

<b>Influx Capital, LLC. v Pershin</b>
2019 NY Slip Op 30574(U)
February 25, 2019
Supreme Court, Kings County
Docket Number: 501030/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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INFLUX CAPITAL, LLC., INFLUX CAPITAL  
GROUP, LLC., GTR SOURCE, LLC., ADDY  
SOURCE, LLC., TSVI DAVIS AND TZVI REICH,

Plaintiffs,

Decision and order

- against -

Index No. 501030/19

*ms # 1*

HENRY PERSHIN, FOX CAPITAL GROUP,  
LLC., d/b/a FOX CAPITAL GROUP, INC.,  
MAIN STREET CAPITAL, LLC., d/b/a  
MAIN STREET CAPITAL GROUP, LLC.,  
COMMONWEALTH MERCHANT ADVANCE, INC.,  
BUSINESS CAPITAL, LLC., AND  
COLONNA COHEN, LAW, PLLC.,

Defendants,

February 25, 2019

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved seeking a preliminary injunction restraining the defendants from engaging in certain conduct. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiffs essentially allege that defendant Henry Pershin induced clients of the plaintiffs to breach their agreements with the plaintiffs. The plaintiffs further allege Pershin has agreed to fund frivolous lawsuits filed by third parties in order to ruin the business reputation of the plaintiffs. Thus, the plaintiffs are a merchant cash advance funder and on June 5, 2018 an entity called World Global Capital LLC of which defendant Davis was affiliated entered into an agreement with non-party Gateway International 360, LLC. Gateway fell behind in its payments and defendant Colonna Cohen Law,

counsel for Gateway negotiated a settlement agreement with World Global Capital in August 2018. The plaintiffs allege that instead of executing any settlement agreement Gateway initiated a lawsuit against World Global Capital on September 18, 2018 in New York County, *Gateway International 360 LLC et al v. Richmond Capitl Group LLC, et al*, Index Number 654636/2018 [hereinafter the 'Gateway Action']. The plaintiffs further allege that Pershin funded Gateway additional sums of \$128,000 and \$100,000 on August 27, 2018 and September 18, 2018 through defendants Fox Capital and Main Street Capital. Further, the same day the Gateway lawsuit was filed in New York County another action was filed in Kings County against plaintiffs GTR Source LLC and Influx Capital, *FCI Enterprises, Inc., et al v. Richmond Capital Group LLC, et al*, Index Number 520934/2018 [hereinafter the 'FCI Action']. Further, two months later a third lawsuit was filed against GTR Source LLC and plaintiffs Davis and Reich and other defendants, *Dual Diagnosis Treatment Center, Inc, et al, v. Yellowstone Capital West LLC, et al*, Index Number 525443/2018 [hereinafter the 'Dual Action'. Further, two days later, a fourth lawsuit was filed against the plaintiffs herein and other defendants, *James Davis II et al, v. Richmond Capital Group LLC*, Index Number 656346/2018 [hereinafter the 'Medisale Action']. The plaintiffs assert that "Pershin's sole goal in funding Gateway was to harm Davis, by having Gateway default on its

agreement with World Global Capital and sue Davis" (see, Affirmation in Support of the Injunction, ¶ 12). The plaintiffs further allege the defendants induced the plaintiffs in the above four noted lawsuits to breach their agreements with the plaintiffs and are "funding, controlling, managing, the lawsuits thereto" (see, Affirmation in Support of the Injunction, ¶ 22). The plaintiffs have now moved seeking an injunction to restrain the defendants from doing any activity to induce any of plaintiffs customers to breach their agreements, to restrain the defendants from controlling or funding any lawsuits, to restrain the defendants from entering into any agreements with plaintiffs customers and to restrain Colonna Cohen law firm from taking any direction from the Pershin defendants in initiating or pursuing any legal action involving plaintiffs and any third parties. The defendants oppose the motion arguing it has no merit.

#### Conclusions of Law

It is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]). Thus, a party seeking injunctive relief must establish a clear right to that relief

under the law and the undisputed facts (Gagnon Bus Company Inc., v. Vallo Transportation Ltd., 13 AD3d 334, 786 NYS2d 107 [2d Dept., 2004])). In this case the basis for the injunction is grounded in the fact it is alleged the failure to grant such relief will cause harm to the plaintiffs since it is alleged the defendants are conspiring to ruin the plaintiffs business. Of course, the defendants deny these underlying facts supporting the injunctive relief and indeed there is disputed evidence presented supporting those allegations. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1<sup>st</sup> Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when the facts are in "sharp dispute" and it cannot be said the movant has "established a clear right to preliminary injunctive relief" the injunction must be denied (Advanced Digital Security Solutions Inc., v. Samsung Techwin Co., Ltd., 53 AD3d 612, 862 NYS2d 551 [2d Dept., 2008])).

