

Fedex Corporate Servs., Inc. v Shakuff LLC
2020 NY Slip Op 33072(U)
September 14, 2020
Supreme Court, Kings County
Docket Number: 501770/2019
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 14th day of September 2020

PRESENT:
HON. CAROLYN E. WADE,

Justice

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FEDEX CORPORATE SERVICES, INC,

Plaintiff,

Index No. 501770/2019

-against-

DECISION and ORDER

SHAKUFF LLC T/A SHAKUFF CUSTOM GLASS
LIGHTING & DECOR,

Defendant.

-----X

Recitation, as required by CPLR ' 2219 (a), of the papers considered in the review of defendant's order to show cause:

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1</u>
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	<u>2,3</u>
Reply Affidavits/Affirmations.....	<u>4</u>
Memorandum of Law.....	_____

Upon the foregoing cited papers and after oral argument, defendant Shakuff LLC T/A Shakuff Custom Glass Lighting & Decor moves, by an order to show cause, for an order vacating the information subpoena with restraining notice served on Defendant's banking institution, JP Morgan Chase Bank, N.A., and unfreezing Defendant's restrained checking account.

Facts

The underlying action was commenced by plaintiff FEDEX CORPORATE SERVICES, INC (“Plaintiff”) for non-payment of services rendered (Kurtz aff, exhibit A). Defendant SHAKUFF LLC T/A SHAKUFF CUSTOM GLASS LIGHTING & DECOR (“Defendant”) is in the business of selling custom lighting and glass and operates a retail store located in Brooklyn, New York. Defendant failed to file an answer in the underlying action; thus, on April 16, 2019, a judgment for \$29,787.21 was entered against it by the Kings County Clerk (Kurtz aff, exhibit B).

After Plaintiff restrained several of Defendant’s bank accounts, the parties entered into a Post Judgment Stipulation of Settlement, dated May 3, 2019, in the amount of \$29,787.21 (Kurtz aff, exhibit C). Pursuant to the settlement agreement, Defendant made an initial payment of \$3,000.00 to release the bank accounts previously restrained by Plaintiff. Defendant also agreed to make monthly payments in the amount of \$1,500.00 until the settlement amount was paid. In exchange, Plaintiff would refrain from enforcing the judgment.

Due to the COVID-19 pandemic, and executive orders issued by Governor Andrew Cuomo, which required the closure of non-essential businesses, Defendant ceased operating in March 2020, and did not resume business until June 2020. During this time, Defendant applied for and received a loan pursuant to the Paycheck Protection Program (“PPP”) under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. While Defendant’s store remained closed, Defendant did not make payments to Plaintiff as provided in the settlement agreement. Defendant also acknowledged that it had missed making a payment that was due prior to the COVID-19 pandemic (Kurtz aff at 12). In June, Plaintiff served a restraining notice on Defendant's bank, JPMorgan Chase Bank, N.A. (“Chase”). Defendant’s restrained account contained approximately \$17,000.00 (Kurtz aff at 12).

Arguments

In support of its application, Defendant asserts that the approximate \$17,175.38.00 balance in the restrained account is the remainder of the PPP loan. It argues that the PPP loan is provided by the U.S. Government to help Defendant fulfill its payroll obligations and maintain employment; and that using it to pay a judgment will potentially subject it to criminal or civil liability. Defendant also asserts that if it cannot make payroll, it will not be able to continue to operate its business.

Plaintiff, in opposition, points out that Defendant concedes that it is not in compliance with the stipulation of settlement. It also argues that Defendant did not submit evidence that any of the restrained funds are exempt from attachment, and it has failed to indicate whether there were co-mingled funds in the subject account.

In reply, Defendant submits a screenshot of an undated bank account summary named “BB-SBA LOAN (...3002)”, which shows a “current balance” of \$82,949.00, and a “loan funding” transaction on April 11, 2020, in the amount of \$82,780.00. Defendant also submits an invoice from Chase, dated April 27, 2020, which indicates a “Sba Loan” balance in the amount of \$82,780.00.

Analysis

To be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*Ruiz v Meloney*, 26 AD3d 485, 485-86 [2d Dept 2006]; *W. T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (see *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 604 [2d Dept 2004]).

In the instant case, Defendant submitted, for the first time in its reply papers, documentary evidence (*i.e.* account screenshot and a loan invoice) to support its contention that the funds in the restrained bank account is the remainder of PPP loan. “[G]enerally, evidence submitted for the first time in reply papers should be disregarded by the court” (*Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015], citing *Adler v*

Suffolk County Water Auth., 306 AD2d 229, 230 [2d Dept 2003]). “[E]xceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers, and/or when the other party is given an opportunity to respond to the reply papers” (*id.*, [internal citation omitted]). Here, such exceptions do not apply.

Even assuming, *arguendo*, that the documentary evidence was properly submitted in Defendant’s moving papers, such evidence does not sufficiently demonstrate that the approximate \$17,000.00 balance in the restrained account is the remainder of the PPP loan. Notably, Defendant did not submit any account statements reflecting the transactions that it made upon the deposit of the \$82,949.00 PPP loan, including any withdrawals or deposits. Defendant also failed to indicate whether there are co-mingled funds in the account.

Conclusion

Accordingly, based on the above, it is

ORDERED that defendant Shakuff LLC T/A Shakuff Custom Glass Lighting & Decor’s Order to Show Cause is **DENIED**.

This constitutes the Decision and Order of the court.



**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE**

2020 SEP 16 AM 10:39
KINGS COUNTY CLERK
FILED