

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

BORN TO BUILD LLC,

Decision and Order

Plaintiff,

MOTION SUBMITTED:

March 28, 2013

-against-

MOTION SEQUENCE: 12

INDEX NO.: 002345-11

**IBRAHIM SALEH, a/k/a Abraham Saleh,
a/k/a Kamel Saleh, a/k/a Kamel Y. Saleh,
a/k/a Kamel Youssef Saleh, a/k/a Yaakoub
Saleh, a/k/a Yaakoub Y. Saleh, a/k/a
Yaakoub Youssef Saleh, 1141 REALTY
LLC, KARIM BIN TALEB, a/k/a Karim Bentelab,
BORN TO BUILD CONSTRUCTION CORP.,
SARITA VASWANI, BANCO POPULAR OF
NORTH AMERICA, EDMUND A. NAHAS,
ZRAICK NAHAS & RICH, and JOHN DOES
1 through 10 (such parties being persons of
entities who have possession of plaintiff's tools
and equipment, or who own or control the places
where such tools and equipment are stored),**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause	1
Affidavit in Opposition	2
Affidavit in Response	3
Affirmation in Partial Opposition	4
Memorandum of Law in Opposition	5

In this action to recover damages for, *inter alia*, breach of contract and conversion, the Plaintiff Born to Build LLC ("Born to Build") moves for an order pursuant to CPLR 6212 attaching real property of Defendant 1141 Realty LLC ("1141 Realty") located at 1141 Broadway, New York, New York ("the Premises"), or the proceeds thereof, net of any amount used to satisfy liens, if the Premises has been sold, and fixing the undertaking to be given by the Plaintiff in an amount not greater than \$500.00.

Factual and Procedural Background

As previously set forth in the order of the court dated June 7, 2012, this litigation arises out of a contractual relationship between the Plaintiff and Defendant 1141 Realty, in which the Plaintiff was engaged to perform construction work at the Premises owned by 1141 Realty. According to the complaint, in April 2007, the Plaintiff began demolition of a structure at the Premises. The principal of 1141 Realty, Defendant Ibrahim Saleh, allegedly contacted G. Hourani, the principal of the Plaintiff, and suggested that the Plaintiff open an account at Defendant Banco Popular of North America ("Banco Popular"), where Saleh maintained a checking account, in order to facilitate the transfer of funds to the Plaintiff in connection with the construction work at the Premises. Based on Saleh's suggestion, the Plaintiff opened a checking account at Banco Popular. Although Hourani allegedly instructed Defendant Sarita Vaswani, an employee of Banco Popular, to forward checking statements to the Plaintiff's address, "as the result of collusion between I. Saleh, S. Vaswani and E. Nahas [an attorney and defendant herein] . . . all of Banco Popular's statements for the Account were mailed to the office of E. Nahas. . . ." The Plaintiff received no account statements during the time that it "worked as the general contractor for the hotel construction project at 1141 Broadway" (Ex. "A": Complaint at ¶s 1-38). Defendant Saleh had previously informed Hourani that he deposited monies into the account, which was used by the Plaintiff to pay various subcontractors. However, upon examination of the account statements, the Plaintiff discovered that money was transferred to companies with which it had no business relationship. In addition, the Plaintiff discovered that other unauthorized payments were made from the account; the amount of unauthorized wire transfers exceeded \$1.4 million. The Plaintiff further alleges that many checks drawn on the account were forged. (Ex "A": Complaint at ¶s 40-63).

By order of the court dated May 18, 2011, the Plaintiff was granted a default judgment against Defendant Ibrahim Saleh in the sum of \$2,732,000.00; the Plaintiff's causes of action against the remaining Defendants were severed.

In a related action, Plaintiff brought suit to foreclose on its mechanic's lien against 1141 Realty (*Born to Build LLC, et. ano. v 1141 Realty LLC, et. al.*, Supreme Court, New York County, Index Number 113855/2010). Defendant 1141 Realty interposed an answer with counterclaims in that action seeking damages in excess of \$14,000,000.00 against the Plaintiff for breach of contract and for willful exaggeration of lien.

Plaintiff also commenced a proceeding to dissolve 1141 Realty (*Born to Build LLC v 1141 Realty LLC, et. al.*, Supreme Court, New York County, Index Number 108128/2011). In that proceeding, Born to Build twice moved unsuccessfully for a preliminary injunction enjoining the disposal or transfer of 1141 Realty's assets.

Plaintiff now moves pursuant to CPLR 6212 for an order of attachment against the Premises owned by Defendant 1141 Realty to secure the judgment it anticipates it will ultimately obtain against 1141 Realty in this action.

While disputing the accuracy of some of the statements and arguments made on behalf of the Plaintiff in support of this motion, Defendants Banco Popular and Sarita Vaswani, Edmund A. Nahas and Zraick, Nahas & Rich take no position with respect to the relief sought by the Plaintiff herein. Defendant Saleh has not submitted any response to the Plaintiff's motion for an order of attachment against the Premises owned by 1141 Realty.

For the reasons that follow, the motion is denied.

The Court's Determination

CPLR 6212(a) provides, in relevant part, that on a motion for an order of attachment, the plaintiff must show by affidavit and such other written evidence as may be submitted: (1) that there is a cause of action; (2) that it is probable that the plaintiff will succeed on the merits; (3) that one or more grounds for attachment provided in CPLR 6201 exist; and (4) that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.¹ A prejudgment order of attachment is considered a harsh remedy and the statute is strictly construed in favor of those against whom it may be employed (*Grafstein v Schwartz*, 100 AD3d 699 [2d Dept 2012]; *Glazer & Gottlieb v Nachman*, 234 AD2d 105 [1st Dept 1996]; *First National Bank of Downsville v Highland Hardwoods*, 98 AD2d 924, 926 [3d Dept 1983]).

In moving for an order of attachment against Defendant 1141 Realty, the Plaintiff relies upon the ground set forth in CPLR 6201(3) that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts."

In order to demonstrate a probability of success on the merits, the Plaintiff must establish by affidavit that it is more likely than not to succeed on its claims. Although the Plaintiff is

¹ The court notes that while Defendant 1141 Realty has failed to raise any counterclaims in its answer in this action, it has raised counterclaims against the Plaintiff in the Plaintiff's mechanic's lien foreclosure action, the value of which far exceeds the amount sought by the Plaintiff from Defendant 1141 Realty (CPLR 6212[a]).

entitled to all legitimate inferences being drawn in its favor, it still must make an evidentiary showing of proof stronger than that required to establish a prima facie case (*DLJ Mortgage Capital, Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 [ED NY 2009]).

The cause of action on which the Plaintiff claims entitlement to an order of attachment is its first cause of action for the conversion of funds in its checking account at Banco Popular. Conversion is the unauthorized exercise of dominion over or interference with a specific identifiable piece of property in defiance of the owner's rights (*Petty v Barnes*, 70 AD3d 661 [2d Dept 2010]). The Plaintiff alleges that while Defendant 1141 Realty made deposits into the Plaintiff's account at Banco Popular, the account was "drained" through the forgery of checks and wire transfers that were unknown to and unauthorized by it. The Plaintiff further alleges that it was Defendant Ibrahim Saleh and/or his assistant, Defendant Karim Bentaleb, who forged the checks and issued the instructions for the wire transfers.

In opposition, Defendant 1141 Realty argues that most of the checks and transfers from the account that the Plaintiff cites as instances of conversion were actually proper payments made to subcontractors and suppliers working for the Plaintiff on the hotel construction project at the Premises and that such payments were the obligation of the Plaintiff pursuant to the terms of the contract between the Plaintiff and Defendant 1141 Realty. To the extent that some of the transfers were unrelated to the construction project at the Premises, Defendant 1141 Realty argues that such payments were made by Defendant Saleh without the authority of 1141 Realty, beyond the scope of his employment by 1141 Realty and not foreseeable or for the benefit of 1141 Realty. In this regard, the law is well settled that an employer may be liable when an employee acts negligently or intentionally if the tortious conduct is generally foreseeable and a natural incident of the employment. However, if the employee for purposes of his own departs from his duties so that his acts constitute an abandonment of his service, his employer is not liable (*Judith M. v Sisters of Charity Hospital*, 93 NY2d 932 [1999]). Here, Plaintiff asserts that while Ibrahim Saleh and Karim Bentaleb may have taken some of the money in the account for their own purposes while they were pursuing the company's business, that was a foreseeable consequence of the conversion committed by and for 1141 Realty.

Without deciding the ultimate merits of the respective parties' claims at this juncture, for the purpose of this motion for an order of attachment, the Plaintiff has failed to establish that it is more likely than not to succeed on its claim of conversion against Defendant 1141 Realty.

In addition, the Plaintiff has failed to establish that Defendant 1141 Realty has acted or is about to act to defraud the Plaintiff or frustrate enforcement of any judgment that the Plaintiff might obtain in this action.

Plaintiff alleges that Defendant 1141 Realty has listed the Premises for sale and that there is a prospective buyer prepared to go to contract. Since the principals of the "grandparent"

company of 1141 Realty are not residents of the United States,² the Plaintiff fears that any proceeds from a sale of the Premises would not remain in this country. Defendant 1141 Realty admits that it is seeking to refinance or sell the Premises but only because the Premises are the subject of what 1141 Realty deems to be a meritless mortgage foreclosure action. Moreover, the affidavit of a principal of 1141 Realty's grandparent corporation indicates that 1141 Realty never authorized the real estate listing referred to by the Plaintiff and that there is currently no contract between the net lessee and 1141 Realty for the sale of the Premises.

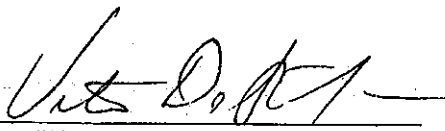
Finally, with respect to an "intent to defraud" as required by CPLR 6201(3), an intent to defraud creditors is never presumed from a mere showing of the removal, assignment or other disposition of property by a defendant. It must be demonstrated that fraudulent intent really existed in the defendant's mind. The fact that the affidavits in support of a motion for an order of attachment contain allegations raising a suspicion of an intent to defraud is not enough (*Computer Strategies v Commodore Bus. Machs.*, 105 AD2d 167, 173 [2d Dept 1984]; *Mitchell v Fidelity Borrowing LLC*, 34 AD3d 366 [1st Dept 2006]; *Abacus Federal Savings Bank v Lim*, 8 AD3d 12, 13 [1st Dept 2004]; *Rosenthal v Rochester Button Co.*, 148 AD2d 375, 376 [1st Dept 1989]). Plaintiff's disputed claims that a sale of the Premises is imminent and that the proceeds of such a sale may not remain accessible are insufficient to demonstrate an intent to defraud or intent to frustrate enforcement of any potential judgment which the Plaintiff might obtain against Defendant 1141 Realty.

6 The remaining arguments raised have been considered and found to be without merit.

7 Accordingly, it is hereby ordered that the Plaintiff's motion for an order of attachment is denied.

This constitutes the decision and order of the court.

Dated: May 15, 2013


Hon. Vito M. DeStefano

² Defendant 1141 Realty is owned by Main Team Hotel, LLC., which is owned by Main Team Trading Ltd., whose principals appear to be residents of Liberia and China.