Glickman v Glickman
2008 NY Slip Op 33249(U)
November 20, 2008
Supreme Court, Nassau County
Docket Number: 5896/08
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

MELVYN GLICKMAN, BARBARA GLICKMAN, ERIC GLICKMAN, ANDREA ROTHBORT, Individually and Derivatively on Behalf of BROOKLYN SUGAR CO., INC., and POWERHOUSE LOGISTICS, INC.,

Plaintiffs,

-against-

MARK GLICKMAN,

Defendant.

INDEX No. 5896/08

MOTION DATE: Sept. 17, 2008
Motion Sequence # 001, 002, 004

The following papers read on this motion:

Order to Show Cause................................ X
Notice of Motion..................................... XX
Affidavit/Affirmation in Opposition......... XXXX
Reply Affirmation X
Memorandum of Law............................... X

This motion, by plaintiffs, brought on by order to show cause, pursuant to CPLR 6301 for an order, *inter alia*, preliminarily enjoining the defendants from: (a) accessing the business premises of Brooklyn Sugar Co., Inc. ["Brooklyn Sugar"], Powerhouse Logistics, Inc. ["Powerhouse"], and/or 920 East 149th Street Holding Corp. ["920 East Holding"]; (b) accessing the business computers of Brooklyn Sugar, Powerhouse or 920 East Holding; (c) contacting any customer, account representative, or vendor of Brooklyn Sugar, Powerhouse or 920 East Holding; (d) contacting any employee or independent

contractor or professional working for or associated with Brooklyn Sugar, Powerhouse or 920 East Holding; (e) using, directly or indirectly through his wife, Susan Glickman, any of the Business American Express Cards of Brooklyn Sugar, Powerhouse or 920 East Holding; (f) using, either directly or indirectly through his wife Susan, the E-Z Pass being paid for by Brooklyn Sugar, Powerhouse or 920 East Holding; (g) destroying any books, records, statements or documents within his custody or control which relate to Brooklyn Sugar, Powerhouse or 920 East Holding and turning over such documentation to the Plaintiffs; (h) directing defendant Mark Glickman to turn over and provide all computer passwords or pass codes; (i) directing defendant Mark Glickman to change the authorization on the AT&T account for the business cell phones to Mel Glickman; and (j) enjoining defendant from taking any action with regard to the property located at 920 East 149th Street, Bronx, New York or acting on behalf of 920 East Holding, including, but not limited to terminating any and all lease agreements and/or evicting Powerhouse; and a further order (k) setting aside the assignment of the real property located at 920 East 149th Street, Bronx, New York; and a motion pursuant to CPLR 3215[e] by the plaintiffs for a default judgment based upon the defendant's alleged failure to timely interpose his answer; and a motion by non-party movant Lance Grossman, Esq., for an order pursuant to CPLR 2304, 3103 quashing and/or limiting or conditioning a subpoena duces tecum, dated June 26, 2008, served upon him by the plaintiffs, are **all** determined as hereinafter set forth.

The defendant Mark Glickman ["Mark"] is currently a director, shareholder and president of Powerhouse Logistics, Inc. ["Powerhouse"], a family-owned business which distributes non-perishable food products from leased warehouse premises located at 920 East 149th Street in the Bronx (Mark Glickman Aff., ¶¶ 2-4; Melvyn Glickman Aff., ¶¶ 18-19; Def' s Exh., "D").

Mark's father, Melvyn Glickman ["Melvyn"], alleges that he and Mark's brother, Eric Glickman ["Eric"], are also shareholders, officers and directors of both Powerhouse and another family-owned entity known as the Brooklyn Sugar Co., Inc. ["Brooklyn Sugar"](Melvyn Aff., ¶¶ 4-8; Mark Aff., ¶ 5, 28).

Powerhouse is actually a sublessee since it rents the property from non-party 920 East 149 Street Holding Corp.["920 East Holding Corp"], an entity which is wholly owned by Mark.

Mark asserts in this respect that in 2001 – and with the plaintiffs' knowledge and

assent – 920 East Holding entered into a lease agreement with the owner of the property, the New York City Industrial Development Agency, after which 920 East Holding then sublet the premises to Brooklyn Sugar and Powerhouse (Mark Aff., ¶¶ 32-33). At about the same time, Brooklyn Sugar assigned its rights in the warehouse premises to 920 East Holding – again according to Mark, with the plaintiffs' knowledge and consent (Mark Aff., ¶¶ 32-34).

