Reichman v Reichman
2011 NY Slip Op 33760(U)
March 11, 2011
Supreme Court, Nassau County
Docket Number: 000158-11
Judge: Timothy S. Driscoll

SUPREME COURT-STATE OF NEW YORK
DECISION AND ORDER AFTER HEARING
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MICHAEL REICHMAN,

Plaintiff,

-against-

PAUL REICHMAN,

Defendant.

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TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 000158-11
Motion Seq. No: 1, 2, 3, 4, 5, 6, 7
Submission Date: 3/11/11

This matter is before the Court on seven different motions that have been filed since this case was initiated just over two (2) months ago. The motions seek either some measure of injunctive relief in favor of the moving party, or a decision adjudging the non-moving party in contempt for alleged violations of the Court's Orders during the pendency of this case. The Court has also considered the arguments of counsel on the record on March 11, 2011. As set forth in more detail below, the Court denies Motion Sequence Nos. 1, 2, 3, 4, 5 and 6, and grants limited relief as to Motion Sequence No. 7.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO MOTION SEQUENCE NO. 1

This matter initially came before the Court after Justice Phelan, sitting in Special Term, signed Motion Sequence No. 1, which was an *ex parte* Order to Show Cause with various decretal paragraphs constituting a Temporary Restraining Order ("TRO"). On January 11, 13, and 14, 2011, this Court held a hearing on the TRO, as well as the application for a preliminary injunction that was part of the Order to Show Cause. As part of that hearing, the Court heard testimony from plaintiff Michael Reichman ("Michael"), Defendant Paul Reichman ("Paul") (who is the father of Michael), accountant Paul Gittleson, attorney David Kaplan, and Jason

Richter.

At the conclusion of the hearing, the Court vacated the TRO issued by Justice Phelan, and issued a new TRO. First, on consent of the parties, the Court appointed M. Kathryn Meng, Esq. to serve as a neutral officer and director of BedBathStore.com, the entity at issue in the case. The Court further directed that (1) Paul would be limited to $25,000 in monthly withdrawals from the business, (2) Michael was required to restore all computer systems and bank accounts as they previously existed prior to the case being filed, and (3) the company was to operate as it existed prior to the case being filed.

The Court then invited further briefing on the issues presented in the motion papers and the hearing. As an initial matter, the Court addresses the question of the length of the Memorandum of Law submitted by Michael. That Memorandum is 56 pages in length, which far exceeds the 25 page limit for memoranda as set forth in Rule 17 of the Rules of the Commercial Division. After receiving a copy of the Memorandum, counsel for Paul sent a letter to the Court, on notice to Michael, urging the Court to reject the Memorandum due to its violation of Rule 17. Counsel for Michael then sent a letter to the Court requesting permission to file the Memorandum in question.

Somewhat distressing is the last paragraph in the March 2, 2011 letter from Michael's counsel, in which counsel tacitly acknowledges its violation of the rules, but nevertheless asks the Court to "exercise its sound discretion, invoke its equitable powers and consider all the matters had herein on the merits, thereby ignoring any alleged irregularities or technicalities as non-prejudicial." The Court is somewhat troubled by the apparent attempt to equate the Court's rules with "technicalities." It is those "technicalities" that guide all lawyers. Those "technicalities" are embodied in the Rules of the Commercial Division, and indeed rules of this sort are not unique to the Commercial Division.

Nevertheless, in its discretion, the Court will consider Michael's memorandum, even though that memorandum exceeds the page limit provided in Rule 17 by some 31 pages. In so doing, though, the Court reminds counsel that there may well be consequences in the future for violations of the Court's rules. The Court views its admonition to counsel as sufficient to address Michael's violation of the Commercial Division Rules. Future violations are unlikely,

however, to result in similar largesse.

Turning to the merits of the application for a preliminary injunction, the Court finds that Michael has not demonstrated that a preliminary injunction is appropriate. In arriving at this decision, the Court has reviewed the initial Order to Show Cause (Motion Sequence No. 1) and accompanying affidavits and exhibits, the post-hearing Memoranda filed by each party and the transcript of the hearing. The Court also presided over the entire hearing, and incorporates its observations of the parties' appearance, demeanor and temperament in its decision.

The standards regarding the issuance of a preliminary injunction are clear. 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).

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).

