

K9 Bytes, Inc. v Arch Capital Funding, LLC
2016 NY Slip Op 32879(U)
October 19, 2016
Supreme Court, Westchester County
Docket Number: 54755/16
Judge: Linda S. Jamieson
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Disp _____ Dec __x__ Seq. Nos. 1-2 _____ Type __misc.____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
K9 BYTES, INC., EPAZZ, INC., STRANTIN,
INC., MS HEALTH INC., and SHAUN PASSLEY,

Plaintiffs,

-against-

Index No. 54755/16

DECISION AND ORDER

ARCH CAPITAL FUNDING, LLC, CAP CALL, LLC,
JOHN DOES 1-10, and JANE DOES 1-10,

Defendants.

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The following papers numbered 1 to 9 were read on these motions:

<u>Paper</u>	<u>Number</u>
Order to Show Cause, Affidavit, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition	2
Affidavit and Exhibits "In Support"	3
Memorandum of Law in Opposition	4
Reply Affidavit, Exhibits and Memorandum of Law	5
Notice of Motion, Affirmation and Exhibits	6
Affirmation and Exhibits in Opposition	7
Letter in Opposition	8
Reply Memorandum of Law	9

There are two motions before the Court, both filed by plaintiffs. The first motion seeks (1) a preliminary injunction enjoining defendants from enforcing judgments against plaintiffs;

(2) to vacate restraining notices filed by defendants against plaintiffs; (3) a preliminary injunction against defendants' taking any steps to exercise the rights of a secured creditor of any of plaintiffs, and vacating any notices therefor; and (4) to compel defendants to identify the full names, home and business addresses of defendants' officers, members, employees "or other agents involved with making, collecting, or otherwise conducting business concerning usurious loans." The second motion seeks leave to amend the complaint. As an aside, the Court warns counsel that if they cite unpublished cases that are not readily available on Westlaw or Lexis, they must attach them to their motion papers. This is a courtesy to the Court, and required by the applicable rules.

The Court held oral argument on the Order to Show Cause, ruling that if plaintiffs submitted evidence of having posted a \$300,000 bond, the preliminary injunctive relief that they sought might be granted. Plaintiffs did not post such a bond. As a result, the injunctive relief cannot be granted.

This is not the only reason why the Court cannot grant the preliminary injunction. It is well-settled that "To prevail on a motion for a preliminary injunction, the moving party must establish: (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the moving party's position." *Mangar v. Deosaran*, 121 A.D.3d 650,

650, 993 N.Y.S.2d 182, 182-83 (2d Dept. 2014). Movant must do this by "clear and convincing evidence." *M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v. Werner*, 126 A.D.3d 859, 860, 5 N.Y.S.3d 517, 518 (2d Dept. 2015).

Putting the aside the issue of likelihood of success on the merits, the Court notes that "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." *Alayoff v. Alayoff*, 112 A.D.3d 564, 566-67, 976 N.Y.S.2d 530, 534 (2d Dept. 2013). Stated differently, "economic loss, which is compensable by money damages, does not constitute irreparable harm." *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 82 (2d Dept. 2010). Here, the only damages that plaintiffs allege are purely financial, compensable solely by money damages. Indeed, a review of the motion papers shows that plaintiffs' sole allegation of irreparable injury is that "without an injunction, the defendants enjoy free reign to, among other things, restrain the plaintiffs' bank accounts . . . and execut[e] upon them, through a judgment [sic] based upon usury and fraud." This is the definition of economic loss. The Court thus cannot issue any of the injunctive relief that plaintiffs seek.

Turning to the remaining requests for relief, the Court finds that there is no basis at this juncture for the Court to compel defendants to identify their officers, members or

employees. This is information that plaintiffs will uncover through the normal discovery process.

The Court now examines plaintiffs' request to vacate restraining notices, subpoenas or other judgment enforcement devices. The basis for this request is plaintiffs' argument that the devices are deficient in multiple key respects, as required by CPLR § 5222-a. This section provides, in relevant part, that a person serving a restraining notice

shall provide the banking institution with the restraining notice, a copy of the restraining notice, an exemption notice and two exemption claim forms with sections titled "ADDRESS A" and "ADDRESS B" completed. The exemption notice and exemption claim forms shall be in the forms set forth in paragraph four of this subdivision. The notice and the forms shall be served on the banking institution together with the restraining notice and copy of the restraining notice. Service must be accomplished in accordance with subdivision (a) or (g) of section fifty-two hundred twenty-two of this article. **Failure to serve the notice and forms together with the restraining notice renders the restraining notice void, and the banking institution shall not restrain the account.**

Emphasis added.

The Court first looks at the Arch Capital Funding, LLC ("Arch") restraining notice. Plaintiffs allege that it is deficient because it fails to identify the judgment debtors; states that the judgment was entered in "Westches" County; and fails to list the issuing attorney's address and firm. A review of the document shows that none of these deficiencies are material. First, the defendants are clearly set forth in the

caption. The Employer Identification Number ("EIN") and Social Security number ("SSN") at the top of the document are redacted. It thus is clear that this pertains to the defendant business and defendant individual listed in the caption. Next, the caption clearly states "County of Westchester," so that it is clear that the "Westches" below is a typo. Finally, while it is true that Israel Weinstein's contact information is missing from the Information Subpoena with Restraining Notice, that information is set forth on the Exemption Claim Form which accompanied it. The Court thus finds that there is no basis for vacating the Arch restraining notice.

The same does not hold true for the Information Subpoena with Restraining Notice served by Cap Call, LLC ("Cap Call"). Plaintiffs complain that this notice is deficient in multiple ways, including that it did not include the exemption notice and two Exemption Claim Forms; and that it did not include the lawyer's contact information,¹ among other things. In response, counsel for Cap Call states in the memorandum of law - unsupported by any evidence - that they "certainly did serve the required" documents, and that all of the documents that they served are attached as an exhibit. A review of that exhibit shows that the missing documents are, in fact, still missing. Cap Call's argument that "Plaintiffs' counsel should have known

¹The lawyer who signed the Information Subpoena with Restraining Notice did not even type his or her name below.

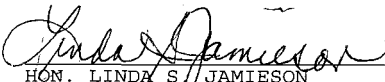
that Citibank would not have placed the restraint on the account without these documents" has no persuasive power. Given the lack of documentary or other evidence that proves that Cap Call did actually serve the requisite documents, the Court finds that the Cap Call Information Subpoena with Restraining Notice is defective on its face. Accordingly, this subpoena is vacated.

As for plaintiffs' request to amend their complaint, the Court notes that defendants do not oppose the request in general, but only object on the basis that this particular proposed complaint is "unnecessarily prolix, confusing, difficult to answer, and fails to comply with the most basic pleading requirements set forth in CPLR 3014." This section states, in relevant part, that "Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation." A review of the new proposed complaint shows that many paragraphs of this 45-page complaint (as opposed to the original eight-page complaint) contain multiple allegations that are not "plain and concise." The Court thus grants plaintiffs' motion with the caveat that plaintiffs shall revise the proposed amendment to simplify the complaint, to make it "plain and concise." This shall be done within 30 days of receipt of this Decision and Order. Once revised, the request to amend the complaint is granted. The parties shall confer to set the timing for defendants' motions to dismiss.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
October 19, 2016


HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Jonathan M. Proman, Esq.
Attorney for Plaintiffs
30 Wall St., 8th Fl.
New York, NY 10005

Tara N. Pomparelli, Esq.
Attorney for Defendant Cap Call, LLC
122 E. 42nd St., #2112
New York, NY 10168

Vadim Serebro, Esq.
Attorney for Arch Capital Funding, LLC
17 State St., #4000
New York, NY 10004