

**Del Forte USA, Inc. v Blue Beverage Group, Inc.**

2017 NY Slip Op 31525(U)

July 17, 2017

Supreme Court, Kings County

Docket Number: 518454/2016

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of July, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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DEL FORTE USA, INC.,

Plaintiffs,

DECISION AND ORDER

- against -

Index # 518454/2016

BLUE BEVERAGE GROUP, INC., JOSEPH GOLDBERGER, JOSEPH MENCZER and THE KUZARI GROUP LLC,

Mot. Seq. 1, 2

Defendant(s).

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The following papers numbered 1 to 10 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed \_\_\_\_\_

1-5

Opposing Affidavits (Affirmations) \_\_\_\_\_

6, 7

Reply Affidavits (Affirmations) \_\_\_\_\_

8-10

Upon the foregoing papers, Plaintiff's motion, brought by order to show cause, for a preliminary injunction pursuant to Debtor and Creditor Law ("DCL") §279 enjoining Defendant BLUE BEVERAGE GROUP, INC. ("Blue Beverage"), from selling its assets to Defendant THE KUZARI GROUP, LLC ("Kuzari Group"), unless \$500,000.00 is placed in escrow; appointing a receiver over Blue Beverage and its assets; or, in the alternative, for an order of attachment pursuant to CPLR §6201 attaching at least \$500,000.00 from the proceeds of the sale of Blue Beverage's assets to Kuzari Group, is hereby DENIED.

The motion by Defendants, Blue Beverage, JOSEPH GOLDBERGER ("Goldberger"), and JOSEPH MENCZER ("Menczer")(collectively the "Blue Beverage Defendants"), also brought by order to show cause, for a preliminary injunction enjoining Plaintiff and its agents from destroying, secreting, removing, damaging, changing or modifying any paper or electronic records relating to its account payable records is GRANTED to the extent that all parties herein are under an obligation

to preserve physical and electronic records relevant to the claims and defenses in this case irrespective of whether a motion is made for such, and further, that a preliminary conference shall be held on **September 14, 2017**, at 10:00 a.m. in Room 541, to address discovery but that the motion is otherwise denied.

Plaintiff, DEL FORTE USA, INC., manufactures and sells cold coffee beverages in the New York metropolitan area. Blue Beverage, owned by Goldberger and Menczer, is one of only four facilities in the United States that has a post-closure, retort operation in which beverages are made sterile by processing aluminum cans at high heat. According to Plaintiff, the retort process enables beverages containing milk to remain on retail shelves unrefrigerated for about a year. Plaintiff brings this action against the Blue Beverage Defendants alleging, among other things, breach of contract and fraudulent inducement for Blue Beverage's alleged failure to carry out the retort process for Plaintiff's coffee beverages and falsely assuring that it could cure its deficient retort process. Based on Blue Beverage's alleged failures, Plaintiff asserts that it has sustained direct and consequential damages in excess of \$500,000.00.

According to Plaintiff, Blue Beverage is insolvent and its assets are to be sold to Kuzari Group. Plaintiff proffers no less than nine separate complaints from various companies or individuals seeking money damages against the Blue Beverage Defendants. Plaintiff also alleges that Blue Beverage has encumbered its assets with collusive judgments filed by insiders including, but not limited to, a judgment in the amount of \$6,098,210.20 recorded by Goldberger's wife. Plaintiff further alleges that Blue Beverage failed to pay multiple creditors resulting in numerous lawsuits and judgments. It is Plaintiff's position that, by favoring insiders with collusive judgments, the Blue Beverage Defendants have engaged in fraudulent conveyances and have demonstrated an intent to defraud creditors and frustrate a judgment that should be rendered in Plaintiff's favor. By reason of the foregoing, Plaintiff argues that it is entitled to an order of attachment pursuant to CPLR §6201[3] attaching the sum of at least \$500,000.00 of any sale proceeds paid by Kuzari Group and/or an order restraining Blue Beverage Defendants from selling its assets unless at least \$500,000.00 of the sale proceeds is deposited in escrow for the purpose of paying genuine creditors pursuant to DCL §279. Plaintiff also seeks the appointment of a receiver for Blue Beverage pursuant to DCL §279.

