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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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STEPHEN KATZ, MICHAEL LOEB, DONALD CHAIFETZ and JAMES V. ZIZZI,

Plaintiffs,

- against -

BARRY J. BEIL and STANLEY PINE,

Defendants.

---x

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 600510-11
Submission Date: 8/9/11
Motion Seq. No. 1

The following papers have been read on this motion:

Order to Show Cause, Affirmation in Support,
Affidavit in Support and Exhibits.....x
Emergency Affirmation.....x
Affidavit in Support of L. Fink.....x
Memorandum of Law in Support.....x
Affidavit of B. Beil and Exhibits.....x
Affidavit of S. Pine.....x
Affidavit of R. Beil.....x
Affidavit of T. Lennon.....x
Affidavit of B. Curran and Exhibit.....x
Affidavit of S. Tarnofsky.....x
Affidavit of R. Anrig.....x
Affidavit of L. Hoffman and Exhibit.....x
Affidavit of L. Citarelli and Exhibit.....x
Affidavit of R. Michne and Exhibit.....x
Affidavit of R. Pace.....x
Affidavit of S. Feinstein and Exhibit.....x
Affidavit of A. Liguori.....x
Affidavit of E. Howard.....x
Memorandum of Law in Opposition.....x

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiffs Stephen Katz ("Katz"), Michael Loeb ("Loeb"), Donald Chaifetz ("Chaifetz") and James V. Zizzi ("Zizzi") (collectively "Plaintiffs") on June 23, 2011 and submitted on August 9, 2011. For the reasons set forth below, the Court denies Plaintiffs' Order to Show Cause in its entirety, and vacates the temporary restraining order issued by the Court on June 23, 2011, and amended on June 30, 2011.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR §§ 6301 and 6313, 1) preliminarily enjoining Defendants Barry J. Beil ("Beil") and Stanley Pine ("Pine") (collectively "Defendants") from using or continuing to use assets belonging to the Hampton Hills Associates General Partnership ("Partnership") to pay legal fees or expenses incurred in connection with this action to counsel for Defendants ("Defendants' Counsel"), or any other attorney or law firm connected to this litigation, pending the hearing and determination and entry of an Order on Plaintiffs' motion; 2) requiring Defendants to restore any Partnership money already used to pay legal fees or expenses incurred in connection with this action to Defendants' Counsel, or any other attorney retained in connection with this action, pending the hearing and determination and entry of an Order on Plaintiffs' motion; or, alternatively, 3) requiring each of the Defendants to post a bond, in a minimum amount of $250,000, pending the outcome of this litigation as security for their use of Partnership assets to pay for their legal fees in this case.

Defendants oppose Plaintiffs' motion.

B. The Parties' History

The Complaint (Ex. A to Berman Aff. in Supp.) describes the nature of this action as follows:

> The Defendants in this action are two partners of the Hampton Hills Associates General Partnership (the "Partnership"), one of whom was designated as Managing Partner and described in [the Partnership Agreement] as a fiduciary, together with all of the responsibilities thereof. As set forth below, acting without the knowledge or consent of their other partners, over a period of years, Defendants have doled out free, virtually free or significantly discounted memberships to the Hampton Hills Golf Club, exclusively for their own personal gain.

Compl. at ¶ 1.

Plaintiffs also allege that Defendants have financial interests in a nearby club known as Baiting Hollow Club ("Baiting Hollow"), and have improperly permitted members of Baiting Hollow, and other non-members of the Hampton Hills Golf Club ("Club"), to play at the Club without paying attendant costs and expenses to the Club. As a result, the Partnership and the partners who were not involved in this alleged scheme have suffered extensive financial loss.

The Complaint contains six (6) causes of action: 1) breach of fiduciary duty, 2) self-dealing, 3) breach of duty of loyalty/usurpation of corporate opportunity, 4) waste, 5) unjust enrichment/restitution, and 6) request for an accounting. Plaintiffs seek 1) an Order entitling them to inspect the Partnership's books and records, 2) an Order requiring Defendants to make restitution of at least $750,000, and 3) an award of actual and consequential damages directly and proximately caused by Defendants' misconduct and breaches of duty.

In his Affidavit in Support, Katz affirms that he is a partner of, and owns the largest equity stake in, the Partnership. The Partnership has seven (7) partners, consisting of Plaintiffs, Defendants and one partner who is not involved in this litigation. Beil is the Managing General Partner and, in that capacity, controls the management and operation of the Partnership and its bank accounts. Pine is the Club Manager and, along with Beil, has managed the Club's daily operations since 1997. Beil and Pine pay themselves salaries and "take numerous perquisites" (Compl. at ¶ 5) for managing the Club.

Katz affirms that he reviewed financial information about the Club supplied to him by Beil and discovered a discrepancy between the projected revenue for 2010, and the revenue that should have been projected based on the number of Club members. Due to Beil's failure to explain this discrepancy, a full partners' meeting ("Meeting") was held on October 28, 2010. At the Meeting, Defendants admitted that Beil maintained a category of members called "Special Members" who paid nothing, or almost nothing, for Club memberships. Plaintiffs were unaware of these Special Memberships.

Plaintiffs discounted Beil's explanation that the Special Memberships were appropriate because the Special Members were 1) people of standing who could increase Club membership, 2) "Barter Members" who provided services to the Club, and/or 3) charities who were deserving of Special Memberships. Plaintiffs determined, instead, that the Special Members were individuals who provided personal favors to Defendants. Katz provides details regarding certain Special Members and the benefits they conferred on Defendants, including one Special Member who procured jobs for Defendants' children..

Plaintiffs determined that there were more than three dozen Special Members and calculated that these Memberships resulted in a loss of at least $250,000 in projected revenue. Beil allegedly prevented Plaintiffs from obtaining further information regarding his management of the Club, and instructed the Partnership's accountants not to speak with Plaintiffs.

On December 15, 2010, Loeb and Katz met with Beil who agreed to 1) provide accurate information to the partners; 2) establish a set of standards for "Barter Memberships;" and 3) correct the Special Membership issues. Beil, however, failed to do the things he promised. Defendants now take the position that they have the right to provide the Special Memberships.

In opposition, Beil submits that Plaintiffs are pursuing this action in an effort to gain control of the Partnership. Beil contends that Plaintiffs' claims of wrongdoing are refuted by a report prepared by Leon Fink ("Fink"), Plaintiffs' accountant ("Accountant's Report") (Ex. A to Beil Aff. in Opp.). The Accountant's Report is a five-page handwritten document. Beil also provides an October 11, 2010 email from Loeb to Beil in which Loeb stated that he had spoken to Fink and "his report was very positive."

Pine echoes Beil's contention that the Accountant's Report refutes Plaintiffs' claim that the Special Memberships were improper. Pine also affirms that the Club's membership was not full, and that Defendants used the Special Memberships to attract new members and reduce costs. Pine cites examples of the benefits provided to the Club by Special Members, including increased visibility and a bartering system with vendors for services. Pine denies that he or Beil received any personal benefit from the Special Memberships. Defendants have provided affidavits from numerous Special Members who affirm that they did not provide special benefits to Defendants in exchange for the Special Memberships. Pine also disputes Katz' claim that

Defendants lack adequate funds to repay the Partnership if it is determined that Partnership funds should not have been used to defend this litigation. Pine submits that Katz has no personal knowledge of Pine's financial situation, and affirms that he does, in fact, have sufficient funds to repay the Partnership if so directed.

Defendants also provide an affidavit of Stephen H. Tarnofsky ("Tarnofsky"), who disputes Katz' explanation as to why Tarnofsky did not immediately respond to his request for documents regarding the Partnership's finances. Tarnofsky affirms that he delayed responding to Katz so that he could confer with Beil, the Partnership's designated representative, regarding Katz' request. Tarnofsky, in May of 2011, provided Partnership tax returns and other financial information to Katz' accountant.

Fink provides an Affidavit in response in which he disputes Beil's claim that Fink concluded that Beil had acted properly in offering the Special Memberships. Fink describes the Accountant's Report as his summary of an informal meeting he had with Beil on October 8, 2010. Fink denies ever reaching a conclusion as to the propriety of the Special Memberships, and affirms that he never had access to membership records and other information that would be necessary to reach such a conclusion. At the October 2010 meeting, Beil justified the Special Members on the grounds that the recipients were individuals deserving of the Membership, or had provided services to the Club. Fink never investigated or determined whether Beil's assertions were accurate, or justified the Special Memberships.

C. The Parties' Positions

Plaintiffs submit that they have demonstrated a likelihood of success on the merits by demonstrating that Defendants breached their fiduciary duty to Plaintiffs by offering Special Memberships without Plaintiffs' knowledge. Plaintiffs claim that Defendants "have treated the Partnership's Bank accounts and assets as a personal slush fund for years" (Katz Aff. in Supp. at ¶ 23)

Plaintiffs argue, further, that they will suffer irreparable harm if Defendants are permitted to continue to use the Partnership's bank accounts to pay their legal bills in this matter because neither Defendant has sufficient funds to repay the Partnership if they are not successful in this litigation. In support of that assertion, Katz provides paperwork from a foreclosure action

against Defendants in Suffolk County, New York (Ex. D to Katz Aff. in Supp.) reflecting Defendants' joint and several liable for approximately $3 million in mortgage debt in connection with Baiting Hollow. Katz also affirms that in May of 2011, Beil admitted that he was experiencing serious financial difficulties, and did not have sufficient funds to pay his legal expenses. In addition, total Partnership distributions have fallen from $600,000 in 2009 to $100,000 in 2010.

Plaintiffs contend that Defendants' reliance on Section 5.1(x) of the Partnership Agreement (Ex. A to Katz Aff. in Supp.) to justify Defendants' use of Partnership assets to pay their legal fees in this case is misplaced. Section 5.1(x), titled "Expenses," provides as follows:

> The Managing General Partner shall cause the Partnership to pay expenses, which may include, but are not limited to:...costs incurred in connection with any litigation in which the Partnership is involved, as well as in the examination, investigation or other proceedings conducted by any regulatory agency with jurisdiction over the Partnership, including legal and accounting fees incurred in connection therewith.

Plaintiffs submit that this provision is inapplicable to the matter at bar because the Partnership is not a party to this lawsuit. Moreover, Plaintiffs contend, § 5.1(x) is not an indemnification provision, and the Partnership Agreement contains no indemnity clause. Thus, the Court should reject Defendants' claim that they may use Partnership assets to pay for their personal legal bills.

Defendants oppose Plaintiffs' application submitting, first, that Plaintiffs have not demonstrated a likelihood of success on the merits, in light of the fact that 1) the affidavits provided by Defendants refute Plaintiffs' claims that personal benefits were conferred on Defendants, as opposed to the Club, in exchange for the Special Memberships; 2) the Accountant's Report contradicts Plaintiffs' allegations of impropriety; 3) Defendants' conduct is protected by the business judgment rule ; 4) even assuming *arguendo* that Defendants breached their fiduciary duties, Plaintiffs have not been damaged by the Special Memberships; and 5) Sections 5.1 and 7.1 of the Partnership Agreement, as well as Partnership Law § 40, authorize the use of Partnership funds to defend this litigation.

Defendants contend, further, that Plaintiffs have not demonstrated that they will suffer irreparable injury without the requested injunctive relief. First, Plaintiffs have no personal knowledge of Defendants' assets, and Defendants dispute Plaintiffs' claims that Defendants lack sufficient funds to repay the Partnership if they are not successful in this litigation. Moreover, as Plaintiffs' harm is compensable by money damages, there is no irreparable harm. Finally, Plaintiffs' motion is "really a disguised motion for an attachment of the Partnership's assets" (Ds' Memorandum of Law at p. 10) and, therefore, any irreparable harm is suffered by the Partnership, and not the Plaintiffs. Finally, Defendants argue that the equities balance in their favor because preventing Defendants from using Partnership funds to defend this action would 1) be contrary to the Partnership Law and the Partnership Agreement; 2) reward Plaintiffs for intentionally declining to name the Partnership as a defendant, although Plaintiffs have asserted an accounting claim against the Partnership; and 3) encourage Plaintiffs who have commenced this action "[as] an attempt to extort Defendants into forfeiting their positions of control" (id. at p. 12).

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. Application of these Principles to the Instant Action

Section 6.1 of the Partnership Agreement provides that Beil, as the Managing General Partner, "shall have the fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership and all such assets shall be used only for the benefit of the Partnership." Section 7.1 of the Partnership Agreement provides, in pertinent part, that the Partnership "shall be managed by the Managing General Partner and the conduct of the Partnership's business, subject to Sections 7.2 and 7.3, shall be controlled and conducted solely and exclusively by the Managing General Partner in accordance with this Agreement." Sections 7.2 and 7.3 do not

expressly address the Special Memberships, and the Court cannot say, at this juncture, that the awarding of Special Memberships clearly violates any provision of Sections 7.2 or 7.3 which prohibits conduct by the Managing General Partner including doing any act "in contravention of this Agreement or which would make it impossible to carry on the ordinary business of the Partnership" (Partnership Agreement at § 7.2(B)).

The Court denies Plaintiffs' Order to Show Cause based on the conclusion that Plaintiffs have not demonstrated a likelihood of success on the merits. The Partnership Agreement authorizes Beil, as the Managing General Partner, to control the Partnership, in accordance with the Partnership Agreement. While Plaintiffs may dispute the wisdom of awarding the Special Memberships, and believe this is information of which they should have been made aware, they have not demonstrated that Beil lacked the authority to issue the Special Memberships. Moreover, there exists a factual dispute as to whether Defendants benefitted personally by awarding the Special Memberships, which might bear on Plaintiffs' ultimate ability to establish that Defendants breached their fiduciary duties to Plaintiffs. Although Plaintiffs have not named the Partnership as a defendant, this action is effectively an action against the Partnership, and Section 5.1(x) of the Partnership Agreement appears to authorize the expenditure of Partnership funds to pay the litigation expenses incurred in this lawsuit.

The Court also denies Plaintiffs' Order to Show Cause based on the Court's conclusion that any harm suffered by Plaintiffs is compensable by money damages. Moreover, there exists a factual dispute as to the ability of the Defendants to repay the Partnership, in the event it is ultimately determined that their use of Partnership funds to defend this litigation was improper.

In light of the foregoing, the Court denies Plaintiffs' Order to Show Cause in its entirety, and vacates the temporary restraining order issued by the Court on June 23, 2011, and amended on June 30, 2011.

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 September 14, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

August 15, 2011

HON. TIMOTHY S. DRISCOLL

J.S.C.

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