

**B'hidur v 13th Ave. Seforim ONC.**

2018 NY Slip Op 31916(U)

July 3, 2018

Supreme Court, Kings County

Docket Number: 515999/2017

Judge: Richard Velasquez

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MS #s 1, 2

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3<sup>rd</sup> day of July, 2018.

PRESENT: HON. RICHARD VELASQUEZ

Justice.

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MITZVAH B'HIDUR, LLC d/b/a KETER JUDAICA,

Plaintiff,

Index No.: 515999/2017

-against-

Decision and Order

13<sup>TH</sup> AVENUE SEFORIM ONC., MOSHE BLAU, ELIMELECH BLAU, THE JUDAICA MALL, LLC, YONESON SCHWARTZ, ELITE SEFORIM, INC., TREFF & LOWY PLLC, and DANIEL FRIEDMAN,

Defendants.

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The following papers numbered 1 to 10 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	1-2
Opposing Affidavits (Affirmations) _____	3-4
Reply Affidavits (Affirmations) _____	5-7
Memorandum of Law _____	8-10

After oral argument and a review of the submissions herein, the Court finds as follows:

Plaintiffs, MITZVAH B'HIDUR, LLC, move this court pursuant to CPLR 6401 for appointment of a Temporary Receiver. Defendants, The Judaica Mall LLC (hereinafter

Judaica Mall) and Yoneson Schwartz (hereinafter Schwartz), oppose the same and request this court deny the plaintiff motion.

Defendants, The Judaica Mall LLC (hereinafter Judaica Mall) and Yoneson Schwartz, move this court pursuant to CPLR 3211(a)(1) and (a)(7) for an order dismissing the Amended Complaint as to these moving defendants.

**ANALYSIS**

Pursuant to CPLR 6401 (a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party; (b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property; (c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court. CPLR 6401 (McKinney).

Courts do proceed with “extreme caution” in determining whether to appoint a temporary receiver because of the drastic incursion it imposes on the defendant's interests prior to determination of the underlying action on the merits. *Hahn v. Garay*, 1976, 54 AD2d 629, 387 NYS2d 430 (1st Dep't). The appointment must be “necessary” to protect the property from waste, dissipation or disappearance. *In re Armienti*, 2003, 309 AD2d 659, 661, 767 NYS2d 2, 4 (1st Dep't); *Nelson v. Nelson*, 99 AD2d 917, 918, 473 NYS2d 40, 41 (3d Dep't). Thus, courts require clear and convincing evidence of the danger of irreparable loss or damage. See, e.g., *McBrien v. Murphy*, 1989, 156 AD2d 140, 548 NYS2d 186 (1st Dep't). They are particularly hesitant to appoint a receiver with respect to a profitable, ongoing business. See, e.g., *Martin v. Donghia Associates, Inc.*, 1980, 73 AD2d 898, 424 NYS2d 222 (1st Dep't).

The provisional remedy of temporary receivership is available to a person with an “apparent interest” in property when that property is the subject of the action and the property is at risk of loss, material injury or destruction or removal from New York. CPLR 6401(a). Depending on the scope of the court's order of appointment (see Commentary C6401:3, below), the receiver may be empowered not only to take possession of the property but also to manage daily operations relating to the property, such as collect rent from tenants or supervise the financial aspects of a commercial business directly connected with the property. If the risk of irreparable loss is shown, a broad range of actions involving specifically identifiable real or personal property (tangible or intangible) may fall within the scope of CPLR 6401(a), including mortgage foreclosures on income-producing property; corporate or partnership dissolutions; and abuses of various types of

fiduciary relationships involving ownership or management of property. "...An action seeking solely money damages does not meet the statutory criteria" *Meurer v. Meurer*, 21 AD2d 778, 250 NYS2d 817 (1st Dep't 1964). See also *Somerville House Management, Ltd. v. American Television Syndication Co.*, 100 AD2d 821, 474 NYS2d 756 (1st Dep't 1984).

In the absence of clear proof of the danger of irreparable loss or damage, and proof that a receiver is necessary for the protection of the parties to the action and their interests, a temporary receiver should not be appointed (*Mtr. of Di Bona [General Rayfin Limited]*, 45 AD2d 696, 357 NYS2d 71; *S. Z. B. Corp. v. Ruth*, *supra*; *Laber v. Laber*, 181 AppDiv. 733, 168 NYS 1040); *Groh v. Halloran*, 86 AD2d 30, 33–34, 448 NYS2d 680, 682 (1982).

Here, the allegations and accusations set forth by the plaintiff fall short of the required "clear evidentiary showing that property... was or is in danger of being 'removed from the state, or lost, materially injured or destroyed.'" see *Lee v. 183 Port Richmond Ave. Realty*, 303 AD2d at 380, 755 NYS2d 664, quoting CPLR 6401[a]; see *Iannone v. Iannone*, 31 AD3d 713, 715, 820 NYS2d 86; *Matter of Kristensen v. Charleston Sq.*, 273 AD2d 312, 709 NYS2d 853; *cf. Friedman v. Ragin*, 228 AD2d 642, 645 NYS2d 56); *Vardaris Tech, Inc. v. Paleros Inc.*, 49 AD3d 631, 632, 853 NYS2d 601, 602 (2008). In the present case, the only request for relief is money damages. As such, money damages alone are not enough to appoint a temporary receiver.

Turning to defendant's motion to dismiss, pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in

the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Morone v. Morone, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; Rovello v. Orofino Realty Co., 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970). Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., Heaney v. Purdy, 29 NY2d 157, 324 NYS2d 47, 272 NE2d 550). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (Rovello v. Orofino Realty Co., supra, 40 NY2d at 635, 389 NYS2d 314, 357 NE2d 970) and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (Guggenheimer v. Ginzburg, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; Rovello v. Orofino Realty Co., supra, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). In the present case, affording the complaint a liberal construction, accepting the facts as alleged therein as true, and granting plaintiff the benefit of every possible inference, it is the opinion of this Court that the complaint could possibly state a cause of action for breach of contract, quantum meruit, account stated, fraudulent conveyance, guarantee, and civil conspiracy, which should be further fleshed out upon some discovery being conducted. Moreover, numerous issues of fact are raised in both party's papers.

Accordingly, plaintiff's request to appoint a temporary receiver is hereby denied, pursuant to CPLR 6401 as the plaintiffs commenced an action seeking solely money damages and there is no evidentiary showing that property any property is in danger of

being 'removed from the state, or lost, materially injured or destroyed. Defendants, The Judaica Mall LLC (hereinafter Judaica Mall) and Yoneson Schwartz notice of motion to dismiss the Amended complaint is hereby denied with leave to renew, as a cause of action is stated and there are numerous issues of fact that remain.

This constitutes the Decision/Order of the Court.

Date: July 3, 2018



RICHARD VELASQUEZ, J.S.C.

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So Ordered  
Hon. Richard Velasquez

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