

Bar v Mandler

2010 NY Slip Op 34049(U)

May 25, 2010

Supreme Court, Nassau County

Docket Number: 023271/09

Judge: Stephen A. Bucaria

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

ARIE BAR AND 55BM LLC d/b/a BEST
ENERGY POWER,

Plaintiffs,

INDEX No. 023271/09

MOTION DATE: April 16, 2010
Motion Sequence # 001

-against-

YARON MANDLER and 55BM LLC d/b/a
BEST ENERGY POWER,

Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation in Opposition..... X
- Reply Affidavit... .. X

Motion by plaintiff for an order for an accounting, directing defendant to return all monies, books, and records of B & M Limited Liability Company, and enjoining defendant from using the trade name "Best Energy Power" is granted in part and denied in part.

This action for breach of fiduciary duty and an accounting arises from a dispute between the members of a limited liability company. Plaintiff Arie Bar holds a degree in electrical engineering. In February 2008, defendant Yaron Mandler approached plaintiff about creating a partnership to engage in the business of installing solar panels. In April, the parties signed an operating agreement for a limited liability company, known as 55BM LLC,

which would engage in this business under the name of "Best Energy Power."

The operating agreement provides that each member has an "initial membership interest and initial sharing ratio" of 50%. According to plaintiff, Article 4.1 of the operating agreement provides that the company's books and records are to be maintained at its principal office. Plaintiff also asserts that Article 7.1 of the agreement contains a provision requiring the unanimous action of the board of directors. The court notes that the pages of the operating agreement which purportedly contain these provisions have not been submitted to the court.

Plaintiff initially provided 55BM with free office space and equipment through his company AAR/CO Electric Inc. However, on August 7, 2008, the parties agreed that 55BM would reimburse AAR/CO for 20% of its cost for rent, electric, heating, and cleaning service.

Although the business continued to grow, a dispute arose between the parties. On returning home from vacation, plaintiff discovered that defendant had removed all of the books and records of the company. On December 30, 2008, the parties signed an agreement to wind up the affairs of the company, including provisions as to paying employees, guaranteeing liabilities, and dividing the profits. Plaintiff subsequently learned that defendant had formed a new company, Best Energy Power, LLC or B & M Limited Liability Company, which is apparently engaged in the solar panel installation business.

This action was commenced on December 13, 2009. Plaintiff asserts claims for breach of fiduciary duty, conversion, breach of the operating agreement, interference with contract, trademark infringement, constructive trust, unfair competition, and an accounting.

Plaintiff moves for an order for an accounting, directing defendant to return the company's books and records, and permanently enjoining defendant from using the trade name "Best Energy Power." The court will consider plaintiff's motion for injunctive relief as one for a preliminary injunction.

In opposition, defendant argues that plaintiff does not have standing to maintain a lawsuit on behalf of 55BM because no action may be taken without the unanimous agreement of the members. Defendant further argues that plaintiff has not exhausted the dispute resolution procedure contained in Article 14.11 of the operating agreement. The court notes that this provision has also not been submitted to the court. Finally, defendant argues that

plaintiff's trade name is not distinctive.

Section 610 of the Limited Liability Company Law provides that a member of a limited liability company is a "proper party" to proceedings to enforce the member's rights as against the limited liability company. Moreover, a member of an LLC has a common law right to seek an equitable accounting (*Gottlieb v. Northriver Trading Co.*, 58 AD3d 550 [1st Dept 2009]). Accordingly, plaintiff has standing to bring the present action.

The members of a limited liability company may adopt a dispute resolution provision in the operating agreement, provided the provision is not inconsistent with the limited liability company law (Limited Liability Company Law § 417[a]). Since the parties' dispute resolution provision has not been submitted to the court, it cannot be determined whether it is consistent with the statute. Moreover, because the provision containing the dispute resolution procedure has not been submitted, defendant has not established that plaintiff failed to exhaust the dispute resolution procedure prior to commencing the present action. The court will proceed to the merits of plaintiff's claims.

Plaintiff has requested an accounting with respect to B & M Limited Liability Company, the company formed by defendant after he withdrew from the parties' venture. Although plaintiff is not entitled to an accounting with respect to a company in which he holds no interest, plaintiff is entitled to an accounting with respect to the company of which he was a member. Accordingly, plaintiff's motion for an accounting with respect to B & M Limited Liability Company is granted to the extent of ordering an accounting with respect to the affairs of 55BM LLC on a date to be set by the court.

Plaintiff's motion for an order directing the return of books and records is granted to the extent of directing defendant to provide plaintiff with access to the books and records of 55BM LLC. Plaintiff's motion for an order directing the turnover of books and records of B & M Limited Liability Company is denied, with leave to serve a notice for discovery (See CPLR 3120).

Common law trademarks and trade names may be protected by an action for unfair competition (*Allied Maintenance Corp v Allied Mechanical Trades*, 42 NY 2d 538, 542 [1977]). To state a cause of action for unfair competition, a likelihood of confusion, rather than actual confusion, is all that is required to be shown (Id at 543). Injunctive relief is difficult to secure unless the parties are in competition, or produce similar products or

services (Id). However, injunctive relief is more likely to be granted if plaintiff possesses a strong mark--one which has a distinctive quality or has acquired a secondary meaning which is capable of dilution (Id at 545).

Since defendant is operating under the trade name previously used by the parties, there is a likelihood of confusion. However, it is not clear from plaintiff's affidavit whether he is engaged in the solar panel business in competition with defendant. In any event, the name "Best Energy Power" is not distinctive. Nor has plaintiff made a showing that the name has acquired a secondary meaning, such as being associated with solar panels or a more efficient heating technology. Since plaintiff has failed to establish a likelihood of success on the merits, plaintiff's application for a preliminary injunction restraining use of the name "Best Energy Power" is denied.

So ordered.

Dated 25 May 10

Stephen A. Bucaria
J.S.C.

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