First, the plaintiffs have not presented any evidence at all that Pershin has orchestrated or is funding or is controlling any of the four lawsuits pending against the plaintiffs herein. The only allegations supporting that accusation found in the complaint are contained in paragraph 34 where the complaint

states that "the plaintiffs in the Medisale Action...admitted to Reich that they had been contacted by a person named 'Henry' who encouraged them to default on their agreements and sue Plaintiffs, and agreed to provide funding for their lawsuit" (see, Verified Complaint, ¶ 34). That accusation only concerns the Medisale Action and there is no independent evidence supporting that allegation. Moreover, it is expressly disputed by James Davis a member of Medisale Inc., and a plaintiff in the Medisale Action. Mr. Davis states that "no one named 'Henry' or anyone else for that matter, instructed, encouraged, or induced me to cause Medisale to breach any of its contractual agreements with any of the Plaintiffs. The statements verified in the complaint that so state are a complete and total falsehood" (see, Affidavit of James Davis, ¶ 3). The complaint does note in Paragraph 29 that "Colonna Cohen Law, then upon information and belief, on the behest of Pershin, filed a Notice of Appearance, dated December 18, 2018 on behalf of the plaintiffs in the FCI Enterprises Action" (see, Verified Complaint, ¶ 29), however, that statement does not allege any tortious conduct. The plaintiffs Reply, in Footnote 5 attempts to undermine the preciseness of the denial of Davis by noting that "there is a noticeable lack of a denial of a conversation with Henry Pershin, as had been alleged in the Verified Complaint" (see, Reply Affirmation, ¶ 27 Footnote 5). However, Davis denied that

"anyone else for that matter" induced him to act in a tortious manner, sufficiently denying the complaint and creating significant questions of fact. Thus, there can be no injunction granted restraining Pershin from engaging in any lawsuits since there has been no evidence presented Pershin has so engaged. Moreover, even if there was evidence Pershin has engaged in the four lawsuits noted above there has been no evidence presented the lawsuits lack merit or were filed with the intent to harass and ruin the plaintiff's reputation sufficient to warrant injunctive relief. The plaintiffs argue in Reply that "despite involving separate and distinct plaintiffs and transactions, the Dual Action and Medisale Action were brought by the same attorneys at the same time, against numerous common defendants, and assert many of the same claims" (see, Reply Affirmation, ¶ 18). However, that reality does not express any improper conduct and does not demand any injunctive relief.

Concerning claims of tortious interference, the plaintiffs have presented evidence that Pershin entities engaged in transactions with Gateway. First, those agreements took place after Gateway had already defaulted making any allegation Pershin induced Gateway to default difficult to understand. Moreover, to the extent it was improper for Pershin to fund Gateway, that matter can be resolved in any action between the party harmed by that wrong, if a wrong it is, and Pershin. It is conceded that

none of the plaintiffs in this action have any connection to the Gateway agreement. In an affidavit dated January 19, 2019 Tsvi Davis stated that he was "a member of" World Global Capital LLC, the entity that could maintain any action against Pershin concerning Gateway. However, in an affidavit dated January 24, 2019 Davis stated that he only owns a minority interest in Yellowstone Capital LLC which is the sole owner of World Global and thus owns a minority interest in World Global. These conflicting affidavits executed within five days of each other surely require further exploration, however, in any event any ownership interest Davis may have in World Global does not support an injunction against Pershin in this action. As noted, World Global, the entity allegedly harmed by Pershin's conduct, if true, may pursue any claims against Pershin.

Furthermore, there is no evidence supporting the underlying claims that Pershin induced any party to breach their agreements with the plaintiff. As noted, Mr. Davis has flatly contradicted any allegations regarding the Medisale Action. Concerning the Dual Action, Tonmoy Sharma a member of Dual Diagnosis has submitted an affidavit in opposition to the motion. Although the affidavit refers to a different case than the Dual Action noted in the Verified Complaint in this case the core denial of Sharma that "the claim in this action that someone instructed, encouraged, or induced me to cause Dual to breach any of its

contractual agreements with any of the Defendants in that action is a lie" (see, Affidavit of Tonmoy Sharma, ¶ 3). While the reference to 'that' action might have erroneously included a different action, it is clear the affidavit disputes any inducement in any Dual action including the Dual Action mentioned in the Verified Complaint. In any event, the plaintiffs have not presented any specific evidence of any actual inducement. Again, Harper Franklin Zarker the owner of Gateway submitted an affidavit which stated that "Henry Pershin, Colonna Cohen Law, PLLC, nor any other Defendant in this action has ever persuaded me or attempted to persuade me from not paying any of the Plaintiffs, or any entity for that matter. The allegations are patently false" (see, Affidavit of Harper Franklin Zarker, ¶ 5). Lastly, Chaim Freund, the sole director and shareholder of FCI Enterprises Inc., submitted an affidavit wherein he states that "Henry Pershin did not instruct, encourage, or induce me to cause FCI to institute the FCI Action" and that "none of the remaining Defendants have instructed, encouraged, or induced me to cause FCI to breach any of its contractual agreements with GTR Source LLC and/or Influx Capital LLC, or to cause FCI to institute the FCI Action" (see, Affidavit of Chaim Freund, ¶¶ 5,6).

Thus, the plaintiffs have not presented any undisputed facts they are entitled to an injunction (Omakaze Sushi Restaurant Inc., v. Ngan Kam Lee, 57 AD3d 497, 868 NYS2d 726 [2d Dept.,

2008]). Indeed, the plaintiffs have not presented any facts at all of sufficient validity in support of the injunction. The bare allegations of the complaint, which must be deemed true for purposes of a motion to dismiss, are wholly insufficient to obtain an injunction. Likewise, there have been no facts alleged supporting an injunction against any counsel of any of the parties for which injunctions have been sought. Therefore, since the plaintiffs have not presented any evidence supporting the allegations, they have failed to allege a likelihood of success on the merits and consequently the motion seeking any injunction is denied.

So ordered.

ENTER:



DATED: February 25, 2019

Brooklyn N.Y.

Hon. Leon Ruchelsman

JSC

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