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

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ANTHONY SPOTA,

Plaintiff,

- against -

ELAINE SHURE,

Defendant.

TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 8663-11
Motion Seq. No. 1
Submission Date: 3/22/12

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The following papers have been read on this Order to Show Cause

Order to Show Cause, Emergency Affidavit in Support,
Emergency Affirmation and Exhibits.....x
Affirmation in Opposition and Exhibits.....x
Affirmation in Reply and Exhibit.....x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff Anthony Spota ("Plaintiff") on January 17, 2012 and submitted on March 22, 2012. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause in its entirety and vacates the temporary restraining order issued by the Court (Sher, J.) on January 17, 2012.

BACKGROUND

A. Relief Sought

Plaintiff moves, pursuant to CPLR §§ 6301 and 6313, for an Order staying the proceedings in the related action pending in the District Court of Nassau County, New York, Landlord-Tenant Part, titled *Unified Credit Trust Under the Will of Barnett Shure v. S & S Eatery LLC*, L&T Index

Number 007195-11 ("District Court Action"), pending the hearing of this Order to Show Cause.[1]

Defendant Elaine Shure ("Shure" or "Defendant") opposes Plaintiff's application.

On January 17, 2012, the Court (Sher, J.) issued a temporary restraining order ("TRO") directing that, pending the hearing of this Order to Show Cause, the proceedings in the District Court Action are stayed.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. B to Daw Aff. in Opp.) alleges that this is an action for breach of agreements, both written and oral, arising out of the operation of a delicatessen known as S & S Eatery LLC ("S & S"), located at 908 Rockaway Avenue, Valley Stream, New York.

The Complaint alleges that on July 8, 2010, Plaintiff spoke with Wayne Shure ("Wayne"), son of Defendant, at an antique store located at 904 Rockaway Avenue, Valley Stream, New York. Plaintiff asked Wayne whether he would sell one of the six (6) units in the building where the antique store was located. Wayne advised Plaintiff that Wayne's father, Barnett Shure, had passed away and the building was in probate. Wayne also told Plaintiff that Wayne's mother, the Defendant, was interested in opening a business.

On July 9, 2010, Plaintiff, Defendant and Wayne discussed opening a restaurant, and Defendant expressed her desire to be a partner in such a business. Defendant agreed to use one of the units in the Building for the new business, S & S. As part of the agreement, Plaintiff suggested to Defendant that they use Unit 908 in the Building which had been empty for at least fifteen (15) years. Plaintiff drew up an agreement dated July 9, 2010 pursuant to which Plaintiff and Defendant agreed to share equally the start-up expenses and work together in operating S & S ("Oral Agreement").

On July 12, 2010, demolition and renovation ("Renovation") began at Unit 908 ("Premises") to make improvements to which the parties had agreed. To compensate for the increase in the value of the building as a result of the Renovation, Defendant agreed to abate the rent until the start-up costs were recovered, or for up to five years, whichever occurred first. On

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[1] The Court declines to consider Plaintiff's reply papers in light of the fact that the Order to Show Cause did not authorize the filing of reply papers and Plaintiff did not seek the permission of this Court to file a reply.

July 14, 2010, Plaintiff, Defendant and Wayne met with an attorney ("Attorney") to draft a contract that would memorialize the Oral Agreement. Relying on the Oral Agreement, Plaintiff continued with the Renovation.

On August 17, 2010, S & S executed a lease ("Lease") with Unified Credit Trust Under the Will of Barnett Shure ("Trust") for a period of ten (10) years from September 1, 2010 to August 31, 2020, with an option to renew for five (5) years. On that same date, the S & S Operating Agreement ("Operating Agreement") was signed. The Attorney prepared the Lease and Operating Agreement.

After reviewing the Lease and Operating Agreement, Plaintiff realized that none of the agreed-upon provisions were embodied in the Operating Agreement. Plaintiff alleges that the Attorney later advised him that Defendant had contacted the Attorney to make certain changes without Plaintiff's knowledge or consent. Plaintiff contacted the Defendant directly and on September 3, 2010, Plaintiff and Defendant reached the September 3, 2010 agreement detailing the terms of their duties and responsibilities with respect to S & S which opened for business on January 5, 2011.

The Complaint contains two (2) causes of action. In the first, Plaintiff alleges that Defendant breached the provisions in the agreements dated July 9, 2010 and September 3, 2010 stating that the hours would be divided equally between the parties regarding the daily operation of S & S. Plaintiff alleges that he complied with his obligations but that Defendant refused to perform any work related to S & S's daily operations, resulting in damages to Plaintiff in excess of $100,000. In the second cause of action, Plaintiff alleges that Defendant is liable for abandonment and breached the covenant of good faith and fair dealing when she reopened the antique store previously operated by Wayne and his late father and failed to devote the required time to operating S & S. Plaintiff alleges that he was compelled to hire additional help at S & S and seeks damages at an annual cost of $62,400.

In his Affidavit in Support, Plaintiff affirms the truth of the allegations in the Complaint. He provides copies of 1) the handwritten, unsigned July 9, 2010 agreement, 2) the Lease, 3) the Operating Agreement, and 4) the September 3, 2010 agreement, signed by the parties (Exs. A - D to Spota Aff. in Supp.).

Plaintiff also affirms that Defendant, as a 50% owner of S & S and executrix of the Trust, serves as both landlord and tenant of the Premises. In the District Court Action, Defendant, as landlord, alleges that S & S defaulted under the Lease by failing to remit monies owed under the Lease. Defendant served Five Day Notices on Plaintiff directing him to pay the outstanding sums due or surrender possession of the Premises (Ex. F to May Emerg. Aff.). Plaintiff affirms that Defendant, allegedly in an effort to cause S & S to default, stood outside of S & S and instructed customers not to enter. Plaintiff also affirms that Defendant, in addition to failing to contribute to S & S' operations as agreed, delivered allegedly threatening letters to Plaintiff (Ex. E to Spota Aff. in Supp.). Plaintiff submits that Defendant's actions caused the default for which she now seeks relief in the District Court Action.

Plaintiff's counsel affirms that, following the service of the Five Day Notice on Plaintiff, she wrote a letter to Defendant's counsel "questioning" the Notice (May Emerg. Aff. at ¶ 10 and Ex. G) and outlining Plaintiff's position regarding the sums allegedly owed by Defendant to Plaintiff for S & S expenses including taxes and payroll. Plaintiff's counsel notes that Defendant did not pursue a landlord-tenant action immediately after receipt of this letter. On or about December 5, 2011, Defendant forwarded to Plaintiff another Notice alleging default by S & S as lessee, and on or about January 10, 2012, Plaintiff received a Notice of Non-Payment Petition (*id.* at Exs. H and I).

In opposition, Defendant's counsel affirms that 1) the petitioner in the District Court Action is the Trust and the respondent in the District Court Action is S&S Eatery, LLC; 2) Defendant Shure's only involvement in the District Court Action is that she verified the Petition as the Trustee of the Trust, on behalf of the Trust; 3) neither Shure nor Spota is a party in the District Court Action; 4) the District Court Action was filed to enforce the landlord's rights under the Lease; 5) the agreement under which Plaintiff seeks relief in this action is unrelated to the Lease that forms the basis for the District Court Action; and 6) the issues in this action are unrelated to those in the District Court Action in which the petitioner seeks remedies arising from the non-payment of rent.

C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by

establishing a likelihood of success on the merits. Plaintiff submits that the July 9, 2010 and September 3, 2010 agreements establish Defendant's obligation to dedicate appropriate attention to S& S, and Spota's affidavit establishes his performance under the parties' agreements and Defendant's failure to comply with those agreements.

Plaintiff contends, further, that Plaintiff will be irreparably harmed if the Court denies injunctive relief because Defendant would then be able to exploit her dual roles as landlord and tenant and the instant action will effectively be rendered moot. Plaintiff also argues that a balancing of the hardships favors Plaintiff who affirms that he has invested substantial monies and effort into operating S &S, and that Defendnat has failed to make her agreed-to contributions to their business.

Defendant opposes Plaintiff's application on the grounds that 1) as District Court is the preferred venue for the District Court Action which is a landlord-tenant proceeding, the Court should permit the District Court Action to proceed; 2) Plaintiff has not demonstrated a likelihood o f success on the merits in light of the allegations in the related dissolution action pending in the Supreme Court titled *In the Matter of the Petition of Elaine Shure for the Judicial Dissolution of S&S Eatery, L.L.C.*, Index Number 000950-12 ("Related Action") in which Sharpe disputes many of Spota's allegations; 3) Plaintiff has not established irreparable harm without the requested injunctive relief as the sole relief sought by petitioner in the District Court Action is the payment of additional rent in the sum of $6,183.48, comprised of real estate taxes and utility costs, and the payment of that additional rent will not force Spota out of business; 4) a stay of the District Court Action will cause substantial harm to the landlord by delaying its right to collect rent to which it is entitled under the Lease; and 5) a balancing of the equities does not favor Plaintiff whose arguments "really amounts to a claim that he (or the Tenant) should be allowed to occupy business premises without being obliged to pay rent to do so," and in light of the fact that the tenant, S & S Eatery LLC, has the ability to retain the premises by paying the outstanding rent.

RULING OF THE COURT

A. Preliminary Injunction Standards

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. Landlord-Tenant Actions

The District Court, or the Civil Court, is the preferred forum for the resolution of landlord-tenant disputes where the tenant may obtain full relief in a pending summary proceeding. *All 4 Sports & Fitness, Inc. v. Hamilton, Kane, Martin Enterprises, Inc.*, 22 A.D.3d 512, 513 (2d Dept. 2005), citing, *inter alia*, *Spain v. 325 W. 83rd Owners Corp.*, 302 A.D.2d 587 (2d Dept. 2003).

C. Application of these Principles to the Instant Action

The Court notes that it recently issued a decision in the Related Action referring certain issues relevant to the petitioner's application for dissolution of S & S Eatery to a hearing in light of the disputed issues of fact.

The Court denies Plaintiff's Order to Show Cause based on the Court's conclusion that, even assuming *arguendo* that Plaintiff has demonstrated a likelihood of success on the merits, 1) Plaintiff's injury, if any, is compensable by money damages and, therefore, Plaintiff has not

demonstrated irreparable harm without the requested injunctive relief; and 2) a balancing of the equities does not favor Plaintiff as a delay of the District Court Action will potentially prejudice the landlord from enforcing its rights under the Lease.

Accordingly, the Court denies Plaintiff's Order to Show Cause in its entirety and vacates the TRO.

All matters not decided herein are hereby denied.

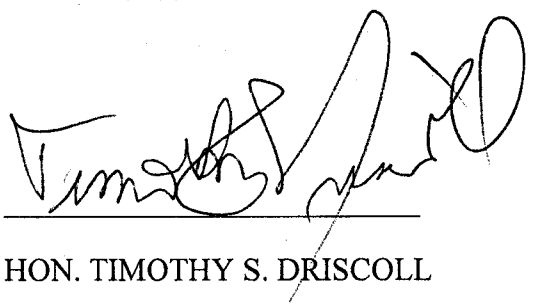
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on June 6, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY

April 5, 2012



HON. TIMOTHY S. DRISCOLL

J.S.C.