

Kalish v Fernandez

2011 NY Slip Op 31571(U)

May 27, 2011

Sup Ct, Nassau County

Docket Number: 006179-11

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**SOLOMON KALISH and ADEX MANAGEMENT
CORP., individually and derivatively as members of
MRI ENTERPRISES, LLC**

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiffs,

**Index No: 006179-11
Motion Seq. Nos. 1 and 2
Submission Date: 5/24/11**

- against -

**BENITO FERNANDEZ, HORIZONS INVESTMENT
CORP., WARMINSTER INVESTMENT CORP.,
ALLAN HAUSKNECHT, M.D., COMPREHENSIVE
IMAGING OF NEW YORK, PLLC, and MRI
ENTERPRISES, LLC,**

Defendants.

-----X

The following papers have been read on these motions:

- Order to Show Cause, Emergency Affidavit in Support,
Affidavits in Support and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Defendants' Memorandum of Law in Opposition.....X**
- Order to Show Cause, Affirmation in Support,
Affidavit in Support and Exhibits.....X**
- Emergency Affirmation in Support.....X**
- Affidavits in Opposition and Exhibits.....X**
- Letter dated May 19, 2011.....X**

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiffs Solomon Kalish ("Kalish") and Adex Management Corp. ("Adex"), individually and derivatively as members of MRI Enterprises, LLC ("MRI-LLC") on April 26, 2011, and 2) the

Order to Show Cause filed by Defendants Benito Fernandez (“Fernandez”), Horizons Investment Corp. (“Horizons”), Warminster Investment Corp. (“Warminster”), Allan Hausknecht (“Hausknecht”), Comprehensive Imaging of New York, PLLC (“CINY”) and MRI Enterprises, LLC on May 4, 2011, both of which were submitted on May 24, 2011, following oral argument before the Court. For the reasons set forth below, the Court denies both Orders to Show Cause, except that the Court directs that the temporary restraining order issued by the Court on May 4, 2011 remains in effect. The Court vacates the temporary restraining order issued by the Court on April 26, 2011. Thus, the parties remain bound by the Court’s Order of May 4, 2011 directing that, pending further order of this Court, all parties shall 1) maintain and preserve all documents and records, including electronic data, that refer to MRI-LLC or CINY, or their assets; and 2) account for all sums removed from accounts belonging to CINY or MRI-LLC since 2005. Given that this temporary restraining order applies equally to both parties, and does not impose restraints on either party, the Court declines to require the posting of a bond.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR Article 63, 1) directing that Kalish is the Administrator of CINY and President of MRI-LLC; 2) directing Defendants to deposit and maintain all current and future revenues of CINY and MRI-LLC in connection with the provision of magnetic resonance imaging (“MRI”) services at hospitals operated by the New York City Health and Hospitals Corporation (“HHC”), including Lincoln Hospital (“Lincoln”) in the Bronx and Metropolitan Hospital in Manhattan (“Metropolitan”), in a segregated interest-bearing account (“Segregated Account”); 3) enjoining Defendants from making any payments from the Segregated Account to any of the Defendants, whatever the form of those payments; 4) enjoining Defendants from making any expenditures from the Segregated Account to any person except in the ordinary course of business and except with the written consent of the Plaintiffs; and 5) determining that the address of CINY and MRI-LLC should continue to be 8 Melton Drive West, Rockville Centre, New York 11570 (“RVC Address”), directing Defendants to rescind their recent efforts to change that address, and enjoining any future actions by the Defendants to change that address.

On April 26, 2011, the Court granted Plaintiffs a limited temporary restraining order

(“First TRO”) directing that, pending the hearing and determination of this motion, CINY and MRI-LLC shall operate in the normal course of business.

