

**Violet Realty, Inc. v Amigone, Sanchez & Mattrey,
LLP**

2017 NY Slip Op 33202(U)

November 20, 2017

Supreme Court, Erie County

Docket Number: 806953/2017

Judge: Henry J. Nowak

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**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

VIOLET REALTY, INC.,

Plaintiffs,

vs.

MEMORANDUM DECISION

INDEX NO. 806953/2017

AMIGONE, SANCHEZ & MATTREY, LLP,

Defendants.

**HON. HENRY J. NOWAK, J.S.C.
Justice Presiding**

Plaintiff Violet Reality, Inc. commenced this action alleging that defendant Amigone, Sanchez and Mattrey, LLP breached a commercial lease for the office space previously occupied by defendant in the Main Place Tower in Buffalo. By order to show cause, plaintiff has moved for a preliminary injunction seeking to enjoin defendant from transferring funds and other tangible assets, as well as accounts receivable. Plaintiff also seeks expedited discovery.

Plaintiff contends that it is entitled to injunctive relief because it is likely to succeed on the merits, it will be irreparably harmed without the injunction because a future judgment may be uncollectible, and that the balance of equities are in its favor. Plaintiff also contends that accounts receivable are tangible assets, thus making them recoverable under the terms of the lease. Defendant responds by asserting, inter alia, that plaintiff cannot establish the likelihood of success on the merits, that plaintiff will not be irreparably harmed if it is not granted an injunction, that a balancing of the equities does not favor plaintiff, and that accounts receivable do not constitute tangible assets.

In addition to both parties presenting competing arguments with respect whether plaintiff has satisfied the elements required to establish entitlement to a preliminary injunction, the parties submitted expert affidavits taking contrary positions on the issue of whether accounts receivable constitute tangible or intangible assets (*see* the affidavits of Timothy J. McPoland, Doc. Nos. 17 and 29, and the affidavit of Kelly G. Besaw, Doc. No. 23). In this court's view, however, the threshold issue is whether a preliminary injunction is a remedy that could, in the first instance, be granted under the circumstances presented in a case such as this.

CPLR 6301 provides that

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of *the plaintiff's rights respecting the subject of the action*, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff (emphasis added).

“It is well settled that preliminary injunctive relief is not available to a party seeking money damages on a breach of contract claim . . .” (*Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn., Inc.*, 21 AD3d 777, 778 [3d Dept 2005]; *see Helmar Const., Inc. v Basic Structure Engineering*, 33 Misc3d 1237(A), *2 [Sup Ct Suffolk Co 2011]).

“In no proper or legal sense can a defendant do or permit any act in violation of the plaintiff's rights respecting the subject of the action, in an action on contract for the recovery of money only. The plaintiff in such an action *has no rights as against the property of the defendant* until he obtains a judgment, and *until then he has no legal right to interfere with the defendant in the use and sale of the same*” [citation omitted, emphasis in original].

(*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545-546 [2000]).

As the Court of Appeals further observed, citing Professor Siegel, “the mere danger of asset-stripping is not a sufficient basis to make an exception to the general rule” that courts will refuse to grant an injunction where a money judgment is the object of the action (*id.* at 548). “[T]he debtor's disposing of its assets, even rendering the anticipated judgment uncollectible, will not produce cognizable injury to the plaintiff and will not support a temporary injunction” (*Helmar Const.*, 33 Misc3d at *2).

Plaintiff's reliance on *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.* (69 AD3d 212 [4th Dept 2009]) is misplaced. The majority in this sharply divided decision issued a carefully crafted and narrow decision that addressed “whether plaintiff . . . [was] entitled to a preliminary injunction requiring defendant, Citigroup . . ., to fund ‘pending draw requests’ on a loan structured as ‘an advancing term loan’ ” (*id.* at 213-214). Despite the disagreement among the Appellate Division justices on this dispositive issue, both the majority and dissent agreed on the well-settled principle

that provisional injunctive relief has historically been “limited to equitable actions where the defendant threatened to violate the rights of the plaintiff ‘respecting the subject of the action, which would tend to render the judgment ineffectual’ ” (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545 [2000]). That is because, generally, “in a pure contract money action, there is no right of the plaintiff in some specific subject of the action; hence, no prejudgment right to interfere in the use of the defendant's property; and no entitlement to injunctive relief pendente lite” (*id.*). In such situations, the “plaintiff has an adequate remedy in the form of monetary damages, and injunctive relief is both unnecessary and unwarranted” (*D&W Diesel v McIntosh*, 307 AD2d 750, 751 [2003]).

(*id.* at 216-217).

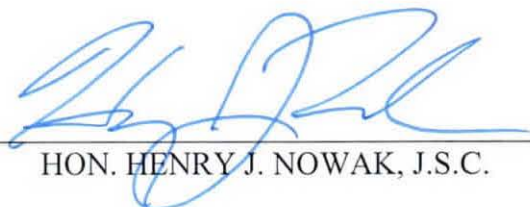
While there are cases where money can be the subject of an injunction, such situations

involve specific identifiable funds that the plaintiff has an equitable interest in and that are, in fact, the subject of the action (*see Zonghetti v Jeromack*, 150 AD2d 561 [2d Dept 1989] [converted funds]; *Pando v Fernandez*, 124 AD2d 495 [1st Dept 1986] [lottery winnings]). Assuming arguendo that accounts receivable are tangible assets, plaintiff nevertheless does not have an equitable or security interest in defendants' accounts receivable nor can they be restrained prior to the entry of a judgment. As a result, plaintiff is not entitled to a preliminary injunction as a matter of law.

Plaintiff has also moved for expedited discovery. Inasmuch as an expedited discovery schedule seems warranted under the circumstances presented in this case, a conference is scheduled for December 4, 2017 at 10:30 am, for the purpose of establishing a discovery schedule.

Submit order.

DATED: November 20, 2017



HON. HENRY J. NOWAK, J.S.C.