Gomes v Gomes
2011 NY Slip Op 34153(U)
November 21, 2011
Supreme Court, Suffolk County
Docket Number: 29780/11
Judge: Thomas F. Whelan

[* 1]

ORIGINAL

SHORT FORM ORDER

INDEX No 29780/11

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/6/11
ADJ. DATE 11/ 4/11
Mot. Seq. # 001 - MD

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CHRISTIAN C. GOMES, individually, and as a Member of 440 Jericho Turnpike Auto Sales, LLC, d/b/a Ford & Lincoln of Smithtown, and a Member of 440 Properties, LLC.,

Plaintiff,

- against -

STEVEN S GOMES, and as a Member of 440 Jericho Turnpike Auto Sales, LLC, d/b/a Ford & Lincoln of Smithtown, and as a Member of 440 Properties, LLC,

Defendant.

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Attys. for Defendant
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Upon the following papers numbered 1 to 11 read on this motion by the plaintiff for preliminary injunctive relief Notice of Motion/ Order to Show Cause and supporting papers 1-4; 5; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 6-8; Replying Affidavits and supporting papers ; Other 9 (memorandum); 10-11 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for preliminary injunctive relief is considered under CPLR 6311 and is denied.

The plaintiff commenced this action to recover damages by reason of the defendant's purportedly wrongful conduct which culminated in the plaintiff's termination as a member and/or employee in two limited liability companies formed by the parties in 2007. In nine separate causes of action, the plaintiff demands money damages from the defendant under theories of tort, contract and the equitable remedy of a constructive trust. In addition, the plaintiff demands an accounting from the defendant and permanent injunctive relief both mandatory and non-mandatory in nature.

The circumstances underlying the institution of this law suit have been presented to be as follows on the instant motion. In the spring of 2007, the parties formed 440 Properties, LLC for purposes of owning, managing, and leasing real estate property. The company, 440 Jericho Turnpike Auto Sales, LLC (hereinafter "440 Dealership"), was formed for purposes of operating a Ford-Lincoln-Mercury dealership on a parcel of real property owned by 440 Properties, LLC. The parties agreed that the defendant would own an 80% interest in both LLCs and that the plaintiff would own the remaining 20%. The plaintiff managed the

dealership on a daily basis overseeing its business operations directly as the defendant was engaged with operating another Ford dealership which he owned prior to acquiring his interests in the subject LLCs. The parties agreed that the plaintiff would receive a weekly draw of $2,000.00 and be provided with family health insurance and an entitlement to 50% of the over-remit repayments paid by Ford as well as the use of several vehicles while the defendant would receive a $3,000.00 per week draw.

From its inception in May of 2007 through February of 2011, the 440 Dealership was highly successful. While no profit distributions were made to its two members, its Ford Motor cash management account had amassed some 1.5 million dollars in deposits. Relations between the plaintiff and defendant deteriorated rapidly after the defendant allegedly purchased, in his own name, a parcel of real property that the plaintiff intended to purchase through the 440 Properties, LLC so as to expand the 440 Dealership. In February of 2011, the plaintiff instituted suit against the defendant in this court under a separate index number. The action was settled and the parties entered into a new operating agreements for both LLCs on May 6, 2011.

The two new operating agreements provided that the defendant would buy-out the plaintiff's interests in both LLCs by May 6, 2014. The defendant exercised this buy-out on May 26, 2011 by serving 90 day notices of his intention to buy out the plaintiff's 20% interest in each of the LLCs. On June 10, 2011, the defendant terminated the plaintiff's employment at the 440 Dealership "for cause" due to his purported failure "to devote his full and compete attention to the day to day operations of the Company" (*see* § 10.8 of 440 Dealership Operating Agreement). On September 8, 2011, the defendant tendered the first installment of the agreed-upon, buyout price. The plaintiff rejected the tender due to the defendant's alleged breach of the operating agreement by his improper firing the plaintiff, which is alleged to have vitiated both of such operating agreements.

By the instant motion, the plaintiff seeks extensive preliminary injunctive relief including: 1) a restraint upon the defendant, his agents and employees from withdrawing, conveying, removing, assigning, transferring or paying any assets or funds from the accounts and/or assets of the Companies and/or from the Dealership, other than in the ordinary course of business; 2) compelling the defendant, his agents and employees to preserve all documents, files, books and records of the defendant and the dealership, including, without limitation, all electronic files or data including, without limitation, all phone records, text messages, e-mail, voicemail, information on websites, chat rooms or through social medias of any kind or nature, and all data generated by and/or stored on any computer, or computer system wherever located; 3) prohibiting the defendant from claiming that the plaintiff is not a member of the subject LLCs; 4) enjoining the removal of the two vehicles possessed by the plaintiff; 5) mandating the reinstatement of the plaintiff to his prior position and employment with the LLCs and the restoration of his salary, health insurance and other compensation; 6) compelling the production of enumerated business records; and 7) compelling the defendant to account for all funds paid to him by the Companies on and after January 1, 2011. For the reasons stated below, the motion is denied.

It is axiomatic that entitlement to preliminary injunctive relief rests upon a clear showing of a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*see* ***Tatum v Newell Funding, LLC,*** 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]), as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]). Consequently, a clear legal right to relief, which is plain from undisputed facts, must be established by the movant (*see* ***Wheaton/TMW Fourth Ave. LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***Omaakaze Sushi Rest., Inc. v Ngan Kam Lee***, 57 AD3d 497, 868 NYS2d 726 [Dept 2008]; ***Gagnon Bus Co., Inc. v Vallo***

Transp., Ltd., 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]).

Factors militating against the granting of preliminary injunctive relief include: 1) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; ***Dana Distr., Inc. v Crown Imports, LLC***, 48 AD3d 613, 853 NYS2d 111 [2d Dept 2008]; ***White Bay Enter. v Newsday, Inc.***, 258 AD2d 520, 685 NYS2d 257 [1999]); 2) that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action (*see* ***Wheaton/TMW Fourth Ave. LP v New York City Dept. of Bldgs.***, 65 AD3d 1051, *supra*; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 795 NYS2d 690 [2d Dept. 2005]); or 3) that an alteration rather than a preservation of the *status quo* of the parties or res at issue would result from a granting of provisional injunctive relief (*see* ***Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.***, 50 AD3d 1072, 857 NYS2d 648 [2d Dept 2008]; ***Matter of 35 New York City Police Officers v City of New York***, 34 AD3d 392, 826 NYS2d 22 [1st Dept 2006]).

A preliminary injunction is thus not a proper remedy where it appears that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, *supra*; ***Dana Distr. Inc. v Crown Imports, LLC***, 48 AD3d 613, *supra*). Nor is a preliminary injunction an available remedy where the irreparable harm claimed is remote or speculative or where it is economic in nature (*see* ***Family-Friendly Media, Inc. v Recorder Tel. Network***, 74 AD3d 738, 903 NYS2d 80 [2d Dept 2010]; ***Quick v Quick***, 69 AD3d 827, 892 NYS2d 769 [2d Dept 2010]; ***DiFabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 887 NYS2d 168 [2d Dept 2009]). Finally, it is clear that prior restraints on speech in the form of injunctions are strongly disfavored as free speech is protected from censorship "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest" (***Rosenberg Diamond Dev. Corp. v Appel***, 290 AD2d 239, 735 NYS2d 528 [1st Dept 2002]; *see also* ***Rose v Levine***, 37 AD3d 691, 830 NYS2d 732 [2d Dept 2007]).

Since the purpose of a preliminary injunction is not to determine the ultimate rights of the parties but to maintain the status quo until there can be a full hearing on the merits (*see* ***SJJK Tennis, Inc. v Confer Bethpage, LLC.***, 81 AD3d 629, 916 NYS2d 789 [2d Dept 2011]; ***Gluck v Hoary***, 55 AD3d 668, 865 NYS2d 356 [2d Dept 2008]), a preliminary injunction that would disturb the status quo and/or confer upon the movant some or all of the ultimate relief demanded is available only under "extraordinary circumstances"(*see* ***Willow Woods Mfr. Homeowner's Assn., Inc. v R&R Mobile Home Park, Inc.***, 81 AD3d 930, 917 NYS2d 656 [2 Dept 2011]; ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]). Courts are thus empowered, albeit under very limited circumstances, to grant mandatory injunctive relief (*see* ***Village of Westhampton Beach v Cayea***, 38 AD3d 760, 835 NYS2d 582 [2d Dept 2007]).

A mandatory preliminary injunction is one mandating specific conduct by which the movant receives some form of the ultimate relief sought as a final judgment (*see* ***Jones v Park Front Apts., LLC.***, 73 AD3d 612, 901 NYS2d 46 [1st Dept 2010], quoting ***Second on Second Café, Inc. v Hing Sing Trading, Inc.***, 66 AD3d 255, 264, 884 NYS2d 353 [1st Dept 2009]). In such cases, the status quo "'is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon the complainant" (***Bachman v Harrington***, 184 NY 458, 464 [1906]). The drastic relief afforded by a mandatory injunction is sparingly granted since it requires affirmative action on the part of the non-moving party and confers upon the movant some form of the ultimate relief sought. Mandatory injunctive relief is thus available only in "unusual" or "extraordinary" situations where the right thereto is clearly established (*see* ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, *supra*; ***Second on Second Café, Inc. v Hing Sing Trading, Inc.***, 66 AD3d 255 [1st Dept 2009], *supra*; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD2d 727,

728, 795 NYS2d 690 [2d Dept 2005]; ***St. Paul Fire & Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, 349, 765 NYS2d 573 [1st Dept 2003]). A "heightened standard" thus governs applications for a mandatory preliminary injunction (*see* ***Roberts v Paterson***, 84 AD3d 655, 923 NYS2d 326 [1st Dept 2011]).

Much of the preliminary injunctive relief sought by the plaintiff on the instant motion is not that which preserves the status quo, but rather, is that which seeks to return him to his previous status as an member and employee of one or more of the subject LLCs. The granting of such relief would confer upon the plaintiff some of the ultimate relief sought by him in this action, namely, that the defendant wrongfully terminated the plaintiff's employment with and membership in the subject LLCs for which the plaintiff is entitled to both money damages and restoration to his prior positions. It was thus incumbent upon the plaintiff to meet the "heightened standard" which governs mandatory injunctive relief by demonstrating, not only clear satisfaction of the familiar three-pronged test set forth above, but also, that instant circumstances are so extraordinary that the mandatory injunctive relief sought is clearly warranted and necessary to preserve the parties' rights pending trial on the merits. However, the record is devoid of proof necessary to satisfy these standards.

A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract (*see* ***Goldman v White Plains Ctr. for Nursing Care, LLC***, 11 NY3d 173, 176, 867 NYS2d 27 [2008]; ***Innophos, Inc. v Rhodia, S.A.***, 10 NY3d 25, 29, 852 NYS2d 820 [2008]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms," without reference to extrinsic materials outside the four corners of the document (***Greenfield v Philles Records***, 98 NY2d 562, 569, 750 NYS2d 565 [2002]).

Here, the plaintiff failed to demonstrate that the defendant wrongfully terminated his membership and employment with the subject LLCs. The new operating agreements clearly called for the buyout exercised by the defendant and his right to terminate the plaintiff's employment with the 440 Dealership LLC for the "cause" stated (*see* § 10.8 of 440 Dealership Operating Agreement). No showing of any violation of the operating agreement has been made on this motion with respect the defendant's termination of the plaintiff for cause or that any such violation "vitiates' the operating agreements, in part or in whole (*see* ***Radiology Assoc. of Poughkeepsie, PLLC v Drocea,*** 87 AD3d 1121, 930 NYS2d 594 [2d Dept 2011]; ***Gluck v Hoary***, 55 AD3d 668, *supra*). The circumstances presented in this case have not been shown to be of such an extraordinary nature as to warrant mandatory injunctive relief pending the resolution of the litigation (*see* ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, *supra*; ***St. Paul Fire & Mar. Ins. Co. v York Claims Serv.***, 308 AD2d 347, *supra*).

The plaintiff further failed to demonstrate a likelihood of success on the merits of his claims for relief including reinstatement due to his purported wrongful termination or irreparable harm for which he could not be recompensed by an award of money damages. Finally, the defendant has not demonstrated that a balance of the equities tips in his favor (*see* ***Blinds & Carpet Gallery, Inc. v EEM Realty, Inc.***, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]; ***Tatum v Newell Funding, LLC***, 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Gluck v Hoary***, 55 AD3d 668, *supra*).

In view of the foregoing, the instant motion (#001) by the plaintiff for preliminary injunctive relief is denied. All restraints previously imposed, to the extent that have not already expired by their terms, are hereby lifted and vacated.

DATED: 11/21/14

THOMAS F. WHELAN, J.S.C.