

<b>Naughton v Navillus Tile, Inc.</b>
2022 NY Slip Op 30239(U)
January 20, 2022
Supreme Court, New York County
Docket Number: Index No. 654384/2021
Judge: Verna Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

-----X INDEX NO. 654384/2021

PADRAIG NAUGHTON, MOTION SEQ. NO. 002; 003  
Plaintiff,

- v -

NAVILLUS TILE, INC. d/b/a NAVILLUS CONTRACTING, Defendant. **DECISION + ORDER ON MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 43, 44, 47, 48, 50

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 45, 49, 54

were read on this motion to/for SEAL.

Plaintiff commenced this action by summons and complaint against defendant, seeking an immediate advancement of legal fees and expenses which he claims he is entitled to pursuant to an agreement entitled "Indemnification Undertaking," dated August 3, 2020. (NYSCEF Doc. Nos. 1-2, *summons and complaint*).

The salient facts of this case are summarized as follows. On July 29, 2020, a federal grand jury in the United States District Court for the Eastern District of New York indicted plaintiff, a financial controller at defendant, along with two other Navillus employees,<sup>1</sup> for violations of mail fraud, wire fraud, and other federal statutes, in connection with an alleged "payroll scheme" operating between 2011 and 2017 ("the federal action"). (NYSCEF Doc. No. 5, *federal indictment*) (see *United States v. O'Sullivan, et al.*, No. 20-CR-272 [EDNY 2020]).

On or about August 3, 2020, the parties executed an agreement (amended on August 5, 2020) whereby defendant promised to indemnify plaintiff for all expenses, including attorneys' fees, in connection with the federal action. Plaintiff later retained Cadwalader, Wickersham & Taft LLP ("the firm") to represent him in the federal action (NYSCEF Doc. No. 19, *engagement letter*). Plaintiff asserted that, at the time of the filing of the complaint, plaintiff had incurred \$1,871,891.17 in attorney's fees and expenses in connection with the firm's legal representation of plaintiff in the federal action, relating to services rendered from late August 2020 through July 2021. He further represented that defendant had only advanced \$991,851.34 in fees and costs in connection with plaintiff's defense in the federal action. Thus, as of the date of the complaint,

<sup>1</sup> The other defendants include Donal O'Sullivan, owner and president of Navillus, as well as, Helen O'Sullivan, a payroll manager at Navillus. (NYSCEF Doc. No. 2 ¶ 14).

\$880,039.83 remained unpaid by defendant and, of this amount, \$768,141.46 consisted of fees that remain unpaid for more than thirty (30) days after the invoice date, in violation of both defendant's obligation of advancement pursuant to the agreement, as well as, its acknowledgement to the engagement letter. (NYSCEF Doc. No. 2, *complaint*).

Plaintiff now moves the court, pursuant to CPLR 6301 and 6311, for an order directing defendant "(i) to immediately advance to Mr. Naughton all attorneys' fees and expenses he has already incurred in connection with *United States v O'Sullivan, et al.*, No. 20-CR-272 (E.D.N.Y.) that remain unpaid more than 30 days after the invoice date, which totals \$768,141.46 as of July 15, 2021; (ii) within thirty (30) days of receipt of invoices from Mr. Naughton's counsel, to advance to Mr. Naughton all attorneys' fees and expenses that he represents he has incurred in connection with *United States v O'Sullivan, et al.*, No. 20-CR-272 (E.D.N.Y.); (iii) to pay the full amount of Mr. Naughton's reasonable attorneys' fees and expenses incurred in connection with the instant action, in an amount to be determined after submission of an affirmation by Mr. Naughton's counsel within five (5) business days of the Court's order; and for such other and further relief as the Court deems just and proper." (NYSCEF Doc. No. 14, *notice of motion*). (Motion Sequence 002). Defendant opposes the motion and cross-moves, pursuant to CPLR 3211(a)(8) and CPLR 311, for dismissal of the complaint based on lack of personal jurisdiction. (NYSCEF Doc. No. 23, *notice of cross-motion*).

Defendant also moves, by order to show cause, to seal NYSCEF Doc. Nos. 28 and 29 or, in the alternative, an order directing that said documents be replaced with redacted versions. (NYSCEF Doc. No. 45, *OSC*) (Motion Sequence 003). This application is not opposed.

The motions are consolidated for disposition.

Turning first to the motion seeking a preliminary injunction, plaintiff argues that he is entitled to a preliminary injunction ordering defendant to comply with its contractual obligation to advance him his reasonable costs, including attorneys' fees and expenses, incurred in connection with the pending criminal action against him that was slated to proceed to trial in October 2021. Plaintiff claims, the agreement establishes a clear right to advancement of reasonable attorney's fees prior to the final disposition of the federal action and directs defendant to do so within thirty (30) days of any request for funds. Therefore, plaintiff maintains that he has established a likelihood of success on the merits. Plaintiff also contends that, absent a preliminary injunction, he will be unable to adequately prepare his defense in the federal action, which involves complex criminal charges, and that this constitutes irreparable harm. Moreover, plaintiff asserts that the balance of the equities weighs in his favor insofar as he stands to lose his liberty absent the granting of said relief. Lastly, plaintiff maintains that he is also entitled to advancement of the fees incurred in this action. (NYSCEF Doc. No. 20, *memorandum of law*).

In opposition to the motion, defendant argues that plaintiff fails to establish the elements necessary for a preliminary injunction (NYSCEF Doc. No. 32, *memorandum of law in opposition*). Specifically, defendant claims that it has "substantial defenses in this action" since, pursuant to the subject agreement, plaintiff agreed to pay only "reasonable attorney's fees and expenses." In support of this contention, defendant submits the affidavit of Selina Maddock

(“Maddock”), general counsel for defendant, who affirms that she emailed plaintiff’s counsel on September 3, 2020 and December 18, 2020, informing plaintiff’s counsel that defendant was having all invoices in the criminal matter reviewed by Legal Cost Control, an expert in auditing legal billing and invoices. Legal Cost Control, affirms Maddock, identified several inaccuracies with the firm’s invoices. Maddock also affirms that the fees plaintiff seeks are excessive and that the retainer agreement, which was co-signed by defendant, allows defendant to challenge the fees by non-binding mediation and/or arbitration and that defendant intends to avail itself of said process, belying plaintiff’s argument that it has demonstrated a likelihood of success on the merits. (NYSCEF Doc. Nos 25, *Maddock’s affidavit*; 28, *emails*).

As to the element of irreparable harm, defendant argues that “[p]laintiff will clearly be compensated at the end of the non-binding mediation and/or arbitration for any unpaid fees determined to be reasonable. Moreover, as the affidavit of Maddock makes clear, Navillus was and will continue to advance to [the firm] all attorneys’ fees it determines to be reasonable. This determination is based on the expert opinion of Legal Cost Consulting. Thus, [p]laintiff will suffer no irreparable harm.” Defendant also maintains that the balance of the equities favors denial of the motion because “a requirement to pay all fees to [the firm] before the required judicial review to resolve the legitimate disputes raised by Navillus would be unjust.” (NYSCEF Doc. No. 32).

Addressing its cross-motion for dismissal of the action based on lack of personal jurisdiction, defendant argues that the affidavit of service submitted by plaintiff is facially defective. Plaintiff submitted an affidavit of service reflecting that it served Freddy Maldonado (“Maldonado”) and that defendant “knew said individual to be authorized to accept service thereof.” However, defendant now submits the affidavit of Maldonado who affirms that he is an administrative worker and delivery man for defendant and, thus, not an officer, director or agent authorized to accept service of any legal papers on defendant’s behalf. (NYSCEF Doc. No. 24, *Maldonado’s affidavit*; 31, *affidavit of service*).

In opposition to the cross-motion and in further support of its motion, plaintiff maintains that its affidavit of service is not facially defective insofar as it states that Maldonado was authorized to accept service on behalf of defendant. He nevertheless effectuated service again on defendant on August 11, 2021 by serving Maddock, defendant’s general counsel, within the 120-day time limit of service pursuant to CPLR 306-b. Plaintiff also argues that, it is also clear, based on defendant’s opposition and cross-motion, that defendant has received notice of the pendency of this action.

Addressing the request for a preliminary injunction, plaintiff argues that it has established a likelihood of success on the merits because defendant cannot dispute that it has an obligation to pay plaintiff’s legal fees and that the dispute regarding the “reasonableness” of the fees to be advanced should more properly be addressed in a later proceeding. Plaintiff claims that the arguments raised by defendant regarding non-binding mediation and arbitration, pursuant to the engagement letter, are also unavailing because defendant is neither a party nor a third-party beneficiary of said agreement; therefore, defendant cannot enforce the retainer agreement’s dispute resolution provisions. Defendant also argues that the purported billing errors and irregularities amount to an improper delay tactic; that the objections fail to identify any reason to

question the reasonableness of the firm's fees and that those objections can be addressed following the trial in the federal action. (NYSCEF Doc. No. 43, *memorandum of law in reply*).

To prevail on a motion for injunctive relief, a movant "is required to make a clear showing of likelihood of ultimate success on the merits, that it will suffer irreparable injury unless the relief sought is granted and that the balancing of the equities lies in its favor." (*OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 [1st Dept 2007] [internal quotation marks and citation omitted]; see *Metro. Steel Indus., Inc. v Perini Corp.*, 50 AD3d 321, 322 [1st Dept 2008].)

Here, as an initial matter, the application seeking payment of legal fees and costs in advance of the trial scheduled in the federal action is now moot insofar as the federal action has already proceeded to trial and, as of Friday, October 22, 2021, a jury rendered a verdict against plaintiff. (see United States Department of Justice, U.S. Attorney's Office for the Eastern District of New York, <https://www.justice.gov/usao-edny/pr/navillus-construction-executives-convicted-embezzling-union-benefits-funds> [last accessed Dec. 12, 2021].) By letter dated January 18, 2022, counsel for plaintiff has confirmed that the trial concluded on October 22, 2021. (NYSCEF Doc. No. 58, *letter*).

Assuming, *arguendo*, this court were to find that the action is not moot, plaintiff nevertheless fails to establish its entitlement to the drastic relief of a preliminary injunction. While it is undisputed that defendant has agreed to pay *reasonable* attorney's fees and costs expended in the federal court action, plaintiff fails to attach to his moving papers a bill of costs or some other itemized document to establish the reasonableness of the fees herein sought. Instead, the application relies solely on plaintiff's counsel's representation that the invoices rendered to defendant, and the amount due, reflect an accurate accounting of the work performed and billed. And, even if this court were to credit plaintiff's argument that the execution of the agreement establishes a likelihood of success on the merits given that defendant does not dispute its agreement to pay legal fees and costs, and, having considered plaintiff's assertion that defendant's remedy for recouping excessive fees should be subject to a separate litigation (see generally *United States v Stein*, 452 F Supp 2d 230, 272-273 [SDNY 2006]; *Dupree v Scottsdale Ins. Co.*, 96 AD3d 546, 546 [1st Dept 2012]), this court nevertheless finds that, under the present circumstances, plaintiff has failed to demonstrate irreparable harm sufficient to establish entitlement to injunctive relief.

While this court acknowledges that "[d]eprivation of a right to a defense may well constitute irreparable harm" (*Kaloyeros v Fort Schuyler Management Corp.*, 55 Misc 3d 1082, 1090 [Sup Ct, Albany County 2017], *affd* 157 AD3d 1152 [3d Dept 2018]), there is simply no proof that plaintiff's ability to defend against the criminal charges in federal court was, and will continue to be, prejudiced absent a preliminary injunction in this action. There is no basis for concluding that the firm intends to withdraw as counsel such that defendant will be without an attorney in the criminal proceedings. Quite the contrary, in its January 18, 2022 letter, counsel for plaintiff confirms that "[the firm's] representation of Mr. Naughton in [the federal action] is ongoing"; that it is engaging in briefing post-trial motions; and that, if the post-trial motions are denied, "[the firm] will also represent Mr. Naughton in connection with sentencing submissions and the sentencing hearing, and thereafter on appeal." Importantly, the January 2022 letter also

confirms that, since oral argument on this motion, defendant has made “partial payment” in the amount of \$436,000.00 towards defendant’s defense in the federal action. (see *Kaloyeros v Fort Schuyler Mgt. Corp.*, 55 Misc 3d at 1090.) Therefore, plaintiff has failed to establish that the stated harm, i.e., his inability to present a defense in the criminal proceedings, is imminent and likely to occur absent a preliminary injunction. Thus, after balancing the equities, plaintiff’s motion seeking a preliminary injunction is denied in its entirety.

Turning next to the cross-motion, this court agrees that, in light of Maldonado’s affidavit, the original service on defendant was defective insofar as it failed to comply with CPLR 311. CPLR 311 provides that personal service on a corporation may be accomplished by, *inter alia*, delivering the pleadings “to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service” and Maldonado’s affidavit establishes that he was not authorized to accept process on behalf of defendant. However, plaintiff served defendant, albeit after the filing of plaintiff’s motion, in accordance with CPLR 306-b, which provides that “[s]ervice of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding.” Thus, the court has since obtained personal jurisdiction over defendant, within 120 days from the filing of the summons and complaint and, thus, the issue of personal jurisdiction is rendered moot. Moreover, defendant has interposed an answer in this action, and it does not dispute that Maddock is authorized to accept process on its behalf. Thus, the cross-motion is denied as moot.

Lastly, finding defendant has established good cause for sealing, it is hereby ordered that the motion seeking sealing of NYSCEF Doc. Nos. 28 and 29 is granted, without opposition. Accordingly, it is hereby

**ORDERED** that plaintiff’s motion seeking a preliminary injunction (motion sequence 002) is denied; and it is further

**ORDERED** that defendant’s cross-motion seeking dismissal of the summons and complaint pursuant to CPLR 3211(a)(8) is denied as moot; and it is further

**ORDERED** that defendant’s motion seeking sealing (motion sequence 003) is granted, without opposition; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff; and it is further

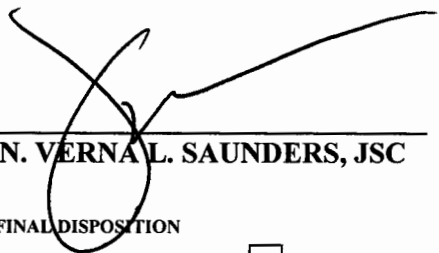
**ORDERED** that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141 B) of a copy of this order with notice of entry, to seal NYSCEF Doc. Nos. 28 and 29, and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

**ORDERED** that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

January 20, 2022

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED  
 GRANTED

DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE