

Carleton v Pindus

2006 NY Slip Op 30124(U)

August 8, 2006

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. RICHARD B. LOWE, JUDGE

PRESENT: house Justice PART 5th

Deborah Catterton

INDEX NO. 650096106

MOTION DATE 5/30/06

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Gerard B. Pardo

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
E-FILED DEPT.
AUG 22 2006
NYS SUPREME COURT
REVIEWED

RECEIVED
AUG 16 2006
HON. JUSTICE
SUPPORT OFFICE

FILED
AUG 18 2006
COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE, III

Dated: 8/8/06

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

REFERENCE

Handwritten signature/initials

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
JEFFREY CARLETON and LEE HOFFMAN

Index No. 650096/06

Plaintiffs

GERALD V. PINDUS, U.S. ENERGY MONITORING
AND MANAGEMENT, LLC., U.S. ENERGY GAS OIL
ELECTRIC SUPPLY, LLC. and U.S. ENERGY HEAT
CONTROLS, INC.

**DECISION
AND ORDER**

Defendants

-----X
RICHARD B. LOWE, III, J.:

Defendants Gerald V. Pindus (Pindus), U.S. Energy Monitoring and Management, LLC, US Energy Gas Oil Electrics Supply, LLC. and U.S. Energy Heat Controls, Inc. seek a preliminary injunction pursuant to CPLR 6301 and CPLR 7502 preliminarily enjoining Plaintiffs Jeffrey Carleton (Carleton) and Lee Hoffman (Hoffman) from using property removed from the offices of the defendants.

BACKGROUND

Defendant Pindus has been involved in the energy business for over thirty years, his companies service real estate management firms who wish to minimize their energy use and expenses. In October 2003, Pindus, owner of US Energy Heat Controls, Inc., hired plaintiff Carleton, to work as an analyst and maintenance worker. Although Carleton had just recently finished his undergraduate studies he exhibited an enthusiasm and intelligence which convinced Pindus that Carleton would be able to manage a new corporation that Carleton and Pindus would develop together.

FILED
AUG 13 2006
COUNTY CLERK
NEW YORK

In May 2004, Carleton and Pindus formed U.S. Energy Gas Oil Electric Supply, LLC (GOES) with the objective of neutralizing oil prices during inflated price periods by using information technology tools and volume purchasing. Pindus supplied all the capital, office space, and administrative staff to start GOES and Carleton supplied the day to day management. Both Carleton and Pindus agreed to hire the co-plaintiff Lee Hoffman (Hoffman), a friend of Carleton's, to create a fuel tracking software for GOES. Hoffman received a 2% interest in GOES and signed an operating agreement which included the following arbitration clause:

“[i]n the event of any dispute of any nature whatsoever in any way relating to the Company or this Agreement, including and not limited to valuation or transfer of membership interest, the parties shall attempt to resolve the same with the aid of their respective counsel, and, in the event of their failure to do so after consulting with counsel, then such dispute shall be arbitrated in Queens County, New York, in accordance with the Commercial Arbitration Rules for Arbitration then applicable, as established by the American Arbitration Association, and the decision resulting from such arbitration shall be final.” (emphasis added).

(Pindus Aff, Ex B ¶ 9.03; Ex C ¶ 9.03).

In 2005, with a loan supplied by GOES, Carleton and Pindus formed US Energy Monitoring and Management, LLC (M&M) to develop a self-monitoring software for real estate owners . Pindus received a 49.5% interest, Carleton received a 48.5%, and a non party received the remaining interest. At this time, Carleton signed an operating agreement for M&M containing the same arbitration clause quoted above. The parties dispute whether Hoffman has acquired a 15% ownership in M&M. Per the agreement, Pindus retained “complete and unchecked power” of M&M while Carleton and Hoffman oversaw the company's management and development. Hoffman maintains he received a 15% ownership interest in M&M in exchange for full time employment and the software's license.

In or around 2006, the relationship between Carleton, Hoffman, and Pindus began to deteriorate when Carleton and Hoffman wished to have more executive power at M&M. The parties tried several times to reach a compromise. Finally on April 10th, 2006 Pindus delivered a letter to Carleton demanding that all the hardware, software, design documentation, user documentation, source codes and related items belonging to M&M be handed over to Pindus. That same night Carleton and Hoffman removed all the computers, off site servers, and files from the offices of M&M. Carleton claims the removal of property was for the purpose of servicing the customers of M&M during a period of negotiation. Pindus claims that Carleton and Hoffman's actions reflect a plan to put M&M and Pindus out of business, pointing to the fact that Carleton and Hoffman had formed a new company, USE Management, on January 4, 2006 and then yet another company, Firebuilt, Inc., on May 2, 2006 to provide the same services as M&M and utilizing M&M's software, website, and other property.

On April 24, 2006 Carleton and Hoffman sued Pindus, US Energy Heat Controls, GOES, and M&M claiming seven causes of action¹ including dissolution of M&M. Pindus moved for a temporary restraining order, preliminary injunction, a stay for arbitration and filed an answer and counterclaims in the event a stay for arbitration is not granted. This court granted the Temporary Restraining Order on May 18, 2006 compelling plaintiffs to return property and desist from using privileged information. Oral arguments were held on May 30 2006.

¹ The seven causes of action are: 1)Against Pindus: Breach of Fidiciary Duty. 2)Against Pindus: Prima Facie Tort. 3)Against Pindus and US Heat Controls: Conversion, Misappropriation, Mismanagement. 4)Against Pindus, US Energy Heat Controls and GOES: Conspiracy, Interference with Economic Advantage. 5)Against Pindus and M&M: Breach of Contract, Fraud and Inducement to Breach Contract. 6)Against M&M: Common Law Dissolution. 7)Against Pindus: Permanent Injunction.

DISCUSSION

I. PRELIMINARY INJUNCTION

The court will first consider defendant's motion for a preliminary injunction. A party seeking a preliminary injunction pursuant to CPLR Section 6301 or CPLR Section 7502(c) must show "1) a likelihood of success on the merits, 2) irreparable injury to the moving party, and 3) that the equities are in its favor" (*J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406 [1986].) A *preliminary injunction* may be granted when the moving party seeks to permanently restrain the opposing party from acting or continuing to act, and such act if committed or continued during the pendency of a legal action or arbitration, would produce injury to the moving party or make the resulting judgement/award ineffectual, CPLR 6301. Defendant corporations and their chief executive, Gerald Pindus, move for a preliminary injunction against the plaintiffs, Jeffrey Carleton and Lee Hoffman.

Defendants request to enjoin the plaintiffs from:

- A) Contacting customers of the defendants.
- B) Using, retaining, revealing, copying, or extracting computer programs or any other property obtained by the plaintiffs while they were employed by the defendants.
- C) Using any confidential information of the defendants.
- D) Contacting any of defendants' employees for the purpose of inducing them to leave the employ of the defendants.
- E) Receiving, retaining, or depositing into any banking account any payments for services rendered by the plaintiffs, or owed to the defendants, made by customers of the defendants.

F) Compelling plaintiffs to return to the defendant all information taken by the plaintiffs from the offices of the defendants.

G) Using, accessing, modifying, or preventing entry to any website previously used by the defendants.

A. Likelihood of Success on the Merits

The basic question revolves around the property removed by the plaintiffs. At issue is whether the plaintiffs should be permanently enjoined from using the information they took from M&M. The defendants contend that the plaintiffs should be permanently enjoined from using the information they removed and make three arguments as to their likelihood of success on the merits concerning this issue. The defendants first argue that the information removed by the plaintiffs is proprietary information which the law of this state protects against unwarranted use and dissemination. The defendants further argue that even if the information taken by the plaintiffs is not considered proprietary, to the extent that the plaintiffs as employees of M&M breached their fiduciary duty and duty of good faith to M&M by removing the information while employed by M&M, the plaintiffs must be enjoined from using such information. The defendant's third argument requests that the plaintiffs' use of the proprietary information be enjoined because of the egregious conduct by which the plaintiffs' obtained M&M's information. All three of defendant's arguments are persuasive and demonstrate a likelihood of success on the merits.

In arguing that the information removed by plaintiffs is proprietary, and that a preliminary injunction should be granted, defendants emphasize that the information in controversy was protected as a secret and gave them an advantage over their competitors. In *Garvin Grirgbutler v Cowen*, 155 Misc 2d 39 (Sup. Ct., N.Y. Co. 1992), the court found

information regarding the off-dates of particular traders to be proprietary information which gave the plaintiffs an advantage over their competitors and enjoined the defendant's from using such information. Here, M&M spent thousands of dollars and countless hours to develop software, engineering plans, and customer contacts and this information gave them an advantage over their competitors. In fact both parties acknowledge that no other company was offering the same services as M&M. Therefore the information developed by M&M had created a new branch of real estate management and gave them an advantage over their competitors, for M&M was the only company to offer such unique management services.

The Court of Appeals in *Ashland Management Incorporated v Janien*, 82 NY2d 395, 407 (1993), states that a trade secret must be regarded as a secret by a company and also "give him an opportunity to obtain an advantage over competitors who do not know or use it." Here, the information removed by plaintiffs included customer lists compiled over the course of thirty years of business. The defendants regarded these customer lists as trade secrets, these lists could not *easily* be collected from a phone book or other public source and these lists gave the defendants an advantage over their competitors. The plaintiffs also removed secret software, secret engineering plans, and other secret company information which M&M protected and which formed the basis and undisputed uniqueness of the company. All of the information removed by the plaintiffs was considered a secret by the defendant corporation and gave the defendants an advantage over their competitors. The defendants first argument convinces the Court that the defendant's are likely to succeed on the merits.

The defendants' second and third arguments requests that even if the information in question is not considered proprietary information, nonetheless the plaintiffs should be enjoined from using such information because the plaintiffs physical taking of defendant's property

amounts to bad faith and even egregious conduct and should be enjoined (*CBS Corp. v Dumsday* 268 AD2d 350 [1st Dept 2000], *7th Sense, Inc. v Liu* 220 AD2d 215 [1st Dept 1995]). These two arguments by the defendant are very convincing. In *Silfen v Cream*, 29 NY2d 387, 392 (1972), the court states, “a physical taking[] can be enjoined simply because it constitutes egregious [behavior].” Here, the plaintiffs had just received a letter from the chief executive of M&M threatening termination, came to the offices of M&M in the middle of the night, removed nearly all the property of M&M and thereby crippled M&M. The plaintiffs then used this property to start their own corporation named Firebuilt, Inc. The plaintiff’s conduct was “an egregious breach of trust and confidence” while still in defendant’s employ and should be enjoined (*id.* at 392).

The plaintiffs contend that the defendants have not demonstrated their likelihood of success, pointing to (*Doe v Axelrod*, 73 NY2d 748 [1988]), where the Court of Appeals reversed an injunction granted by the lower court because the likelihood of success was not demonstrated by the moving party. Here, however, the moving party has submitted sufficient evidence to show that they are likely to succeed. The plaintiffs point to no relevant case law or facts which weakens the defendants’ argument and therefore, the defendants have presented a compelling argument that they are likely to succeed on the merits.

B. Irreparable Injury

The defendants have also demonstrated that they will suffer irreparable injury in the absence of a preliminary injunction. Irreparable injury may be shown by loss of customers, permanent loss of revenues, as well as loss of good will (*Battenkill Veterinary Equine P.C. v Cangelosi*, 1 AD3d 856 [3rd Dept. 2003]). As a result of the removal of M&M’s property the defendant, Gerald Pindus, testifies that M&M is unable to contact or service customers and as a

result is suffering from a loss of customers, revenue and good will. In addition M&M suffers by the dissemination of its trade secrets and diversion of its income.

The TRO issued by this Court which required the plaintiffs to return all property and information removed from the offices of M&M may make M&M functional again, however, the use of that same information by the plaintiffs will result in a loss of revenue to M&M by the dissemination of its trade secrets. Such loss of clients and revenue to a competing service constitutes irreparable injury to the defendants (*Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 203 [1st Dept 1996]).

Unlike the defendants, the plaintiffs will not suffer from any irreparable injury if a preliminary injunction is granted. The company which the plaintiffs started was founded on resources that the plaintiffs that the plaintiffs never had an independent right to use. Because the plaintiffs did not have an independent right to use the proprietary information they can suffer no loss from being enjoined from using such information, *id.* Unlike the cases where the court has found irreparable injury to a party resulting from the use of their proprietary information, *id.*, the plaintiffs here do not have a right to the proprietary information and cannot claim a loss extending from an enjoinder of their use of such proprietary information. It is therefore the defendants, and not the plaintiffs, who will suffer irreparable injury in the absence of a preliminary injunction.

C. Balance of the Equities

The balance of the equities lies in the defendants' favor. The plaintiffs removed nearly all the property from the offices of M&M in the middle of the night and used this property to start their own competing business, Firebuilt, Inc. The plaintiffs' taking property from M&M crippled M&M, the plaintiffs' employer, and at a minimum results from bad faith and a breach

of their fiduciary duty to M&M. Even if M&M returns to a functional state it will no doubt suffer from a loss of good will and permanent loss of revenue through the dissemination and use of its proprietary information by the plaintiffs or other competitors.

The plaintiffs contend that they were the developers and managers of M&M and that the disputed proprietary information should be theirs to use. However the plaintiffs developed the software and other information as employees of M&M and as such do not have an independent right to use such information. Plaintiffs' make an unavailing argument that the defendant Gerald Pindus acted in bad faith towards them as employees and business partners in addition to stonewalling the growth of M&M as a whole. Such a dispute between business partners and employees can best be resolved through negotiations not wanton self help. The parties' differences should not have resulted in the plaintiffs taking property from their employer in the middle of the night to start a competing company. Such behavior by the plaintiffs demonstrates bad faith and a breach of duty on their part, and brings the equities in favor of the defendants. For reasons set forth above the court grants the defendant's motion for a preliminary injunction.

II. ARBITRATION

Next, the court will consider defendants' motion for a stay the current proceedings pending a decision in arbitration. Generally, arbitration provisions are favored in the law and courts should broadly construe them. (*United Steelworkers v Gulf Navigation Co.*, 363 US 574 [1960]). Courts usually compel arbitration unless "it may be said with positive assurance that the arbitration clause is not susceptible of a reasonable interpretation covering the asserted dispute," *id.* In New York, a court considering a motion to compel arbitration must first determine that the parties agreed to arbitrate, the causes of action are arbitrable within the scope of the agreement, and the defendant did not waive his right to arbitrate by participating in

litigation. An elemental analysis follows.

A. Agreement to Arbitrate

Defendant argues that the signed operating agreements require plaintiffs to resolve corporate disputes in arbitration. Pursuant to CPLR 7501, an arbitration provision only needs to be in writing to be enforceable. However, a party may “not be compelled to arbitrate unless there is evidence which affirmatively establishes that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute.” (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc, LLP*, 10 AD3d 671 [2d Dept 2004]). Both M&M and GOES executed written arbitration provisions. Here, Carleton cannot dispute he agreed to the arbitration provision because he signed the M&M agreement. The question is whether Hoffman can be compelled to arbitrate his dispute with M&M since he only signed an agreement with GOES.

Initially, Hoffman asserted that he is immune to arbitration because he is not a rightful signatory to M&M's operating agreement. Courts have long held that arbitration agreements do not require a signature to be enforceable. (*See Bay Anesthesia v Zegelstein*, 194 AD2d 397 [1st Dept 1993] [agreement to arbitrate is valid although neither party signed the other's arbitration agreement]; *Metropolitan Arts & Antiques Pavilion, Ltd. V Rogers Marvel Architects, PLLC*, 287 AD2d 372 [1st Dept 2001] [signature is not required; only written proof the parties agreed to arbitrate future disputes]).

Additionally, Hoffman admitted to owning a membership interest in M&M and is currently seeking a judgment, predicated on the M&M agreement, for that interest. When Hoffman was ‘terminated’ by Pindus, he claimed Pindus owed him fifteen percent equity in M&M; equity given in exchange for the monitoring software used by M&M. The Agreement binds all persons holding a membership interest in M&M (“Members”); signatories as well as

“each person who hereafter [became] a Member.” (Pindus Aff, Ex C, Art. 1 § 4). Hoffman became a Member when he agreed to accept membership interest as payment for his work. As a Member, Hoffman had rights to fifteen percent of M&M profits thus bound by the entire agreement. Accordingly, if Hoffman is not a Member of M&M, he has no membership interest in the company and there is little ground for his action against Pindus.²

In the alternative, Hoffman is required to adhere to the arbitration provision as an employee of M&M. Hoffman contends the M&M’s arbitration provision is invalid against him because he did not sign an employment contract with M&M. In *Crawford v Merrill Lynch, Pierce, Fenner & Smith, Incorporated*, the court held that an arbitration clause written into the Constitution and Board of Directors rules of the New York Stock Exchange is enforceable against a Stock Exchange employee because the employee applied to represent the company and thus agreed to abide by the established rules. (35 NY2d 291 [1974]). The Court in *Dunay v Weisglass*, referring to the holding in *Crawford*, explicitly added that because the controversy arose out of the business of a director or officer; arbitration is enforceable. (54 NY2d 25 [1981] [“Although those words are narrowed in scope as to member-nonmember arbitration by the additional requirement that the controversy be one “arising out of the business of” the member, we conclude, for the reasons hereafter stated that arbitration of the instant controversy is required whichever provision is applied.”]; See also *Hoffman v Finger Lakes Instrumentation, LLC*, 7 Misc 3d 179 [NY 2005] [the court compelled arbitration where each member of an LLC signed an operating agreement containing an arbitration provision]).

Similar to the plaintiff in *Crawford*, Hoffman applied to represent M&M and thus agreed to abide by the rules. Initially, Hoffman worked “free-lance” for GOES. He worked from home,

² In the present action, Hoffman seeks a declaratory judgment for exclusive ownership of the Heat Computing Monitoring System created for use at M&M and, in the alternative, fifteen percent equity interest in M&M.

set his own hours and did not have to “answer” to Pindus. He relinquished that position to work full-time at M&M’s office, represent M&M’s services to potential clients, and operate the monitoring software. Following the reasoning in *Dunay*, the actions in the present case originated with the owner of M&M. In either capacity, Hoffman agreed to the broad arbitration provision in M&M’s operating agreement.

1. Arbitration provisions are severable

Carleton claims Pindus fraudulently induced him to breach their partnership agreement which invalidates the contract. Generally, a broad arbitration provision is severable and can remain enforceable even if the parties terminate the contract. (*Weinrott v Carp*, 32 NY2d 190 [1973]). It does not matter that the contract expired naturally, by notice under a cancellation provision, or by breach of one party. (*Primex Intl. Corp. v Wal-mart Stores*, 89 NY2d 594, 599 [1997]). Here, Carleton argues that Pindus created an “outrageous” work environment that prevented Carleton from performing his duties resulting in the breach. Assuming *arguendo*, Pindus’ fraudulent acts against Carleton may destroy the agreements between them, but does not negate the arbitration provision included in these agreements.

2. Dissolution Provision

Carleton suggests the dissolution provision directs the parties to litigate actions specifically regarding dissolution. Carleton bases this contention on Article 8.1.2 of the operating agreement which states, in pertinent part:

“1. Dissolution. Notwithstanding anything to the contrary contained in the LLCL, the Company shall only be dissolved and its affairs shall only be wound up upon the first to occur of the following:

(1) The written consent to dissolve of Members holding, in the aggregate, not less than the Required Percentage of the interest held by Members.

(2) The entry of a decree of judicial dissolution pursuant to

LLCL.”

(Pindus Aff., Ex. B § 8.1.2.)

Courts have disagreed with that contention. (*See Spatz v Ridge Lea Assoc. LLC*, 309 AD2d 1248 [4th Dept 2003] [...]). It does not matter that the plaintiff seeks dissolution or bases his claims on the operating agreement. (*Dassaro v Edwards*, 190 F Supp 2d 544, 549-50 [WD NY 2002] [claim cannot escape arbitration solely because “[i]t would be virtually impossible to litigate or resolve this case without extensive reference to the Agreement”])

Carleton further suggests that because the dissolution provision is so extensive, it negates the brief arbitration clause and renders arbitration useless within the scope of this proceeding. However, this reasoning is fractured. An arbitration clause is not annulled because it is concise. The GOES arbitration clause clearly expresses that “any dispute of any nature whatsoever in any way relating to the Company or this Agreement.” The clause does not exclude disputes concerning corporate dissolution.

Furthermore, corporate dissolution is an arbitrable matter. (*Application of Hega Knitting Mills, Inc.*, 124 NYS2d 115 [1953] [court directed parties to arbitrate the dissolution where the partnership agreement included dissolution and arbitration provisions]). Further, where parties agree to a broad arbitration provision that does not enumerate arbitrable matters, that provision encompasses all the terms of the agreement including dissolution because a dissolution is an arbitrable matter. (*Dassaro*, 90 F Supp 2d at 549-50)

B. The Majority of Plaintiff's Claims are Arbitrable

Most causes of action arising from a broad arbitration clause are arbitrable. Here, Carleton

asserts arbitration is inappropriate because his causes of action are not arbitrable. The court is inclined to disagree. (*Meadows Indem. Co. Ltd. v Baccala & Shoop Ins. Services, Inc.*, 760 F Supp 1036 [ED NY 1991] [Fraud in the inducement of contract claim is arbitrable]; *AFP Imaging Corp. v Ross*, 780 F2d 202 [2d Cir 1985] [Shareholders common-law breach of contract claim against purchasing corporation is arbitrable]; *Kyung Sup Ahn v Rooney, Pace Inc.*, 624 F Supp 368 [SD NY 1985] [Common-law fraud claims]; *Lane v Abel-Bey*, 50 NY2d 864 [1980] [failure to enter into employment contract, breached of fiduciary duties, and waste are arbitrable claims]; *Henry v Suffolk Home Distribution, Inc.*, 118 AD2d 685 [NY AD 1986] [Public policy does not prohibit arbitration of the conduct of a fiduciary]; *Leibowitz v Smith Barney Inc.*, 863 F Supp 171 [SD NY 1995] [Inability to recover all damages in arbitration does not invalidate arbitration agreement]; *But cf. Appel v Kidder, Peabody & Co. Inc.*, 628 F Supp 153 [SD NY 1986] [Request for punitive damages, which may not be awarded by arbitrators, does not prevent arbitration of claims]).

M&M's arbitration clause does not expressly limit any controversies. Therefore, Carleton's primary causes of action can be adequately resolved in arbitration.

C. Waiver of Right to Arbitrate

Pindus' legal response to Carleton's complaint does not amount to a waiver of his right to arbitrate. A party waives his right to arbitrate when he "engages in protracted litigation that prejudices the opposing party" such as unreasonable delay, expense, or damage to the adversary's legal position. (*In re Crysen/Montenay Energy Co.*, 226 F3d 160, 162-3 [2d Cir 2000]). In the absence of prejudice, courts have long held waiver may not occur. (*See, Estate Prop. Corp. v Hudson Coal Co.*, 225 AD 798 [1st Dept 1929]; *ITT World Comm. Inc. v Comm. Workers of America, AFL-CIO*, 422 F2d 77 [2d Cir 1970]).

In the matter at bar, the plaintiffs rely on *Sherrill v Grayco Bldrs. et. al.* to support allegations that Pindus actively pursued litigation resulting in waiver. (64 NY2d 261 [1985]). In *Sherrill*, the court held that defendant affirmatively sought the benefits of litigation because they participated in an arbitration action, and a “companion action,” for nearly thirty years filing repeated motions inconsistent with an arbitration claim, such as pretrial disclosure, *id.* at 274. The *Sherrill* court found that “[w]here claims are entirely separate, though arising from a common agreement, no waiver of arbitration may be implied from the fact that resort has been made to the courts on other claims.” (*id.* at 273 [citing *Denihan v Denihan*, 34 NY2d 307,310]). However, in dicta the court also stated, “[i]f [defendant] had meant to preserve for arbitration ...” it was incumbent on him to do so instead of ... pursuing litigation over an extended period,” *id.* As a result, the *Sherrill* court affirmed that the defendant waived his right to arbitrate because he actively and continuously pursued litigation of the same claims he sought to arbitrate. (*id.* at 271, 272; *see also, Hart v Tri-State Consumer, Inc.*, 18 AD3d 610 [2d Dept 2005]).

In sharp contrast to the defendant’s actions in *Sherrill*, Pindus’ actions did not amount to waiver. He answered the complaint, asserted a counterclaim to compel arbitration, and moved for a temporary restraining order and preliminary injunction.

Additionally, the *Sherrill* court stated, “when an urgent need to preserve the status quo requires some immediate action which cannot wait the appointment of arbitrators, waiver will not occur where plaintiff moves in court for protective relief in order to preserve the status quo while at the same time exercising its right under the contract to demand arbitration.” (64 NY2d at 271 [quoting *Preiss/Breismeister Architects v Westin Hotel Co.*, 56 NY2d 787,789]).

Here, Pindus was financially obligated to sustain M&M. Left with no means of conducting business, Pindus would suffer substantial financial burden if Carleton acquired M&M’s clients.

Prevention of damage to M&M and Pindus necessitated timely injunctive relief. Pindus moved for injunctive relief and in doing so, raised arbitration as an affirmative defense. Therefore, he did not waive his rights to arbitrate. The motion to stay the current proceedings pending arbitration should be granted in favor of defendant, Pindus.

CONCLUSION

Accordingly, it is hereby


ORDERED that the defendants' motion for a preliminary injunction is granted, and it is further

ORDERED that the current proceeding be stayed pending a decision in arbitration.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

Dated: August 8, 2006

ENTER:



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

FILED
AUG 15 2006
COUNTY CLERK'S OFFICE
NEW YORK