Thereafter, in March of 2008, when Mark was away on vacation, Eric Glickman entered Powerhouse's "executive offices" and observed that Mark's desk was in total and complete disarray, with documents and boxes of materials – including unopened mail – strewn and scattered all over his desk and the floors of the office (Gertler Aff., ¶ 14; Pltffs' Exh., "B"). Eric contacted his father, Melvyn, and then both he and Melvyn – together with Melvyn's son-in-law (allegedly a CPA and "certified fraud examiner"), arrived from Florida in order to more carefully inspect the documents found in Mark's office (Gertler Aff., ¶ 15).

Upon conducting their inspection of the materials, the plaintiffs claim to have found, *inter alia*: (1) unopened mail which contained undeposited checks written to Powerhouse; (2) boxes containing two years of unopened invoices from vendors; and (3) unanswered correspondence from the New York City Industrial Development Agency, which owned the property on which Powerhouse conducted its business (Gertler Aff., ¶¶ 14-15).

A further inspection revealed three locked rooms within Powerhouse's executive offices which, when opened, were found to contain approximately "100 rare, antique, and/or collectable guitars and amplifiers * * * many of which appeared to be signed by famous artists * * *" (Cmplt., ¶¶ 22-23; Melvyn Aff., ¶¶ 21-22; Pltffs' Exh., "K"; Gertler Aff., ¶¶ 21-22).

Mark purchased the guitars, purportedly worth between $500,000.00 and $1 million, without informing the other Powerhouse directors and shareholders, with corporate funds, as allegedly evidenced by corporate American Express card bills, wire transfers from Powerhouse's bank accounts and cashier's checks drawn on Powerhouse and Brooklyn Sugar accounts (Melvyn Aff., ¶¶ 14, 21).

The plaintiffs further contend that Mark utilized corporate credit cards to purchase a wide array of personal items, including theater tickets, gasoline, pet supplies, drug

supplies and meals; that Mark diverted corporate funds to pay for those credit items; that he failed to file corporate tax return for the last two years; that he materially and without authorization, increased his salary to $240,000.00 per year; and that he used corporate resources in excess of $7,000.00 to fund a personal brokerage account and paid himself unauthorized bonuses (Cmplt., ¶¶ 27-45; Gertler Aff., ¶¶ 16-18; Melvyn Aff., ¶ 14).

As a result of the foregoing discoveries, Melvyn, his wife Barbara, and Eric met on March 25, 2008 and conducted an emergency, "special joint meeting" during which they adopted a resolution suspending Mark Glickman as officer, director and employee pending further investigation (Melvyn Aff., ¶ 16).

Specifically, the March 25, 2008 corporate resolution by which this action was taken, suspends Mark without pay and prohibits him from acting in any capacity on behalf of Powerhouse (Pltffs' Exh., "N").

By summons and complaint dated March 28, 2008, the plaintiffs Melvyn, Barbara and Eric Glickman and Andrea Rothbort (a claimed shareholder in Brooklyn Sugar [Cmplt.,¶ 9]), commenced the within action against Mark, in their individual capacities, and derivatively, on behalf of the corporate plaintiffs Powerhouse and Brooklyn Sugar (Pltffs' Exh., "A").

In April of 2008, the plaintiffs also served the instant order to show cause which seeks as its principal relief, a preliminary injunction effectively barring Mark from any and all involvement in Powerhouse's corporate affairs, and to a lesser extent, limits and/or narrows Mark's involvement in the affairs of 920 East Holding.

The plaintiffs' application is now before the Court for review and resolution. Also before the Court is a second application by the plaintiffs for a default judgment as against Mark, alleging that he failed to timely interpose his answer.

Lastly, the Court has before it a third motion to quash a *subpoena duces tecum* served by the plaintiffs upon non-party, Lance Grossman, Esq., an attorney who, it is asserted by the plaintiffs, represented both Powerhouse and Brooklyn Sugar – allegedly in "various litigation matters and real estate transactions" (Subpoena at 2).

The plaintiffs' motion for a preliminary injunction is **granted** to the extent indicated below.

However, the plaintiffs' motion for a default judgment is **denied**. Lastly, the motion by non-party movant Lance Grossman, Esq., for an order, *inter alia*, quashing the plaintiffs' *subpoena duces tecum* is **granted**.

Firstly, and with respect to the application for a default judgment, the defendant asserts without dispute or reply from the plaintiffs, that after service of the complaint the parties engaged in settlement discussions and mutually agreed to extend Mark's time to interpose his answer until June 30 – a claim substantiated by the documentary materials and e-mails annexed to the Mark's opposing submissions.

In any event, there is no evidence of prejudice or willful conduct; the delay which ensued was brief; and public policy strongly favors the resolution of cases on the merits (***Cortlandt Healthcare, LLC v. Gantt***, ___ AD3d___, 2008 WL 4260850, 2nd Dept., 2008). Upon review of these relevant factors, the Court agrees that the plaintiffs' motion for a default judgment should must be denied (*e.g.*, ***Montgomery v. Cranes, Inc.***, 50 AD3d 981; ***Nickell v. Pathmark Stores, Inc.***, 44 AD3d 631).

Turning to the plaintiffs' application for provisional relief, it is settled that to establish entitlement to a preliminary injunction, a movant must clearly demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (***Aetna Ins. Co. v. Capasso***, 75 NY2d 860, 1990; ***Doe v. Axelrod***, 73 NY2d 748, 1988; ***EdCia Corp. v. McCormack***, 44 AD3d 991; ***Ruiz v. Meloney***, 26 AD3d 385; ***Stockley v. Gorelik***, 24 AD3d 535; ***Matos v. City of New York***, 21 AD3d 936).

The decision whether to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (***Doe v. Axelrod, supra***, at 750; ***Ruiz v. Meloney, supra***; ***Weinreb Management, LLC v. KBD Management, Inc***., 22 AD3d 571).

With these principles in mind, and upon the evidence presented, the plaintiffs have established their entitlement to preliminary injunctive relief to the extent indicated below, by submitting evidence to the effect that, *inter alia*, the defendant Mark Glickman: (1) utilized the corporate resources of Powerhouse to purchase a guitar and amplifier collection allegedly valued between $500,000.00 and some $1 million; (2) that he failed to file income tax returns for the corporate plaintiff for the last two years; and (3) that additional and significant personal expenditures were allegedly made with corporate funds through the use of credit cards and expenses – a claim, not specifically or

definitively addressed in Mark's opposing submissions.

The attenuated explanations offered by Mark to the effect that his undisclosed guitar purchases supposedly constituted a justifiable corporate investment – sustainable as a proper exercise of "business judgment" (Mark Aff., ¶¶ 30-31), – are implausible and lack credibility on this record (*see*, ***Wisell v. Indo-Med Commodities, Inc***., 11 Misc.3d 1089(A), 2006 WL 1160136 at 15, Supreme Court, Nassau County 2006).

Nor does the record support the assertion that undisclosed, company-funded investment acquisitions of any sort – much less for vintage guitars and amplifiers – were among the ordinary, regular and authorized business functions of Powerhouse officers, directors or employees.

While Mark also complains that the March 25, 2008, resolution excluding him from the business and suspending his employment was procedurally defective since he did not receive notice of the Board meeting and a voting quorum was not achieved in light of his alleged 50% stock ownership in Powerhouse, the propriety of the plaintiffs' resolution is not before the Court on this application. It bears noting in this respect that, neither side has submitted documentary proof definitively establishing to the Court's satisfaction the precise extent and scope of each other's alleged stock ownership.

However, the injunction sought is overbroad to the extent that: (1) it is made expansively applicable to 920 East Holding – an entity wholly owned by Mark; and (2) to the further extent that it purports to set aside the assignment of rights transaction by which Brooklyn Sugar transferred in rights in the warehouse to 920 East Holding (Mark Aff., ¶ 34). Among other things, the plaintiffs have not demonstrated that they will sustain irreparable injury absent the sweeping prohibitions sought with respect to Mark's involvement with non-party 920 East Holding, *i.e,* they have not shown as to this issue, "that the absence of a preliminary injunction would cause * * * [them] greater injury than the imposition of the injunction would inflict upon the defendant"(***Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC***, 42 AD3d 420, 421 *see also*, ***Sinensky v. Weiner***, 44 AD3d 646; ***Laro Maintenance Corp. v Culkin***, 255 AD2d 560, 561).

Nor, upon the instant, pre-discovery application for provisional relief, will the Court set aside the executed assignment by which a 920 East Holding acquired alleged rights in the warehouse – a demand which effectively constitutes the "ultimate relief" in connection with this particular claim (*see*, Order to Show Cause Item "K")(*see generally*,

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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, the application for preliminary injunction should be granted with respect to order show cause items: (a) though (g) – excluding in said items, however, application of the prohibitions and restrictions contained therein and made applicable to 920 East Holding; and (j), only to the extent that this subparagraph prohibits termination of, or interference with the Powerhouse sublease agreement, and/or the potential eviction of Powerhouse from the subject premises.

However, while the Court has granted, in part, the plaintiffs' application, the plaintiffs have not "submitted an undertaking with their motion for a preliminary injunction" (***Griffin v. 70 Portman Road Realty, Inc.***, 47 AD3d 883). It is settled that CPLR 6312[b] "clearly and unequivocally requires the party seeking an injunction to give an undertaking'" (***Glorious Temple Church of God in Christ v. Dean Holding Corp***., 35 AD3d 806, *quoting from*, ***Hightower v. Reid***, 5 AD3d 440, 441 *see also*, ***Winzelberg v. 1319 50th Realty Corp.***, 52 AD3d 700; ***Griffin v. 70 Portman Road Realty, Inc***., ***supra***; ***Buckley v. Ritchie Knop, Inc.***, 40 AD3d 794,796; CPLR 6312[b]).

Therefore, and as a condition to the granting of the above-reference provisional relief, the plaintiffs shall file an undertaking as directed *infra,* in accord with the dictates of CPLR 6312(b).

Lastly, the motion to quash by non-party movant Lance Grossman should be **granted**. Insofar as relevant, the subject subpoena demands "[a]ll legal files, corporate records, e-mails and communications between Lance Grossman and Mark Glickman, and other documents or assets pertaining or belonging to" the corporate plaintiffs from March 19, 1999 to present" and three other non-party corporations, *i.e.,* 3G Enterprises, Inc., New York Logistics, Inc., and 920 East Holding Corp.

CPLR 2303[a] directs, *inter alia,* that "a subpoena duces tecum shall be served in the same manner as a summons * * *." Moreover, "[a]s the parties seeking to assert personal jurisdiction, the plaintiffs bore the burden of proof on this issue" (***Brinkmann v. Adrian Carriers, Inc.***, 29 AD3d 615; ***Ying Jun Chen v. Lei Shi***, 19 AD3d 407; ***Brandt v. Toraby***, 273 AD2d 429, 430).

Here, the record supports the assertion that the subpoena was improperly served inasmuch as it was apparently left with an attorney who merely shares office space with Grossman. The plaintiffs' conclusory assertion that they themselves unilaterally "deemed" this person to be a "managing agent" for the purposes of proper service, or that, in any event, Grossman ultimately received the subpoena anyway (Gertler Aff., ¶ 22), will not suffice to sustain service under the circumstances presented here. It is settled that, "[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" (***Raschel v. Rish***, 69 NY2d 694, 697, 1986; ***Macchia v Russo***, 67 NY2d 592; ***County of Nassau v. Letosky***, 34 AD3d 414, 415).

In any event, a review of the subpoena reveals that the demands made by plaintiffs are "overly broad and unduly burdensome" in scope (***White Bay Enterprises, Ltd. v. Newsday, Inc***., 288 AD2d 211). Specifically, the subpoena literally demands – without meaningful qualification or limit – the production of "all" documents and "assets" over a nine-year period, "pertaining" or "belonging to" to some five corporations, three of which are not even parties to the within action (*e.g.,* ***Fernald v. Vinci***, 5 AD3d 596; ***Chu v. Green Point Sav. Bank***, 228 AD2d 635; ***Blaine Larsen Farms, Inc. v. Stanley Penn & Sons Feed Inc.***, ___Misc3d___, 2007 WL 4221648, at 4, Supreme Court, Nassau County 2007; ***In re Deyette***, 13 Misc.3d 1237(A), 2006 WL 3350650 at 2, Supreme Court, Nassau County 2007 ***cf. MacKinnon v. MacKinnon***, 245 AD2d 690, 691; ***Benzenberg v. Telecom Plus of Upstate New York, Inc.***, 119 AD2d 717; ***Indo Canadian Realty Corp. v. Arroyo***, 14 Misc.3d 132(A), 2007 WL 117396 [Appellate Term, First Department 2007]).

The Court has considered the parties' remaining contentions and concludes that they are either lacking in merit and/or do not warrant an award of relief beyond that granted above.

Accordingly, it is,

ORDERED that order to show cause by the plaintiffs pursuant to CPLR 6311 for a preliminary injunction, is **granted** to the extent indicated above, and it is further,

ORDERED that the plaintiffs shall post an undertaking in the sum of $50,000.00 pursuant to CPLR 6312(b) within twenty (20) days of the date of this Order, and if such undertaking is not posted, the motion is **denied**, and it is further,

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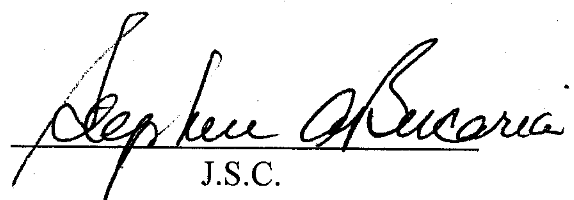
ORDERED that the motion by the plaintiffs for a default judgment based upon the defendant's alleged failure to timely interpose his answer, is **denied**, and it is further,

ORDERED that the motion by non party movant Lance Grossman for an order, *inter alia*, quashing the *subpoena duces tecum* dated June 26, 2008, is **granted**.

The foregoing constitutes the decision and order of the Court.

Dated NOV 2 0 2008



J.S.C.

ENTERED

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