Defendants oppose Plaintiffs’ application, and move for an Order 1) enjoining and restraining Kalish, or any person or entity on his behalf, from a) terminating or threatening to terminate any employee of MRI-LLC and/or CINY, including, without limitation, Frank Santos; b) contacting any person or entity on behalf of or related in any way to MRI-LLC or CINY, including, without limitation, Metropolitan, Lincoln, HHC, Capital One Bank, N.A. (“Capitol One”), including, without limitation, in person, by phone, e-mail, text message, United States mail or through any agent, individual or entity; c) holding himself out as the manager of or as representing the interests of CINY or MRI-LLC in any manner; d) entering Metropolitan and Lincoln; e) entering the MRI-LLC business premises (“Premises”) located at 2689 Pitkin Avenue, Brooklyn, New York; f) withdrawing, transferring, taking, conveying or removing any funds or assets belonging to CINY or MRI-LLC; or g) transmitting, in any form, any communication or information that refers in any way to MRI-LLC, CINY, Horizons, Metropolitan, Lincoln, and HHC, or their current or former employees or members, Hausknecht and Fernandez; and 2) directing Kalish a) to maintain and preserve all documents and other records, including electronic data of MRI-LLC or CINY that relate to MRI-LLC or CINY and its assets; and b) to account to MRI-LLC and CINY for all sums removed from accounts belonging to CINY or MRI-LLC since 2005. Defendants also seek the costs and attorney’s fees incurred in filing their motion.

On May 4, 2011, the Court issued a second temporary restraining order (“Second TRO”) which directed that, pending further order of this Court, all parties shall 1) maintain and preserve all documents and records, including electronic data, that refer to MRI-LLC or CINY, or their assets; and 2) account for all sums removed from accounts belonging to CINY or MRI-LLC since 2005.

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. F to P’s OSC) describes this lawsuit as an action for declaratory and injunctive relief, as well as money damages, arising from the alleged breach of certain agreements concerning MRI-LLC and CINY. Kalish is the owner of Adex, which is a member of MRI-LLC with a 20% ownership interest. Until his removal in March of

2011 (“Removal”), Kalish was also the President of MRI-LLC and administrator of CINY. Horizons is a member of MRI-LLC with a 40% ownership interest. Fernandez owns and controls Horizons and Warminster. Plaintiffs’ subsequent references to Kalish encompass Adex, and their references to Fernandez encompass Horizons and Warminster. Hausknecht, a physician, is a member of MRI-LLC with a 20% ownership interest. Hausknecht owns CINY, a professional medical corporation.

In or about 2000, Kalish entered into an agreement (“Agreement”) with Hausknecht and Fernandez, as well as non-party Luciano Bonanni (“Bonanni”), for the purpose of establishing a business (“Business”) that provided MRI diagnostic services to patients in hospitals. Pursuant to the Agreement, CINY provided the medical functions relating to the MRI services, due to the legal restrictions requiring that those functions may only be provided by a licensed physician, or entity controlled by a licensed physician. Other functions, such as billing and bookkeeping, would be provided by MRI-LLC. After payment was made to CINY for the medical services it provided, the remaining revenues generated by MRI-LLC and CINY were used to pay the expenses of MRI-LLC, and the remaining profits were distributed to Kalish, Hausknecht, Fernandez and Bonanni according to their respective ownership interests.

In 2005, following Bonanni’s removal from the Business, the remaining members of MRI-LLC and CINY designated Kalish as the Administrator of CINY and President of MRI-LLC, and promised that he would be compensated for those services. Kalish has served in, and been compensated for, those positions since 2005. The parties executed certain documents to address the respective obligations of CINY and MRI-LLC in connection with providing MRI services at certain hospitals operated by HHC, including a 2004 Power of Attorney pursuant to which CINY authorized MRI-LLC to act on CINY’s behalf with respect to billing and financial matters. The parties also entered into an operating agreement for MRI-LLC in 2001, and then entered into a First Amended and Restated Operating Agreement for MRI-LLC in 2004 (“Operating Agreement”).

In or about 2003-2004, MRI-LLC entered into written agreements with HHC to provide MRI services at Lincoln and Metropolitan, which services were provided by CINY. HHC made its payments for MRI services to MRI-LLC, and MRI-LLC leased the space from HHC where the MRI services were provided. MRI-LLC incurred numerous expenses, including the purchase

and lease of MRI machines. Plaintiff alleges that the revenues (“Revenues”) that MRI-LLC received from HHC were subject to the Agreement’s provisions regarding the allocation and distribution of those Revenues, as well as the Power of Attorney.

In 2010, the contracts governing the provision of MRI services to Lincoln were revised (“2010 Contracts”). The 2010 Contracts provided that all revenues resulting from the providing of MRI services would now “flow” to CINY (Compl. at ¶ 25), but MRI-LLC would continue to be responsible for renting space and providing the MRI equipment. Kalish affirms that he signed the 2010 Contracts based on the representations of Hauknecht and Fernandez that 1) Kalish would continue to receive compensation from MRI-LLC and/or CINY as Administrator and President; and 2) Kalish would continue to receive 20% of the profits from the Business.

Plaintiffs allege that, in 2005, Fernandez and Hausknecht improperly ousted Bonnani from the Business. That dispute is the subject of a lawsuit pending in the Supreme Court of Suffolk County. Kalish was subsequently designated the Administrator of CINY and President of MRI-LLC, and Fernandez prepared a resolution dated June 28, 2007 (“2007 Resolution”). The 2007 Resolution “effectively provided” (Compl. at ¶ 30) that profits generated by MRI-LLC and CINY would be distributed through CINY in the form of fees to Kalish, Hausknecht and Fernandez.

In 2010, a dispute arose between Kalish, and Fernandez and Hausknecht, regarding issues including the timing of certain loan repayments and the amount of distributions taken by Hausknecht and Fernandez. Plaintiffs allege that Fernandez and Hausknecht decided to remove Kalish from participating in the Business and receiving distributions, and took advantage of a federal indictment filed against Kalish, which was unsealed in early 2011 (“Indictment”) to effect this plan. In March of 2011, Hausknecht sent a letter to HHC that 1) directed HHC to send future payments to Fernandez’ office in Brooklyn, rather than the MRI-LLC address in Rockville Centre; and 2) advised HHC that Kalish was no longer involved in the Business. By subsequent letter dated March 30, 2011, Hausknecht “purported to fire” Kalish as CINY’s Administrator (Compl. at ¶ 38). Plaintiffs allege that the firing (“Firing”) of Kalish was unjustified, and that Defendants directed HHC to forward the payments to Fernandez’ office in an effort to control MRI-LLC’s funds, and divert them to CINY, of which Kalish was not a

record owner.

The Complaint contains thirteen (13) causes of action: 1) breach of the Agreement by the Firing of Kalish, 2) breach of the Agreement by diverting HHC payments to CINY and thereby depriving Plaintiffs of monies due them, 3) breach of the Operating Agreement by the Firing, which was effected without the required vote, 4) breach of the Operating Agreement by diverting HHC payments to CINY without the required notice and vote, 5) request for a constructive trust on revenues received by CINY from HHC pursuant to the 2010 Contracts, 6) unjust enrichment by Fernandez and Hausknecht, 7) conversion of MRI-LLC assets by Hausknecht, Fernandez and CINY, 8) breach of fiduciary duty by Hausknecht and Fernandez, 9) a derivative claim on behalf of MRI-LLC, for which any demand would be futile; 10) waste of MRI-LLC's assets by Hausknecht and Fernandez, 11) request for a declaratory judgment as to Kalish's continued employment, the Firing, the address to which HHC payments should be sent, the diversion of funds to CINY, sums owed by CINY to MRI-LLC, and the amount of profit distributions due to Plaintiff, 12) a request for preliminary and permanent injunctive relief, and 13) a request for an accounting from Defendants.

In his Affidavit in Support, Kalish affirms the truth of the allegations in the Complaint regarding the Agreement, Operating Agreement, Firing and allegedly improper conduct by Defendants. Kalish also affirms that he has been actively involved with HHC in ensuring that MRI services are provided to Lincoln and Metropolitan and that, without his involvement, those services will be compromised and the HHC contracts jeopardized. Kalish provides a copy of an e-mail dated April 19, 2011 from HHC (Ex. G to Kalish Aff. in Supp.) that makes reference to the parties' disputes. That e-mail ends with the following language: "So long as our patients continue to be well served, we will tolerate this situation as long as necessary. Be assured, however, that if there is any indication that services to our patients are being compromised we shall move promptly to terminate our relationship with [MRI-LLC] and [CINY]."

Kalish also affirms that HHC owes CINY and MRI-LLC approximately \$330,000 for services rendered, and that CINY owes MRI-LLC millions of dollars for the functions it has performed in providing MRI services. Kalish submits that, until the parties' disputes are resolved, revenues from HHC for MRI services should be kept in a segregated account, and used only for legitimate business purposes.

Kalish submits that injunctive relief is appropriate on the grounds that 1) Plaintiffs have demonstrated a likelihood of success on the merits by demonstrating Defendants' breach of the Agreement and Operating Agreement; 2) without injunctive relief, irreparably injury will occur because HHC may terminate its contracts with Defendants due to unsatisfactory MRI services and billing issues; and 3) a balancing of the equities favors Plaintiffs, who are attempting to maintain the *status quo*.

Plaintiffs provide an Affidavit of Bonanni, who describes Defendants' allegedly improper ouster of him from MRI-LLC, confirms Kalish's involvement in overseeing the provision of MRI services, and affirms that he would not have voted to remove Kalish from MRI-LLC, based on his belief that the remaining members of MRI-LLC are not capable of operating CINY and MRI-LLC. Bonanni also submits that Hausknecht and Fernandez' purpose in directing HHC to send future bills to Fernandez' address was to exclude Kalish from monies to which he was entitled.

In opposition, Hausknecht affirms that the Indictment¹ (Ex. D to Ds' Opp.) charges that Kalish paid bribes to individuals in exchange for giving benefits to certain hospitals in New York City. HHC has advised Hausknecht of it concerns that Kalish, in light of the Indictment, creates the appearance of impropriety with respect to HHC's relationship with MRI-LLC and CINY. Defendants do not provide an affidavit of an HHC, Metropolitan or Lincoln representative in support of this assertion. Hausknecht also asserts that, in light of the Indictment, CINY and MRI will suffer irreparable harm if Kalish obtains the injunctive relief he requests. Hausknecht submits that Kalish's Firing, and termination as Administrator and Manager of CINY, was warranted in light of the Indictment. Hausknecht also alleges that Kalish failed to bill the hospitals during from January through March of 2011, thereby depriving MRI and CINY of significant revenue.

Defendants also provide an unsworn statement of Frank Santos ("Santos"), an MRI technologist for MRI-LLC. Santos provides details regarding Kalish's allegedly improper conduct, including threatening to terminate Santos' employment with MRI-LLC.

In response, Kalish disputes that his actions will harm the Defendants' contractual

¹ The document referred to as the Indictment is, more precisely, a Complaint.

relationship with HHC, and provides an e-mail from HHC dated April 5, 2011 (Ex. H to Kalish Aff. in Opp.) in which HHC's General Counsel confirms that HHC takes no position regarding Kalish's role in MRI-LLC. The e-mail stated, further, that HHC would disregard communications from Kalish and Hausknecht, and "[does] not want to be in the middle of somebody else's fight."

Kalish also submits that Santos' claims are false or misleading. Kalish describes improper conduct in which Santos has engaged, including overbilling Metropolitan for overtime that he did not work, and arranging an MRI for a patient's hip when he was supposed to conduct an MRI for the patient's knee. Kalish also denies Santos' claims that Kalish cut off his medical benefits, and affirms that it was Fernandez who terminated the health insurance coverage of MRI-LLC and cancelled the check that Kalish had sent to pay for this coverage.

C. The Parties' Positions

Plaintiffs and Defendants submit that they have demonstrated their right to injunctive relief by demonstrating a likelihood of success on the merits, irreparable harm and a balancing of the equities in their favor. Plaintiffs submit that if the Court does not grant the injunctive relief they seek, it will adversely affect the viability of MRI-LLC and the provision of MRI services to patients at Metropolitan and Lincoln. Defendants submit that if the Court does not grant the requested injunctive relief, their contracts with HHC will be terminated and the Business will suffer.

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. Application of these Principles to the Instant Action

The Court denies the parties' applications for injunctive relief, based on the Court's conclusion that the parties have not established irreparable injury. Even assuming, *arguendo*, that either party has demonstrated a likelihood of success on the merits, the Court concludes that the alleged injuries are compensable by money damages. Moreover, neither party has demonstrated that it is likely to suffer the significant potential injury it describes.

Plaintiffs rely on e-mails from HHC in support of their assertion that HHC may terminate Defendants' contracts. A review of those e-mails is telling, in that the e-mails suggest that HHC does not currently intend to make changes to its MRI arrangements, and wishes to refrain from involvement in the parties' disputes. Indeed, the April 19, 2011 e-mail states that "So long as our patients continue to be well served, we will tolerate this situation as long as necessary. Be assured, however, that if there is any indication that services to our patients are being compromised we shall move promptly to terminate our relationship with [MRI-LLC] and [CINY]." A reasonable interpretation of this language is that the patients are currently being well served, and HHC will make a change only if that situation changes. By contrast, there is no indication from the cited language that the situation, in fact, has changed for the worst. The other e-mail explicitly reflects HHC's desire not to become entangled in the parties' litigation, and its intention to disregard correspondence from the parties.

Similarly, Hausknecht asserts that the Indictment will inevitably lead to the termination of the contracts with HHC and a loss of business. Defendants provide no correspondence or other documentation from HHC in support of that assertion. With respect to Hausknecht's assertion that continuing to employ Kalish will adversely affect revenues, that claim is compensable by money damages.

In sum, neither party has persuaded the Court that the irreparable harm they describe will likely occur. Moreover, it is equally plausible, and consistent with the HHC e-mails, that it is the parties' divisive conduct and public jockeying for position, rather than the criminal allegations, that will alienate HHC and adversely affect the Business.

In light of the foregoing, the Court denies both Orders to Show Cause, except that the Court directs that the Second TRO shall remain in effect. Given that the Second TRO applies

equally to both parties, and does not impose restraints on either party, the Court declines to require the posting of a bond. The Court vacates the First TRO. Indeed, the enmity between the parties suggests that they would find it difficult to agree on their "normal course of business." The Court's view is buttressed by the letter of Plaintiffs' counsel dated May 19, 2011, in which Plaintiffs' counsel asserts that Defendants have violated the First TRO by, *inter alia*, 1) preventing Kalish from continuing to serve as the on-site representative, in connection with the provision of MRI services, at Lincoln and Metropolitan; and 2) preventing Kalish from continuing to collect checks from HHC and depositing those funds into the appropriate bank accounts. The Court is reluctant, at this nascent state in the litigation and on this limited record, to make a determination as to the parties' "normal course of business."

All matters not decided herein are hereby denied.

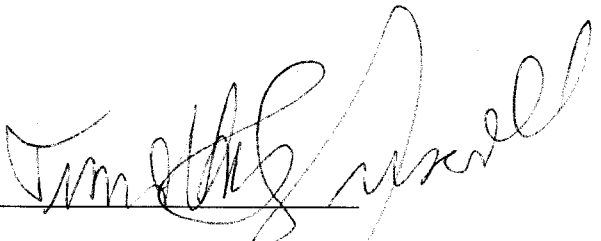
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on June 20, 2011 at 9:30 a.m. for a Preliminary Conference. **The parties need not appear on May 31, 2011.**

ENTER

DATED: Mineola, NY

May 27, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

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