

Start Treatment & Recovery Ctrs., Inc. v Marshall

2018 NY Slip Op 32917(U)

October 18, 2018

Supreme Court, New York County

Docket Number: 512793/18

Judge: Dawn M. Jimenez-Salta

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At an IAS Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of October, 2018.

PRESENT:

HON. DAWN M. JIMENEZ-SALTA

Justice.

-----X

START TREATMENT & RECOVERY CENTERS, INC.,

Plaintiff,

- against -

Index No. 512793/18

KENNETH MARSHALL AND KAM INDUSTRIAL AND BUSINESS SUPPLY,

Defendants.

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The following papers numbered 1 through 8 read herein:

Papers Numbered:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-3
Opposing Affidavits (Affirmations) _____	_____ 4-5
Reply Affidavits (Affirmations) _____	_____ 7-8

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Upon the foregoing papers, plaintiff Start Treatment & Recovery Centers, Inc. (Start) moves, by order to show cause, for an order, pursuant to CPLR 6212 (a): (1) attaching any assets in which defendants Kenneth Marshall (Marshall) and/or KAM Industrial and Business Supply (KAM) might have an interest, including but not limited to (a) the assets held in the bank account maintained at Capital One with account number ending in 2857, (b) the assets held in the bank account maintained at Navy Federal Credit Union with account number ending in 7707, (c) the assets held in any and all deposit, savings, passbook or like

MOTION Seq # 1

accounts owned or maintained by either Marshall or KAM at any bank, savings and loan or other similar institution, (d) any and all personal property which is owned in the name of either Marshall or KAM, and (e) any and all real property owned by either Marshall or KAM, and (2) prohibiting defendants from selling, assigning, transferring, or in any way encumbering those assets.

Background

The Instant Fraud Action

Start, a drug treatment agency, on June 22, 2018, commenced this action against Marshall, its former Purchasing Manager, and KAM by filing a summons and a verified complaint alleging that Marshall “embezzled at least \$517,009.81 between 2008 and 2018 . . .” (complaint at ¶ 2). Specifically, the complaint alleges that Marshall perpetrated a fraud “by creating a fake vendor, Defendant KAM, and fabricating invoices and packing lists to make it appear that START was purchasing supplies from KAM” and “[i]n reality . . . KAM was not a legitimate vendor and provided no supplies, goods or services to START” (*id.*).

The complaint alleges that, on or about May 31, 2018, Start’s Internal Auditor, Ronald Otteson (Otteson), noticed 4 invoices from KAM that “appeared unprofessional” because “KAM’s address on the invoices was listed as a ‘P.O. Box’ number, with no accompanying street address[,]” causing Start to investigate its transaction history with KAM (*id.* at ¶ 15). Allegedly, KAM “has no internet presence[,]” “[t]he telephone number provided by KAM on its invoices . . . is not associated with [KAM]” and “[t]here is no entity called ‘KAM

Industrial and Business Supply' in the New York State Department of State, Division of Corporations database . . ." (*id.* at ¶¶ 18-20). In addition, the complaint alleges that cancelled checks that Start issued to KAM "bore a depositor's signature that is Marshall's" (*id.* at ¶ 21). The complaint alleges that Marshall deposited those checks into an account at Capital One ending with the numbers 2857 (*id.* at ¶¶ 40-42).

Allegedly, Otteson, on June 1, 2018, while inspecting Start's stock room in East New York, discovered a box from KAM bearing a UPS label, and took a picture (*id.* at ¶¶ 24-25). The complaint alleges that the "UPS label was created at 10:14 p.m. on Thursday, May 31, 2018 from an account owned by Marshall [and] had never been used for shipping . . ." (*id.* at ¶ 26). It is further alleged, upon information and belief, that "[b]y Monday, June 4, 2018 . . . Marshall came to believe that his scheme had been discovered" (*id.* at ¶ 31). Later that day, Marshall allegedly sent the following email, in which he resigned from Start, effective immediately:

"Please accept my resignation from my position at START Treatment & Recovery Centers, effective June 4, 2018. My dad is suffering from a serious illness, and is going to require frequent visits to a specialist in another country. I will be unable to fulfill the commitments of my position here for the foreseeable future

"Please let me know if there is anything I can do to ease the transition in any way."

Allegedly, "[t]he suspicious UPS label . . . vanished" and Start alleges, upon information and belief, that "Marshall removed it and/or destroyed it before he resigned" (*id.* at ¶¶ 35-36).

Start's complaint asserts the following 6 causes of action against Marshall and KAM:

(1) conversion; (2) fraud; (3) breach of fiduciary duty; (4) unjust enrichment; (5) constructive trust; and (6) misappropriation/diversion of corporate funds.

Marshall and KAM, on July 13, 2018, collectively answered the complaint, denied the material allegations therein and asserted several affirmative defenses, including the statute of limitations and the doctrines of waiver and laches.

Start's Order to Show Cause

Meanwhile, on June 26, 2018, Start moved, by order to show cause,¹ for an order, pursuant to CPLR 6212 (a), attaching any assets in which Marshall and/or KAM might have an interest, including: (1) assets held in the Capital One bank account ending in 2857; (2) assets held at Navy Federal Credit Union with account number ending in 7707; (3) “assets held in any and all deposit, savings, passbook or like accounts owned or maintained by either Marshall or KAM at any bank, savings and loan or other similar institution”; (4) all personal property owned by Marshall or KAM; and (5) all real property owned by Marshall or KAM. In addition, Start seeks an injunction prohibiting Marshall and KAM from selling, assigning, transferring, or in any way encumbering their assets.

Start asserts that it is entitled to an order of attachment as against KAM, pursuant to CPLR 6201 (1), because “KAM is not qualified to do business in New York” according to its search of the New York State Department of State, Division of Corporations, database.

¹ Start was granted a temporary restraining order pending the hearing of its attachment motion prohibiting Marshall and KAM “from selling, assigning, transferring, or in any way encumbering any assets in which either Defendant might have an interest . . .”

Start also asserts that it is entitled to an order of attachment as against both Marshall and KAM, pursuant to CPLR 6201 (3), “given Marshall’s intent to defraud and evade START’s ability to recover the embezzled funds, including by leaving the country.” In addition, Start argues that it is entitled to attachment because “evidence submitted in support of this motion makes clear that it is probable that START will succeed on the merits of all of its causes of action . . .”

In support of its motion, Start submits 2 affidavits from Otteson, in which he recounts the factual allegations in the complaint, including his discovery of invoices from KAM that “did not, based on [his] experience, have a professional ‘look’ to them” and reflected that KAM’s address was a P.O. Box. Otteson attests that, based on these “two initial red flags,” he conducted an investigation, including internet and reverse telephone number searches. According to Otteson, KAM was not listed in the New York State Department of State, Division of Corporations, database “either as a New York entity *or as a foreign entity qualified to do business in New York*” (emphasis added). Otteson also attests that his internet research confirmed that the telephone number on KAM’s invoices belonged to Marshall.

Otteson further asserts that he reviewed copies of 2 checks issued to KAM and “[u]pon viewing the depositor’s signatures on the backs of the checks . . . [he] immediately recognized them as Marshall’s signature.” Otteson recounts his discovery of a box with a UPS label from KAM at Start’s East New York facility, annexes a copy of the photograph he took of the UPS label and attests that UPS confirmed that the label had never been used.

Otteson claims that he subsequently “learned from UPS that the ‘owner’ of the UPS account from which the label was generated is ‘Kenneth Marshall.’” Otteson’s affidavit also annexes Marshall’s resignation email, which Otteson characterizes as “[m]ost troubling” since it “announced [Marshall’s] intention to leave New York (and the United States), while seeking to provide a reason for that departure.” Regarding the bank accounts that Start seeks to attach, Otteson explains that checks issued by Start to KAM were deposited into a Capital One account ending in 2857 and that Start’s payroll records indicate that Marshall’s paychecks were deposited into a Navy Federal Credit Union account ending in 7707.

Marshall and KAM, in opposition, argue that CPLR 6201 (1) is inapplicable here because KAM was not a foreign corporation not qualified to do business in the state. According to Marshall’s affidavit, he founded KAM which “was certified to do business in Bronx County in 2008.” Annexed to defendants’ opposition is a copy of KAM’s February 15, 2008 Business Certificate from the New York State Department of Taxation and Finance, which was validated on February 27, 2008, and reflects that KAM was authorized to collect sales and use taxes in New York. Notably, regarding the alleged fraud, Marshall attests that “[a]ll invoices and packing slips issued by myself through my company KAM to START . . . were for goods actually and genuinely provided by KAM, and received by START.”

Marshall and KAM also contend that Marshall’s resignation email does not constitute “evidence” that “Marshall has shown an intent to flee the country in order to somehow frustrate an inevitable judgment against him,” as required by CPLR 6201 (3). Marshall

attests that he “never had any intention of leaving the country permanently or in any way encumbering [his] assets or moving them abroad . . .” Marshall explains that his father, who resides in Jamaica and is severely incapacitated due to a knee replacement in February 2018, “requires assistance with basic daily tasks.” Marshall further attests that “[w]hile [he] initially planned to pay regular visits to [his] father in Jamaica [he has] since decided to move [his] father here, to New York, to live with [him] . . .” Defendants contend that Marshall’s resignation email is “speculative and conclusory” evidence that Marshall intended to run away and “falls woefully short of establishing an ‘intent to frustrate creditors,’ or imminently ‘frustrate enforcement of a judgment,’ as mandated under CPLR 6201 (3).” Defendants contend that Start has not satisfied its burden of producing “actual non-speculative *evidence* that [they] have moved, or are about to move, assets out of Plaintiff’s reach to inhibit the collection of a possible judgment.”

Start, in reply, submits another affidavit from Otteson attesting that “START has no record or information to even suggest that it ever received any items from KAM.” Alternatively, Otteson argues that if Marshall did cause Start to purchase supplies from KAM “he engaged in self-dealing for approximately 10 years by causing START to purchase supplies from a vendor that, in sum and substance, was *Marshall himself*.” Start also challenges the admissibility of KAM’s Business Certificate from the New York State Department of Taxation and Finance. Start’s counsel further claims that he contacted an

unidentified “representative” in the sales tax department of the New York State Department of Taxation and Finance who told him that KAM is “not an active account.”

Discussion

CPLR 6212 (a) provides that:

“[o]n a motion for an order of attachment, or for an order to confirm 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” (emphasis added).

Start’s motion relies on CPLR 6201 (1) and (3), which provide that:

“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 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 . . .*” (emphasis added).

“Attachment is considered a harsh remedy and CPLR 6201 is strictly construed in favor of those against whom it may be employed” (*Grafstein v Schwartz*, 100 AD3d 699, 699 [2012]; *see also Michaels Elec. Supply Corp. v Trott Elec. Inc.*, 231 AD2d 695, 695 [1996])

["Because of the harsh nature of attachment and because it is in derogation of the common law, the courts have strictly construed the attachment statute in favor of those against whom it may be employed"]. Importantly, it is the movant's burden to establish conduct which satisfies the requirements of CPLR 6201 (*see Hume v 1 Prospect Park ALF, LLC*, 137 AD3d 1080, 1081 [2016]).

Here, Start has failed to satisfy its strict burden of proving the existence of a ground for the prejudgment attachment of defendants' property, pursuant to CPLR 6201. Start has not proven that KAM is a foreign corporation not qualified to do business in New York, as required for an attachment pursuant to CPLR 6201 (1). The hearsay testimony submitted by Start's counsel regarding KAM's 2008 Business Certificate from the New York State Department of Taxation and Finance does not prove that KAM is a foreign corporation not qualified to do business in New York.

Furthermore, Start has presented no concrete evidence that Marshall and/or KAM are about to frustrate the enforcement of a judgment that might be rendered in Start's favor by assigning, disposing of, encumbering or secreting property, or removing their property from New York. While Marshall's resignation email indicates that he previously intended to leave the country to assist his ailing father, the resignation email does not prove, or even suggest, that Marshall intended to defraud his creditors by removing property from New York (*Societe Generale Alsacienne De Banque, Zurich v Flemington Dev. Corp.*, 118AD2d 769, 773 [1986] [holding that "(a)ffidavits containing allegations raising a mere suspicion of an

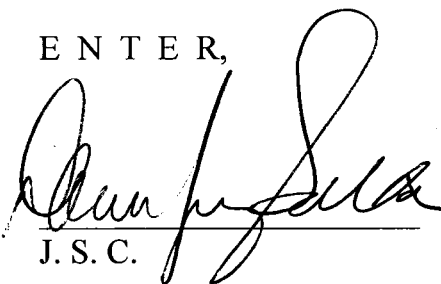
intent to defraud are insufficient. ‘It must appear that such fraudulent intent really existed in the defendant’s mind’”). In any event, Marshall has submitted an affidavit in which he attests that he has no present intentions of leaving the country because his ailing father is moving from Jamaica to New York. Start has made no showing of any conduct by Marshall or KAM which would satisfy the requirements of CPLR 6201 (3).

Because Start has failed to prove a ground for attachment set forth in CPLR 6201, there is no need to address whether Start has demonstrated success on the merits of its claims against Marshall and KAM. In addition, Start has failed to establish that it is entitled to an order prohibiting Marshall and KAM from selling, assigning, transferring, or in any way encumbering their assets. Accordingly, it is

ORDERED that Start’s motion is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

Hon. Dawn Jimenez-Salta

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