

Catinella v Wagner & Kelly Mgt., Inc.

2009 NY Slip Op 31133(U)

May 15, 2009

Supreme Court, New York County

Docket Number: 106944/08

Judge: Marilyn Shafer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Marilyn Shafer
Justice

PART 8

CARMELO CARINELLA,
ET AL.
WAGNER & KELLY MGMT.,
INC., ET AL.

INDEX NO. 106944/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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 decided in accord
with the annexed memorandum.

~~with~~ accompanying memorandum decision. motion is decided in accordance

FILED

MAY 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER
J.S.C.
(Signature)

Dated: 5/16/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x
CARMEL CATINELLA, individually,
and derivatively, on behalf of
ANDREW J. CATINELLA-LYDIA REALTY
LLC,

Plaintiffs,

Index No.: 106944/08

-against-

DECISION

WAGNER & KELLY MANAGEMENT, INC.,
WILLIAM J. BUTLER, MARIE BUTLER,
LYNN (KIVIEHAN) BUTLER, MILDRED
AMICO, MATTHEW AMICO, JOSEPH C.
AMICO, JR., ZAYDA ALVIAR CHIPECO,
MARIE BUTLER-LYDIA REALTY LLC,
JOSEPH AMICO-LYDIA REALTY LLC and
ZAYDA A. CHIPECO-LYDIA REALTY LLC,

Defendants.

-----x
SHAFER, J.

BACKGROUND

Plaintiff, as a member of Lydia Realty Associates, LLC
(Lydia), seeks a preliminary injunction, pursuant to CPLR 6301,
enjoining defendants from "possessing, controlling, diverting, or
in any way making deposits, distributions or payments of any kind
from Lydia Realty Associates, LLC's ... bank accounts without the
express written consent..." of all four members of Lydia.

Plaintiff also seeks, pursuant to CPLR 6104 (a), to have the
court appoint a temporary receiver to maintain, preserve and
administer Lydia's property and accounts.

Plaintiff instituted the present lawsuit against the other

Lydia members and its former managing agent, Wagner & Kelly Management, Inc. (Wagner), and Wagner's president, William J. Butler, alleging breach of fiduciary duty, aiding and abetting the breach of fiduciary duty, fraud, conversion, unjust enrichment, constructive trust, accounting, as well as the appointment of a temporary receiver and a preliminary injunction, which is the subject of the instant motion.

Lydia was formed on or about January 8, 2003, as a successor to a corporate entity, to manage two commercial/residential properties located in Woodside, New York. The four former corporate shareholders became members of Lydia by means of separate limited liability companies in their own names. These LLCs represent the plaintiff and some of the defendants in the instant action.

Andrew J. Catinella, Sr., one of the founding members, died on April 30, 2003, and plaintiff, as executrix of his estate, became a substitute member of Lydia.

Lydia was formed by family members in order to manage jointly owned real property, and the instant lawsuit may best be described as an internecine battle.

Lydia is and was governed by a boilerplate operating agreement, which, although signed, left significant blank spaces in many areas, including who would act as the managing member. At the outset, Joseph C. Amico acted as the manager for Lydia,

and at his death, in September, 2006, his son, defendant Joseph C. Amico, Jr. (Amico), tacitly took over as the managing member.

Defendant Wagner was hired to act as the management agent for the property, and William J. Butler was vested with the authority to handle the day-to-day operations of Lydia. William J. Butler is the son of defendant Marie Butler, another Lydia member.

According to the papers submitted, in January, 2008, plaintiff allegedly became aware that Lydia owed almost \$200,000 to the company that supplied fuel to the property. Wagner sent the Lydia defendants a letter to this effect, dated January 7, 2008. In a letter dated January 15, 2008, Amico wrote to Wagner, indicating that he had conferred with the other Lydia members, and would personally meet with the fuel company. Plaintiff disputes that she ever conferred with Amico about this matter.

Amico arranged for Lydia to pay off the amount due and owing to the fuel company on an informal installment plan. Further, Amico made a surprise visit to Wagner, and discovered several discrepancies with respect to the Lydia accounts. Amico, in his opposition affidavit, states that he also arranged for Wagner to repay funds to Lydia, but this has not happened because the members, specifically plaintiff, have failed to approve the agreement.

Amico then transferred Lydia's management responsibilities

to a new company, New Bedford Management, and terminated Wagner. Amico affirms that all Lydia members were informed of his actions, and all approved except for plaintiff, who never responded to his letters.

On February 9, 2008, the four Lydia members met to discuss the problems with Lydia, and Amico says that plaintiff refused to discuss any matters pertaining to the building, but insisted that the members hire a forensic accountant to go over Lydia's books in order to pursue Wagner and William J. Butler. The three other members declined to do so.

Because of the instant dispute, Wagner is holding over \$90,000 of Lydia funds, which it will not turn over until it receives direction at the conclusion of the instant matter, and its lawyer is retaining the Lydia books until he is certain that they should be turned over to New Bedford Management. According to plaintiff, both management companies are now billing and collecting rents from the Lydia tenants, but no proof of this assertion has been provided.

Plaintiff maintains that Amico is acting without authority, and challenges his ability to transfer management responsibilities to New Bedford Management. Amico maintains that New Bedford Management has been doing an excellent job, having increased revenues and reduced expenses, but plaintiff has steadfastly refused to meet with them. Additionally, Amico

contends that plaintiff has unclean hands, having received personal home oil from the fuel company, said fuel being charged to Lydia, and having claimed to have lost a distribution check, obtaining a replacement, and then cashing both.

