Salzberg v Sena
2018 NY Slip Op 33497(U)
February 16, 2018
Supreme Court, Westchester County
Docket Number: 50399/2016
Judge: Linda S. Jamieson

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp _____ Dec __x___ Seq. No.__9___ Type __PI__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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CHARLES ANDREW SALZBERG and ANITA SALZBERG,

Plaintiffs,

-against-

Index No. 50399/2016

DECISION AND ORDER

KENNETH SENA, JOSEPH MAZZAFERRO, LUXURY MORTGAGE GROUP and WEBSTER BANK,

Defendants.

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The following papers numbered 1 to 6 were read on this motion:

Paper	Number
Order to Show Cause, Affidavits, Affirmation and Exhibits	1
Memorandum of Law	2
Affirmation and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Affidavits	5
Reply Memorandum of Law	6

The motions continue in this adverse possession case. In the current motion, plaintiffs seek (1) to enjoin permanently an action commenced in New York County by defendants against non-party Daniel Scalzi; (2) a preliminary injunction staying the New York County action or, in the alternative, staying it until this

action has been concluded; and (3) sanctions. It is notable that Mr. Scalzi did not move in New York County to dismiss an action which plaintiffs and Mr. Scalzi contend is patently frivolous. Nor did Mr. Scalzi file a motion to change venue to this County, although plaintiffs contend that New York County is an entirely inappropriate venue.

Beginning with the request for a preliminary injunction, it is well-settled that "Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly. . . . In exercising [its] discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction." *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 715, 916 N.Y.S.2d 177, 180 (2d Dept. 2011). This is a "particularly high burden" for plaintiffs. *Sync Realty Grp., Inc. v. Rotterdam Ventures*, Inc., 63 A.D.3d 1429, 1430, 882 N.Y.S.2d 332, 334 (3d Dept. 2009).

Defendants contend that the only possible harm to plaintiffs is litigation expense. In response, plaintiffs argue that they would be damaged by "the prospect of facing vexatious and duplicative litigation in two forums based upon the exact same facts and circumstances of the instant case." Plaintiffs – who

are presently not parties in the New York County action - argue that they are necessary parties in that action, and that their joinder is inevitable. They also assert that by filing that action, defendants "are attempting to manufacture a claim or controversy between Plaintiffs and their key witness. . . ."[1]

The Court finds that under these particular circumstances, irreparable harm cannot be based on an event that has not yet occurred. While plaintiffs may well be necessary parties in the New York County litigation, they are not so at this moment. This Court will not issue an injunction to prevent something that has not occurred and for which there is an alternative remedy - that of moving to dismiss and/or change venue. *See Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442, 628 N.Y.S.2d 375, 377 (2d Dept. 1995) ("Moreover, the irreparable harm must be shown by the moving party to be imminent, not remote or speculative.).

As another trial court has observed, "An order prohibiting and enjoining another court . . . from further prosecution of a pending action is an extraordinary remedy." *Doran v. Van Ingen*, 139 Misc. 2d 307, 310, 526 N.Y.S.2d 757, 759 (Sup. Ct. Monroe Co. 1988). Nothing presented to this Court demonstrates that it should impinge upon the powers of the New York County Court,

[1]Plaintiffs' logic is flawed, since presumably their interest in defeating the New York County litigation is aligned with Mr. Scalzi's interest.

particularly when the parties have undertaken no steps to obtain relief from that Court.

Because the Court has found that there is no irreparable harm, it need not consider the other requirements for obtaining a preliminary injunction. The request to enjoin the New York County litigation permanently is also denied, since it also requires irreparable harm. *See McDermott v. City of Albany*, 309 A.D.2d 1004, 1005, 765 N.Y.S.2d 903, 904 (3d Dept. 2003) ("To be entitled to a permanent injunction, plaintiff was required to establish not only irreparable harm, but also the absence of an adequate legal remedy.").

Finally, if the New York County Court determines that the action before it is frivolous, inappropriate or otherwise sanctionable, it is free to impose appropriate sanctions. This Court will not dictate to a sister Court.

The motion is denied in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
February 16, 2018

HON. LINDA S. JAMIESON
Justice of the Supreme Court