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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

MAUZONE MARKET PLACE LLC,	**TRIAL/IAS PART: 20** **NASSAU COUNTY**
Plaintiff,	**Index No: 002741-11** **Motion Seq. Nos. 1, 2 and 3**
- against -	**Submission Date: 5/2/11**
MAUZONE KOSHER PRODUCTS OF QUEENS, INC. and DAVID ITZKOWITZ,	
Defendants.	

The following papers have been read on these motions:

Order to Show Cause, Affirmation in Support and Exhibits.....x
Notice of Cross Motion, Affidavit in Support and Affirmation in Support.....x
Affirmation in Opposition to Plaintiff's motion.....x
Notice of Cross Motion and Affirmation in Opposition/Support.....x
Affirmation/ Memorandum of Law in Opposition to Plaintiff's Cross Motion..x
Reply Affirmation.....x

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiff on March 8, 2011, 2) the cross motion filed by Defendants on March 17, 2011, and 3) the cross motion filed by Plaintiff on March 28, 2011. For the reasons set forth below, the Court 1) denies the Order to Show Cause; 2) grants Defendants' cross motion to the extent that the Court a) dismisses the Complaint against Defendant David Itzkowitz; and b) dismisses the first and third causes of action against the corporate defendant Mauzone Home Kosher Products of Queens, Inc., incorrectly named as Mauzone Kosher Products of Queens, Inc., and otherwise denies Defendants' cross motion; and 3) grants Plaintiff's cross motion to amend the caption to correct the name of the corporate defendant to read MAUZONE HOME KOSHER PRODUCTS

OF QUEENS, INC. The Court directs Plaintiff to serve a copy of this Order on the Nassau County Clerk who shall **amend the caption** to correct the name of the corporate defendant to read MAUZONE HOME KOSHER PRODUCTS OF QUEENS, INC.

BACKGROUND

A. Relief Sought

Plaintiff Mauzone Market Place LLC ("Plaintiff") moves for an Order 1) precluding Defendants Mauzone Home Kosher Products of Queens, Inc.[1] ("Corporate Defendant") and David Itzkowitz ("Itzkowitz") (collectively "Defendants") from doing any advertising in the area known as the Five Towns under the name Mauzone; 2) precluding the Defendants from taking any orders for Passover foods for the year 2011, within a five (5) mile radius of Plaintiff's place of business; 3) requiring Defendants to take and fulfill any and all orders for Passover foods received by the Plaintiff and forwarded to the Defendants; 4) requiring an accounting from Defendants of all monies received by the Defendants for orders for the high holidays within a five mile radius of Plaintiff's place of business for the year 2010; and 5) relieving Plaintiff of the payments owed to Defendants under the Note executed at the time of the closing until the amount of damages can be determined.

Defendants cross move for an Order, pursuant to CPLR §§ 3211(a)(1), (5), (7), and (8), and 3211(c), dismissing the Complaint.

Plaintiff cross moves for an Order amending the caption of this action to correct the name of the Corporate Defendant to read MAUZONE HOME KOSHER PRODUCTS OF QUEENS, INC.

Based on the Court's conclusion that the requested amendment of the caption is appropriate to correct a *de minimis*, typographical error, the Court's decision will focus primarily on the relief sought by Plaintiff in its Order to Show Cause and Defendants' motion to dismiss the Complaint based on the insufficiency of the Complaint.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Gross Aff. in Supp.) alleges as follows:

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[1] As noted *supra*, Plaintiff named the corporate Defendant as Mauzone Kosher Products of Queens, Inc. instead of Mauzone **Home** Kosher Products of Queens, Inc., but the Court is granting Plaintiff's motion to amend the caption to reflect the correct name of the corporate Defendant.

Plaintiff is a limited liability company ("LLC") doing business in the State of New York ("New York"), County of Nassau. The Corporate Defendant is a corporation doing business in New York. Itzkowitz, the principal of the Corporate Defendant, is a resident of Nassau County, New York.

The business at issue is a retail kosher food store ("Store") located at 341 Central Avenue, Lawrence, New York. Amanda Gluck ("Gluck") entered into a contract with the Corporate Defendant for the purchase and sale of the Store from the Corporate Defendant to Plaintiff on or about May 25, 2010 as reflected by the contract ("Contract") provided (Ex. A to Compl.). The Contract designates the Corporate Defendant as the Seller and Gluck as the Buyer. On or about June 28, 2010, Gluck assigned the Contract to the Plaintiff, as reflected by the Assignment of Contract ("Assignment") provided (*id.* at Ex. B). The area in which the Store is located is known as the Five Towns of Nassau County ("Five Towns"), a predominantly Orthodox Jewish community.

As per the terms of the Contract, Plaintiff paid to the Corporate Defendant $175,000 consisting of a $75,000 cash payment and the execution of a Promissory Note ("Note") (Ex. C to Compl.) for the remaining $100,000. The purchase and sale of the Store included the equipment therein, and the Corporate Defendant was required to provide to Plaintiff recipes for the preparation of the food to be sold by Plaintiff.

At the closing ("Closing"), the Corporate Defendant executed a Bill of Sale (Ex. D to Compl.) which contained a restrictive covenant ("Restrictive Covenant") reading as follows:

> AND the Transferor [Corporate Defendant] further covenants and agrees to and with the Transferee [Plaintiff], not to re-establish, re-open, be engaged in, nor in any manner whatsoever become interested, directly or indirectly, either as employee, as owner, as partner, as agent or as stockholder, director or officer of a corporation, or otherwise, in any business, trade or occupation similar to the one hereby sold, within the area bounded -- within five (5) miles...for a term of five (5) years from the date of these presents.

The Complaint alleges that, almost immediately after the Closing, the Corporate Defendant began advertising in local papers in a manner suggesting that the Itzkowitz Family was still involved in the Store. Copies of two such advertisements are annexed as Exhibit E to the Complaint, one of which contains a heading reading "Mauzone is Still Here for You" followed by the language, in italics, "By the Itzkowitz, Shulman, and Strauss Families and all the

Mauzone employees."

In addition, prior to the sale of the Store, Defendants' catering business was known as Catering by Celebrations, and the name "Mauzone" never appeared in its advertisements or was used by that business. Plaintiff alleges that the sole reason that Defendants use the name "Mauzone" is to confuse the public and divert business from Plaintiff to Defendants. Defendants also allegedly changed the Store's website, after the sale, to remove references to the Store now owned by Plaintiff. As a result, during the high holidays in 2010, Defendants were able to divert business from Plaintiff and fulfilled orders in violation of the restrictive covenant.

The Complaint contains five (5) causes of action. In the first, Plaintiff seeks an accounting of business obtained by Defendants during the high holidays, to determine its damages. In the second, Plaintiff alleges that Defendants failed to provide Plaintiff with the promised techniques and recipes for preparation of food at the Store. In the third, Plaintiff alleges that Defendants breached their promise to continue to fill orders for Passover. In the fourth, Plaintiff seeks an Order 1) permanently enjoining Defendants from using the name Mauzone and indicating that there is a website or telephone number for the purpose of ordering food; 2) requiring Defendants to fulfill all Passover orders received by Plaintiff and forwarded to Defendants for fulfillment; and 3) relieving Plaintiff, pending the outcome of this action, from the requirement that it make payments due under the Note. The fifth cause of action alleges that Defendants have continued to run advertisements that are in violation of the Restrictive Covenant.

In his Affidavit in Support, Dovid Shragi Gross ("Gross") affirms that the purchase price for the Store was reached after Defendants submitted a statement of revenue and expenses to Plaintiff (Ex. B to Gross Aff. in Supp.) which reflected that income for the Passover holiday at the Store was $150,000. The parties agreed that Plaintiff would submit its Passover orders to the Defendants who would prepare and fulfill those orders at their commissary in Queens and return the orders to Plaintiff to distribute to customers who placed orders with Plaintiff. When Plaintiff discussed the placement of those orders, however, Itzkowitz advised Plaintiff that Defendants would not fulfill those orders. Plaintiff then learned that Defendants are still advertising for the placement of Passover orders at a competing business. Gross affirms that the loss of this potential $150,000 in business will be "disastrous" to Plaintiff (Gross Aff. at Supp. at ¶ 10) and

that Plaintiff relied on Defendants' representations regarding the Passover orders in purchasing the Store.

Defendants oppose Plaintiff's Order to Show Cause based on their contention that the Court should not permit Plaintiff to amend the caption and lacks jurisdiction to issue any relief with respect to the Defendants. Defendants also oppose Plaintiff's Order to Show Cause on the grounds, *inter alia*, that 1) the advertisement to which Plaintiff refers does not constitute an advertisement for Defendants; 2) this advertisement has not been distributed anywhere in the Five Towns since Passover of 2010; 3) the Buy-Sell Agreement (Ex. A to Compl.) provides that Seller retains the right to use the "Mauzone" name and recipes to operate its retail stores, catering and sale of its product to certain other caterers (Buy-Sell Agreement at ¶ 22) and, therefore, the advertisements at issue were permitted; 4) Defendants have complied with the Restrictive Covenant, which only limits Defendants' operation of a retail store; and 5) in light of paragraph 19 of the Buy-Sell Agreement, in which Plaintiff agreed that he had made an inquiry into the complete financial circumstances of the Seller, there is no basis for Plaintiff's application for an accounting.

In support of Plaintiff's cross motion to dismiss the Complaint, Itzkowitz affirms that he acted, at all relevant times, as an officer of the Defendant Corporation. Itzkowitz also affirms that he is not affiliated with Mauzone Kosher Products of Queens, Inc., but rather with Mauzone Home Kosher Products of Queens, Inc.

In support of Plaintiff's cross motion to amend the caption, Plaintiff's counsel affirms that, in checking his file, he realized that he inadvertently failed to include the word "Home" in the name of the Corporate Defendant in the caption. He submits that the proposed amendment does not prejudice Defendants, and suggests that Defendants' objection to the proposed amendment is merely an attempt to delay this matter.

C. The Parties' Positions

Plaintiff seeks the requested relief based on its allegation that Defendants breached their agreement to fulfill Passover orders, resulting in significant financial loss to Plaintiff. Defendants oppose Plaintiff's application, submitting, *inter alia*, that Plaintiff has not demonstrated Defendants' breach of the parties' agreement.

Defendants move to dismiss the Complaint against Itzkowitz on the grounds that he was

not a party, as an individual, to the underlying transaction, and Plaintiff makes no such allegation. Defendants also argue that the written agreement between the parties reflects the parties' entire agreement and precludes introduction of conversations between the parties. As the agreement was between two business entities, there is no basis for the asserted causes of action against Itzkowitz in its personal capacity. Plaintiff argues that the relevant agreement is not the Contract, which is of no significance now that the Closing has taken place, but rather the Bill of Sale. Plaintiff submits that dismissal of the action against Itzkowitz is not appropriate in light of the allegations that both Defendants violated the Restrictive Covenant as set forth in the Bill of Sale.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert

the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

Mandatory injunctive relief should not be granted *pendente lite* without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 (2d Dept. 2007).

B. Dismissal Standards

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference

which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

C. Personal Liability for Corporate Obligations

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996).

D. Relevant Contract Principles

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*

E. Accounting

The right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue. *Town of New Windsor v. New Windsor Volunteer Ambulance Corps, Inc.*, 16 A.D.3d 403, 404 (2d Dept. 2005).

F. Application of these Principles to the Instant Action

The Court grants Plaintiff's motion to amend the caption to correct the name of the corporate defendant to read MAUZONE HOME KOSHER PRODUCTS OF QUEENS, INC. In so ruling, the Court is guided by *Post v. County of Suffolk*, 80 A.D.3d 682 (2d Dept. 2011) in which the Second Department held, *inter alia*, that the trial court properly granted the branch of plaintiff's cross motion for leave to amend the caption to reflect the correct name of the defendant hospital. The hospital, St. Catherine of Siena Medical Center, had been sued as St. Catherine's Hospital of Sienna. *Id.* at 683 and 685. *See also Madison Physical Therapy, P.C. v. 3311 Shore Parkway Realty Corp.*, 79 A.D.3d 978 (2d Dept. 2010) (trial court properly granted plaintiff's cross motion to amend caption to correct misnomer in papers filed naming defendant

as 3311 Shore Parkway Corp. instead of 3311 Shore Parkway Realty Corp.).

The Court grants Defendants' motion to dismiss the Complaint against Defendant Itzkowitz because the agreements at issue were executed on behalf of the Defendant Corporation and the Plaintiff has not alleged any facts to warrant piercing the corporation. Thus, there is no basis for holding Defendant Itzkowitz personally liable for the allegations in the Complaint.

The Court also dismisses the first cause of action in the Complaint as against the Corporate Defendant, based on the Court's conclusion that there is no trust or fiduciary relationship that would establish Plaintiff's right to an accounting from the Corporate Defendant.

The Court also dismisses the third cause of action as against the Corporate Defendant, based on the Court's conclusion that the parties' Contract is a complete and integrated document that makes no mention of the Defendants' obligation to fill Passover orders. Moreover, paragraph 27 of the Contract states that the Contract constitutes the entire agreement between the parties and shall not be modified or changed except by written agreement subscribed to by the parties. Accordingly, extrinsic evidence may not be admitted with respect to the Contract and, given the absence of any provision in the Contract regarding Defendant filling Passover orders, this cause of action cannot be sustained.

The Court denies Plaintiff's application for injunctive relief based on the Court's conclusion that Plaintiff's injury, if any, is compensable by money damages. Moreover, Plaintiff has established no basis for its right to an accounting.

The Court directs Plaintiff to serve a copy of this Order on the Nassau County Clerk who shall **amend the caption** to correct the name of the corporate defendant to read MAUZONE HOME KOSHER PRODUCTS OF QUEENS, INC.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on June 15, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 6, 2011

HON. TIMOTHY S. DRISCOLL

J.S.C.