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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

In the Matter of the Application of
BRENDAN M. SCHNECK individually
and as 50% shareholder of
R & J COMPONENTS CORP., B & T
SCHNECK, INC., FEDERAL CONNECTORS,
INC. S & S ELECTRONICS CORP. and
STANDARD RADIO & ELECTRICAL
PRODUCTS CORPORATION, and SCHNECK
PROPERTIES OF SC, LLC,

Petitioner-Plaintiff,

For the Judicial Dissolution of
R & J COMPONENTS CORP., B & T SCHNECK,
INC., FEDERAL CONNECTORS, INC., S & S
ELECTRONICS CORP., STANDARD RADIO &
ELECTRICAL PRODUCTS CORPORATION,
SCHNECK PROPERTIES OF SC, LLC,

-against-

TYREL C. SCHNECK and NEW YORK STATE
TAX COMMISSION,

Respondents-Defendants.

INDEX No.1347/07

MOTION DATE: Oct. 10, 2008
Motion Sequence # 006, 007

The following papers read on this motion:

SCHNECK v SCHNECK, et al **Index no. 1347/07**

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

This motion, brought on by order to show cause, by the petitioner Brendan M. Schneck, individually and as 50% shareholder of R & J Components Corp., B & T Schneck, Inc., Federal Connectors, Inc., S & S Electronics Corp and Standard Radio & Electrical Products Corporation, Schneck Radio & Electrical Products Corp., and Schneck Properties of SC, LLC, for an order enjoining the respondent Tyrel C. Schneck from, *inter alia*: (1) taking any action to compel or compelling the petitioner Brendan M. Schneck to sell his fifty-percent (50%) in R & J Components Corp; (2) enjoining and staying a recently commenced action entitled, ***Tyrel C. Schneck v. Brendan M Schneck***, ____Misc3d___, [Nassau County Index No. 16472-08]; and (3) transferring, conveying, selling or assigning any of the petitioner's shares in R & J Components Corp.; and a motion, by the petitioner Brendan M. Schneck for an order pursuant to CPLR 6301 compelling the defendant respondent Tyrel C. Schneck and/or R & J Components Corp. to: (1) reinstate his salary and benefits, retroactive to when they were terminated, with interest; and (2) to make an equal distribution from the income of R & J Components Corp. for 2007, to both Tyrel and Brendan, are **both** determined as hereinafter set forth.

The petitioner Brendan M. Schneck, and the respondent Tyrel C. Schenck – who are brothers – each own 50% of the outstanding stock in several of the respondent corporations, including R & J Components Corp. ["R & J"].

By verified petition dated January 2007, Brendan commenced the within proceeding pursuant to BCL § 1104 for, ***inter alia***, judicial dissolution of the respondent companies. The amended petition also interposes causes of action for an accounting and breach of fiduciary duty.

Among other things, the amended petition alleges that Brendan is a 50% shareholder and director in the respondent entities; that Tyrel has diverted substantial funds to himself and failed to pay Brendan his 50% share of the profits in accord with his equal ownership interest; that Tyrel has completely frozen him out of the management of

the business and denied him access to various company records; and that as a result, irreconcilable dissension and deadlock currently exists between him and Tyrel – all of which allegedly entitles Brendan to dissolution of the respondent companies.

According to Brendan, after he commenced the within proceeding in January of 2007, he and Tyrel entered into "protracted settlement negotiations".

In light of the acrimony between the two brothers, and in order to promote settlement discussions, Brendan contends that it was "impliedly agreed that * * * [his] presence in the office" would not be helpful so he voluntarily "agreed to stay" away during the negotiations.

Brendan claims that when the negotiations ultimately broke down in early 2008, he attempted to re-enter the office in April of 2008, but that he was unable to do so. Moreover, he claims that R & J stopped paying his salary on June of 2007.

Tyrel asserts, however, that Brendan voluntarily absented himself from the office and that his salary was actually terminated as a result, some 21 months ago in December of 2006 – as evidenced by certain deposition testimony in which Brendan himself: (1) confirmed the accuracy of the foregoing December, 2006 cut-off date; and (2) stated that he never contacted anyone at R & J to complain about the termination of his salary.

Tyrel also contends that there was no tacit or implied agreement that Brendan would absent himself from the office and that, in any event, settlement discussions have been sporadic at best.

Further, and according to Tyrel, despite the fact that his salary had been cut almost two years ago, Brendan never previously sought affirmative relief in his petition or by motion alleging that his salary had been wrongfully terminated.

In prior motion practice, Tyrel moved for summary judgment: (1) dismissing the petition in its entirety based upon certain arbitration clauses set forth in various company shareholders' agreements; and/or (2) for a further order holding that the commencement of the subject dissolution proceeding triggered buy-out provisions in the R & J, Federal and

Properties of SC shareholder's agreements.

By order dated September 17, 2007, this Court denied Tyrel's application, holding, in sum, that Tyrel had waived any right to proceed with arbitration of the dispute. This Court further concluded that the commencement of the subject dissolution proceeding did not trigger an allegedly applicable, contractual buy-out right asserted by Tyrel and that triable issues of fact had been otherwise presented with respect to the Brendan's dissolution causes of action (September 17, 2007 Order pp. 5-8).

Thereafter, at some point in early 2008, another Schneck brother, Lance Schneck, allegedly began a new career as an investment manager and asked Brendan if he could assist him by turning over the funds in Brendan's pension plan to him.

Brendan claims that he agreed and directed Lance to speak to Tyrel, which he did. Thereafter, Tyrel allegedly told Lance that he would help Lance by ensuring that Brendan's pension funds were liquidated and transferred to Lance's company.

Tyrel asserts that in early 2008, Brendan personally contacted R & J's pension administrator, a Ms. June Blumenthal, and allegedly informed her that he had ceased working for R & J in December, 2006; that he had not received any compensation in 2007; and that he wanted to receive his full R & J pension plan distribution.

In response to Brendan's inquiries, Blumenthal informed Brendan – a trustee of R & J's profit sharing plan – that "distribution information would be given to him at the same time it would be given to all other terminated plan members". According to Blumenthal, in order to receive a distribution, an employee must have terminated employment with R & J.

Significantly, paragraph 3.3 of the R & J Shareholders' agreement provides, ***inter alia***, that, "[i]n the event that any Shareholder voluntarily resigns his position or is discharged by the Corporation, the Corporation, or the other Shareholders, shall have options to purchase such Shareholders Shares * * *".

Thereafter, Blumenthal sent Brendan certain forms to sign, which he later executed and returned. In May of 2008, the sum of $497, 210.00 was distributed to Brendan.

In June of 2008, and based upon the theory that the pension distribution was in effect, a resignation, Tyrel sent Brendan a letter purporting to exercise his buy out rights pursuant to the above-referenced provision. When Tyrel's buy-out demand was rejected, Tyrel sent another letter in August of 2008 to Brendan, again demanding that he turn over his shares "in accordance with our shareholders' agreement".

Brendan vigorously argues that he never intended to resign; that he "inadvertently" liquidated his pension without the assistance of counsel; and that he requested the liquidation without fully comprehending that his actions "could have any potential consequence to his role as officer or employee of R & J". Moreover, in stark contrast to his own generosity in assisting Lance, Brendan claims that Tyrel cynically exploited the liquidation by using it as a "trap" or scheme to induce and/or force him to sell his shares.

Indeed, Brendan claims that Tyrel intended from the beginning to exploit the pension transaction by later claiming that the liquidation was tantamount to a voluntary resignation, which would trigger the previously quoted shareholder, agreement buy-out provision.

By order to show cause dated September 3, 2008, Brendan now moves for provisional relief enjoining Tyrel from, ***inter alia***, taking any action to compel Brendan to sell his shares and/or attempting to sell or transfer any of his shares in R & J.

At the same time, Brendan has also moved for an order – styled as one for a preliminary injunction – affirmatively compelling Tyrel and/or R & J to: (1) immediately reinstate his salary and benefits, retroactive to when they were terminated, with interest; and (2) make an equal distribution from the income of R & J Components Corp. for 2007, to him and to Tyrel. Notably, there is no claim in the amended petition which expressly refers to an alleged wrongful withholding of salary benefits.

Brendan's order to show cause and motion are now before the Court for review and resolution. The applications are **granted** in part and **denied** in part.

Initially, and with respect to the order to show cause for injunctive relief, it is settled that in order to be entitled 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 (***Nobu Next Door, LLC v. Fine Arts Housing, Inc.***, 4 NY3d 839, 840 [2005]; ***Aetna Ins. Co. v. Capasso***, 75 NY2d 860, 862 [1990]; ***Doe v. Axelrod***, 73 NY2d 748, 750 [1988]; ***Gluck v. Hoary***, ___AD3d___ , 2008 WL 4595188, 2nd Dept., 2008; ***Ricca v. Ouzounian***, 51 AD3d 997, 998; ***EdCia Corp. v. McCormack***, 44 AD3d 991, 994).

The fundamental purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (***Gluck v. Hoary***, ***supra***; ***Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.***, 50 AD3d 1072, 1073; ***EdCia Corp. v. McCormack***, ***supra***).

"To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts" (***Related Properties, Inc. v. Town Bd. of Town/Village of Harrison***, 22 AD3d 587 *see,* ***Abinanti v. Pascale***, 41 AD3d 395, 396; ***Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.***, 13 AD3d 334, 335).

"While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits * * * to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (***Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.***, 53 AD3d 612, *quoting from*, ***Milbrandt & Co. v. Griffin***, 1 AD3d 327, 328 *see,* CPLR 6312[c]; ***County of Westchester v. United Water New Rochelle***, 32 AD3d 979, 980). "Economic loss, which is compensable by money damages, does not constitute irreparable harm (***EdCia Corp. v. McCormack***, ***supra***, 44 AD3d at 994; ***White Bay Enterprises, Ltd. v. Newsday, Inc***., 258 AD2d 520 *cf.*, ***Valentine v. Schembri***, 212 AD2d 371).

The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (***Doe v. Axelrod***, ***supra***, at 750; ***Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.***, **supra**, at 1073; ***City of Long Beach v. Sterling American Capital, LLC***, 40 AD3d 902, 903; ***Ruiz v. Meloney***, ***supra***; ***Weinreb Management, LLC v. KBD Management, Inc***., ***supra***).

With these principles in mind, and upon the evidence presented, the Court finds that Brendan has demonstrated his entitlement to the preliminary relief requested in his separately noticed order to show cause, *i.e.*, injunctive relief which maintains the currently prevailing *status quo* by enjoining Tyrel and R & J from, ***inter alia***, (1) taking any action to compel, or otherwise compelling Brendan to sell, his fifty-percent (50%) in R & J Components Corp; and (2) transferring, conveying selling or assigning and of the petitioner's shares in R & J Components Corp.

Turning to the remaining salary reinstatement and profit distribution demands, it is clear that both claims demand affirmative, *status quo* altering relief on a motion for a preliminary injunction. It is settled, however, that, "[a] mandatory injunction, which is used to compel the performance of an act * * * is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action" (***Matos v. City of New York***, 21 AD3d 936, 937; ***SHS Baisley, LLC v. Res Land, Inc.***, 18 AD3d 727; ***Rosa Hair Stylists v. Jaber Food Corp.***, 218 AD2d 793, 794 *see*, ***Village of Westhampton Beach v. Cayea***, 38 AD3d 760, 762; ***Nat Holding Corp. v. Banks***, 22 AD3d 471, 474).

Additionally, the demand for an immediate, pre-judgment, profit distribution during the pendency of the subject proceeding effectively constitutes a component of the "ultimate relief" sought in the amended petition, which alleges, among other things, that Tyrel faithlessly distributed and diverted excessive profits to himself, thereby violating an alleged fiduciary duty to Tyrel and entitling Brendan to both an affirmative recovery and an accounting based thereon.

Notably, "absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (***SHS Baisley, LLC v. Res Land, Inc.***, 18 AD3d 727; ***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 generally*, ***Village of Westhampton Beach v. Cayea***, ***supra***, at 762; ***Putter v. City of New York***, 27 AD3d 250, 253; ***MacIntyre v. Metropolitan Life Ins. Co.***, 221 AD2d 602; ***Xerox Corp. v. Neises***, 31 AD2d 195, 199).

In any event, and apart from the foregoing procedural considerations, the record presents sharp factual issues and conflicting inferences with respect to the import and

significance of the Brendan's conduct in: (1) voluntarily absenting himself without pay from the R & J's offices – allegedly from as long ago as December of 2006; and (2) liquidating his R & J pension benefits, conduct which, when cumulatively viewed, arguably supports the inference that Brendan may have resigned from his employment (*see e.g.*, ***Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.***, ***supra***, 53 AD3d at 613; ***Sinensky v. Rokowsky***, 22 AD3d 563, 565).

Although Brendan further contends that he deliberately and voluntarily absented himself in order to facilitate settlement discussions – and that Tyrel's conduct was oppressive – it is unclear why he failed to register an immediate objection to the termination of his salary, and did not demand reinstatement of this significant benefit previously in this matter. Nor is it clear upon the facts presented, that Brendan's conduct in liquidating his pension benefit was merely an innocent attempt to assist his brother, undertaken without knowledge of its potential import and legal significance.

The Court is also unpersuaded by the assertion that Tyrel engaged in fraud, overreaching, or that he concocted a "scheme" to trap or "set up" Brendan with respect to the pension distribution.

Notwithstanding the strained theory that the liquidation was "inadvertent," and the further claim that the distribution was requested absent the involvement of Brendan's already retained counsel – to which he obviously had access – the record is clear that the ultimate decision to request the liquidation was his. Counsel's additional references to a facsimile cover sheet by which opposing counsel colloquially described, in his view, the allegedly decisive import of the liquidation, does not alter this conclusion or support the theory that Brendan's decision to liquidate the pension was other than the product of his own, voluntary conduct.

The Appellate Division case cited by Brendan with respect to the exclusion of incomplete depositions is inapt, since there, the issue was the admissibility of the deposition at trial (***In re Ciraolo***, 37 AD3d 461 *see also,* ***Stern v. Inwood Town House, Inc*** ., 22 AD2d 650) – as opposed to the instant matter, where the subject deposition testimony has been submitted solely in opposition to an application for a preliminary injunction (*see,* ***State v. Metz***, 241 AD2d 192, 199). The Court notes that statements qualifying as admissions would be competent in any event (***Stern v. Inwood Town House, Inc***., ***supra***, at 651).

In sum, while Brendan's claims of oppressive conduct and deadlock must be factored into the constellation of relevant considerations, the record nevertheless presents unresolved issues which effectively undermine "the plaintiff's likelihood of success on the merits * * * to such a degree that it cannot be said that the plaintiff established a clear right" to affirmative relief at issue here (***Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.***, ***supra***, 53 AD3d 612, 613; ***Milbrandt & Co. v. Griffin***, ***supra***, 1 AD3d 327, 328).

Lastly, since the Court has **granted**, in part, Brendan's request for injunctive relief, he was required to submit "an undertaking with * * * [his] motion for a preliminary injunction" (***Griffin v. 70 Portman Road Realty, Inc***., 47 AD3d 883). The Second Department has repeatedly emphasized 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, 807 *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-referenced provisional relief, Brendan shall file an undertaking as directed *infra,* in accord with the dictates of CPLR 6312(b) (***Massapequa Water Dist. v. New York SMSA Ltd. Partnership***, ___Misc3d___, 2008 WL 779259 at 9 [Supreme Court, Nassau County, 2008; *see also,* ***Buckley v. Ritchie Knop, Inc.***, ***supra***).

The Court has considered the parties' remaining contentions and concludes that they do not warrant an award of relief beyond that granted above.

Accordingly, it is,

ORDERED that order to show cause by the petitioner Brendan M. Schneck for a preliminary injunction is **granted** to the extent indicated above, and it is further,

ORDERED that the petitioner Brendan M. Schneck shall post an undertaking in the sum of $25,000.00 pursuant to CPLR 6312(b) within twenty (20) days of the date of this Order, and if such undertaking is not posted, the order to show cause is denied, and it is further,

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ORDERED that the motion by the petitioner Brendan M. Schneck for a preliminary injunction pursuant to CPLR 6301, compelling the defendant/ respondents Tyrel C. Schneck and/or R & J Components Corp. to: (1) reinstate his salary and benefits, retroactive to when they were terminated, with interest; and (2) to make an equal distribution from the income of R & J Components Corp. for 2007, to both Tyrel and Brendan, is **denied**.

The foregoing constitutes the decision and order of the Court.

Dated DEC 02 2008

Stephen A. Bucaria
J.S.C.

ENTERED

DEC 04 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE