

**Stevelman v B'Way Net, Inc.**

2010 NY Slip Op 33249(U)

November 15, 2010

Sup Ct, NY County

Docket Number: 604201/06

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHIRLEY W. KORNREICH  
*Justice*

PART 54

STEVELMAN  
- v -  
B'WAY, NET, INC

INDEX NO. 604201/06  
MOTION DATE 10/15/10  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this motion to/<sup>OSC</sup>for enforce cell phone

	PAPERS NUMBERED
Notice of Motion/ <u>Order to Show Cause</u> — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 11/15/10

JUSTICE SHIRLEY WERNER KORNREICH  
*[Signature]*  
J.S.C.

- Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION
- Check if appropriate:  DO NOT POST  REFERENCE
- SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

IAN STEVELMAN,

Index No.: 604201/06

Plaintiff,

v.

**DECISION and ORDER**

B'WAY.NET, INC., OPEN NET, INC.,  
and KATE LYNCH,

Defendants.

**KORNREICH, SHIRLEY WERNER, J.:**

This fraudulent conveyance action arose from an alleged scheme by defendants to evade paying plaintiff amounts owed under a 2005 judgment. To date, there have been two judgments and two settlement agreements between the parties, reflecting ongoing efforts by plaintiff Ian Stevelman (Stevelman) to collect on the initial judgment. Stevelman now moves, on order to show cause (seq. no. 4), for an order providing, *inter alia*, the following relief: a declaration that Stevelman is the owner of all stock in defendants B'Way Net, Inc. and Open Net, Inc.; and directing entry of a judgment for \$15,000, plus interest, in favor of Stevelman and against defendant Kate Lynch (Lynch). Defendants oppose.

*Background*

The court summarized the parties' drawn-out dispute in its August 16, 2007 decision granting plaintiff's motion to be appointed as temporary receiver of the Net Companies. A brief summary now is necessary for the sake of contextual clarity. The facts material to the pending motion are gleaned from prior court orders, the Affirmation of Stevelman's attorney supporting the motion, the opposing Affidavit of Lynch, and attached exhibits.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1142).**

Stevelman and Lynch formed Bway as co-shareholders in 1995. At the time, they were involved in a relationship, and internet companies were proliferating. They became Co-Presidents and Co-Chief Executive Officers of the company. Under B'Way's Shareholder and Employment Agreements, employees terminated "for cause" were entitled to receive a defined severance amount. B'Way terminated Stevelman's employment "for cause" in 2001.

B'Way then filed a complaint seeking a declaratory judgment as to the validity of the termination, and an order restraining Stevelman from entering the corporate premises, diverting corporate business and accessing the corporation's computer system. Stevelman asserted several counterclaims relating to his wrongful termination, and to enforce the terms of his severance agreement. After a trial, the court awarded a judgment upholding the "for cause" termination of Stevelman, and awarding him \$476,500.72 for B'Way's failure to abide by certain terms of the severance and shareholder agreements.

After B'Way failed to make payments in satisfaction of that judgment, B'Way and Stevelman settled for a lower principal amount and entered into an agreement as to the terms of re-payment. That agreement required an initial \$100,000 payment, which B'Way made on August 25, 2005. After B'Way defaulted, Stevelman obtained a judgment by confession under the default provisions in the settlement agreement. Stevelman then attempted to enforce that judgment, and eventually filed a second complaint against B'Way, this time adding, as defendants, Lynch and a second company named Open Net. Both companies operated out of the same location using the same trade name, "B'Way.Net," and were managed by Lynch.<sup>1</sup> The

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<sup>1</sup>B'Way and Open Net are sometimes referred to solely as "B'Way" in correspondence. The court will attempt to differentiate where supported by the facts, but will generally refer to both as "B'Way" or the "companies."

complaint also included a company named Songbird as a defendant.<sup>2</sup>

The complaint alleged that since September 2005, B'Way, Open Net and Lynch engaged in a scheme to defraud Stevelman by: depleting B'Way's assets through a "phantom foreclosure" by Songbird (on a loan to Lynch); transferring assets out of B'Way into Open Net; and Lynch using loan proceeds to satisfy personal debts arising out of her control and operation of B'Way. Lynch and Stevelman entered into a Settlement Agreement dated September 26, 2007 (Agreement), to resolve the complaint, and again Lynch defaulted. The Agreement was executed by Stevelman and by Lynch on behalf of herself personally and on behalf of the companies. The parties agreed that:

4. All payments are time of the essence and strictly due as set forth above [monthly \$2,500 installments]. In the event that payment(s) are not received on the due date(s), Stevelman or his duly authorized representative will send a written notice of default to B'Way and Open Net, attention Kate Lynch, by overnight mail. If payment is still not received within ten (10) business days after the mailing of such written notice, Stevelman shall be entitled to the following relief:

- a. The entry of judgment against B'Way and Open Net in the sum of One Hundred and Sixty [Five] Thousand (\$165,000.00) Dollars less any payments previously made on the Principal Amount in accordance with the Promissory Note (the "Outstanding Balance"), plus interest at the rate of five (5%) percent per annum on the Outstanding Balance, calculated from the date of this Agreement;
- b. Stevelman shall, pursuant to the Stock Power, be the legal Owner of the Shares, and be designated the sole officer and Director of B'Way and Open Net, and any successor entities, and Lynch shall immediately withdraw as a director and officer of those corporations; and ....

(Motion, Exh. A.) The Agreement also provided: Lynch's personal guarantee of payment for the

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<sup>2</sup>The case against Songbird was discontinued by stipulation filed May 31, 2007.

Balance Due up to \$15,000, triggered by any default of Lynch or the companies (§ 7); for the payment of Stevelman's attorneys' fees and costs incurred in the process of enforcing the Agreement's terms; for the simultaneous turnover of Lynch's shares in the companies, and executed stock powers, to be held in escrow pending full performance<sup>3</sup>; for execution of an Affidavit of Confession of Judgment (Confession) by B'Way and Open Net; and that the Agreement contained "the entire agreement between the parties" (Exh. A, § 10 [merger clause]." Upon receipt of the Note and Confession and the initial \$25,000 payment under the Agreement, Stevelman was to provide an executed Satisfaction of Judgment.

The Note contained the same payment terms as the Agreement, but a different default provision:

## II. Default

In the event of Obligor's failure to pay any of the Principal Amount due under this Note within five (5) business days after notice of its default, Obligor will be entitled to the entire unpaid Principal Amount, plus accrued interest at a rate equal to nine percent (9%) per annum on the Outstanding Balance from the date of this Note [September 26, 2007] in accordance with the terms of the aforementioned Agreement. In no event shall interest payable hereunder exceed the maximum permissible under applicable law.

(Exh. A.) The Note also contained an merger clause and a clause providing the payee [Stevelman] with attorneys' fees and costs for enforcement.

B'Way made twenty-seven monthly payments of \$2,500 to Steveleman pursuant to the Agreement, totaling \$67,500, then defaulted in February 2010. Stevelman's attorney sent Lynch and the companies a Notice of Default dated April 6, 2010, advising that payments totaling

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<sup>3</sup>After executing the Agreement, Lynch, the sole owner of the companies, informed Stevelman that no actual shares existed, even though under the stock powers Stevelman would receive Lynch's shares in the event of a default. Exh. A, § 14.

\$5,000 for the months of February and March had not been paid. Lynch's counsel responded in a letter dated April 14, 2010, that B'Way had experienced a "loss of significant revenue streams," and he suggested that they "enter into negotiations ... to modify the terms of the Settlement Agreement to permit the continuation of the business and the continuation of payments to Mr. Stevelman." Exh. D. Counsel also noted that a \$2,500 payment had been sent under separate cover "as a good faith gesture." That payment was made as indicated, but there were no further payments.

Supported by the Affidavit of Confession of Judgment previously executed by B'Way as security for the Agreement, Stevelman obtained a judgment by confession, filed June 11, 2010, in the amount of \$97,500 plus 5% annual interest from September 26, 2007, amounting in total to \$110,709.25. Stevelman's counsel then sent defendants' counsel a June 9, 2010 letter advising that B'Way remained in default, and that Stevelman would be exercising his right under Section 4(b) of the Agreement, effective immediately, to be the legal owner of all outstanding shares, and to be designated the sole officer and director. The letter also demanded that Lynch step down immediately, as required by the Agreement. Lynch has refused.

The financial records produced by the defendants establish that the companies (B'Way and Open Net, d/b/a B'Way.Net) are in dire straights, operating at a loss, and that Lynch has been working without a salary for quite some time. The companies owe a substantial amount of money to a number of creditors, including Lynch, and her efforts to sell have not succeeded. It appears that the market for small net service providers like B'Way has dried up.

The court, on June 16, 2010, granted Stevelman's request for issuance of an order temporarily restraining and enjoining defendants from "removing, withdrawing, transferring,

dissipating, distributing, conveying, assigning and/or encumbering the assets of B'Way and Open Net, their successor[s] and assigns, other than in the ordinary course of business.”

*Discussion*

While the parties' long term relationship has been stormy and contentious, and the financial wisdom of this motion is questionable, the court is limited to reviewing the plain terms of the parties' Settlement Agreement, which contains a merger clause. 'The purpose of a general merger provision, typically containing the language ... that it "represents the entire understanding between the parties," is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.' *Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599 (1997). There is no claim of ambiguity as to the agreement at issue, which the court must construe as a matter of law according to the plain meaning of its terms. *R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 (2002).

The Settlement Agreement explicitly provides that the companies would be in default if payment were not received within ten business days after the mailing of a written notice of default. Defendants defaulted and have failed to cure the default. The \$2,500 payment, made by check dated April 14, 2010, was an insufficient amount to cure the default for failure to make two monthly \$2,500 payments, amounting to \$5,000. Defendants then failed to make any further payments, either before or after Stevelman's counsel sent a June 9, 2010 letter providing notice of continuing default.

Defendants assert that Stevelman's goal has been "to get the company," that Lynch's attorney negotiated the Agreement under "duress" because he had an undiagnosed critical illness during the negotiation, and that B'Way has been operating at a deficit, which is supported by the

financials submitted on the court's request. Defendants, as stated in Lynch's opposing affidavit, also "cross-move" (without providing the requisite notice of cross-motion) for a declaration that the judgments have been satisfied, citing as grounds the same allegations of motive, duress and the companies' financial distress. The court is constrained to consider only the contractual terms and will not consider defendants' allegations, which in any event do not amount to a basis for avoiding the ramifications of default; defendants do not assert that Lynch was in any way misled about the contents of the agreements she signed.

Stevelman is not now seeking enforcement of certain provisions in the Settlement Agreement, including the Guaranty executed by Lynch. "[S]tipulations of settlement are judicially favored and should not be lightly cast aside." *Matter of Kanter*, 209 AD2d 365, 365 (1st Dept 1994); see *IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 (2009) ("strict enforcement [of settlement agreements] not only serves the interest of efficient dispute resolution but is also essential to the management of court calendars and integrity of the litigation process"). (Citation omitted.) Accordingly, it is

ORDERED that plaintiff Ian Stevelman's motion for issuance of an order enforcing the following provisions of the parties' Settlement Agreement dated September 26, 2007, is granted as to paragraphs 1(d), 4(b) and 7 of that agreement; and it is further

ORDERED that defendant Lynch shall, forthwith, turn over to Stevelman's attorneys, the law firm of Ellenoff Grossman & Schole LLP, all outstanding shares of B'Way.Net, Inc. and Open Net, Inc. stock; and it is further

ORDERED that if no actual shares of stock in either B'Way.Net, Inc. or Open Net, Inc. have been issued, then defendant Lynch shall, forthwith, turn over to Stevelman's attorneys, the

law firm of Ellenoff Grossman & Schole LLP, any and all documents evidencing Lynch's ownership of the companies; and it is further

ORDERED and ADJUDGED that, pursuant to the Settlement Agreement ¶ 4(b), Stevelman shall, forthwith, be designated the legal owner of all shares, and the sole officer and director, of B'Way.Net, Inc. and Open Net, Inc., and that defendant Kate Lynch shall, forthwith, withdraw as an officer and director of both corporations; and it is further

ORDERED and ADJUDGED that a monetary judgment against Lynch and in favor of Stevelman in the amount of \$15,000, with interest at the statutory rate of 9% per annum, measured from June 1, 2010, shall be entered; and it is further

ORDERED that the temporary restraining order issued by the court on June 16, 2010, granting Stevelman's request for issuance of an order temporarily restraining and enjoining defendants from removing, withdrawing, transferring, dissipating, distributing, conveying, assigning and/or encumbering the assets of B'Way.Net, Inc. and Open Net, Inc. their successors and assigns, other than in the ordinary course of business, shall be continued until such time as plaintiff Ian Stevelman has assumed ownership and control of the companies; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Ian Stevelman, with costs and disbursements to plaintiff as taxed by the Clerk.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 4147)**

Date: November 5, 2010

