SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

INDEX No. 014890/09

MOTION DATE: Dec. 11, 2009
Motion Sequence # 001, 002

LAURINO LUCENTE and DIGITAL PRINTING INNOVATIONS, INC., INDIVIDUALLY AND IN THE RIGHT AND ON BEHALF OF PROJECT 44 ENTERPRISES, LLC,

Plaintiffs,

-against-

CHARLES S. WHITING, SR., CHARLES S. WHITING, JR., FLIGHT DECK GRAPHICS, LLC, PROJECT 44 ENTERPRISES, LLC and DAWNE DEANGELIS,

Defendants.

The following papers read on this motion:

Order to Show Cause..... XX
Affidavit in Opposition..... X

This motion and cross motion, by the plaintiffs and defendants respectively, for various injunctive relief and the appointment of receiver pursuant to CPLR 6311 and CPLR 6401 are **denied** and the restraining order presently in place against defendants is hereby **vacated**.

This action arises out of allegations that the Whiting defendants (Charles S. Whiting, Sr., Charles S. Whiting, Jr. and Dawne DeAngelis) in violation of their fiduciary duties to Project 44, a printing company, and Laurino Lucente used their respective positions as

officers and/or members of Project 44 to direct and cause it to disburse and divert sums of money for their personal use and benefit, and/or that of defendant Dawn DeAngelis, who is not an owner, principal officer or member of any of the business entities referred to herein and worked briefly for Project 44 for approximately five months, and for the payment of items which were not properly and legitimately related to Project 44's business operation. It appears from the Operating Agreement that Project 44 was formed in or about July 2006. Its members include plaintiff Laurino Lucente, defendants Charles S. Whiting, Sr., Fllight Deck Graphics, LLC and Digital Printing Innovations, Inc. Both Mr. Whiting Sr. and Mr. Lucente were managing members of the company while Charles S. Whiting, Jr. was president. Defendant Dawne DeAngelis was an employee of Project 44. More specifically, plaintiffs claim that defendants, ***inter alia***,

1) used company assets to pay personal credit card bills and expenses;

2) routinely withdrew cash and/or made wire transfers of company funds for personal use;

3) misrepresented to plaintiffs that payments made to the Whiting defendants were related to legitimate company business expenses; and

4) placed defendant Dawn DeAngelis, defendant Whiting, Jr.'s alleged "girlfriend," on Project 44's payroll and insurance plan.

In the first and third through sixth causes of action of the complaint, plaintiff seeks damages arising from defendants' alleged misappropriation/dissipation of corporate assets, breach of the Project 44 Enterprises, LLC operating agreement, conversion, breach of fiduciary duty, waste of corporate assets and fraud. The second and eighth causes of action seek an accounting and injunctive relief respectively. Plaintiffs claim that defendants' alleged misconduct/looting occurred at a time when the company was losing sales and suffering under the weight of crippling debt as a result of which plaintiff Laurino Lucente "liened personal assets" and lent over $1,000,000 to Project 44 in an attempt to save the company and pay employees while the Whiting defendants continued to misappropriate funds and add to Project 44's crippling debt. Moreover, plaintiff Laurino Lucente alleges that defendant Whiting, Jr. has repeatedly violated the temporary restraining order presently in effect.

In opposition to plaintiffs' application for a preliminary injunction, defendants argue

that

> the two members of Project 44 [Laurino Lucente and defendant Whiting, Sr.], agreed to use company assets to pay certain personal debts and mortgages;
>
> Laurino Lucente and his wife Theresa, the chief financial officer of Project 44 who controlled the books, finances and credit cards relative to Project 44, were aware that personal funds were often put into the business and that not only defendant Whiting, Jr. but both Theresa and her husband paid personal expenses through company accounts;
>
> there has always ben full disclosure between defendant Whiting, Jr. and the Lucentes *vis a vis* financial expenditures; and
>
> since being served with the temporary restraining order, which he claims to have obeyed, defendant Whiting, Jr. has remained unemployed, with no source of income.

As a result of the temporary restraining order presently in effect, defendants were enjoined from

> engaging in any managerial or other business activity with respect to Project 44; transferring, disposing, diverting or otherwise dissipating any of Project 44's customers, business, monies or accounts receivable; accessing, withdrawing, encumbering or otherwise dissipating any funds in specific accounts used by defendants; and destroying any and all electronically stored information, computers and bank and other financial records relevant to Project 44 and the allegations in the complaint.

Defendants seek to vacate the subject "TRO", to enjoin plaintiff Laurino Lucente, etc., from, ***inter alia***, transacting any business or exercising managerial duties or power *vis a vis* Project 44; concealing, selling, assigning or transferring any of the assets of Project 44; and appointment of a temporary receiver to preserve, safeguard and protect those assets.

It is well settled that the remedy of a preliminary injunction is a drastic one which should be granted sparingly. (***McLaughlin, Piven, Vogel v Nolan & Co., Inc.***, 114 AD2d 165, 172, 2nd Dept., 1986). The purpose of the relief is to maintain the status quo during the litigation and prevent the dissipation of property that could render a judgment ineffectual. (***Ruiz v Meloney***, 26 AD3d 485, 486, 2nd Dept., 2006). Such relief will not be granted unless a clear right is established under the law and undisputed facts. The burden of demonstrating such undisputed right rests upon the movant. (***Nobu Next Door, LLC v Fine Arts Housing, Inc.***, 4 NY3d 839, 840, 2005; ***Gagnon Bus Co., Inc. v Vallo Transp., Ltd.***, 13 AD3d 334, 335, 2nd Dept., 2004).

To obtain a preliminary injunction, the movant must meet the heavy burden of demonstrating, by clear and convincing evidence, that the movant: a) is likely to succeed on the merits of the action; b) will suffer irreparable injury absent the issuance of a preliminary injunction; and that c) the balance of the equities favors the movant. (***Dixon v Malouf***, 61 AD3d 630, 2nd Dept., 2009; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642, 643, 2nd Dept., 2006). Here, both sides have failed to sufficiently demonstrate these requirements, especially the irreparable injury component.

Irreparable injury, in this context, means any injury for which a monetary award alone cannot be adequate compensation. (***Dana Distributors, Inc. v Crown Imports, LLC***, 48 AD3d 613, 2nd Dept., 2008). Movant must demonstrate that such injury is more than just a mere possibility and, in fact, is likely and imminent absent injunctive relief. (***Golden v Steam Heat, Inc.***, 216 AD2d 440, 442, 2nd Dept., 1995). Where there is an adequate remedy at law, such as an award of money damages, a preliminary injunction will not issue. (***Di Fabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 2nd Dept., 2009).

While it is possible, even where facts are in dispute, to find that a movant has a likelihood of success on the merits (***Ma v Lien***, 198 AD2d 186, 187, 1st Dept., 1993, *lv to appeal dismissed* 83 NY2d 847 [1994]), it is also true that a 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, 590, 2nd Dept., 2005). Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a drastic remedy which should be used with caution and only when required by urgent situations or grave necessity based upon clear evidence. (***Wm. Rosen Monuments, Inc. v Phil Madonick Monuments, Inc.***, 62 AD2d 1053, 2nd Dept., 1978). Ultimately the decision as to whether to grant injunctive relief rests in the sound discretion of the court. (***City of Long Beach v Sterling***

American Capital, LLC, 40 AD3d 902, 2nd Dept., 2007).

Here, the material facts at issue are far from undisputed. The very essence of the case, i.e., whether defendants improperly misappropriated/diverted/dissipated company assets for their personal benefit is hotly contested and far from clear, especially in light of the defendant Whiting Jr.'s unrefuted allegations that: 1) plaintiff Laurino Lucente's wife controlled the books, finances, credit cards, etc. of Project 44; plaintiff Laurino Lucente himself was aware of every financial transaction made on behalf of Project 44; and both Laurino Lucente and Whiting, Sr. agreed to use company funds to pay personal expenses. Since it is impossible to foresee, at this junction, either side's likelihood of success on the merits, and given that money damages are readily ascertainable here, the movants' respective requests for preliminary injunctive relief must be **denied**.

Issues regarding defendants' alleged misappropriation and improper use of company funds for personal expenses, which defendants dispute, can be addressed in a final judgment through the award of money damages and, therefore, do not present irreparable harm.

For the reasons which follow, there is no basis to appoint a receiver as defendants request.

The provisional remedy of a receivership is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. (***Vardaris Tech, Inc. v Paleros, Inc.***, 49 AD3d 631, 632, 2nd Dept., 2008). CPLR 6401(a) authorizes the appointment of a receiver where "there is danger that property will be removed from the state, or lost, materially injured or destroyed." The remedy is drastic and should be invoked only where necessary for the protection of the parties' interests. There must be danger of irreparable loss. (***Natoli v Milazzo***, 65 AD3d 1309,1310, 2nd Dept., 2009). A court will exercise extreme caution in appointing a receiver which should only be done where a proper case has been clearly established based on a detailed evidentiary showing. (***Trepper v Goldbetter***, 205 AD2d 363, 364, 1st Dept., 1994). It is not a remedy to be used as a sanction, and such relief is **denied**.

A Preliminary Conference has been scheduled for March 8, 2010 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

ENTERED
JAN 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated JAN 19 2010

J.S.C.