Plaintiff is Amico's aunt. Amico's father, one of the original members, was in a medical practice with Zayda Alviar-Chipeco, another defendant and Lydia member. Marie Butler has been a family friend for over thirty years. Amico maintains that, because of the close relationship between all of the families, most of the business transactions have been handled informally.

The court notes that the papers provided include several letters addressed to plaintiff from Amico, indicating the transactions that were taking place. Plaintiff alleges that she was neither informed of the transactions, nor consulted in making the complained-of decisions.

DISCUSSION

CPLR 6401 (a) states;

"Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party."

[* 7]

"Whether to appoint a receiver is a matter confined to the sound discretion of the court [internal quotation marks omitted]... ." 64 B Venture v American Realty Co., 194 AD2d 504, 504 (1st Dept 1993).

"The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of property from a party without the benefit of a trial on the merits. Such a provisional remedy may only be invoked in cases where the moving party has made a clear evidentiary showing of the necessity of the conservation of property and the protection of the interests of that party. [citations omitted]."

Modern Collection Associates, Inc. v Capital Group, Inc., 140 AD2d 594, 594 (2d Dept 1988); *Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d 631 (2d Dept 2008).

In the instant action, plaintiff has sufficiently established that she has an interest in the subject property because she is a twenty-five percent owner of Lydia. See *Secured Capital Corp. of N.Y. v Dansker*, 263 AD2d 503 (2d Dept 1999). However, she has failed to make a clear evidentiary showing of the need to conserve the subject property.

Plaintiff has alleged injury resulting from the management of the property, but has failed to substantiate such current injury, or that the new management company, New Bedford Management, is failing to protect, preserve and make productive the property in question. The mere fact that plaintiff disputes the control exercised by her nephew is insufficient, as a matter of law, to warrant the imposition of a temporary receiver.

Conclusory allegations that the property is being mismanaged are insufficient to require the appointment of a receiver. *Iannone v Iannone*, 31 AD3d 713 (2d Dept 2006); *Modern Collection Associates, Inc. v Capital Group, Inc.*, 140 AD2d 594, *supra*.

The cases cited by plaintiff are all distinguishable from the case at bar, in that those cases concern the transfer of the subject property without appropriate approval. *Singh v Brunswick Hospital Center, Inc.*, 2 AD3d 433 (2d Dept 2003); *Chaline Estates, Inc. v Furcraft Associates*, 278 AD2d 141 (1st Dept 2000). In the instant matter, the property has not been transferred, and is apparently being appropriately managed at the present time, as indicated in the opposition papers.

Based on the foregoing, the court denies plaintiff's request for the appointment of a temporary receiver.

The court also declines to grant plaintiff's request for a preliminary injunction.

CPLR 6301 provides, in pertinent part:

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission of continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff."

A preliminary injunction is a drastic remedy which should

only be granted where the movant has demonstrated a clear legal right to the relief demanded based upon the undisputed facts. *Scotto v Mei*, 219 AD2d 181, 182 (1st Dept 1996). To be entitled to a preliminary injunction, the movant must show a probability of success, the danger of irreparable injury in the absence of an injunction, and a balance of the equities in its favor. *Aetna Insurance Co. v Capasso*, 75 NY2d 860, 862 (1990). If any one of these elements is missing, a preliminary injunction cannot be issued.

At the present juncture, with no discovery and conflicting affidavits, the court cannot conclude that plaintiff will probably prevail in the underlying action. Also, although plaintiff asserts that if a preliminary injunction is not issued she will suffer irreparable harm, that injury appears speculative at best.

"Irreparable injury" is defined as "a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite* [W]here injunctive relief is to be granted, it is to be molded to fit the circumstances so as to preserve the *status quo* to the extent possible (internal citations omitted)." *Societe Anonyme Belge D'Exploitation de la Navigation Aerienne (Sabena) v Feller*, 112 AD2d 837, 840 (1st Dept 1985).

In the instant case, plaintiff has alleged "irreparable

harm" without substantiation. Conclusory allegations of injury will not suffice to meet the burden of proving irreparable harm. *Genesis II Hair Replacement Studio, Ltd. v Vallar*, 251 AD2d 1082 (4th Dept 1988). This is especially so in the present situation in which the property appears to be managed in a way that is benefitting all of Lydia's members, plaintiff included. This is not to say that the property might have been mismanaged in the past.

The final requirement to granting a preliminary injunction is the balancing of the equities that favors the movant. See *VMVS Associates v Consolidated Equities, Inc.*, 116 AD2d 491 (1st Dept 1986). Plaintiff alleges, in her memorandum in support of her application, that the equities favor her because she will suffer greater hardship if the motion is denied than defendants would suffer if the motion were granted. However, she has failed to indicate how the equities balance in her favor, except for alleging criminal activities on the part of some of the defendants.

In opposition, Amico has alleged that plaintiff has "unclean hands," in that she received fuel for her personal use charged to Lydia, and that she obtained a double distribution payment.

At this point, the court is unable to determine the merits of these allegations posited by the parties. However, with such conflicting allegations, it cannot be asserted that the equities

favor plaintiff.

Furthermore, the acts requested to be enjoined, restraining defendants from engaging in any transaction without the unanimous consent of all of Lydia's members, is not only unlikely to happen, but could be counterproductive to Lydia's operation. Additionally, such unanimous consent is not required by Lydia's operating agreement.

Based on the foregoing, plaintiff is not entitled to a preliminary injunction, because she has not met her burden of proof that she would suffer irreparable harm absent a preliminary injunction, and that the equities favor her position.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied.

Dated:

5/15/09

ENTER: **MARILYN SHAFER**
J.S.C.
Marilyn Shafer, J.S.C.

FILED
MAY 21 2009
COUNTY CLERK'S OFFICE
NEW YORK