Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

RACANELLI CONSTRUCTION GROUP, INC.,
Plaintiff,

Index No. 700191/13

Motion Date October 1, 2014

Motion Cal. No. 95

-against-

Motion Seq. No. 4

EASLE SERVICE CORP. and SCOTT EHRLER,
Defendants.

	Papers Numbered
Proposed Order to Show Cause.....	EF 55
Aff. In Support.....	EF 56-57
Exhibits.....	EF 58-76
Aff. In Opposition.....	EF 80
Memorandum of Law in Opposition.....	EF 81

Upon the foregoing papers it is ordered that the branch of plaintiff's motion for an order pursuant to CPLR 6301, or otherwise, for a Preliminary Injunction enjoining and restraining defendants from selling, assigning, conveying, exchanging, encumbering, mortgaging, pledging, granting, alienating, hypothecating, disposing or otherwise transferring title to plaintiff's equipment, namely: (i)2003 Hitachi ZX330LC excavator, S/N 030612; (ii) Welding Machine, Miller 907218; and (iii) 2008 JLG TF6-42 Telescopic Forklift (Machine SN 0160001989; Basket SN 200320501) (collectively, the "Machines"), including any auction to be conducted by Rapid Liens, Inc., pending the outcome of this litigation is hereby granted as follows:

Plaintiff, Racanelli Construction Corp., Inc. asserts causes of action sounding in conversion, monetary damages, and attorneys' fees involving three (3) Machines it purchased in the course of its business. Plaintiff is a general construction company and

defendant Easle Service Corp. ("Easle") is in the business of heavy construction machinery rental and repair and defendant Scott Ehrler ("Ehrler") is the chief executive officer of defendant Easle.

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate '"(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position"'(*Barone v. Frie,* 99 AD2d 129, 132 [2d Dept 1984] *quoting from Gambar Enterprises v. Kelly Servs.,* 69 AD2d 297, 306, 418 [2d Dept 1979); *Aetna Ins. Co. v. Capasso,* 75 NY2d 860, 552 [1990]; and *W.T. Grant Co. v. Srogi,* 52 NY2d 496, 517, [1981]; *see also*, *Merscorp, Inc. v. Romaine,* 295 AD2d 431, 562 [2d Dept 2002]; and *Neos v. Lacey,* 291 AD2d 434 [2d Dept 2002]). The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo (U.S. Reinsurance Corp. v. Humphreys,* 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also*, CPLR 6312[c]; and *Albany Medical College v. Lobel,* 296 AD2d 701,702 [3d Dept 2002]). The determination as to whether to issue a preliminary injunction is a matter left to the sound discretion of the Court (*see*, *Doe v. Axelrod,* 73 NY2d 748, 750 [1988]). Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (*First Nat. Bank of Downsville v. Highland Hardwoods,* 98 AD2d 924, 926, 471 NYS2d 360; *accord 607 Buegler v. Walsh,* 111 AD2d 206, *Orange County v. Lockey,* 111 AD2d 896, 897 [1985]; *William M. Blake Agency, Inc. v. Leon,* 283 AD2d 423, 424 [2d Dept 2001]; and *Peterson v. Corbin,* 275 AD2d 35, 36 [2d Dept 2000]). As the court stated in *Tucker v. Toia*, 54 AD2d 322, 325-326, however, "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (*Hoppman v. Riverview Equities Corp.*, 16 AD2d 631; *Weisner v. 791 Park Ave. Corp.*, 7 AD2d 75, 78-79; *Peekskill Coal & Fuel Oil Co. v. Martin*, 279 App Div 669, 670; *Swarts v. Board of Educ.*, 42 Misc 2d (761,) 764, *supra*; *cf. Walker Mem. Baptist Church v. Saunders*, 285 NY 462, 474)." The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo (U.S. Reinsurance Corp. v. Humphreys,* 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also*, CPLR 6312[c]; and *Albany Medical College v. Lobel,* 296 AD2d 701,702 [3d Dept 2002]).

The plaintiff submits in support of this application, inter alia, an affidavit of Richard Xia, President of plaintiff and an affidavit of Xi Verfenstein, Management Director of plaintiff, who avers, inter alia, that the Machines are custom built for plaintiff's purposes.

To prevail on an application for preliminary injunction relief the first prong of the test is a demonstration by plaintiff of a likelihood of success on the merits. Here, the plaintiff has asserted causes of action for: conversion, monetary damages, and attorneys' fees.

This court finds that plaintiff has made a sufficient showing of likelihood of success. As to likelihood of success, "(i)t is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits (citations omitted)" (*Tucker v. Toia*, *supra*, 54 AD2d at 326). Plaintiff has set forth facts supporting its claims. Accordingly, upon the record presented and in the exercise of its discretion, the Court concludes that the plaintiff has demonstrated a reasonable likelihood of success on the merits.

With regard to the second prong of the test, the plaintiff has demonstrated that it will suffer an irreparable injury if the preliminary injunction is not granted. The plaintiff's allegations that it is subject to the loss of its unique machines, constitutes an immediate injury which cannot be adequately compensated by monetary damages, and qualifies as an irreparable injury supporting an award of injunctive relief (*see generally, Jiggets v. Perales*, 202 AD2d 341 [1st Dept 1994]; *Housing Works, Inc. v. City of New York*, 255 AD2d 209 [1st Dept 1998]).

With regard to the third prong of the test, the plaintiff has demonstrated that equity is balanced in its favor. The Court, having weighed the drastic nature of the relief sought against the plaintiff's allegations of loss of its unique personal property, finds that the plaintiff demonstrated the existence of the extraordinary circumstances which would tip the balance of equity in his favor (*Di Marzo v. Fast Trak Structures, Inc.*, 298 AD2d 909 [2002]; *Penfield v. New York* , 115 AD 502 [1st Dept 1906]).

Moreover, upon review of the parties' factual averments, the Court concludes that the equities balance in favor of maintaining the *status quo* pending resolution of the underlying dispute (*Merscorp, Inc. v. Romaine, supra; Alside Div. of Associated Materials Inc. v. Leclair,* 295 AD2d 873, 875 [3d Dept 2002]; and *State v. City of New York,* 275 AD2d 740, 713 NYS2d 360 [2d Dept 2000]). That is, the harm to be suffered by plaintiff by the loss of its unique machinery outweighs the harm to defendants resulting from the granting of the requested injunctive relief.

Finally, CPLR 6312(b) directs the court to fix the undertaking in an amount that will compensate the defendants for damages incurred "by reason of the injunction", in the event it is determined that the plaintiff was not entitled to the injunction (*see, Margolies v. Encounter, Inc.*, 42 NY2d 475, [1977]; and *Schwartz v. Gruber,* 261 AD2d 526 [2d

Dept 1999]). The fixing of the amount of an undertaking is a matter which rests within the sound discretion of the court (*Clover Street Associates v. Nilsson,* 244 AD2d 312, 313 [2d Dept 1997]). Upon a review of the papers submitted on the motion by the parties, the Court is unable to determine the amount of undertaking that will be reasonable and adequate under the circumstances presented. Accordingly, the Court's determination on this issue is reserved pending compliance with the directives set forth hereinafter.

Accordingly, it is,

ORDERED, that the plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED , that the plaintiff shall post a bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount pursuant to CPLR 6312(b) within fifteen (15) days of entry of this decision. Defendants may submit their position on the amount of the bond in the form of opposition or a cross motion. Alternatively, the parties may stipulate to the waiver of a bond or as to the amount and nature of the bond. If such undertaking is not posted or if such motion to fix the bond amount is not filed within fifteen (15) days of entry of this decision, this motion is denied. Such undertaking shall be in the form of surety, deposited with the Queens County Clerk or in a joint interest bearing escrow account.

That branch of plaintiff's motion for an order pursuant to CPLR 5015, 2005 or otherwise reinstating plaintiff's March 19, 2014 order to show cause (Motion Sequence 003), which was denied, on default, for a failure of the movant to properly serve Rapid Liens, Inc., as was required, but which was fully-briefed by the parties, is denied. Plaintiff may bring a new order to show cause seeking the relief sought in plaintiff's March 19, 2014 order to show cause if it is so advised.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: December 3, 2014

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Howard G. Lane, J.S.C.