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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

B&M LINEN CORP. and 220 COSTER LLC,

Plaintiffs,

-against-

220 LAUNDRY LLC, ELIOT SPITZER, MICHAEL STEINBERG and ADAM J. TELLER,

Defendants.

-against-

MIRON MARKUS and BORIS MARKUS,

Additional Counterclaim Defendants.

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220 LAUNDRY LLC and ELIOT SPITZER,

Third-Party Plaintiffs,

-against-

MIRON MARKUS and BORIS MARKUS,

Third-Party Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 11-013989

MOTION SUBMISSION DATE: 3-5-12

MOTION SEQUENCE NO. 01, 02, 03, 04

There are currently four motions pending before this Court in the above-entitled action. In Mot. Seq. No. 1, Defendants 220 LAUNDRY LLC, ELIOT SPITZER,

MICHAEL STEINBERG, and ADAM J. TELLER (hereinafter referred to as "Defendants") move for a preliminary injunction as follows:

i) restoring Defendant 220 Laundry to immediate possession of the 220 Coster Street laundry facility;

ii) barring Plaintiffs and their principals, representatives and agents from the facility and barring them from any interference with the business operations of the facility by 220 Laundry;

iii) directing Plaintiff B&M to account immediately for all sums received and all payments made from and including September 27, 2011 to the date of such accounting as a result of operations at the facility;

iv) suspending all payment obligations on the part of Purchaser and its guarantors, pending further Order of the Court upon a determination of the amount by which monthly expenses for water and gas service to the facility were wrongfully misstated by Plaintiffs and/or Additional Counterclaim Defendants, and directing that discovery proceed immediately as to said monthly expenses;

v) directing Seller and its principals and representatives to comply immediately with all obligations contained in the closing documents relating to the transfer of operational control of the 220 Coster Street facility from Seller to Purchaser, including but not limited to those provisions relating to the email address and website for the business; and

Movants did not request any temporary relief. Plaintiffs B&M LINEN CORP. and 220 COSTER LLC (hereinafter "Plaintiffs") oppose said relief for reasons set forth below.

In Mot. Seq. No. 03, Defendants sought a temporary restraining order and injunctive relief pending determination of Mot. Seq. No. 01 to restrain and enjoin

Plaintiffs and Third Party Defendants/Additional Counterclaim Defendants MIRON MARKUS and BORIS MARKUS (hereinafter "Markus") from "selling, assigning, pledging, encumbering or otherwise transferring any of the assets of Plaintiffs...or otherwise granting to any third party the right to operate" the laundry business at 220 Coster Street, Bronx, New York. The Court granted a temporary restraining order to said effect "except for ordinary operating expenses in the regular course of business" by Order to Show Cause dated February 8, 2012.

This second Order to Show Cause arose out of Defendants' investigation into whether the utility bills provided by the Plaintiffs during due diligence were accurate. Subpoenas were served upon Con Edison and the first response was received the day before oral argument on the first Order to Show Cause (held on January 5, 2012). Subsequently, a second response was received on January 26, 2012 and the second Order to Show Cause followed.

Defendants claim that Con Edison determined there was a theft of past services by B & M in excess of $5 million and Con Edison demanded payment of same from B & M or service would be shut off thereby putting the laundry out of business. Defendants further claim that this theft of services establishes that B & M cannot prevail on its claims and that Defendants will prevail on their Counterclaims that B & M and MARKUS fraudulently concealed the actual utility costs. In support, Defendants produced copies of Con Edison investigative reports, emails, and other documents purportedly prepared by Con Edison.

In Mot. Seq. No. 02, Defendants/Third Party Plaintiffs move for default judgment against Plaintiffs and the Third Party Defendants for failure to file and serve a Reply or an Answer pursuant to CPLR 3012.

In Mot. Seq. No. 04, Plaintiffs and Third Party Defendants cross-moved to extend the time to serve a Reply and an Answer and for default judgment against Defendants due to their service of an unverified Answer pursuant to CPLR 3020.

This action arises out of the purchase of a laundry business by Defendants from Plaintiffs located at 220 Coster Street, Bronx, New York, In May 2011. Prior thereto, Plaintiff B & M Linen Corp. (hereinafter "B & M") was operating a commercial laundry facility at the above address. B & M is solely owned by Additional Counterclaim Defendant BORIS MARKUS, whose son MIRON MARKUS, is an officer of B & M.

On November 10, 2010, Defendant ELIOT SPITZER entered into an Asset Purchase Agreement with B & M. SPITZER assigned all his rights under the Agreement to Defendant 220 LAUNDRY LLC at the closing.

Based upon information provided prior to closing and upon the warranties and representations in said Agreement, a Modification of Assets Purchase Agreement was entered into at the closing on May 19, 2011, as well as the following documents:

a) Promissory Note in the principal amount of $1,000,000;

b) Promissory Note in the principal amount of $8,600,000;

c) a Personal Guaranty of the $8,600,000 Note;

d) Security Agreement in favor of B & M, securing 220 Laundry's obligations under the $8,600,000 Note, covering all assets "as were transferred by Secured Party to the Debtor in accordance with an Assets Purchase Agreement and a bill of sale dated May 23, 2011";

e) Security Agreement in favor of B & M, securing 220 Laundry's obligations under the $1,000,000 Note, covering all assets "as were transferred by Secured Party to the Debtor in accordance with an Assets Purchase Agreement and a bill of sale dated May 23, 2011"; and

f) Lease for the business premises, running between 220 Coster, LLC, as Landlord, and 220 Laundry, as Tenant, the identity of the tenant being set forth in the Modification.

All originals and copies of the closing documents were to be held in escrow by Plaintiff B & M's attorney until the $1,000,000 Note was fully paid. The Agreement included an agreement for MARKUS to consult for a six-month period, terminable by Defendants at any time.

Defendants claim that post-closing MIRON MARKUS and BORIS MARKUS "consistently and systematically" interfered with the operation of the business in numerous ways set forth in the Affidavit of ELIOT SPITZER dated November 6, 2011 (paragraphs 31-36). On September 27, 2011, a meeting was held between all principals and their counsel. When SPITZER advised that the consulting agreement was terminated, counsel for B & M allegedly offered to "undo" the transaction or allow SPITZER to proceed with the business. SPITZER chose the latter, but B & M's counsel advised that this was agreeable provided they were not in default.

At that point, B & M advised that the monthly payment under the 8.6 million dollar Note due on Friday, May 23, 2011 was not paid timely. SPITZER alleged in his affidavit he personally paid same on Sunday, May 25th due to his observance of the Jewish Sabbath. Additionally, SPITZER states that on or about September 25, 2011 a Note payment was delivered to B & M and not deposited by B & M. Nonetheless, B & M demanded payment of an unpaid note payment in the First Cause of Action in the Complaint dated September 27, 2011. SPITZER contends no payments were unpaid on said date.

A Notice of Default was annexed to the Complaint, alleging that the September 23 payment "was not timely made" and "other events of default" occurred. B & M declared a material default and stated in relevant part as follows:

> Whereas the payment due on 9/23/2011 was not timely made, and
>
> Whereas other events of default under the Modified Agreement, Lease, Note, and related Document has occurred,
>
> The Seller hereby notifies the Purchaser that a material default has occurred under the Note, and that no cure provision is present in either the Note, Modified Agreement, or any related document, and that
>
> In accordance with Section 50.3.2 of the Modified Agreement, the Seller hereby declares that no sale has occurred, and all assets transferred to the Purchaser are hereby reclaimed by the Seller.
>
> In accordance with Section 50.3.3.2 the Purchaser has no further right to occupy the Premises.
>
> The Purchaser is hereby informed that the presence of the Purchaser or his agents on the Premises after 9/27/2011 shall be deemed as trespass.

Defendants state that based on the Notice of Default and the facts and circumstances set forth in the moving papers, including hostile and violent behavior by the Additional Defendants MARKUS, they have not returned to the laundry facility, which is now being operated by Plaintiffs and the Third Party Defendants. Further, one of 220 LAUNDRY's employees was denied access to the facility on September 29, 2011 by BORIS MARKUS.

Based on this, Defendants seek the injunctive relief set forth above in Mot. Seq. No. 01. Plaintiffs and Third Party Defendants oppose said relief. Said motion is denied for the reasons set forth below.

"A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (*Radiology Associates of Poughkeepsie, PLLC v. Drocea*, 87 AD3d 1121, 1123). More specifically, to establish entitlement to a preliminary injunction must "demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor" (*84-85 Gardens Owners Corp. v. 84-12 35th Ave. Apartment Corp.*, 91 AD3d 702; *306 Rutledge, LLC v City of New York,* 90 AD3d 1026, 1028 *see*, CPLR 6301; *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Perpignan v. Persaud*, 91 AD3d 622). The decision whether to grant or deny the remedy, "which should be used sparingly," rests in the sound discretion of the Supreme Court (*Doe v Axelrod*, 73 NY2d 748, 750 [1988];

Trump on the Ocean, LLC v. Ash, 81 AD3d 713, 715 *see*, 61 *West 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330, *aff'd*, 16 NY3d 822 [2011]).

With these principles in mind, and at this early juncture of the proceeding, the Court finds that the defendants have not established a clear right to the relief sought (*e.g*, *306 Rutledge, LLC v City of New York, supra*, 90 AD3d 1026, 1028; *Cooper v. Board of White Sands Condominium*, 89 AD3d 669, 670; *Board of Managers of Wharfside Condominium v. Nehrich*, 73 AD2d 822).

Subsequent to the Court's signing of the second Order to Show Cause, and the receipt of letters from counsel for all parties on February 21 and 22, 2012, the Court, by short form order dated February 23, 2012, ordered a hearing "concerning the shut off of gas service by Con Ed" on March 5, 2012, and other relief. The Court restored both Orders to Show Cause and the other pending motions to the calendar for said date.

Thereafter, and based upon the letters from Defendants' counsel dated March 2 and 5, 2012, Defendants advised there was no need to proceed with the hearing. Plaintiffs did not wish to proceed with the hearing based on that statement. Accordingly, the hearing was cancelled and all motions marked submit. The Court has not received certified copies of Con Ed's documents or other evidence in admissible form concerning the investigation and any payment agreement with Con Edison.

It is settled, that the purpose of a preliminary injunction is to maintain the status quo (*Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 *see*, *Rutledge, LLC v. City of New York*, *supra*, 90 AD3d 1026, 1028). The *pendente lite* remedy demanded here, however, is tantamount to a status

quo-altering, mandatory injunction which would also award the defendants portions of the "ultimate relief" sought in their counterclaims and third party actions. *See generally, 306 Rutledge, LLC v. City of New York, supra*, 90 AD3d at 1028; *In re Marciano v. Champion Motor Group, Inc.*, ___Misc.3d.___, 2007 WL 4473342 [Supreme Court, Nassau County 2007] *see also, Board of Managers of Wharfside Condominium v. Nehrich,* 73 AD3d 822, 824; *Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 1053; *Village of Westhampton Beach v Cayea*, *supra*, 38 AD3d 760, 762; *Rosa Hair Stylists, Inc. v. Jaber Food Corp.*, 218 AD2d 793, 794).

Significantly, a mandatory injunction, "which is used to compel the performance of an act * * * is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action" (*Matos v. City of New York*, 21 AD3d 936, 937; *Rosa Hair Stylists v. Jaber Food Corp.*, *supra*, 218 AD2d 793, 794 *see, Kane v. Walsh*, 295 NY 198, 205-206 [1946]; *306 Rutledge, LLC v City of New York, supra*, 90 AD3d 1026, 1028). Relatedly, and "absent extraordinary circumstances" – not demonstrated here – a preliminary injunction will not issue where to do so would "grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 729; *Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348-349 *see*, *306 Rutledge, LLC v City of New York, supra*).

In sum, and upon carefully weighing the constellation of relevant factors and balancing of the equities, the Court concludes in its discretion that granting the drastic, equitable remedy sought in the Order to Show Cause dated November 14, 2011 (Mot. Seq. No. 01) is not warranted. It bears noting, however, that the Court's holding with respect to that motion for preliminary injunctive relief is not a determination on the merits of the defendants' claims (*e.g., J. A. Preston Corp. v Fabrication Enters.,* 68 NY2d 397, 406-407 [1986]; *Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 703). It follows that if the defendants ultimately succeed in establishing that, *inter alia*, the plaintiffs/third party defendants breached the agreements and that the allegations of fraud concerning Con Edison billings are established by admissible evidence, they may be ultimately entitled to a damage award and/or the issuance of mandatory injunctive relief, as requested in their counterclaims (*see*, *Rutledge, LLC v. City of New York*, *supra*, 90 AD3d 1028).

Further, the Court upon review of all the relevant factors and a balancing of the equities, concludes in its discretion and in the interest of justice that the request for injunctive relief in the Order to Show Cause dated February 8, 2011 (Mot. Seq. No. 03) is granted only to the extent that the plaintiffs and additional counterclaim defendants are prohibited from selling, assigning, pledging, encumbering, or otherwise transferring any assets of B & M LINEN CORP. or 220 COSTER LLC except for ordinary operating expenses in the ordinary course of business pending further order of the Court, provided that Defendants file an undertaking in the sum of $10,000.00 within twenty (20) days of service of a copy of this order with notice of entry.

The remaining motions for a default judgment (Mot. Seq. No. 02) and for leave to extend the time to serve a Reply and for a default judgment (Mot. Seq. No. 04) are disposed of as follows:

According to defendants, the delay in serving a Reply – which was attributable to an inadvertent, law office failure – was minimal, unintentional and non-prejudicial in import. Upon the record papers submitted, B & M's motion should be denied. The cross-motion for leave to extend the time is granted.

The record indicates that the delay was brief – approximately three weeks – and that the actual default in serving the Reply was neither willful nor the product of bad faith, but rather, occasioned by law office failure which was unintentional (*see generally, Cakmakian v. Maroney,* 78 AD3d 1103, 1104; *Merchants Ins. Group v. Hudson Valley Fire Protection Co., Inc.,* 72 AD3d 762, 764 *see also, Adolph H. Schreiber Hebrew Academy of Rockland, Inc. v. Needleman,* AD3d 791; *Klughaupt v. Hi-Tower Contractors, Inc.,* 64 AD3d 545, 546). Notably, the Court has broad discretion to accept law office failure as a reasonable excuse (*see,* CPLR 2005; *Swenson v. MV Transp., Inc.,* 89 AD3d 924, 925). Moreover, "[w]hether an excuse is reasonable is a determination within the sound discretion of the Supreme Court" (*Walker v. Mohammed*, 90 AD3d 1034; *Adolph H. Schreiber Hebrew Academy of Rockland, Inc. v. Needleman, supra; Swenson v. MB Transp., Inc., supra*). Nor has the defendant shown that it would sustain prejudice if the plaintiff's application were to be granted (*Zeccola & Selinger, LLC v. Horowitz*, 88 AD3d 992, 993; *Giha v. Giannos Enterprises, Inc.,* 69 AD3d 564, 565 *cf., Spitzer v. Schussel*, 48 AD3d 233, 234). Additionally, and for the

purposes of the motion (*Moore v. Day,* 55 AD3d 83, 805), the plaintiff has adequately shown potential merit to its defenses (*Walker v. Mohammed*, *supra; Quis v. Bolden*, 298 AD2d 375).

In sum, the cumulative import of these factors, tempered by the strong public policy favoring dispositions on the merits, supports an exercise of discretion in favor of excusing the delay at issue (*Zanelli v. Jmm Raceway, LLC,* 83 AD3d 697).

The Court has considered the remaining contentions in these motions addressed to verification of the pleadings and in the interest of justice directs that defendants serve and file a Verification of the Answer within twenty (20) days of service of a copy of this order with notice of entry. Plaintiffs shall serve and file a Verified Reply within ten (10) days of service of the Verification of the Answer. All other requests for relief are denied.

Accordingly, the motions are decided as follows:

1. Mot. Seq. No. 01 is denied.

2. Mot. Seq. No. 02 is denied.

3. Mot. Seq. No. 03 is granted to the extent that the plaintiffs and additional counterclaim defendants are enjoined from selling, assigning, pledging, encumbering, or otherwise transferring any assets of B & M LINEN CORP. or 220 COSTER LLC except for ordinary operating expenses in the ordinary course of business pending further order of the Court, provided that Defendants file an undertaking in the sum of $10,000.00 within twenty (20) days of service of a copy of this order with notice of entry.

4. Mot. Seq. No. 04 is denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 16, 2012

STEVEN M. JAEGER, A.J.S.C.