

Flash Funding Servs., Inc. v Fan Food Corp.

2020 NY Slip Op 34022(U)

December 2, 2020

Supreme Court, Nassau County

Docket Number: 603802/2020

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

FLASH FUNDING SERVICES, INC.,

Plaintiff(s),

-against-

FAN FOOD CORP., and TENLONG LO,

Defendant(s).

TRIAL/IAS, PART 18
NASSAU COUNTY

Index No.: 603802/2020

Motion Seq. No.: 002 & 003
Motion Submitted: 9/30/2020

The following papers read on this motion:

- Order to Show Cause/Supporting Exhibits.....X
- Notice of Cross Motion/Supporting Exhibits.....X
- Affirmation in Opposition to Cross Motion/Further Support/
Supporting Exhibits.....X

Plaintiff, Flash Funding Services, Inc. (Flash), moves this court (Motion Seq. 002) for leave to amend its summons and complaint to add a new party, and for a preliminary injunction seeking to restrain funds belonging to Defendant Fan Food, Corp, (Fan) Tenlong Lo (Lo) or current non-party Fan Chinese Cuisine, Inc. (Fan Chinese). Fan and Lo do not oppose the motion to amend, but oppose the motion for a preliminary injunction, and cross move (Motion Seq. 003) to vacate their default in opposing a prior motion. Flash opposes the cross motion.

Flash and Fan entered into an agreement whereby Flash purchased certain receivables from Fan for \$53,000.00. In return, Fan agreed to allow Flash to receive 25% of its receivables until Flash was paid \$75,790.00. Lo guaranteed the payment amount. At some point Defendants stopped paying 25% of its receivables. Flash commenced the within action and Defendants failed to appear. By short form order dated July 7, 2020, this court granted Flash's unopposed motion to restrain certain bank accounts.

Flash then moved by order to show cause seeking to add Fan Chinese Cuisine Inc. (Fan Chinese) to this action, arguing that once Fan's bank accounts were restrained, Fan opened up Fan Chinese, with a new bank account, and simply continued operating its business under a new name, without having to pay Flash.

FLASH'S MOTION TO AMEND THE COMPLAINT (MOTION SEQ. 002)

“Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit’ ” (*Bloom v. Lugli*, 102 AD3d 715 [2d Dept 2013]; quoting *Greco v. Christoffersen*, 70 AD3d 769, 770 [2d Dept 2010], quoting *Gitlin v. Chirinkin*, 60 AD3d 901, 901–902 [2d Dept 2009]; see CPLR 3025[b];). “A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed” (*Gitlin*, 60 AD3d at 902; see *Greco*, 70

A.D.3d at 770). “The granting of such leave is committed to the sound discretion of the trial court and must be determined on a case-by-case basis” (*Biaggi & Biaggi v. 175 Medical Vision Properties, LLC*, 105 AD3d 790, 791 [2d Dept. 2013]; quoting *Skinner v. Scobbo*, 221 A.D.2d 334, 335 [2d Dept 1995]). The same standards that apply to amend pleadings apply to amendments of bills of particulars. (*Daly-Caffrey v. Licausi*, 70 AD3d 884 [2d Dept 2010]).

Herein, the motion to amend the complaint is unopposed. As such, it will be granted.

As for the preliminary injunction, Flash claims that Fan never stopped operating its business, but simply changed its name, and in May and June, 2020 grossed over \$120,000.00 for the month. Upon presentation of the order to show cause seeking to amend and restrain bank accounts, this court granted Flash a temporary restraining order (TRO) on the bank accounts and financial services Fan and Fan Chinese were using to operate. That TRO remains in effect.

It is well established that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051 [2d Dept 2009]; *Pearlgreen Corp. v. Yau Chi Chu*, 8 AD3d 460

[2d Dept. 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (see *Tatum v. Newell Funding, LLC.*, 63 AD3d 911 [2d Dept. 2009]; *Bergen-Fine v. Oil Heat Inst., Inc.*, 280 AD2d 504 [2d Dept. 2001]), as the remedy is considered to be a drastic one (see *Doe v. Axelrod*, 73 NY2d 748 [1988]). Consequently, a clear legal right to relief which is plain from undisputed facts must be established (see *Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, *supra*; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 AD3d 334 [2d Dept. 2004]; *Blueberries Gourmet v. Aris Realty*, 255 AD2d 348 [2d Dept. 1998]).

Article 63 of the CPLR governs the issuance of preliminary injunctions and temporary restraining orders. Pursuant to CPLR § 6301, a preliminary injunction may be granted in an action for permanent injunctive relief to restrain the defendant, during the pendency of said action, from doing that which the plaintiff seeks to enjoin permanently, by the final judgment. In addition, a preliminary injunction may be granted in any action where it appears that a defendant threatens, or is about to do, or is doing, or procuring to be done, an act in violation of the plaintiff's rights, respecting the subject of the action, which is likely to render the judgment ineffective. To constitute the "subject of the action" within the contemplation of CPLR § 6301, the property or assets for which restraint is sought must be unique or sufficiently specific and the very object of the claim giving rise to the demand for preliminary injunctive relief (see *Credit Agricole Indosuez*

v. Rossiyskiy Kredit Bank, 94 NY2d 541 [2000]; *Coby Group, LLC v. Hasenfeld*, 46 AD3d 593 [2d Dept 2007]).

The court finds Flash has established entitlement to a preliminary injunction. Flash has established it would be successful on the merits by proving Fan stopped making payments. While in general, irreparable harm cannot be proven where money damages can make a party whole, herein Flash has established, at this point, that Fan has simply changed the business entity it was operating under, likely leaving Fan itself insolvent and rendering any judgment Flash may get to be worthless. Finally, the equities favor Flash in that they held up their end of the bargain by paying Fan \$53,000.00, yet Fan did not hold up their end of the bargain when they stopped payments soon thereafter.

In opposition to the preliminary injunction, Lo, who owns Fan, submits an affidavit that does not deny not paying Flash. He also does not deny that Fan Chinese simply took over for Fan. He claims that Flash's action "forced" Fan to make that move.

Lo's business was a Chinese food restaurant, and he claims that in the beginning of 2020, when news of Covid-19 began circulating around the world, the impact was felt by Asian businesses such as his long before the virus caused the various lock downs and pause orders in the United States. Lo claims that in mid-February, it became clear that he would be unable to make the payments he had agreed to, and he claims he contacted Flash to arrange to lower the payments to \$1,000.00 per week. Within a month, however,

his business was so impacted by the pandemic that he could not make that payment either. Lo then attacks Flash's tactics by moving for the injunction of TRO. He claims he did not answer the complaint because he thought the courts were closed down due to the pandemic. Lo also points to paragraph "4" of the contract and argues that Flash took the risk that Fan could fail, and under their contract they did not have the right to try to recover what was not paid:

Nonrecourse Sale of Future Receipts (THIS IS NOT A LOAN): Seller is selling a portion of a future revenue stream to Buyer at a discount, not borrowing money from Buyer. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Buyer. If Future Receipts are remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down, or if the full Purchased Amount is never remitted because Seller's business went bankrupt or otherwise ceased operations in the ordinary course of business, and Seller has not breached this Agreement, Seller would not owe anything to Buyer and would not be in breach of or default under this Agreement. Buyer is buying the Purchased Amount of Future Receipts knowing the risks that Seller's business may slow down or fail, and Buyer assumes these risks based on Seller's representations, warranties and covenants in this Agreement that are designed to give Buyer a reasonable and fair opportunity to receive the benefit of its bargain. By this Agreement, Seller transfers to Buyer full and complete ownership of the Purchased Amount of Future Receipts and Seller retains no legal or equitable interest therein. Seller agrees that it will treat Purchase Price and Purchased Amount in a manner consistent with a sale in its accounting records and tax returns. Seller agrees that Buyer is entitled to audit Seller's accounting records upon reasonable Notice in order to verify compliance. Seller waives any rights

of privacy, confidentiality or taxpayer privilege in any such litigation or arbitration in which Seller asserts that this transaction is anything other than a sale of future receipts.

In reply, Flash points out that Fan stopped making any payments one month prior to the statewide shutdown. At that time Fan did ask to reduce its payments, but refused to provide bank statements or any other proof that its receivables had declined. Regardless, Flash agreed to reduce the payments to \$1,000.00 per week, as long as Fan provided a credit card to which Flash could charge the payment. Fan gave a credit card that was declined when Flash tried to take a payment. Fan would not provide another credit card, and then stopped communicating with Flash completely. Flash's owner, Kunal Bhasin, states he physically went to Fan's restaurant at this time and saw it was open and operating. Mr. Bhasin further points out that, other than Lo's affidavit, neither Fan nor Lo provide any proof of the decline in business or sales. Flash, however, had access to Fan's Chase Bank account information because Fan went to a broker for funding, and the broker sent the request to Flash. In the application, Flash saw that in May, 2020, Fan grossed in excess of \$128,000.00 and in June 2020, it grossed over \$131,000.00. July, 2020 also showed substantial income coming in. Flash points out that had Fan honored its agreement during these months, the entire debt contract would have been satisfied.

Based upon the foregoing, the court finds Fan has not presented evidence to challenge Flash's entitlement to a preliminary injunction.

**FAN'S CROSS MOTION TO VACATE ITS DEFAULT IN OPPOSING THE
MOTION TO RESTRAIN BANK ACCOUNTS AND TO VACATE THE
RESTRAINTS (MOTION SEQ. 003)**

Fan first argues that the TRO should not have been granted because Fan was not served with it and this court lacked jurisdiction. The court disagrees. First, the court had jurisdiction over Fan because Fan was properly served with the complaint. Second, Fan acknowledges doing that which caused Flash concern- simply moving the money out of the bank account that Flash had access to, and opening another one and moving forward with its business. Lo claims he was "forced" to do this by Flash's action but provide no evidence to support that assertion.

However, the court finds that, under the circumstances, Fan should be allowed to interpose an answer to the amended complaint. Therefore, Flash will serve the amended summons and complaint within 10 days of being served with notice of entry of this order. Fan and Lo may then answer pursuant to the CPLR.

Accordingly, it is hereby

ORDERED, that Flash's motion (Motion Seq. 002) to amend the caption and complaint is **GRANTED**. Flash shall serve the amended complaint consistent with the terms of this order; and it is further

ORDERED, that Flash's motion for a preliminary injunction is **GRANTED** under

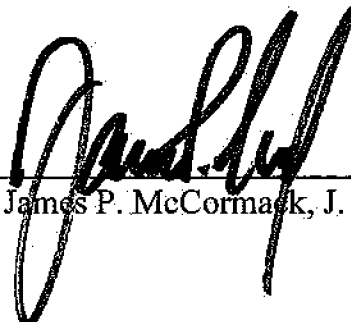
the same terms as the TRO; and it is further

ORDERED, that Fan's motion (Motion Seq. 003) to vacate the court's prior TRO is DENIED to the extent that the court will not vacate the prior TRO. However, Fan and Lo may interpose an answer to the amended complaint.

The court has considered the remaining arguments of the parties and finds them to be without merit.

This foregoing constitutes the Decision and Order of the Court.

Dated: December 2, 2020
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED
Dec 09 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE