

Ehrenkranz v 58 MHR LLC
2016 NY Slip Op 31966(U)
July 12, 2016
Supreme Court, Suffolk County
Docket Number: 04444/2012
Judge: James Hudson
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Supreme Court of the County of Suffolk
State of New York - Part XLVI

COPY

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

X-----X
JOHN EHRENKRANZ and
ANDREA EHRENKRANZ

Plaintiffs,

-against-

58 MHR LLC, DIMITRI BOYLAN and
JULIAN BOYLAN

Defendants.

X-----X
58 MHR LLC and JULIAN BOYLAN,

Counterclaim-Plaintiffs,

-against-

JOHN EHRENKRANZ and ANDREA
EHRENKRANZ

Counterclaim-Defendants.

X-----X
58 MHR LLC and JULIAN BOYLAN,

Third-Party Plaintiffs,

-against-

MARTIN ANDERSON, LEPATNER &
ASSOCIATES, LLP, CYNTHIA ROBINSON,
ANDERSON BROTHERS CONSTRUCTION,
INC. and 624 BUTLER LANE LLC,

Third-Party-Defendants.

X-----X

INDEX NO.:04444/2012

SEQ. NO.:009-MD

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Upon the following papers numbered 1 to 50 read on this motion to Vacate Preliminary Injunction; Notice of Motion/Order to Show Cause and supporting papers 1-29; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 30-48; Replying Affidavits and supporting papers 49-50; ~~Other 0~~; and upon due deliberation; it is,

ORDERED that the Defendants' motion (009) for an order vacating the preliminary injunction is denied; and it is further

ORDERED that Defendants are directed to serve and file their answers, if not already done so, within twenty (20) days of service of this Order's notice of entry; and it is further

ORDERED that the parties are directed to appear at a preliminary conference on **September 30, 2016 at 9:30 am**, and to bring copies of all pleadings.

In this action, Plaintiffs seek to recover damages against defendants for, *inter alia*, fraudulent conveyance and aiding and abetting in making the fraudulent conveyance. Plaintiffs were awarded a jury verdict on their counterclaims after a trial in the prior action captioned *Vivir of LI, f/k/a Opus Vivir, Inc. v Ehrenkranz*, Index No. 09/43523.

Procedurally in the instant action, by Order dated September 6, 2012 (Mayer, J.), the Court denied that branch of the Plaintiffs' motion which was for an order of attachment, and otherwise granted the motion to the extent of preliminarily enjoining, restraining, and preventing defendants from assigning, disposing of, selling, encumbering, mortgaging, removing, or otherwise interfering with certain real property, and denied those branches of their cross motion which were pursuant to CPLR 3211 (a) (7) to dismiss the first, third, and fourth causes of action.

Upon appeal, by Order dated April 15, 2015, the Appellate Division found that Supreme Court should have granted that branch of Defendants' cross motion to dismiss the first cause of action, which was to recover damages for conversion of money. The Appellate Division also found that The Supreme Court properly granted the third and fourth causes of action alleging fraudulent conveyance and aiding and abetting in making the fraudulent conveyance.

The Appellate Division further found that, "...contrary to defendants' contention, Supreme Court properly granted preliminary injunctive relief in this action because the Plaintiffs sufficiently established a likelihood of success on the merits on the third and fourth causes of action, irreparable injury in the absence of injunctive relief, and a balancing of the equities in their favor" (*Ehrenkranz v 58 MHR, LLC*, 127 AD3d 918, 6 NYS3d 649 [2d

Dept 2015]; *Mehulic v New York Downtown Hosp.*, 113 AD3d 567, 979 NYS2d 320 [1st Dept 2014]; *Pantel v Workmen's Circle/Arbetter Ring Branch 281*, 289 AD2d 917, 918, 735 NYS2d 228, [3d Dept 2001]).

Defendants moved to reargue the Appellate Division's April 15, 2015 decision. In its application, Defendants/Appellants argued that there was "...no res which Plaintiffs/Respondents owned at issue in this action and their claim is only for money damages against the appellants. With this Court's dismissal of the claim for conversion, it is indisputable that the respondents have no claim for any specific res, and certainly no claim of ownership to 58 MHR LLC's physical property; the respondents only seek money." By Order dated July 13, 2015, after reviewing Defendants/Appellants' arguments, the Appellate Division denied their motion to reargue, or, in the alternative, for leave to appeal to the Court Appeals.

Defendants now move to vacate or otherwise modify the preliminary injunction preventing the sale, transfer, or encumbrance of the property located at 56 Quogue Riverhead Road in Quogue, New York, pursuant to CPLR 6314, on the grounds that there are changed circumstances. In support, Defendants contend that MHR has no bank account and is unable to pay mounting taxes and fees related to the property; Plaintiffs have no cognizable conversion claim against 58 MHR LLC ("MHR"), which demonstrates that there is no claim for any specific res; and that Plaintiffs will not prevail in recovering a large monetary award after this Court found in the prior action, by order dated July 1, 2014 (Pines, J.), that the Court declined to pierce the corporate veil of *Opus Vivir, Inc.* as to Julian Boylan. Instead, Defendants seek an order permitting the sale of the premises and an order that no more than \$300,000 be placed in escrow pending the final determination of the Plaintiffs' remaining claims. In support, Defendants submit their attorney's affirmation, and copies of transcripts and briefs of prior proceedings.

Defendants rely upon *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 708 NYS2d 26 (2000), which holds that an Article 63 preliminary injunction cannot be maintained where the Plaintiff seeks only money damages, and a preliminary injunction under Article 63 is not the correct mechanism for insuring Defendant's ability to pay in the future. In addition, Defendants argue that *Winter v Brown*, 49 AD3d 526, 529, 853 NYS2d 361 (2d Dept 2008), which purportedly supports their application to vacate inasmuch as the Court reversed the trial Court's Order granting injunctive relief because the money Plaintiff sought to collect in that action was not part of any specific res or fund which could rightly be regarded as the 'subject of the action.'

In opposition, Plaintiffs contend that there are no changes in circumstances except that they obtained a judgment of over \$3,000,000 in the prior action which has yet to be paid. Plaintiffs further assert that the conversion claim was immaterial to the injunction, since the Appellate Division upheld the injunction after dismissing the conversion claim, and held that Plaintiffs demonstrated a likelihood of success on the remaining claims of fraudulent conveyance and aiding and abetting in making the fraudulent conveyance. In support of their opposition, Plaintiffs submit, *inter alia*, portions of the trial transcripts of the prior matter, copies of prior orders, emails, and correspondence.

Plaintiffs further assert that Defendants have made no showing that there are no funds to maintain the subject property or pay the property taxes, and, that Defendants have failed to produce discovery as to this issue. In addition, Defendants have failed to provide a statement by a witness with knowledge as to these alleged circumstances. Plaintiffs further contend that Defendants have actually violated the injunction prohibiting MHR from encumbering the property in any way, *ie.*, incurring a property tax liability. Plaintiffs also claim that on its own admission, MHR has further harmed Plaintiffs' efforts at recovery by devaluing the MHR property in open violation of the injunction. Plaintiffs also note that although the Court declined to pierce the corporate veil as to Julian Boylan, the Court did find that Plaintiff has stated a third and fourth causes of action, but no findings of fact have been made regarding intercompany loans and payments between MHR and Opus Vivir, or payments between the individual Defendants. It is undisputed that no discovery has yet occurred in the instant action. In the absence of MHR's books and records, the Court would be unable to assess the characteristics of the subject transactions for evidence of the Debtor Creditor Law or other *indicia* of fraud.

In addition, Plaintiffs note that the cases relied upon by Defendants reveal that the lifting of the injunctions occurred after discovery and after summary judgment was decided, which has not yet occurred here. In *Thompson v 76 Corp.*, 37 AD2d 459, 830 NYS2d 564 (2d Dept 2007), the Court upheld the trial Court's denial of Defendant's attempt to vacate or modify the injunction holding that, among other things, the fact that the Defendant had not provided a full "...accounting and inventory of all of his assets and businesses..." was sufficient grounds to deny the motion to vacate or modify.

A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the *status quo* until there can be a full hearing on the merits (*Gambar Enterprises, Inc. v Kelly Services, Inc.*, 69 AD2d 297, 306, 418 NYS2d 818 [4 Dept 1979]; *Residential Bd. of Managers of Columbia Condominium v Alden*, 178 AD2d 121, 122, 576 NYS2d 859 [1st Dept 1991]). A motion to vacate a

preliminary injunction is addressed to the sound discretion of the court and may be granted either upon compelling or changed circumstances that render continuation of the injunction inequitable (CPLR 6314; see *After Six, Inc. v 201 East 66th Street Associates*, 87 AD2d 153, 155, 450 NYS2d 793 [1st Dept 1982]). Conversely, a defendant may not use this provision to reargue an injunction when there has been no relevant change in circumstances (*Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806, 807, 850 NYS2d 516 [2d Dept 2008]). Here, the Court notes that Defendants offered only the affirmation of counsel, unsupported by any evidentiary submissions. In addition, Defendants reiterated their theories from their appellate brief and motion to reargue which were rejected by the Appellate Division in its orders, dated April 15, 2015 and July 13, 2015, respectively. Therefore, Defendants have failed to allege new facts, evidence, or case law showing compelling or changed circumstances that would render continuation of the injunction in its present form inequitable (see *Matter of Xander Corp. v Haberman*, 41 AD3d 489, 490-491, 838 NYS2d 133 [2d Dept 2007]; *Thompson v 76 Corp.*, *supra*; *Wellbilt Equip. Corp. v Red Eye Grill, L.P.*, 308 AD2d 411, 765 NYS2d 490 [1st Dept 2003]).

Accordingly, the motion is denied. Defendants are directed to serve and file their answers to the complaint within twenty (20) days of service of this Order with notice of entry, if not already served and filed. The parties are directed to appear for a preliminary conference on **September 30, 2016 at 9:30 a.m.** at The New York State Supreme Court of Suffolk County, One Court Street, Riverhead, New York, Part XVI, and to bring copies of all pleadings.

The foregoing constitutes the decision and Order of the Court.

DATED: JULY 12, 2016
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.