Cornell Coop. Extension of Tompkins County v QUB9, Inc.
2018 NY Slip Op 30666(U)
April 13, 2018
Supreme Court, Tompkins County
Docket Number: 2017-0146
Judge: Eugene D. Faughnan
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At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 2nd day of February, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

CORNELL COOPERATIVE EXTENSION
OF TOMPKINS COUNTY

Plaintiff,

-vs-

DECISION AND ORDER

Index No. 2017-0146
RJI No.: 2017-0320-M

QUB9, INC., A & F OF ROCHESTER, INC.,
and RICHARD ALLOCO, SR.,

Defendants.

APPEARANCES:

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RICHARD ALLOCO, SR.:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon an Order to Show Cause submitted by Plaintiff Cornell Cooperative Extension of Tompkins County ("CCE"), and signed by this Court on December 15, 2017, which granted a temporary restraining order and preliminary injunction, preventing Defendants from selling or otherwise disposing of CCE's containers; and a Cross-Motion for Partial Summary Judgment filed by Defendants A & F of Rochester ("A & F") and Richard Alloco, Sr. ("Alloco"). The case was previously before the Court to address a Motion to withdraw filed by the attorneys for QUB9, which was granted.

BACKGROUND FACTS AND PROCEDURAL HISTORY

This action arises out of a contract between CCE and QUB9 to build a structure from storage containers. According to the Amended Complaint, the contract called for QUB9 to build a structure consisting of 4, 20-ft storage containers to be located on a concrete pad at CCE's premises. Per the agreement, CCE was to pay half the contract price up front, another "25% upon commensurate progress and the balance due upon delivery of finished structure." CCE did make an initial payment and work was started. Two storage containers were delivered to QUB9 to begin work, and the other two were to be shipped directly to CCE from a company in New Jersey. However, delays and disagreements about the details, scope and progress of work ensued, and QUB9 ceased work on the containers. After work stopped on the structure, QUB9 submitted an invoice for nearly $14,000 in expenses that QUB9 claimed resulted from the purported delays by CCE. QUB9 later informed CCE that CCE would also have to pay for storage costs for the containers, since no additional work was being performed until the invoice was paid. CCE was subsequently informed by Alloco that the containers were in his possession, and located at his company's (A & F) property.

CCE commenced an action against QUB9 in March, 2017 for breach of contract (seeking

money damages) and specific performance (seeking an Order requiring QUB9 to deliver the container to CCE). In July, 2017, the attorney who was representing QUB9 made a Motion to be allowed to withdraw from representation, and CCE made a Cross Motion to compel and/or preclude discovery. The Motion to withdraw was granted and QUB9 was afforded additional time to respond to the Cross Motion. No opposition was submitted to CCE's Cross Motion, and a conditional order was granted, directing QUB9 to respond to CCE's discovery demands, or be precluded from offering evidence pursuant to CPLR §3126 (2).

In the meantime, upon learning that the two containers were in Alloco's possession and on A & F's property, CCE filed another Order to Show Cause seeking leave to add Alloco and A & F as defendants in this action, and add additional causes of action. On December 8, 2017, the Court granted the motion to file an Amended Complaint. Almost immediately thereafter, CCE filed another Order to Show Cause, seeking an Order to prevent any of the defendants from selling and/or relocating the containers.[1] CCE alleged it had received notice from A & F that A & F intended to sell the two containers at a public auction. The Court signed the Order and scheduled the case for argument on the motion. A & F and Alloco opposed the temporary restraining order and preliminary injunction and cross moved for Summary Judgment on CCE's claims for conversion and specific performance. The parties thereafter appeared for oral argument on the issues.

LEGAL ANALYSIS AND DISCUSSION

CCE seeks a preliminary injunction to prevent any of the defendants from disposing of the containers. CCE claims that the agreement with QUB9 was to build and install the structure on CCE's premises and that the two containers belonged to CCE since they paid for the containers as part of the agreement. Alloco and A & F contend that there is no proof that CCE is the proper owner of the containers, and that CCE has not shown it paid for the containers, ever

[1]CCE also filed its Amended Complaint on December 15, 2017.

had possession of the containers, or any other documentation to support the claim it is an owner. Therefore, the moving defendants claim that A & F has been storing the containers without any payment and that A & F is entitled to recover for the storage costs and/or it should be allowed to sell the two containers pursuant to a warehouseman's lien.

"It is well settled that a preliminary injunction, the purpose of which is to preserve the status quo pending resolution of the underlying dispute ... is a drastic remedy ... and imposes upon the party seeking such relief the burden of demonstrating a likelihood of success on the merits, irreparable harm absent the issuance of the requested injunction and a balancing of the equities in his or her favor ...." *Bonnieview Holdings, Inc. v. Allinger*, 263 AD2d 933, 935 (3rd Dept. 1999) (citations omitted). If any one of the three requirements is not satisfied, the application must be denied. *Faberge Int'l v. De Pino*, 109 AD2d 235 (1st Dept. 1985).

CCE must show a likelihood of success on the merits. "While mere issues of fact will not preclude a preliminary injunction ... sharp factual disputes obscuring the likelihood of success will bar the remedy." *Eklund v. Pinkey*, 31 AD3d 908,909 (3rd Dept. 2006) (citations omitted); *Winkler v. Kingston Hous. Auth.*, 238 AD2d 711 (3rd Dept. 1997). Here, there are several issues to consider along these lines, including ownership of the containers, whether the parties' contract was for goods or services, the applicability of the Uniform Commercial Code, and the storage of the containers and costs associated with that storage.

In support of the Order to Show Cause and preliminary injuction, Plaintiff submitted an attorney affidavit from Sharon M. Sulimowicz (12/15/17 Sulimowicz affidavit) and an Amended Complaint. As noted above, the Amended Complaint added defendants A & F and Alloco, and asserted causes of action for breach of contract, specific performance and conversion. The 12/15/17 Sulimowicz affidavit also claimed that the containers were in the possession of A & F and Alloco, and that Alloco offered to turn over the containers if CCE paid $14,000 and dropped the litigation against QUB9. The $14,000 was also the amount that QUB9 was claiming CCE still owed to QUB9 for expenses incurred after the work stopped. Sulimowicz was provided

with a notice that A & F was planning to sell the containers at auction pursuant to New York Uniform Commercial Code §7-210, to enforce the lien of A & F as a warehouseman. A & F claimed that there was an agreement between A & F and QUB9 to store the containers at a cost of $25 per day per container, and that upon the failure to pay, A & F had the right to sell the containers. CCE sought the temporary injunction to prevent the sale, claiming it would be irreparably harmed if the sale were allowed to occur.

A & F and Alloco opposed CCE's application and submitted an affidavit from John M. Bansbach, Esq. (Bansbach affidavit), as well as an affidavit from Mr. Alloco. The opposition papers noted that CCE has not produced any bill of sale, title, invoice, statement or cancelled check showing ownership of the containers; and that CCE has not even alleged that it ever had possession of the containers. Therefore, these defendants argue that CCE does not have any ownership interest, and no security interest in the containers, so CCE cannot interfere with the proposed auction. They also argue that QUB9 was CCE's agent when it entered into the storage agreement with A & F, and if CCE does have an ownership interest as it alleged, then CCE owes the storage charges. Alloco's affidavit states that he owns real property in Rochester, which includes a gated yard used for purposes such as storage and work on cars and trucks. Alloco alleges that Brian Jerman, on behalf of QUB9, contacted Alloco to arrange for storage of the two containers on the lot owned by A & F. The two men agreed to a storage rate of $25 per day per container. Alloco's affidavit also details that he observed Jerman and others working on the containers while the containers were located at A & F. Despite Alloco's request, neither Jerman, nor QUB9, has paid any costs associated with the storage. In an effort to resolve the matter, Alloco contacted CCE and spoke with Ken Schlather ("Schlather"), Executive Director for CCE. Alloco informed Schlather of the unpaid storage costs, and that Alloco wanted to be paid for the storage and have the containers removed. However, no agreement for payment was reached between Alloco and CCE.

In response to the papers submitted by Alloco and A & F, Plaintiff submitted reply papers, including an affidavit from Schlather and an affidavit from Sulimowicz. Schlather's

affidavit asserts that it was his understanding that the per the agreement with QUB9, the storage containers belonged to CCE since CCE paid for them and they would be part of a structure on CCE's property. Schlather also noted that Alloco offered to turn over the containers if CCE paid him $14,000 and dropped the suit against QUB9. Schlather found that unusual because he could not understand why Alloco would have interest in the suit with QUB9, or make the payment of storage costs and transfer of the containers, contingent on dropping the lawsuit. Schlather also observed that the original proposal from QUB9 said that the work would be done at QUB9's facilities at 575 Lyell Avenue in Rochester. That is the same address where the containers are currently being stored, and which property apparently belongs to A & F. Schlather, therefore, believed that QUB9 and Alloco may have been acting in concert, both at the time of the agreement with CCE, and at the time of any agreement to store the containers.

