree [it] might issue will become effective only upon the occurrence of a future event that may or may not come to pass" (*New York Public Interest Research Group, v Carey*, 42 NY2d 527, 531 [1977]; *Cuomo v Long Island Lighting Co.*, 71 NY2d 349 [1988]; *United Water New Rochelle, Inc. v City of New York*, 275 AD2d 464 [2d Dept 2000] [declaratory relief improper where case presented hypothetical issues concerning future events which may or may not occur]).

Based on the foregoing, it is hereby ordered that the Plaintiff's motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: April 3, 2012

Hon. Vito M. DeStefano, J.S.C.