Here, Michael has failed to provide the Court with sufficient evidence on any of these three elements. At the outset, Michael has failed to demonstrate that he is likely to succeed on

the merits of his claim. The gravamen of his claim is that he holds a majority interest in Bedbathstore.com LLC. Indeed, Michael seeks a declaratory judgment that he holds 80% of the membership interests in that LLC. The credible evidence demonstrates to the contrary.

First, the Court's review of both parties' temperament, appearance and demeanor throughout this trial, as well as their manner of answering questions posed to them on both direct and cross-examination, buttresses the conclusion that Paul Reichman has operated as the head of the company, and not Michael. Michael's temperament and demeanor demonstrated aggressiveness and anger, and his answers to questions on both direct and cross examination were prone to hyperbole. By contrast, Paul came across calm and measured, with a demeanor befitting the head of a small company.

Second, the documents received in evidence, when viewed in light of the credible testimony, establish that Michael is not an 80% owner of the company. A review of the background of the LLC is appropriate. Bedbathstore.com LLC is the successor to Mildred's For Fine Linens, a traditional bricks and mortar store that was founded by Paul's parents in Borough Park, Brooklyn. The name of the company was chosen because that is Paul's mother's name. Indeed, she is still alive, although apparently no longer working for the company.

Some time in 2000, the domain name Bedbathstore.com was registered. The LLC was then formed in January 2002. At the time the domain name was registered, Michael was still in college. At the time of the formation of the LLC, he was just over 22 years old, and a recent college graduate.

Paul Reichman met with counsel to determine the ownership of the LLC. Originally, Paul planned for a total of 100 shares to be issued, with Michael to own 80 shares. Paul explained credibly that, in sum and substance, he wanted Michael to feel like he had some ownership in a company, particularly given that Michael had had some difficulties during college. Paul wanted to have some ownership, nevertheless, because he put his life savings into the LLC.

Almost immediately after forming the initial plan, Paul thought better of it given his extensive financial contribution, and determined that Michael should receive 15 shares, and Paul

should receive the other 85. Paul also admitted that part of his motivation in granting shares to Michael was to shield assets from Paul's wife, as Paul and his wife had marital difficulties at that time.

Then, in March 2003, the parties executed an operating agreement whereby Michael would receive 40 shares, and Paul would receive 60. Around that same time, Paul began the process of obtained a substantial loan from the Small Business Administration. Paul was apparently advised that the loan could not close if Michael had an ownership interest in the company, because Michael had had legal troubles during college that resulted in his arrest. Shortly thereafter, Paul asked Michael to transfer his shares back to Paul so that the loan could close. Michael apparently told Paul, in sum and substance, "whatever it takes, Dad." The Court credits this testimony, as it is consistent with Michael's age, relative inexperience in the industry compared to Paul, and Paul's capital contribution to the LLC which dwarfs any contribution by Michael.

While the Court credits Paul's testimony regarding the background of how the LLC was formed, the various attempts to grant Michael an equity stake, and the ultimate decision to ask for Michael to transfer these shares back to Paul, the Court does note that the records regarding these various changes are far from conclusive. In the Court's view, however, this is far from atypical in a small, family-run business. It is the actions of the parties that are most telling as to their intent regarding ownership of the LLC. The evidence before the Court demonstrated that Paul Reichman has, throughout the history of Bedbathstore.com LLC, acted in a manner consistent with the role of an owner. By contrast, Michael Reichman has taken action consistent with the role of an employee.

Michael's own tax returns support the conclusion that he is not an owner of the LLC to the degree that he claims. Indeed, since 2003, he has claimed to be an employee of the company on his personal tax returns. He has never received a Schedule K-1 or any other document that would establish an ownership interest in the company.

The company's financial records also do not support the conclusion that Michael is a majority owner. He does not have any capital account, and he only pays an employee's share of

the applicable FICA taxes. He also receives health care tax-free, as an employee typically would.

In addition, Michael has not acted like a majority owner during his employment with the company. For example, in describing his background and duties to the Court, the Court notes that he did not claim to have knowledge or responsibility in several areas, such as finance and human resources, that would be typical among chief executive officers and/or owners.

Michael has also failed to demonstrate that his alleged injuries are not compensable by money damages. As an employee and possibly limited shareholder, he may well have damages based on Paul's operation of the company. As he is an employee and at most a limited shareholder, however, those damages appear compensable by money, and not the drastic remedy of a preliminary injunction.