In response, the Blue Beverage Defendants state that Kuzari Group are investors contemplating investing in and then acquiring Blue Beverage as indicated by Kuzari Group's letter of intent which reflects that it seeks to acquire 60% of Blue Beverage's common and preferred shares

for total consideration of \$5 million in preferred capital. Blue Beverage Defendants argue that Kuzari Group's investment results in zero harm to Plaintiff who may continue to litigate its routine breach of contract claim. Blue Beverage Defendants further argue that Plaintiff is not, in any case, entitled to relief under CPLR §6201 or the DCL because Plaintiff has not satisfied its burden with regards to any claim of fraud or intent to defraud by Blue Beverage.

In order to be granted an order of attachment under CPLR §6201[3], a "plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors, or to frustrate the enforcement of a judgment that might be rendered in favor of the plaintiff" (*Benedict v Browne*, 289 AD2d 433, 433 [2d Dept 2001]). "Attachment is a provisional remedy designed to secure a debt by preliminary levy upon the property of the debtor to conserve it for eventual execution, and the courts have strictly construed the attachment statute in favor of those against whom it may be employed" (*Hume v 1 Prospect Park ALF, LLC*, 137 AD3d 1080, 1081 [2d Dept 2016]). Accordingly, fraud is not lightly inferred, and the intent to defraud creditors may not be presumed from the mere disposition or removal of property (*see Maitrejean v Levon Properties Corp.*, 45 AD2d 1020, 1020 [2d Dept 1974]).

Under DCL §279, where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured, the creditor may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may, (a) restrain the defendant from disposing of his property; (b) appoint a receiver to take charge of the property; (c) set aside the conveyance or annul the obligation; or (d) make any order which the circumstances of the case may require. DCL §276 provides that "[e]very conveyance made and every obligation incurred with actual intent... to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Because direct evidence of fraudulent intent is often elusive, courts consider certain "badges of fraud," the presence of which give rise to an inference of intent (*see Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004]). Badges of fraud include: (1) a close relationship between the parties to the transfer; (2) the inadequacy of consideration; (3) the transferor's knowledge of the creditor's claims and the transferor's inability to pay them; (4) the retention of control of the property by the transferor after the conveyance; (5) the fact that the transferred property was the only asset sufficient to pay the transferor's obligations; (6) the fact that the same attorney represented the transferee and transferor; and (7) a pattern or

course of conduct by the transferor after it incurred its obligation to the creditor (*see Cadle Co. v Organes Enters., Inc.*, 29 AD3d 927, 928 [2d Dept 2006]).

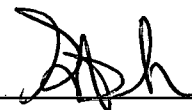
Here, upon consideration of the foregoing and the record before the Court, the Court finds that Plaintiff has not sufficiently satisfied its burden to obtain the relief that it seeks. Specifically, Plaintiff has not demonstrated that the Blue Beverage Defendants are entering into the subject transaction with the intent to defraud creditors. Plaintiff also fails to establish that \$5 million constitutes inadequate consideration for what the Kuzari Group seeks to purchase from Blue Beverage and, further, what the value or worth of Blue Beverage is overall. Although Plaintiff provides plenty of evidence of potential judgment creditors of Blue Beverage, there is no evidence that the proposed transaction between the Kuzari Group and Blue Beverage is one that aims to defraud or frustrate potential creditors, nor is there any indication that the proposed sale will render Blue Beverage an “empty shell” of a corporation. Accordingly, the relief that Plaintiff seeks must be denied at this time.

Accordingly, Plaintiff’s motion is DENIED and the temporary restraining order granted by this Court’s Order dated November 9, 2016, is hereby vacated. The Blue Beverage Defendants’ motion for an injunction is granted to the extent granted herein and the parties are reminded to appear for a preliminary conference on **September 14, 2017**, at 10:00 a.m. in Room 541.

Any arguments not addressed explicitly herein were deemed to be without merit or procedurally improper.

This constitutes the Decision and Order of this Court.

**E N T E R,**



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**Sylvia G. Ash, J.S.C.**