STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 193-5-20 Wncv
CRW Corp., Plaintiff v. William Hayes, AARDVARK Excavating, LLC, Defendants	

Opinion and Order on Plaintiff's Motion for A Temporary Restraining Order

Plaintiff filed this case seeking damages and replevin in connection with an Excavator that was allegedly sold to Defendant but for which Plaintiff did not receive full payment. The alleged purchase and sale agreement provided that Plaintiff would retain full title to the Excavator and no bill of sale would issue until it had been paid for in full. A hearing has been scheduled for August 4 concerning Plaintiff's preliminary request for a writ of replevin.

In advance of that hearing, Plaintiff has now filed a motion seeking a temporary restraining order (TRO). The Affidavit of Andre Parent, which is submitted in support of the motion, avers that Mr. Parent had spoken to a Mr. Bixby who indicated he was buying or taking possession of an Excavator of the same type involved in this case. The Affidavit indicates that Mr. Bixby is an acquaintance of Defendant. Mr. Parent indicated his "belief" that the Excavator

involved in the pending sale is the same one that is the subject of this action. Plaintiff hopes to enjoin the sale/transfer before it occurs. The Court makes the following determinations.

An injunction, particularly an *ex parte* TRO, is an "extraordinary remedy," and the Plaintiff bears the burden of showing that his right to such relief is "clear." *See* Vt. R. Civ. P. 65; *Comm. to Save the Bishop's House v. Medical Center Hosp. of Vt.*, 136 Vt. 213, 218 (1978); *Blast v. Fisher*, No. 07-CV-0567, 2007 WL 2815754, at *2 (W.D.N.Y Sept. 20, 2007); *see also Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000) (discussing preliminary injunctions).

Additionally, in assessing claims for injunctive relief, the Court is guided by four considerations: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596 (internal quotation omitted). As the United States Court of appeals has further specified:

> A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.... [T]o satisfy the irreparable harm requirement, [p]laintiff[ ] must demonstrate that absent a preliminary injunction [it] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm...." Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances.

Faiveley Transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citations omitted); *accord* Vt. R. Civ. P. 65(a)

(requiring Court to explain basis for irreparable harm when issuing TRO); *Taylor*, 2017 VT 92, ¶ 40, 205 Vt. at 605 ("A preliminary injunction will usually be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief." (internal quotation omitted)).

Here, Plaintiff's motion fails to set forth sufficient facts and precedents to establish that it is clearly entitled to a TRO.

First, the Affidavit of Parent provides only speculative evidence of some potential future harm. Other than the author's surmise, it does not offer convincing proof that the alleged sale actually involves the Excavator at issue here. While the conjecture may be accurate, it establishes only the smoke and not the fire necessary to support exemplary relief.

Second, there has been no showing that, even if the sale occurred, monetary damages would not be sufficient to make Plaintiff whole. Unlike real property, which is inherently unique, *see O'Hagan v. United States,* 86 F.3d 776, 783 (8th Cir.1996); or rare commodities, which have intrinsic value that is difficult to estimate, *see John Paul Mitchell Sys. v. Quality King Distributors, Inc*., 106 F. Supp. 2d 462, 478 (S.D.N.Y. 2000), a used Excavator can be examined and its value determined. And, in this case, the purchase and sale agreement provides good evidence as to the amounts Plaintiff may be owed. As noted by the Southern District of New York in examining New York law, to obtain "injunctive relief in a claim for relief based on replevin, [a plaintiff] must demonstrate that the goods at

issue are unique. If it cannot, the right protected by replevin is fully compensable by money damages." *Id.* Plaintiff has provided no such proof here.

Some courts have also held that a defendant's impending or current insolvency can amount to the irreparable harm needed to restrain a sale of assets because, under such circumstances, plaintiff might not be able to be made whole following trial. *See American Hosp. Supply Corp. v. Hospital Prods. Ltd.,* 780 F.2d 589, 594 (7th Cir. 1986). In this instance, however, though there are hints of Defendant's business difficulties, there is no compelling evidence in the record establishing that Defendant lacks funds, land, or other assets that might be accessed to satisfy a judgment.

Third, to the extent Plaintiff desires the Excavator, as opposed to monetary damages, Plaintiff has not provided any legal argument as to why a claim for replevin would not lie against the alleged third-party purchaser. Prior to the UCC, Vermont law was clear that a person could convey no greater title to property than she possessed. *Sheldon Slate Prod. Co. v. Kurjiaka*, 124 Vt. 261, 268 (1964). In *Tittemore v. Labounty*, 60 Vt. 624, 625-26 (1888), for example, a person who was wrongfully in possession of a colt, sold it to a third party. The true owner successfully brought a replevin action against the third party because the person wrongfully in possession had no lawful title and could pass no title to the third party. *Id.*; *see Cramton v. Chapman*, 85 Vt. 74, 75-76 (1911) ("The defendant in the action of replevin can prevail only when it appears that he is entitled to a return of the property, and that can be only when it appears that his right is superior to that

of the plaintiff." (internal quotation omitted); *see also Guerin v. Kirst*, 202 P.2d 10, 14 (Cal. 1949) (pre-UCC case with similar facts as presented *sub judice* indicating that party in position of Defendant is "a mere possessor and he could not convey title, however innocent his vendee").

Lastly, while the Plaintiff has not briefed the impact of Vermont's version of the UCC on the above law, Plaintiff's version of the facts indicates that no bill of sale was completed and title did not pass to Defendant. Even if Defendant somehow obtained voidable title to the Excavator, it appears that Plaintiff knows the identity of the supposed purchaser. There seems no reason why it cannot notify Mr. Bixby of Plaintiff's allegedly superior claim of ownership and of its possession of title. Such notice may well prevent him from buying converted property or from making any claim of being a "good faith" purchaser of the Excavator under the UCC. 9A V.S.A. §§ 1-201(20); 2-403.

In sum, Plaintiff's motion fails to establish a basis to issue a TRO.

Dated this 23rd day of July, 2020, at Montpelier, Vermont

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Timothy B. Tomasi
Superior Court Judge