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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SKYCOM SRL,

Plaintiff,

-against-

FA & PARTNERS, INC. and DOMENICO ALLESIO,

Defendants.

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Index No. 152035/2014

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Skycom SRL commenced the instant action to recover sums allegedly due and owing by defendants FA & Partners, Inc. ("FA") and Domenico Alessio ("Alessio") in connection with three separate construction projects based on defendants' alleged diversion of trust funds in violation of Article 3-A of the Lien Law. Plaintiff now moves for an Order pursuant to CPLR §§ 6201 and 6210 granting it an order of attachment against the defendants' assets. For the reasons set forth below, plaintiff's motion is denied.

The relevant facts and procedural history of this case are as follows. Plaintiff is a manufacturer of glass walls and windows, typically for use in high-rise buildings. FA is a subcontractor that contracted with plaintiff with regard to three construction projects and Alessio is FA's principal. In or around June 2012, plaintiff and FA entered into an agreement for

plaintiff to design, manufacture and install windows in a building located at 3710 Webster Avenue, Bronx, New York (the "Webster Avenue Project"). Plaintiff and FA also entered into an agreement for plaintiff to design, manufacture and install windows in a building located at 218 West 50th Street, New York, New York (the "50th Street Project") in or around October 2012. In or around November 2012, plaintiff and FA entered into a third agreement for plaintiff to design, manufacture and install windows in a building located at 136 West 42nd Street, New York, New York (the "42nd Street Project"). Plaintiff claims that FA, as a subcontractor, received funds from the general contractors on these three projects required to be held in trust pursuant to Article 3-A of the Lien Law. However, plaintiff claims that these funds were knowingly diverted by the defendants and that plaintiff was never paid the full sums it was owed pursuant to the three agreements.

Thus, in or around March 2014, plaintiff commenced the instant action asserting three separate claims for trust fund diversion relating to each project, three separate claims for an accounting relating to each project and a claim for attorney's fees. In or around July 2016, plaintiff moved for partial summary judgment on its three causes of action alleging trust fund diversion on the ground that defendants failed to furnish an adequate verified statement of lien as required by Lien Law § 76 and are therefore presumptively liable for diverting trust assets. In a decision dated August 22, 2016, this court denied plaintiff's motion finding that there is a material issue of fact as to whether plaintiff is entitled to payments pursuant to its agreements with FA in the first instance. Specifically, the court held that although plaintiff made its *prima facie* showing that it is entitled to payments pursuant to its agreements with FA, defendants raised an issue of fact as to whether plaintiff is entitled to payments through their submission of Alessio's affidavit in which Alessio affirmed that plaintiff failed to supply certain contracted-for

materials, that the materials plaintiff did supply were defective or late and that FA was forced to pay for alternate manufacturers and express shipping to replace or repair plaintiff's defective, missing or late materials on all three projects.

Plaintiff now moves for an order of attachment against the assets of defendants and any interest that the defendants may have in any property or any debt owed to them which is situated in the state of New York.

Pursuant to CPLR § 6201,

> An order of attachment may be granted in any 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 defendants, when:
>
> 1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or
>
> ...
>
> 3. the defendant, with 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 addition to establishing that one or more grounds for attachment under CPLR § 6201 exist, a plaintiff seeking an order of attachment must also "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...and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." CPLR § 6212(a). Additionally, a plaintiff seeking an order of attachment is required to give an undertaking. *See* CPLR § 6212(b).

The court first turns to plaintiff's motion for an Order of attachment pursuant to CPLR § 6201(1). As an initial matter, plaintiff's motion for an order of attachment pursuant to CPLR §

6201(1) against defendant FA is denied as plaintiff has failed to establish that FA is a foreign corporation not qualified to do business in New York. Pursuant to Business Corporation Law § 102(a)(7),

> "Foreign corporation" means a corporation for profit formed under laws other than the statutes of this state, which has as its purpose or among its purposes a purpose for which a corporation may be formed under this chapter, other than a corporation which, if it were to be formed currently under the laws of this state, could not be formed under this chapter. "Authorized", when used with respect to a foreign corporation, means having authority under article 13 (Foreign corporations) to do business in this state.

All that plaintiff provides in support of its assertion that FA is a foreign corporation not qualified to do business in New York is a printout from FA's website showing that the office at which to contact FA is located in New Jersey. However, such printout does not establish, as a matter of law, that FA is foreign corporation not qualified to do business in New York.

Additionally, plaintiff's motion for an order of attachment pursuant to CPLR § 6201(1) against the individual defendant Alessio is denied as plaintiff has failed to establish that Alessio is a nondomiciliary residing outside of New York. All that plaintiff provides in support of its assertion that Alessio is a nondomiciliary residing outside of New York is the affidavit of Tullia Barbuto, plaintiff's representative, who affirms that Alessio resides in New Jersey and cites as a reference the printout from FA's website showing that the office at which to contact FA is located in New Jersey. However, such evidence is insufficient to establish that Alessio is a nondomiciliary residing outside of New York.

The court next turns to plaintiff's motion for an order of attachment pursuant to CPLR § 6201(3). "In order to prevail under CPLR § 6201(3), the plaintiff must demonstrate: (1) that the defendant has, or is about to conceal his or her property in one of the enumerated ways, and (2) that 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. Flemingdon Development Corp.*, 118 A.D.2d 769, 772 (2d Dept 1986). "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...Such intent must be proved, and the facts relied upon to prove it must be fully set out in the moving affidavits." *Eaton Factors Co. v. Double Eagle Corp.*, 17 A.D.2d 135, 136 (1st Dept 1962). It is not sufficient for a plaintiff to provide affidavits in support of an attachment which contain allegations raising a suspicion of an intent to defraud. *Id.* Rather, "it must appear 'that such fraudulent intent really existed in the mind of the defendants, and not merely in the ingenuity of the plaintiffs." *Id.* (citation omitted).

In the present case, plaintiff's motion for an order of attachment pursuant to CPLR § 6201(3) is denied as plaintiff has failed to demonstrate that defendants have assigned, disposed of, encumbered or secreted property, or removed property from New York or that defendants are about to commit such acts or that that 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. In support of its motion, Mr. Barbuto, plaintiff's representative, affirms as follows:

> Defendants have a history of wrongful and unlawful dealings that have bankrupt at least...(2) Italian companies, wrongfully failed to pay large sums to third parties (lawsuits pending), and/or used bankruptcies to avoid paying large creditors, all in similar wrongful and unlawful circumstances as Defendants used against Plaintiff in the three (3) above referenced projects. More specifically, (i) Vetromed and (ii) G. Stramandinoli Srl, are bankrupt, and Hydro Building Systems SPA has court filed claims in excess of $1.3 Million Dollars. Sesal, Srl and Sestito Infissi Snc. were both owned by Defendant Alessio and bankruptcy was declared to avoid paying construction related debts.

Additionally, plaintiff provides three pages of documents, all in Italian, which plaintiff asserts is evidence of such wrongful and unlawful dealings. However, such evidence fails to establish

defendants' intent to defraud their creditors or that defendants plan to frustrate the enforcement of a judgment for the plaintiff as Mr. Barbuto's affidavit is conclusory and the only documentary evidence provided to the court is in Italian and has not been translated.

Finally, as plaintiff has failed to establish a basis for an order of attachment under CPLR § 6201, the court need not address whether plaintiff has established its likelihood of success on the merits and whether the amount demanded from the defendant exceeds all counterclaims known to the plaintiff, as is required by CPLR § 6212(a).

Accordingly, plaintiff's motion for an order of attachment is denied. This constitutes the decision and order of the court.

Dated: 12/7/16

Enter: _____
J.S.C.
HON. CYNTHIA S. KERN
J.S.C.