SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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MICHAEL MORIARTY

Plaintiff,

- v -

CHELSEA WINE & STORAGE, INC.,

Defendant.

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INDEX NO. 160795/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this action for conversion and breach of contract, plaintiff Michael Moriarty ("Plaintiff") moves for an order (1) granting a preliminary injunction directing defendant Chelsea Wine & Storage, Inc. ("Defendant"), not to sell, dispose, transfer, or otherwise alienate wine owned by Plaintiff and stored Defendant (the "Wine") and (2) imposing a constructive trust on the proceeds of any Wine already sold by Defendant. Defendant opposes the motion.

BACKGROUND

Defendant owns and operates a pair of retail wine sale and personal wine storage locations in New York. In 2006, Plaintiff entered into an agreement (the "Contract") with Defendant to store and maintain Plaintiff's personal wine collection, which eventually consisted of approximately 1,200 bottles. In exchange, Defendant regularly billed Plaintiff approximately $600.00 on a monthly basis through automated charges to Plaintiff's personal credit card.

The Contract provides in relevant part that:

> **Termination.** The Customer may terminate this Agreement at any time, upon payment of all outstanding fees to the Company. The Company may terminate this Agreement on ten (10) business days prior written notice to Customer and Customer shall thereafter notify the Company of the location the Customer's wine

is to be delivered to. *If no instructions are given to the Company regarding the delivery of Customer's wine, it will be delivered to Customer at the address first listed above.* This Agreement holds for any and all inheritors, designees, successors, assigns or other third parties of the Customer.

(Dkt. No, 14, ¶ 4 [emphasis added]).

The Contract further provides that:

Warehouseman's Lien. The Company reserves the right to claim a lien against all wine stored by the Customer with the Company in the event that the Customer's Storage Fees remain unpaid for a period of 120 days after notice thereof. *The Company may sell any wines for which storage or other charges remain outstanding after such 120 day period.* The proceeds of such a sale shall first be applied to any indebtedness owing to the Company, and to any costs and expenses incurred with respect to the sale of any of the Customer's wine, and any efforts to collect such indebtedness. Any excess shall be remitted to the customer. The customer waives all requirements of notice, advertisement and disposition of proceeds required by law with the regard to and in furtherance of the warehouseman's lien.

(Dkt. No. 14, ¶ 6 [emphasis added]).

Lastly, the Contract provides that:

Miscellaneous. This Agreement represents the entire and only agreement between the parties herein and overrides all prior negotiations, representations contracts, agreements, either written or oral. This Agreement does not create a partnership, employment or agency relationship between the parties to is Agreement is governed by New York law. EACH PARTY WAIVES TO THE FULLEST EXTENT PERMITTED BY LAW TRIAL BY JURY OF ALL CLAIMS RELATING TO THIS Agreement. Each party consents to the exclusive jurisdiction and venue of courts in New York, NY for all disputes relating to this Agreement. The prevailing party in any such dispute may recover its reasonable attorneys' fees, costs and expenses from the other party. *No term of this Agreement may be waived, modified or amended without a writing executed by both parties.* If any term of this Agreement is deemed invalid or unenforceable by a court of competent jurisdiction, the remainder of this Agreement will continue in effect. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one instrument. This Agreement may also be executed via facsimile, which shall be deemed an original.

(Dkt. No. 14, ¶ 10 [emphasis added]).

On September 30, 2016, an employee of Defendant emailed Plaintiff a copy of "changes to your [Plaintiff's] Chelsea Wine Storage Account, effective November 1st, 2016" (Dkt. No. 15). Plaintiff did not reply to Defendant's email or execute the "CWS Basic Storage Agreement with Insurance" that was attached thereto. Significantly, the purported superseding 2016 contract contained a different termination provision which provided that, in the event of Plaintiff's default in paying all amounts owed for professional storage fees, Defendant could either sell the Wine at private or public auction or "discard the Goods [Wine]" (Dkt. No. 15, ¶ 10).

In or about September 2017, Defendant stopped automatically billing Plaintiff, apparently because Plaintiff's credit card on file for automatic payments had expired. Between October 12, 2017 and June 4, 2018, Defendant emailed (@yahoo.com) Plaintiff copies of his monthly invoices stating that Plaintiff's credit card on file had expired and requesting that Plaintiff contact Defendant to provide them with updated credit card information (Dkt. No. 17). On June 26, 2018, Defendant mailed (First Class Mail) and emailed (@yahoo.com) a letter to Plaintiff stating that Plaintiff had a current outstanding balance of $6,301.85 and that, unless Plaintiff paid the outstanding amount in full within ten (10) days, the contents of Plaintiff's wine storage locker would be disposed. (Dkt. No. 18, p.1). On July 30, 2018, Defendant sent a further letter to Plaintiff stating that, due to Plaintiff's failure to pay his outstanding balance, the contents of his storage locker would be destroyed "pursuant to your Basic Storage Agreement" (Dkt. No. 18, p.2).

On or about October 29, 2018, Plaintiff attempted to obtain bottles of his Wine from Defendant. Defendant refused to provide the requested bottles. Thereafter, Plaintiff was contacted by Defendant's counsel who indicated to Plaintiff that his Wine had been "disposed of" due to non-payment of storage charges. Defendant also rejected Plaintiff's offers to pay the

outstanding storage fees, and to date has provided neither an explanation for how the Wine was "disposed" or an accounting of any sale or auction of Plaintiff's Wine (see Dkt. No. 8).

On November 19, 2018, Plaintiff commenced this action by filing a summons and Complaint and an Order to Show Cause seeking a preliminary injunction and constructive trust on the proceeds of any sale of his Wine by Defendant. The application was supported by photographs of bottles of Plaintiff's Wine on the shelf at Defendant's second location and testimony that a member of Defendant's staff represented that the Wine was from the locker of a former storage client. On those proofs, the court signed Plaintiff's Order to Show Cause and granted Plaintiff a temporary restraining order pending the hearing and determination of Plaintiff's application for a preliminary injunction.

DISCUSSION

To obtain preliminary injunctive relief, a party must demonstrate: (1) a likelihood of success on the merits; (2) that in the absence of injunctive relief, the moving party will suffer irreparable harm; and (3) a balancing of the equities favors the party seeking injunctive relief. (*see Manhattan Real Estate Equities Group LLC v. Pine Equity, NY, Inc.*, 16 AD3d 292 [1st Dept 2005], citing *W. T. Grant Co. v. Srogi*, 52 N.Y.2d 496 [1981]).

Here, Plaintiff's Complaint contains causes of action for, *inter alia*, conversion, breach of contract, and unjust enrichment. Plaintiff alleges that Defendant was unjustly enriched and breached the Contract by converting around 1,200 bottles of Wine valued collectively at between $100,000.00 and $200,000.00 in response to storage fee arears of approximately $7,000.00. Defendant opposes Plaintiff's motion on the grounds that the superseding storage contract sent to Plaintiff provides that Defendant may dispose of Plaintiff's wine for his failure to pay

outstanding storage fees, and that Plaintiff assented to the contract by paying the higher rate for storage contained therein.

Defendant's argument is without merit. The Contract expressly provides that it cannot be modified except by a writing signed by both parties. It is uncontested that Plaintiff did not execute the updated storage agreement. Unlike the purported superseding contract, the Contract does not permit Defendant to "dispose" of Plaintiff's Wine. Defendant's remedy under the Contract is to sell Plaintiff's Wine to the extent of covering the outstanding fees and collection costs. (Dkt. No. 14, ¶ 6 ["The Company may sell any wines for which storage or other charges remain outstanding after such 120 day period."]). Regardless, neither agreement allows Defendant to "dispose" of Plaintiff's Wine to itself and then sell the Wine at Defendant's second location without accounting to Plaintiff and remitting to Plaintiff any amounts obtained by such sale in excess of the amounts owed by Plaintiff to Defendant for unpaid fees. Accordingly, the court finds that, upon a review of the proofs before it, Plaintiff is likely to succeed on the merits of the Complaint.

Plaintiff also establishes irreparable harm in the absence of an injunction through proof that the Wine stored by Plaintiff with Defendant is unique and arguably irreplaceable. On these facts, the court also finds that the balancing of the equities is in Plaintiff's favor. Plaintiff alleges that Defendant was aware that Plaintiff had moved and, therefore, did not receive notice by mail or email that Plaintiff's credit card had been declined. Plaintiff alleges he continued to visit Defendant's place of business during such time and successfully retrieved bottles of wine but was not notified of the outstanding storage fees. Moreover, there is no equity served by permitting Defendant to shield itself from liability by relying on its right to dispose of Plaintiff's Wine under a provision contained in an unsigned purportedly superseding storage agreement

which contradicts the fully executed Contract. Accordingly, Plaintiff's motion for a preliminary injunction is granted.

However, given that Defendant's business is still in operation and continues to generate revenue, the court finds that a constructive trust is not necessary to protect Plaintiff's financial interests in the event Plaintiff succeeds in obtaining a judgment against Defendant.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Plaintiff's motion seeking a preliminary injunction is granted; and it is further

ORDERED that Defendant is directed not to sell, dispose of, destroy, transfer or otherwise alienate any Wine belonging to Plaintiff during the pendency of this action; and it is further

ORDERED that the branch of Plaintiff's motion seeking a constructive trust is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/1/19
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	☐	CASE DISPOSED			☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE