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| <b>Loewentheil v O'Hara</b>  |
| 2006 NY Slip Op 30436(U)   |
| May 19, 2006   |
| Supreme Court, New York County   |
| Docket Number: 601761/05   |
| Judge: Helen E. Freedman   |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Freedman  
Justice

PART 39m

Stephen Leventhal

INDEX NO. 601761/05

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

Edwin O'Hara

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 \_\_\_\_\_

Repeating Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the accompanying memoranda of law.*

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

**FILED**

MAY 24 2006

COURT CLERK'S OFFICE  
NEW YORK

Dated: 5/19/06

ASW  
J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 39

-----X  
STEPHAN LOEWENTHEIL and BETH  
LOEWENTHEIL,

Plaintiffs,

Index No.: 601761/05

-against-

EDITH O'HARA, Individually and as a Director and  
Shareholder of WHITE KNIGHT, LTD.,

Defendants.

-----X  
Helen E. Freedman, J.S.C.

In this action to recover on three promissory notes issued by White Knight, Ltd. ("White Knight"), intervenor Edith O'Hara ("O'Hara") moves to amend her answer and counterclaims and seeks equitable relief to prevent plaintiffs from disposing of corporate assets and from taking steps to remove her and her theater from White Knight's only major asset, the building located at 50 West 13<sup>th</sup> Street, New York, New York (the "Building"). In December 2004, the plaintiffs Stephan and Beth Loewentheil purchased White Knight shares from former part-owner Gordon Milde ("Milde"). At that time, Milde also transferred to plaintiffs promissory notes as consideration for loans Milde allegedly made to White Knight. The Loewentheils sued White Knight on the promissory notes and entered a default judgment against it for \$751,758.57. In a decision entered November 23, 2005, this court vacated the default judgment and granted O'Hara leave to intervene and file an answer and counterclaims.

O'Hara now seeks leave to amend her answer and counterclaims to add a claim seeking a declaratory judgment that the Loewentheils do not own a majority interest in the company, and seeking equitable relief to permanently enjoin White Knight from selling air rights appurtenant to the

Building and from taking actions to remove O'Hara's not-for-profit corporation, the Thirteenth Street Repertory Company, Inc. (the "Theater"), from the Building. O'Hara also seeks to stay plaintiffs from selling the air rights and from taking any steps to remove the Theater from the Building during the pendency of this action, and moves for dismissal of the Loewentheils' affirmative defenses to O'Hara's counterclaims.

For the reasons stated below, O'Hara's motion seeking leave to amend her counterclaims is granted, but her motion seeking preliminary equitable relief is denied. It is premature at this time to dismiss plaintiffs' affirmative defenses to O'Hara's counterclaims.

*O'Hara's Allegations Supporting the Counterclaims and Proposed Amendments:*

O'Hara formed and has been running the Theater since 1979. O'Hara alleges that she and Milde formed White Knight in 1982 as a vehicle to acquire the Building and provide a location for the Theater. Since its acquisition, O'Hara has used the Building as a residence and as a location for the Theater's operations. On January 4, 1983, O'Hara and Milde entered into a Cross Purchase Agreement in connection with White Knight's formation that named Milde, O'Hara, and Robert Flicker as directors, with O'Hara serving as president and Milde serving as vice-president and secretary. As of January 1983, Milde held 50 shares, O'Hara held 25 shares, and the Theater held 25 shares. O'Hara alleges that later that year, Milde proposed to O'Hara that they divide the Theater's shares so that White Knight could become a subchapter S corporation, receive more favorable tax treatment, and more easily attract additional investors. Milde agreed to pay the Theater \$25,000 as consideration for 12.5 shares, resulting in Milde holding 62.5 shares and O'Hara holding 37.5 shares.

O'Hara alleges that on January 3, 1986 Milde loaned \$180,000 to White Knight, and that was the only loan approved by the board of directors (the "Board") for which Milde received a promissory

note. O'Hara alleges that Milde and O'Hara also made informal contributions to the Building for needed renovations.

O'Hara alleges that in the summer of 2004, Stephan approached O'Hara about purchasing the Building from White Knight. After O'Hara rejected this offer, Stephan and his wife Beth Loewentheil negotiated a deal with Milde to purchase his shares and gain majority control of the White Knight. The Board held a special meeting on December 2, 2004 that O'Hara did not attend. At that meeting, Milde stated that he had lost his stock certificates and three promissory notes issued by White Knight, and the Board attendees approved the replacement of the certificates and promissory notes. Exercising his rights as majority shareholder, Milde elected Stephan, Beth, and their daughter Kara Ann to the Board. Milde also selected officer positions, with Stephan as president and treasurer, Beth as secretary, and Kara Ann as vice-president.

On March 23, 2005, the plaintiffs conducted a combined annual meeting of the shareholders and directors. O'Hara attended the meeting and advised that she did not think the Board acted legitimately during the December 2004 meeting. Plaintiffs stated at the March 2005 meeting that they intended to sue White Knight to recover on the promissory notes, and they did not authorize O'Hara to represent White Knight. O'Hara then sought leave to intervene in the Loewentheil's action against White Knight.

Since the November 2005 decision vacating the default judgment against White Knight and granting O'Hara leave to intervene, Stephan Loewentheil has announced that White Knight will sell the air rights appurtenant to the Building to a real estate development firm. In addition, Stephan Loewentheil, on behalf of White Knight, sent two notice to quit letters to the Theater, care of O'Hara, dated January 19, 2006 and January 26, 2006.

*Claims and Contentions:*

O'Hara seeks to amend her answer and counterclaims, adding three new causes of action in light of plaintiff's recent actions and the lack of documentary evidence produced during disclosure. O'Hara seeks a declaratory judgment that O'Hara and Milde never consummated the 1983 transfer of the Theater's stock because the Theater never actually received consideration and no documents exist proving the transfer took place. O'Hara disputes the validity of Milde's "replacement" stock certificates created at the December 2004 meeting. Because O'Hara disputes the validity of the 1983 purported stock transfer, she contends that the Theater retained a 25 percent interest, O'Hara has a 25 percent interest, and the Loewentheils have a 50 percent interest that Milde transferred to them. O'Hara contends that because the Loewentheils do not own a majority interest in White Knight, they do not have authority to sell the Building's air rights or evict the Theater from the Building. O'Hara also argues that the eviction notices constitute wrongful, retaliatory landlord actions under Real Property Law § 223-b ("RPL § 223-b"), and the sale of the air rights may not proceed without two-thirds shareholder approval under Business Corporation Law § 909 ("BCL § 909"). Thus, O'Hara seeks to add counterclaims for equitable relief preventing plaintiffs from selling air rights and evicting the Theater, and she seeks equitable relief staying plaintiffs from taking further steps in connection with these acts.

The Loewentheils oppose the proposed amendments and motion for equitable relief contending that the 1983 stock transfer was valid and they own a 62.5 percent majority interest in White Knight. According to the Loewentheils, the January 26, 1983 minutes acknowledge that Milde and O'Hara agreed to the stock transfer and that O'Hara has never before disputed that Milde owned a majority interest. Plaintiffs also contend that the sale of air rights does not require a two-thirds

shareholder vote under BCL § 909 because the sale does not constitute a disposition of “all or substantially all of the corporation’s assets” under the statute. The Loewentheils also argue that there is no basis to enjoin an eviction proceeding under RPL § 223-b because that provision only applies to residential property, and the Theater has not paid rent or accounted for income to White Knight.

*Leave to amend:*

Leave to amend under CPLR § 3025(b) shall be freely granted so long as the opposing side does not suffer prejudice and the proposed claims are not facially meritless. *See Romero v. Romero*, 231 A.D.2d 460 (1<sup>st</sup> Dept. 1996). Plaintiffs have not shown that they will suffer prejudice as a result of the amendments, particularly because the parties are still in the disclosure phase of litigation. Assuming O’Hara’s allegations are true, she states a claim for the declaratory judgment regarding the parties’ interests in White Knight. The statement in the November 2005 decision that the Loewentheils held a 62.5 percent interest was not a conclusion of a litigated issue but a statement of an undisputed fact at the time the parties submitted the motion to intervene. Now, that fact is in dispute, and neither party has produced sufficient evidence proving the shareholders’ stock ownership. The stock ownership is a threshold issue in this case because if the Loewentheils did not purchase a majority interest in White Knight and the Board did not exercise adequate corporate formalities required of closely held corporations, *see Chan v. Louis*, 303 A.D.2d 141 (1<sup>st</sup> Dept. 2003), then Stephan Loewentheil does not have authority to act on behalf of White Knight. Thus, O’Hara states a cognizable claim for permanently enjoining the air rights sale and the Theater’s removal from the Building.

*Preliminary Equitable Relief:*

Granting preliminary injunctive relief requires a clear showing of a likelihood of ultimate

success on the merits, irreparable harm absent the equitable relief, and a balancing of the equities. *See Scotto v. Mei*, 219 A.D.2d 181 (1<sup>st</sup> Dept. 1996). While O'Hara's allegation that Stephan Loewentheil does not have authority to act on behalf of White Knight satisfies the liberal standard for amending pleadings, O'Hara has not made a clear showing of a likelihood to succeed on this claim that would warrant the "drastic" remedy of injunctive relief. *Id. at 182*. Additionally, O'Hara has not shown that the statutory bases for her claims are applicable here.

O'Hara has not shown that a preliminary injunction is warranted to prevent further actions the Loewentheils may take in connection with the removal of the Theater because it is retaliatory under RPL § 223-b. That provision applies to residential property (RPL § 223-b(6)), and the alleged retaliatory act must be in response to a tenant's complaint to the government about alleged health and safety violations (§ 223-b(a)), a tenant's action to enforce rights under the lease (§ 223-b(b)), or participation in a tenant's organization (§ 223-b(c)). Here, the notices to quit are not retaliatory under RPL § 223-b because the Theater is not residential property, and the notices to quit are allegedly in retaliation for O'Hara's intervention in a corporate dispute. Additionally, although an actual eviction could cause irreparable harm to the theater, the possible institution of a legal proceeding will not cause irreparable harm because White Knight has a right to bring an action if it has a cognizable claim to evict for nonpayment of rent. If Stephan Loewentheil does not have authority to act on behalf of White Knight, then O'Hara may raise that issue as a defense in an eviction proceeding, but no proceeding need be enjoined at this time.

O'Hara also has not shown that a preliminary injunction is warranted to stay the sale of air rights under BCL § 909. Corporations have the explicit right to sell or transfer any or all of its property under BCL § 202(5). However, the corporation's right to dispose of property is limited when

a corporation transfers “all, or substantially all, of a corporation's assets,” and the transfer “falls outside the ordinary scope of a corporation's business.” In such a case, the transfer must first be approved by the board of directors, and two-thirds of the shareholders. BCL § 909. Here, the proposed sale is for air rights and development rights above the Building, not the Building itself. Although construction above the Building will presumably affect it, O'Hara has not submitted evidence that the sale of air rights will effectively dispose of “substantially all of the corporation's assets,” or that the failure to stay the sale until the conclusion of this action will cause irreparable harm. Determining which side the equities favor remains unclear at this time. Although the sale of air rights could disrupt the Theater's operations, the Loewentheils argue that enjoining the sale would result in lost revenue for White Knight equaling \$2.8 million.

In sum, O'Hara has alleged sufficient facts to support amending her answer and counterclaims challenging the Loewentheils' authority to act on behalf of White Knight. However, the evidence submitted does not support staying any actions at this time.

Accordingly, it is

ORDERED that leave to amend O'Hara's answer and counterclaims is granted, and the Second Verified Answer and Counterclaims annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof, and it is further

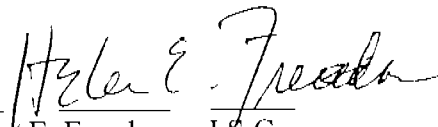
ORDERED that plaintiffs serve an answer to the amended counterclaims within 20 days of the date of said service, and it is further

ORDERED that the remaining branches of O'Hara's motion for preliminary equitable relief and dismissal of plaintiffs' affirmative defenses to O'Hara's counterclaims are denied, and it is further

ORDERED that the parties are directed to appear for a status conference in Room 208 on June 13, 2006 at 9:30 a.m.

DATED: May 19, 2006

ENTER:

  
Helen E. Freedman, J.S.C.

**FILED**  
MAY 24 2006  
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