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SHORT FORM ORDER

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SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 16

CHAMPION AUTO COLLISION, INC. and
DEMETRIO GIACOBBE,

Plaintiff,

INDEX NO.: 000575/2004
MOTION DATE: 06/02/2004
MOTION SEQUENCE: 02 & 03

- against -

RICHARD PRESTI and SALLY PRESTI,

Defendants.

RICHARD PRESTI,

Defendant and Counterclaim Plaintiff,

- against -

DEMETRIO GIACOBBE and MICHAEL GIACOBBE,

Counterclaim Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmation, Affidavit & Exhibits Annexed.....	1
Defendants' and Counterclaim Plaintiff's Memorandum of Law.....	2
Notice of Cross Motion, Affidavits, Affirmation & Exhibits Annexed.....	3
Plaintiffs' and Counterclaim Defendants' Memorandum of Law in Support.....	4
Affidavit of Richard C. Presti and Affirmation.....	5

This motion by defendants for an order pursuant to 6514(b) cancelling the Notices of Pendency filed against three properties owned by defendant, Richard Presti, and his company

R&S Railroad Realty Corp., and the cross motion by plaintiffs for an order pursuant to Judiciary Law §§ 750, 753 & 756 punishing defendant, Richard Presti, for contempt for his alleged disobedience of two injunctive orders of this court, for an order granting plaintiff renewal of a former motion for a temporary restraining order and preliminary injunction which resulted in orders dated February 9, 2004 and March 29, 2004, restraining defendants, inter alia, from using or appropriating or leasing or liening any chattel property formerly used by Champion Auto Collision, Inc. (Champion) pending further order of the court, and upon renewal for an order including a certain USI Italia Downdraft Spray booth in the aforesaid restraining order, for a further order pursuant to CPLR 3211(a)(7) dismissing defendants' counterclaim, and for an order pursuant to CPLR § 2304 quashing subpoenas served upon South Shore Honda, South Shore Porsche, Acura of Valley Stream, Millenium Honda, Porsche-Legend Autorama, and, finally, for an order granting plaintiff leave to add Presti Automotive Corp. as a party defendant are determined as follows.

While the record compiled heretofore reveals many of the factual circumstances of plaintiff Giacobbe's business life since 1998, little is disclosed about defendant Richard Presti's. Apparently he had, and perhaps still has, a business named "Presti Automotive." It is not known what service it performs or what goods are produced.

Plaintiffs commenced this action seeking to protect the assets used by Champion in its automotive business which terminated on January 5, 2004. After considering carefully this second and third motion brought in a relatively short period of time since filing the RJI, a pattern emerges whereby plaintiff Giacobbe's recitation of the facts concerning his own circumstances are not directly confronted by defendants, but statements made by plaintiff about defendants' own situation vis-a-vis Champion are portrayed differently, and indeed sometimes changes on their own account.

In 1998, an auto body repair business opened under the name of Champion Auto Collision, Inc. Apparently plaintiff Giacobbe knew well how to repair cars. Previously he was working with his brother Michael, a third party defendant, in the same trade, not far away. All of the shares of Champion were issued to plaintiff, Giacobbe. It is not clear where the first cars were repaired, but in 1999 the business operated out of 33 Clinton Avenue, Valley Stream, where

painting was done, and at 75 Whitehall Street, Lynbrook, where the body work was done. Both properties are owned by defendant, Richard Presti.

In 2001, R&S Railroad Realty Corp. purchased 48 Railroad Avenue, Valley Stream. From this location the financial and record keeping part of the business operated under the guidance of defendant and wife Sally Presti. Plaintiff Giacobbe understood that the business was growing and was successful. He says he did not become involved in any bookkeeping aspect of the business. For the use of the three premises, Champion paid Presti $11,200 a month, and there is no mention of a written lease.

It is not clear on this record how the necessary tools and machinery to operate the business were acquired, beyond the fact that they were. The three largest capital investments are two Car-O-Liner machines, installed at Whitehall Street and a spray painting booth at Clinton Ave. It also seems that "Presti Automotive" either pre-existed Champion or co-existed with Champion but there is no reliable statement on that fact. Yet, it seems despite gaps in the credible evidence, that in 2003 an auto body repair shop was operating smoothly, and at a profit.

On January 5, 2004 worked ceased at Clinton Avenue. Cars that had been left for repairs were left untouched, employees went away to find other work. Champion ceased to exist although all the equipment used as recently as the month before was left in place.

Plaintiff claims that from the outset he and Presti were partners in the business; Presti owned and offered the premises, Giacobbe could fix cars. Apparently they both added funds at different times but this has not developed as a critical matter of contention. Giacobbe recites that Presti was having marital difficulties and in November inquired if Giacobbe wanted to buy out his interest. However interested Giacobbe was, he found the price too high at a right of first refusal on the real property at 3 million dollars and 1 million for the business. Plaintiff states that it was a total surprise to arrive for work at Clinton Avenue on January 5, 2004 and find that Presti had locked the door.

Plaintiff, in the exercise of hindsight, proposes that Presti duped him into building up a business complete for a turn key operation. He then shut the door on Champion keeping all the equipment either affixed or left at the location to be sold as a going business, and this is seemingly what has happened. At the very least the premises are now occupied by "Northstar

Collison," which has access to the equipment.

Defendants' version is that they were neither partners with Giacobbe nor investors nor involved with Champion, it was only Giacobbe's project. They only leased the premises to Champion is their claim. They argue that some of the equipment was leased or purchased by either Presti individually or Presti Automotive and is rightfully the defendants. Defendants portray the events of January 5, 2004, as an abandonment of the leasehold by the tenant. The two Car-o-Liners and the spray paint booth are, in any event, affixed to the real property. Defendant is under contract to sell all three premises and a closing would take place, allegedly, but for the lis pendens filed by plaintiff. Defendant claims that Giacobbe abandoned the leased premises and took Champion's business to Michael Giacobbe's repair shop where plaintiff now works.

Addressing defendants' application to lift the lis pendens first, it is the law that a notice of pendency may be filed in any action in which "the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property." CPLR § 6501. At first blush it would seem that the underlying claim in this action as to whether the parties were business partners and then to equitable distribution of their business's assets, if they were, has nothing to do with use or enjoyment or title to real property. However, the result of an astute look is that the use and enjoyment of real property is involved as long as the three major pieces of body shop equipment are attached. To sell the property without determining the value and rightful ownership of such appurtenances would effectively deprive plaintiff of the judgment demanded. Hercules Chemical Co. v VCI, 118 Misc2d 814 (N.Y. Sup. 1983); In re Lafayette Houses, City of New York, 220 N.Y.S.2d 109 (N.Y. Sup. 1961). Again at first blush defendants' seemingly generous offer to plaintiff to possess the chattels would make sense but the integrity of the offer is cancelled out by Presti's claim that he owns them, he bought or leased them and he has been paying the debt service.

Moreover, although there was no written lease, and plaintiff cannot enforce one without running afoul of the Statute of Frauds, G.O.L.§ 5-703, even in a month to month tenancy one would expect notice to move a commercial enterprise, RPL § 232-b, including its good will, its telephone number, and more importantly in this case, the automobiles belonging to other parties

and the contracts with insurance companies. Although all this is subject to proof at trial, if there was an ejectment the use of the premises by another repair shop tenant together with fixtures used by Champion Auto contemplates a competing claim of at least a temporary use of the premises by plaintiff.

To the view of the court, it would be an abuse of discretion to vacate the lis pendens at this time. While there is authority that a lease is not an interest in real property within the meaning of CPLR § 6501, Gyurek v 103 East 10th Owners Corp., 128 Misc2d 384 (Sup Ct NYCty 1992), there is also authority that machinery annexed to the premises solely for use in the occupant's business or trade is a trade fixture and may be removed when the tenant vacates conditioned upon not damaging the real property. JKSP Rest v Nassau County, 127 A.D.2d 121127 (2d Dept 1987). As time passes plaintiff's occupancy of the premises becomes less of a probability, while it remains that valuable property to which plaintiff lays a competing claim will still be attached but beyond his reach when the property is sold. A just resolution is to vacate the lis pendens conditioned upon defendants holding the sum of $120,000.00 in escrow from the sale of the property to ensure repayment of the value of the property if plaintiff prevails.

Turning to plaintiff's first request for relief, it is alleged that defendant has violated the temporary and preliminary injunctions granted by this court by using or permitting the use of assets which are allegedly the property of Champion by another entity, by negotiating a negotiable instrument made payable to Champion and by keeping the telephone listed to Champion.

It is here that defendant's account is hard to integrate. He claims the Car-o-Liners and spray booth are not Champion's but are his. Although it seems that North Star Collision is in possession of the leasehold, including those fixtures, he claims that one lease for such equipment is in default and subject to foreclosure. If it is being used by another "tenant", then why is the lease in default? Defendant asserts that the telephone number which rang at Collision was in reality the number of Presti Automotive. Yet, there is no evidence that the latter entity was operating from the same premises as Collision, at the same time, and defendant claims he was only the landlord. The negotiating of a check made payable to a tenant for car repairs defendant claims to have had no involvement with is even more difficult to reconcile. In sum, a hearing

must be held to determine whether defendants are in contempt of this court's orders dated February 9, 2004 and March 29, 2004.

Accordingly, a hearing is scheduled before the undersigned in the Supreme Court, County of Nassau, on August 20, 2004, at 9:30 A.M.

Plaintiff further seeks to include a USI Italia Downdraft Spray Booth in the injunctive orders directing defendants to preserve the assets of Champion pending a final determination of their rightful ownership. Plaintiff has demonstrated on this record sufficient evidence on this record to show that the aforesaid spray booth may have been paid for and owned by Champion to find that plaintiff may prevail on the merits and the equities are in its favor. However, compensation for the spray booth is a matter of money damages and the court has directed defendant to escrow the value of the spray booth from the sale of the premises. If it develops that the premises are not sold and title is not conveyed, then it is ORDERED that defendant maintain any lease payments that might be due during the pendency of this action and not suffer additional default payments to Champion by reason of a default.

Plaintiff seeks and order dismissing the counterclaim for tortious interference with contract asserted against him and third party defendant Michael Giacobbe. "'Tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract and damages resulting therefrom' Lama Holding Co., v Smith Barney, 88 NY2d 413, 424." Beecher v Feldstein, __ AD3d __ 2004 WL 1471986 (2d Dept 2004). The contract defendant relies upon is the purported lease between plaintiff, Collision Auto and defendants. The cause of action fails against plaintiff as there is no third-party inducing a breach of contract for his own gain. Stated simply, plaintiff may be in breach of contract, but he cannot be held liable for interfering with his own contract, assuming there was one.

Reviewing the allegations in defendants' counterclaim against Michael Giacobbe, and liberally construing them as the court must, Leon v Martinez, 84 NY2d 83, 88 (1994), there is no allegation of any deliberate action by Micheal Giacobbe to procure a breach of the purported Lease to Champion. To impose liability for tortious interference with contract more than

knowledge of the contract is necessary. The counterclaim as against third-party defendant Michael Giacobbe which sounds in tortious interference with defendant's contractual relationship with Champion is properly dismissed where defendant's agreement with Champion was terminable at will and defendant failed to plead any proof of wrongful or improper conduct on third-party defendant's part (see, NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614; Thur v IPCO Corp., 173 AD2d 344, 345, lv dismissed 78 NY2d 1007). Lawrence-Picaso v Cosme, 228 AD2d 392 (1st Dept 1996). The third-party defendant in this case must have intentionally induced his brother on behalf of Champion to leave the premises and it is simply not plead. Beecher, __ AD3d __ at __.

Accordingly, plaintiff and third-party defendant's motion to dismiss the counterclaim is granted, and it is SO ORDERED.

So much of plaintiffs' motion as seeks to quash subpoenas served upon South Shore Honda, South Shore Porsche, Acura of Valley Stream, Millenium Honda and Porsche-Legend Autorama is denied. In an absence of a motion to quash by those entities, the information elicited from them would, to the view of the court, be instructive as to with whom they did business how they invoiced as vendors to the parties and how they were paid.

Finally, plaintiff's motion to amend the pleading to add Presti-Automotive Company as a party-defendant is granted. As the record has developed in this case, the allegations increase that certain property believed to be Champion's is represented to be Presti-Automotive's. In light of this circumstance Presti-Automotive should be added as a party defendant, and it is SO ORDERED. Plaintiff shall serve an amended pleading within ten days of the date of this order. Presti Automotive shall serve a responsive pleading within twenty days of the date of service of the amended complaint.

Dated: July 21, 2004

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE