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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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In Re State Wars Hockey Inc. Derivative Litigation

TRIAL/IAS PART: 20
NASSAU COUNTY

---x

Jason Domitrovic, as a shareholder and in his official, individual and derivative capacities,

Plaintiff,

- against -

Timothy McManus, in his official and individual capacities,

Defendants.

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Index No: 007615-11
Submission Date: 7/8/11
Motion Seq. No. 1

The following papers have been read on this motion:

Order to Show Cause and Affirmation of Urgency.....x
Affirmation in Support, Affidavit in Support and Exhibits.....x
Affidavit in Opposition, Affirmation in Opposition and Exhibits....x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff on May 24, 2011 and submitted on July 8, 2011. For the reasons set forth below, the Court denies the Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order 1) granting a preliminary injunction restraining the ability of Defendant, or anyone acting on his behalf, from removing, spending or otherwise improperly diverting the interests of State Wars Hockey Inc. ("Company"); and 2) placing the Company into

receivership.

Defendant opposes Plaintiff's application.

B. The Parties' History

The Verified Complaint ("Complaint") alleges as follows:

Plaintiff Jason Domitrovic and Defendant Tim McManus are equal shareholders of the Company which was formed in 2004 in California ("Formation") and, in 2007, became a New York corporation ("Move"). Prior to the Move, Plaintiff was the President and Secretary of the Company. After the Move, Plaintiff became the Vice President of the Company. Prior to the Move, Defendant was the Vice President and Treasurer of the Company. Following the Move, Defendant became the President of the Company.

At the time of the Formation of the Company, each party owned 50% of the Company and each made a capital contribution in the amount of $2,500. A friend of Plaintiff contributed an additional $32,825.00 on Plaintiff's behalf for legal fees and services rendered for the Company. The Company is the coordinating entity for roller hockey tryouts throughout the United States and Canada, and plans and executes tournaments in exchange for fees paid by the participants.

Allegations on behalf of the Company

At an unknown point in time, Defendant participated in the creation of a company called Roller Hockey Alliance ("RHA"). Plaintiff alleges that Defendant is an owner of, and profits from, RHA. Defendant allegedly used the Company's website to market and sell insurance policies, which participants are required to purchase as a condition of participation with the Company. Defendant did not disclose his involvement with RHA to Plaintiff, and misled Plaintiff into believing that RHA did not benefit from the Company's business.

Plaintiff also alleges that Defendant is involved in a company known as Mission Labeda Challenge ("MLC") which competes directly with the Company. Defendant has allegedly diverted business from the Company to MLC, and has refused to provide Plaintiff with information regarding the withdrawal of Company funds. Thus, Plaintiff, submits, a formal demand for an accounting is futile.

Individual Allegations on behalf of Plaintiff

Plaintiff and Defendant discussed the formation of a similar business for soccer, called State Wars Soccer ("SWS"). Defendant has prevented Plaintiff from participating in SWS which "is acting under SWH's corporate status" (Compl. at ¶ 29). The parties intended that Plaintiff would have a 35% share in SWS but Defendant has prevented Plaintiff from participating in, or profiting from, SWS despite Plaintiff's status as an owner of SWS. Defendant has also received money from SWS which he has not shared with Plaintiff, in violation of the parties' agreement. The Company is now operating under the name "State Wars Club Hockey" and performing services under that name.

In December of 2009, Defendant changed the passwords on the Company's AmeriTrade, Paychex, checking, savings and Facebook accounts, thereby preventing Plaintiff from gaining access to those accounts and exercising his ownership rights in the Company. Defendant also prevented Plaintiff from using the Company's credit card.

The Complaint contains three (3) derivative claims against Defendant: 1) breach of fiduciary duty, 2) fraud, and 3) embezzlement. The Complaint also contains six (6) individual claims against Defendant: 1) fraud, 2) unjust enrichment, 3) breach of fiduciary duty, 4) request for an accounting, 5) conversion with respect to Company assets, and 6) conversion with respect to SWS assets.

In his Affidavit in Support, Plaintiff affirms the truth of the allegations in the Complaint regarding the formation and history of the Company. He provides financial summaries (Ex. D to Domitrovic Aff. in Supp.) in support of his assertion that the Company is profitable. Plaintiff makes reference to November 4 and November 5, 2009 emails that Defendant sent to Plaintiff (*id.* at Ex. F) which he Plaintiff characterizes as containing "numerous accusations and personal matters" (Domitrovic Aff. in Supp. at ¶ 11). In those emails, Defendant stated, *inter alia*, that 1) Plaintiff had kept secrets from, and lied to, Defendant over the past several years; 2) Plaintiff had not advised Defendant that Plaintiff was considering moving to Hawaii to work for an individual named Richard; 3) Defendant had concerns about the woman that Plaintiff was going to marry, including the fear that the marriage would adversely affect the Company; 4) Plaintiff was not as motivated at work as he had been in the past; 5) the Company was Defendant's idea;

6) Defendant handled the majority of the Company's business; and 7) Defendant did not wish to continue to be Plaintiff's partner.

In October of 2009, Defendant's counsel advised Plaintiff that Defendant wished to buy him out. Plaintiff affirms the truth of the allegations in the Complaint regarding Defendant changing various Company passwords and avers that, as a result, Plaintiff was unable to pay Company bills. Plaintiff has not received payments from the Company since November 2009 and Defendant continues to deprive Plaintiff of access to Company information.

Plaintiff affirms, further, that Defendant is involved in a competing entity called State Wars Sports, and it was Plaintiff who suggested that name when the Company was first formed. Plaintiff also affirms the truth of the allegations in the Complaint regarding Defendant's improper diversion of Company funds to RHA and MLC, and Defendant's refusal to provide Plaintiff with information regarding the Company. Plaintiff provides an email (Ex. U to Domitrovic Aff. in Supp.) dated September 26, 2010 from a participant in the programs provided by the Company to Plaintiff in which the participant expresses his opinion that the quality of the Company's services has declined as a result of Plaintiff's lack of involvement in the Company.

In opposition, Defendant affirms, *inter alia*, that 1) Plaintiff has not worked diligently for the Company, as reflected by the numerous emails provided (Ex. 1 to McManus Aff. in Opp.) in which Defendant addressed those concerns; 2) as a result of Plaintiff's poor work ethic, and overspending, Defendant decided in 2009 that he no longer wished to work with Plaintiff; 3) Defendant's decision to stop working with Plaintiff was further supported when he learned that Plaintiff intended to move to Hawaii to take a second position with another company; 4) following that decision, Defendant offered to buy Plaintiff out and the parties began to negotiate that buyout; 5) the parties reached an agreement regarding the buyout and scheduled a closing date (*see* correspondence at Ex. 3 to McManus Aff. in Opp.), but Plaintiff canceled the closing; 6) another closing was scheduled, which Plaintiff also canceled; 7) Defendant advised Plaintiff that the buyout offer would be withdrawn if not accepted by a particular date; 8) Plaintiff's attorney advised Defendant's attorney in July of 2010 that he no longer represented Plaintiff; 9) Plaintiff did not contact Defendant until he commenced this action; 10) Defendant never diverted business opportunities from the Company; 11) Defendant's involvement in RHA,

an entity that Defendant and others created in 2009 to address insurance issues involved in Company events, was on the advice of counsel and accounting personnel who recommended that Defendant take efforts to insulate SWH from liability in the event that a participant was injured; 12) Plaintiff was aware of RHA and never voiced any objection to it; 13) in light of Plaintiff's imminent move to Hawaii, Defendant pursued SWS but never diverted corporate opportunities from the Company; and 14) Defendant is unaware of the organizations called State Wars Club Hockey and State Wars Sports to which Plaintiff refers.

C. The Parties' Positions

Plaintiff submits that he has demonstrated his right to the requested relief by establishing that Defendant 1) diverted Company resources and prohibited Defendant from using Company funds; 2) made misleading and/or false statements to Plaintiff to secure profits for himself; and 3) withdrew funds from Company accounts without Plaintiff's consent. Plaintiff contends that, without the requested injunctive relief, there will be a wasting of Company assets rendering those assets unavailable to Plaintiff. Plaintiff also argues that the appointment of a temporary receiver is necessary to ensure that Defendant does not further deplete the value and assets of the Company.

Defendant opposes Plaintiff's application, submitting, *inter alia*, that 1) Plaintiff has provided "no concrete evidence or documentation" (Ostar Aff. in Opp. at ¶ 8) establishing that Plaintiff has diverted Company assets or information; 2) Plaintiff has failed to provide evidence in support of his claim that Defendant has engaged in mismanagement or conversion of Company property, or breached his fiduciary duty to Plaintiff; 3) Defendant has provided information suggesting that he has defenses to this action, including the equitable doctrine of laches in light of Plaintiff's failure to act after the buyout did not materialize; 4) Defendant has provided proof that RHA is an independent venture that does not compete with the Company; 5) Defendant has affirmed that MLC was a small business operated by a friend, to whom Defendant provided advice, and Defendant never diverted Company assets to MLC; 6) many of Plaintiff's allegations are on information and belief, and Plaintiff has failed to state the nature of the assets diverted or information allegedly provided to competing entities; 7) Plaintiff violated his fiduciary duty to Defendant by, *e.g.*, taking a full-time position in Hawaii while representing to Defendant that he

was fully committed to working for the Company; 8) the Court should consider Plaintiff's failure to take action for almost a year after the closing on the proposed buyout did not materialize; and 9) Plaintiff has failed to make the requisite showing to warrant the appointment of a temporary receiver in light of his failure to demonstrate that Defendant has depleted the value and assets of the Company.

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).

B. Appointment of a Receiver

With respect to Plaintiff's application for the appointment of a receiver, CPLR § 6401 provides as follows:

> (a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.
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> (b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.
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> (c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

The appointment of a receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. *Vardaris Tech v. Paleros Inc.*, 49 A.D.3d 631, 632 (2d Dept. 2008), quoting *Schachner v. Sikowitz*, 94 A.D.2d 709 (2d Dept. 1983). The court should grant a motion seeking such an appointment only when the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests. *Id.*, quoting *Lee v. 183 Port Richmond Ave. Realty*, 303 A.D.2d 379, 380 (2d Dept. 2003). In *Valderis*, *supra*, the Second Department reversed the trial court's order granting plaintiff's motion for appointment of temporary receiver in light of plaintiff's failure to make the required evidentiary showing. *Id.* at 631-632.

C. Application of these Principles to the Instant Action

The Court denies Plaintiff's application for injunctive relief based on the Court's conclusion that, in light of the conflicting affidavits and documentation corroborating Defendant's claim that the parties negotiated a buyout over a year ago, Plaintiff has not demonstrated a likelihood of success on the merits. The Court notes that the emails provided by Plaintiff corroborate Defendant's claims regarding the reasons that he decided to terminate his business relationship with Plaintiff.

The Court also concludes that Plaintiff has not demonstrated a threat of irreparable harm without the requested injunctive relief, in light of the Court's conclusion that any injury is compensable by money damages, and in consideration of the Plaintiff's delay in filing this action following the parties' buyout discussions. Moreover, in light of the conflicting affidavits regarding the extent to which the parties contributed to the success of the Company, Plaintiff has not demonstrated that the equities balance in his favor.

The Court also denies Plaintiff's application for the appointment of a temporary receiver, based on the Court's conclusion that, in consideration of the factual disputes outlined *supra*, Plaintiff has not made a clear evidentiary showing of the necessity for the conservation of the Company's property to protect his interests.

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 for a Preliminary Conference on August 2, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 25, 2011

HON. TIMOTHY S. DRISCOLL

J.S.C.