Matter of Ugenti v DCS Pharmacy, Inc.
2010 NY Slip Op 32528(U)
September 13, 2010
Supreme Court, Suffolk County
Docket Number: 29161-2009
Judge: Emily Pines
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SHORT FORM ORDER

Index Number: 29161-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 05-26-2010
Motion Submit Date: 07-06-2010
Motion Sequence No's.: 002 MD
003 MOTD

[ ] FINAL
[X] NON FINAL

X

In the Matter of the Application of
VINCENT UGENTI,

Petitioner,

-against-

DCS PHARMACY, INC., dba DATASCAN and
ALEX MINASSIAN,

Respondents.

X

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ORDERED, that the motion (motion sequence number 002) by respondents brought on by Order to Show Cause (PINES, J.) dated May 12, 2010, to quash certain subpoenas is denied; and it is further

ORDERED, that the motion (motion sequence number 003) by petitioner brought on by Order to Show Cause (PINES, J.) dated May 12, 2010, for a preliminary injunction is granted to the extent indicated herein and otherwise denied; and it is further

ORDERED, that a status conference is scheduled for October 12, 2010 at 9:30 a.m. before the

undersigned.

Background

Petitioner commenced this dissolution proceeding pursuant to BCL §1104-a by the filing of an Order to Show Cause and Verified Petition on or about July 24, 2009 and issue was joined by respondents' service of a Verified Answer dated September 15, 2009. Petitioner alleges that he owns at least 21% of the outstanding shares of respondent corporation, DCS Pharmacy, Inc., d/b/a Datascan ("DCS") and respondent Alex Minassian ("Minassian") is the majority shareholder. According to the Petition, Datascan is a corporation in the business of providing hardware and software to retail pharmacies, to assist those pharmacies in various aspects of their business, including credit card payments, insurance matters and point of sale software. The submissions reflect that on or about September 5, 2006, the parties entered into an Employment Agreement (the "Agreement"), which, by its terms, was retroactive to July 1, 2004. Pursuant to the terms of the Agreement, petitioner was employed by DCS as its General Manager and provided that petitioner would have to right after the first year of employment to purchase shares of stock of DCS. Specifically, the Agreement stated at paragraph 12 as follows:

> 12. **Ownership Interest.**
>
> (a) At the end of the first year of employment Vincent shall have the right to purchase eight (8) shares of common stock in the company at a cost of Ten and 00/100 Dollars ($10.00) per share payable to the company and an additional ten (10) shares at the end of each year thereafter for a total of ninety-eight (98) shares representing a forty-nine percent (49%) ownership interest in the company. The option to purchase shares is a right solely granted to Vincent and may not be sold or otherwise assigned by him.
>
> (b) At the end of the tenth year of employment in his current position (December 2014) Vincent shall purchase the remaining outstanding shares of common stock of the company representing the 51% ownership interest held by Alex or his heirs or successors. The value of the shares shall be determined by the one (1) year gross profits of the company calculated as the average of the gross profits for the five year period immediately preceding. The purchase of the 51% ownership shall be paid over a 10 year period with the shares of stock to be held as security until payment in full is made. Interest shall be paid at the rate of the published prime rate plus two percent (prime + 2%) per annum on the unpaid balance due and owing to Alex.

The Agreement further contained a non-compete provision in the event of petitioner's termination of employment with DCS and also provided that upon termination, petitioner would

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surrender to DCS all "source codes pertaining to the day to day business of the company and shall receive $500.00 per POS customer for the source codes." DCS agreed to use the source codes only to maintain customers of the company and petitioner agreed that any source codes for software he developed remained the property of DCS. (Agreement at ¶ 6(b) and (c)).

Petitioner alleges that pursuant to the terms of the Agreement, he began receiving dividend payments in 2007, which were represented as including retroactive payments from 2004 forward. He asserts that in July of 2008 he requested documentation as evidence of his stock ownership but that Minassian refused to provide such information but indicated in the corporate record that petitioner had a 19% ownership interest (in 2008). Petitioner claims that in 2009, Minassian told him he was given an additional 2% interest, thus increasing his total shares to 21% of the outstanding stock. Petitioner further asserts that he should have received his yearly increase in June of 2009, bringing his total to 24%, but that a minimum, he owns at least 21%, entitling him to bring this dissolution proceeding.

Petitioner claims that he has been denied access to the books and records of the corporation, not given notice of shareholder meetings and denied th right to vote. Instead, he believes all of the decisions were made solely by Minassian. Although in July of 2009 petitioner sought to redeem his shares, he claims Minassian told him there were no available funds for the purchase since DCS paid out all the profits via payment of Minassian's personal expenses. Petitioner alleges that Minassian breached his fiduciary duty to DCS and further, that he was terminated from employment in violation of the Agreement as retaliation for seeking to enforce his rights as a shareholder. Specifically, petitioner claims that DCS did not follow proper procedures to terminate him, without written notice or cause as defined in the Agreement. Based on the foregoing, petitioner seeks dissolution pursuant to BCL §1104-a(1) and (2), on the grounds that Minassian has been guilty of illegal, fraudulent, or oppressive actions and that the assets of the corporation are being wasted or diverted for non-corporate purposes. Petitioner seeks dissolution of the corporation, an accounting and a valuation hearing.

In their Answer, respondents essentially deny the allegations of the Complaint and raise the affirmative defense that petitioner lacks standing to bring this proceeding on the ground that he is not the holder of twenty percent (20%) of outstanding shares of the corporation. Further, regarding the termination of petitioner's employment, respondents claim that petitioner was terminated for cause under "emergency circumstances", obviating the need for notice and permitting Minassian to purchase back the shares of the company. Respondents additionally assert that petitioner never paid for the stock as

required by the agreement, and thus, has no ownership interest in the corporation.

On April 27, 2010, counsel for the parties appeared at a conference before the Court. On that date, they entered into a Stipulation which was So-Ordered by the undersigned. The Stipulation, drafted by counsel, provided in relevant part that "This case is not bifurcated, and all discovery shall not be limited to the issue of whether the plaintiff has 20% ownership of the defendant corporation provided same pertains to this Petition."

Motion to Quash

Respondents now move by Order to Show Cause (PINES, J.) pursuant to CPLR §3302 quashing the subpoena duces tecum served by petitioner on North Fork Bank and modifying and/or otherwise limiting the scope of the subpoena ad testificandum served on Kandell, Farnworth 7 Publins, CPA's P.C., on the ground that both subpoenas are overbroad and otherwise improper. First, respondents assert the subpoena served on North Fork Bank, which requests copies of all bank statements, signature cards and corporate resolutions for any and all checking, savings, and/or investment accounts, as well as copies of cancelled checks and deposits slips, from January 1, 2002 pertaining to the corporation, does not pertain to the issue of petitioner's ownership interest in DCS and thus must be quashed. Essentially, despite the execution of the Stipulation on April 27, 2010, respondents' counsel challenges the North Fork Bank subpoena duces tecum on the grounds that it is not relevant to the issue of standing. Clearly, pursuant to CPLR §3101, the documents requested are material relevant to petitioner's claim of waste and breach of fiduciary duty as set forth in the Petition and respondents agreed that discovery was not limited to the issue of standing. The parties have charted their own course in this litigation and the Court will not render a determination in contravention of the parties' Stipulation.

Turning to the deposition subpoena served on Kandell, Farnworth & Pubins, CPA's, P.C., it requests an appearance at an examination before trial and production of "copies of all correspondences, proposals, work documents, supporting documentation, work sheets, invoices, contracts, cancelled checks, communication either received or sent or prepared by you, regarding or referencing any of the named defendants and plaintiffs in this action." Respondents allege this subpoena is over broad at this stage of the litigation and again that the documents requested are not relevant to the issue of standing. Moreover, that petitioner should complete party discovery prior to exercising non-party discovery. In

opposition, petitioners reiterate that the parties' April 27, 2010 Stipulation permits discovery of the requested documents and that the information sought from the accountants pertains to the Petition and thus is not irrelevant.

As with the petition for the North Fork records, the items sought from Kandell, Farnworth & Pubins, CPA's, P.C., are covered by the parties' April 27, 2010 Stipulation and are relevant to the Petition for dissolution pursuant to BCL §1104-a in that petitioner alleges that respondent Minassian has been guilty of waste of the corporate assets.

Based on the foregoing, the motion to quash the subpoena is denied in its entirety.

