

Urban Archaeology Ltd. v Dencorp Investments

2003 NY Slip Op 30010(U)

September 23, 2003

Supreme Court, New York County

Docket Number: 4_30060/1353

Judge: Diane A. Lebedeff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. DIANE A. LEBEDEFF PART 8

Justice

Urban Archaeology Ltd.,

- v -

Dencorp Investments,

INDEX NO. 601353/03
MOTION DATE 9/22/03
MOTION SEQ. NO. 001
MOTION CAL. NO. 29

The following papers, numbered 1 to _____ were read on this motion to/for PI

~~Notice of Motion~~ Order to Show Cause — Affidavits — Exhibits ...

X-motion
Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

} 1-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION /CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: SEP 23 2003.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
..... X

URBAN ARCHAEOLOGY LTD., GIL SHAPIRO
and GERALDINE RONAN,

Plaintiffs,

-against-

Index No. 601353/03
Mot. Seq. No. 001

DENCORP INVESTMENTS, INC. and ALLAN
S. REIVER,

Defendants.

-----X

DIANE A. LEBEDEFF, J.:

On the prime motion, plaintiffs sought a preliminary injunction directing that defendant Reiver not harass plaintiff Geraldine Ronan by alleged boorish, rude and offensive behavior. In the two months since the motion was restored to the calendar of July 21,2003, there has been no further complaint as to defendant Reiver’s conduct toward Ms. Ronan. Accordingly, the motion is denied without prejudice.

By cross motion, Dencorp Investments, Inc. and Allan S. Reiver (respectively, “Dencorp” and “Reiver”) seek preliminary relief directed at limiting the business operations of a partnership known as Urban **Archaeology Co.** (“UAC”). Dencorp and Urban Archaeology, Ltd., are the two sole partners of UAC. Pursuant to their partnership agreement, either partner may issue a “put-call option” (Partnership Agreement, para. 11). It has been stated that UAC issued such a put on May 1,2003. Defendants request a stay of such **put.**

As the court considers this branch of the cross motion, it weighs the reasoning set forth in *St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc.*, -- A.D.2d --, 2003 WL 22100841, *2 (1st Dept. 2003), as follows:

“It is well settled that in order to be entitled to a preliminary injunction, a movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant’s favor’ (see e.g. *Doe v. Axelrod*, 73 N.Y.2d 748; *Doe v. Poe*, 189 A.D.2d 132, [lv denied 81 N.Y.2d 711]). ‘A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite’ (*Rosa Hair Stylists, Inc. v. Jaber Food Corp.*, 218 A.D.2d 793,794; see also *Bachman v. Harrington*, 184 N.Y. 458,464; *MacIntyre v. Metro. Life Ins. Co.*, 221 A.D.2d 602).”

(Compare, *Indosuez Intem. Finance, B.V. v. National Reserve Bank*, 304 A.D.2d 429,430 [1st Dept. 2003], “It was not an abuse of discretion to grant, sua sponte, a preliminary injunction The preliminary relief did not purport to definitively determine the rights of the parties so as to prematurely grant the ultimate relief sought”).

To examine the rights of the partners, it is helpful to review the documents. The commencement of the process starts with the exercise of the option under paragraph 11.1 of the Partnership Agreement, which reads as follows in relevant part:

“11.1 Exercise of Option. Either Partner (the “offeror”) may, at any time, by written notice (the “Notice”) to the other partner (the “Offeree”) offer to sell all of its interest in the Partnership to the Offeree. The Notice shall specify the price for the Offeror’s interest in the Partnership, which shall be subject to adjustment as provided in paragraph 11.2 below (the price specified in the Notice, as adjusted pursuant to paragraph 11.2 being hereinafter referred to as the Purchase Price). The terms of the purchase shall be as specified in paragraph 11.3 below. The Offeree shall have 90 days after the date the Notice is given within which to elect to accept the offer and purchase the Offeror’s interest in the Partnership by giving written notice of acceptance to the Offeror.”

After the 90-day period for consideration of the option runs, the closing is not to take place for 90 days thereafter and full payment of the purchase price is not required. Paragraph 11.3 of Partnership Agreement provides, in part:

“The closing of the purchase and sale under this Section 11 shall take place at the principal place of business of the Partnership within 90 days after the expiration of the 90-day period described above at a time designated by the purchasing Partner, * * * If Dencorp is the purchasing Partner, Dencorp shall pay the Urban Premium plus ten (10) percent of the balance of the Purchase Price in cash or certified funds and shall pay the balance of the Purchase Price delivery of its negotiable promissory note. The promissory note shall bear interest at a rate equal to the published prime rate of Citibank N.A., with such interest rate to be adjusted annually on the anniversary date of the closing. The promissory note shall be payable in nine (9) equal annual installments of principal plus accrued and unpaid interest each anniversary date of the closing, with the final payment (including all accrued and unpaid interest) due on the tenth (10th) anniversary of the closing. The promissory note may be prepaid at any time without penalty and will provide for a default interest rate two (2) percentage points higher than the regular interest rate on the note. * * * ”

Taking this procedure into consideration, the court has stayed the expiration of the put and will extend such stay to October 22,2003.

The reason for such stay is to preserve the *status quo* and to permit a knowing exercise of the right to exercise the option or to decline to exercise it, as well as to begin to arrange for any necessary financing for the payment of the required portion of the purchase price. The parties have had a dispute over the method of calculating the adjustments to their capital accounts, which are the only adjustments permitted to the purchase price named by partner Urban Archaeology, Ltd. No longer period appears warranted to permit Dencorp to reach a considered judgment as to the proper amount of such adjustment and its desired action, in that a resolution of any of the other disputes between the parties would not impact **upon** the purchase price to be paid or received.

Further, the cross motion is otherwise granted to the extent that plaintiffs are restrained from engaging in or authorizing expenditures, dispositions, encumbrances, purchases, acquisitions or transfers in relation to UAC except in the ordinary course of business. The balance of the cross motion is otherwise denied, including the requests that the approval of defendant Reiver be required for checks over \$100 and transactions over \$2,500, and that all company credit cards be surrendered. The court is not persuaded as to the need for such broad measures. Moreover, there is no persuasive proof of denial of access to books and records, beyond that incidental to the issue of Reiver's conduct toward Ms. Ronan. Finally, the request for an accounting appears to involve a question bearing upon the ultimate issues in the case, given that such is demanded in a counterclaim.

The court fixes the bond for the preliminary injunction herein granted at \$10,000.00.

This decision constitutes the order of the court.

Dated: September 23, 2003



J.S.C.