SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

In the Matter of the Application of JOHN MARCIANO,

Petitioner-Plaintiff,

INDEX NO.: 001264/2006
MOTION DATE: 11/02/2007
MOTION SEQUENCE: 010

for a Judgment pursuant to Business Corporation Law § 1104-a, dissolving CHAMPION MOTOR GROUP, INC., d/b/a Bentley of Long Island,

Respondent,

ACTION NO. 1

- and -

GARY BRUSTEIN, MICHAEL TODD, 115 SOUTH SERVICE ROAD, LLC, BENTLEY LONG ISLAND, LLC, GOLD COAST LUXURY AUTO, LLC, BTM GROUP, LLC, CHAMPION MOTOR SERVICE, INC., CHAMPION AUTO BROKERS, INC. and CHAMPION LEASING GROUP, INC.,

Additional Respondents-Defendants.

JOHN MARCIANO, individually and on behalf of 115 SOUTH SERVICE ROAD, LLC,

Plaintiff,

INDEX NO.: 017879/2007
MOTION DATE: 11/02/2007
MOTION SEQUENCE: 001

- against -

GARY BRUSTEIN, MICHAEL TODD, BT 115 REALTY, LLC, 115 SOUTH SERVICE ROAD, LLC, CHAMPION MOTOR GROUP, INC., CHAMPION LEASING GROUP, INC., FORCHELLI, CURTO, SCHWARTZ, MINEO, CARLINO & COHN, LLP ANTHONY V. CURTO, BARBARA S. ALESI

ACTION NO. 2

and BANK OF AMERICA, NA,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmations, Affidavit & Exhibits Annexed..... 1
Affirmation in Opposition to Order to Show Cause of Andrew E. Curto, Esq., Affidavits & Exhibits Annexed..... 2
Reply Affirmation in Further Support of Plaintiff's Motion for Provisional Relief (Including Appointment of a Temporary Receiver) of Robert M. Calica, Esq. & Exhibits Annexed..... 3
Order to Show Cause, Affirmation, Affidavit & Exhibits Annexed..... 4
Affirmation in Opposition to Motion for Provisional Relief of Neil J. Moritt, Esq, Affidavits & Exhibits Annexed..... 5
Reply Affirmation in Further Support of Plaintiff's Motion for Provisional Relief (Including Appointment of a Temporary Receiver) of Robert M. Calica, Esq. & Exhibits Annexed..... 6
Bank of America, N.A.'s Response to Plaintiff's Request for Appointment of a Temporary Receivership and Position as to the Temporary Restraining Order Granted by the Court..... 7

Order to show cause in Action-proceeding No. 1 by the petitioner-plaintiff John Marciano for an order, *inter alia*: (1) appointing a temporary receiver of all the income and assets of defendants 115 South Service Road, LLC, Champion Motor Group, Inc., Champion Leasing Group, and/or alternatively, directing the defendants to post an undertaking in an amount no less than $20 million; (2) enjoining codefedants Gary Brustein, Michael Todd, 115 South Service Road, LLC, Champion Motor Group, Inc. and Champion Leasing Group, Inc ["the Champion Defendants"], from, *inter alia,* engaging in or taking any steps concerning any further assignment, sale or other disposition of any of the assets of the Champion Defendants and/or further enjoining the defendant from taking any steps or actions other than in the ordinary course of business; and (3) directing the defendants to "disgorge and restore" all monies and property which was allegedly diverted from 115 South Service Road, LLC.

Order to show cause in Action No. 2 by the plaintiff John Marciano for an order, *inter alia*: (1) appointing a temporary receiver of all the income and assets of defendants 115 South Service Road, LLC, Champion Motor Group, Inc., Champion Leasing Group, and/or

alternatively, directing the defendants to post an undertaking in an amount no less than $20 million; (2) enjoining co-defendants Gary Brustein, Michael Todd, 115 South Service Road, LLC, Champion Motor Group, Inc. and Champion Leasing Group, Inc ["the Champion Defendants"], from, *inter alia,* further assigning, selling or otherwise disposing of any of the assets of the Champion Defendants and/or further enjoining the defendant from taking any steps or actions with respect to the Champion entities other than in the ordinary course of business; and (3) directing the defendants to "disgorge and restore" all monies and property which was allegedly diverted from 115 South Service Road, LLC.

This is the latest installment in a contentiously litigated commercial dispute arising out of the parties' soured, professional relationship and the subsequent ouster of plaintiff John Marciano from involvement in the "Champion" family of high-end automobile dealership entities.

Unlike the previous motions, however, the current applications for, *inter alia*, stated injunctive relief and the appointment of a temporary receiver, feature an entirely new, companion action – containing fiduciary duty and debtor-creditor causes of action – in which both opposing counsel and the Bank of America have now been joined as party defendants.

In sum, the plaintiff contends that in August of 2007, codefendants Gary Brustein and Michael Todd – with the alleged tortious assistance of their attorneys, Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP – concocted a scheme by which they fraudulently, and without Marciano's participation, conveyed and then effectively appropriated a valuable dealership lease held by Champion affiliate 115 South Service Road, LLC ["South Service"] (Cmplt., Action No 2. ¶¶ 6-7, 52-53).

Notably, the subject lease contained a $6.5 million option to purchase the dealership property, now allegedly valued at more than double the option price (Cmplt., ¶¶ 4-5; Calica Aff.,¶¶ 3-5; Defs' Opp., Exh., "3"). It is undisputed that Marciano currently holds a one-third, ownership in South Service.

Based upon foregoing, and by essentially identical orders to show cause with temporary restraining orders submitted October, 11, 2007, the plaintiff now moves in both pending actions for stated provisional relief including, among other things, the appointment of a temporary

receiver to assume control of South Street, CMG and CLG (the two "dealership" entities); and the issuance of a preliminary injunction precluding the defendants from, *inter alia*, wasting assets and/or acting other than in the ordinary course of business.

The plaintiff's applications are now before the Court for review and resolution. The motions should be granted to the extent indicated below.

Upon the exercise of its broad discretionary authority in considering provisional remedies (*e.g.*, *Ruiz v. Meloney*, 26 AD3d 485, 486), the Court finds that the plaintiff has demonstrated his entitlement to preliminary injunctive relief, *i.e.*, he has shown: (1) a likelihood of success on the merits of his newly asserted claims, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in his favor (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Doe v. Axelrod*, 73 NY2d 748 [1988]; *EdCia Corp. v. McCormack*, 44 AD3d 991; BCL §§ 1113, 1115).

It is settled that "a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty" (*Willoughby Rehabilitation and Health Care Center, LLC v. Webster,* 13 Misc.3d 1230(A),2006 WL 3068961 at 4 [Supreme Court, Nassau County 2006] *see also, Salm v. Feldstein*, 20 AD3d 469, 470; *Nathanson v. Nathanson,* 20 AD3d 403; *Out of the Box Promotions LLC v. Koschitzki*, 15 Misc.3d 1134(A), 2007 WL 1374501 at 7 [Supreme Court, Kings County 2007]; *Finkelman v. Greenbaum*, 14 Misc.3d 1217(A), 2007 WL 102464 at 4 [Supreme Court, Nassau County 2007] *cf., Tzolis v. Wolff,* 39 AD3d 138, 146).

Here, the plaintiff has submitted evidentiary materials suggesting that in August of 2007, defendants Todd and Brustein assigned South Service's lease to a related entity – (BT 115 Realty, LLC ["BT"]) – in which they alone are principals for ostensibly less than fair value and under circumstances which further suggest that the transaction may have involved self-dealing and/or constituted a breach of the defendants' fiduciary duties.

The record establishes in this respect that the recited consideration for the subject assignment – as memorialized in a South Service company resolution adopted by solely Todd

and Brustein – was: (1) a *de minimis,* up-front cash payment of only $25,000.00; (2) coupled with a vague, unsecured representation that an appraisal would supposedly be conducted at some unspecified date to the determine what additional consideration would be "fair and reasonable" (Pltff's Exh., "H").

The plaintiff has further demonstrated that after the assignment was complete, BT immediately exercised the lease option; acquired the valuable dealership property for itself; and then obtained a roughly $14 million mortgage loan from the Bank of America – portions of which, the plaintiff further contends, were misappropriated by the defendants Todd and Brustein (Calica Aff., ¶ 15[d]-[f]; Pltff's Exh., "J").

Additionally, the plaintiff has raised serious questions relating to what he has described as a fictitious, $6 million promissory note, executed as part of the same assignment transaction, and made payable by South Service to the dealership entity, Champion Motor Group ["CMG"](Pltff's Exh., "L").

The subject note recites, *inter alia*, that it was given to repay monies allegedly advanced by CMG to South Street for building improvements at the dealership site – loans and debts which are puportedly inconsistent with, and entirely unsupported by, the bookkeeping and accounting history pertinent to both involved entities (Calica Aff., ¶ 8[c][iii]; Marcus Aff., ¶¶ 5-8; Marcus Supp Aff.,¶¶ 3-5).

The Court agrees that the defendants' opposing submissions fail to particularly address the fact-specific claims made by the plaintiff's expert accountant to the effect that the note and recited debt claims are erroneous and/or nonexistent (Moritt Aff.,¶ 41, fn 11, at 15).

Nor is the Court persuaded by defendants' attempt to analogize the assignment transaction to a so-called "freeze out" merger, where minority interests may be legally eliminated in very limited circumstances provided – that fair value is paid and the merger furthers a legitimate corporate purpose apart from merely eliminating the minority interest (*Alpert v. 28 Williams Street Corp.*, 63 NY2d 557, 569 [1984] *see Loengard v. Santa Fe Industries, Inc.,* 70 NY2d 262, 266-267 [1987]).

Here, there has been no forced elimination of the minority interest for a prescribed, "fair value" within the meaning of *Alpert* – and no merger for that matter. Rather, the plaintiff's

claims are essentially based on the far less exotic theory that the defendants simply transferred a company asset to a third party for less than fair value.

The further claim that an assignment to an entity which excluded the now felony-convicted plaintiff was necessary to obtain needed institutional financing – even if true – would not justify a sham asset transfer and the creation of an allegedly bogus promissory note to support the conveyance of additional company assets (Moritt Aff., ¶¶ 12-14; Classi Aff., ¶¶ 2-3).

However, the plaintiff's request for in effect, a status quo-altering, mandatory injunction compelling the defendants to immediately "disgorge and restore" all allegedly diverted property is denied, both because the award of monetary relief in a *pendente lite* context is premature at this juncture (*Village of Westhampton Beach v. Cayea*, 38 AD3d 760, 762), and because "a preliminary injunction will not issue where to do so would grant the movant the ultimate relief" sought (*SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727, 728; *St. Paul Fire and Mar. Ins. Co. v. York Claims Serv.*, 308 AD2d 347, 348- 349; *MacIntyre v. Metropolitan Life Ins. Co.*, 221 AD2d 602 *see also*, *Matos v. City of New York*, 21 AD3d 936).

Accordingly, those branches of the orders to show cause which are for preliminary injunctive relief are granted to the extent that the temporary restraining order granted upon submission of the plaintiff's applications shall be continued in full force and effect subject to the posting of an undertaking as directed, *infra* (*see generally, Buckley v. Ritchie Knop, Inc.*, 40 AD3d 794, 795; *Gerstner v. Katz*, 38 AD3d 835, 836).

Lastly, and in the exercise of its discretion, that Court declines to appoint a temporary receiver over "all assets and income" of BT, South Service, CMG and Champion Leasing Group, Inc., or alternatively, to direct the posting of a $20 million bond.

It is settled that receivership is a drastic remedy and that courts will "exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits"(*see, Application of Androtsakis*, 139 AD2d 471, 472; *Modern Collection Associates, Inc. v. Capital Group*, 140 AD2d 594; *Hahn v. Garay*, 54 AD2d 629, 629-630 *see also, In re Application of Chiovitti*, 280 AD2d 412, 414 *see, North Fork Preserve, Inc. v. Kaplan*, 31 AD3d 403, 406; *Ronan v. Valley Stream Realty Co.*, 249 AD2d 288; CPLR 6401[a]; BCL § 1202).

Considering the totality of the circumstances presented, the Court is of the view the provisional relief already granted will suffice to adequately protect the plaintiff's interests (*cf.*, *Kristensen v. Charleston Square, Inc.*, 273 AD2d 312).

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief in excess of that granted above.

Accordingly, it is,

ORDERED that the plaintiff's motion for a preliminary injunction is granted to the extent that terms and provisions of the temporary restraining orders previously approved by the Court shall be continued during the pendency of the subject actions, and it is further,

ORDERED that the plaintiff shall post an undertaking in the sum of $ 500,000 pursuant to CPLR 6312(b) within fifteen (15) days of the date of this Order, and if such undertaking is not posted, the motion is denied, and it is further,

ORDERED that the plaintiff's orders to show cause are otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: December 7, 2007

J.S.C.