

For Krunch, LLC v Julius Klein Diamonds, LLC

2007 NY Slip Op 31381(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0104415/2007

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN
Justice

PART 17

FOR KRUNCH, LLC,
ETAL

INDEX NO. 104415/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

SOLIS KLEIN DIAMONDS, LLC,
ETAL

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 is denied as moot

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

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/22/07

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
FOR KRUNCH, LLC, individually, and
derivatively on behalf on RITANI, LLC,

Plaintiffs,

Index No. 104415/07

-against-

JULIUS KLEIN DIAMONDS, LLC and H. RITANI
CORP.,

Defendants,

RITANI, LLC,

Nominal Defendant.

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.S.C.

In this action for breach of contract, breach of fiduciary duty, corporate waste, and breach of the implied covenant of good faith and fair dealing, plaintiffs move for an order granting a preliminary injunction preventing defendant Julius Klein Diamonds, LLC (Diamonds) from purchasing from defendant H. Ritani Corp., the latter's 26% membership interest in Ritani, LLC (the Company). Defendants oppose the motion on the basis that plaintiffs, who currently own 19% of the Company, failed to show a likelihood of success, the existence of irreparable harm and that the equities tip in favor of plaintiffs. For the reasons stated below, plaintiffs' motion is denied.

A party seeking a preliminary injunction must demonstrate a

probability of ultimate success on the merits, irreparable injury in the event that injunctive relief is denied and a balancing of the equities in its favor. Wall Street Garage Parking Corp v New York Stock Exchange, Inc, 10 AD3d 223, 226 [1st Dept 2004]; Sterling Fifth Associates v Carpentille Corp, Inc, 5 AD3d 328 [1st Dept 2004].

Plaintiffs maintain that Diamonds, who owns 55% of the Company, should be enjoined from purchasing an additional 26% from H. Ritani Corp., because the Company did not renew a member of For Krunch LLC.'s employment agreement, because H. Ritani Corp. was allegedly selling its interest for an amount less than the amount for which the Company's membership interests were valued, and because under the proposed sale, a member of H. Ritani Corp would receive an additional \$50,000 increase and bonuses in connection with his Employment/Consulting Agreement. Thus, plaintiffs argue that Klein is essentially shifting the purchase price for the sale onto plaintiffs and the Company by offering the purchaser additional compensation under the Employment/Consulting Agreement for a reduced purchase price.

Plaintiffs have not set forth sufficient facts to demonstrate that they are likely to succeed on the merits of their claims. There is no evidence that the purchase is below market and the fact

that plaintiffs argue that another potential buyer offered more is not proof as the terms of that sale are unknown. As alleged by defendants, the proposed transaction was not appealing and did not involve an immediate all cash payment as the current sale does. In any event, it is not clear why the sale price matters as plaintiffs are not entitled to a portion of the sale price. To the extent that plaintiffs argument is that the increase in the amounts that would be paid under the Employment/Consulting Agreement substitutes for the compensation, there is no evidence that the amounts are significant enough to support that argument. In any event, the Company's Operating Agreement vests management and control of the affairs of the Company in the Board of Directors, which are comprised of five members, three appointed by Diamonds. Thus, unless plaintiffs can demonstrate (which they have not, in this motion) that wrongdoing, oppression or abuse of fiduciary duty has occurred, the decision is protected. See Marx v Akers, 88 NY2d 189 [1996]. Furthermore, plaintiffs have not demonstrated why damages would not compensate them. A preliminary injunction is not warranted in cases where the movant cannot "demonstrate that its potential damages are not compensable in money and capable of calculation and, thus, that it will suffer irreparable harm absent the requested injunction." Credit Index, LLC v Riskwise Intern LLC,

282 AD2d 246 [1st Dept 2001]; see, White Bay Enterprises, Ltd v
Newsday, Inc, 258 AD2d 520, 521 [2d Dept 1999].

ORDERED that plaintiffs' motion for a preliminary injunction
is denied; and it is further


ORDERED that the temporary restraining order, granted without
opposition, is dissolved; and it is further

ORDERED that the parties appear for a preliminary conference
on a date to be set by the Court.

This Constitutes the Decision and Order of the Court.

DATED: May 22, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE