

Babaew v Shteymn

2011 NY Slip Op 31410(U)

May 18, 2011

Sup Ct, Nassau County

Docket Number: 003691/11

Judge: Stephen A. Bucaria

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

SHIMON BABA EW a/k/a SHIMON BABA EV,
as a Shareholder in ESSENTIAL NURSE
STAFFING INC. and ESSENTIAL NURSE
STAFFING INC.,

INDEX No. 003691/11

MOTION DATE: April 6, 2011
Motion Sequence # 001, 002, 003

Plaintiffs,

-against-

EDWARD SHTEYMAN, individually and as a
Shareholder of MERIDIAN NURSE
RECRUITERS INC., MAYA SHTEYMAN,
individually, BORIS BABA EW a/k/a BORIS
BABA EV, individually, SALEEM MOHAMMED,
individually, ESSENTIAL NURSE RECRUITERS
INC., STERLING PAYROLL SOLUTIONS INC.,
ESSENTIAL MEDICAL STAFFING INC.,
AMWAY PAYROLL SOLUTIONS INC.,
ADVANCED STAFFING PAYROLL, LLC,
METRO CARE SERVICES, LLC, PROFESSIONAL
CARE SOLUTIONS, LLC, SUPERIOR CARE
SOLUTIONS, LLC, IDEAL CARE SOLUTIONS,
LLC and JOHN AND JANE DOE # 1-10,

Defendants.

The following papers read on this motion:

Order to Show Cause..... XXX

Affirmation in Opposition.....	X
Affirmation in Support.....	XXX
Memorandum of Law.....	XX

Motion by plaintiffs for an order restraining defendants from transferring the assets of Essential Nurse Staffing, Inc, except in the ordinary course of business, and restraining defendants from destroying Essential Nurse's records is **granted** to the extent provided in the temporary restraining order. Motion by plaintiffs for an order appointing plaintiff Shimon Babaew as receiver of defendants' assets is **denied**. Motion by plaintiffs for an order imposing a constructive trust is **denied** with leave to renew upon the completion of discovery. Motion by plaintiffs for an order restraining defendants from utilizing Essential Nurse's trade secrets and confidential information is **denied**. Motion by plaintiffs for an order holding defendants Edward and Maya Shteyman and Meridian Nurse Recruiters, Inc. in contempt of court is **denied**.

Motion by defendants for an order dissolving Essential Nurse Staffing Inc. is **denied** with leave to renew upon proper papers. Motion by defendants for an order restraining plaintiff Shimon Babaew from disposing of the assets of Essential Nurse Staffing, destroying Essential Nurse's records, and restricting access to Essential Nurse's offices is **granted** to the extent provided in the temporary restraining order. Motion by defendants for an order restraining plaintiffs from defaming defendants or tortiously interfering with defendants' business is **denied**. Motion by defendants to divest plaintiff Shimon Babaew as an equity holder of Essential Nurse Staffing is **denied**. Motion by defendants to appoint defendants Edward and Maya Shteyman or a neutral third party as a receiver of Essential Nurse Staffing is **denied**.

This is a shareholder derivative action for breach of fiduciary duty and looting of corporate assets. Plaintiff Shimon Babaev is a 50 % shareholder of plaintiff Essential Nurse Staffing, Inc. Defendant Maya Shteyman is the other 50 % shareholder. The corporation was engaged in the business of providing nursing services. Shimon was responsible for recruiting nurses and developing customers. Defendant Edward Shteyman was in charge of financial matters for the corporation.

Plaintiffs allege that on February 3, 2011, Edward formed a new company, defendant Meridian Nurse Recruiters, Inc. Plaintiffs allege that defendants diverted Essential's business to Meridian by telling Essential's customers that the company had changed its name.

Plaintiffs further allege defendants stopped paying Essential's nurses and solicited them to work for Meridian. Plaintiffs allege that on February 25, 2011 defendants removed Essential's office equipment, furniture, and corporate records.

This action was commenced on March 10, 2011. Plaintiffs assert claims for misrepresentation, RICO, conversion, misappropriation of trade secrets, disparagement, misappropriation of corporate opportunity, misappropriation of corporate assets, breach of fiduciary duty, and tortious interference. Plaintiffs seek damages as well as an accounting with respect to Meridian.

By order to show cause dated March 10, 2011, plaintiffs move for an order imposing a constructive trust on defendants' assets, appointing plaintiff Shimon as receiver of Essential Nurse Staffing, restraining defendants from disposing of Essential's assets except in the regular course of business, restraining defendants from destroying Essential's records, and restraining defendants from utilizing Essential's trade secrets and other confidential information. In the order to show cause, the court granted a temporary restraining order, restraining defendants from disposing of Essential's assets except in the regular course of business, using or transferring Essential's trade secrets and confidential information, and destroying any of Essential's or defendants' records pending the hearing of the motion. The court further ordered defendants to maintain those records pending further order of the court.

By order to show cause dated March 23, 2011, plaintiffs move for an order holding defendants Edward and Maya Shteyman and Meridian Nurse Recruiters, Inc in contempt of court for violation of the court's temporary restraining order. Plaintiffs allege that defendants violated the TRO by continuing to operate Meridian, and particularly by soliciting business at a convention of the American College of Health Care Administrators on March 13, 2011.

By order to show cause dated April 5, 2011, defendants move for an order appointing defendants Edward and Maya Shteyman as receivers of Essential Nurse Staffing, restraining plaintiff Shimon Babaew from disposing of Essential's assets, restraining plaintiff Shimon Babaew from destroying Essential's records, enjoining plaintiff Shimon Babaew from defaming defendants, restraining Babaew from tortiously interfering with Meridian Nurse Recruiters, restraining plaintiff from restricting access to Essential Nurse's offices, dissolving Essential Nurse Staffing, and divesting plaintiff Shimon Babaew of his interest in the corporation.

In the order to show cause, the court granted a temporary restraining order, restraining

plaintiff Shimon Babaew from disposing of Essential's assets except in the regular course of business, destroying any of Essential's records, or defaming defendants pending the hearing of the motion.

Business Corporation Law § 1104(a) provides that the holders of 50 % of the voting shares may petition for dissolution on the ground that the directors are so divided respecting the management of the corporation's affairs that action by the board cannot be obtained, the shareholders are so divided that the election of directors cannot be obtained, or there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders. It is clear that the shareholders of Essential Nurse Staffing are deadlocked and dissolution would be beneficial to the shareholders.

However, Business Corporation Law § 1106(c) provides that a copy of the order to show cause shall be published as prescribed therein, at least once in each of three weeks before the time appointed for the hearing thereon, in one or more papers, specified in the order, of general circulation in the county in which the office of the corporation is located at the date of the order. It appears that the purpose of publication is to protect the rights of creditors of the corporation. In any event, an order of dissolution may not be granted until the statutory requirement of publication has been met (*Matter of WTB Properties, Inc.*, 291 AD2d 566 [2d Dept 2002]).

Accordingly, defendants' motion for an order dissolving Essential Nursing Services, Inc. is **denied** with leave to submit a new order to show cause, providing for publication as required by Business Corporation Law § 1106 and setting a proper hearing date.

Where a shareholder in a close corporation breaches his fiduciary duty by diverting a corporate opportunity, the other shareholder is injured only to the extent that he is entitled to a share in the profits which should have been earned by the corporation (*Glenn v Hoteltron Systems*, 74 NY2d 386, 392 [1989]). If defendants breached their fiduciary duties to plaintiffs by establishing a competing business, Meridian Nurse Recruiters, plaintiffs may be entitled to a share of the profits of that company. Accordingly, plaintiffs' motion for an order imposing a constructive trust on defendants' assets is **denied** with leave to renew upon the completion of discovery. Defendants' motion to divest plaintiff Shimon Babaew as an equity holder of Essential Nurse Staffing is **denied**.

The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits

(CPLR 6401; *Quick v Quick*, 69 AD3d 828 [2d Dept 2010]). A temporary receiver should be appointed only where there is clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interest in that property (Id). While the parties each seek possession of Essential Nurse's records, the temporary relief issued by the court should be adequate to preserve the records during the course of the litigation. Moreover, the appointment of either party as the receiver of the corporation would give an undue advantage to that party. Accordingly, plaintiffs' motion to appoint plaintiff Shimon Babaew as receiver of defendants' assets is **denied**. Defendants' application to appoint defendants Edward and Maya Shteyman or a neutral third party as a receiver of Essential Nurse Staffing is similarly **denied**.

Generally speaking, a trade secret is as any "formula, pattern, device, or compilation of information which is used in one's business and gives [one] an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Management v Janien*, 82 NY2d 395, 407 [1993]). In deciding a trade secret claim, the court should consider 1) the extent to which the information is known outside the business, 2) the extent to which it is known by employees and others involved in the business, 3) the extent of measures taken by the business to guard the secrecy of the information, 4) the value of the information to the business and its competitors, 5) the amount of effort or money expended by the business in developing the information, and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others (Id).

Plaintiffs have not established that Essential's list of nurses, or its method of recruiting, is entitled to trade secret protection. In particular, plaintiffs have not shown the amount of effort expended to develop this information or that it is not generally known within the health care industry. Accordingly, plaintiffs' motion for an order restraining defendants from utilizing Essential Nurse's trade secrets and confidential information is **denied**.

Plaintiffs have not established that defendants disposed of Essential Nurse's assets other than in the regular course of business, used Essential's trade secrets or confidential information, or destroyed any of Essential's business records. Accordingly, plaintiffs' motion to hold defendants Edward and Maya Shteyman and Meridian Nurse Recruiters, Inc. in contempt of court is **denied**.

Absent extraordinary circumstances, injunctive relief should not be issued in defamation cases (*Rombom v Weberman*, 309 AD2d 844 [2d Dept 2003]). The reason for


BABA EW, et al v SHTEYMAN, et al

Index no. 003691/11

this limitation is to avoid impermissible prior restraints on free speech (*Rose v Levine*, 37 AD3d 691 [2d Dept 2007]). The court concludes that defendants have not shown extraordinary circumstances sufficient to restrain plaintiffs from attempting to regain Essential Nurse's customers. Accordingly, defendants' motion for an order restraining plaintiffs from defaming defendants or tortiously interfering with defendants' business is denied.

So ordered.

Dated MAY 18 2011


J.S.C.

ENTERED
MAY 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE