

Bellerose Dental, P.C. v Liberty Universal Corp.

2015 NY Slip Op 32924(U)

April 14, 2015

Supreme Court, Queens County

Docket Number: 15248/14

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

OS

BELLEROSE DENTAL, P.C.,

Plaintiff,

-against-

LIBERTY UNIVERSAL CORP., a/k/a
LIBERTY UNIVERSAL INC., ROMAN MATATOV,
ATLANTIS DENTISTRY, P.C., KATIA
TONKONOGY and JULIA ABEND,

Defendants.

Index No: 15248/14

Motion Date: 1/12/15

Motion Seq. No.: 1

FILED
APR 28 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 10 read on this motion by plaintiff for a preliminary injunction

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits	1 - 4D
Answering Affidavits-Exhibits.....	5 - 7
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Replying Affidavits.....	

Upon the foregoing papers it is ordered that this motion is determined as follows.

Plaintiff commenced this action alleging causes of action for breach of a lease, wrongful eviction, fraud and conversion seeking compensatory and punitive damages and declaratory and permanent injunctive relief restoring plaintiff to possession of the premises and its contents. Simultaneously with the commencement of this action, the plaintiff moved by the instant Order to Show Cause for a preliminary injunction, seeking to be restored to possession of the premises, the equipment and the plaintiff's books and records and patient files located in the premises.

In support of its motion, plaintiff submitted the affidavit of Uvaydov, the president and sole principal of the plaintiff and the verified complaint, verified by Uvaydov. The plaintiff's complaint alleges the following. Title Agency Headquarters, LLC,

the owner of the property located at 102-30/32 Jamaica Ave., Richmond Hill, N.Y. (the subject premises) leased the subject premises to the defendant, Liberty Universal Inc. (Liberty), for a period of ten years. Pursuant to a commercial lease, dated March 1, 2013 Liberty as landlord leased the subject premises to the plaintiff, as tenant, for a term of ten years commencing on March 1, 2013 for use as a dental care and services facility. The plaintiff installed various trade fixtures and equipment at an alleged cost of approximately \$150,000.00. The plaintiff claims that on or about June 1, 2014, the lease had not expired, modified or properly terminated, the defendants, Liberty, Matatov the owner of Liberty, and/or Tonkonogy an agent or employee of Liberty, unlawfully evicting the plaintiff by changing the locks to the premises, without giving plaintiff the new keys and gave possession to the defendants, Atlantis Dentistry, P.C. (Atlantis) and Abend. Plaintiff further asserts that since the unlawful eviction, defendants have wrongfully denied plaintiff possession of and access to the premises, the trade fixtures and equipment and other property such as the corporate records including corporate tax records and patient files. Plaintiff further asserts that the defendants, Atlantis and Abend were aware of the plaintiff's lease conspired and colluded with the co-defendants to divest plaintiff of possession to the premises and its equipment and property. Finally, plaintiff asserts that it is presently subject to an IRS audit with which he is unable to comply because defendants have denied access to and possession of the premises and the property contained at the premises.

In opposition, defendants, Matatov, Liberty and Tonkonogy submitted the affidavit of Matatov and Tonkonogy together with various documents. The defendants, Atlantis and Abend submitted a copy of the Matatov's affidavit, copies of the documents submitted by co-defendants and three checks. Based upon this evidence, defendants argue that the plaintiff voluntarily terminated the lease in accordance with Paragraph 64 of the lease, abandoned the premises, sold the assets of the practice and was never denied possession of the premises its equipment or any other property. Matatov further asserts that Liberty did not change the locks. Tonkonogy asserts that she was employed by Dr. Uvaydov to work at his office as a manager, and was not an officer, employee or agent of Liberty.

Pursuant to CPLR 6301, a preliminary injunction may be granted in any action where the plaintiff has asserted a cause of action for permanent injunctive relief or where it appears that the defendant "threatens or is about to do ... an act in violation of the plaintiff's right respecting the subject of the action" which would tend to render the judgment ineffective.

In order to obtain a preliminary injunction the plaintiff has the burden of showing a (1) likelihood of success on the merits, (2) irreparable injury if the requested relief is not granted; and (3) a balance of the equities in his favor(see Aetna Ins. Co. v. Capasso, 75 NY2d 860, 962 [1990]; W.T. Grant v. Srogi, 52 NY2d 496, 517 [1981]; Cooper v. Board of White Sands Condominium, 89 AD3d 669 [2011]). The purpose of a preliminary injunction is to maintain the status quo and to prevent the dissipation of property that could render a judgment ineffectual until a determination of the ultimate rights of the parties can be made (see CPLR § 6301; Putter v. Singer, 73 AD3d 1147, 1148 [2010]; Dixon v. Malouf, 61 AD3d 630 [2009]; Ruiz v. Meloney, 26 AD3d 485, 486 [2006]). However, a preliminary injunction mandating specific conduct is granted only in extraordinary situations such as where it is essential to maintain the status quo pending trial of the action (see Pizer v. Trade Union Serv., Inc., 276 App Div 1071 [1950], citing Bachman v. Harrington, 184 NY 458, 464 [1906], and Kakalios v. Mesevich, 259 App Div 112 [1940]; see also Sithe Energies, Inc. v. 335 Madison Ave., LLC, 45 AD3d 469, 470 [2007]; Village of Westhampton Beach v. Cayea, 38 AD3d 760 [2007]; St. Paul Fire & Mar. Ins. Co. v. York Claims Serv., 308 AD2d 347, 349 [2003]; Rosa Hair Stylists v. Jaber Food Corp., 218 AD2d 793, 794 [1995]). This drastic remedy should not be granted where the status quo would be disturbed rather than preserved and where the plaintiff would receive the ultimate relief sought in the action (see Bachman v. Harrington, 184 NY 458 [1906]; McIntyre v. Metropolitan Life Ins. Co., 221 AD2d 602 [1996]; Rosa Hair Stylists, Inc. v. Jaber Food Corp., 218 AD2d 793 [1995]; Merrill Lynch Realty Assoc. v. Burr, 140 AD2d 589, 593 [1988]).

The plaintiff has failed to demonstrate its entitlement to injunctive relief. "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" (Cooper v. Board of White Sands Condominium, 89 AD3d 669 [2011] quoting Matter of Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., 53 AD3d 612, 613 [2008]). In light of the sharply conflicting affidavits presented, plaintiff has failed to demonstrate a clear right to relief (see Joseph v. Joseph, 108 AD3d 597 [2013]; Omakaze Sushi Rest., Inc. v. Ngan Kam Lee, 57 AD3d 497 [2008]; Matter of Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., supra).

Plaintiff has also failed to demonstrate irreparable injury. "Economic loss which is compensable by money damages, does not

constitute irreparable harm" (EdCia Corp. v McCormack, 44 AD3d 991, 994 [2007]). Based upon the plaintiff's allegations and demand for money damages, any injury suffered by plaintiff will be adequately remedied by money damages (see Colby Group, LLC v. Hasenfeld, 46 AD3d 593 [2007]; Matos v. City of New York, 21 AD3d 936 [2005]; 39 College Point Corp. v. Transpac Capital Corp., 12 AD3d 664 [2004]). Injunctive relief is therefore, precluded.

Moreover, granting the injunction plaintiff seeks in this case would not maintain the status quo, but would in effect grant the plaintiff some of the ultimate relief it seeks in the underlying action (see Village of Westhampton Block v. Cayea, supra; Matos v. City of New York, supra).

However, in view of plaintiff's claim that it is subject to an IRS audit and corporate records, including corporate tax records, and patient files are at the premises, it is ORDERED that the defendants shall turnover any and all of Bellerose Dental, P.C.'s corporate records and patient files within 30 days of being served with a copy of this Order with Notice of entry.

Dated: April 14, 2015
D# 52

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J.S.C.

FILED
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QUEENS COUNTY