SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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MORRIS ANTEBI,

Plaintiffs, Decision and order

- against - Index No. 524776/2019

ms # 1

RAYMOND GUINDI & ROYAL CHOICE DEVELOPMENT INC.,

January 13, 2020

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the defendant from making any distributions of any kind to any member of Royal Choice Development LLC. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

On June 21, 2007 the plaintiff entered into an agreement with defendants wherein the plaintiff loaned the defendants $750,000 to be used in the construction of a real estate project in Kings County. Pursuant to the terms of the agreement the money was to be paid back within two years. Further, the agreement provided the company would pay the plaintiff an additional $200,000 and that if the full amount was not repaid within two years then interest would accrue at a rate of 15% per year. There is no dispute the plaintiff was not repaid within two years and that in 2011 he was paid $75,000. Further, the defendants allege the plaintiff orally agreed to waive the right to seek any of the interest due and in fact had not requested the interest for six years. By the end of

2014 the plaintiff was repaid the entire $750,000.

The plaintiff instituted the current lawsuit seeking the interest payments he alleges are due as well as the $200,000 compensation he claims he is owed. This motion seeking to enjoin the defendants from disbursing any funds has now been filed.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v.

Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is grounded in the fact it is alleged the defendants have breached the agreement by failing to pay the interest due and the additional compensation of $200,000. Of course, the defendants deny these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]). Thus, the Verified Complaint states the defendants agreed to pay plaintiff $200,000 plus interest beginning in 2009 and currently owes the plaintiff approximately $2,117,626 (see, Verified Complaint, ¶ 12). The defendants counter the interest payments were expressly waived by the plaintiff. Generally, whether a waiver has taken place is a question of fact (Jefpaul Garage Corp., Presbyterian Hospital in City of New York, 61 NY2d 442, 474 NYS2d 458 [1984]). Further, a waiver is only possible if it was done, knowingly, intentionally and voluntarily and such waiver should not

be "lightly presumed" (Fundamental Portfolio Advisors Inc., v. Tocqueville Asset Management L.P., 7 NY3d 96, 817 NYS2d 606 [2006]). While the facts surrounding any such waiver, if it took place, must be explored, it must be noted that an addendum to the contract was signed on May 6, 2013 acknowledging the payment of $75,000 without any mention of any outstanding interest payments owed. While that does not establish a waiver it surely creates questions whether the plaintiff's failure to include those payments was indicative of a pattern waiving the payments. Thus, while the allegations may prove true, at this juncture there are factual disputes undermining the availability of any injunction. More importantly, even if the first prong could be satisfied, the second prong cannot be maintained.

In order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). The plaintiff does not even allege anything other than money damages. The plaintiff cites to Golden City Commercial Bank v. Hawk Properties Corp., 236 AD2d 282, 658 NYS2d 257 [1st Dept., 1997] for the proposition that the dissipation of one's investment is a valid basis upon which to grant an injunction. However, that case, and its companion case, Board of Managers of the 235 East 22nd Street Condominium v. Lavy Corp., 233 AD2d 158, 649 NYS2d 688 [1st

Dept., 1996] concerned a foreclosure action where there was an unauthorized mortgage payoff prior to the payment of taxes in violation of RPAPL §1354. The court held the mortgage payoff prior to the tax payoff was in direct contravention of the law and consequently an injunction stopping the improper mortgage payment was appropriate since otherwise the tax lien could be rendered ineffectual. That in no way stands for the proposition that any time a money judgement might prove futile an injunction is proper. If true, an allegation of dissipation of funds would render the irreparable injury prong a mere formality. Thus, any alleged loss which can be compensated by money damages is not irreparable harm (Family Friendly Media Inc., v. Recorder Television Network, 74 AD3d 738, 903 NYS2d 80 [2d Dept., 2010]). As noted, since the plaintiff has not alleged anything other than monetary damages the plaintiff has failed to allege any irreparable harm.

Therefore, based on the foregoing, the motion seeking preliminary injunction enjoining the defendants is denied.

So ordered.

ENTER:

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DATED: January 13, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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