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**Docket: 1884CV00375-BLS2**

**Date: February 20, 2018**

**Parties: ANAESTHESIA ASSOCIATES OF MASSACHUSETTS, PC v. PLEXUS ANESTHESIA SERVICES OF MASSACHUSETTS, PC**

**Judge: Kenneth W. Salinger Justice of the Superior Court**

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Anaesthesia Associates of Massachusetts, PC ("AAM") claims that defendant Plexus Anesthesia Services of Massachusetts, PC ("PASM") owes it at least \$2.0 million for past anesthesia services. AAM asks the Court to enter a preliminary injunction that would PASM from transferring or encumbering any assets, or from making any payments of any funds except for paying wages to its employees, paying its attorneys, or paying rent, utilities, and taxes. AAM asserts that it will suffer irreparable harm without the requested injunction because PASM has been making and would continue to make preferential payments to entities other than AAM, thereby preventing from receiving money it is still owed for past services rendered.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To the contrary, "the significant remedy of a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto." *Student No. 9 v. Board of Educ.*, [440 Mass. 752](#), 762 (2004). "Trial judges have broad discretion to grant or deny injunctive relief." *Lightlab Imaging, Inc. v. Axsun Technologies, Inc.*, [469 Mass. 181](#), 194 (2014).

The Court will DENY this motion for a preliminary injunction for two reasons: AAM has not met its burden of proving irreparable harm, and the broad relief it seeks is not permitted without a judgment under Massachusetts law.[1]

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[1] At the close of the oral argument, the Court stated that it was also persuaded that granting the preliminary injunction sought by AAM would be against the public interest because it would materially interfere with PASM's ability to provide anesthesiology services to its hospital clients. However, the Massachusetts Appeals Court has held that it is reversible error for a trial court to consider harm to the public interest as a factor in granting or denying a preliminary injunction in a case like this that involves a dispute between a private debtor and a private creditor. See *Bank of New England, N.A. v. Mortgage Corp. of New England*, [30 Mass. App. Ct. 238](#), 246248, rev. denied, 409 Mass. 1105 (1991). The Court has therefore not considered the public interest in deciding AAM's motion.

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1. Failure to Prove Irreparable Harm. As the moving party, AAM has the "burden of showing it would suffer an irreparable harm absent an injunction." *GTE Products Corp. v. Stewart*, [414 Mass. 721](#), 726 (1993).

AAM asserts that it will suffer irreparable harm without the proposed preliminary injunction because PASM has been making preferential payments to another entity. The sole evidence supporting that assertion is a statement made "upon information and belief" by AAM's chief operating officer. But assertions in an affidavit or verified complaint made on "information and belief" that are not supported by any other evidence do "not supply an adequate factual basis for the granting of a preliminary injunction." *Eaton v. Federal Nat'l Mortgage Assn* [462 Mass. 569](#), 590 (2012); accord *Alexander & Alexander•, Inc. v. Danahy*, [21 Mass. App. Ct. 488](#), 494 (1986).

Since AAM has made no factual showing of likely irreparable harm other than assertions made solely on "information and belief," it has failed to meet its burden of proving that it will suffer irreparable harm without the

proposed injunction. It is therefore not entitled to obtain preliminary injunctive relief. See, e.g., *American Grain Products Processing Institute v. Department of Pub. Health*, [392 Mass. 309](#), 326-329 (1984) (vacating preliminary injunction because plaintiff did not prove it would suffer irreparable harm without relief); *Nolan v. Police Comm'r of Boston*, [383 Mass. 625](#), 630 (1981) (same).

2. Failure to Justify a Creditor's Bill Attachment. AAM would not be entitled to the requested preliminary injunction even if it had met its burden of proving irreparable harm. AAM is seeking incredibly broad relief. Rather than seek a real estate attachment or some other kind of pre-judgment security that is authorized by rule or statute, AAM asks the Court to tie up freeze all of PASM's assets and to bar it from spending any many except to pay its employees, lawyers, or its rent, utility, and tax bills. AAM has not met its burden of proving that such preliminary injunctive relief can or should be granted.

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AAM's request to tie up PASM funds and other assets is essentially a "nonstatutory action[] to reach and apply" that used to be known as a "creditor's bill." See *Cavadi v. DeYeso*, [458 Mass. 615](#), 625 (2011). "Traditionally, a creditor's bill could be brought (i) by a judgment creditor, (ii) who had attempted to obtain satisfaction at law, and (iii) who sued in equity for the purpose of reaching property that could not be taken on execution at law." *Id.* The "true rule in equity is that under usual circumstances a creditor's bill may not be brought except by a judgment creditor after a return of 'nulla bona' on execution." *First Nat. Bank of Boston v. Nichols*, [294 Mass. 173](#), 182 (1936), quoting *Harkin v. Brundage*, 276 U.S. 36, 52 (1928). In cases involving fraudulent conveyances that leave a judgment debtor insolvent, the judgment creditor need not prove a fruitless attempt at execution, but still must show that it has obtained a final and enforceable judgment before obtaining equitable relief in the nature of a creditor's bill. See *Foster v. Evans*, [384 Mass. 687](#), 693-694 (1981).

Since Plaintiffs are not yet judgment creditors of PASM, the Court may not exercise its general equity jurisdiction to temporarily grant injunctive relief in the nature of creditors' bill attachment.<sup>2</sup> See *First Nat. Bank*, 294 Mass. at 182-183; *Consolidated Ordnance Co. v. Marsh*, [227 Mass. 15](#), 23 (1917); *In re Rare Coin Galleries of America, Inc.*, 862 F.2d 896, 904-905 (1st Cir. 1988) (applying Massachusetts law); *Hunter v. Youthstream Media Networks*, 241 F.Supp.2d 52, 5557 (2002) (Collings, M.J.) (applying Massachusetts law). The Court notes that the United States Supreme Court has reached the same result under federal law, holding that federal courts have "no authority to issue a preliminary injunction preventing" parties "from disposing of their assets pending adjudication of [a] claim for money damages," where the plaintiff does not claim any lien upon or other equitable interest in the assets. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 310, 333 (1999).

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[2] PASM did not argue that AAM is seeking equitable relief that the Court lacks the power to grant. Nonetheless, since the scope of a court's general equitable powers is matter of public interest, the Court concludes that it is appropriate to raise and resolve the issue sua sponte. Cf. *Quincy Trust Co. v. Taylor*, [317 Mass. 195](#), 198 (1944) ("Where a court has once taken jurisdiction and has become responsible to the public for the exercise of its judicial power so as to do justice, it is sometimes the right and even the duty of the court to act in some particular sua sponte.").

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The one published appellate Massachusetts decision cited by AAM for the proposition that trial courts may freeze a defendant's assets is not to the contrary. The Boston Athletic Ass'n appeal did not involve a creditor's bill attachment, but instead involved an injunction to prevent the dispersal of particular, contested funds generated by a contract the validity of which was in dispute. See *Boston Athletic Ass'n v. International Marathons, Inc.*, [392 Mass. 356](#), 362 (1984). The Court recognizes that it would have the power to enjoin the dissipation of particular funds in which a plaintiff has a demonstrated equitable interest, as in the BAA case. See also, e.g., *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 130-131 (2d Cir. 2014) (distinguishing *Grupo Mexicano* on ground that plaintiff asserted equitable interest in defendant's profits under federal trademark act). But AAM only asserts a legal claim for damages, not an equitable claim in particular funds.

ORDER

Plaintiff's motion for a preliminary injunction is DENIED.  
Kenneth W. Salinger Justice of the Superior Court

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