

Singh v Thiyakaraajakkurukkal
2013 NY Slip Op 34124(U)
August 1, 2013
Supreme Court, Nassau County
Docket Number: 601281-13
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

**DALBARA SINGH, individually and as a shareholder
of MOHTHI TRANSPORTATION, INC., suing in the
right of MOHTHI TRANSPORTATION, INC.,**

Decision and Order

Plaintiffs,

MOTION SUBMITTED:

June 21, 2013

MOTION SEQUENCE: 01 & 02

INDEX NO.:601281-13

-against-

**MOHANAROOBAN THIYAKARAAJAKKURUKKAL
and MOHTHI TRANSPORTATION, INC.,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause	1
Affidavit in Opposition	2
Notice of Motion	3
Affirmation in Support	4
Affidavit in Opposition	5
Reply Affidavit	6

In this action for, *inter alia*, breach of contract, fraud in the inducement, and breach of fiduciary duty, the Plaintiff, Delbara Singh, moves for an order pursuant to CPLR 6301 for a preliminary injunction (Motion Seq No 1) and for the appointment of a receiver pursuant to CPLR 6401(a) (Motion Seq No 2).

Background

On March 7, 2013, the Plaintiff and Mohanarooban Thiyakarajakkurukkal (“Defendant”) executed a Shareholder’s Agreement for Mohthi Transportation, Inc. (“Company”), a trucking

company. The Shareholder Agreement demonstrates that the Plaintiff and Defendant each hold 100 shares of the Company's 200 shares of outstanding stock. Plaintiff and Defendant are the only two shareholders of the Company (Ex. "A" to Motion in Support of Preliminary Injunction).

Defendant claims that at about the same time the Shareholder's Agreement was executed, the parties executed an Agreement for Sale of Shares ("Stock Purchase Agreement") which provided, *inter alia*, as follows:

1. MOHTHI TRANSPORTATION, INC. is the owner of 200 shares of the Common Stock, \$99,538.00 par value, of MOHTHI TRANSPORTATION, INC., a corporation organized and existing under the laws of the State of New York, located at 70 Squirrel Lane, 2nd Floor, Levittown, New York 11756 (the "Corporation").

2. MOHTHI TRANSPORTATION, INC. hereby sells, assigns and transfers to DALBARA SINGH 100 shares of the Corporation's common stock, now owned by MOHTHI TRANSPORTATION, INC. (the "Shares"), which constitute 50 percent (%) of the issued and outstanding shares of stock in the Corporation effective as of the date of this agreement, for a total price of \$49,769.00, tendered as consideration to MOHTHI TRANSPORTATION, INC., as follows:

a) \$19,000.00 by personal check number 1063 from Bank of America Account #334038852653 (*copy annexed hereto as, Exhibit A*); and

b) \$12,269.00 by personal check number 1065 from Bank of America Account #334038852653 (*copy annexed hereto as, Exhibit B*); and

c) Personal Property described as, "Freightliner Columbia Truck, Green, 2007, VIN #: 1fuja6ck271x58179, miles: 1029076" purchased on February 1, 2013 (*copy of bill of sale annexed hereto as, Exhibit C*)

upon DALBARA SINGH's execution and delivery of this agreement; and

3. In addition to these documents, DALBARA SINGH will be required to execute and deliver the Corporation's current Shareholders' Agreement, a copy of which is enclosed herewith, *Exhibit "D"*, although DALBARA SINGH will have no rights as a shareholder of the Corporation until such time as the full purchase price has been tendered and the Shares have been delivered to DALBARA SINGH.

* * *

5. Except for the foregoing, MOHTHI TRANSPORTATION, INC. makes no representation or warranty of any kind whatsoever about the Shares, the Corporation or DALBARA SINGH's rights as a shareholder or employee of the Corporation, it being understood that the Shares are being transferred hereunder "as is."

6. We agree that title to the Shares will not pass to DALBARA SINGH until such time as the full purchase price has been paid.

7. If at any time before the purchase price is paid in full, DALBARA SINGH should breach any of his obligations under this Sale of Shares Agreement or the Shareholders' Agreement, then DALBARA SINGH shall not be deemed a shareholder of the Corporation for any purpose whatsoever.

8. By acceptance of and agreement to the foregoing DALBARA SINGH agrees to be bound by all of the provisions of the Corporation's Certificate of Incorporation, Bylaws, and the Shareholders' Agreement.

9. DALBARA SINGH hereby represents and warrant that:

* * *

(b) DALBARA SINGH has sufficient knowledge and experience in financial and business matters so as to be capable of evaluating the merits and risks of acquiring the Shares.

* * *

(d) DALBARA SINGH understands, and has the financial capability of assuming, the economic risk of an investment in the Corporation for an indefinite period of time.

* * *

11. This agreement is governed by New York law, and any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in State of New York in accordance with the rules of the American Arbitration Association then in effect, and judgment upon the award rendered may

be entered in any court having jurisdiction thereof.

Notably, the Stock Purchase Agreement annexed to the motion papers is not signed.¹

Two months later, on May 14, 2013, Defendant, as President of the Company, sent a termination letter to Plaintiff stating the following:

Please be advised that Mohthi Transportation Inc. will effective [sic] terminate your service with our company as of May 14, 2013, based on your business action practices, your breach of the Mohthi Transportation, Inc. Agreement of Sale of Shares item #2, item #9(b), #9(d) and the Mohthi Transportation, Inc. Shareholder's Agreement Item #11.² Also your termination reflects any and all your activities which do not promote "the best interests of the corporation."

All company items in your possession, be prepared to surrender to me or deliver to this office IMMEDIATELY.

(Ex. "B" to Motion in Support of Preliminary Injunction).

On May 20, 2013, Plaintiff commenced the instant action, both individually and on behalf of the Company, asserting the following causes of action: breach of the Shareholder's Agreement, fraud in the inducement, unjust enrichment, breach of fiduciary duty, conversion, fraudulent conveyance, alter ego, constructive trust, temporary restraining order ("TRO") and preliminary injunction.

On May 31, 2013, Plaintiff moved, by order to show cause, for a TRO and preliminary injunction. The undersigned signed the TRO, only to the extent of restraining the Defendant and Company from using the Company's receivables, property or assets other than "in the usual and ordinary course of business". With respect to the preliminary injunction, the Plaintiff sought to restrain the Defendant and Company from: 1) using a 2007 Columbia Freightliner truck and a 2009 Kenworth truck (collectively referred to as the "trucks"); 2) selling or in any other way

¹ Defendant claims that the original Stock Purchase Agreement, along with other corporate documents, has been illicitly removed from the Defendant's residence (Affidavit in Opposition to Preliminary Injunction at ¶ 5). Apparently, at the time the Plaintiff and Defendant entered into the Shareholder's Agreement, they were both living in a "mother-daughter" house at 70 Squirrel Lane, Levittown, New York.

² See relevant provisions of the Stock Purchase Agreement, *supra* at pp 2-3.

transferring the trucks or any other receivables, property or assets of the Company until further order of the court; 3) permitting the further use or transfer of the trucks or any other asset fraudulently transferred by the Company to Defendant or any other person or entity; or 4) accepting payment of any kind from Total Quality Logistics or other freight brokerage service provided that such payments (including payments due to the Company or any other company owned or controlled by Defendant) shall be held in escrow pending further order of the court.³

On June 26, 2013, the Plaintiff moved for the appointment of a temporary receiver pursuant to CPLR 6401(a). According to the Plaintiff, “this case is ripe for the appointment of a Temporary Receiver to oversee the enforcement of the Court’s Temporary Restraining Order, and to monitor [the Company’s] expenditures and receivables, thereby preventing the total destruction of [the Company’s] credit and assets” (Affidavit in Support of Receiver at ¶ 30).

For the reasons that follow, Plaintiff’s motions seeking a preliminary injunction and the appointment of a receiver are denied.

Discussion

Preliminary Injunction (Motion Seq No 1)

In support of the motion for a preliminary injunction, the Plaintiff, in his affidavit, states that in February 2013, following Defendant’s proposal that Plaintiff invest in the Company, the Plaintiff, using his own funds, purchased the Columbia truck, which was subsequently registered in the name of the Company, “caused” the Kenworth truck to be leased to the Company, and spent additional funds for the repair and maintenance of the trucks (Affidavit in Support of Preliminary Injunction at ¶¶ 5-9, 12).⁴ In addition to executing the Shareholder’s Agreement, plaintiff asserts that he and the Defendant “separately” agreed that each of them would serve as a

³ In opposition to the motion, Defendant argues that: 1) Plaintiff’s claims are barred by the agreement to arbitrate set forth in the Stock Purchase Agreement; and 2) because Plaintiff failed to pay the purchase price of \$31,269, Plaintiff has no rights as a shareholder and, ipso facto, no right to a preliminary injunction (Affidavit in Opposition to Preliminary Injunction at ¶¶ 6, 8, 9). Notably, section 21 of the Shareholder’s Agreement states that “This [Shareholder’s] Agreement contains the entire agreement of the parties and no provision may be waived, altered or amended, in whole or in part, unless such waiver, alteration or amendment is in writing and signed by all the parties” (Ex. “A” to Motion in Support of Preliminary Injunction).

⁴ According to the Plaintiff, Defendant claimed that the Company owned and operated two trucks and Defendant proposed that Plaintiff acquire two additional trucks for the Company in exchange for which Plaintiff would become a 50% shareholder of the Company (Affidavit in Support of Preliminary Injunction at ¶¶ 5-7).

director of the Company and that Plaintiff would serve as Vice President and Secretary of the Company.⁵

Plaintiff alleges that, notwithstanding the foregoing, the Defendant: failed to provide Plaintiff with the Company's financial books and records; failed to provide dividends; failed to account for funds received and paid by the Company; "upon information and belief" opened bank accounts for which Plaintiff does not have access; "upon information and belief" misdirected funds that otherwise should have been paid to the Company; "upon information and belief" cancelled and/or threatened to cancel the Department of Transportation numbers for the trucks and other vehicles owned or operated by the Company; "upon information and belief" failed to properly insure and maintain the trucks and other vehicles owned or operated by the Company; "upon information and belief" misappropriated the trucks and other Company equipment and business opportunities for his own use or for the companies over which Defendant has control; "upon information and belief" never contributed two trucks to the Company; and "upon information and belief", presented the Plaintiff "with patently false information" regarding the Company "with the intent of convincing [Plaintiff] to making a capital investment" in the Company that Plaintiff would not otherwise have made had he known the truth about the Company and Defendants "actual intended use" of Plaintiff's investment (Affidavit in Support of Preliminary Injunction at ¶¶ 14-24).

Preliminary injunctive relief is a drastic remedy not routinely granted. A party moving for a preliminary injunction must demonstrate by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual, not to determine the ultimate rights of the parties. In addition, mandatory preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d at 727, *supra*). "The mere existence of an issue of fact will not itself be grounds for the denial of the motion" (*Arcamone-Makinano . Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]). The decision whether to grant or deny a preliminary injunction is within the sound discretion of the court (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d at 738, *supra*; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

On this record, the Plaintiff has failed to sufficiently demonstrate a likelihood of success on the merits. The only proof Plaintiff submits in support of his application is his affidavit and a

⁵ There is no separate agreement to this effect contained in the motion papers.

copy of the termination letter. The affidavit is replete with allegations of wrongdoing based “upon information and belief”, yet Plaintiff offers no proof to substantiate such claims. The Plaintiff, thus, has not established, by clear and convincing evidence, any wrongdoing by the Defendant to demonstrate the merits of any of the causes of action asserted in his complaint (*see Fekete v Camp Skwere*, 16 AD3d 544 [2d Dept 2005] [affidavit which was predicated largely “upon information and belief” was insufficient to establish a meritorious defense]; *Oswald v Oswald*, 107 AD3d 45 [3d Dept 2013] [affidavits from plaintiff and his attorney, on motion for summary judgment, which merely averred, “upon information and belief,” were without probative value]; *Anderson v Livonia, Avon & Lakeville Railroad Corp.*, 300 AD2d 1134 [4th Dept 2002] [affidavits based only upon information and belief were without probative value]; *Mason v Simmons*, 139 AD2d 880 [3d Dept 1988] [conclusory allegations based mainly upon information and belief were insufficient]).

The only wrongdoing asserted in Plaintiff’s affidavit that is not premised “upon information and belief” is the following: Defendant has failed to provide Plaintiff with “proper financial books and records” of the Company despite repeated demands for them; and Defendant has failed to account for funds received and paid by the Company despite repeated demands for the accounting (Affidavit in Support of Preliminary Injunction at ¶¶ 14, 16). However, while Plaintiff claims he made “repeated demands” for an accounting and the Company’s financial books and records, there is no evidence of such demands annexed to the motion papers.

Furthermore, the Defendant denies the fact that the Plaintiff made any demand for an accounting (Affidavit in Opposition to Preliminary Injunction at ¶ 9).⁶ While disputed issues of fact alone will not justify the denial of a motion for a preliminary injunction (see CPLR 6312[c]; *Arcamone–Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]), here, where a central fact is in dispute, it is more difficult to ascertain whether the movant has shown a likelihood of success on the merits (*County of Westchester v United Waste New Rochelle*, 32 AD3d 979 [2d Dept 2006]; *Pearlgreen Corp. v Yau Chi Chu* (8 AD3d 460 [2d Dept 2004])). Accordingly, it cannot be said that the Plaintiff, on the record before this court, established a likelihood of success on the merits (*see Radiology Assoc. of Poughkeepsie, PLLC v Drocea*, 87 AD3d 1121, 1124 [2d Dept 2011]; *Matter of Advanced Digital Security Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612, 613 [2d Dept 2008])).

The Plaintiff has also failed to establish irreparable injury absent the granting of a preliminary injunction, as he failed to establish imminent and nonspeculative harm that would

⁶ The Defendant also denies that: Singh ever worked or provided any services to the Company; Defendant ever proposed that Singh should acquire two trucks; Defendant ever agreed that Singh would be an officer of the Company; and that Singh used his own funds in excess of \$100,000 for the purchase, lease, repair and maintenance of the trucks (Affidavit in Opposition to Preliminary Injunction at ¶¶ 5-8).

befall him in the absence of a preliminary injunction (*see Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739–740 [2d Dept 2010]; *Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 716 [2d Dept 2011]).⁷ Moreover, where, as here, the movant can be fully compensated by a monetary award, an injunction will not be granted because no irreparable harm will be sustained in the absence of injunctive relief (*306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011]).

Finally, the Plaintiff failed to establish that a balance of the equities weighs in his favor. When considering the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief (*Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806 [2d Dept 2008]). Specifically, to obtain an injunction, the movant is required to show that irreparable injury to be sustained is more burdensome to him than the harm that would be caused to the party opposing the injunction if the injunction were granted (*Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717 [2d Dept 2012]). The Plaintiff has failed to make such a showing.

Appointment of a Receiver (Motion Seq No 2)

In his affidavit in support of the appointment of a temporary receiver, the Plaintiff alleges that the Defendant: has had “ample opportunity to continue misdirecting” funds, which are paid in a “substantial amount of cash”⁸; changed the Company’s passwords with Total Quality Logistics and other freight brokering services, thereby “cutting” the Plaintiff out of the Company’s day to day operations; and on April 16, 2013, using his wife’s maiden name, incorporated a new company, Krishna Trans Inc.,”for the sole purpose of”⁹ fraudulently conveying Company assets and thus rendering the Company a “mere shell” (Affidavit in Support

⁷ Plaintiff alleges that “upon information and belief”, the Defendant intends to move the trucks and the Company’s other vehicles and equipment “outside of the jurisdiction of this Court” and that time is of the essence because if his interests, as well as those on behalf of the Company “are not protected immediately”, his “investment will be lost”, his “personal liability will increase, and the assets of [the Company] will be fraudulently transferred without proper consideration” having been paid to the Company, “thereby draining the company of any value - rendering it a mere shell” (Affidavit in Support of Receiver at ¶¶ 25, 31).

⁸ Plaintiff’s allegation that the Defendant has misdirected substantial amounts of cash is, in part, premised upon Plaintiff’s counsel conversation with Total Quality Logistics (a freight brokerage service used by the Company) indicating that some of the Company’s accounts receivables are paid in cash (Affidavit in Support of Receiver at ¶¶ 18, 44).

⁹ The allegation that Krishna Trans was formed for the sole purpose of allowing the Defendant to engage in fraudulent conveyances of the Company’s assets was alleged “upon information and belief” (Affidavit in Support of Receiver at ¶ 25).

of Receiver at ¶¶ 18-19, 24-25).

In light of these allegations, the Plaintiff now seeks the appointment of a receiver because: the Plaintiff, both individually and as a shareholder suing derivatively, “will suffer irreparable harm . . . as the assets of [the Company] are being wasted, misdirected and fraudulently transferred through [Defendant’s] acts of malfeasance”; the Defendant is not in compliance with the court’s TRO and is “still finding ways to misappropriate the funds” of the Company; and, without a receiver, Defendant will “drain the company of all and any value - thereby destroying it and rendering it a mere shell” (Affidavit in Support of Receiver at ¶¶ 28-30).

In opposition to the Plaintiff’s application for appointment of a receiver, the Defendant argues that, until the Plaintiff can demonstrate that he has fulfilled the terms of the Stock Purchase Agreement, and that the assets of the Company are at risk of loss, material injury, destruction, or removal, that Plaintiff’s request for the appointment of a receiver should be denied. Specifically, there has not been a showing “by anything other than by information and belief that the assets are being secreted or moved to another jurisdiction”, nor has the Plaintiff identified specific funds which need protection (Affidavit in Opposition to Receiver at ¶¶ 17-18).

The appointment of a temporary receiver is an extreme remedy that should be granted only where the movant (a person having an apparent interest in the property which is the subject of the action) has made a clear evidentiary showing of the need to conserve the property at issue and protect the moving party's interests (*see Lee v 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d 379 [2d Dept. 2003]).¹⁰ Here, notwithstanding the fact that Krishna Trans (the Hicksville, New York company recently incorporated in the name of the Defendant’s wife) obtained two quotes for insurance on the Company’s trucks (Exs. “M” and “N” to Plaintiff’s Reply Affidavit in Support of Receiver), the Plaintiff has nevertheless failed to make a clear evidentiary showing that the trucks and other assets of the Company are in danger of being “removed from the state, or lost, materially injured or destroyed” (CPLR 6401[a]; *see also Vardaris Tech v Paleros Inc.*, 49 AD3d 631, 632 [2d Dept 2008]; *Lee v 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d at 379, *supra*).

Based on the foregoing, it is hereby

Ordered that the Plaintiff’s motion for a preliminary injunction is denied and the TRO previously issued by the court on May 31, 2013 is vacated; and it is further

¹⁰ In the instant case, the Plaintiff, a 50% shareholder as evidenced by the Shareholder’s Agreement, meets the test of a person with “apparent interest in the property.”

Ordered that the Plaintiff's motion for the appointment of a temporary receiver is denied.

This constitutes the decision and order of the court.

Dated: August 1, 2013


Hon. Vito M. DeStefano, J.S.C.

ENTERED
AUG 09 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE