| **Avraham Diner v Halevi** |
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| 2018 NY Slip Op 31514(U) |
| June 11, 2018 |
| Supreme Court, Richmond County |
| Docket Number: 150008/2016 |
| Judge: Jr., Orlando Marrazzo |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF RICHMOND**

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**AVRAHAM DINER, 830 BAY STREET SERVICE, INC., BAY STREET AUTO CENTER INC., H&D AUTOMOTIVE CORP., RICHMOND AUTO CENTER INC., and VICTORY SERVICE STATION INC.,**

**Plaintiffs,**

**-against-**

**YARON HALEVI and FOREST SERVICE CORP.,**

**Defendants.**

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**DCM Part 21**

**Present:**

**ORLANDO MARRAZZO, JR.**

**DECISION AND ORDER**

**Index No.: 150008/2016**

**Motion No: 823-005**

The following papers numbered 1 to 4 were fully submitted on the 24th day of April, 2018:

| | Papers Numbered |
|---|---|
| Plaintiffs' Order to Show Cause for Attachment (Affirmation, Affidavit in Support) (Dated: February 22, 2018) | 1 |
| Defendants' Affirmation, Affidavit in Opposition (Dated: March 7, 2018) | 2 |
| Plaintiff's Reply Affirmation (Affidavit, Memorandum of Law in Support of Motion for Order to Show Cause for Attachment) (Dated: March 14, 2018) | 3 |
| Defendants' Affirmation in Reply (Affidavits of Yaron Halevi and Norman Teitler) (Dated: April 20, 2018) | 4 |

Upon the foregoing papers, plaintiffs' application for an order of attachment is denied.

This matter arises out of a business dispute between plaintiff, Avraham Diner, and his former son-in-law, defendant, Yaron Halevi. It appears conceded that prior to October 2, 2013 the parties equally owned the six corporate businesses that are named in the action (*i.e.*, four

automobile service stations, together with a towing business [830 Bay St. Service Inc.] and an automotive repair shop [Bay Street Auto Center Inc.]). By written Agreement dated October 2, 2013, Diner and Halevi severed their interests in the service stations[1] (*see* Defendants' Exhibit B) to the extent, *inter alia*, that defendant agreed to transfer to plaintiff all of the common stock of (1) 830 Bay St. Service Inc., (2) Bay Street Auto Center Inc., (3) H & D Automotive Corp., (4) Victory Service Station Inc., and (5) Richmond Auto Center Inc., and plaintiff agreed to deliver to defendant all of the common stock of (6) 741 Forest Service Corp., (the only entity which owns both the service station and the real property upon which it is situated) in return for the sum of $250,000.00.

Currently, plaintiffs seek damages of $250,000.00 for, *inter alia*, breach of the October 2, 2013 "Agreement" relative to the sale of Forest Service Corp. In their May 19, 2016 Answer, defendants have asserted twelve counterclaims, the first of which seeks damages in the amount of $500,000.00[2] based on plaintiffs' failure to pay the mortgage on 741 Forest Avenue (*see* Defendants' Answer with Counterclaims). It appears conceded that, to date, plaintiff has sold two corporate entities, *i.e.,* Richmond Auto Center Inc. and H & D Automotive Corp., and is in the process of selling a third, Victory Service Station, Inc. (*see* Defendants' Affirmation in Opposition, para 5). It is likewise conceded that on February 2, 2018, defendant, Yaron Halevi, sold the real property located at 741 Forest Avenue, Staten Island, together with the assets of Forest Service Corp., to Chrystal Forest Realty LLC (*see* Defendants' Exhibit H).

Plaintiffs move for an order of attachment pursuant to CPLR 6201(3), on the grounds that defendant, Yaron Halevi, is planning to move from New York without paying plaintiff, Avraham

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[1] It appears that in 2011, two years before the Agreement was executed, the defendant became divorced from plaintiff's step-daughter.
[2] The total of defendants' counterclaims amounts to $760,555.91.

Diner, the $250,000.00 allegedly owed upon the sale of 741 Forest Avenue. In support of the application plaintiff points to, *inter alia*, a post from Yaron Halevi's Facebook page, wherein defendant purportedly wrote that he "sold [his] business and will be traveling the world and living in [his] dream of Love, Dance and Healing" (*see* Attachment to February 22, 2018 Affirmation of Marc E. Scollar, Esq.). Defendant opposes the motion.

"The provisional remedy of attachment is, in part, a device to secure the payment of a money judgment" (*Cooper v. Ateliers de la Motobecane*, 57 NY2d 408, 413 [1982]). Thus, on a motion for an order of attachment or for an order to confirm an order of attachment, "the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in §6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff" (CPLR 6212[a]; *see also Amlon Metals, Inc. v. Liu*, 292 AD2d 163 [1st Dept. 2002]; *Arzu v. Arzu*, 190 AD2d 87 [1st Dept. 1993]; *Silvestre v. DeLoaiza*, 12 Misc3d 492 [NY Sup. Ct. 2006]; *Pires v. Frota Oceanica Brasileira*, SA, 6 Misc3d 1036(a) [NY Sup. Ct. 2005]).

As stated by Professor Siegel, in a motion for an attachment:

> The proof must establish to the court's satisfaction that…the plaintiff will succeed on the merits…When CPLR 6212(a) requires the plaintiff to show that it is "probable" that the action will succeed on the merits, it means that there must be something in the proof stronger than the mere *prima facie* case that could satisfy as a pleading… "What is sufficient for a pleading may be insufficient for attachment" said Judge Cardozo in *Zenigh Bathing Pavillion, Inc. v. Fair Oaks S.S. Corp.*, 240 NY 307 [1925], which well illustrates the point that for an attachment there must be evidentiary detail stronger than the summary and conclusory allegations that suffice today in a pleading"

*New York Prac. 4th Ed. P. 504-5.*

Here, plaintiff has not demonstrated that he will likely succeed on his breach of contract claim against defendant for the $250,000.00. Indeed, the meaning of the agreement itself is in

dispute, and credibility determinations are not for this Court to address. Further weakening plaintiff's application is the fact that the counterclaims asserted by defendants are double the monetary amount claimed by plaintiff. Plaintiff has failed to furnish any evidence that defendant has assigned, disposed of, encumbered or secreted the proceeds of the sale, or removed it from the state, with the intent to defraud plaintiff. Finally, the sale of the property occurred on February 2, 2018, some weeks before the application was brought. The law is clear that "an injunction will not issue to prohibit a *fait accompli*" (*Town of Oyster Bay v. New York Telephone Co.*, 75 AD2d 59)

Accordingly, plaintiff's application is denied inasmuch as he has failed to sustain his burden of proof for an order of attachment, and has failed to establish sufficient proof that the defendant, "with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201[3]).

8 [2d Dept. 1980]).

Accordingly, it is

ORDERED, that plaintiff's motion for an attachment is denied; and it is further

ORDERED, that the parties return to Part 21 at 26 Central Avenue, Staten Island, New York, on **October 2, 2018 at 9:30 a.m.** for a pre-trial conference.

This constitutes the Decision and Order of the Court.

ENTER,

Dated: 6/11/2018

J. S. C.



Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice