

Zhiye Intl., Inc. v Park
2010 NY Slip Op 30587(U)
March 17, 2010
Supreme Court, New York County
Docket Number: 116877/09
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ZHIYE INTERNATIONAL, INC., SONGS of
FREEDOM, INC., ZHAO QI LIU and LI FANG LIN
LIU,

Plaintiffs,

- v -

GEORGE PARK, DENIM ARTISAN INC. and LABEL
NYC INC.,

Defendants.

Index No.: 116877/09

Motion Date: 02/18/10

Motion Seq. No.: 01002

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion for a preliminary injunction.

Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3

4

FILED

MAR 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiffs move by Show Cause Order for a temporary
restraining order and a preliminary injunction to restrain
defendants George Park, Denim Artisan, Inc. and Label NYC Inc.
from transferring any funds paid to the defendants that are the
proceeds of the sale, design, import or manufacture of clothing
or apparel. The plaintiffs' complaint sets forth causes of
action sounding in conversion, breach of fiduciary duty and
loyalty, breach of contract, and unjust enrichment.

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):

Plaintiff Zhiye International Inc. ("Zhiye") is in the business of manufacturing clothing at a factory that it owns in Guangzhou, China. One hundred percent of its common stock is owned by plaintiff Zhao Qi Liu. With offices also located in New York City and Panama, Zhiye has gross sales of approximately \$11 million.

Plaintiff Zhiye alleges that defendant George Park is an employee of Zhiye and also a minority shareholder of plaintiff Songs of Freedom, Inc. ("Songs"), and wholly owns defendants Denim Artisan Inc. ("Denim") and Label NYC Inc. ("Label"). It alleges that in violation of the shareholder agreement of defendant Songs, defendant Park has diverted approximately \$3.5 million of business from plaintiffs to defendants Denim and Label. Plaintiff Zhiye contends that defendant Park carried out this conversion while at all times continuing and remaining its employee, in breach of his fiduciary and loyalty duties to the corporation. According to plaintiff Zhiye, defendant Park, inter alia, sold merchandise of Songs in contravention of the shareholder agreement that gave him no authority to do so.

Defendant Park opposes the motion for a preliminary injunction.

Defendant Park contends that none of the plaintiff or defendant corporations are competitors. He claims that non-party Zhiye International, S.A., is the factory that Liu owns in China,

and that Zhiye International, S.A. manufactures private label goods, and is otherwise known as a contract manufacturing company. Such a company manufactures apparel under one label or brand of another firm. As such, non-party Zhiye International, S.A. manufactures such apparel for purchase by competing firms. He does not know the entity known as Zhiye, the plaintiff here, and speculates that it is an entity incorporated so that plaintiff Liu may conduct business in the United States.

Park asserts that Songs of Freedom, Inc. is only a clothing label manufacturer, and that Songs designs and manufactures clothing under its label, the trademark of which he owns. He alleges that Songs' only business is the promotion of its label, and that the restrictive covenant in Songs' shareholder agreement merely applies to the use of that trademark.

Defendant Park agrees that he owns Denim, which is also a private label manufacturer. He contends that none of the goods manufactured by Denim belong to Songs. He concurs that he also owns Label, which sells branded apparel. He contends that Label's products are not private label goods and that Label has never produced Songs brand goods.

Defendant Park asserts that it is plaintiff Liu who has violated Songs' shareholder agreement by conducting Songs' business in the name of Liu's other business entities. He concedes that he sold Songs' merchandise, but states that he did

so only in order to pay Songs' employees and only with the approval of plaintiff Liu's relative who is Songs' treasurer because plaintiff Liu absented himself from the business and failed to pay such employees.

On January 19, 2010, this court granted plaintiff an ex parte temporary restraining order with respect to the funds in question, except as to payments made in the regular course of business. On January 25, 2010, on application of defendant Park, the court further modified the temporary restraining order by removing any restrictions on the funds in defendant Park's personal bank accounts on deposit at non-party JP Morgan Chase Bank.

Upon further submissions and arguments on February 17, 2010, the court now determines that plaintiffs are not entitled to a preliminary injunction with respect to funds held in the bank or other accounts of defendants George Park, Denim Artisan, Inc. and Label NYC, Inc.

Plaintiffs have failed to demonstrate that they will suffer irreparable harm without such provisional remedy.

Although injunctive relief is not appropriate in actions involving breach of contract where the movant has an adequate remedy at law for monetary damages (O'Neill v Poitras, 158 AD2d 928) nevertheless, the IAS court, in ruling in defendant[]'s favor, properly recognized that injunctive relief is appropriate to remedy the conversion of identifiable proceeds as sought in the underlying action (Crocker v Commercial Servs. v Davan Enterprs., 88 AD2d 877).

'It is well settled that an action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question.'

(Manufacturers Hanover Trust Co. v Chemical Bank, 160 AD2d 113, 124.)

Amity Loans, Inc. v Sterling National Bank Trust Co., 177 AD2d 277, 279 (1st Dept 1991).

However, the circumstances in Amity Loans are distinguishable from the facts in the case at bar, as Amity Loans involved a security agreement between the parties where "full ownership of all of plaintiff[]'s accounts receivable and all proceeds thereof were specifically and unequivocally assigned and transferred to the defendant". Here, the only writing between the parties is the Songs shareholder agreement. The provisions of such agreement fail to establish that there are any monies that constitute a res that is to be held in trust for the benefit of plaintiffs or any of Song's shareholders.

Since plaintiffs have not shown a specific, identifiable fund that defendants or anyone else is obligated to return or treat in a particular manner on their behalf, a preliminary injunction with respect to the subject funds is an inappropriate remedy and plaintiffs are relegated to money damages.

Furthermore, an attachment, not an injunction, is an appropriate remedy to prevent a removal, transfer or disposition of property, rather than an injunction. In any event, plaintiffs have failed to demonstrate the requisite conditions that would permit the court to grant an attachment of the funds in question.

See Polish American Resource Corp. V Byrczek, 270 AD2d 96 (1st Dept 2000) and First National Bank of Downsville v. Highland Hardwoods, Inc., 98 AD2d 924 (3d Dept 1983).

Accordingly, it is hereby

ORDERED that the motion is DENIED in all respects and the temporary restraining order is lifted; and it is further

ORDERED that defendants shall move or answer pursuant to the New York Civil Practice Laws & Rules; and it is further

ORDERED that the parties are directed to attend a preliminary conference on April 13, at 9:30 A.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York.

This is the decision and order of the court.

Dated: March 17, 2010

ENTER:

~~10/1/10~~
DEBRA A. JAMES

FILED
MAR 22 2010
NEW YORK
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