

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32421
O/prt

_____AD3d_____

Argued - September 15, 2011

A. GAIL PRUDENTI, P.J.
REINALDO E. RIVERA
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2011-02756

DECISION & ORDER

Michael Reichman, appellant, v
Paul Reichman, respondent.

(Index No. 158/11)

Certilman Balin Adler & Hyman, LLP, East Meadow, N.Y. (Douglas E. Rowe and Anthony W. Cummings of counsel), for appellant.

Jaspan Schlesinger, LLP, Garden City, N.Y. (Steven R. Schlesinger, Jared A. Kasschau, and Seth A. Presser of counsel), for respondent.

In an action, inter alia, for a judgment declaring that the plaintiff is the holder of the majority of shares in Bedbathstore.com, LLC, for an accounting, and to impose a constructive trust on, among other things, the assets of Bedbathstore.com, LLC, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Driscoll, J.), entered March 15, 2011, as, after a hearing, denied his motion to preliminarily enjoin the defendant, the other member of Bedbathstore.com, LLC, from, inter alia, having access to the assets and records of Bedbathstore.com, LLC, during the pendency of this action. By decision and order on motion dated April 14, 2011, this Court granted stated portions of the plaintiff's motion, inter alia, to stay the defendant from accessing the computers and servers of Bedbathstore.com, LLC, pending hearing and determination of the appeal.

ORDERED that the order is modified, on the facts and in the exercise of discretion, by deleting the provisions thereof denying those branches of the plaintiff's motion which were to preliminarily enjoin the defendant, during the pendency of this action, from transferring any Yahoo accounts associated with Bedbathstore.com, LLC, transferring the domain name associated with Bedbathstore.com, LLC, accessing Bedbathstore.com, LLC, computers and servers and the online credit card transaction processing terminals related to the company's operations except in the ordinary course of business, making any expenditure of funds of Bedbathstore.com, LLC, that are not in the ordinary course of business, altering the financial records of Bedbathstore.com, LLC,

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except in consultation with the accountant for the company in accordance with generally accepted accounting practices, or drawing any funds from the company, other than a base salary in the ordinary course of business, and substituting therefor a provision granting those branches of the plaintiff's motion; as so modified, the order is affirmed insofar as appealed from, with costs to the plaintiff, and the matter is remitted to the Supreme Court, Nassau County, for the fixing of an appropriate undertaking pursuant to CPLR 6312.

The plaintiff commenced this action, inter alia, for a judgment declaring that he is the holder of the majority of shares in Bedbathstore.com, LLC (hereinafter the LLC), for an accounting, and to impose a constructive trust. The plaintiff moved to preliminarily enjoin the defendant, the other member of the LLC, from, inter alia, having access to the assets and records of the LLC, during the pendency of this action.

“A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant's favor” (*Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844; *see Shasho v Pruco Life Ins. Co. of N.J.*, 67 AD3d 663, 665; *Matter of Related Props., Inc. v Town Bd. of Town/Vil. of Harrison*, 22 AD3d 587, 590). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*Ruiz v Meloney*, 26 AD3d 485, 486). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625). “The mere existence of an issue of fact will not itself be grounds for the denial of the motion” (*id.*).

Here, the plaintiff demonstrated, inter alia, a likelihood of ultimate success on the merits on the causes of action for an accounting and to impose a constructive trust by submitting evidence tending to show that he is a member of the LLC, including a copy of the LLC operating agreement, which states that he owns a 40% share of the LLC (*see Limited Liability Company Law* § 1102[a]; *see also Man Choi Chiu v Chiu*, 38 AD3d 619, 620-621; *Matter of Capizola v Vantage Intl.*, 2 AD3d 843, 844-845). Contrary to the defendant's contention, the record does not show, at this point, that those causes of action are time-barred (*see CPLR* 213[1]), and does not show that it was improper for the plaintiff to seek such relief in his individual capacity (*see Craven v Rigas*, 85 AD3d 1524). Further, the plaintiff demonstrated potential irreparable injury to the company absent the preliminary injunction, and the balance of the equities are in the plaintiff's favor (*see S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC*, 81 AD3d 629,630; *Hicksville Props. v Wollenhaupt*, 268 AD2d 407, 409). Under these circumstances, the Supreme Court should have granted the plaintiff's motion to the extent indicated herein.

PRUDENTI, P.J., RIVERA, AUSTIN and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court