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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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WQN, INC., and Park Avenue Associates, LLC (a Delaware limited liability company),

Plaintiffs,

-against-

MARK C. HOTTON, PARK AVENUE ASSOC. MANAGEMENT, LLC, 154TH STREET CORP., PIONEER VENTURES LLC, PINE AIR VENTURES LLC, THE RISING CHILD FOUNDATION, MARK C. HOTTON TRUST, MARK C. HOTTON LIVING TRUST, EDWARD JOHNSON, PARK AVENUE ASSOCIATES, LLC (a New Jersey limited liability company) and JOHN DOES 1 through 99,

Defendants.

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Decision/Order
Index No.: 102004/06
Seq. Nos. : 001, 002 & 003

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Sequence No. 001	
Pltf's OSC#1	1
Def's x-motion (DSL)	2
Defs Hotton, Pioneer, 154th St., Rising Child, Hotton Trust, Hotton Living Trust, Johnson and Park Avenue affid (KC) w/exh	3
Transcript dated February 23, 2006	4
Motion Sequence No. 002	
Pltf's OSC#2 w/RV affid in support, exh	5
Pltf's affid in response (EDJ) w/exhs	6
Pltf's affid in support (ADS) w/exhs	7
Pltf's affid in support (JP)	8
Pltf's supplemental affid in oppos (SWH)	9
Pltf's supplemental affid in oppos (DSM) w/exh	10
Pltf's supplemental memorandum of law in further support (GCH)	11
Pltf's supplemental affid in further support (DSM)	12
Pltf's affid in support (SA)	13

003

Pltf's affid in support (DS) w/exhs 14
Motion Sequence No. 003
Pltfs OSC #3 [modifying order of attachment] w/DSM affid in support, exhs 15
Defs Hotton, Pioneer, 154th St, Rising Child, Hotton Trust, Hotton Living Trust, Johnson, Park Avenue affid in opp (BD) 16
Pltfs affirm in further support (GCH) w/exhs 17
Transcript dated 3/9/06 18

Upon the foregoing papers, the decision and order of the court is as follows:

There are three related motions and a cross-motion before the court. The court is, therefore, consolidating such motions and cross-motion for consideration and determination in this decision and order. Plaintiffs are seeking, during the pendency of this action, to enjoin defendant Mark C. Hotton, his agents and representatives or anyone acting in concert with him, from dissipating, transferring or otherwise encumbering any funds in accounts in the name of, or controlled by Mark C. Hotton (mot. seq. #1). Defendants Mark C. Hotton, 154th Street Corp., Pioneer Ventures LLC, The Rising Child Foundation, Mark C. Hotton Trust, Mark C. Hotton Living Trust, Edward Johnson and Park Avenue Associates LLC, a New Jersey Limited Liability Company, (collectively "Hotton defendants")[1] have cross moved to dismiss the fifth cause of action for a permanent injunction. They also seek a "dismissal of the Temporary Restraining Order". Plaintiffs have brought a separate motion for prejudgment attachment of certain real and personal property owned by defendant Mark C. Hotton. They also seek an order directing defendant Mark C. Hotton to provide documentation and information regarding the location of certain funds (mot. seq. #2). Plaintiffs have brought a third motion to attach certain other assets they claim are being

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[1]The remaining named defendants have not appeared.

held for some of the Hotton Defendants (mot. seq. #3).

There are some important facts that are not in dispute between the parties.

It is undisputed that WQN is a public company. It embarked in a joint venture with Mark C. Hotton and other investors affiliated with Mr. Hotton to invest in real estate in New York and New Jersey. The parties agreed that they would form Park Avenue Associates LLC in Delaware ("PAA-Delaware"). They all agreed that they would all purchase membership interests in the LLC, which would create capital used to make various real estate investments in the name of PAA-Delaware.

PAA-Delaware was formed in August 2005. Several months before, however, in March 2005, Mark C. Hotton had formed Park Avenue Associates LLC in New Jersey (PAA-New Jersey). Mark C. Hotton is a member of PAA-New Jersey along with other unidentified investors. WQN has no membership or any other interest in PAA-New Jersey.

The parties planned to use PAA-Delaware to invest in at least three identified real estate transactions. Between the period November 14, 2005 and January 2006, Mark C. Hotton received no less than $3,577,000 from WQN.[2] This money was to be credited as part of WQN's investment in PAA-Delaware, and used in connection with PAA-Delaware acquiring an interest in the variously identified real estate deals.

The transferred money was originally deposited in bank accounts for PAA-New Jersey. The money was never used for the identified real estate deals. The money was then transferred into certain bank accounts owned and/or controlled by Mark C.

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[2]Although plaintiff's claim that Mark C. Hotton was sent an additional $377,000, this amount remains in dispute.

Hotton. Although Hotton claims that the monies were returned to various entities and persons associated with WQN (a fact disputed by plaintiffs), the monies were never returned to WQN itself. Nor were the monies ever placed in any account with any financial institution that was titled in the name of PAA-Delaware.

Some additional facts are not disputed. Mark C. Hotton has his personal residence up for sale. Hotton admits that the money sent by WQN was first deposited in PAA-New Jersey and then deposited into other accounts controlled by him. He admits that such accounts no longer contain the money he originally obtained from WQN.

There are, however, some material facts that are disputed.

Plaintiffs claim that an operating agreement for PAA-Delaware was signed on or about October 31, 2005. The have provided a full copy of the document they purport to be the operating agreement, which among other things identifies WQN as a majority interest holder with a capital commitment of $5.6 million dollars. It also identified Mark C. Hotton as making a capital commitment of $2 million dollars. The document also identified the initial projects for PAA-Delaware as: The Willows at the Shore; Eagle's Wood and Sayville Commons.

The Hotton defendants deny that any operating agreement for PAA-Delaware was ever entered into. Although Mr. Hotton acknowledges that his signature appears on the signature page, he claims that he signed the signature page at a time when only that page was presented to him. He claims that he signed that page at the request of Denton Jones (a board member and shareholder), who wanted to maintain WQN's NASDQ listing. Hutton claims that unless WQN was operating business, it would be

de-listed from NASDQ. Hotton claims that notwithstanding that he signed the signature page to show NASDQ that PAA-Delaware was an operating business, it was not operational at that time.

Plaintiffs claim that Hotton's representation, that real estate deals were being negotiated for the benefit of PAA-Delaware and that there was a need for immediate capital, were false. They claim that monies were given by WQN to the Hotton defendants on account of such representations. They claim that the business deals never went through and that the monies sent were not needed. They claim that, thereafter, when they asked Hotton where the monies were, he falsely claimed that he had secured the monies in separate accounts. Although he produced bank account statements containing millions of dollars, plaintiff's claim that Hotton made quickie deposits and withdrawals just to show monies in the accounts, when in fact the monies were not really there.

The Hotton defendants claim that the real estate deals were all bona fide, but they fell through for valid reasons. They claim they returned the disputed monies. Hotton claims that he was instructed by Denton Jones of WQN to funnel the monies through accounts that Hotton controlled and then to send the monies over to entitles affiliated with WQN. He claims that all but $70,000 of the monies was returned, which he claims he kept for his trouble and expenses.

Plaintiffs dispute that the monies claimed to be paid to related WQN entities were in repayment of the WQN investment in PAA-Delaware. They point out, persuasively, that two of the repayments relied upon actually pre-date payment of the investment. The also have some documentary evidence that the payments relied upon

were categorized by Mr. Hotton as loans or other transactions at the time he made them. The have an affidavit from Mr. Denton Jones denying any such instructions and indicating that he did not have any authority to make such directions. Finally they highlight that most of the payments went to an entity called Cross County, in which Mr. Hotton himself has an interest.

Plaintiffs interposed a complaint asserting the following causes of action: [1] fraud, [2] breach of fiduciary duty, [3] conversion, [4] constructive trust and [5] temporary, preliminary and permanent injunctive relief.

Discussion

1. Cross-Motion to dismiss

The Hotton defendants seek to dismiss the fifth cause of action for injunctive relief. They argue that since plaintiffs can be made whole by money damages, they cannot also seek injunctive relief.

Parties have the right to plead in the alternative. Thus, it is well established that a plaintiff may plead claims in both law and equity in a complaint. Albany Heights Realty Co. v. Voght, 182 AD 736 (2nd dept. 1918). While the Hotton defendants' argument may affect the ultimate remedy that plaintiffs may be entitled to in this action, it is premature for the court to dismiss such claim at the pleading stage of the action.

2. Preliminary injunction

Plaintiffs seek to preliminarily restrain defendants from dissipating particular bank accounts while this action is pending.[3] The accounts against which this remedy is sought are either owned or controlled by Mark C. Hotton. Plaintiffs have produced documentary evidence that the monies first provided by WQN have been deposited into these accounts. Indeed, the Hotton defendants admit this. The Hotton defendants claim that the monies were withdrawn from these accounts and returned to entities designated by WQN. While the ultimate use of the monies is disputed, it is evident that the bank accounts identified do not contain anywhere near the $3.5 to $3.9 million dollars that is the subject of this action.

The Hotton defendants argue that any preliminary injunction would be improper because such a remedy cannot be used to prevent dissipation of assets necessary to satisfy an anticipated money judgment. CPLR § 6301. Under the authority of Credit Agricole v. Rossiyskiy Kredit Bank (94 NY2d 541 [2000]), this court agrees that no preliminary injunction is available in this case. The underlying objective for the restraint appears to be a securing of assets in the event plaintiffs prevail in this case. The court of appeals has rejected this objective as the basis for the granting of a preliminary injunction, noting that until a creditor has established title to the assets, this would unduly interfere with a creditors rights. Credit Agricole v. Rossiyskiy Kredit Bank, *supra* at 547.

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[3]Plaintiffs' motion for a preliminary injunction was originally more blunderbuss in term of the assets it was seeking to enjoin. After the court declined the sign the original restraint in the Order to Show Cause, plaintiffs narrowed their request to a restraint on bank accounts in which it could trace back the monies originally provided by WQN.

Plaintiffs' arguments, that the money that has been identified in the accounts they wish to restrain really belongs to them, is unpersuasive. Money is fungible and the concept of ownership of money is elusive, especially in an active account. Thus, a preliminary injunction is not available to protect money in this case.

3. Attachment

While a preliminary injunction is not a remedy that can secure assets for a future judgment, attachment is such a provisional remedy. An order of attachment provides security that if, and when, a judgment is obtained by the plaintiff, it will have some value. CPLR § 6201. Such an order may be granted when (as claimed in this case) the defendant intends to defraud his creditors, frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, or a defendant has disposed of property, removed it (or is about to remove it) from this state. CPLR § 6201 [3]. Shu Yiu Louie v. David & Chiu Place Restaurant Inc., 261 AD2d 150 (1st dept. 1999). The showing may, but need not, be based on property that the plaintiff claims was wrongfully taken by the defendant. In addition, in order to obtain such remedy, a plaintiff must show a probability of success on the merits in the underlying action. Arzu v. Arzu, 190 AD2d 87 (1st dept. 1993). Once the right to attach is established, the property that can be the subject of the attachment is "any debt or property against which a money judgment may be enforced.." CPLR § 6202.

Plaintiffs have satisfied their burden in this case. They have shown that monies were solicited from them to invest in real estate ventures; that the real estate ventures were never entered into and that the monies were, thereafter, diverted into accounts controlled by Mark C. Hotton. The monies are no longer contained in such accounts

and serious questions exist about the Hotton defendants' claims of repayment.

Mark C. Hotton is a savvy businessman and his defenses show at best, poor judgment, and at worst, admissions of criminal conduct. His claim, that no PAA-Delaware operating agreement was signed, but it only appears that way because he was helping WQN defraud NASDQ (and consequently the stock purchasing public), if actually established, will require that this case be forwarded to appropriate prosecutorial authorities. Mr. Hotton's claims, that he did no wrong, but was only was only taking instructions from WQN board member and shareholder Denton Jones, is also questionable. Not only is this claim disputed by Mr. Jones, but more importantly, conventional corporate governance usually requires that officers make decisions and give instructions about these types of matters, not the board members and certainly not shareholders, no matter how large their holdings in the company. Finally, the Hotton defendants' claims of repayment are questionable in light of documentary evidence showing that some money was repaid before it was even given, no monies went directly to WQN and other monies went to entities which are partly owned by Mark C. Hotton.

The court, therefore, grants the motion for an order of attachment. Plaintiffs are entitled to attach up to $4 million dollars of assets that are titled in the name of or beneficially held for, Mark C. Hotton. The amount is intended to secure the principal claim as well as interest accruing thereon. The property to be attached includes, but is not limited to: real property known by the street address of 164 Secatogue Lane West, West Islip, New York, New York; real property known by the street address 501 Corbin Place, West Islip, New York 11795; and the following identified boats: [1] plate 1067262; hull # TPP70144J687; '87 Topaz; County of Use: Suffolk, [2] plate 2187MA;

hull # GAH00168J304; '04 Quick; County of Use: Suffolk, and [3] plate 6512MC; hull # JDJ27625A505; '05 Conte; County of Use: Suffolk.

Plaintiffs also seek to attach the sum of $192,000 that PAA-New Jersey transferred to Brian Davis, Esq. Mr. Davis apparently represented PAA-New Jersey in connection with the purchase of at least one of the real estate transactions that were originally contemplated for PAA-Delaware. Mr. Davis claims that he sent these funds (save $2,400) to the law firm of Kelly & Visotcky, LLC, which represented the seller. Mr. Davis claims that the actual real estate is now held by an entity called Coastal Partners, LLC in which Mr. Hotton has only a 1% interest. Based upon this representation, the court permits attachment only of whatever funds remain in Mr. Davis' possession. This is without prejudice if such other and further information warranting attachment of other assets shall come to plaintiffs' attention.

As part of the attachment the court requires that plaintiff post a bond in the amount of $250,000.[4]

4. Request for Documents

Although plaintiffs seek an order requiring Mark C. Hotton to turnover certain documents, it is not clear why these documents cannot be exchanged during the normal course of discovery in this case. The request for documents is, therefore, denied, without prejudice.

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[4]Neither party addresses with any particularity the amount of the required bond.

Conclusion

In accordance with this decision, the motion for a preliminary injunction is denied (mot. seq. #1) and the cross-motion is granted only to the extent that the court vacates the temporary restraining order. The court otherwise denies the motion to dismiss the fifth cause of action.

The court grants the motions (mot. seq. #s 2 & 3) for an order of attachment to the extent provided herein.

The court directs that plaintiff settle an order of attachment on notice no later than 20 days of the date of this decision. In the interim, the Hotton defendants, their agents and their representatives are hereby, restrained and enjoined from transferring and/or encumbering any property that is the subject of this order of attachment.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 16, 2006

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.