

Epmmy LLC v Nycanna LLC
2020 NY Slip Op 32229(U)
July 6, 2020
Supreme Court, New York County
Docket Number: 655480/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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EPMMNY LLC,

Plaintiff,

INDEX NO. 655480/2018

MOTION DATE 05/06/2020

- v -

NYCANNA LLC, et al.

MOTION SEQ. NO. 011

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 294, 295, 296, 297, 298, 300, 305, 306, 307, 308, 309, 310, 311, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Masley, J.:

In motion sequence number 011, plaintiff moves for a preliminary injunction and pre-judgment attachment against defendants NYCANNA, LLC (NYCANNA), Terradiol Management Company, LLC (Terradiol Management), Terradiol Ohio, LLC (Terradiol Ohio), NYCI Holdings LLC (NYCI), New Amsterdam Distributors, LLC (New Amsterdam), Impire State Holdings, LLC (Impire), John Vavalo, Dominic Falcone, Dennis T. Duval, Dino Dixie, Patrick Harvey, Phillip Hague, Jeffrey Scheer, Esq., Bond, Schoeneck & King, PLLC (Law Firm), Acreage New York, LLC (Acreage LLC), NY Medicinal Research & Caring, LLC (NY Medicinal), High Street Capital Partners, LLC (High Street Capital), and Acreage Holdings, Inc. (Acreage Holdings).¹

¹ Defendant Acreage Holdings, Inc. does not object to the portion of plaintiff's OSC (motion seq. no. 008) seeking to serve and file a Supplemental Summons to add it as a defendant. (See NYSCEF 178, First PI Motion at 2; NYSCEF 182, Supplemental
655480/2018 EPMMNY LLC vs. NYCANNA LLC Motion No. 011 Page 1 of 5

PROCEDURAL HISTORY

On November 2, 2018, plaintiff commenced this action against defendants. (NYSCEF Doc. No. [NYSCEF] 2, Complaint.) On January 31, 2019, plaintiff filed an amended complaint. (NYSCEF 48, Amended Complaint.)

On April 1, 2019, defendants Law Firm and Scheer; NYCI, New Amsterdam, Vavalo, Falcone, Duval, Dixie, and Harvey (collectively, NYCI Defendants); Terradiol Management and Terradiol Ohio; and NYCANNA, NY Medicinal, Impire, and Acreage LLC (collectively, the Acreage Defendants) moved to dismiss the amended complaint (Motion Seq. Nos. 003, 004, 005, 006, and 007.)

On June 27, 2019, plaintiff filed motion sequence number 008, seeking a preliminary injunction prohibiting defendants from “the transfer, sale, encumbrance, pledge, assignment, use, hypothecation or other act affecting the rights, title or ownership of” NYCANNA and the associated license (the NYCANNA License) (First PI Motion). (NYSCEF 178, Order to Show Cause [OSC] at 2.) The First PI Motion also sought an order from the court imposing a constructive trust upon defendants and an order granting pre-judgment attachment against defendants’ assets. (*Id.*) Plaintiff also sought leave to serve a Supplemental Summons and leave to file a second amended complaint to add Acreage Holdings as a defendant and to add two causes of action. (*Id.*; *see also supra* n. 1.) Plaintiff’s claims for injunctive relief were staked in part on plaintiff’s allegation that a transaction announced between defendant Acreage Holdings and nonparty Canopy Growth Corporation (Canopy), a deal allegedly including

Summons.) Acreage Holdings, Inc. has accepted service. (NYSCEF 305, Acreage Defendants’ Memo in Opposition at 6 n 1.)

NYCANNA (in which plaintiff claims 25% equity ownership), would frustrate plaintiff's efforts to enforce a possible judgement in its favor. (NYSCEF 179, Feder Aff. ¶¶ 36-38, 56, 61.) The court issued a limited TRO, requiring defendants to notify plaintiff within twenty-four hours of receiving notice from Canopy that Canopy intended to exercise its option to purchase Acreage Holdings. (NYSCEF 191, OSC at 3.)

On January 6, 2020, the court issued an order directing the First PI Motion be held in abeyance until resolution of the capacity issue raised by NYC Defendants in their motions to dismiss. (NYSCEF 243, Decision and Order.) This order left the limited TRO in place pending resolution of the capacity issue. (*Id.*) In a separate decision and order issued on January 6, 2020, the court referred this matter to a Special Referee to hear and determine whether David Feder has the capacity to bring this action on behalf of EPMMNY and further ordered that all defendants' motions to dismiss (motion sequences 003, 004, 005, 006, and 007) be held in abeyance pending resolution of this issue. (NYSCEF 245-249, Decision and Order.) This court held that it could only address the merits of this action after the threshold issue of capacity to sue had been resolved. (*Id.* at 6.)

On January 27, 2020, plaintiff filed motion sequence 010, by OSC, seeking a stay of the Special Referee hearing and re-argument of the January 6, 2020 decision to set a Special Referee hearing on the capacity issue. (NYSCEF 257, Plaintiff's Motion to Stay and Reargue.) On March 2, 2020, the court heard oral argument on plaintiff's

motion to stay and reargue. (NYSCEF 305, Mar. 2, 2020 Hearing Tr.) This motion is currently *sub judice*.²

On March 24, 2020³, plaintiff filed this motion (seq. no. 011), by OSC, seeking a preliminary injunction prohibiting defendants from “the transfer, sale, encumbrance, pledge, assignment, use, hypothecation or other act affecting the rights, title or ownership of” NYCANNA and the NYCANNA License (Second PI Motion). (NYSCEF 295, OSC at 2.) Plaintiff also seeks an order granting pre-judgment attachment against the Acreage NY Assets, as defined as rights, title or ownership of NYCANNA and the NYCANNA License, “including but not limited to the associated New York real estate and intellectual property.” (*Id.*)

Discussion

The injunctive relief and attachment sought by plaintiff in this Second PI Motion is substantially similar to that sought in the First PI Motion. In both motions, plaintiff seeks an injunction to prohibit defendants (primarily Acreage Holdings) from “the transfer, sale, encumbrance, pledge, assignment, use, hypothecation or other act affecting the rights, title or ownership of” NY Canna and the NYCANNA License. (NYSCEF 178,

² On March 15, 2020, Chief Administrative Judge Lawrence Marks issue a memorandum which directed that, effective at 5PM on March 16, 2020, all non-essential functions of the Unified Court System were postponed until further notice.

³ On March 22, 2020, Chief Administrative Judge Lawrence Marks issued Administrative Order 78/20 which “direct[ed] that, effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters attached as Exh. A. This directive applies to both paper and electronic filings.” (NYSCEF 308, AO/78/20.)

OSC [seq. no. 008] at 2; NYSCEF 295, OSC [seq. no. 011] at 2.) Both motions also seek pre-judgment attachment. (*Id.*)

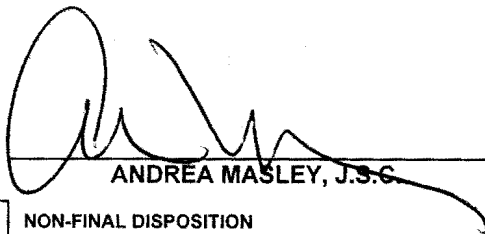
Moreover, the justifications offered by plaintiff in support of the two motions are similar and rely on many of the same factual allegations. In both motions, plaintiff argues that the Canopy deal posed a serious cause for concern that NYCANNA's assets will be transferred beyond plaintiff's reach. (NYSCEF 181, Plaintiff's Memo in Support at 7; NYSCEF 297, Plaintiff's Memo in Support at 4.) Plaintiff also advances a theory that Acreage Holdings is incapable of satisfying a potential money judgment against it. (NYSCEF 181, Plaintiff's Memo in Support at 17; NYSCEF 297, Plaintiff's Memo in Support at 12.) This motion is denied as redundant of motion 08 which was held in abeyance pending a hearing on plaintiff's standing. The court will address that motion along with the motions to dismiss. The court vacates its decision that these motions cannot be determined until capacity is addressed. See decision on motion 010.

Accordingly, it is

ORDERED that plaintiff's motion is denied without prejudice; and it is further

ORDERED that counsel for plaintiff and defendants are directed to jointly inform the court (by email to SFC-Part48@nycourts.gov) within 10 days of this court's entry of this decision and order on NYSCEF whether they agree to a virtual hearing before this court on the issue of capacity.

7/6/2020
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input checked="" type="checkbox"/>	DENIED
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE