

Zodkevitch v Feibush
2006 NY Slip Op 30105(U)
September 21, 2006
Supreme Court, New York County
Docket Number: 0060134/2006
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RICHARD B. LOWE III
Justice

PART 56

ZODKEVITCH, ET AND
- v -
FEIBUSH, ET AL

INDEX NO. 601342/06
MOTION DATE 9/14/06
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

FILED
SEP 25 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/21/06

RICHARD B. LOWE III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The underlying action involves Zodkaevitch's allegation that Feibush and Spiegel attempted to freeze him out from AFHSG with the assistance of the Yorks. Zodkaevitch owns 65% of AFHSG, and is one of its two Managing Members. Zodkaevitch is also the chairman of TLA. Feibush is the enterprise's business manager and owns 30% of AFHSG; Spiegel owns the remaining 5%. The Yorks are the original founders of the "Toughlove" program; Rony Z licensed the Toughlove Trademark from them. AFHSG and TLA are in the business of assisting parents with troubled children through a self-help program built around Zodkaevitch's expertise in the field of psychology and the Toughlove program.

Zodkaevitch contends that the defendants acted in concert to deprive him of his management and ownership rights. Specifically, he asserts that the defendants took control of all of the enterprise's assets; wrongfully terminated Rony Z's TLA trademark license; refused to inform him on how money raised from a private placement was utilized; altered his title on the enterprise's website, demoting him from TLA's Chairman to "Program Director"; sent an email to all of TLA's representatives falsely informing them that Zodkaevitch was no longer affiliated with the company; and re-hired Spiegel as General Counsel, without his consent or counsel.

In an earlier ruling, this court granted Zodkaevitch's request for a preliminary injunction. The order dated June 14, 2006 enjoined the defendants from further utilization of the money raised in the private placement and instructed the Yorks to place \$262,128 of it into an escrow; prevented the Yorks from making any further false and misleading statements about Zodkaevitch's relationship with the enterprise; stopped the defendants from making any disposition of property until they have turned over the enterprise's books and records to

Zodkevitch for inspection; ordered that the defendants provide an accounting; required that the defendants get Zodkevitch's express written consent to use or dispose of property; and prevented Spiegel from holding himself out as the enterprise's General Counsel and ordered him to return all original papers, documents, and files to the enterprise. The instant motion seeks to enforce this Court's orders through the remedy of contempt sanctions pursuant to CPLR 5104 and N.Y. Jud. L 753 *et seq.*

The Yorks argue they were not required to comply with the escrow order because they are infirm and destitute. They further aver that the monies raised from the private placement were lawfully spent, and there was no misconduct on their part with respect to the money. Feibush believes that the preliminary injunction should be vacated because, as business manager, he ran the enterprise according to the terms of the operating agreement ("the agreement"). According to him, Zodkevitch's allegations of a freeze out are false.

Additionally, Zodkevitch seeks the appointment of a temporary receiver ("Receiver"), pursuant to CPLR 6401. The basis for Zodkevitch's request is that the defendant's actions, designed to retaliate against him personally, inflicted damage on the enterprise to the detriment of all the owners and investors. He argues that leaving Feibush in control of the enterprise affects its very existence and that a Receiver is necessary to salvage the business. Feibush opposes the motion with the same arguments in opposition to the motion for contempt sanctions.

DISCUSSION

Motion for Contempt

For reasons stated on the record, the motion for contempt was denied.

Motion for a Temporary Receiver

The court may appoint a temporary receiver upon the motion of “any person having an apparent interest” in property which is subject of a pending action, where “there is danger that the property will be removed from the state, or lost, materially injured or destroyed.” (CPLR 6401(a)). “It is well-recognized that a court of equity exercise extreme caution in appointing receivers because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits.” (*Jacobowitz v Jacobowitz*, 798 NYS 2d 710 [2005]) “Conclusory allegations that the appointment of a receiver was necessary” will not suffice. (*Scharf v SS & K Partnership*, 187 AD 2d 645 [1992]). “The drastic remedy of the appointment of a receiver is to be invoked only *where necessary* for the protection of the parties...” (*Id*)(*emphasis added*)

Zodkevitch clearly has an interest in the enterprise as a 65% owner. The allegations set forth demonstrate a business that is injured due to the owners’ contentious relationship. However, there is no showing that a Receiver is necessary.

The plaintiffs aver that a Receiver is necessary because Feibush failed to provide an accounting to the enterprise’s outside accountant; Feibush makes business decisions such as failing to post Zodkevitch’s schedule on the enterprise’s website without Zodkevitch’s permission; and that Feibush and Spiegel fail to turn over original documents to Zodkevitch. The basis for this motion concerns essentially the same behavior on the defendants’ part that was the subject of the preliminary injunction. This court already provided the plaintiffs with a remedy for the defendant’s actions. The plaintiffs fail to convince this court that the preliminary

injunction was inadequate and a different, more “drastic” remedy under CPLR 6401 is necessary.

Moreover, the plaintiffs fail to demonstrate that the enterprise’s assets are in such danger of dissipation to warrant a Receiver. They cite *Nesis v Int’l Lighting, Inc.*, 184 AD 2d 485 [1st Dep’t 1982] and *Nelson v Nelson*, 99 AD 2d 917 [3d Dep’t 1984] as authority where a Receiver was necessary because one business partner failed to provide an accounting and when there was a sufficient demonstration of a fraudulent asset transfer. Neither situation is present here. In *Nelson*, the defendant failed to controvert the plaintiff’s allegation that an accounting was not made. Here, Feibush made at least a partial accounting in compliance with the preliminary injunction. In *Nesis*, the plaintiff demonstrated that there was a fraudulent asset transfer. Here, the plaintiffs fail to demonstrate that the trademark-license termination was fraudulent and not the result of Zodkaevitch’s default. Furthermore, as the record indicates, this court denied the motion for contempt and allowed the defendants time to comply with the preliminary injunction. As already noted, the basis for the motion for a Receiver is the same as the basis for the preliminary injunction and the motion for contempt. This court was not convinced that contempt sanctions were necessary at this juncture to protect the enterprise; it is equally not convinced of the need for a Receiver.

Additionally, mere conclusory assertions that under Feibush “debts will continue to mount” and “liabilities...will grow exponentially” are insufficient for a receivership appointment. (*Moyal v Stadnik*, 803 NYS 2d 19 [2005]) The plaintiff concludes that Feibush will continue his “end-run” around the preliminary injunction. First, general conclusions about hypothetical future behavior will not suffice for a Receiver. Second, this conclusion fails to

take into account that Feibush is subject to the preliminary injunction, which placed restrictions on his actions with respect to Zodkevitch and the enterprise during the case's pendency.

Accordingly, since this court already remedied the underlying issues for the receivership appointment, the plaintiffs failed to convince the court that the enterprise's assets are in danger of dissipation, and allegations of potential future misconduct are inadequate, the necessity for this "drastic remedy" is not present. Because the evidence is insufficient, the plaintiffs' motion pursuant to CPLR 6401 is denied

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the plaintiff's motion for contempt is denied; and it is further

ORDERED that the plaintiff's motion to appoint a temporary receiver is denied.

Dated: September 21, 2006

ENTER:


RICHARD B. LOWE III

RICHARD B. LOWE, III, J.S.C.

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