

Christou v Koureli Rest. Group, Inc.

2013 NY Slip Op 32743(U)

October 29, 2013

Sup Ct, New York County

Docket Number: 651839/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Erineous Christou, et al.

INDEX NO. 651839/2013

MOTION DATE 9/25/13

- v -

Kareli Restaurant Group, Inc., et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

6

Answering Affidavits – Exhibits _____

10-14

~~Replying Affidavits~~ and exhibits and record from 8/23/13 and 9/16/13

38

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 10/29/13

SHIRLEY WERNER KORNREICH
S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 54

-----X
ERINEOS CHRISTOU and EFTHIMIOS
PAPANASTASOPOULOS,

Plaintiffs,

Index No. 651839/2013

-against-

DECISION & ORDER

KOURELI RESTAURANT GROUP, INC.,
CONSTANTINOS YOUSISS, SPIRO MENEGATOS and
DINO GOURMOS,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

In 2011, plaintiffs, Erineos Christou (Christou or Reno) and Efthimios “Tim” Papanastasopoulos (Tim), and defendants, Constantinos Youssis and Spiro Menegatos, became the shareholders of Koureli Restaurant Group, Inc. (Koureli), a corporation formed to create and operate a Greek restaurant. Christou and Tim were to be employed by Koureli, but could be discharged for good cause. At a shareholders meeting in July 2012, Christou and Tim were removed from their positions, and a vote was held to reduce Tim’s shares in Koureli to zero. After plaintiffs commenced the instant action in May 2013, notice was given of another shareholders meeting to be held for the purpose of stripping Christou of his shares.

Plaintiffs moved for a preliminary injunction preventing the meeting from taking place, preventing the transfer of any shares of the corporation and for inspection of the books and records. After argument on July 12, the court directed a preliminary injunction hearing to determine the issue of whether the meeting to strip Christou’s shares could take place. At the hearing, held on August 23, 2013, plaintiff Christou was the only witness. Tim chose not to

testify.

I. Background

A. The Shareholders Agreement

Kourelis was formed to “establish, own and operate a restaurant and bar” in Manhattan at 55 East 54th Street (exhibit 1 [Shareholders Agreement], 1). Pursuant to the Shareholders Agreement, dated July 19, 2011, defendants Youssis and Menegatos (the money partners) each were to make capital contributions of \$1.03 million (*id.* at 1) and receive seventy shares. Christou and Tim (the operating partners) made no capital contributions, and each received thirty shares (*id.*). Should the restaurant require further capital contribution, the money partners were each to contribute up to \$500,000 (*id.* at 3). For every \$2,000 of excess contributions made by the money partners, .01 shares were to be transferred from each operating partner to Youssis and Menegatos (*id.* at 3–4).

Plaintiffs agreed to be responsible for the future restaurant’s management and day-to-day operation, which responsibilities were set forth and described “Duties” (*id.* at 4). Among such Duties were “retaining and dismissing independent contractors in the ordinary course of business, purchasing appliances and equipment for less than \$50,000, paying bills and invoices of less than \$50,000 and paying wages and salaries (*id.* at 4-5). As compensation, they each were to be paid \$2,000 a week for the first 36 months of the restaurant’s operation (the Introduction Period), beginning 60 days before the restaurant was to open, with a 9% raise for each subsequent three-year period (*id.* at 6):

The operating partners could be discharged as managers of the restaurant for certain enumerated acts. For Christou those were:

- (I) Found guilty of a crime that involves the Corporation:

- (ii) Found guilty of a felony...
- (iii) Misconduct with respect to performing any of the Duties (for purposes of this provision the term misconduct means any intentional act or omission that is not in the best interests of the Corporation);
- (iv) Gross negligence with respect to performing any of the Duties;
-
- (vii) Fails to perform, or adequately perform, any of the Duties (as determined by shareholders owning, at least 140 issued shares);
-

Tim could be discharged for failing to perform the following duties:

- (I) Found guilty of a crime;
- (ii) Misconduct for performing any of the Duties;
- (iii) Gross negligence with respect to performing any of the Duties;
-
- (vi) Fails to perform, or adequately perform, any of the Duties (as determined by shareholders owning, at least 140 issued shares);
-

“Misconduct” was defined to mean “any intentional act or omission . . . not in the best interests of the Corporation” (*id.* at 7, 8).

If Tim was discharged for (ii) or (vi), that is, misconduct of failing to perform or adequately perform his Duties as determined by shareholders holding 140 shares, his shares were to be reduced to zero (*id.* at 9). If, on the other hand, he was discharged for reasons not enumerated as Duties for which he could be discharged, then his shares were to be reduced by 1/36 for every month from the date of the event giving rise to the discharge through the end of the initial 36 month Introduction Period. In other words, his shares would be proportionally reduced by the amount of time left in the Introduction Period (*id.*). The provisions governing Christou’s discharge were similar, except that his shares would only be reduced to zero for (I)

and (ii), conviction of a crime against the Corporation or of a felony (*id.* at 8).¹ The shares taken from either Christou or Tim, upon discharge, were to be redistributed equally among the remaining shareholders (*id.* at 8, 9). A dismissal after the Introduction Period would not result in a reduction of stock (*id.* at 8, 9).

The restaurant had to be built-out before opening; the Shareholders Agreement provided that “any decision with respect to the construction, design, lay-out and arrangement of the initial build-out” could only be made on consent of shareholders owning at least 160 shares (*id.* at 6). Nonetheless, in addition to their other duties, Christou and Tim were to “supervise and oversee the initial build-out . . . from start to finish” (*id.* at 6, 7). Tim was to be paid \$2,000 starting on the day the “physical work of the initial build-out” began until the 59th day prior to the restaurant’s opening (*id.* at 7).² No additional compensation was provided for Christou, who testified that primary responsibility for the supervision of the construction rested on Tim (Christou: 85, 87), although Christou was to be on premises 20 hours per week.

B. Discharge of Christou and Tim

Together, the shareholders selected a designer for the construction project, entering into a design contract on August 1, 2011 (exhibit B; Christou: 63–64, 79). Physical work on the space started approximately two months later in October 2011, when exploratory demolition began (Christou: 31, 45). Christou, who had been given Koureli’s checkbook, however, began writing weekly \$2,000 checks for Tim on August 26, 2011 (*id.* at 44, 49–50; exhibit A). Moreover, he

¹ Furthermore, unlike Tim, if Christou was discharged for violating any term of the Shareholders Agreement, Koureli had no right to reduce his shares at all (*see* Shareholders Agreement 8). No explanation of these differences was offered on the record.

² The Shareholders Agreement characterizes these payments as a loan (*id.* at 7).

occasionally would give Tim blank checks (*id.* at 59), one of which was filled out and signed by Tim³ to pay himself a second time for the week of September 28 (*id.* at 49–51; exhibits A-6 & A-7).

Meantime, the pace of construction was slower than hoped. The proposed designs called for some structural changes to the space, which required the consent of the landlord (Christou: 80). The landlord, in turn, raised concerns with Koureli about possible code violations arising from the demolition work (*id.* at 70–71). Additionally, there was difficulty in closing out the plumbing permit, and Christou acknowledged that debris was left on the premises (68). In March 2012, defendants took the checkbook away from Christou (*id.* at 74). A special shareholders meeting was held some months later, on July 17, 2012 (*id.* at 8–9). Youssis, Menegatos and Christou attended the meeting, with Christou voting Tim’s shares by proxy (exhibit 3-B [Meeting Minutes], 1). At the meeting, a motion was made to discharge Tim and Christou. As grounds for the dismissal, Youssis and Menegatos cited what they perceived as failures to adequately supervise and oversee the construction project, such as not producing plans or drawings in a timely fashion, failure to close out permits, inadequate supervision or coordination of the various trades and contractors, not hiring a kitchen designer and allowing the demolition contractor to leave debris on the premises (*id.* at 2; Christou: 11). They further claimed that Tim and Christou had engaged in misconduct, citing the unauthorized payments made to Tim and claiming misuse of the corporate credit card (Meeting Minutes 3; Christou 10–11). Youssis and Menegatos, who held the requisite 140 shares, voted to fire Tim and Christou and retain defendant Dino Gourmos

³ Each shareholder had the authority to sign checks for under \$50,000 (Shareholders Agreement 9).

in their stead (Meeting Minutes 5, 7). They also voted to reduce Tim's thirty shares to zero (*id.* at 5).

