

Baghaei-Rad v Jones
2014 NY Slip Op 30237(U)
January 27, 2014
Sup Ct, Wayne County
Docket Number: 76605/2013
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

 ORIGINAL

MOHAMMAD BAGHAEI-RAD,

Plaintiff,

DECISION

-vs-

Index No. 76605

SHERMAN JONES, DONNA JONES AND
GALA ROSE FARMS,

2013

Defendants.

Underberg & Kessler, LL
Roy Z. Rotenberg, Esq., of Counsel
Attorneys for Plaintiff

DeValk, Power, Lair & Warner, P.C.
Richard L. DeValk, Esq., of Counsel
Attorneys for Defendants

The Plaintiff Mohammad Baghaei-Rad has commenced this action seeking a permanent injunction against the Defendants, together with specific performance of an alleged contract between the Plaintiff and the Defendants for the sale and purchase of cows and cow embryos. In conjunction with this action, the Plaintiff has filed and served an Order to Show Cause, seeking a Preliminary Injunction, prohibiting the Defendants Sherman and Donna Jones, and Gala Rose Farms from selling, transferring or removing the subject cows and embryos, pending the determination of this action. A

Temporary Restraining Order was granted by the Court as part of the Order to Show Cause.

The Plaintiff's claim arises from an auction which was held in Lyons, New York on November 3, 2013, for the purpose of the dispersal of the Gala Rose Farm herd. At the auction, an individual named Tom Packard placed winning bids on behalf of the Plaintiff, which resulted in the purchase of five Black Angus cows and eleven lots of embryos. The total combined purchase price was \$19,750.00.

The Plaintiff owns Hidden Acres Angus, a farm in Amsterdam, New York, where he operates a business engaged in the breeding of Black Angus cows, and the selling of Black Angus cow embryos. In his Affidavit, the Plaintiff alleges that "the cows and the embryos (purchased at the auction) are of a unique quality and character", due to their "pedigree and lineage", making it impossible to purchase replacements elsewhere.

A Bill of Sale was tendered by the auctioneer to Mr. Parkard on the Plaintiff's behalf at the close of auction. The auction sheet contains a paragraph stating that the "suggested Terms and Conditions of the American Angus Association" will control the auction procedures. That paragraph also contains the following language in bold face type:

ALL PURCHASES MUST BE PAID FOR IN FULL PRIOR TO

LOAD OUT - NO EXCEPTIONS, CATTLE NOT PICKED UP WITHIN 30 DAYS WILL BECOME THE SOLE PROPERTY OF GALA ROSE FARMS. (emphasis added).

The suggested terms and conditions also state that all sales are for cash unless credit arrangements are made prior to sale.

According to the Affidavit of the Defendant Sherman Jones, Mr. Packard advised Mr. Jones that he did not have the necessary cash at the time of auction, but that he would pay for the cattle the next day and load them out. Mr. Jones then received a telephone call from Mr. Packard the next day, indicating he still did not have the money, but that he would come the following Wednesday. Mr. Packard finally appeared at the Defendant's farm on November 25, 2013. At that time the cattle were loaded, and Mr. Jones then proceeded to open a sealed envelope given to him by Mr. Packard on behalf of the Plaintiff. There was, indeed, a check in the envelope from the Plaintiff in the amount of the full bid price; however, the check had a handwritten notation indicating it should not be deposited "on or before December 10th". At that point, Mr. Jones called Mr. Packard and told him to return the cows. The Plaintiff then called Mr. Jones and asked him to hold the check as he did not presently have the funds. Mr. Jones refused and Mr. Packard returned the cows, at which point Mr. Jones gave Mr. Packard the Plaintiff's check. Mr. Jones informed Mr. Packard at that time

that he considered the sale cancelled, for breach of contract.

On November 27, 2013, Mr. Jones received a telephone call from Paul L. Wollman, Esq. on behalf of the Plaintiff. Mr. Wollman informed Mr. Jones that the Plaintiff had provided him with a cashier's check in the amount of \$19,750.00. He advised Mr. Jones that the Plaintiff would deliver the check and pick up the cattle on November 29, 2013. Mr. Jones indicated he would not accept the check. Later in the day, Mr. Wollman called Mr. Jones a second time, indicating that Plaintiff had provided him with the bid price in the form of cash. Mr. Jones stated that he would not accept payment and that he would not deliver the cows.

On December 2, 2013, the Plaintiff's attorney Roy Z. Rotenberg, Esq., emailed and faxed letters to the Defendants, stating that the Plaintiff was prepared to tender cash to the Defendants, pick up the cows and obtain a release for the embryos on December 3, 2013 at 1:00 P.M. The letters also stated that, if the Defendants did not confirm the terms with him by 10:00 A.M. on December 3, 2013, legal action would be taken against them. Mr. Rotenberg received no confirmation from the Defendants.

Based upon the above sequence of events, the Defendants maintain that any contract arising from the auction is now cancelled. However, the Plaintiff contends that it is uncontroverted that he made several tenders of

the purchase price, and that he advised the Defendants that he was prepared to load out the cattle prior to the expiration of the 30 day period as set forth in the auction sheet.

The Plaintiff now seeks a Preliminary Injunction, restraining the Defendants from transferring the cows and embryos to a third party, pending the outcome of this action. In order to obtain a preliminary injunction, a party must establish: 1) a likelihood of success on the merits; 2) irreparable injury absent a preliminary injunction; and 3) a balancing of the equities in the movant's favor (See, e.g. Destiny USA Holdings, LLC v Citigroup Global Marks Realty Corp., 69 AD3d 212 (4th Dept, 2009)). While a hearing is often necessary to determine issues of fact prior to issuing a preliminary injunction, (See, CPLR §6312(c)), in this matter, the Court concludes that the Plaintiff has made a sufficient showing by the affidavits and documentary evidence submitted with the Order to Show Cause to demonstrate a likelihood of success in the underlying action. The evidence includes affidavits by the Plaintiff, counsel for the Plaintiff, attorney Paul L. Wollman, Esq., and the auctioneer Tom Burke, as well as documentary evidence which includes the Terms and Conditions of sale, the auction sheet and the Bill of Sale. While the Defendants have raised issues based upon the restrictions on the original check, the alleged improprieties in the conduct of the auction, and the

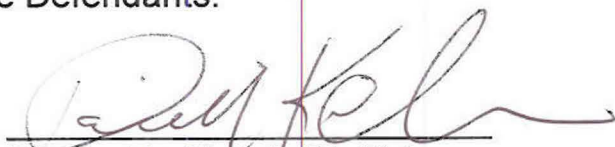
interpretation of the language of the auction documents, these allegations are insufficient to defeat the Plaintiff's application for a preliminary injunction.

The Plaintiff has also demonstrated the possibility of irreparable harm by his unrefuted statements as to the "unique quality and character" of the cows. Finally, in balancing the equities of the matter between the parties, the Court agrees with the Plaintiff's contention that the issuance of a preliminary injunction will preserve the status quo without significant harm to the Defendants. If the Defendants maintain that they are entitled to money damages, that issue may be determined at the time of trial.

CPLR §6312(b) provides that, if a preliminary injunction is granted by a court, the Plaintiff shall give an undertaking in an amount to be fixed by the court. The Plaintiff is therefore directed to give an undertaking in the amount of \$25,000.00.

Therefore, the Court finds by clear and convincing evidence that the Plaintiff has established his entitlement to a Preliminary Injunction. Counsel for the Plaintiff is directed to submit an Order in accordance with this Decision, on prior notice to counsel for the Defendants.

Dated: January 27, 2014
Lyons, New York


Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT
WATKINS COUNTY