

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 7-8-09, 8-18-09,
8-7-09
Motion Submit Date: 10-08-2009
Oral Argument Held: 10-08-2009
Motion Sequence No's.: 001 MD
002 MOTD
003 MOTD

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**LINDA McCALLEN, as Executrix of the Estate of
RICHARD O. RICHTBERG,**

Plaintiff,

-against-

**MRW GROUP, and MICHAEL J. JANNUZZI, ISQ, as
Escrow agent of the funds representing the proceeds of
certian life insurance policy(ies) paid to MRW GROUP,
INC, upon the death of Richard O. Richtberg,**

Defendant.

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Plaintiff moves by Order to show Cause (motion sequence # 001) for an Order 1) preliminarily enjoining Defendant Januzzi, escrow agent of Defendant MRW Group Inc (“MRW”) from distributing \$875,000 in life insurance proceeds paid to MRW upon the death of Plaintiff’s decedent , Richard Richtberg; 2) enjoining MRW or those on its behalf, from transferring, altering or utilizing other than in the ordinary course of MRW’s business, a “client list” or “book of business” of MRW; 3) directing MRW to re-issue corporate stock certificates to reflect decedent Richtberg’s alleged 90.75% ownership thereof; and 4) directing MRW to hold a new election of its Board of Directors, permitting Decedent Richtberg’s estate to vote his alleged 90.75% shares in the corporation. Based on the terms of a 1987 Stock Redemption Agreement signed, inter alia, by Richtberg and Rehberger, the Plaintiff claims it is entitled to the proceeds of life insurance purchased by MRW on the life of Richtberg, and assertedly being held by MRW in trust for Richtberg’s Estate.

Proposed Defendant Frederick Rehberger (“Rehberger”) moves, by Notice of Motion (motion sequence # 002) for an Order permitting that party to intervene in this proceeding pursuant to CPLR § 1012, on the grounds that Rehberger, as a judgment creditor of MRW, as opposed to Richtberg’s Estate, is entitled to the proceeds of the Life Insurance policy. Rehberger also opposes Plaintiff’s Preliminary Injunction motion and asserts that he has been required to pursue civil litigation in State and Federal Court since 2000 in order to obtain a Judgment against MRW, of which \$389,583.77 remains unpaid.

Jannuzzi moves, by Notice of Cross-Motion (motion sequence #003) both in support of Rehberger’s motion to intervene and in opposition to Plaintiff’s requests for preliminary injunctive relief. Jannuzzi, the escrow agent for MRW, holding the proceeds of the subject life insurance policy, also seeks reformation of the 1987 Stock Redemption Agreement based on his allegation that the decedent is guilty of misrepresentation, fraud, and breach his fiduciary duty to the minority shareholders of MRW by acknowledging that the value contained in the Stock Redemption Agreement was far too high but ignoring the constant requests by the minority shareholders to revalue.

The Stock Redemption Agreement at issue, was executed on June 19, 1987 and contains the following relevant provisions:

“Article II

PURCHASE OF STOCK AT DEATH OF . . . STOCKHOLDER

B. Upon the death of any stockholder, the corporation shall purchase and the estate of the deceased stockholder shall sell the deceased stockholder’s interest in the corporation now owned or hereafter acquired Such sale shall occur within such time as the parties may agree, but in no event shall such sale be consummated more than sixty (60) days after the later of

(a) the qualification of the deceased Stockholder’s legal representative.

(b) the collection of the life insurance proceeds from the policy or policies on the life of the deceased Stockholder as listed in Schedule A . . .

Article III

INSTALLMENT PURCHASE OF STOCK EVIDENCED BY PROMISSORY NOTES

The Corporation upon receiving life insurance proceeds by reason of the death of a stockholder must first apply these proceeds to the purchase of any stock. . . . In the event that the proceeds of any life insurance owned by the corporation and made part of this agreement are less than the purchase price, at least \$500,000 shall be paid within 60 days of

the death and the balance of the purchase price shall be paid in Forty (40) consecutive quarterly installments beginning within three months after the death of the . . . Stockholder.

Article IV

PURCHASE OF STOCK DURING LIFETIME OF STOCKHOLDER

. . . notwithstanding anything to the contrary stated elsewhere in the agreement at any time after a stockholder attains his sixtieth (60th) birthday he can require the Corporation and or the other stockholders, as the case may be, to purchase his interest in the corporation for the value stated in Article VI.

Article VI

VALUATION OF STOCK

The Stockholders and the Corporation agree that the present value of the outstanding shares of common stock including good will is Seven Million (\$7,000,000) Dollars. . . .

Article VII

INSURANCE ON THE . . . STOCKHOLDERS' LIVES

The Corporation may apply for and be the owner of insurance on the lives of each of the stockholders

The Corporation shall not exercise any of the rights privileges or benefits of the policies owned by it, . . . without the written consent of the Stockholders.”

The Court notes, at the outset, that all parties have stipulated to the joinder of Rehberger as a party Defendant to this action and the Court has amended the caption to reflect the agreement.

Plaintiff asserts that the language of the Agreement makes clear that the purpose of the life insurance policies are for payment by the corporation to the estate of the deceased shareholders whose lives they insured and that they are not assets of the corporation, subject to the claims of creditors such as Rehberger. Thus, Plaintiff asserts that the proceeds of the policy should be held in constructive trust for the intended beneficiary of the policy, i.e., the estate of Richtberg.

Plaintiff further argues that although Richtberg owned 27 % of the shares of outstanding MRW stock at the time of the Redemption Agreement and acquired additional shares over the years, he became owner of 90.75% of the shares, including Rehberger's 25.668% of the shares, when Rehberger opted to sell his shares pursuant to Article IV of the agreement. Thus Plaintiff contends that it is irrelevant

that MRW has yet to fulfill its obligation, now in the form of a filed judgment, to complete payment for Rehberger's shares before they became the property of decedent Richtberg. Plaintiff's requests for further relief regarding the election of the Board of Directors and the client lists arise from Plaintiff's claim that its decedent was the super-majority shareholder of MRW and must be consulted on all corporate management issues until the decedent's shares are paid for in full.

Rehberger and Jannuzzi, on behalf of MRW, both dispute these arguments, stating that, as judgment creditor of the corporation, Rehberger should be paid the balance of his judgment before any other monies are paid to decedent's estate. They also argue that it is ridiculous for Plaintiff to take the position that MRW need not pay Rehberger and yet claim that Rehberger has forfeited his shares prior to payment therefor, while Richtberg's estate has not. Finally, MRW claims that it is entitled to demonstrate that Richtberg acted to defraud the corporation and Rehberger by both refusing to allow the corporation to pay Rehberger as per the Agreement, by admitting in writings that the \$7 million was far higher than the actual value of MRW, promising to have the corporation revalued and, yet failing to agree to an appropriate valuation. MRW takes the position that the decedent's improper acts give rise to its claimed cause of action to reform the Agreement. Based thereon, Defendants assert that the Plaintiff cannot obtain Preliminary Injunctive relief because the estate cannot demonstrate a likelihood of success on the merits. On the issue of balancing of the equities, Rehberger points to his years of seemingly fruitless litigation against MRW to obtain payment for his shares, which was only recently reduced to judgment as a result of a second lawsuit in the Federal Court (**Rehberger v MRW, CV 05-0210 JS**). Jannuzzi asserts there can be no irreparable harm, as he has agreed to hold the proceeds of the life insurance policy in escrow pending the outcome of this litigation.

In an earlier attempt to resolve the matter that is currently before this Court, attorneys for the Plaintiff, for Rehberger and for MRW entered into a letter agreement paying Rehberger and the estate each \$300,000 and counsel for MRW states that this was also based on an understanding that no further funds would be released without written consent of the three partes or by Order of the Court. It was after Plaintiff commenced this lawsuit that Rehberger obtained a Sheriff's levy seeking to collect his former Judgment against MRW.

The generally stated purpose of a Preliminary Injunction is to serve the salutary purpose of maintaining the status quo. A party seeking this relief must demonstrate the well known tri-partite test of 1) a likelihood of success on the merits; 2) danger of irreparable injury in the absence of the relief sought; and 3) a balancing of the equities in the movant's favor. **Nobu Next Door LLC v Finer Arts Housing, Inc**, 4 NY 3d 839, 800 NYS 2d 48, 833 NE 2d 191 (2005); **Doe v Axelrod**, 72 NY 2d 748, 536 NYS 2d 44, 532 NE 2d 1271 (1988); **Serota v Mayfair Super Markets, Inc**, 273 AD 2d 296, 710 NYS

2d 532 (2d Dep't 2000). Although the proof required to obtain such relief is substantial, Courts often require more, where the injunction sought is mandatory rather than prohibitory in nature, as mandatory relief often changes rather than preserves the status quo. Thus, the request for mandatory relief requires the movant to demonstrate extraordinary circumstances and clear entitlement to the relief sought. *SHS Baisley LLC v Res Land, Inc*, 18 AD 3d 727, 795 NYS 2d 690 (2d Dep't 2005); *Rosa Hair Stylists, Inc v Jaber Food Corp*, 218 AD 2d 793, 631 NYS 2d 167 (2d Dep't 1995).

Contractual language, which is clear on its face, should be interpreted as written; and, in examining an agreement in order to glean the intent of the parties, such should be read as a whole in the context of the parties' relationship. *South Road Associates, LLC v International Business Machines Corp*, 4 NY 3d 272, 793 NYS 2d 835, 825 NE 2d 806 (2005); *R/S Associates v New York Job Development Authority*, 98 NY 2d 29, 744 NYS 2d 358, 771 NE 2d 240 (2002); *Matter of Riconda*, 90 NY 2d 733, 665 NYS 2d 392, 688 NE 2d 248 (1997).

It is axiomatic that an entity seeking equitable relief from the Court, such as an injunction, must come before the Court with clean hands. See, *Mandalay Property Owners Association v Keiseheuer*, 291 AD 2d 483, 738 NYS 2d 677 (2d Dep't 2002).

The case at Bar presents a panoply of hotly contested issues. Following eight years of costly litigation, Rehberger was granted Judgment against MRW for his shares based on the Stock Redemption Agreement, which specifically permitted him to opt for and MRW to pay for his shares at retirement. Richtberg's Estate is entitled to payment for Richtberg's shares of MRW's stock at the time of Richtberg's death under the same Agreement, which permitted MRW to purchase life insurance on Richtberg's life and directed MRW to utilize the proceeds of such insurance to purchase those shares. MRW has stated a potential cause of action against Richtberg's estate for breach of fiduciary duty based on his alleged statements regarding MRW's value and his refusal to act to revalue the corporation.

Under all of the circumstances, the application for broad preliminary injunctive relief is not justified. First, the Plaintiff cannot meet the requirement of "irreparable harm" since its claim, which is monetary, can be satisfied through an action for damages. Second, it is unclear that the equities balance in the estate's favor, where the newly added Defendant, Rehberger has been attempting to collect the value of his shares for over eight years, with Richtberg assertedly playing an alleged integral part in preventing that money from being paid. Third, Plaintiff is simply not entitled to the mandatory injunctive relief sought, regarding the re-election of the Board of Directors or the turning over a corporate book of business and customer lists as there remain many hotly contested issues. MRW has raised serious arguments regarding the validity of those claims for relief based upon its argument that

the purpose of the Agreement was to “(c)ontinue the orderly management of the corporation’s business”. Thus, while the Estate may be entitled to payment of the life insurance proceeds, that does not mean it is also entitled to continue to manage the daily affairs of the corporation.

In denying the motion, the court is not rejecting the Plaintiff’s argument that the life insurance proceeds are akin to monies to be held in trust favor the estate of Richtberg. Both side have raised excellent arguments as to whether the monies held are property of the corporation. For that reason, and based on the statements of MRW’s counsel that he will not release such funds until further order of the Court, an injunction is inappropriate at this time. As Rehberger is also now a party to this litigation before the Court, this Court will determine whether his Judgment against MRW will permit him to seize any of the life insurance proceeds now being held by Januzzi. In addition, the Defendants have raised serious issues concerning Richtberg’s conduct which may be required to be resolved before the amount to which the estate is entitled is finally determined. For example, MRW may be able to make a case for reformation of the Stock Redemption Agreement. The effect of that claim remains to be litigated.

Accordingly, for the reasons set forth, the Plaintiff’s motion for preliminary injunctive relief is denied. This constitutes the **DECISION** and **ORDER** of the Court.

Counsel for all parties shall appear in this part for a conference on January 12, 2010 at 11:00 o’clock a.m.

Dated: November 4, 2009
Riverhead, New York

EMILY PINES
J. S. C.