

Andrus v Bee Offshore Operations, LLC

2013 NY Slip Op 32906(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 651056/2013

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN Justice PART 60

THOMAS G. ANDRUS, et al., INDEX NO. 651056/2013

Plaintiffs,

-against-

MOTION DATE

BEE OFFSHORE OPERATIONS, LLC, et al.,

Defendants.

MOTION SEQ. NO. 001

The following papers, numbered 1 to were read on this motion for a preliminary injunction.

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... No (s).
Answering Affidavits -- Exhibits No (s).
Replying Affidavits No (s).

Cross-Motion: Yes No

Plaintiffs' motion for a preliminary injunction to dismiss is decided in accordance with the attached decision/order, dated November 13, 2013.

Dated: 11-13-13

Marcy S. Friedman, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

THOMAS G. ANDRUS, et al.,
Plaintiffs,

Index No.: 651056/2013

- against -

BEE OFFSHORE OPERATIONS, LLC, et al.,
Defendants.

DECISION/ORDER

x

In this breach of fiduciary duty and minority shareholder oppression action, plaintiffs Thomas G. Andrus, White Marlin Energy Services, Inc., Guy E. Matthews, Carolyn Matthews, Stephen G. Lawrence, and Carl Hammond allege that various defendants diluted their interest in Black Elk Energy Offshore Operations, LLC (“BEE Offshore”). It is undisputed that plaintiffs are members and shareholders of Black Elk Energy, LLC (Black Elk Energy), a company that holds a minority interest in BEE Offshore. BEE Offshore owns oil and gas properties and is the operating company of Black Elk Energy. (Oct. 31, 2013 Transcript of Oral Argument [Tr] at 16-17.) Plaintiffs move for a preliminary injunction enjoining BEE Offshore from dispersing any proceeds from the sale of 43 offshore fields “currently on offer through The Oil & Gas Asset Clearinghouse until 27.01 percent of said proceeds are placed in an escrow account.”

It is well settled that a preliminary injunction is a drastic remedy that will be granted “only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant’s favor (Grant Co. v

Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606).” (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996]. Accord City of New York v 330 Cont. LLC, 60 AD3d 226 [1st Dept 2009].) “The movant has the burden of establishing a right to this equitable remedy.” (McLaughlin, Piven, Vogel, 114 AD2d at 172.)

CPLR 6301 further provides:

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.”

CPLR 6301 thus sets forth two independent grounds on which a preliminary injunction may be granted.

Here, plaintiffs are not entitled to an injunction under the first ground. Neither the offshore fields nor the proceeds from their sale can be considered the subject of the action, which “is typically a specific res in which the plaintiff has a preexisting interest.” (Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn., Inc., 21 AD3d 777, 778 [1st Dept 2005] [internal quotation marks and citation omitted]; compare Ficus Inv., Inc. v Private Capital Mgt., LLC, 61 AD3d 1, 20 [1st Dept 2009] [upholding preliminary injunction placing mortgages in escrow because the mortgages “constituted a specific res that [was] the ‘subject of the action,’” where the mortgages were acquired with funds allegedly misappropriated from the plaintiff].)

Plaintiffs also fail to demonstrate entitlement to an injunction under the second ground. It

is well settled that “a general creditor has no legally recognized interest in or right to interfere with the use of the unencumbered property of a debtor prior to obtaining judgment.” (Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541, 549 [2000].) Thus, provisional injunctive relief is not available “in a general creditor’s action on a debt, to prevent the dissipation of assets necessary to satisfy the anticipated money judgment.” (Id. at 547.)

Plaintiffs argue that this action is not solely a breach of contract action or a mere action on a debt, and is distinguishable from Credit Agricole because plaintiffs have alleged “dissipation of corporate assets along with breaches of fiduciary duty.” (P.’s Reply Memo. at 4.) However, the Credit Agricole doctrine cannot be avoided where, as here, the breach of fiduciary duty claim is “incidental to and purely for the purposes of enforcement of the primary relief sought . . . , a money judgment.” (Credit Agricole, 94 NY2d at 548.)

In the instant action, the primary relief sought is money damages. At most, plaintiffs vaguely assert that dilution of their interest in BEE Offshore may be remedied by equitable relief (see Tr. at 9), but do not expressly plead a claim for equitable relief. (See Complaint, Wherefore Clauses seeking “1) Nominal, compensatory and punitive damages . . . ; [and] 2) “Any and all remedies allowed by and applicable to Plaintiffs’ claims”.)

The authority cited by plaintiffs does not support their request for an injunction. In North Fork Preserve, Inc. v Kaplan (31 AD3d 403, 405-406 [2d Dept 2006]), minority shareholders who alleged they had been frozen out of the management of the defendant corporation were granted an injunction preventing the defendant from selling its assets and dissolving its business, a hunting and fishing preserve. Here, in contrast, there is no claim that the sale of the offshore fields will result in the dissolution of the business. Indeed, defendants assert, and plaintiffs do

not controvert, that the sale is part of BEE Offshore's business plan.

Plaintiffs assert for the first time on the reply that in the event the court determines that the Credit Agricole doctrine bars a preliminary injunction, the court should issue an order of attachment. (P.'s Reply Memo. at 4.) The remedy of an attachment may be available to prevent dissipation of assets where a preliminary injunction is barred by the Credit Agricole doctrine. (Fatima v Twenty Seven-Twenty Four Realty Corp., 65 AD3d 1079, 1079 [2d Dept 2009].) On this record, however, plaintiffs have not made the showing required by CPLR 6201 (3) for an attachment.

In view of this disposition, the court does not reach the issue of whether plaintiffs have otherwise satisfied the elements for a preliminary injunction.

It is accordingly hereby ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that the parties shall appear for the previously scheduled compliance conference on March 4, 2014 at 2:30 p.m. in Part 60, Courtroom 248, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: New York, New York
November 13, 2013


MARCY FRIEDMAN, J.S.C.