

Casavecchia v Mizrahi

2010 NY Slip Op 32678(U)

September 20, 2010

Sup Ct, Nassau County

Docket Number: 006679/2005

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 8

JOSEPH CASAVECCHIA, SR., individually and
derivatively as a shareholder on behalf of Casa
Mason Corp.,

Plaintiff,

-against-

INDEX NO.: 006679/2005
MOTION DATE: 7/23/10
SEQUENCE NO.: 06

WILLIAM MIZRAHI, individually and as the
controlling officer, director and shareholder of
Casa Mason Corp., CHITTOOR GOVINDARAJ,
and CASA MASON CORP.,

Defendants.

The following papers were read on this matter:

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| Order to Show Cause With Exhibits "A" — "HH" | 1 |
| Affirmation in Opposition to Motion | 2 |
| Reply Affidavit in Further Support of Motion | 3 |

PRELIMINARY STATEMENT

Plaintiff seeks injunctive relief against Casa Mason Corp. ("CMC") and William Mizrahi ("Mizrahi"), and directions that Mizrahi turn over to plaintiff books and records, sign documents required to permit plaintiff to assume control of CMC, authorizing plaintiff to retain a certified public accountant, with the cost borne by Mizrahi individually, to assist plaintiff in handling CMC financial matters, and compelling

defendants to respond to Plaintiff's Second Set of Interrogatories and Documents Demand dated September 12, 2008.

BACKGROUND

Casavecchia and Mizrahi have been involved as shareholders in a number of companies over the past 30 years, including CMC. In approximately 2005 a series of disputes arose between them, generating a number of lawsuits,¹ including one previously assigned to this Part.² The initial complaint in this action alleged fraudulent conduct, breach of fiduciary duty, and breach of contract by which Mizrahi gained majority control of CMC in an effort to oust Casavecchia. The action remained relatively dormant, pending the resolution of *Hills of Heartland* matter, and was restored to the calendar by Order dated June 30, 2008. Plaintiff filed an Amended Complaint pursuant to an Order dated July 29, 2009.

The Amended Complaint³ alleges, in addition to the original causes of action, claims of further breaches by Mizrahi of his fiduciary duties, including, making unauthorized development decisions for CMC, undertaking unauthorized construction for CMC, and entering into unauthorized financial transactions for personal benefit. Defendants filed their Answer to the Amended Complaint on or about August 27, 2009.⁴

The Answer contains five counterclaims:

1. Contributory Negligence;
2. Misuse of company funds of Centennial Estates by Plaintiff, barring him

¹ In addition to this action, the other lawsuits were entitled *Joseph Casavecchia, Sr. v. William W. Mizrahi, Bloomingdale Greens, Inc., and Charleston Square, Inc.*, Nassau Index No. 08-011406, and *Joseph Casavecchia, Sr. v. William W. Mizrahi and GMC Construction Corp.*, Nassau Index No. 018486/05.

² *Joseph Casavecchia, Sr., v. William W. Mizrahi, Hills of Heartland, LLC, and Casa Mason Corp.*, Index No. 008635/05.

³ Exh. "F" to Motion.

⁴ Exh. "G" to Motion.

from employment in future projects;

3. Breach of common law duty of loyalty by Plaintiff as shareholder of CMC, by misuse of company funds;

4. Breach of fiduciary duty to fellow shareholders by seeking to dissolve the corporation for his own benefit, failing to act for benefit of company, and acting to detriment of company and shareholders; and,

5. Breach of covenant of good faith and fair dealing, thereby depriving Defendants of company assets, materials and labor.

Plaintiff asserts that these counterclaims are untenable for the following reasons:

1. Contributory (comparative) negligence is not a separate action, but an affirmative defense, and only in actions involving negligence;

2. The second counterclaim deals with entities not in any way involved in this action; and it is impossible to discern from the pleadings any way in which the actual Defendants claim damage as a result of dealing with non-parties, who have not made claims of any kind toward Plaintiff.

3. The third insinuates a particular duty of loyalty on the part of Plaintiff, which may be correct, but there is a complete failure to particularize any specifics as to the time, manner, or amount of misused funds; and such generalities do not meet the pleading requirements of CPLR § 3013;

4. Plaintiff asserts that the Fourth Cause of Action, similar to the Third, makes broad assertions without any specification as to the manner, for example, of how Plaintiff sought to dissolve the corporation, there having been no dissolution action commenced;

5. Lastly, the Fifth Cause of Action alleges breach of a duty of good faith and fair dealing, which is implicit in all contracts. Notably, however, it does not identify any contract between or among the parties.

By prior Order the First, Third, Forth and Fifth counterclaims were dismissed.

DISCUSSION

The authority to issue a temporary injunction is governed by CPLR § 6301:

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 or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

To be entitled to a preliminary injunction, the movant must demonstrate by clear and convincing evidence “(1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position.” (*Apa Sec., Inc. v. Apa*, 37 A.D.3d 502, 503 [2d Dept. 2007]); (*W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981)); (*Ruiz v. Meloney*, 26 A.D.3d 485 — 486 [2d Dept. 2006]).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property which could render a judgment useless. (*Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 (*Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 [2d Dept. 2004])). All that is required of the Plaintiff is the likelihood of success, and the existence of factual questions will not preclude the grant of injunctive relief. *Id.* at 604 — 605 (internal citations omitted).

Plaintiff alleges that, despite a Judgment of this Court that \$1.225 million be refunded to Hills of Heartland, as a consequence of action entitled *Joseph Casavecchia, Sr. v. William Mizrahi, Hills of Heartland, LLC and Casa Mason Corp.*, (Exh. “D” to Motion), Mizrahi did not keep these funds segregated in any fashion; but rather, expended the funds without the knowledge or consent of Casavecchia. In an effort to cover the inability of CMC to refund the

monies, Mizrahi and other Mizrahi entities made loans to CMC, at 10% interest, significantly higher than the one or two points above prime which previously governed loans from Mizrahi or Casavecchia to the companies. Plaintiff contends that Mizrahi is now profiting by the loans to replace funds he expended on such items as eight homes on speculation, with no purchasers in sight. He further claims that treating interest payments on \$100,000 and sheriff fees as CMC business expenses, requires that plaintiff share the burden occasioned solely by misdeeds of Mizrahi.

Plaintiff's specific requests are as follows:

(1) enjoining CMC from making payment on loans from Mizrahi or Mizrahi affiliates; entering into new loans from these sources ; and incurring other debt obligations without prior notice to plaintiff;

(2) enjoining Mizrahi from causing CMC to make payment on such loans, enter into new loans, or incur additional debt obligations without advance notice to plaintiff;

(3) directing Mizrahi to turn over books and records, including, but not limited to ledgers, checkbooks, contracts, bank authorizations, accounts receivable information, accounts payable information, and tax-related information;

(4) directing Mizrahi to execute all necessary documents and take all necessary measures to enable Casavecchia to assume control of CMC's financial matters;

(5) authorizing plaintiff to retain a certified public accountant to assist plaintiff in handling CMC's financial matters and correct, as may be necessary, the financial irregularities in CMC's financial records caused by Mizrahi, including preparing amended financial statements and tax returns;

(6) directing Mizrahi to personally pay the fees of such accountant; and,

(7) pursuant to CPLR § 3124, compelling defendants to provide a complete response to Plaintiff's Second Set of Interrogatories and Document Demands dated September 12, 2008.

Counsel for defendants opposes the foregoing requests. With respect to ledger

sheets, financial statements, credit card receipts, loan documents and payroll records, defendants contend that documents identified as “V” and “X” annexed to the motion papers are responsive to the Second Set of Interrogatories and Document Demands. Plaintiff replies that these responses are deficient; that there has been no document production respecting loans taken out by CMC; that there has been no production of documents beyond the 2008—2009 year. He asserts that when responsive papers were produced on June 16, 2010, they did not include 2010 ledgers, documents relating to loans by CMC, or bank statements.

Defendant also contends that plaintiff is seeking monetary damages, precluding a claim for irrevocable damages, as is required. Defendant retorts that the expenditures on behalf of CMC, without his consent, the manipulation of funds, including the taking of unwarranted loans to construct home for which there is no present market, will have the effect of rendering CMC devoid of funds available for distribution.

The goal of a preliminary injunction is to maintain the status quo, where there has been a showing of ultimate likelihood of success on the merits, the possibility of irreparable harm, and a balancing of the equities in favor of the movant. Plaintiff’s motion is determined as follows:

- Defendants are enjoined from making payments on loans issued by defendant Mizrahi or any related entities;
- Defendants, to the extent they were not included in their June 16, 2010 response to the Second Set of Interrogatories and Document Demands, are directed to provide ledger, check book, contracts, bank statements, accounts receivable and payable information for the year 2010, as well as promissory notes, mortgages and other documents substantiating loans taken by CMC;
- Plaintiff is authorized to retain a certified public accountant to investigate the books and records of CMC. The Court reserves

decision on the allocation of this cost based upon fault pending further evaluation of the propriety of the documents;

- Pending evaluation of the books and records of CMC by an expert on behalf of the plaintiff, the Court does not direct the transfer of financial control from Mizrahi to Casavecchia at this time, but requests comments from counsel on the economic viability of appointing a Receiver, with the costs borne equally between plaintiff and defendant.

This constitutes the Decision and Order of the Court.

September 20, 2010

Lea B. Warshawsky
J.S.C.

ENTERED

SEP 23 2010

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COUNTY CLERK'S OFFICE**