Finally, Michael has failed to demonstrate that a balancing of the equities favors injunctive relief. The LLC employs some 20 or more people. The Court credits Paul's testimony that, prior to this lawsuit, Paul controlled hiring, firing, pricing and purchasing. It is thus Paul who was the decision-maker prior to this litigation. It could well put the financial well-being of the other LLC employees at risk if control of the company were transferred from Paul to Michael, given that Michael has not operated the company in the past and does not have the breadth and depth of experience that Paul has. The Court's conclusion is buttressed by its observations of Michael's temperament and demeanor throughout these proceedings.

Accordingly, Motion Sequence No. 1 is denied in its entirety, and any Temporary Restraining Order issued at any time during this case is now lifted.

DECISION AND ORDER AS TO MOTION SEQUENCE NOS. 2, 3, 4, 5, 6 AND 7

In the interregnum between the end of the hearing on January 14, 2011 and today, the Court has also received six other motions that have been fully briefed by both sides. Having vacated the temporary restraining order and denied the preliminary injunction sought in Motion Sequence No. 1, the Court turns to the various motions that have been filed over the past two months.

Motion Sequence No. 2 is an Order to Show Cause seeking to direct Michael to comply with the Court's January 14, 2011 directive from the bench that Bedbathstore.com LLC be operated "as it existed prior to this case being filed," as well as injunctive relief based on that directive. The Court has considered the Order to Show Cause, Affirmation of Mr. Schlesinger, and accompanying Exhibits.

The Court also has before it Motion Sequence No. 4, which is a Cross-Motion similar to Motion Sequence No. 2, in that it asks for the Court to require Paul to comply with the January 14, 2011 Order. That Notice of Cross-Motion also contains an Affidavit of Michael. Paul has submitted a Reply Affirmation with respect to Motion Sequence No. 2, and in that same document opposes the Cross-Motion.

Inasmuch as the Court has vacated the TRO, including the directive on January 14, 2011, Motion Sequence Nos. 2 and 4 are denied as moot. To the extent that Paul also seeks injunctive relief in Motion Sequence No. 2, that application is denied without prejudice. In denying injunctive relief in these motions, the Court notes that, in essence, the Company is now restored to its position prior to the filing of the lawsuit by Michael. That, in and of itself, appears to give Paul the authority he seeks in his application for preliminary injunction. The Court does not, however, wish to run the company, or to issue orders about how the company should be run. Nor does the Court wish for the parties to continually come to Court in effort to ask the Court to assist in running the Company. Simply put, the Company has existed for a long time. The equities do not balance in favor of continued Court orders as a basis for how the company is to be run. Rather, the Court's view is that, in determining the extent of judicial involvement in BedBathStore.com LLC, "less is more." Put another way, on the evidence before the Court, Paul has the authority to run the company.

Motion Sequence No. 3 is an Order to Show Cause filed by Paul seeking to hold Michael in contempt for violating the previously-referenced January 14, 2011 directive of the Court. The Court has before it the Order to Show Cause, Affirmation of counsel, and Affidavit of Paul and accompanying exhibits.

Motion Sequence No. 5 is Paul's Order to Show Cause to hold Michael in contempt, filed

on February 17, 2011 and returnable on February 21, 2011.The Court has before it the Order to Show Cause, Affirmation of Marci Zinn, Affidavit of Paul, and accompanying exhibits. The Court also has an affirmation in opposition by Mr. Rowe and accompanying affidavits in opposition to the Order to Show Cause.

Motion Sequence No. 6 is Michael's Motion to hold Paul in contempt, returnable March 11, 2011. The Court has before it a Notice of Motion dated February 25, 2011, with the accompanying affidavit of Mr. Rowe. The Court also has an Affidavit of Paul Reichman in Opposition to the Motion.

It is well settled that the following must be established in order for the Court to find a person in contempt: (1) A lawful order of the Court, (2) an unequivocal mandate in that order, (3) knowing disobedience of that order by the alleged contemnor, and (4) prejudice to the right of a party to the litigation. *E.g., McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (civil contempt sanction is "designed to compensate the injured private party for the loss of or interference with the benefits of the [Court's] mandate"). Here, the proof before the Court fails to provide a basis to hold either party in contempt.

The gravamen of Motion Sequence 3 is that Michael has violated the Court's January 14, 2011 directive by making improper contact with the LLC's vendors and failing to restore the computer systems as they were prior to the case being filed. Having vacated the TRO and denied the preliminary injunction, the January 14, 2011 directive is no longer operative. Moreover, there is insufficient proof before the Court of any loss specifically incurred by Paul Reichman as a result of Michael's allegedly contemptuous actions. Accordingly, the Court denies the application to hold Michael in contempt, and denies Motion Sequence No. 3 in its entirety.

The gravamen of Motion Sequence 5 is that Michael has violated the Court's directive on January 14, 2011 that the company Bedbathstore.com, LLC is "to operate as it existed prior to this case being filed." Michael responds that the alleged violation of the Court's directive is his setting up a "draw" account in the LLC's QuickBooks. Michael also provides evidence that he received the equivalent of a "draw" between 2001 and 2003.

The Court takes a dim view of Michael's attempt to claim that a practice that existed from 2001 to 2003 is somehow the equivalent of "operating the company as it existed prior to this case being filed." Nevertheless, the Court has heard a small snapshot of how this company existed prior to the case being filed. Moreover, the Court's directive is not the type of clear and unequivocal mandate upon which a finding of contempt is to be based. In sum, the evidence before the Court is not so clear that Michael did not have a "draw" prior to the case being filed to justify a finding of contempt for such a draw existing in nearly two months that have elapsed since the Court's January 14, 2011 directive.

In light of the Court vacating the TRO and denying the preliminary injunction, it appears, of course, that Michael is now essentially an employee of the company. Accordingly, Michael's unilateral decision to grant himself a draw during this litigation may well be the basis for Paul to terminate Michael's employment. Similarly, the acts complained of in Motion Sequence No. 3 regarding the computer system may also be the basis for Paul to terminate Michael's employment. These actions could also either separately, or together, be part of the basis to terminate Michael's employment. The Court takes no view on whether termination is appropriate under the governing law, or whether it is an appropriate business — or family — decision.

With respect to Motion Sequence No. 6, Michael claims that Paul has violated the Court's orders inasmuch as the Court initially limited the amount that Paul could withdraw from company funds to $25,000 on January 14, 2011, and subsequently increased that amount to $28,000. Michael claims that various checks that have been cut, and additional amounts spent, by Paul in both months that Michael states exceeds the Court's directive. Michael's papers do not, however, provide evidence of those checks or amounts spent beyond Michael's own bare bones allegations. Given the Court's assessment of Michael's credibility after multiple days of observing Michael throughout this hearing, the Court declines to credit Michael's allegations to the extent that he seeks. That in and of itself is a basis for the Court to deny the motion.

Moreover, even if the proof before the Court was sufficient, the Court has now vacated the TRO and denied the preliminary injunction. Thus, it appears that Paul may now spend what

he believes appropriate in accordance with the governing law, including any amounts in excess of the previous (and now vacated) directives of the Court. In essence, then, the Court does not believe it appropriate to hold Paul in contempt of an Order that was essentially an interim or stopgap, Order when that Order is no longer valid.

Accordingly, Motion Sequence Number 6 is denied in its entirety.

With respect to Motion Sequence 7, the Court has before it the Order to Show Cause, along with the Affirmation of Mr. Schlesinger and the Affidavit of Paul, along with accompanying exhibits. The Court also has reviewed the Affidavit in Opposition of Michael, along with accompanying exhibits, and the Memorandum of Law of the Certilman Balin firm. The Court also has reviewed the Affidavit of Ms. Meng, in which she in essence takes no position on the application, but instead describes some of the problems in the company and her efforts to address those problems.

The Order to Show Cause seeks the removal of M. Kathryn Meng as a neutral director, which was accomplished by the Court's Order on consent of the parties on January 14, 2011. Inasmuch as the Court has denied Michael's motion for a preliminary injunction that precipitated the appointment of Ms. Meng, and insofar as the evidence before the Court has established at thi juncture that Paul is the majority owner of the LLC and is the person with the authority to run the day-to-day affairs of the company, the factual disputes that led to the appointment of Ms. Meng are no longer present. As the Court has already stated, the end result of the Court's decision is that Paul is in charge of the LLC. It is for him to address the problems detailed by Ms. Meng, as well as any other issues of which is he, or should be, aware. An outside director is thus no longer necessary. Accordingly, that portion of Paul's motion is granted inasmuch as the Court vacates its earlier Order appointing Ms. Meng, and she is to take no further action on behalf of Bedbathstore.com LLC.

All matters not decided herein are hereby denied.

This constitutes the Decision and Order of the Court.

This matter shall be the subject of a Preliminary Conference on April 27, 2011.

ENTER

DATED: Mineola, NY
March 11, 2011

HON. TIMOTHY S. DRISCOLL
J.S.C.