SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 16**
RC'S SHORT STOP, INC. and JOHN SWOBODA,	**NASSAU COUNTY**
Plaintiffs,	**Index No: 016649-11**
	Motion Seq. No: 1
-against-	**Submission Date: 1/10/12**
ROGER SWOBODA and ROGER CHARLES REALTY CORP.,	
Defendants.	
----------x	

Papers Read on this Motion:

Order to Show Cause, Affidavit in Support, Affirmation in Support and Exhibits.....x
Affidavit in Opposition and Exhibits.....x
Affidavit of C. Swoboda in Opposition.....x
Affirmation in Opposition.....x.

This matter is before the court on the Order to Show Cause filed by Plaintiffs RC's Short Stop, Inc. ("RC") and John Swoboda ("John") (collectively "Plaintiffs") on December 1, 2011 and submitted on January 10, 2012. For the reasons set forth below, the Court denies Plaintiffs' Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiffs seek an Order directing Defendants Roger Swoboda ("Roger") and Roger Charles Realty Corp. ("Realty Corp.") (collectively "Defendants") to restore possession of premises ("Premises") known as and located at 525 Westbury Avenue, Carle Place, New York to

Plaintiffs and enjoining Defendants from further interfering with Plaintiffs' operation of their business.

Defendants oppose Plaintiffs' application

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to DeSimone Aff. in Supp.) alleges as follows:

On or about April 3, 2004, John purchased from Roger all shares of RC ("Purchase"). Pursuant to the Purchase, on or about April1, 2004, RC entered into a lease agreement ("Lease") with Roger. At the time of the Purchase, and continuing to date, RC has operated a store at the Premises. The purchase price of $1,045,114.80 included the fixtures and equipment set forth in the schedule provided (Ex. A to Compl.).

The Complaint contains three (3) causes of action: 1) Roger and Realty Corp., on or about October 28, 2011, forcibly ejected Plaintiffs from possession of the Premises and remain in unlawful possession of the Premises, for which Plaintiffs seek monetary damages; 2) Roger and Realty Corp., on or about October 28, 2011, unlawfully took possession of the Premises, constituting wrongful interference with Plaintiffs' business, for which Plaintiffs seek injunctive relief; and 3) on or about October 28, 2011, Roger wrongfully converted Defendants' fixtures, cash and inventory to his own use, for which Plaintiffs seek monetary damages.

In his Affidavit in Support, John affirms that he is the President and sole shareholder of RC. On or about April 3, 2004, John purchased from Roger, his father, all of the shares in RC which operated a convenience store ("Store") at the Premises. Pursuant to that Purchase, John entered into the Lease with Realty Corp. to occupy the Premises where he operated the Store. John affirms that Roger misrepresented the profitability of the Store and inflated the Purchase price of the Store. John was unable to generate sufficient revenues to meet operating expenses and payment of the promissory notes ("Notes") that were part of the Purchase price. Roger subsequently agreed to forebear from enforcing the payment terms, and provided John with additional time to make payments. John avers that he relied on Roger's promise to forebear required payments in not pursuing the sale of the Store to a third party which would have provided him with funds to pay off the Notes. John has paid Roger over $500,000 to date.

John avers, further, that on or about October 28, 2011, Roger "coerced" him to leave the Premises (John Aff. in Supp. at ¶ 6) and "threatened force" if John attempted to return (*id.*). John affirms that Roger forced him to leave the Premises without advance notice, and has not permitted John to return to the Premises. Defendants have changed the locks at the Premises, installed a new security system and intend to change the Store's name. In addition, Defendants have converted the fixtures at the Premises and are selling the inventory. As a result, John has lost goodwill and his business opportunity, and his credit has suffered as a result of Defendants' failure to pay for inventory purchased in RC's name. The Store is John's sole source of income and he is unable to provide for his family as a result of Defendants' allegedly improper conduct.

John also notes that the Contract of Sale (John Aff. in Supp. at Ex. B) contains a restrictive covenant that prevents Roger from working at the Store. Specifically, Section 11 of the Contract of Sale provides that:

> Seller agrees that, from and after the closing, he will not, unless acting as an officer or employee of the Company, or with Buyer's prior written consent, directly or indirectly own, manage, operate, join, control, or participate in, or be connected as an officer, employee, partner, or otherwise with, any business under any name similar to the Company's name, and that for a period of five years after the closing, he will not in any such manner directly or indirectly compete with, or become interested in any competitor of, the Company. The Seller acknowledges that the remedy at law for any breach by either of them of the foregoing will be inadequate, and that the Company and the Buyer shall be entitled to injunctive relief.

In opposition, Roger affirms that Defendants have interposed a Verified Answer with Counterclaim (Ex. B to Roger Aff. in Opp.) in which they asserted three (3) counterclaims alleging that 1) Plaintiff is in default of its obligations to make payments for the Purchase and owes Defendants the sum of $674,972.02; 2) Plaintiff is in default of the Lease by virtue of its failure to make required rent payments since March 1, 2010, entitling Defendants to possession of the Premises and judgment in the amount of $63,000; and 3) during their operation of the Premises, Defendants incurred bills in the amount of $9,200 to vendors and utilities that they have failed to pay, which Plaintiffs have now paid on Defendants' behalf.

Roger affirms that the Purchase payments were secured by a Note and Security Agreement (Ex. D to Roger Aff. in Opp.). In addition, RC entered into the Lease (*id.* at Ex. E) pursuant to which RC agreed to pay annual rent equal to the actual amount of real estate taxes

and insurance due on the Premises. Plaintiffs have not made any Note or rent payments since March 1, 2010 and, as a result, $674,972.02 is now due on the accelerated Notes, and approximately $63,000 is due as back rent. Roger recently learned, in addition, that Plaintiffs have not been paying vendors and utilities for the Premises and "there was a serious risk the business would be lost thereby destroying my security" (*id.* at ¶ 7). Accordingly, on October 28, 2011, Roger went to the Store with his wife Caroline Swoboda ("Caroline") and spoke with John. Roger asked John to surrender the Store to Roger so that he could take over the Store to prevent its demise. John confirmed that he was unable to pay Roger or the Store's vendors and agreed to surrender the Premises to Roger. Roger disputes that he made any threats to John and describes their meeting as "extremely calm" (*id.* at ¶ 8).

Since October 28, 2011, Roger has operated the Store and has repaid many of its outstanding debts. John never advised Roger that he wished to reenter the Premises until he filed the instant action more than thirty days after he surrendered the Premises to Roger. John still has insufficient funds to pay the arrears under the Notes and Lease, or to pay the Store's vendors. Roger submits that permitting John to resume possession of the Store will lead to its demise and cause irreparable harm to the Store, whose business Roger built up for a period of twenty five years.

In her opposition to Plaintiffs' application, Caroline affirms that she is John's mother and Roger's wife. In October of 2011, Caroline accompanied Roger to the Store where they spoke with John about his inability to run the Store, pay its vendors and utilities and pay Roger for the Purchase. She affirms, further, that she and Roger had discussed similar issues with John in the past. She describes their meeting with John as "extremely calm" (Caroline Aff. in Opp. at ¶ 6) and affirms that no threats were made by anyone. Caroline affirms that Roger asked John to surrender the Premises so that Roger could take over the Store and "save the business" (*id.*) and John agreed.

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to the requested injunctive relief by establishing that Defendants unlawfully evicted Plaintiffs from the Premises and have refused to restore Plaintiffs to the Premises despite due demand. In light of Defendants' alleged

conversion of cash and inventory, failure to pay for goods ordered in RC's name and intention to change the Store's name, Plaintiffs will lose goodwill and the benefits of the Store if the requested injunctive relief is not graunted.

Defendants oppose Plaintiffs' application submitting that, in light of Plaintiffs' default of their obligations under the Note and Security Agreement and Lease, Defendants acted properly in entering the Premises and assuming operation of the Store. Paragraph 2(f) of the Security Agreement provides, in pertinent part, as follows:

> Upon any default of the Debtor and at the option of the Secured Party, the obligations secured by this agreement shall immediately become due and payable in full without notice or demand and the Secured Party shall have all the rights, remedies and privileges with respect to repossession, retention and sale of the collateral and disposition of the proceeds as are accorded to a Secured Party by the applicable actions of the Uniform Commercial Code respecting "Default", in effect as of the date of this Security Agreement.
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> If the Debtor shall default in the performance of any of the provisions of this agreement on the Debtor's part to be performed, Secured Party may perform same for the Debtor's account and any monies expended in so going shall be chargeable with interest to the Debtor and added to the indebtedness secured hereby.

Defendants submit, further, that John is in default under the Lease by not paying the real property taxes or insurance fee for the last two years. Pursuant to paragraph 6 of the Lease, Defendants may reenter the Premises upon a default in the payment of rent. Defendants note that John does not deny that he is in default of his obligations to Defendants, and contend that Plaintiffs initially consented to surrendering the Premises and then "feigned protest"over Roger's operation of the Store (Gillette Aff. in Opp. at ¶ 7) by commencing this action. Defendants submit that the meeting in October of 2011 was peaceful, and dispute Plaintiffs' characterization of the circumstances under which John surrendered possession of the Store.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving

papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Application of these Principles to the Instant Action

The Court denies Plaintiffs' Order to Show Cause in its entirety. Plaintiffs have not established a likelihood of success on the merits in light of 1) Defendants' affirmations regarding Plaintiffs' defaults under the Note, Security Agreement and Lease, 2) Plaintiffs' failure to dispute those defaults, 3) the factual disputes regarding the circumstances under which Defendants retook possession of the Store, and 4) the provisions in the Security Agreement and Lease permitting Defendants to retake possession of the Premises in the event of defaults under those agreements. Moreover, Plaintiffs have not demonstrated that a balancing of the equities favors Plaintiffs, in light of Roger's affirmations regarding his numerous years of building up the Store's business, John's inability to operate the Store successfully, and Roger's recent efforts to repay obligations incurred by John during his operation of the Store.

In light of the foregoing, the Court denies Plaintiffs' Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on February 23, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
January 23, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.