The reply affidavit from Sulimowicz also raised questions about the relationship, if any, between the defendants. Sulimowicz reviewed County Assessment records which show that 575 Lyell Avenue in Rochester is owned by A & F. Sulimowicz noted that the original agreement submitted by QUB9 to CCE stated that the work would be done at QUB9's facilities at 575 Lyell Avenue- the same address where A & F is located, and where the containers are presently stored. Sulimowicz contends that QUB9 either had some ownership interest, or other relationship, with A & F allowing it to utilize the property. She also noted that the containers had been at the Rochester property since June, 2016, but there is no evidence that QUB9 was being charged any rent until after QUB9 stopped performing the CCE contract. At that point, QUB9 allegedly entered into a storage arrangement with A & F. Sulimowicz also claimed that QUB9 has failed to respond to discovery demands that could establish CCE's ownership of the containers. If QUB9 is acting in concert with A & F and Alloco, according to Sulimowicz, then QUB9's lack of responses would prejudice CCE in establishing ownership.

In this case, the parties disagree about who even owns the containers. CCE alleges that it was intended that the storage containers would be paid for and installed at their premises, and that CCE understood that the containers belonged to CCE. However, as noted by defendants,

CCE has not produced any evidence to support ownership, such as a receipt, bill of sale, or other proof of payment, or that CCE has even been in possession of the containers at any time. The question of ownership is a preliminary issue that needs to be resolved to determine the parties' respective rights. At this point, discovery has not been completed, and may shed light on the question of ownership.

CCE also argues that the actions of the Defendants suggest a possible relationship between the Defendants and/or actions taken in concert after the CCE and QUB9 contract work came to a halt. CCE challenges QUB9's authority to enter into a storage agreement that would bind CCE. Alloco and A & F argue that CCE has alleged that QUB9 was CCE's agent when the containers were purchased, and cannot now be heard to complain QUB9 was not an agent when arranging for storage of the containers.

It is this Court's view that there are sharply disputed issues of fact which preclude the granting of a preliminary injunction. *See e.g. Bleuberries Gourmet v. Aris Realty Corp.*, 255 AD2d 348 (2nd Dept. 1998). There are contested issues arising from the initial contract, such as ownership of the containers during the work, as well as contested issues following the work stoppage and storage of the containers. Some of these issues include: whether QUB9 was an agent of CCE when the containers were purchased; whether CCE was to have an ownership interest while the work was being performed; whether QUB9 was an agent of CCE when it agreed to storage fees; whether there is any relationship between defendants; whether defendants were acting in concert to deprive CCE of the containers, or in forcing CCE to incur storage costs it did not agree to pay; and whether QUB9 is entitled to any payments above the contract price. CCE has also made allegations that QUB9 may have had some relationship with the other defendants at the time of the signing of the CCE contract, which has some support in the record, and if true, could have bearing on the allegation that the Defendants are acting in concert to deprive CCE of the containers.

With these issues so heavily contested, the Court finds that CCE has not shown a clear

likelihood of success on the underlying claim. *See e.g. Winkler v. Kingston Hous. Auth.*, 238 AD2d 711, *supra*. Accordingly, the Court concludes that the request for a preliminary injunction must be denied.

Even if the Court were to find that CCE had met its burden under the first prong- likelihood of success- the Court would still deny the preliminary injunction for failure to meet the "irreparable harm" element. "The burden is on the party seeking the injunctive relief to make 'a clear showing' that it will suffer irreparable injury." *OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 (1st Dept 2007). It is well-established that no injunction will issue unless the moving party shows it will suffer irreparable injury, loss or damage without such relief. To be irreparable, the injury alleged must be incapable of being adequately compensated in money damages. *See OraSure Tech., Inc., supra; Public Employees Fed. v. Cuomo*, 96 AD2d 1118 (3rd Dept. 1983). In the present case, CCE has asserted several causes of action, but has not made any allegations that it cannot be made whole through money damages, that there is anything unique about these containers, or that QUB9's failure to deliver on the agreement has left CCE in peril of any damage that cannot be compensated monetarily. Therefore, irreparable harm has not been established.

CCE points out that A & F is attempting to claim it is a "warehouseman" under the UCC, and then sell the containers based on its alleged lien. However, the issue before the Court at this time is CCE's request for preliminary injunctive relief, and whether CCE has shown a clear entitlement for a preliminary injunction. The Court does not reach the question, at this point, as to whether A & F is a "warehouseman", as the resolution of that question will require more information and conclusions, such as ownership of the containers, and QUB9's authority to act on behalf of CCE. It is premature for the Court to make any determinations on those matters. However, pending resolution of those questions, any sale of the containers would be at the risk of an adverse finding in the future.

Alloco and A & F also have filed a Cross Motion to dismiss CCE's claims for conversion

and specific performance. However, resolution of those causes of action also require a determination as to the ownership of the containers, and QUB9's authority to contract with A & F for storage. At this early stage, the Court finds that Summary Judgment is not proper, but the request can be made again, following completion of discovery.

Accordingly,

Plaintiff's Motion for a preliminary injunction is DENIED;

Defendants' Cross Motion for Summary Judgment is DENIED, without prejudice to renewal.

IT IS SO ORDERED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: April 13, 2018
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice