

Gutnick v Jacobson
2021 NY Slip Op 30112(U)
January 4, 2021
Supreme Court, Kings County
Docket Number: 518404/2020
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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MEYER GUTNICK, BEDFORD REALTY MANAGEMENT,
LLC, 1704 OCEAN AVENUE, LLC,

Plaintiffs, Decision and order

- against -

Index No. 518404/2020

YERACHMEAL JACOBSON, MARC JACOBOWITZ,
BLUEJAY MANAGEMENT, LLC, BLUEJAY
CAPITAL, LLC, SKY HIGH REALTY GROUP LLC,
1704 OCEAN AVENUE, LLC,

January 4, 2021

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6201 seeking to attach property of the defendants. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

As recorded in a prior order the plaintiff invested over one million dollars and is a 15% owner of 1704 Ocean Avenue LLC, an entity created to buy, develop and sell property located at 1704, 1708 and 1712 Ocean Parkway in Kings County. An operating agreement was executed between the parties on January 8, 2015 and another side agreement on February 16, 2015. The complaint alleges the defendants violated the agreements by failing to give the plaintiff sufficient time in which to invest additional funds and that failure caused a dilution of his ownership share from 15% to 11.17%. The complaint further alleges the defendants failed to make contributions and failed to provide or maintain

records. Moreover, the complaint alleges the defendants unlawfully expelled the plaintiff from the company. The complaint alleges, breach of contract, breach of a fiduciary duty, fraud, conversion, unjust enrichment and negligence. The plaintiff has now moved seeking to attach the defendants property so that funds will be available if a judgement is secured. The plaintiff alleges the defendants are intentionally divesting the company of all funds in efforts to deprive the plaintiff of any potential recovery. The defendants oppose the motion arguing that attachment is not proper.

Conclusions of Law

It is well settled that a party seeking pre-judgment attachment must demonstrate, "by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that plaintiff will succeed on the merits, that one or more grounds for attachment provided in CPLR §6201 exist and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff" (Elliot Associates L.P., v. Republic of Peru, 948 F.Supp 1203 [S.D.N.Y. 1996]). The basis for the attachment is to provide security to insure the enforcement of any money judgement (see, Hotel 71 Mezz Lender LLC v. Falor, 14 NY3d 303, 900 NYS2d 698 [2010]).

CPLR §6201 provides five distinct grounds permitting the

attachment of property in an action where the party would be entitled to a money judgement. The plaintiff is seeking the attachment on one ground, namely that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgement 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 (see, CPLR §6201(3)).

Attachment is a drastic remedy which should be construed narrowly in favor of the party against whom it is sought (Michaels Electrical Supply Corp., v. Trott Electric Inc., 231 AD2d 695, 647 NYS2d 839 [2d Dept., 1996]). Thus, to succeed upon the attachment request it must be demonstrated the defendant acted with the intent to frustrate the enforcement of a judgement (Abacus Federal Savings Bank v. Lim, 8 AD3d 12, 778 NYS2d 145 [1st Dept., 2004]). The disposition of the property without the requisite intent is an insufficient basis upon which to attach property (Sylmark Holdings Ltd. v. Silicone Zone Intern. Ltd., 5 Misc3d 285, 783 NYS2d 758 [Supreme Court New York County 2004]).

Thus, the plaintiff must demonstrate the defendants intentionally sought to frustrate the enforcement of a judgement by disposing of its assets (Silverman v. Miranda, 116 F.Supp3d 289 [S.D.N.Y. 2015]).

The plaintiff does not present any evidence supporting the contention the property has been disposed of to frustrate a potential judgement. The plaintiff essentially argues that of course the defendants intention is to frustrate any judgement, since why else would the property be so disposed. However, that circular argument lacks any evidence supporting the allegation. Essentially, that argument boils down to the fact that since property has been removed an attachment is proper. As already noted the mere removal of assets is not grounds for an attachment (Corsi v. Vroman, 37 AD3d 397, 829 NYS2d 234 [2d Dept. 2007]). To support a request for attachment the plaintiff must present evidentiary facts and circumstances tending to establish a probability that such intent exists (Rosenthal v. Rochester Button Company Inc., 148 AD2d 375 539 NYS2d 11 [1st Dept., 1989]). This means there must be evidence that fraudulent or improper intent existed in the mind of the defendants (DLJ Mortgage Capital Inc., v. Kontogiannis, 594 F.Supp2d 308 [E.D.N.Y. 2009]). To be sure, since fraudulent or improper intent is difficult to prove courts have developed 'badges of fraud' which can give rise to intent. Although the stated basis for the attachment in this case is the frustration of a judgement, the analysis is the same as fraud. Such badges of fraud include gross inadequacy of consideration, a close

relationship between transferor and transferee, the transferor's insolvency as a result of the conveyance, a questionable transfer not in the ordinary course of business, secrecy in the transfer and retention of control of the property by the transferor after the conveyance (see, In re Kaiser, 722 F2d 1574 [2d Cir. 1983]).


As noted, the plaintiff does not support these allegations of frustration of judgement with any evidentiary facts at all. The plaintiff merely seeks to secure finds in case they secure a judgement. Where no evidence supporting the allegation has been presented then attachment is not proper (Singapore Tong PTE Ltd., v. Corrado Coppola, 2004 WL 1936296 [E.D.N.Y. 2004]).

Therefore, based on the foregoing, the motion seeking attachment is denied.

So ordered.

ENTER:

DATED: January 4, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC