Backhaus v McMann
2014 NY Slip Op 31393(U)
May 20, 2014
Supreme Court, Suffolk County
Docket Number: 62513-14
Judge: Thomas F. Whelan
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SHORT FORM ORD ER

INDEX No. 62513-14

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

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/25/24
SUBMIT DATE: ________
Mot. Seq. # 001 - MD
PC Scheduled: 7/11/14
CDISP: YES

---X

ADAM BACKHAUS,

Plaintiff,

-against-

KEVIN McMANN, ANTHONY HOLOP and MCC BAGELS, INC.,

Defendants.

---X

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Upon the following papers numbered 1 to 12 read on this special proceeding for relief pursuant to CPLR 6301 Order To Show Cause/Notice of Motion and supporting papers: 1 - 4 ; Notice of Cross Motion and supporting papers ________; Answering papers 5-8 ________; Reply papers 9; 10 ____; Other 11 (Plaintiff's reply memorandum); 12 (Plaintiff's memorandum in support) ________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for mandatory injunctive relief with respect to custody and control of the day to day business operations of the defendant corporation and its finances and prohibitory restraints is considered under CPLR 6301 and is denied; and it is further

ORDERED that a preliminary conference shall be held herein on Friday, **July 11, 2014**, at 9:30 a.m. in the courtroom of the undersigned on the first floor of Supreme Court Annex building at One Court Street, Riverhead, New York 11901.

On July 27, 2013, defendant McCann, as sole owner of the defendant corporation, entered into two separate Stock Sale and Purchase agreements. In the one, he purportedly sold to the plaintiff, in exchange for consideration valued at $150,000.00, a 66 ⅔ interest in the defendant corporation. In the second Stock Sale and Purchase agreement, the plaintiff sold that same 66 ⅔ interest to defendant Holop for the same consideration. In addition, the plaintiff and the individual defendants executed on that date, a separate handwritten agreement which purports to confer upon the plaintiff the right to operate and manage the bagel store business of the defendant corporation for a period of five years, after which, the plaintiff and the individual defendants would become co-equal, one-third owners of the defendant corporation. All three of these writings were drafted by the plaintiff.

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The plaintiff claims that he performed his obligations under the agreements he signed by closing his nearby store, obtaining a lease extension for the defendant's store, by making substantial improvements to the bagel store and its equipment and by working and managing its day to day operations until March of 2014. It was then that the plaintiff was physically ousted from the store by agents of the individual defendants.

Shortly thereafter, the plaintiff commenced this action in which he seeks declaratory relief and specific performance of the stock sales purchase agreement dated July 27, 2013 under which he purportedly purchased a two thirds interest in the defendant corporation from defendant McCann. The plaintiff also seeks declaratory relief and specific performance of the separate handwritten agreement executed by him and the individual defendants in which he was allegedly conferred the right to operate and manage the corporate defendant's bagel store. The plaintiff further seeks an accounting of corporate assets and money damages under theories of unjust enrichment, quantum meruit and conversion. By the instant motion, the plaintiff seeks various forms of mandatory and prohibitory preliminary injunctive relief including the restoration of occupancy and control of the store and its business to the plaintiff.

The defendants oppose the plaintiff's motion on various grounds including that the plaintiff's stock purchase agreement is unenforceable due to various reasons including indefiniteness, lack of assent to its terms by defendant McCann, improper execution and the alteration of some of its terms by the plaintiff after presentment to defendant McCann. The defendants further contend that the plaintiff's Stock Sale and Purchase agreement is unenforceable because it constitutes a mere agreement by defendant McCann to sell one-third interests in the corporate defendant to the plaintiff and to Holop in the future following a five year trial period. The defendants vigorously dispute the plaintiff's version of the facts which they claim also warrants a denial of the requested preliminary injunctive relief. In reply, the plaintiff contests the defendants' factual assertions and demands that his motion be granted. For the reasons stated below the motion is denied.

By statutory fiat, "[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). The satisfaction of one of these two statutory predicates, namely the presence of harm or threatened harm to the subject of the action that may render the judgment ineffectual or a claim for permanent injunctive relief, must be advanced in the complaint (*see* ***BSI, LLC v Toscano***, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]).

To constitute the "subject of the action" within the fist type of cases contemplated by CPLR 6301, the property or assets for which a restraint or other mandate is sought must be unique or sufficiently specific thereby rendering the plaintiff's interest therein incalculable and such property or assets must be the very object of the claim giving rise to the demand for preliminary injunctive relief (*see* ***Credit Agricole Indosuez v Rossiyskiy Kredit Bank***, 94 NY2d 541, 548, 708 NYS2d 26

[2000]; ***Kurlandski v Kim***, 111 AD3d 676, 975 NYS2d 98 [2d Dept 2013]; ***Coby Group, LLC v Hasenfeld***, 46 AD3d 593, 847 NYS2d 239 [2d Dept 2007]). Accordingly, non-unique chattels do not qualify as proper targets of preliminary injunction since the plaintiff's interests therein are sufficiently quantifiable thus rendering their loss or destruction capable of recompense by an award of money damages (*see* ***Kurlandski v Kim***, 111 AD3d 676, *supra*). Monies that are not part of any specific res or fund are not regarded as the "subject of the action" and likewise not the proper targets of a preliminary injunction (*see* ***Etzion v Etzion***, 62 AD3d 646, 880 NYS2d 79 [2d Dept 2009]; ***Winter v Brown***, 49 AD3d 526, 853 NYS2d 361 [2d Dept 2008]).

Under this statutory backdrop, appellate case authorities have formulated clear standards by which a party's entitlement to preliminary injunctive relief is measured. To obtain such relief, the movant must make a clear and convincing showing of the following; 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* ***Nobu Next Door, LLC v Fine Arts Hous., Inc***., 4 NY3d 839, 800 NYS2d 48 [2008]; ***County of Suffolk v Givens,*** 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013]; ***Greystone Staffing, Inc. v Warner***, 106 AD3d 954, 2013 WL 2228792 [2d Dept 2013]; ***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, as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]; ***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]). Consequently, a clear legal right to relief, which is plain from facts presented that are generally undisputed, must be established (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***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]). While the existence of disputed issues of fact alone will not justify the denial of a motion for a preliminary injunction (*see* CPLR 6312[c]), the motion should not be granted where there are issues that "'subvert the plaintiff's likelihood of success on the merits ... to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (***Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.***, 53 AD3d 612, 862 NYS2d 551 [2d Dept 2008], *quoting*, ***Milbrandt & Co. v Griffin***, 1 AD3d 327, 328, 766 NYS2d 588 [2d Dept 2003]).

Factors militating against the granting of preliminary injunctive relief include: 1) the absence of either of the two predicate claims for preliminary injunctive relief imposed by CPLR 6310 and 6311 (*see* CPLR 6301; ***BSI, LLC v Toscano***, 70 AD3d 741, *supra*); 2) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Di Fabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 636–637, 887 NYS2d 168 [2d Dept 2009]; ***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]); 3) 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]); and 4) that the relief would disturb, rather than maintain the status

quo, except where it is necessary to restore the status quo ante that was disturbed by action undertaken immediately prior to suit so as to preserve the unique assets that are the subject of the action (*see* ***1650 Realty Assoc., LLC v Golden Touch***, 101 AD3d 1016, 956 NYS2d 178 [2d Dept 2012]), or to preserve the status of one or more of the parties withe respect to such assets (*see* ***Bachman v Harrington***, 184 NY 458, 464 [1906]; ***Datwani v Datwani***, 102 AD3d 616, 959 NYS2d 153 [1st Dept 2013]; ***North Fork Preserve, Inc. v Kaplan***, 31 AD3d 403, 819 NYS2d 53 [2d Dept 2006]).

While it is often stated that the purpose of a preliminary injunction is to maintain, pending the trial, the status quo by the issuance of restraints to prevent the dissipation of assets that could render the judgment ineffectual (*see* ***County of Suffolk v Givens***, 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013]), there are circumstances in which the injunctive relief sought has the effect of compelling affirmative action on the part the defendant thereby altering, rather than preserving, the status quo. Mandatory, rather than prohibitory preliminary injunctive relief, is thus available even though such relief will confer upon the movant, provisionally, some form of the ultimate relief sought demanded in the action. 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, *supra*). Because this relief is considered most drastic, the traditional three prong test is enlarged to include a showing of "unusual" or "extraordinary" circumstances (*see* ***Roberts v Paterson,*** 84 AD3d 655, 923 NYS2d 326 [1st Dept 2011]; ***Board of Mgrs. of Wharfside Condominium v Nehrich***, 73 AD3d 822, 900 NYS2d 747 [2d Dept 2010]; ***Second on Second Café, Inc. v Hing Sing Trading, Inc.***, 66 AD3d 255, 884 NYS2d 353 [1st Dept 2009]; ***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]). Such circumstances may include proof "showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties" (***Bachman v Harrington***, 184 NY 458, 464 *supra*).

Upon application of the foregoing legal precepts to the circumstances evident from the record adduced on this motion, the court finds that the plaintiff failed to demonstrate an entitlement to the preliminary injunctive relief demanded by him. A review of the complaint served reveals that only three of the six claims advanced in his complaint provide a statutory predicate for preliminary injunctive relief, namely, the plaintiff's demands for specific performance of the two writings of July 27, 2013 by which the plaintiff allegedly acquired a two thirds interest in the defendant corporation and the right to operate and manage the bagel store; the claim for the issuance of judicial declaration so declaring such rights and interests; and the demand for an accounting from the defendants. The remaining claims, which sound in unjust enrichment, quantum meruit and conversion, will not support preliminary injunctive relief since their prosecution, if successful, will afford the plaintiff fully sufficient remedy at law in the form of money damages thereby eliminating the element of irreparable harm (*see* ***Kurlandski v Kim***, 111 AD3d 676, *supra*; ***Stangel v Chen***, 74 AD3d 1050, 903 NYS2d 110 [2d Dept 2010]).

The plaintiff's submissions failed to demonstrate a likelihood of success on the merits of his claims for specific performance and declaratory relief with respect thereto or the accounting sought

from the defendants. The record is devoid of a clear and convincing showing that the January 27, 2013 writings, upon which the plaintiff predicates his claim of ownership to a two thirds interest in the defendant corporation and the right to operate and manage the day to day operations of the bagel store, are enforceable contracts that are capable of being specifically performed. "Generally, when there is an objective manifestation of intent to enter into a contract, a purchase offer agreement will 'be subject to specific performance [if] it identifies the parties, describes the subject property, recites all essential terms of a complete agreement, and [if necessary] is signed by the party to be charged'" (***Ouimet v Fitzsimmons***, 68 AD3d 1507, 892 NYS2d 248 [3d Dept 2009], *quoting* ***Garnot v LaDue***, 45 AD3d 1080, 1082, 845 NYS2d 555 [3d Dept 2007]). The existence of a valid contract is thus a necessary element of a claim for specific performance (*see* ***Bayly v Broomfield***, 93 AD3d 909, 939 NYS2d 634, [3d Dept 2012]). In addition, it is well established that plaintiffs who seek specific performance must demonstrate that the following: 1) that they substantially performed their contractual obligations and were ready, willing and able to fulfill their remaining obligations; 2) that the defendant was able but unwilling to convey the interest or property that was the subject of the contract; and 3) that there is no adequate remedy at law (***see Huntington Min. Holdings v Cottontail Plaza***, 60 NY2d 997, 998, 471 NYS2d 267 [1983]; ***Janetti v Whelan***, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]; ***EMF General Contracting Corp. v Bisbee***, 6 AD3d 45, 51, 774 NYS2d 39 [1st Dept 2004]).

Here plaintiff's submissions fall short of establishing a likelihood of success on the merits of his claims for specific performance of his Stock Sale and Purchase agreement and the handwritten agreement of the same date. Insufficient clear and convincing proof of enforceable agreements was presented in light of the plaintiff's production of the second Stock Sale and Purchase agreement between defendant McCann and defendant Holop in which the same two thirds interest in the defendant corporation was sold by defendant McCann to defendant Holop. There was also less than clear and convincing proof of the plaintiff's performance of his obligations under the terms of the writings when made, the nature of which are unclear, in light of the allegations that certain of the terms now appearing on the writings did not exist at the time they were executed as they were unilaterally added or altered by the plaintiff following execution by defendant McCann. In this regard, the court notes that it is without authority to effectively re-write ambiguous contracts via the issuance of a preliminary injunction (*see* ***Trump on the Ocean, LLC v Ash***, 81 AD3d 713, 916 NYS2d 177 [2d Dept 2011]).

In addition, the record reveals the existence of numerous questions of fact regarding whether defendant McCann assented to the terms of the writings as they existed on the subject writings when he initialed and/or signed them and his ability to perform an enforceable promise, if any, to sell the two thirds interest in the corporate defendant to the plaintiff. These questions of fact "'subvert the plaintiff's likelihood of success on the merits ... to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (***Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.***, 53 AD3d 612, *supra*, *quoting*, ***Milbrandt & Co. v Griffin***, 1 AD3d 327, 328, *supra*).

Nor has the plaintiff demonstrated the existence of special or extraordinary circumstances which are necessary for the granting of the mandatory injunctive relief demanded by the plaintiff, namely, that the defendants be compelled to allow the plaintiff unrestricted access to the store and to

"run MCC's bagel business at the store" as set forth in the ancillary handwritten agreement executed by the parties on July 27, 2013. The record is devoid of proof showing or tending to show that this affirmative action on the part of the defendants is necessary to preserve the interests which the parties may have in the corporate defendant or their status as owners viz a viz one another (*see* ***Bachman v Harrington***, 184 NY 458, 464 *supra*).

In addition, the court finds that there was no demonstration that the plaintiff will suffer irreparable harm if the preliminary injunctive relief requested by him is denied. The element of irreparable harm has been defined as "that which cannot be repaired, restored, or adequately compensated in money, or where the compensation cannot be safely measured" (***McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.***, 114 AD2d 165, 498 NYS2d 146 [2d Dept 1986]). Imminence is also required for a finding of irreparable harm since harm that is remote or speculative does not qualify (*see* ***County of Suffolk v Givens***, 106 AD3d 943, *supra*; ***Family-Friendly Media, Inc. v Recorder Tel. Network,*** 74AD3d 738, *supra*). Any such irreparable harm must be shown to be more burdensome to the movant than that caused to the defendant if the injunction were granted (*see* ***Lombard v Station Sq. Inn Apts. Corp.***, 94 AD3d 717, 942 NYS2d 116 [2d Dept 2012]). While a plaintiff may be credited with satisfaction of the irreparable harm element when one or more of his or her or underlying predicate claims involves a dispute over corporate control and governance (*see* ***Datwani v Datwani***, 102 AD3d 616, 959 NYS2d 153 [1st Dept 2013]; ***Cooperstown Capital, LLC v Patton***, 60 AD3d 1251, 876 NYS2d 186 [3d Dept 2009]; ***North Fork Preserve, Inc. v Kaplan***, 31 AD3d 403, *supra*), or the destruction, rather than disruption, of an ongoing business concern (*see* ***Reuschenberg v Town of Huntington***, 16 AD3d 568, 791 NYS2d 652 [2d Dept 2005]; ***North Shore Auto & Towing v Nassau County***, 18 Misc3d 1108[A], 856 NYS2d 25 [Sup. Ct. Nassau County 2007]), the mere existence such claims cannot satisfy the irreparable harm element. There must be proof that harm has or will occur to the corporation at issue thereby jeopardizing plaintiff's interests therein in a manner not subject to restoration or capable of recompense by a damage award.

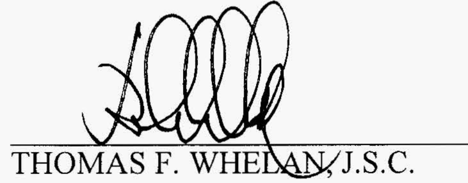
The plaintiff's claims here, do not warrant of finding of irreparable harm even though his claims for specific performance and declaratory relief may be viewed as touching, tangentially, upon claims for corporate control and governance and/or that the business of the corporate defendant will be subject to destruction if the plaintiff is not restored to his former position as chief operator and manager of the store. There is simply no evidence that his claimed interests in the corporate defendant will be irretrievably lost or destroyed at the hands of the defendants if the injunctive relief requested is not granted. All that has been put before the court are speculative claims that a diminution in the bagel store business of the corporate defendant will occur without the plaintiff's unrestricted access and control and management of the store and its retail business due to the inferior experience and business incompetence of the defendants.

Finally, the court finds that a balance of the equities does not favor the plaintiff's position. As the drafter of all three of the instruments before the court, the ambiguities and inconsistencies apparent from a reading thereof are of the plaintiff's own making. By virtue of such draftsmanship, these ambiguities and inconsistencies are likely to be construed against him and in favor of the defendants (*see* ***McGowan v Great Northern Ins. Co.***, 105 AD3d 714, 962 NYS2d 638 [2d Dept 2013]; ***State***

v ***Industrial Site Serv., Inc.***, 52 AD3d 1153, 862 NYS2d 118 [3d Dept 2008]). Moreover, the deeply disputed questions of material fact regarding the parties intentions further militate against a finding that equities balance in favor of the plaintiff.

In view of the foregoing, the instant motion (#001) by the plaintiff for preliminary injunctive relief is denied.

DATED: 5/20/14



THOMAS F. WHELAN, J.S.C.