Motion for Preliminary Injunction

Petitioner moves by Order to Show Cause (PINES, J.) dated May 12, 2010 for an Order, *inter alia,* preliminarily enjoining respondents from (1) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part any of their shares or, outstanding unissued corporate shares, or interests in and to respondent corporation; (2) wasting assets and/or the good will of respondent corporation; (3) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part any and all assets, property, leases, interests, rights or obligations owned by respondent corporation; (4) encumbering, mortgaging or using as security or collateral any and all assets, plant and/or good will of respondent corporation; (5) amending the by-laws or Articles of Incorporation of respondent corporation, or issuing any additional shares or otherwise diluting the shares of the corporation; and (6) selling, assigning or otherwise transferring, encumbering or alienating certain intellectual property. Petitioner also seeks to compel the turn over of certain books and records and to compel the payment of certain royalties. In the Order to Show Cause, the Court issued a temporary restraining order enjoining respondents from (1) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part any of their shares or, outstanding unissued corporate shares, or interests in and to the respondent corporation; (2) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part any and all assets, property, leases, interests, rights or obligations owned by respondent corporation except in the ordinary course of business; and (3) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part, or seeking to file any patent, trademark, or copyright with respect to certain enumerated

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intellectual property.

The gravamen of petitioner's argument is that the relief sought will preserve the status quo and protect petitioner's intellectual property rights and ensure that petitioner is paid for respondents' use of such intellectual property. Petitioner alleges that Minassian is a shareholder and director of another business, Datascan Consulting Co. ("Datascan"), which provides consulting services to DCS for which it is paid a fee. In sum, petitioner argues that Minassian is funneling or channeling funds from DCS to Datascan, thus depleting the assets of DCS. Petitioner seeks injunctive relief to protect his intellectual property which is being used by DCS and to preserve the assets of the respondent corporation.

Respondents oppose the motion and reiterate their belief that, at best, petitioner is only a 19% shareholder of DCS. Respondents claim petitioner never paid for the shares of stock he claims he owns. Respondents argue that petitioner cannot meet the criteria for issuance of a preliminary injunction and the motion must be denied in its entirety. With regard to the intellectual property, respondents refer to a Trade Secret Agreement executed by the parties and assert that such provides that any intellectual properties developed during petitioner's employment are the property of DCS. Minassian asserts that the specific items of intellectual property referenced by petitioner were developed for DCS under his direction, are pharmacy specific and the property of DCS.

It is well settled that to demonstrate entitlement to a preliminary injunction, a movant must usually establish (1) the likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) the balancing of the equities in the movant's favor. ***Moy v. Umeki,*** 10 A.D.3d 604, 781 N.Y.S.2d 684 (2d Dept. 2004). However, in evaluating a motion for a preliminary injunction, the Court must be mindful that "the purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties." ***Masjid Usman, Inc. v. Beech 140, LLC.,*** 68 A.D.3d 942, 892 N.Y.S.2d 430 (2d Dept. 2009)(internal quotations omitted). ***See also, Livas v. Mitzner,*** 303 A.D.2d 381, 756 N.Y.S.2d 274 (2d Dept. 2003); ***Melvin v. Union College,*** 195 A.D.2d 447, 600 N.Y.S.2d 141 (2d Dept. 1993).

In the instant case, while the issue of petitioner's ownership interest in DCS cannot be determined on this motion, and thus the Court cannot determine the likelihood of success on the merits, limited injunctive relief is warranted to preserve the status quo pending the determination of this action.

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Moreover, it appears there are issues of fact regarding the rights to certain intellectual property purportedly developed by petitioner. Therefore, during the pendency of this action, the Court is extending the temporary restraining Order signed May 12, 2010 and respondents are enjoined and restrained from (1) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part any of their shares or, outstanding unissued corporate shares, or interests in and to, DCS Pharmacy, Inc., d/b/a Datascan; (2) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part any and all assets, property, leases, interest, rights or obligations owned by DCS Pharmacy, Inc., d/b/a Datascan, except in the ordinary course of business; and (3) selling, assigning or otherwise transferring, encumbering or alienating either in whole or in part, or seeking to file any patent, trademark, or copyright with respect to the intellectual property delineated in the Order to Show Cause.

Counsel are reminded that a status conference is scheduled for October 12, 2010 at 9:30 a.m. before the undersigned.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: September 13, 2010
Riverhead, New York

EMILY PINES
J. S. C.