

<b>Global Delivery Sys., L.L.C. v Benvenuti</b>
2011 NY Slip Op 33356(U)
December 5, 2011
Supreme Court, Nassau County
Docket Number: 15600-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER  
Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X **TRIAL/IAS PART: 20**  
**GLOBAL DELIVERY SYSTEMS, L.L.C.,**

**Plaintiff,**

**Index No: 15600-11**

**Motion Seq. No. 1**

**Submission Date: 11/18/11**

**-against-**

**BRUCE P. BENVENUTI and  
LASER DELIVERY, INC.,**

**Defendants.**

-----X  
**The following papers have been read on this Order to Show Cause:**

**Order to Show Cause, Affidavit in Support and Exhibits.....X**  
**Memorandum of Law in Support.....X**  
**Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X**

This matter is before the court on the Order to Show Cause filed by Plaintiff Global Delivery Systems, L.L.C. ("GDS" or "Plaintiff") on November 2, 2011 and submitted on November 18, 2011. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause in its entirety but directs that the Order issued by the Court on the record on November 2, 2011, related to the production of certain documentation, remains in effect.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves for an Order, pursuant to CPLR § 6301, granting Plaintiff a preliminary injunction enjoining and restraining Defendants Bruce P. Benvenuti ("Benvenuti") and Laser Deliver, Inc. ("Laser") (collectively "Defendants"), their employees, representatives, affiliates, subsidiaries, successors, assigns, and all those acting in concert with and on behalf of them, pending final judgment in this matter, from using GDS' FedEx National Account and its related

sub-accounts, or receiving proceeds of revenues generated from the National Account and its related sub-accounts.

Defendants oppose Plaintiff's application.

B. The Parties' Background

The Verified Complaint ("Complaint") (Ex. 1 to Beaury Aff. in Supp.) alleges that GDS is an Indirect Air Carrier that has been in the freight forwarding business since 1998. James R. Galante ("Galante"), William Beaury ("Beaury"), Scott J. Harris ("Harris") and Benvenuti are members of GDS with varying ownership interests. Galante owns 79.5% of GDS, and Galante and Beaury have been the managing members of GDS since March of 2001.

Effective June 1, 2011, Galante and Beaury were the only individuals authorized by GDS to have communication with FedEx regarding GDS' operations. GDS owns a FedEx National Account ("National Account"), which it has owned since 1999, which Plaintiff describes as "extremely valuable" (Compl. at ¶ 11). GDS creates sub-accounts ("Sub-Accounts") to its National Account to help manage its shipping under the National Account.

Plaintiff alleges that in August of 2011 it learned that Benvenuti and Laser had created Sub-Accounts for current and former GDS clients, without Plaintiff's authorization. Plaintiff further alleges that Defendants improperly diverted fees ("Fees") charged to and paid by GDS' clients, to themselves. Plaintiff demanded that Laser cease using the National Account and provide an accounting of the Fees, but Laser continues to use the National Account.

Plaintiff also alleges that Benvenuti has refused to provide GDS with the master log in and password to the National Account. GDS is responsible to pay FedEx in the event that any customers do not pay on the Sub-Accounts, and alleges that through Defendants' alleged conversion of the Fees, Benvenuti has put GDS "in a precarious position" (Compl. at ¶ 32).

The Complaint contains seven causes of action: 1) failure by Benvenuti to remit and account for the Fees, 2) Benvenuti's interference with GDS' contractual relationship with FedEx, 3) unjust enrichment by Benvenuti, 4) a request for injunctive relief prohibiting Benvenuti and his agents from using the National Account and Sub-Accounts, and communicating with FedEx on behalf of GDS, 5) conversion of the Fees by Laser, 6) unjust enrichment by Laser, and 7) injunctive relief against Laser.

In support of Plaintiff's application, Beaury affirms the truth of the allegations in the Complaint. He alleges that, without the requested injunctive relief, GDS will suffer irreparable harm.

In opposition, Benvenuti affirms that in 2007, Plaintiff transferred its rights to the GDS assets, including its contract rights, to a company known as Axis Global Delivery Systems, LLC, which has the same members as GDS. Benvenuti avers that, to his knowledge, GDS has not actively engaged in business activities using the Fed Ex master account since that transfer. Rather, business use of the FedEx master account was accomplished through subordinate accounts established by Axis, or members of Axis.

Benvenuti also affirms that the managing partners refused to pay a GDS FedEx bill of a major client in 2007, which resulted in a default that nearly resulted in the loss of the master account due to non-payment. Benvenuti paid that bill in the sum of \$14,725.77 from his personal accounts to preserve the master account for GDS/Axis, thereby preserving the master account.

Benvenuti affirms, further, that prior to the 2007 asset transfer, the members of GDS agreed to "spin off" (Benvenuti Aff. in Opp. at p. 2) a portion of its business in a management agreement with SDS Global Logistics, Inc. ("SDS"). As part of this management agreement, Benvenuti was to be employed by SDS. Although he worked for SDS from 2008-2010, he continued to perform duties for Axis and handled its dealings with FedEx sales representatives. He was the contact person in GDS/Axis for any problems with the master account, and worked to preserve the master account and all subsidiary account.

Benvenuti also avers that the managers of GDS and Axis have repeatedly refused his requests for financial information regarding those entities, in which he has an interest. Benvenuti affirms that he has acted in the best interest of GDS and protected the FedEx account, which is highly valuable, for the benefit of that entity and its members.

### C. The Parties' Positions

Plaintiff submits that it has demonstrated its right to the requested injunctive relief by 1) establishing a likelihood of success on the merits by establishing that Defendants improperly converted the National and Sub-Accounts, and the related Fees; 2) demonstrating that it will suffer irreparable harm by virtue of the fact that, without the requested relief, GDS will be unable to monitor its Account and Sub-Accounts, for which it is ultimately responsible, and will

be unable to manage its business properly; and 3) the equities favor Plaintiff in light of the fact that Defendants have no right to use the National Account or Sub-Accounts, or to retain the Fees.

Defendants oppose Plaintiff's application, submitting that Plaintiff's application constitutes an effort to freeze out Benvenuti from GDS. They submit, further, that Benvenuti's affidavit establishes that the GDS managers have used the master account for purposes unrelated to GDS business, and thereby breached their fiduciary duty to GDS.

### 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).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); see also CPLR § 6312(c).

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 Plaintiff's Order to Show Cause based on its conclusion that, even assuming *arguendo* that Plaintiff has established a likelihood of success on the merits, any injury suffered by Plaintiff is compensable by money damages. Moreover, Plaintiff's claim that its inability to monitor its account may result in its liability for unpaid fees is undermined by Benvenuti's affirmation that he provided personal funds in the past to ensure that GDS/Axis retained its FedEx account, and the absence of any evidence that a particular account or accounts is currently delinquent. In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety. The Court directs that the Order issued by the Court on the record on November 2, 2011, related to the production of certain documentation, remains in effect.

All matters not decided herein are hereby denied.

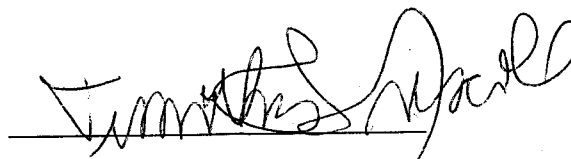
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court on January 13, 2012 at 10:00 a.m. for a Preliminary Conference.

ENTER

DATED: Mineola, NY

December 5, 2011

  
HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
DEC 09 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE