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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

--x

CONTINENTAL BANK,

Plaintiff,

- against -

INDEPENDENT EQUIPMENT CORP.,

Defendant.

--x

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 019878-10
Motion Seq. No: 1
Submission Date: 12/16/10

The following papers have been read on this motion:

Order to Show Cause, Emergency Affirmation,
Affidavit in Support and Exhibits...x
Summons and Complaint with Exhibits...x
Affidavit in Opposition..x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff Continental Bank ("Plaintiff") on October 21, 2010 and submitted on December 16, 2010. For the reasons set forth below, the Court denies Plaintiff's application for an Order of Seizure but grants Plaintiff's application for injunctive relief to the extent that the Court directs that the temporary restraining order ("TRO") issued by the Court on October 21, 2010 shall remain in effect pending further court order, on the condition that Plaintiff post an undertaking in the sum of $25,000 within thirty (30) days of the date of this Order.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order pursuant to CPLR § 7102, directing the Defendant to turn over to Plaintiff certain equipment ("Equipment") described in Exhibits B and C and Paragraph 20 of the Affidavit in Support of Eric Helt ("Helt"). Plaintiff further requests that, in the event that Defendant fails to turn over the Equipment, the Court direct the Sheriff of any County within the State of New York or any other jurisdiction in which the Equipment is found to seize the Equipment. Moreover, Plaintiff seeks an Order that, if the Equipment is not voluntarily delivered to the Sheriff, he shall be permitted to break open, enter and search for the Equipment at the locations set forth in Exhibits B and C and Paragraph 18 of the Helt Affidavit ("Location"). Plaintiff also moves for an Order 1) directing the Defendant immediately to disclose to the Court and Plaintiff's counsel in writing under oath a) the location of the Equipment, b) the identity of the person(s) or entity(ies) in possession or control of the Equipment, c) the identity of the owner(s) of the premises at which the Equipment is located, and d) produce all agreements and writings identifying the Equipment, its location and the terms under which Defendant maintains any interest in the Equipment; 2) pursuant to CPLR § 6301, enjoining Defendant, its principals, employees, representatives, affiliates, subsidiaries, successors, assigns and all those acting in concert with and on behalf of them, pending a final judgment in this action, from using, transferring, hypothecating, selling, pledging, assigning or disposing of or removing the Equipment from its current location or from the State of New York, or from permitting the Equipment from being subject to any lien or security interest.

B. The Parties' History

The Verified Complaint ("Complaint") alleges as follows:

Plaintiff is a foreign corporation authorized to do business in the State of New York. Defendant is a domestic corporation that maintains its offices in Nassau County, New York.

On or about March 7, 2003, Mitsui Machinery Distribution, Inc. ("Mitsui"), as the secured party, and Defendant, as debtor, entered into a Security Agreement (Ex. A to Compl.). Between September 30, 2005 and September 4, 2007, Mitsui and Defendant entered into at least fifteen (15) Finance and Security Agreements (collectively "Finance Agreements") (Ex. B to

Compl.), pursuant to which Defendant purchased certain items of equipment from Mitsui.

Pursuant to the Finance Agreements, Mitsui lent money to Defendant which Defendant used to purchase the equipment which consisted of the following: 1) seven (7) Airman PDS 185S-6B4 Air Compressors, 2) one (1) Airman SDG25S-6A7 Generator, 3) one (1) Yanmar VIO15-2 Excavator, 4) one (1) Yanmar VIO35-2 Excavator, and 5) four (4) Airman PDS400 Air Compressors.

Between November of 2005 and January of 2009, Mitsui and Defendant entered into a series of purchase orders ("Purchase Orders") (Ex. C to Compl.), pursuant to which Mitsui sold to Defendant certain equipment identified in the Purchase Orders. Mitsui subsequently assigned to Plaintiff all of Mitsui's right, title and interest in and to the Security Agreement, Finance Agreements and Purchase Orders.

In the First Cause of Action, Plaintiff alleges that Defendant has taken possession of the equipment that it purchased pursuant to the Finance Agreements and Purchase Orders ("Equipment"), but has failed to make payment on the Purchase Orders. The First Cause of Action includes a table ("Table") listing the Invoice Number, Invoice Date and amount owed under every listed Invoice and alleges that Defendant owes a total of $290,146.16 to Plaintiff, plus applicable late charges and interest. Plaintiff seems damages in the sum of $290,146.16, plus applicable late charges and interest.

In the Second Cause of Action, Plaintiff seeks an Order granting it immediate possession of the Equipment, and directing Defendant to release and relinquish possession of that Equipment forthwith. Plaintiff cites the applicable provisions in the Security Agreement that entitle Plaintiff to immediate possession of the Equipment. The relevant provisions of the Security Agreement, which refers to Defendant as the "Debtor" and Mitsui as the "Secured Party," include the following:

Paragraph I of the Security Agreement provides that "Debtor hereby grants to Secured Party a purchase money security interest in the Collateral described in Paragraph II to secure the performance of payment of the Obligations of Debtor to Secured Party under Paragraph III."

Paragraph II of the Security Agreement, titled "Collateral," provides that:

All unpaid inventory, equipment, and goods manufactured by or distributed by

> Secured Party, whenever sold, consigned or delivered, directly or indirectly, to or for the benefit of Debtor by Secured Party, wherever located, now owned and hereafter acquired including but not limited to all Products under the following description and/or brand names; MMD-NAC Pumps and Portable Generators, Airman Air Compressors, TCM Wheel Loaders, TCM Lift Trucks, Yanmar Excavators, Sakai Compaction, Airman Welders and Generators; and parts and all accessions and products; and all proceeds from the sale thereof; and all existing or subsequently arising, accounts, and all accounts receivable which may from time to time hereafter come into existence during the term of this Security Agreement.

Paragraph III(A) of the Security Agreement, titled "Obligation to Pay," provides as follows:

> Debtor shall pay to Secured Party when due, the Secured Party's invoices to Debtor for Products sold to Debtor by the Secured Party.

Paragraph IV of the Security Agreement, titled "Default," provides, in pertinent part, that "[N]oncompliance with or nonperformance of any of Debtor's Obligations or Agreements under this agreement shall constitute default under this Security Agreement."

Paragraph V of the Security Agreement sets forth the Secured Party's Rights and Remedies in the event of default which is defined as including 1) any failure to comply with the provisions of the Security Agreement, 2) failure to pay when due any portion of the indebtedness, including interest, 3) any loss, theft, substantial damage or destruction of the collateral or issuance of attachments, levy, garnishment or judicial process with respect to the collateral, or 4) insolvency, bankruptcy, business failure, assignment for the benefit of creditors or appointment of receiver for debtor on its property. Pursuant to Paragraph V, the Secured Party's rights and remedies are:

> Secured Party at its election and without prior notice may declare all indebtedness presently due and payable. If the indebtedness has not been fully paid, Secured Party may exercise any and all rights and remedies granted a Secured Party under the Uniform Commercial Code ["UCC"], including but not limited to:
>
> (1) The right to enter upon Debtor's premises to take possession of, assemble and collect the collateral or to render it unusable and
>
> (2) The right to require Debtor to assemble the collateral and make it available at a place Secured Party designated which is mutually convenient to allow Secured Party to take possession or dispose of the collateral and

(3) The right to waive any default or remedy in any reasonable manner without waiving the default remedied and without waiving any other prior or subsequent default.

In the event of sale of collateral by Secured Party, it is agreed the proceeds of sale will be applied first to costs of sale and other expenses authorized by the [UCC] including reasonable attorney's fees, second to interest, then to principal of the indebtedness and thereafter any surplus shall be paid to Debtor or such other person as may be entitled thereto. Debtor shall remain liable for any deficiency and shall pay the same to Secured Party immediately upon demand.

In accordance with the terms of the Security Agreement, Mitsui filed a UCC-1 Financing Statement with the New York County Clerk and New York Secretary of State. The Financing Statement provides a lien on all unpaid inventory, equipment and goods manufactured or distributed by Mitsui. The Financing Statement was continued and assigned to Plaintiff. Plaintiff alleges that, by virtue of Defendant's failure to pay to Plaintiff the sums due and owing under the Purchase Orders, Plaintiff is entitled to immediate possession of the Equipment.

In the Third Cause of Action, Plaintiff, pursuant to the applicable provisions in the Security Agreement, seeks costs and expenses, as well as attorney's fees, incurred by Plaintiff in connection with the enforcement of the Security Agreement.

In his Affidavit in Support, Helt affirms as follows:

Helt, a Vice-President for Plaintiff who is fully familiar with the facts and circumstances of this matter, affirms the truth of the allegations in the Complaint. He affirms, further, that Plaintiff has no knowledge of any defense to Plaintiff's claims.

Helt submits that Plaintiff has the right, pursuant to the Loan Agreements and Article 9 of the New York UCC, to seize and take possession of the Equipment for the purpose of reducing the amounts owned by Defendant to Plaintiff. In addition, the Loan Agreements entitle Plaintiff to enter the Defendant's premises to search for the Equipment. The current location of the Equipment is believed to be Defendant's premises located at 332 Sagamore Avenue, Mineola, New York 111501. The aggregate fair market value of the Equipment is estimated to be at least the amount due under the Loan Agreements, depending on factors including manner of sale and current condition.

In his Affidavit in Opposition, Richard Bohm ("Bohm") affirms as follows:

Bohm, the President of Defendant, opposes that portion of Plaintiff's motion seeking an

Order 1) requiring Defendant to furnish Plaintiff with possession of the Equipment; and 2) granting Plaintiff an Order of Seizure; and 3) granting Plaintiff a preliminary injunction barring Defendant from transferring the Equipment.

Defendant has compared the Invoices referred to in the Table to the Equipment in Defendant's possession. Based on that comparison, Defendant has determined that it is currently in possession of certain Equipment, for which Bohm provides descriptions and serial numbers, referred to in Invoice Numbers 236693, 251355, 255133 and 263568. With respect to this Equipment, Defendant does not oppose continuing the TRO, "subject to the continued understanding between Independent, plaintiff and the Court that should Independent find a customer willing to lease or purchase said piece of equipment for a reasonable sum, the Court will permit such sale or lease to occur, so long as the full proceeds of such sale or lease are placed into escrow pending the outcome of the underlying action" (Bohm Aff. at § 3). Defendant, however, opposes being required to turn over possession of this equipment to Plaintiff, or an Order of Seizure.

Bohm affirms that the monies owed by Defendant to Plaintiff constitute "a fraction" (*Id.* at ¶ 5) of the value of the Equipment. By way of example, Plaintiff alleges that Defendant owes a total of $2,462.03 with respect to Invoice 236693 but Invoice 236693 reflects that the total price of the three pieces of Equipment on that Invoice was $43,617.00. Defendant submits that it would be inappropriate to require Defendant to turn over the Equipment where the balance owed represents a small percentage of the value of the Equipment.

Bohm argues, further, that Plaintiff has failed to submit an affidavit of an individual with knowledge of the Equipment, or the circumstances surrounding the assignment of Mitsui's rights to Plaintiff. He submits that the Court should consider this failure in determining whether Plaintiff has demonstrated a likelihood of success on the merits.

Bohm submits, further, that an Order directing Defendant to relinquish possession of the Equipment, or authorizing Plaintiff to seize the Equipment is inappropriate because Plaintiff is seeking an Order with respect to Equipment for which it does not claim that any sum is due. For example, Plaintiff includes a Yanmar VIO15-2 Excavator in the Equipment for which it seeks an Order of Seizure, but a review of the Invoices reveals that none of the sums owed relate to this Excavator. The Court considered Defendant's argument in this regard in limiting the scope of

the TRO to only the items included on the Invoices contained in Exhibit C to Plaintiff's Order to Show Cause.

Bohm also argues that an Order of Seizure is inappropriate because Defendant believes that it may never have received certain items of Equipment for which Plaintiff seeks relief. Bohm argues that Plaintiff failed to produce documentation prepared by Defendant, such as a purchase order or delivery ticket, reflecting that Defendant ordered or received any of the Equipment. Defendant also claims that it has been unable to confirm that it received all of the Equipment.

Finally, Bohm contends that an Order of Seizure is inappropriate because Defendant has claims against Mitsui that exceed the monetary relief sought by Plaintiff. Specifically, Mitsui agreed that it would provide service and parts for the equipment that it sold to Defendant, but failed to honor that agreement. As a result of Mitsui's alleged breach, Defendant incurred damages in performing its service and part obligations without Mitsui's assistance, as it was forced to sell certain pieces of equipment at a loss. Defendant is still calculating its damages but believes they exceed the damages sought by Plaintiff. Defendant intends to asserts its claims and defenses against Plaintiff, as the assignee of Mitsui.

Should the Court issue an Order of Seizure, Defendant asks that the Court require Plaintiff to furnish an undertaking, as required by CPLR § 7102.

C. The Parties' Positions

Plaintiffs submit that they have established their right to injunctive relief. First, the allegations in the Helt Affidavit establish the likelihood of Plaintiff's success on the merits by demonstrating that 1) Defendant pledged to Mitsui , Plaintiff's assignor, all of Defendant's Equipment, pursuant to a Security Agreement, as security for the obligations Defendant owed to the assignor pursuant to the Loan Agreements; 2) Mitsui assigned its right, title and interest in and to the Loan Agreements to Plaintiff; 3) Defendant has defaulted in its payment obligations under the Loan Agreements; and 4) as a result of Defendant's default, Plaintiff is entitled to immediate possession of the Equipment, which remains in the possession and control of Defendant, pursuant to the terms of the Loan Agreements, as well as §§ 9-601 and 9-609 of the New York UCC.

Plaintiff also argues that it would be irreparably harmed if the Court does not enjoin

Defendant's allegedly wrongful conduct because the Equipment, which remains in Defendant's possession, is in imminent danger of being lost, stolen, damaged or discarded. Were this to occur, Plaintiff would have no recourse against Defendant to satisfy Defendant's debt to Plaintiff. In addition, the Equipment continues to diminish in value while it remains in Defendant's possession and/or is being used by Defendant.

Finally, Plaintiff contends that a balancing of the equities favors Plaintiff because Plaintiff is being wrongfully denied its clear right to possession of the Equipment and Plaintiff's ability to satisfy Defendant's debt will be compromised without the requested injunctive relief.

Defendant opposes Plaintiff's application, *inter alia*, on the grounds that 1) Defendant is not in possession of all the Equipment as to which Plaintiff seeks relief; 2) the monies owed by Defendant to Plaintiff constitute only a small percentage of the value of the Equipment; and 3) Defendant has claims and defenses against Mitsui, that it intends to assert against Plaintiff.

D. History of this Litigation

On October 21, 2010, the Court issued a temporary restraining order ("TRO") directing that, pursuant to CPLR §§ 6301 and 6313, pending the hearing of this motion, Defendant, its officers, directors, owners, employees, agents, assignees, related companies, as applicable, and/or anyone else are enjoined from removing the Equipment, serial numbers for which are set forth in Exhibit "C" to this Order to Show Cause and are incorporated by reference, from its current location(s), except to return the equipment at the conclusion of an existing lease or from selling, transferring, pledging, assigning, disposing, leasing or otherwise encumbering the Equipment without the written consent of Plaintiff.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*,

75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. <u>Standards for an Order of Seizure</u>

CPLR §§ 7102 (c) and (d)(1) provide as follows:

(c) Affidavit. The application for an order of seizure shall be supported by an affidavit which shall clearly identify the chattel to be seized and shall state:

1. that the plaintiff is entitled to possession by virtue of facts set forth;

2. that the chattel is wrongfully held by the defendant named;

3. whether an action to recover the chattel has been commenced, the defendants served, whether they are in default, and, if they have appeared, where papers may be served upon them;

4. the value of each chattel or class of chattels claimed, or the aggregate value of all chattels claimed;

5. if the plaintiff seeks the inclusion in the order of seizure of a provision authorizing the sheriff to break open, enter and search for the chattel, the place where the chattel is located and facts sufficient to establish probable cause to believe that the chattel is located at that place;

6. that no defense to the claim is known to the plaintiff; and

7. if the plaintiff seeks an order of seizure without notice, facts sufficient to establish that unless such order is granted without notice, it is probable the chattel will become unavailable for seizure by reason of being transferred, concealed, disposed of, or removed from the state, or will become substantially impaired in value.

(d) Order of seizure.

1. Upon presentation of the affidavit and undertaking and upon finding that it is probable the plaintiff will succeed on the merits and the facts are as stated in the affidavit, the court may grant an order directing the sheriff of any county where the chattel is found to seize the chattel described in the affidavit and including, if the court so directs, a provision that, if the chattel is not delivered to the sheriff, he may break open, enter and search for the chattel in the place specified in the affidavit. The plaintiff shall have the burden of establishing the grounds for the order.

Under CPLR § 7102(d), a court may grant an order of seizure upon the presentation of an affidavit and undertaking and upon a determination that the plaintiff will likely succeed on the merits and that the facts are as stated in the affidavit. *Amplicon, Inc. v. Information Management*

Technologies, 1999 U.S. Dist. LEXIS 13464, p.3 (S.D.N.Y. 1999). *See also Ukryn v. Morgan Marine*, 100 A.D.2d 649 (3d Dept. 1984) (order of seizure dependent on court's finding that it is probable that plaintiff will succeed on the merits). In an action for recovery of chattels pursuant to CPLR § 7101, the sole issue is which party has the superior possessory right to the chattels. *Merrill Lynch v. American Standard Testing*, 2010 U.S. Dist. LEXIS 2278, p. 21 (E.D.N.Y. 2010), citing *Christie's Inc. v. Davis*, 247 F. Supp. 2d 414, 419 (S.D.N.Y. 2002), quoting *Honeywell Information Systems, Inc.* v. Demographic Systems, Inc., 396 F. Supp. 273, 275 (S.D.N.Y. 1975).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's application for an Order of Seizure in consideration of factors including the factual disputes as to which of the Equipment is currently in Defendant's possession, and Defendant's assertion that it has claims and defenses that it intends to assert against Plaintiff as the successor-in-interest to Mitsui.

The Court grants Plaintiff's application for injunctive relief to the extent that the Court directs that the TRO shall remain in effect pending further court order, on the condition that Plaintiff post an undertaking in the sum of $25,000 within thirty (30) days of the date of this Order. Plaintiff has provided evidence that Defendant is in possession of the Equipment referred to in the Complaint, and that Defendant is in arrears with respect to its obligations to pay for that Equipment. Moreover, Defendant concedes that it is in possession of at least some of the Equipment referred to in the Complaint, and does not deny being in arrears with respect to payment on that Equipment. In addition, while Defendant expresses its "belief" that it is not in possession of certain of the Equipment, Defendant does not deny receiving the Equipment from Mitsui. Moreover, Defendant admits having sold some of the Equipment that it purchased from Mitsui, ostensibly due to Mitsui's breach of certain assurances that it gave to Defendant, and, therefore, the Court concludes that, without injunctive relief, there is a danger that the Equipment will be sold and will not be available to Plaintiff to satisfy its debt.

All matters not decided herein are hereby denied.

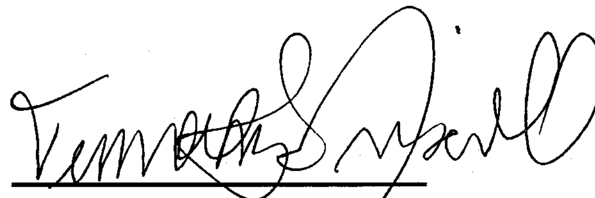
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court on February 9, 2011 at 9:30 a.m. for a Preliminary Conference.

ENTER

DATED: Mineola, NY

January 3, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JAN 06 2011

NASSAU COUNTY

COUNTY CLERK'S OFFICE