Since the July 2012 meeting, there was little to no communication between Christou and the defendants (*id.* at 21, 76). He never inquired as to the status of Koureli's affairs, and no one sent him any information on the subject (*id.* at 22, 76). By agreement dated September 5, 2012, Youssis and Menegatos each conveyed 30 Koureli shares to Gourmos, the new manager (exhibit 2). Christou received no notice of this transfer (Christou: 19). In fact, the only substantial communication between Christou and Koureli was the notice of the shareholders meeting that is the subject of the instant motion (*id.* at 19–20). That letter, dated June 1, 2013, gave notice that a majority of the Koureli shareholders had called for a special meeting to be held on June 18, 2013, to reduce Christou's shares, to confirm the total amount of capital contributions made by Youssis, Gourmos and Menegatos and to calculate each shareholder's ownership interest (affirmation of Michael J. Romano, exhibit B). Christou obtained a temporary order restraining defendants from taking any action "regarding the ownership of [Koureli]" (order, June 18, 2013). Consequently, though the meeting was held (with Christou in attendance by proxy), no action was taken to confirm any shareholder's ownership interest (exhibit 4, ¶ 22). However, Koureli did adopt a resolution confirming that Youssis had made \$670,000 in additional capital contributions to cover excess opening costs (*id.* at ¶ 23).

II. *Standard*

To succeed on a motion for a preliminary injunction, the movant must demonstrate a likelihood of ultimate success on the merits, that irreparable injury would result in the absence of injunctive relief, and that a balancing of the equities to effect substantial justice and to preserve

the status quo warrants the grant of this extraordinary relief (CPLR 6301; *Key Drug Co. v Luna Park Realty Assoc.*, 221 AD2d 598, 599 [2d Dept 1995]; *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 [1st Dept 1982] *app dismissed*, 58 NY2d 1113 [1983]). Movant “must demonstrate a clear right to relief which is plain from the undisputed facts,” to establish its likelihood of success (*Blueberries Gourmet Inc. v Aris Realty Corp.*, 255 AD2d 348, 349–50 [2d Dept 1998]). Where questions of fact exist which would substantially subvert the movant’s likelihood of ultimate success, an injunction should not be granted (*Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co.*, 53 AD3d 612, 613 [2d Dept 2008]). Furthermore, “economic loss, which is compensable by money damages, does not constitute irreparable harm” and so does not justify injunctive relief (*DiFabio v Omnipoint Communications Inc.*, 66 AD3d 635, 637 [2d Dept 2009] *quoting Matter of Walsh v Design Concepts*, 221 AD2d 454, 455 [2d Dept 1995]).

III. Discussion

The credible hearing evidence demonstrates that Christou and Tim were discharged from their Duties more than a year ago and, at the time, Tim’s shares were reduced to zero. The discharge and taking of shares were accomplished by a vote of 140 shareholders because of inadequate supervision of the renovation and the misappropriation of corporate funds. Neither Christou nor Tim took any legal action at the time. Defendants now have announced their intention to meet to take Christou’s shares. As a result, Christou and Tim have commenced this action and moved for injunctive relief, arguing they were improperly discharged.

Essentially, they seek an order preventing Koureli’s shareholders from determining who owns how many shares until this action is concluded. They also seek an order directing that they

be permitted to inspect Koureli's books and records.

As the Shareholders Agreement provides that in all or nearly all instances the discharge of an operating partner automatically results in the reduction of his interest in the company, it is plaintiffs' burden to show that they are likely to be able to prove that their dismissal was improper. They have not done so. The Shareholders Agreement clearly requires Christou and Tim to oversee and supervise the build-out of the restaurant "from start to finish," even though these duties would commence before the two began to collect their regular weekly salary (Shareholders Agreement 6, 7). While the slow pace of the project could have been attributed to major design decisions in which all shareholders took part, the evidence shows that the money partners had complaints about matters over which Christou and Tim had discretion and, therefore, responsibility. In support of their claims that the managers had failed to adequately perform their duties, Youssis and Menegatos cited to, *inter alia*, a failure to properly close out a plumbing demolition permit, which caused a substantial delay in obtaining a certificate of occupancy, paying the demolition contractor for incomplete work and allowing it to leave debris on the premises, and not coordinating or communicating with the various tradesmen and contractors engaged in the construction work. These tasks are of the sort that simply needed to be done and did not call for a decision by a super-majority of the shareholders. Responsibility for making sure these things were accomplished rested with plaintiffs, who have not presented any evidence showing that they actually fulfilled their duties in this regard and, in fact, have acknowledged in certain instances that they did not (Christou: 68-71).

Similarly, with respect to the misappropriation of funds, the evidence shows that the operating partners began disbursing \$2,000 a week to Tim prior to the beginning of any physical

work on the premises, contrary to the provisions of the Shareholders Agreement. Christou acknowledges that he began making these payments without discussing it with the money partners (*id.* at 82). Repeated unauthorized payments out of corporate funds could constitute misconduct as defined under the Shareholders Agreement. While both at the July 12, 2012 shareholders meeting (exhibit 3-B) and at the hearing (Christou: 88, 94), Christou claimed that there was a cap on the amount that would be paid to Tim for supervising construction, evidence of such a cap was never presented. All told, plaintiffs have made no showing that their discharge in 2012 was improper and would not constitute grounds for the reduction of their shares. Since these improper events took place before the Introduction Period even *began*, it would appear by simple arithmetic that Koureli has ample grounds for stripping Christou of all of his shares (*see* Shareholders Agreement 6, 9).⁴

It also is not clear that the balance of the equities favors plaintiffs. Christou argues that allowing Koureli to adopt a resolution stripping him of his shares would deprive him of the ability to participate in major decisions that require a shareholder vote. But between the time he was fired (at which point the demolition work was still ongoing [Christou: 69]) and the filing of the instant motion, Christou made no effort to be involved in Koureli, showed no interest in the company's finances, and took no part in making any decision concerning the establishment or operation of the restaurant. From the record it appears that plaintiffs' interest in reasserting their supposed shareholder rights was only rekindled when it seemed as though the opening of the

⁴ As further grounds for reducing Christou's shares, defendants have declared their intent to rely on Youssis's additional capital contribution of \$670,000, sufficient to transfer at least 5 shares to him from Christou (exhibit 4, ¶ 24).

restaurant was imminent (*see* complaint ¶ 28).⁵ In other words, the effect of granting the requested relief would be to disrupt, rather than preserve, the way the business has been managed over the past year or more. Moreover, that plaintiffs only broke their silence when it became likely that Koureli would actually start to take in revenue leaves the court with suspicions that the instant motion is at least in part an attempt to throw a wrench into the operation of a going concern while the parties sort out who deserves a cut of the proceeds.

Plaintiffs having failed to clearly establish a likelihood of success on the merits or a balance of the equities in their favor, the court need not consider the issue of whether they will suffer irreparable harm (*See Eljay Jrs., Inc. v Rahda Exports*, 99 AD2d 408, 409 [1st Dept 1984] [where proof insufficient to show likelihood of success, court need not inquire into irreparable harm]; *Damon Creations, Inc. v James Talcott, Inc.*, 39 AD2d 677, 677 [1st Dept 1972][failure to establish clear likelihood of success precludes issuance of preliminary injunction]). The court concludes that it would be inappropriate to force the corporation to operate as though it were still July 11, 2012. Pursuant to Business Corporation Law § 624 and its restrictions, however, Christou has the right to inspect Koureli's books and records and Tim has that right for the period during which he was a director and shareholder. Accordingly it is

ORDERED that the motion of plaintiffs Erineos Christou and Efthimios Papanastasopoulos for a preliminary injunction enjoining defendants Koureli Restaurant Group, Inc., Constantinos Youssis and Spiro Menegatos from conducting s Special Meeting, is denied and the Temporary Restraining Order is vacated; and it is further

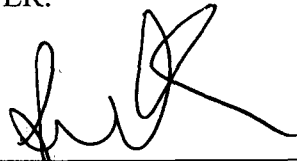
⁵ It appears that the restaurant, named "Nerai," in fact opened for business shortly before oral argument on the preliminary injunction was held (transcript, July 17, 2013, 11:14-15, 21:6).

ORDERED that defendants Koureli Restaurant Group, Inc., Constantinos Youssis, Spiro Menegatos and Dino Gourmos permit plaintiffs Erineos Christou and Efthimios Papanastasopoulos to inspect the books and records of the defendant corporation, consistent with Business Corporation Law § 624; and it is further

ORDERED that the parties are to appear in Part 54, 60 Centre St., rm. 228, New York, N.Y., at 9:30 on November 14, 2013 for a preliminary conference.

Date: October 29, 2013

ENTER:

A handwritten signature in black ink, appearing to be 'J.S.C.', written over a horizontal line.

J.S.C.