

**D&A Woodlands Enter., Inc. v Sinatra**

2020 NY Slip Op 33169(U)

August 18, 2020

Supreme Court, Queens County

Docket Number: 718242/2018

Judge: Cheree A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**  
**Justice**

IAS PART 30

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D&A WOODLANDS ENTERPRISE, INC.

Index No. 718242/2018

Motion  
Date: August 5, 2020

Plaintiff,

Motion Cal. No.:12

-against-

Motion Sequence No.: 4

GARY SINATRA,

**FILED**

**8/19/2020  
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Defendant.

**COUNTY CLERK  
QUEENS COUNTY**

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The following efiled papers numbered 93-109 submitted and considered on this motion by plaintiff D&A Woodlands Enterprise, Inc. (hereinafter referred to as "Plaintiff") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") §6201(3) for attachment of the sum of \$85,000.00 from the pending sale of defendant Gary Sinatra's (hereinafter referred to as "Defendant") home since Defendant is allegedly selling his home and moving out of the State to Florida and for such other and further relief as this Court deems just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 93-103
Opposition-Affidavits-Exhibits.....	EF 104-108
Reply Affirmation.....	EF 109

**Facts**

Defendant was the owner of a business which engaged in the repair of power tools and equipment. The business had been in operation since 1998. On or about June 2016 Defendant began soliciting purchasers to buy the power tool and equipment repair business so that he could retire. Plaintiff approached Defendant to discuss purchasing the business. On or about July 31, 2017 Plaintiff and Defendant entered into a Contract of Sale of Business and Rider, paying valuable consideration to Defendant for the purpose of the business. The parties were both represented by counsel. At paragraph 30(f) of the agreement, pursuant to the terms of the business, the sale included, among other things, the "good will" of the business and the customer contacts of the

business, and Defendant's work for Plaintiff for a one year period following the closing in order to effectuate the exchange of "Good Will being purchased in the agreement." Paragraph 30(b) of the agreement provided that "[i]t is expressly understood that the work performed by Seller [Defendant] shall be subject to and bound by the direction of Purchaser [Plaintiff]."

The Contract also contained a non-compete clause which stated the following at Paragraph 26:

"Non-compete clause - It is expressly understood that this Agreement is premised upon Seller's desire to retire power tool and equipment repair business and cease working, except as set forth herein. Seller agrees that provided that Purchaser is in compliance with the terms of this Agreement, Seller shall not compete with Purchaser, directly or indirectly, by engaging in the power tool and equipment repair business as an owner, partner, member, associate, employee, consultant or in any other manner anywhere in Long Island (Nassau and Suffolk County), the Five Boroughs of New York City or Westchester County after the date of closing for a period of four (4) years.

Plaintiff contends that during the one year period following the closing of the sale of the business, rather than working towards transferring the "Good Will" of the purchased business to Plaintiff, Defendant actively worked to keep the "Good Will" for himself personally. Despite the sale and agreeing not to compete with Plaintiff, Defendant continued to repair power tools and equipment and to sell those repaired power tools and equipment for his own benefit in violation of the parties agreement. Defendant continued to solicit work with the customer base he sold to Plaintiff in direct competition with Plaintiff. Plaintiff also claims that they were fraudulently induced into the agreement since Defendant had not retired or stopped working in the power tool and equipment repair business.

Defendant contends that Plaintiff breached the agreement. The Rider contained a Labor Agreement where Defendant was to work for Plaintiff for a period of one year, for a minimum of twenty hours a week. Plaintiff agreed to divide net profits from the business equally during his period of employment. Defendant began working for Plaintiff on August 8, 2017, and the store had no heat, air conditioning or lights. The store could not process credit card payments. Defendant never received any breakdown of profits and expenses in the business although he asked for same in August and September 2017. In essence, Defendant maintains that Plaintiff has violated the agreement based upon Plaintiff's inaccurate accounting and failure to allow Defendant to work the agreed upon minimum of twenty hours a week as of October 30, 2017; Defendant's firing prior to the one year period of employment agreed upon in the Labor agreement; being told in December 2017 when the first of the three \$5000.00 payments was due under the agreement that he in fact breached the agreement (which was later resolved); Plaintiff being evicted from the storefront and working at Danny Gammino's, the president of D&A Woodlands Enterprise Inc. a/k/a Plaintiff (hereinafter referred to as "Gammino"), home instead; Gammino's mismanagement of the business; that he did not receive any profits in December 2017 and February and March 2018; being accused of actively soliciting Plaintiff's clients and breaching the contract; and Defendant claims at no time

did he actively solicit any of his former clients for contract work or a position.

### Discussion

CPLR §6201 provides the grounds for obtaining an attachment:

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
2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; 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; or
4. the action is brought by the victim or the representative of the victim of a crime, as defined in subdivision six of section six hundred twenty-one of the executive law, against the person or the legal representative or assignee of the person convicted of committing such crime and seeks to recover damages sustained as a result of such crime pursuant to section six hundred thirty-two-a of the executive law; or
5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53.

Plaintiff seeks an attachment for the sum of \$85,000 from the pending sale of Defendant's home. Plaintiff alleges Defendant plans to move to Florida "in part to frustrate enforcement of the judgment that likely will be rendered in Plaintiff's favor in this lawsuit". Plaintiff acknowledges it knew Defendant intended to retire and move to Florida based on the Affidavit of Gammino. Gammino stated when he met Defendant prior to signing the contract, Defendant informed him he intended to retire and move to Florida. Plaintiff alleges Defendant will take the proceeds from the sale of his home with him to Florida and by removing the funds from the State he "will frustrate Plaintiff's enforcement of the judgment that is expected to be rendered in Plaintiff's favor".


"To obtain an order of attachment under CPLR 6201(3), the plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors, or to frustrate the enforcement of a judgment that might be rendered in favor of plaintiff. The moving papers must contain evidentiary facts, as opposed to conclusions, proving the fraud. In addition to proving fraudulent intent, the plaintiff must also show probable success on the merits of the action" (*Elena Duke Benedict v Elise B. Browne et al.*, 289 AD2d 433 [2d Dept 2001] [citation omitted]).

Here, Plaintiff was aware Defendant intended to move to Florida. In fact, upon meeting Defendant, Mr. Gammino attested to the fact that Defendant divulged those plans prior to the signing of the contract. The mere assertion that Plaintiff intends to sell his house and move to Florida is not proof of “fraudulent intent” (*id*). Defendant has failed to satisfy it’s burden, therefore the Court will not consider the likelihood of success on the merits. Furthermore, within his opposition papers Defendant alleges that the home Plaintiff seeks to attach \$85,000 too has already been sold and provides a copy of the Deed. Therefore, even if Plaintiff fulfilled its burden the Court lacks the authority to grant the relief requested. Therefore it is,

**ORDERED**, that the Plaintiff’s motion is denied.

This constitutes the decision and Order of the Court.

Dated: August 18, 2020



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**Hon. Chereé A. Duggs, JSC**

**FILED**

**8/19/2020**

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**COUNTY CLERK  
QUEENS COUNTY**