

Canaanite LLC v Wolfe

2023 NY Slip Op 33301(U)

September 21, 2023

Supreme Court, New York County

Docket Number: Index No. 653065/2023

Judge: Shahabuddeen Abid Ally

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHAHABUDDEN ABID ALLY PART 16TR

Justice

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CANAANITE LLC, INDIVIDUALLY AND AS A REPRESENTATIVE OF BENEFICIARIES OF THE FUNDS HELD IN TRUST BY PETITIONER UNDER ARTICLE 3A OF THE NEW YORK LIEN LAW,

Plaintiff,

- v -

SYDNEY WOLFE, ALBERT MARTINEZ, and ULRIKE D. MARTINEZ MARITAL TRUST B,

Defendants.

DECISION + ORDER ON MOTION

INDEX NO. 653065/2023
MOTION DATE 8/22/2023
MOTION SEQ. NO. 002

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3-19, 26, 31-48 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this action under Lien Law § 77 and related relief, plaintiff now moves for an order: granting the following relief:

- (a) Pursuant to CPLR §§ 6301 and 6311, requiring defendants to deposit security in the amount of \$3,102,464.92 with the court for the pendency of this case; (ii) prohibiting defendants from dispersing any funds from their bank account(s) until and unless one or more of the defendants has deposited the aforementioned security with the Court, and (iii) prohibiting defendants from disposing of or transferring any of the construction materials for the construction project at 95 Greene Street;
- (b) In the event that subheading (a) of this motion is not granted then in the alternative to the relief requested in branch (a), pursuant to CPLR § 6201 issuing an order of attachment against defendants in the amount of \$3,102,464.92 and permitting the sheriff and/or marshal to attach and/or levy defendant's property or assets;
- (c) Pursuant to the Court's inherent authority over discovery, ordering expediting discovery in this action and directing defendants within seven days the following information and documents:
 - i. All books and records required to be maintained by IM LLC and defendants pursuant to Lien Law § 75, which include books and records showing: (a) trust assets

- receivable, (b) trust accounts payable, (c) trust funds received, (d) trust payments made with trust assets, and (e) transfers in repayment of or to secure advances;
- ii. Documents demonstrating the whereabouts of funds transferred by Canaanite to IM LLC on or around October 11, 2022, including identification of all persons or entities to whom the money may have been disbursed, and if it was disbursed, who authorized each specific disbursement;
 - iii. Defendants' account statements for any bank, trust, insurance policy, or other accounts in which the Trust Funds were transferred from the date of any transfer through the present.

And further requiring that, after receipt of the aforementioned information and documents and within seven days, Canaanite be permitted to depose each of the defendants as to the tracing of the Trust Funds and, to the extent Trust Funds were transferred to their personal accounts, the use and present location of those Trust Funds.

Defendants filed opposition and the Court heard oral argument via Microsoft Teams on August 22, 2023.

Background

On October 6, 2022, respondent engaged Interior Management LLC ("IM") by written contract to perform interior renovations to an apartment. The contract provided that the agreed-upon method of binding dispute resolution would be arbitration (petitioner's exhibit B at § 13.2). At the time of execution, the individual petitioners were managing members of IM and petitioner Wolfe served as IM's president. Pursuant to the contract, respondent paid IM a deposit of \$3,102,464.92 ("Deposit").

Prior to the completing the contracted work, IM notified respondent that it would be closing down operations but failed to return the Deposit. After receiving no response to its demand for the return of the Deposit, respondent filed a Demand for Arbitration against IM and all petitioners, seeking money damages, an accounting, and related relief for claims which included breach of contract, breach of fiduciary duty, conversion, and unjust enrichment from IM and petitioners (petitioner's exhibit A). Respondent simultaneously filed an Application for

Emergency Relief under AAA rule 39 seeking books and records or an accounting of the Deposit (petitioner's exhibits D), which was granted by the Emergency Arbitrator (respondent). Pursuant to the order, respondent received certain materials related to IM's financials during the period shortly before and after respondent paid its Deposit.

On May 1, 2023, defendants commenced a special proceeding to stay the Arbitration Proceedings before the undersigned (Index No. 652099/2023). In that proceeding, this Court granted the petition and permanently stayed arbitration as to the individual defendants Wolfe, Martinez, and the Marital Trust. Plaintiff subsequently brought the instant action.

Plaintiff brings claims against defendants pursuant to Article 3-A of the Lien Law, as well as claims for breach of fiduciary duty, conversion, unjust enrichment, and fraudulent inducement. Defendants answered and raised several affirmative defenses. Plaintiff now moves for a preliminary injunction or, in the alternative, an order of attachment pursuant to CPLR § 6301. Plaintiff also seeks expedited discovery.¹

Preliminary Injunction

It is well settled that a party seeking a preliminary injunction must show by clear and convincing evidence “(i) a likelihood of ultimate success on the merits, (ii) irreparable harm if the preliminary injunction is denied, and (iii) a balance of the equities in favor of the moving party” (*Nobu Next Door, LLC v Fine Arts Hous, Inc.*, 4 NY3d 839, 840 [2005]; *Gilliland v Acquafredda Enters, LLC*, 92 AD3d 19, 24 [1st Dept 2001]; CPLR § 6301). The “remedy of granting a preliminary injunction is a drastic one which should be used sparingly” (*McLaughlin, Piven, Vogel, Inc. v W.J. Nolan Co.*, 114 aD2d 165, 172 [1986]), and as such the burden is on

¹ The parties do not dispute that defendant Martinez is currently engaged in bankruptcy proceedings and as such proceedings in this matter are stayed as to defendant Martinez only.

the movant to “establish a clear right to that relief under the law and the undisputed facts” (*Omakaze Sushi Rest. Inc v Ngam Kam Lee*, 57 AD3d 497, 497 [2d Dept 2008]). The decision whether to grant such relief is ordinarily committed to the sound discretion of the trial court (*Doe v Axelrod*, NY2d 748, 750 [1988]).

However, the Court is not persuaded that plaintiff has demonstrated that injunctive relief is necessary to prevent irreparable harm. Generally, “[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm” (*EdCia Corp. v McCormack*, 44 AD3d 991 [2d Dept 2007]) and therefore a preliminary injunction is not available. Plaintiff argues that its demand is based on a claim to a “specific fund,” which grants them recourse to injunctive relief (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545-545 [2000]); *Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn., Inc.*, 21 AD3d 777 [1st Dept 2005]). However, plaintiff has not established here that the Deposit funds exist in an identifiable specific fund whose contents could be protected with injunctive relief. Further, notwithstanding plaintiff’s arguments pursuant to the Lien Law, there has not been sufficient showing that an award of money damages would not adequately compensate it (*see Zodkevitch v Feibush*, 49 AD3d 424 [1st Dept 2008]) *US Re Cos v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007]); *ERS Enters v. Empire Holdings*, 286 AD2d 206, 207 [1st Dept 2001]). Because plaintiff has not established this necessary element, the motion for a preliminary injunction is denied.

As Plaintiff has not established irreparable harm, the Court need not address the remaining factors.

Order of Attachment

Plaintiff argues in the alternative that it is entitled to an order of attachment pursuant to CPLR § 6201 and seeks an order permitting the sheriff and/or marshal to attach and/or levy the

defendants' property or assets. CPLR § 6201 provides, in relevant part, that an order of attachment may be granted where the plaintiff has demanded and would be entitled to a money judgment and where, "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" (CPLR § 6201[3]). Mere "removal, assignment or other disposition of property is not a sufficient ground for attachment; fraudulent intent must be proven, not simply alleged or inferred, and the facts relied upon to prove it must be fully set forth in the moving affidavits" (*Abacus Fed. Sav. Bank v Lim*, 8 AD3d 12, 13 [1st Dept 2004]); *Mitchell v Fidelity Borrowing LLC*, 34 AD3d 366, 366-67 [1st Dept 2006]).

Here, the plaintiff has not made the requisite showing of fraudulent intent, specifically, that any dispersal or other disposition of property was made with the intent to defraud creditors. Accordingly, plaintiff's motion in the alternative for attachment is denied.

Expedited Discovery

Finally, petitioner requests limited, targeted discovery regarding the movement of the Deposit funds and depositions of the defendants to take place within seven days. The decision to grant or deny expedited discovery is within the discretion of the Court (*see J.G. v Zachman*, 34 AD3d 1277, 1278 [4th Dept 2006]). The Court finds that plaintiff has demonstrated that the documents sought are relevant and necessary to this proceeding and are likely to be in the sole possession of the defendants (*see Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd.*, 5 Misc 3d 285 [Sup Ct, New York County 2004]; *see also Bel Geddes v Zeiderman*, 228 AD2d 393 [1st Dept 1996]). As such, plaintiff's motion for expedited discovery, including limited depositions relating to tracing of the Deposit funds, is granted.

Conclusion

Based on the foregoing, plaintiff's motion is denied as to the preliminary injunction and attachment but granted as to expedited discovery. Accordingly, it is hereby:

ORDERED that petitioner's motion for a preliminary injunction is denied; and it is further

ORDERED that petitioner's motion in the alternative for attachment is denied; and it is further

ORDERED that petitioner's motion for expedited discovery is granted to the following extent that the following documents should be produced by defendants to petitioners on or before September 29, 2023:


- a. All books and records required to be maintained by IM LLC and defendants Wolfe and the Trust pursuant to Lien Law §75 in defendants' possession or control, including without limitation books and records showing: (a) trust assets receivable, (b) trust accounts payable, (c) trust funds received, (d) trust payments made with trust assets, and (e) transfers in repayment of or to secure advances;
- b. Documents demonstrating the whereabouts of funds transferred by Canaanite to IM LLC on or around October 11, 2022, including identification of all persons or entities to whom the money may have been disbursed, and if it was disbursed, who authorized each specific disbursement;
- c. As to defendants Wolfe and the Trust, defendants' account statements for any bank, trust, insurance policy, or other accounts in which the Deposit funds were transferred from the date of any transfer through the present.

and it is further

ORDERED that on or before September 29, 2023, defendants Wolfe and the Trust shall be scheduled for limited depositions relating to the tracing of the Deposit funds and, to the extent the Deposit funds were transferred to their personal accounts, the use and present location of those Deposit funds, and which shall take place no later than thirty days after scheduling; and it is further

ORDERED that any requested relief not expressly granted herein has been considered and is denied.

This constitutes the decision and order of the Court.



SHAHABUDDEN ABID ALLY, A.J.S.C.

9/21/2023
 DATE

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER
 APPLICATION: SETTLE ORDER SUBMIT ORDER
 CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE