

1st Dibs.com v Forcione
2008 NY Slip Op 31551(U)
June 2, 2008
Supreme Court, New York County
Docket Number: 0100935/2005
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GOODMAN
Justice

PART 17

1 STDIBS. COM, INC

- v -

LAWRENCE TORCIONE

INDEX NO. 100935705
MOTION DATE _____
MOTION SEQ. NO. 14
MOTION CAL NO. _____

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

per attached *is decided*

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

Dated: 6/2/08

EMILY JANE GOODMAN s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 17

-----X
1ST DIBS.COM,

Plaintiff,

-against-

LAURENCE FORCIONE AND
MICHAEL J. BRUNO, II,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Index No. 100935/05
DECISION
APPOINTMENT OF
TEMPORARY
RECEIVER

Ultimately this action requires a determination of the rights and interests of the various parties in the Plaintiff corporation. This decision is limited to a motion to appoint a Receiver, which request the Court has not previously granted during the long course of this litigation.

Following extensive submissions¹, oral argument and multiple conferences, and acknowledging the exceptional significance of such an appointment, the Court finds that it is in the interests of the ~~named~~ Plaintiff corporation that a Temporary Receiver be appointed with powers limited as discussed below.

¹Submissions of Memorandum of Law replete with exhibits, factual assertions, and the contents of settlement negotiations rather than legal positions and research is an abuse of the litigation process and the Court's time and efforts, and misperceives the purpose of a Brief or Memorandum.

This litigation was commenced in 2005, flowing from a relationship which was both professional and domestic. The extraordinarily hostile nature of the relationship between the shareholders Michael J. Bruno, II and William J. Holloway (Bruno, Holloway), is such that the Court recognizes and anticipates substantial risk to the business entity. It is undisputed that at one point in time Bruno and Holloway owned 50 percent each of the corporation, although it is alleged now that this is no longer the case. The Court has considered the allegations, statements and actions of all concerned and has concluded that at the present time, the personal acrimony has overtaken the interests of the corporation.

The Court, at this time, makes no assignment of blame to either of the principals as that is not the immediate issue, and it would be premature to make such findings. It is undisputed that Bruno runs the company on a day-to-day basis and that Holloway's present involvement is passive. It is also undisputed that Bruno is knowledgeable about the subject of the business which involves antique decor sold through the internet. Therefore, the Court believes that he should not now be replaced in his creative, management, sales duties.

What is before the Court, however, is the issue of **wasted assets and the realistic threat of transferring assets which would deplete the corporation.** At a recent conference with the Court, in the presence of all counsel, Bruno threatened to, in effect, shut down Plaintiff 1st Dibs.com, by starting another company to compete with it. Moreover,

although no order was generated at the conference, it was made clear to all that no distribution of assets should take place other than for bona fide, documented business expenses. Nevertheless, it is conceded that immediately following the conference, Bruno withdrew a very substantial sum of money from the corporate assets—purportedly for his past due salary. At oral argument, and on the record, Bruno’s counsel conceded that error of judgment on the part of Bruno and attributed it to his client’s “emotional state of mind.”

It is of great concern to the Court, that a business functioning in this state, while the focus of considerable litigation, not be run by an “emotional state of mind.” Bruno’s unilateral and determined withdrawal of monies as he sees fit and for his own benefit, is evidence that he means it when he says that Holloway “could finally be convinced, or if you will, coerced” into meeting expectations, requirements and demands, and that the business is being run by an “emotional state of mind.” It is the duty of the Court to prevent such conduct by any party. In the interests of preserving the assets of the existing corporation, the Court must insure that they are not squandered in any way such as establishing a competing business in order to destroy the existing company, which Bruno has already stated an intent to do.

The Court has delayed the appointment of a Receiver, and has considered less intrusive options. However, an injunction, for example, against dissipating assets would be fruitless due to an inability here to determine what constitutes “dissipating.” What

Holloway calls wasting, or dissipating, Bruno considers reasonable, such as the rental or partial rental of an apartment in Los Angeles. The two principals do not cooperate with each other or the Court and have impeded discovery at every step. Moreover, they have not acted in the best interests of the company which is now vulnerable even if it is doing well in the marketplace.

Bruno's reliance on a decision, issued by a court of concurrent jurisdiction and therefore not binding on this Court, is, in any event, distinguishable except to the extent that its language is contra Bruno's position. That is, "a temporary receiver may be appointed, if . . . there is a showing that the fund [or property] is in danger of being materially injured or destroyed (see Willoughby Rehabilitation and Health Care Center, LLC v Webster, 831 NYS2d 357 [Supreme Court, Nassau County 2006], citing Meurer v Muerer, 21 AD2d 778 [1st Dept 1964]). The purpose of the Temporary Receiver here, would be to ascertain the financial posture of this corporation, to see that only proper payments are made, and to obtain and manage all documents and records to facilitate such analysis and the ongoing protection of the assets and therefore the corporation itself. The powers shall extend to overseeing the company's finances and expenditures which may include retaining a Certified Public Accountant for said purpose. This will require the cooperation of all parties including production of all documents called for by the Temporary Receiver and/or an independent Certified Public Accountant. As in Modern Telecommunications, Inc. v Dalessandro (185 AD2d 218, 224 [First Dept 1992]), even

though fiduciary breaches were not determined, and “the actions of the various antagonists threaten the well being and continued viability of [the corporation], we deem it appropriate that a receiver be appointed to manage the corporation pending the outcome of this litigation.” Similarly here, the continued viability of the corporation is threatened given the “emotional” issues between the parties.

Accordingly, the appointment of a Temporary Receiver, who files the appropriate UCS forms, whose duties shall be consistent with the above, is required and the motion is granted to that extent.

SETTLE ORDER.

This Constitutes the Decision and Order of the Court.

Dated: June 2, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN