

150 Broadway N.Y. Assoc., L.P. v Shandell
2011 NY Slip Op 30831(U)
April 4, 2011
Supreme Court, New York County
Docket Number: 601950/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

150 BROADWAY N.Y.
ASSOCIATES, L.P.
- v -

INDEX NO. 601950/09

MOTION DATE _____

MOTION SEQ. NO. 28 004

MOTION CAL. NO. _____

Richard Shannell, Et Al.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

APR 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: APR 04 2011

[Signature]
HON. JUDITH J. GISCHE 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: IAS PART 10**

-----X
150 Broadway N.Y. Associates, L.P.,

Plaintiff (s),

-against-

Richard Shandell, Bert Blitz, Arthur Blitz,
Shosana Bookson, Shandell Blitz Blitz &
Bookson, LLP, Shandell Blitz Blitz &
Ashley, LLP, Mitchell H. Ashley, Esquire,
Ashley Law Firm, Ameer Benno, Esquire,
Drew Benenson, CPA and James H.
Shenwick, Esquire,

Defendant (s).

-----X

DECISION/ ORDER
Index No.: 601950/09
Seq. No.: 004
PRESENT:
Hon. Judith J. Gische

FILED

APR 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's OSC (prelim injunction) w/ARV affirm, exhs	1
ARV atty affirmation (re: typographical error)	2
Berenson opp w/JB affirm, exhs	3
MA opp w/MA affid, exh	4
Shenwick opp w/EDM affirm	5
Pltf's reply w/ARV affirm	6
Pltf's further reply w/ARV affirm, exhs	7
Transcript of OA on TRO 9/28/10	8

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff for unpaid rent, additional rent and other arrears (hereinafter "rent"). The various defendants are law firms and attorneys affiliated with those firms. Richard Shandell, Esq. is no longer in this action, as his motion for

summary judgment was previously granted by the court (Gische, J., Order, 5/10/10) ("prior order"). Plaintiff's motion for summary judgment was granted as to Arthur Blitz but denied as against Shoshana Bookson. Bert Blitz has defaulted in this action. Plaintiff has served an amended complaint adding new claims and new parties. Prior to this motion by plaintiff, one of the newly added defendants ("Shenwick") moved for the pre-answer dismissal of the claims against him (5th cause of action). That motion was granted by this court in its decision and order dated January 3, 2011.

Presently before the court plaintiff's motion for a preliminary injunction enjoining defendants Mitchell Ashley, Esq., the Ashley Law Firm, PLLC (collectively "Ashley defendants"), Ameer Benno, Esq. ("Benno"), Drew Benenson, CPA ("Benenson" or "accountant"), Shenwick and each of their attorneys from disbursing and/or distributing any of the assets, etc., of the law firm once known as "Shandell, Blitz, Blitz & Ashley." Shenwick, Ashley and Benenson oppose the motion.

Given the extensive litigation in this case thus far, the reader is presumed to be familiar with the prior orders of the court.

Facts alleged and arguments presented

Plaintiff was the landlord for Shandell Blitz Blitz & Bookson, LLP (SBB&B) which later became known as Shandell Blitz Blitz & Ashley, LLP ("Shandell Ashley"). Eventually the firm fell into arrears on its rent and plaintiff brought a nonpayment proceeding against SBB&B. Plaintiff obtained a money judgment against SBB&B for \$257,378.72. The action at bar seeks to enforce the judgment against the attorneys who personally guaranteed SBB&B's obligations under the lease, hereinafter referred to as the "guaranteeing defendants."

Shandell Ashley is in the process of dissolution. It hired Benenson as its accountant and Shenwick as its attorney. Although initially Benenson was identified as the liquidating agent, the Ashley defendants have retreated those statements and acknowledge that Mitchell Ashley is, himself, handling the payments being made from the law firm's receipts. Plaintiff alleges that although the Ashley defendants are taking in legal fees in connection with personal injury cases that it has settled, only the paltry sum of \$5,000 has been distributed to plaintiff and its judgment against SBB&B remains unsatisfied. Plaintiff claims this is Mitchell Ashley is incapable of being objective in deciding who gets paid what and this is an inherent conflict of interest for Ashley. Thus plaintiff not only seeks an order enjoining defendants from making any further distributions or disbursements of any of the legal fees in any of the cases they are handling (or were handled), they also seek an accounting.

Discussion

At the outset, plaintiff's motion for an accounting is denied for the same reason that similar relief was denied in connection with the motion that Shenwick brought to dismiss the claim against him (Order, Gische J., 1/3/11). Absent a statutory right or fiduciary relationship, plaintiff has no right to an accounting (see In re Hunter, 4 N.Y.3d 260 [2005]; Hathaway v. Clendening Co., 135 A.D. 407 [1st Dept. 1909]).

Plaintiff is also seeking a preliminary injunction, enjoining all the defendants from disbursing and distributing any of the law firm's receivables, properties, assets, etc. A party moving for such relief must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor (see CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d

839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Although the movant does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept 2001]). Generally a preliminary injunction will be denied unless the relief is necessitated and justified from the undisputed facts (O'Hara v. Corporate Audit Co., 161 AD2d 309 [1st Dept 1990]) because a preliminary injunction prevents a litigant from taking actions that it is otherwise legally entitled to take in advance of an adjudication on the merits (Uniformed Firefighters Ass'n of Greater New York v. City of New York, 79 N.Y.2d 236, 241 [1992]).

The relief that plaintiff is seeking reaches too far into the dissolution process and plaintiff has no right to it. This is a voluntary dissolution by a professional corporation, not a judicial dissolution. Plaintiff is not a shareholder of the dissolving corporation but a creditor. The claims that plaintiff has made about how assets are being distributed are far beyond the narrow scope of this case and are more commonly associated with the litigation of these issues in a dissolution proceeding (see, Goldberg v. Harwood, 88 NY2d 911 [1996]).

Although plaintiff has a money judgment against Shandell, Blitz, Blitz & Bookson, LLP, it has not judgment against any of the guaranteeing defendants in this action or the firm of Shandell Ashley. Consequently, plaintiff is not a secured creditor but a general creditor. It is well established law that a general creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor prior to obtaining judgment (Credit Agricole Indosuez v. Rossiyskiy Kredit

Bank, 94 N.Y.2d 541 [2000]). Thus, even if the anticipated judgment might include permanent injunctive relief, the acts of the debtor in disposing of assets will not have produced cognizable injury to the plaintiff" and thus will not support a temporary injunction (Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d at 549).

Shandell Ashley has obligations towards all of its creditors, not just plaintiff. Ashley has explained that the firm has a secured creditor (Capital One Bank) and that he has reached an agreement with the bank, obligating him to pay 60% of the firm's receipts to that lender. Since Shandell Ashley has closed for business, whatever legal fees it is taking in have to be shared with other the other firms that have taken over those cases. All of these circumstances severely undercut plaintiff's claims, that it has priority in receiving monies from the defendants.

Plaintiff has not, in any event, satisfied any of the elements necessary for the issuance of a preliminary injunction. Leaving aside whether plaintiff has shown a likelihood of success on the merits, plaintiff has not shown "irreparable injury" or that the equities balance in its favor. "Irreparable injury" requires a showing of substantial prejudice caused by the acts sought to be restrained (generally, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1st Dept 2009]). The loss of monetary benefits is not "irreparable harm" because such injuries are compensable with money damages (Modern Telecommunications, Inc. v. Zimmerman, 140 AD2d 217, 221 [1st Dept 1988]).

Although a preliminary injunction may also be granted to maintain the *status quo*, even if the movant's success on the merits cannot be determined when the motion for that relief is brought, as a general rule, the decision to grant or deny a preliminary

injunction lies within the sound discretion of the Supreme Court (Doe v. Axelrod, 73 N.Y.2d 748 [1988]). Here, the *status quo* is that plaintiff's judgment against SBB&B is unpaid. Denial of the preliminary injunction does not change that.

Having failed to meet its burden of establishing its entitlement to a preliminary injunction, plaintiff's motion for that relief is denied in its entirety.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by plaintiff 150 Broadway N.Y. Associates, L.P. for a preliminary injunction is hereby denied in all respects; and it is further


ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 4, 2011

So Ordered:

FILED
APR 06 2011
NEW YORK
COUNTY CLERK'S OFFICE



Hon. Judith J. Gische, JSC