

**Red Oak Capital Advisors, LLC v 524 W. 19th St.
Corp.**

2016 NY Slip Op 31800(U)

September 30, 2016

Supreme Court, New York County

Docket Number: 651970/2016

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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RED OAK CAPITAL ADVISORS, LLC,

Plaintiff,

- v -

524 WEST 19TH STREET CORP.,

Defendant.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Red Oak Capital Advisors, LLC (“Red Oak” or “plaintiff”) brings this breach of contract action against defendant 524 West 19th Street Corp. (“524 West” or “defendant”) seeking the recovery of an “Advisory Fee” in the amount of \$80,000 for Red Oak’s services in arranging mortgage financing for real property owned by 524 West under a written “Exclusive Authorization” agreement (the “Contract”).

Plaintiff now moves for an order, pursuant to CPLR 6201, granting an attachment in favor of plaintiff and against defendant in the proceeds from the sale of real property located at 524 West 19th Street, New York, NY. In support, plaintiff submits (i) the affirmation of Samuel Guss, the president and sole member of Red Oak; (ii) the Contract, dated November 24, 2015, signed by Klemens Gasser on behalf of 524 West; and (iii) email correspondence between Klemens Gasser, Samuel Guss, and Dan Shlufman.

In opposition, defendant submits the attorney affirmation of Gary J. Wachtel, Esq., the affidavit of Klemens Gasser, the president of 524 West, and a copy of 524 West’s certificate of good standing issued by the New York State Department of State, dated January 26, 2016.

As set forth in the verified complaint, plaintiff is a New Jersey limited liability company authorized to conduct business in the State of New York and defendant is a New York corporation that owns 524 West 19th Street, New York, NY. On

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**DECISION
and ORDER**

Mot. Seq. 001

November 24, 2015, plaintiff and defendant entered into the Contract, under which plaintiff agreed to perform certain services in connection with arranging a mortgage loan for the Commercial Gallery Unit and Residential Unit 1 (collectively, the "Units") at the condominium located at 524 West 19th Street, New York, NY. Plaintiff alleges that it performed its obligations under the Contract by obtaining a Term Sheet from Emerald Creek Capital on December 8, 2015 for a loan of \$5,000,000 to be made to the defendant and to be secured by mortgages on the Units. Plaintiff further alleges that Defendant accepted and executed the Term Sheet on December 8, 2015 and returned the same to Emerald Creek Capital along with a Due Diligence Fee of \$8,000 as required thereby. Pursuant to the terms of the Contract, plaintiff claims that it is entitled to an "Advisory Fee" of 1.60% of the loan amount, which remains unpaid despite due demand.

Plaintiff asserts that it "has reason to believe that once the Property is sold, the defendant and its principal will depart from the State of New York, and even the United States of America, to return to his native Italy." Plaintiff also asserts that "one of the reasons that defendant has failed to pay the Advisory Fee is because Mr. Gasser ... has incurred a substantial debt to the [IRS]" and "intends on using the proceeds from the sale of the Property to satisfy his personal debts[.]" Plaintiff argues that Gasser's conduct, together with defendant's failure to honor the payment terms of the agreement, leads to the reasonable conclusion that defendant is attempting to frustrate plaintiff's efforts to enforce the judgment that plaintiff is likely to obtain, and therefore, the order of attachment should be granted.

In his affidavit, Gasser avers that defendant owns two condominium units at 524 West 19th Street, New York, NY, which are encumbered by a five million dollar mortgage held by Titan Capital ID, LLC, and have a market value of \$10,000,000. Gasser further avers that he resides in Brooklyn, New York with his family and has lived in New York since 1998. His daughter attends high school in Brooklyn. While he is a citizen of Italy, Gasser attests that he is employed by Spiritos Properties, a real estate development company in New York, and has no intention to leave New York. With respect to the Contract between defendant and plaintiff, Gasser alleges that plaintiff did not deliver a lender that would have ultimately closed on the financing of a mortgage for defendant's property. Gasser claims that plaintiff is not entitled to the advisory fee because it only put forth a lender who likely would not accept defendant's outstanding debts. Gasser avers that three days after plaintiff identified Emerald Creek Capital as defendant's potential lender, defendant realized that Emerald Creek Capital would likely decline to close the loan, and therefore, defendant canceled the process.

Attachment is considered a “harsh remedy” and is construed narrowly in favor of the party against whom the remedy is invoked. *VisionChina Media Inc. v. S’holder Representative Servs., LLC*, 109 A.D.3d 49, 59 (1st Dept. 2013); *Glazer & Gottlieb v. Nachman*, 234 A.D.2d 105, 105 (1st Dept. 1996). Whether to grant a motion for an order of attachment rests within the discretion of the court. *VisionChina Media Inc.*, 109 A.D.3d at 59; *J.V.W. Inv. Ltd. v. Kelleher*, 41 A.D.3d 233, 234 (1st Dept. 2007) (finding that the granting of such a “drastic provisional remedy” was not “a sound exercise of the motion court’s discretion”).

On a motion for an order of attachment,

the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

CPLR § 6212(a).

CPLR 6201 provides, in pertinent part:

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 of the defendants, when:

* * *

3. the defendant, with the 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; * * *

In order to prevail under CPLR 6201(3), the plaintiff must demonstrate that (1) the defendant has, or is about to conceal his or her property in one of the enumerated ways, and (2) the defendant has acted or will act with the intent to defraud his or her creditors or to frustrate the enforcement of a judgment for the plaintiff. *Societe Generale Alsacienne De Banque, Zurich v. Flemington Dev. Corp.*, 118 A.D.2d 769, 772 (2d Dept. 1986).

As the First Department noted in *Rosenthal v. Rochester Button Co.*, 148 A.D.2d 375 (1st Dept. 1989),

The mere removal or assignment or other disposition of property is not ground for attachment. There must coexist an intent of the debtor to defraud his creditors. From disposition of the property no presumption of intent to defraud arises. Such intent must be proved, and the facts relied upon to prove it must be fully set out in the moving affidavits.

Id. at 376 (citing 10 Carmody–Wait, New York Practice, p. 51).

Thus, affidavits submitted in support of an attachment that contain allegations raising a mere suspicion of an intent to defraud are insufficient; it must appear that such fraudulent intent really existed in the defendant's mind. *Id.* (internal citations omitted); *Eaton Factors Co. v. Double Eagle Corp.*, 17 A.D.2d 135 (1st Dept. 1962); *Societe Generale Alsacienne De Banque, Zurich*, 118 A.D.2d at 772 (“Fraud is not lightly inferred, and the moving papers must contain evidentiary facts—as opposed to conclusions—proving the fraud.”); *Anderson v. Malley*, 191 A.D. 573 (1st Dept. 1920) (“Fraud cannot be inferred, it must be proved.”). In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the underlying action in order to obtain an order of attachment. *See* CPLR § 6212(a).

Here, plaintiff's assertions regarding defendant's fraudulent intent lack sufficient evidentiary support. Guss states that “[o]n previous occasions” he was advised that Gasser “would be ready, willing and able to return to his native country of Italy” and that Gasser did not pay the commission that was owed in part because “[Gasser] owed a substantial debt to the [IRS] that he was attempting to satisfy.” Such allegations do not raise more than plaintiff's mere suspicion of defendant's intent to defraud, and thus do not support an order of attachment. *See Computer Strategies, Inc. v. Commodore Bus. Machines, Inc.*, 105 A.D.2d 167, 173 (2d Dept. 1984) (“[A]ffidavits in support of an attachment contain[ing] allegations raising a suspicion of an intent to defraud is not enough.”). Accordingly, plaintiff has failed to demonstrate that the defendant “assigned, disposed of, encumbered or secreted property, or removed it from the state” or is about to do such acts “with the intent to ... frustrate the enforcement of a judgment that might be rendered in plaintiff's favor,” as required by CPLR 6201(3) and 6212(a) to obtain an order of attachment.

Nor has plaintiff shown a probability of success on the merits of their claims. Under the terms of the Contract, the “Advisory Fee”

shall be deemed earned upon Client’s acceptance, in writing, of a loan commitment letter or other similar document setting forth the loan terms. Though earned at such time, Advisory Fee shall be payable by Client to Red Oak at closing of the loan transaction.

Plaintiff has not submitted proof that defendant “accept[ed], in writing, ... a loan commitment letter or other similar document setting forth the loan terms[,]” as required for plaintiff to earn the fee it claims under the terms of the Contract. *See Shisgal v. Brown*, 3 A.D.3d 434, 434 (1st Dept. 2004) (denial of motion for attachment was also proper in light of plaintiffs’ failure to show a probability of success on the merits of their claims).

Wherefore, it is hereby

ORDERED that plaintiff Red Oak Capital Advisors, LLC’s motion for an order of attachment is denied.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: SEPTEMBER 30, 2016



EILEEN A. RAKOWER, J.S.C.