

<b>950 Third Ave. LLC v Theirapp, Inc.</b>
2021 NY Slip Op 31077(U)
April 1, 2021
Supreme Court, New York County
Docket Number: 653316/2020
Judge: Shawn T. Kelly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 57

-----X  
950 THIRD AVENUE LLC,

Plaintiff,

- v -

THEIRAPP, INC., D/B/A APPRISE MOBILE, JEFF  
CORBIN,

Defendant.

INDEX NO. 653316/2020

MOTION DATE 11/23/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

-----X  
JEFF CORBIN

Plaintiff,

-against-

K4 PRIVATE INVESTORS, L.P., K4 CAPITAL ADVISORS,  
L.P., K1 INVESTMENT MANAGEMENT, LLC, TRACKFORCE  
ACQUIRECO, INC., TRACKFORCE TOPCO, INC.,  
TRACKFORCE ULTIMATE TOPCO, INC., TRACKFORCE  
MIDCO, LLC, THEEMPLOYEEAPP, LLC

Defendant.

Third-Party  
Index No. 595747/2020

HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for

PREL INJUNCTION/TEMP REST ORDR

Upon the foregoing documents, it is

In the present case, Defendant and Third-Party Plaintiff Jeff Corbin (herein "Corbin") previously founded the theIRapp Inc., d/b/a Apprise Mobile (herein "theRapp"), which is Corbin's co-defendant and the commercial tenant in this landlord-tenant dispute. On November 27, 2017, in his capacity as theIRapp's founder and Chief Executive Officer, Corbin executed a

commercial office lease (herein the “Lease Agreement”) with Plaintiff 950 Third Avenue LLC (herein “Plaintiff 950 Third Avenue”). As a condition of the Lease Agreement, Corbin also executed a “Good Guy Guaranty,” under which he personally promised to pay rent due under the Lease Agreement in the event theIRapp failed to perform its obligations under the lease.

Defendant Corbin moves pursuant to CPLR Article 63, for a preliminary injunction restraining and enjoining co-defendant and third-party defendants its officers, directors, agents, employees, servants and any and all other persons acting on their behalf from taking any action to increase the liability of Defendant Corbin and for an order directing co-defendant and third-party defendants to immediately surrender possession of the Premises to plaintiff in the condition required by the Lease, and to give plaintiff proper notice of its surrender in accordance with the terms of the Good-Guy Guaranty; and further directing co-defendant and third party defendants to deposit collateral with Corbin in the amount of \$300,000.00, or, alternatively, enjoining and restraining defendants, their officers, agents, employees, attorneys and other persons acting on their behalf, from transferring, conveying, selling or encumbering, in any manner, any property or assets, which are jointly or solely owned by the defendants.

### **Background**

Corbin previously founded theIRapp and on November 27, 2017, and executed the Lease Agreement with Plaintiff 950 Third Avenue. As a condition of the Lease Agreement, Corbin also executed a “Good Guy Guaranty,” under which he personally promised to pay rent due under the Lease Agreement in the event theIRapp failed to perform its obligations under the lease. On February 13, 2019, Corbin sold a majority interest in theIRapp to Third-Party Defendants K4 Private Investors, LP and K4 Capital Advisors, LP (herein collectively “Third Party Defendants”). theIRapp began experiencing financial difficulty and its last rent payment under

the Lease Agreement was on or about February 7, 2020. On or about July 23, 2020, the Plaintiff commenced this action against the IRapp and Corbin alleging breach of contract against the IRapp for breach of the Lease Agreement and against Corbin for breach of the Good Guy Guaranty agreement. Corbin asserts cross claims against the IRapp of exoneration, common law indemnification and *quia timet*.

On or about September 15, 2020, Corbin filed his first Third-Party Complaint against the Third-Party Defendants. Corbin asserts three causes of action: contractual indemnification pursuant to the Stock Purchase Agreement, common law indemnification, and legal fees. On November 6, 2020, Corbin filed an Amended Third-Party Complaint and Second Amended Verified Answer with Cross-Claims. The Amended Third-Party Complaint voluntarily dismissed Corbin's contractual indemnification claim and added claims for exoneration and *quia timet* against each of the Third-Party Defendants. The Second Amended Verified Answer with Cross-Claims asserted the same cross-claims against the IRapp, but Corbin dropped his prior allegation that the IRapp is obligated under the Stock Purchase Agreement to indemnify Corbin for the Good Guy Guaranty obligation.

### Analysis

Defendant Corbin moves pursuant to CPLR Article 63, for a preliminary injunction restraining and enjoining co-defendant and third-party defendants its officers, directors, agents, employees, servants and any and all other persons acting on their behalf from taking any action to increase the liability of Defendant Corbin and for an order directing co-defendant and third-party defendants to immediately surrender possession of the Premises to plaintiff in the condition required by the Lease, and to give plaintiff proper notice of its surrender in accordance with the terms of the Good-Guy Guaranty; and further directing co-defendant and third party defendants

to deposit collateral with Corbin in the amount of \$300,000.00, or, alternatively, enjoining and restraining defendants, their officers, agents, employees, attorneys and other persons acting on their behalf, from transferring, conveying, selling or encumbering, in any manner, any property or assets, which are jointly or solely owned by the defendants.

### Preliminary Injunction

A preliminary injunction is a drastic remedy and should not be granted unless plaintiff can demonstrate “a clear right” to such relief (*City of New York v 330 Continental, LLC*, 60 AD3d 226 [1st Dept 2009]). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*Perpignan v Persaud*, 91 AD3d 622, 622 [2012] [*quoting Ruiz v Meloney*, 26 AD3d 485, 486 (2006)]). “As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121, 1123 [2017]). On a motion for preliminary injunctive relief, plaintiff must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in its favor (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]; *see also 1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011]).


Defendant Corbin contends that under the Stock Purchase Agreement K4 and the other Third-Party Defendants acquired the Lease and responsibility under the Good Guy Guaranty. He further alleges that the irreparable harm that would befall him includes the loss of the right to exoneration and damage to his business reputation. In opposition, the IRapp and Third-Party Defendants argue that under the mandatory arbitration clause in the Stock Purchase Agreement this dispute must be arbitrated. Further, the IRapp and Third-Party Defendants allege that Corbin

has not established irreparable harm, likelihood of success on the merits, or that the balancing of equities is in his favor.

“Irreparable injury,” for purposes of equity in the context of a motion for preliminary injunctive relief, has been held to mean any injury for which money damages are insufficient, while conversely, economic loss, which is compensable by money damages, does not constitute irreparable harm (*DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 887 NYS2d 168 [2nd Dept 2009]). Corbin has not established that failure to secure a preliminary injunction will result in any harm that could not be remedied solely by monetary compensation. Further, Corbin fails to establish a likelihood of success on the merits that is beyond mere conclusory and speculative arguments, nor has he established a balancing of equities in his favor (*Hui v New Clients, Inc.* 126 AD3d 759 [2 Dept. 2015]). Accordingly, Corbin’s motion for a preliminary injunction is denied.

It is hereby,

ORDERED that Corbin’s motion for a preliminary injunction is denied.

<u>4/1/2021</u> DATE			 SHAWN TIMOTHY KELLY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE