

**Ferrari v Greco**

2009 NY Slip Op 32508(U)

October 27, 2009

Supreme Court, Richmond County

Docket Number: 102027/09

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X  
NICK FERRARI and Nick Ferrari,  
a Shareholder of THE CAKE TOPPER CORP., suing  
in the right of THE CAKE TOPPER CORP.,

Plaintiffs,

*-against-*

DANIELLE GRECO and MELISSA FERRARI,

Defendants.

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DCM PART 6

Present:  
Hon. Philip G. Minardo

**DECISION & ORDER**

Index No. 102027/09  
Motion No. 2823 - 001

The following papers numbered 1 to 7 were marked fully submitted on the 17th day of September, 2009:

	Papers Numbered
Plaintiffs' Order to Show Cause dated August 26, 2009, with Supporting Affidavit of Nick Ferrari.....	1
Plaintiffs' Memorandum of Law in Support.....	2
Answering Affidavit of Defendant Melissa Ferrari (dated September 4, 2009).....	3
Affirmation in Opposition (dated September 9, 2009).....	4
Memorandum of Law in Opposition.....	5
Plaintiffs' Reply Affidavit (dated September 15, 2009).....	6
Plaintiffs' (Second) Reply Affirmation (dated September 15, 2009).....	7

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Upon the foregoing papers, plaintiffs' application for injunctive relief is denied.

In this action, plaintiff Nick Ferrari, individually and as a minority shareholder of Cake Topper Corp. (hereinafter referred to as "plaintiff") asserts direct and derivative claims against the defendant/majority shareholders of said corporation for, *inter alia*,

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breach of fiduciary duty, and misappropriation of corporate assets and business opportunities. It is undisputed that plaintiff and his wife, defendant Melissa Ferrari, each own twenty-five percent of the issued and outstanding shares of stock of The Cake Topper Corp. (hereinafter, "Cake Topper"); and Danielle Greco (Melissa's sister) owns fifty percent. These three individuals are the sole officers and directors of Cake Topper, which was conducting business as a specialty bakery located at 1660 Richmond Road in Staten Island, New York.

Presently before the Court is plaintiff's order to show cause seeking to enjoin defendants from (1) liquidating, selling, transferring or assigning any assets of Cake Topper; (2) terminating, assigning or breaching the lease agreement for the business premises located at 1660 Richmond Road; (3) transferring, assigning, pledging or encumbering any or all of the shares of stock of Cake Topper; (4) selling or issuing any shares of stock in said company; (5) transferring or removing its business assets; and (6) signing any checks or incurring any obligations on behalf of the subject corporation. Also sought is a mandatory injunction requiring defendants to immediately make available for inspection and copying the books and records of Cake Topper.

In support of the injunction, plaintiff maintains that as a result of a marital dispute and pending divorce proceedings, his wife and sister-in-law have (1) physically locked him out of the company's business operations, (2) refused to make the company's books and records available to him for inspection and (3) improperly noticed and conducted directors' and shareholders' meetings for the wrongful purpose of

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transferring and diverting Cake Topper's business assets to an individual or company controlled by defendant Danielle Greco, thereby rendering his stock worthless.

In opposition, defendants submit copies of (1) a "Notice of Directors' Meeting for the Voluntary Dissolution of Corporation and Disposition of Equipment" dated August 5, 2009, (2) a "Resolution by [the] Board Approving Dissolution and Disposition of the Assets of Corporation" dated August 7, 2009 and (3) a "Notice of Special Shareholders' Meeting" dated August 7, 2007.

In view of these notices and the assertion of each defendant (the former holders of a majority of the shares in Cake Topper) that each was delivered to plaintiff, defendants maintain that plaintiffs' conclusory assertion of an "improperly noticed meeting" is insufficient to warrant the relief requested (*see* Business Corporation Law §§ 602, 605, 710 and 711). In support, defendants point to plaintiff's alleged appearance at the special shareholders' meeting on August 18, 2009, at which he voted against dissolution.

Based on the papers before it, it is the Court's opinion that plaintiff has failed to establish a likelihood of success on the merits, a *sina qua non* where a preliminary injunction is sought (*see* CPLR 6301; W.T. Grant Co. v Srogi, 52 NY2d 496, 517 superceded on another issue by the amendment of RPTL §720 [L. 1995 ch 693]). Rather, the conflicting affidavits of the parties raise multiple, material questions of fact as to motive, bad faith and breach of fiduciary duty, the core issues in this action, which are not amenable to resolution at the "hearing" contemplated by CPLR 6312(c) (added

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L1996 ch 24).<sup>1</sup> In this regard, it is well settled that preliminary injunctive relief constitutes “a drastic remedy” that “will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant” (Abinanti v Pascale, 41 AD3d 395, 396, quoting Peterson v Corbin, 275 AD2d 35, 37 and Nalitt v City of New York, 138 AD2d 580, 581 [citations and internal quotation marks omitted]).

In any event, it is clear that the basis for the injunctive relief sought in this order to show cause no longer exists since it appears that the dissolution of Cake Topper was approved by its majority shareholders and is an accomplished fact. More particularly, according to defendant Greco, following the shareholders’ meeting and the vote of 75% of its shareholders in favor of the dissolution and disposition of its assets, Cake Topper’s lease for the business premises was assigned to a new corporation (named “The Cake Topper NYC, Inc.”) owned solely by this defendant, and the equipment was returned to the lender who facilitated its purchase, Anthony Greco, in partial satisfaction of the corporation’s debts. Thus, there is no longer any basis for the injunctive relief sought by plaintiff (*see* Stutz v 15 W. 72<sup>nd</sup> St. Assoc., 75 AD2d 773), and the application has been rendered moot.

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<sup>1</sup> That subdivision provides as follows: “Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff’s papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.”

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Accordingly, it is

ORDERED, that plaintiffs' application for a preliminary injunction to stay the transfer and liquidation of assets of the corporation is denied as academic. A preliminary conference to schedule discovery shall be scheduled for November 18, 2009 at 9:30 A.M.

E N T E R,

Dated: October 27, 2009

s/ Philip G. Minardo  
J.S.C.