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NO. 19947-05

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 16 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 12-22-05
Submission Date: 1-18-06
Motion Sequence No.: 001/MOT D

TEMPLE JUDEA OF MANHASSET, INC.,
Plaintiff,

- against -

A & B ROOFING, INC., A & B SYSTEM, INC., and ANTHONY BOUCHARD, Individually,
Defendants,

COUNSEL FOR PLAINTIFF
Michael A. Rosenberg, Esq.
122 East 42nd Street - Suite 606
New York, New York 10168

COUNSEL FOR DEFENDANT
Ronald D. Weiss, P.C.
734 Walt Whitman Road - Suite 203
Melville, New York 11747

## ORDER

The following papers were read on Plaintiff's motion for a preliminary order of attachment, a preliminary injunction and the appointment of a temporary receiver:

Order to Show Cause dated December 19, 2005;
Affidavit of Steven Groman sworn to on November 30, 2005;
Affirmation of Michael A. Rosenberg, Esq. dated November 30, 2005;
Plaintiff's Memorandum of Law;
Affidavit of Anthony Bouchard sworn to on December 30, 2006;
Affidavit of Steven Groman sworn to on January 16, 2006;
Affirmation of Michael Wininger sworn to on January 16, 2006;
Affirmation of Michael A. Rosenberg, Esq. January 16, 2006.

Plaintiff Temple Judea of Manhasset, Inc. ("Temple Judea" or "Temple") moves for an order of attachment of Defendants' assets, accounts and property and debts

owed to the Defendants, for a preliminary injunction enjoining the Defendants from paying the principals or any of their creditors except in the regular course of business and for the appointment of a temporary receiver for all of the Defendants assets, accounts, funds, record and property.

## BACKGROUND

Temple Judea owns and operates a synagogue at 333 Searingtown Road, Manhasset, New York.

In May 2004, the Temple's Board of Trustees voted to repair and replace the entire flat roof of the synagogue. Pursuant to the Board of Trustees' directive, and in accordance with Temple policy, the roof repair and installation was put out for competitive bid.

Temple Judea approved a bid received from Defendant A & B Roofing, Inc. ("Roofing"). In May 2004, the Temple entered into a written agreement with Roofing pursuant to which Roofing was to remove the existing roof down to the deck, install a new roof in accordance with the specifications contained in the Agreement and to remove and legally dispose of all debris generated by the removal of the old roof and install the new roof. The Agreement provided that the roof was to have a twenty (20) year Diamond Pledge NDL guarantee.

Roofing was to be paid the sum of $293,500 for the work. The contract price was to be paid as follows: $88,065 on the signing of the contract; $88,065 on the

commencement of the work; 88,065 on completion of the work; and the balance of $29,355 on receipt of the manufacturers warranties.

Temple Judea has paid Roofing the amount due on contract and the amount due on the commencement of the work. The Temple and Roofing agree that Roofing removed the existing roof. At this point, the parties versions and perceptions of the events diverge significantly.

Temple Judea asserts that Roofing removed the old roof and installed a one-ply covering on the roof and performed no further work. It further alleges that Roofing never did any additional work despite frequent and repeated requests by Temple to complete the job. Temple Judea asserts that it received a series of excuses from Roofing as to why it could not complete the work. Temple went so far as to contact the supplier of the roofing material that was to be used and was advised Roofing had ordered but not paid for the materials. The supplier stated the materials would not be shipped until Roofing paid for the materials.

Roofing asserts that it could not do the work because of delays relating to the air conditioning system and the engineer retained by the Temple to supervise the work. Roofing claims the work on the roof-mounted air conditioners was not completed timely and was not done properly. The Agreement provided that Roofing would commence its work when the air conditioning work was completed.

The delay in the completion of the work on the air conditioners pushed the start time for the roofing work back into the winter. Roofing asserts manufacturer's

specifications prevent installation of the roofing material in the winter.

Roofing further asserts that its work was delayed by new and additional requirements imposed by the Temple and its engineer after the work began.

Roofing further asserts that it could not begin the work because the Temple had requested the specifications for the roofing material, a letter from the manufacturer indicating its intent to issue the warranty and a certificate from the manufacturer indicating that Roofing was qualified to install the roof. Roofing asserts it presented the material it needed to obtain these items to the Temple and its engineer. The Temple and the engineer never provided the response Roofing needed to obtain the letter of intent or the certificate of Roofing's ability to install the roof.

Roofing asserts that further problems were caused when Temple employees went on the roof to remove snow during the winter of 2004-05. Roofing claims it had advised Temple to stay off since walking on the new roofing material prior to the completion of the work would damage the roof.

In addition, further problems arose in the Spring of 2005 in connection with the air conditioners. In February 2005, Roofing met with the Temple regarding problems with the air conditioners. As a result of the meeting, and based upon the work that Roofing believed was needed to complete the air conditioner work, Roofing retained Inter-County Mechanical at it's expense to finish the air conditioning work on three (3) air conditioners as per the air conditioning specifications.

When Roofing and Inter-County inspected the air conditioners in the Spring of 2005, they determined that significantly more work than was in the air conditioning specifications would be required to properly complete the air conditioning work to meet local code. Roofing and Inter-County determined that several other air conditioning units on the roof, that were not subject to the air conditioning specifications and upon which work was not being performed, were not installed properly. Roofing was concerned that the improperly installed air conditioning units might compromise the roof work. As a result, Roofing requested the Temple provide it with a release from liability should roofing problems arise due to the problems with these air conditioners.

Roofing also submitted a new proposal for the remainder of the work. While the proposal was for the same amount of money as in the Agreement, the new proposal provided for a different payment schedule.

Roofing and the Temple were unable to come to an agreement on the remainder of the work or the new payment schedule. As a result, the Temple cancelled the contract and retained another contractor to complete the work.

Defendant Anthony Bouchard ("Bouchard") is the vice president of Roofing. He signed the Agreement on behalf of Roofing, the correspondence between Roofing and the Temple and dealt with the Temple in connection with this project.

Some of the Roofing correspondence to the Temple and the revised proposal was on the letterhead of Defendant A&B Systems, Inc. ("Systems").

The complaint in this action alleges eleven causes of action including causes of action for breach of contract, negligence, conversion, fraud, piercing the corporate veil and civil RICO violations. Despite the allegations in the complaint, the Temple appears to be seeking to recover the money paid to Roofing on account of the Agreement and any additional expenses incurred with the new contractor in connection the completion of the roof.

## DISCUSSION

### A. Preliminary Order of Attachment

The Temple asserts it is entitled to an order of attachment pursuant to CPLR 6201(3) which permits the court to order a preliminary attachment when the Defendant, with intent to defraud creditors or frustrate the enforcement of a judgment, assigns, disposes of , encumbers or secretes property or removes property from the state or is about to do any of these acts.

In order to obtain an order of attachment, Plaintiff must establish the existence of a meritorious cause of action, a likelihood of success on the merits and one of the grounds for attachment specified in CPLR 6201. Arzu v. Arzu, 190 A.D.2d 87 (1st Dept. 1993); and CPLR 6212(a)

CPLR 6201(3) requires the party seeking a preliminary order of attachment to establish (1) that the Defendant "...has assigned, disposed of, encumbered or secreted property or removed it from the state" or that the Defendant is about to engage in one of these activities; and (2) such action was with intent to defraud creditors or to frustrate

the enforcement of a judgment that Plaintiff might obtain. 1 *New York Civil Practice*: CPLR ¶ 6201.12. See also, Societe Generale Alsacienne De Banque, Zurich v. Flemingdon Development Corp., 118 A.D.2d 769 (2nd Dept. 1986); and Benedict v. Browne, 289 A.D.2d 433 (2nd Dept. 2001).

Even if Plaintiff establishes the statutory requirements for obtaining a pre-judgment attachment, the granting of such relief is discretionary. Sylmark Holdings Ltd. v. Silicone Zone International Ltd., 5 Misc.3d 285 (Sup. Ct., N.Y. Co. 2004).

A plaintiff seeking a pre-judgment attachment must establish the defendant's fraudulent intent. Computer Strategies, Inc. v. Commodore Business Machines, Inc., 105 A.D.2d 167 (2nd Dept. 1984), *rearg. and lv. app. den.,* 110 A.D.2d 743 (2nd Dept. 1985). See also, Rosenthal v. Rochester Button Co., Inc., 148 A.D.2d 375 (1st Dept. 1989). Fraud must be established through evidentiary facts stated in the affidavits in support of the application for an attachment. Benedict v. Browne, *supra;* and Eaton Factors Co., Inc. v. Double Eagle Corp., 17 A.D.2d 135 (1st Dept. 1962).

Mere removal of property from New York or assignment or other disposition of property is insufficient to establish fraud. Computer Strategies, Inc. v. Commodore Business Machines, Inc., *supra.* See also, Bank of China, New York Branch v. NBM L.L.C., 192 F.Supp.2d 183 (S.D.N.Y. 2002).

Plaintiff has failed to establish either element to warrant a preliminary order of attachment. There is no evidence that the Defendants have assigned, disposed of, encumbered or secreted any property, have removed any property from the state or are

about to do any of these activities. Plaintiff has also failed to establish that Defendants have taken any action that would frustrate the enforcement of a judgment.

Temple Judea claims that because it has plead a cause of action for common law fraud that it has made the requisite showing to obtain a preliminary order of attachment. Such argument fails to distinguish between the elements of common law fraud, (See, Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403 [1958]), and the statutory requirements for obtaining a preliminary order of attachment pursuant to CPLR 6201(3).

Temple Judea is seeking to create a fund from which to obtain the enforcement of a judgment should it ultimately prevail in this action. This is not one of the statutory bases for obtaining a preliminary order of attachment.

Since Temple Judea has failed to establish its entitlement to a preliminary order of attachment, its motion for such relief must be denied.

B. Preliminary Injunction

Temple Judea also seeks a preliminary injunction enjoining the Defendants from paying any money to any of their principals or creditors except in the ordinary course of business.

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits, (2) the Plaintiff will suffer irreparable harm in the absence of an injunction and (3) a balancing of the equities favors the granting of an injunction. Aetna

Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); Doe v. Axelrod, 73 N.Y.2d 748 (1988); and Olabi v. Mayfield, 8 A.D.3d 459 (2nd Dept. 2004).

The party seeking the preliminary injunction has the burden of establishing a *prima facie* entitlement to such relief. Gagnon Bus Co., Inc. v. Vallo Transportation, Ltd., 13 A.D.3d 334 (2nd Dept. 2004); and William M. Blake Agency, Inc. v. Leon, 283 A.D.2d 423 (2nd Dept. 2001). A preliminary injunction will be granted only if there is a clear right to the relief upon the law and the undisputed facts. JDOC Construction LLC v. Balabanow, 306 A.D.2d 318 (2nd Dept. 2003); Peterson v. Corbin, 275 A.D.2d 35 (2nd Dept. 2000); Carman v. Congregation De Mita of New York, Inc., 269 A.D.2d 416 (2nd Dept. 2000); and Anastasi v. Majopon Realty Corp., 181 A.D.2d 706 (2nd Dept. 1992).

The party seeking the preliminary injunction must present evidence establishing the likelihood of success on the merits. Moy v. Umeki, 10 A.D.3d 604 (2nd Dept. 2004); and Terrell v. Terrell, 270 A.D.2d 301 (1st Dept. 2001).

Plaintiff has no right to interfere with the Defendants' use or sale of their property until it has obtained a judgment. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541 (2000). When the only relief sought by the plaintiff is a money judgment, plaintiff has failed to establish the existence of irreparable harm. 1659 Ralph Avenue Laundromat Corp. v. Ben David Enterprises, LLC, 307 A.D.2d 288 (2nd Dept. 2003); and Klein, Wagner & Morris v. Lawrence A. Klein, P.C., 186 A.D.2d 631 (2nd Dept. 1992).

Temple Judea only seeks compensatory and exemplary damages. As a result, it has failed to establish the existence of irreparable harm. Thus, it is unnecessary to

reach the other essential elements for the granting of a preliminary injunction.

Since its has failed to establish this necessary element for obtaining a preliminary injunction, the Temple's motion for a preliminary injunction must be denied.

C. Receiver

Temple Judea seeks the appointment of a temporary receiver of all the Defendants' assets, accounts , funds, records and property. Such relief cannot be granted because it is beyond the scope of CPLR 6401.

CPLR 6401 permits the appointment of a temporary receiver to preserve specific identifiable property that is the subject of the action. Siegel, *New York Practice 4th* §332. A temporary receiver will not be appointed if the relief being sought is money damages. Brody v. Mills, 278 App.Div. 771 (2nd Dept. 1951); and Mack v. Stanley, 74 App.Div. 145 (1st Dept. 1902)

A temporary receiver may be appointed in an action for money damages if the subject of the action is a specific fund of money. Meurer v. Meurer, 21 A.D.2d 778 (1st Dept. 1964). The party seeking a temporary receiver must establish that funds or the property are in danger of being materially injured or destroyed. Secured Capital Corp. of N.Y. v. Dansker, 263 A.D.2d 503 (2nd Dept. 1999). That is not the case here.

Temple Judea is seeking general compensatory and exemplary damages. It is not seeking recovery of any specific property or specific fund of money. Therefore, the appointment of a temporary receiver would be improper.

Accordingly, it is,

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**ORDERED,** that Plaintiff's motion for a preliminary attachment, a preliminary injunction and the appointment of a temporary receiver is **denied**: and it is further,

**ORDERED,** that counsel for the parties are directed to appear for a preliminary conference on May 9, 2006 at 9:30 a.m.

This constitutes the decision and Order of this Court.

Dated: Mineola, NY
April 10, 2006

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
APR 13 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE