At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of March 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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BORBONI, LLC., ANGELO BONDI, SALVATORE FRATERRIGO, and EMANUELA PACIFICO

*Plaintiffs*,

-against-

MAURIZIO DE ROSA, GIANCARLO QUALDATI and GIANQUA, LLC.,

*Defendants.*

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Index No. 515268/2022

DECISION AND ORDER

Motion Sequence #1 & #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| | Papers Numbered (NYSCEF) |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 1-8, 10, 20 |
| Opposing Affidavits (Affirmations) | 11, 13-18, 23-28 |
| Reply Affidavits (Affirmations) | 22 |
| Memorandum of Law | |



After a review of the papers, the Court finds as follows:

The Plaintiffs, Borboni, LLC, Angelo Bondi, Salvatore Fraterrigo and Emanuela Pacifico (collectively the "Plaintiffs") move (motion sequence #1) by Order to Show Cause for injunctive relief (preliminary injunction) relating to Plaintiffs' property and the real property located at 284 Grand Street, Ground Floor, Brooklyn, NY. Pursuant to said Order to Show Cause, dated May 25, 2022, the Honorable Richard Montelione granted a temporary restraining order which provided, *inter alia*, that Defendants, Maurizio De Rosa ("De Rosa"), Giancarlo Qualdati, and Gianqua, LLC ("Owner Defendants") (collectively the "Defendants"), and the sheriff of the City of New York,

pending a hearing in this matter, be enjoined from "taking any action to relet, sell, transfer or encumber Plaintiff's property or the leased Premises." De Rosa cross-moves (motion sequence #2) for an order "to Appoint an Independent Auditor and Administrator to Borboni, LLC, as Maurizio De Rosa has resigned as manager on June 16, 2022, for non-payment of his salary as provided in the stockholder's Agreement, and the Plaintiffs have failed to appoint a new manager."

Motion Sequence #2

As an initial matter, Motion Sequence #2 is denied. Defendant De Rosa relies upon an affidavit he previously filed in opposition to Motion Sequence #1. Motion Sequence #2 was filed thereafter. The affidavit[1] (June 6, 2022) predates the date of De Rosa's purported resignation as manager of Plaintiff LLC (June 16, 2022), as reflected in the notice of motion (June 20, 2022). Also, the affidavit makes no reference to the relief sought, as required. *See* CPLR 2214(a). The Court need not address the application further. The motion is denied.

Motion Sequence #1

Defendant LLC apparently leased the Premises with an ancillary personal guarantee. Generally, Plaintiffs seek injunctive relief restraining Defendants from, 1) reletting the Premises, 2) selling, transferring or encumbering the leased Premises, and 3) selling, gifting, transferring, or encumbering any of the equipment, trade fixtures, or furnishings of Plaintiff LLC. Plaintiffs allege

[1] The Court notes that the affidavit was purportedly sworn in the state of Colorado and does not contain a Certificate of Conformity. This is not fatal. "Parenthetically, we note that even if the Mills [Plaintiff's Senior Foreclosure Litigation Specialist] affidavit was not accompanied by a certificate of conformity, the Appellate Division, Second Department, has typically held, since 1951, that the absence of a certificate of conformity is not, in and of itself, a fatal defect (*see Mack–Cali Realty, L.P. v. Everfoam Insulation Sys., Inc.*, 110 A.D.3d at 680, 972 N.Y.S.2d 310; *Bey v. Neuman*, 100 A.D.3d at 582, 953 N.Y.S.2d 266; *Fredette v. Town of Southampton*, 95 A.D.3d at 941, 944 N.Y.S.2d 206; *Falah v. Stop & Shop Cos., Inc.*, 41 A.D.3d at 639, 838 N.Y.S.2d 639; *Smith v. Allstate Ins. Co.*, 38 A.D.3d at 523, 832 N.Y.S.2d 587; *Raynor v. Raynor*, 279 App.Div. 671, 108 N.Y.S.2d 20). The defect is not fatal, as it may be corrected *nunc pro tunc* (*see U.S. Bank N.A. v. Dellarmo*, 94 A.D.3d 746, 942 N.Y.S.2d 122), or pursuant to CPLR 2001, which permits trial courts to disregard mistakes, omissions, defects, or irregularities at any time during an action where a substantial right of a party is not prejudiced (*see Matos v. Salem Truck Leasing*, 105 A.D.3d at 917, 963 N.Y.S.2d 366; *Rivers v. Birnbaum*, 102 A.D.3d at 44, 953 N.Y.S.2d 232; *Betz v. Daniel Conti, Inc.*, 69 A.D.3d at 545, 892 N.Y.S.2d 477)." *Midfirst Bank v. Agho*, 121 AD3d 343, 351-352, 991 N.Y.S.2d 623, 629-630 [2d Dept 2014].

that the individual Plaintiffs own 60% of Plaintiff LLC and Defendant De Rosa owns 40%. Plaintiffs also allege that De Rosa has a "personal/social relationship" with Defendant Qualdati and that Qualdati is a principal of Defendant LLC, the purported owner of the Premises. Plaintiffs also state that a lease for the Premises was executed between the LLCs on February 9, 2022, with a lease term of ten years starting March 1, 2022 (the "Lease"). Plaintiffs contend that Plaintiff LLC invested $160,000 in renovations, furnishings and equipment, and on or about May 19, 2022, approximately one month after the commencement of business operations, De Rosa, without notice to the Plaintiffs, and without authority, executed a lease termination. Plaintiffs also allege that the Premises were locked and none of the movants' property or equipment were returned.

Defendants oppose the motion. Defendants point to the fact that De Rosa signed the Lease on behalf of the tenant, and personally guaranteed the Lease. He also executed the termination. Defendant Qualdati also contends that Plaintiff LLC has defaulted in payment of the rent and has failed to procure required insurance. De Rosa stated that the business was undercapitalized and he was personally responsible under the Lease, until such time as the tenants surrender possession to the landlord. Defendants argue that the Plaintiffs' application does not satisfy the requirements of a preliminary injunction. Defendants also argue that the Court lacks jurisdiction because Plaintiffs commenced by summons with notice and the only relief sought relates to the preliminary injunction.

As an initial matter, the Court agrees that the nature of the action, as reflected in both the notice and complaint, is for a preliminary injunction and unrelated to an underlying action for other relief. As such, the Court lacks authority to entertain this application. The relief sought in the pleading is not reflective of a judicial action. The preliminary injunction alone is insufficient. *See Matter of Hart Is. Comm. v. Koch*, 150 AD2d 269, 541 N.Y.S.2d 790 [1st Dept 1989]. *See* also

*Parker v. Mack*, 61 N.Y.2d 114, 460 N.E.2d 1316, 472 N.Y.S.2d 882 [1984], *Evans v. Evans*, 273 AD 895, 77 N.Y.S.2d 320 [2d Dept 1948], and *Lynn v. Sterling Natl. Bank*, 151 AD3d 1049, 54 N.Y.S.3d 864 (Mem), 2017 N.Y. Slip Op. 05215 [2d Dept 2017]. This notwithstanding, the Court will also address the merits.

"To be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Ruiz v. Meloney*, 26 A.D.3d 485, 485–86, 810 N.Y.S.2d 216, 217 [2d Dept 2006]. "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual." *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 604, 781 N.Y.S.2d 684, 686 [2d Dept 2004]. However, "[c]onclusive proof is not required, and a court may exercise its discretion in granting a preliminary injunction even where questions of fact exist." *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 A.D.3d 1104, 1106, 48 N.Y.S.3d 251, 254 [2d Dept 2017]. The evidence in support of a preliminary injunction must be clear and convincing (*see East Coast Drilling, Inc. v. Total Structure Enter., Inc.*, 106 AD3d 688, 689, 964 N.Y.S.2d 238, 2013 N.Y. Slip Op. 03057 [2d Dept 2013].

Plaintiffs have not shown a likelihood of success on the merits. This dispute seems to relate to a non-payment dispute and a business partner dispute. The only relief sought is preliminary injunctive relief. The action does not seek relief that would serve to resolve these disputes. There is also no indication that the allegation of non-payment and failure to procure insurance is disputed by the Plaintiffs. Moreover, although a complaint was provided in reply, it does not articulate, with any particularity, that De Rosa and Qualdati engaged in fraud. There is no showing in the papers

of any impermissible relationship, or that De Rosa did not have apparent authority to bind Borboni, LLC. There is nothing more than a conclusory allegation.

Plaintiffs have also failed to show that they would suffer irreparable harm in the event that the injunction was denied. As stated above, Plaintiffs do not suggest that the Owner Defendants' claims of non-payment of rent and failure to procure insurance are disputed. As such, possession does not appear to be the basis for this application. It appears that the value of removable property and equipment is at issue. Plaintiffs have not shown that any of these items are unique. Since any loss of the items can be remedied with the payment of money, the Plaintiffs have not shown irreparable harm. *See Mar v. Liquid Mgt. Partners, LLC*, 62 AD3d 762, 880 N.Y.S.2d 647, 2009 N.Y. Slip Op. 03874 [2d Dept 2009], and *Lombard v. Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 942 N.Y.S.2d 116, 77 UCC Rep.Serv.2d 297, 2012 N.Y. Slip Op. 02467 [2d Dept 2012]. Further, the equities lean in favor of the Defendants. Based upon the presentations before the Court, there is insufficient information to support enjoining the Owner Defendants from operating the property. *See 34 College Point Corp. v. Transpac Capital Corp.*, 12 AD3d 664, 784 N.Y.S.2d 905 [2d Dept 2004], and *Eklund v. Pinkey*, 31 AD3d 908, 819 N.Y.S.2d 586 [3d Dept 2006].

For the reasons stated above, the motion is denied.

Accordingly, it is hereby ordered:

Plaintiffs' motion (motion sequence #1) is denied.

Defendant De Rosa's cross-motion (motion sequence #2) is denied.

Defendants shall serve a copy of this Decision and Order with notice of entry by overnight mail upon Plaintiff's counsel, within 20 days of entry, and the temporary restraining order shall be deemed vacated 20 days after such service.

The foregoing constitutes the Decision and Order of the Court.

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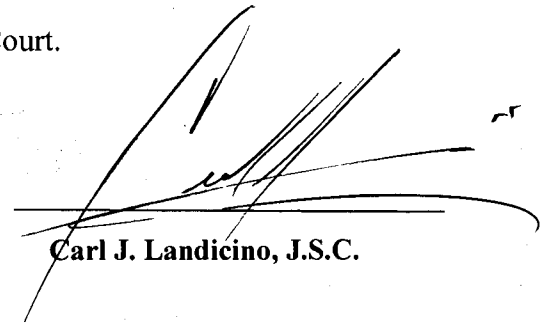

**Carl J. Landicino, J.S.C.**