

Matter of D'Angelo v West End Kids Corp.
2015 NY Slip Op 30757(U)
May 7, 2015
Sup Ct, New York County
Docket Number: 652729/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

In the Matter of the Application of GAETANO D'ANGELO, for an Order and Judgment Pursuant to BUSINESS CORPORATIONS LAW 1104-a dissolving WEST END KIDS CORP. and related relief,

INDEX NO. 652729/2014
MOTION DATE. 04-22-2015
MOTION SEQ. NO. 004
MOTION CAL. NO.

Petitioner,

-against-

WEST END KIDS CORP., LISA CANNISTRACI, MINERVA RIVERA, and LISA GRANZIANO,

Respondents.

The following papers, numbered 1 to 7 were read on this motion to renew, cross-motion to compel discovery and for leave to amend pleadings.

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

PAPERS NUMBERED

1-5

Answering Affidavits — Exhibits

6-8, 9-11

Replying Affidavits

12, 13-15

Cross-Motion: X Yes [] No

Upon a reading of the foregoing cited papers, it is ORDERED that petitioner's motion by Order to Show Cause for leave to renew is granted, upon renewal the underlying motion seeking the appointment of a receiver is denied, respondents LISA CANNISTRACI and MINERVA RIVERA's cross-motion for leave to serve an amended answer is denied, respondent WEST END KIDS CORP.'s cross-motion is granted to the extent of granting leave to serve an Amended Answer asserting causes of action for breach of fiduciary duties and conversion, the remainder of the motion is denied.

Petitioner alleges owning a 35% share and equity in West End Kids Corp. (herein "West End"), along with the individually named respondents (collectively known herein as "Respondents"). Petitioner claims that Respondents locked him out of West End's business matters and records some time on or about June 2013. Petitioner further claims that Respondents have diverted corporate funds and refused to pay petitioner wages or dividends.

Petitioner commenced this proceeding by Petition dated August 29, 2014 seeking 1) a judicial dissolution of West End; 2) an appointment of a receiver; 3) an order compelling Respondents to grant petitioner access to West End's financial books and records; and 4) enjoining Respondents from transacting business without the expressed written consent of petitioner, collecting or receiving any asset, debt or property of West End, and from using West End funds to pay legal fees in the defense of this Petition.

After joinder of issue, petitioner moved to enjoin Respondents from holding an election of directors of West End and for a judicial dissolution of West End. In an Order dated December 10, 2014, this Court granted the injunctive relief, but denied petitioner's

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

motion to dissolve West End reasoning that dissolution was premature for lack of discovery. This Court ordered petitioner and Respondents to grant each other access to the books and records in their possession, including weekly reconciliation reports, bank deposits and checking account records. The Court referred this matter to a special referee to hear and report on the merits of each of the party's contentions in regards to the claim for dissolution.

Petitioner also moved for further injunctive relief seeking an appointment of a receiver. In an Order dated December 10, 2014 (Mot. Seq. 002) this Court denied the injunctive relief for petitioner's failure to substantiate his claims with any proof as there had been no discovery. Petitioner then moved for leave to reargue this Court's prior decisions. In an Order dated December 17, 2014, this Court denied leave to reargue and ordered that West End hold a meeting for the purpose of electing a board of directors, ratification of the proposed buy-out of respondent Lisa Graziano, and the issuance of stock certificates.

Petitioner now moves for leave to renew his prior application seeking injunctive relief appointing a receiver for West End. Petitioner contends that after inspecting the books and records of West End on January 16, 2015, he has obtained new evidence that was not previously available to him, and that he is now able to substantiate his claim that Respondents have continually removed West End's assets, misused and misappropriated West End's assets for their own benefit, and diverted those assets. Specifically, petitioner claims that the books and records prove that Respondents are misusing West End's assets by paying themselves a salary and shareholder dividends.

West End opposes the instant motion arguing that petitioner fails to meet the requirements for an appointment of a receiver. Lisa Cannistraci and Minerva Rivera (herein "Moving Respondents") oppose petitioner's motion arguing that they are entitled to be paid a salary, that the petitioner has not been paid any dividend payouts because he allegedly stole money from West End, and that the Moving Respondents have kept meticulous records showing that West End is solvent and profitable.

A motion for leave to renew is addressed to the sound discretion of the court (Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp., 64 A.D.3d 85, 878 N.Y.S.2d 97 [2nd Dept., 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Renna v. Gullo, 19 A.D.3d 472, 472, 797 N.Y.S.2d 115 [2nd Dept., 2005] citing to Rubinstein v. Goldman, 225 A.D.2d 328, 329, 638 N.Y.S.2d 469 [1st Dept., 1996]; see CPLR § 2221[e]). A motion for leave to renew must be based on additional material facts existing at the time the prior motion was made, but the material facts were not known to the party seeking leave to renew (Nassau County v. Metropolitan Transp. Authority, 99 A.D.3d 617, 953 N.Y.S.2d 183 [1st. Dept., 2012] citing to, Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1st Dept., 1979]).

Petitioner has stated a basis for leave to renew by presenting evidence not known to him at the time the prior motion was made.

CPLR § 6401 allows for the appointment and powers of a temporary receiver “where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.” “[T]he appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. [A] temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party’s interests in that property” (Quick v Quick, 69 A.D.3d 828, 829, 893 N.Y.S.2d 583, 585 [2nd Dept., 2010]).

Petitioner has not stated a basis for the extreme remedy of appointing a temporary receiver. The evidence presented by petitioner does not show that property will be removed from the state, or lost, materially injured or destroyed. The documents put forth by petitioner show that the Moving Respondents pay themselves a salary for their work at West End, and that they have offset petitioner’s debt to West End by withholding corporate dividends.

West End and the Moving Respondents cross-move for leave to serve an amended answer interposing counterclaims against petitioner for fraud, breach of contract, breach of fiduciary duty and conversion. The Moving Respondents additionally move to strike the Petition based upon petitioner’s failure to comply with this Court’s ordered discovery.

Leave to amend pleadings pursuant to CPLR § 3025 (b) should be freely given “absent prejudice or surprise resulting directly from the delay” (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011], “or if the proposed amendment is palpably improper or insufficient as a matter of law” (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st Dept., 2012] citing to, Shepherd v. New York City Tr. Auth., 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2nd Dept., 1987]).

The Moving Respondents’ Proposed Amended Answer asserts causes of action for breach of fiduciary duty, conversion of corporate funds, and sanctions and attorneys fees. The causes of action for breach of fiduciary duty and conversion are improper because they are derivative “as they turn on allegations of the [petitioner’s] looting and mismanagement of [West End]” (Sansum v. Fioratti, 2015 NY Slip Op 03782 [1st Dept., 2015]; Yudell v. Gilbert, 99 AD3d 108, 114, 949 N.Y.S.2d 380 [1st Dept., 2012]). The third cause of action is improper because there is no independent cause of action for sanctions under section 130-1.1 (see 360 W. 11th LLC v. ACG Credit Co. II, LLC, 90 A.D.3d 552, 935 N.Y.S.2d 289 [1st Dept., 2011]). The Moving Respondents’ motion for leave to serve an amended answer is denied.

West End’s motion for leave to serve an amended answer is also denied as to the causes of action asserted for fraud and breach of contract. The Amended Answer fails to state a causes of action for fraud with the requisite particularity (see Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559, 910 N.E.2d 976, 883 N.Y.S.2d 147 [2009]; CPLR 3016(b)). The Amended Answer also fails to state the essential elements for a cause of action for breach of contract. Specifically, West End fails to allege West End’s performance under the contract and that a binding agreement existed (see Harris v. Seward Park Housing Corp., 79 A.D.3d 425, 426, 913 N.Y.S.2d 161, 162 [1st Dept., 2010]). The

