

Carollo v Rogers
2015 NY Slip Op 31740(U)
August 10, 2015
Supreme Court, Queens County
Docket Number: 701773/15
Judge: Valerie Brathwaite Nelson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON
Justice

IA Part 7

STELLA CAROLLO, DDS a/k/a STELLA
CAROLLO-ROIT and ENDODONTIC
ASSOCIATES OF BAYSIDE, PLLC,

Index
Number: 701773/15

Plaintiffs,

Motion
Date: 3/31/15

-against-

Motion Cal. No.: 32

ELAINE ROGERS, DDS,

Motion Seq. No.: 1

Defendant. x

The following papers numbered 1 to 8 read on this application by the plaintiffs for an order compelling the defendant to honor and comply with the terms and conditions of a purchase agreement dated October 6, 2014.

Papers
Numbered

FILED
AUG 12 2015
COUNTY CLERK
QUEENS COUNTY

Order to Show Cause-Affidavits-Exhibits.....	1-5
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Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs, Stella Carollo, DDS a/k/a Stella Carollo-Roit, DDS and Endodontic Associates of Bayside, PLLC, commenced this action on February 25, 2015 asserting causes of action for breach of contract, an injunction and an accounting. Plaintiffs allege, *inter alia*, that Dr. Carollo acquired a the 50% ownership interest of her former partner, Elaine Rogers DDS, in plaintiff Endodontic Associates of Bayside, PLLC, pursuant to a purchase agreement dated October 6, 2014. Plaintiffs assert that, under the terms of the purchase agreement, Dr. Carollo purchased all bank accounts, securities accounts and/or cash and/or cash equivalents from Dr. Rogers, who agreed to deliver to Dr. Carollo all documents, files and records relating thereto. Plaintiffs allege that Dr. Rogers failed to turn over a certain retirement account entitled Elaine Rogers-Tulman TTR FBO Elaine Rogers DMD PS & Employee Savings Plan FBO Elaine Rogers, UA 01/01/02 with

TD Ameritrade ("Retirement Account") and possibly other bank accounts and securities accounts as well.

Plaintiffs' second cause of action seeks injunctive relief directing that Dr. Rogers be compelled to (a) turn over the bank records dealing with the Retirement Account; (b) turn over any and all documentation, data, etc. relating to the Retirement Account; [c] transfer the defendant's interest from the Retirement Account to Dr. Carollo and/ or the Company; (d) turn over control of the Retirement Account to Dr. Carollo and/ or the Company; (e) turn over of any and all documentation, data, etc. relating to any other bank accounts and securities accounts of the defendant.

By the within application, plaintiffs seek an order compelling defendant, Elaine Rogers, DDS, to honor and comply with the terms and conditions of the purchase agreement dated October 6, 2014 by the immediate (a) turn over of all bank records, statements of account and the like which detail the various transactions, account balances and related activities concerning a certain retirement account entitled Elaine Rogers-Tulman TTR FBO Elaine Rogers DMD PS & Employee Savings Plan FBO Elaine Rogers, UA 01/01/02 with TD Ameritrade ("Retirement Account"); (b) accounting of the defendant to the plaintiff of all bank accounts, securities accounts and/or cash and/or cash equivalents that were held by the defendant and /or which the defendant had an interest that should have been turned over pursuant to the terms of the Purchase Agreement; [c] transfer of the defendant's interest in the Retirement Account to Dr. Carollo and/ or the Company; (d) transfer of control of the Retirement Account to Dr. Carollo and/ or the Company; (e) turn over of any and all other documentation, data, statements of account, etc. relating to any other bank accounts and securities' accounts of the defendant which should have been transferred in accordance with the terms of the purchase agreement; and (f) to pay for the costs and expenses, including plaintiffs' legal fees, for having to make the within motion.

In support of the motion, plaintiffs submit, *inter alia*, a copy of the pleadings, the purchase agreement dated October 6, 2014 and the affidavit of Dr. Carollo, who states that Dr. Rogers failed to turn over all of the bank accounts and securities accounts pursuant to the October 6, 2014 purchase agreement with defendant, particularly the aforementioned Retirement Account. In addition, plaintiffs submit a copy of an email message to the parties dated November 29, 2014 from their purported financial advisor indicating that there are several participants in a new retirement plan established by Endodontic Associates of Bayside, PLLC who seek to have their retirement interests transferred from the old Retirement Account.

In opposition, Dr. Rogers submits an affidavit wherein she states that she has provided to plaintiffs all documents in her possession, custody and control relating to the aforementioned Retirement Account as she takes all steps necessary to transfer it to plaintiff Endodontic Associates of Bayside, PLLC. Dr. Rogers attests that, apart from the aforementioned Retirement Account, there are no other accounts, security accounts, cash or cash equivalents in which plaintiff has an interest that should be turned over pursuant to their purchase agreement.

It is well established that to prevail on a motion for a preliminary injunction, the movant must demonstrate 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 *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]; *Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051 [2d Dept 2009]; *Pearlgreen Corp. v Yau Chi Chu*, 8 AD3d 460 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (see *Tatum v Newell Funding, LLC*, 63 AD3d 911 [2d Dept 2009]; *Bergen-Fine v Oil Heat Inst., Inc.*, 280 AD2d 504 [2d Dept 2001]). Because this provisional remedy is considered to be a drastic one (see *Doe v Axelrod*, 73 NY2d 748 [1988]), a clear legal right to relief which is plain from undisputed facts 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 [2d Dept 2004]; *Blueberries Gourmet v Avis Realty*, 255 AD2d 348 [2d Dept 1998]). The burden of showing such an undisputed right rests with the movant (see *Omakaze Sushi Rest., Inc. v. Ngan Kam Lee*, 57 AD3d 497 [2d Dept 2008]; *Doe v Poe*, 189 AD2d 132 [2d Dept 1993]).

Factors militating against the granting of preliminary injunctive relief include: 1) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (see *306 Rutledge, LLC v City of New York*, 90 AD3d 1026 [2d Dept 2011]; *DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2d Dept 2009]; *Mar v Liquid Mgt. Partners, LLC*, 62 AD3d 762 [2d Dept 2009]); 2) 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 [2d Dept 2005]); or 3) that an alteration rather than a preservation of the status quo of the parties or the res at issue would result from a granting of the injunction (see *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc.*, 50 AD3d 1072 [2d Dept 2008]; *Matter of 35 New York City Police Officers v City of New York*, 34 AD3d 392 [1st Dept 2006]). Moreover, a preliminary injunction will not issue in

cases wherein the irreparable harm claimed is remote or speculative or purely economic in nature (see *Rowland v Dushin*, 82 AD3d 738 [2d Dept 2011]; *Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738 [2d Dept 2010]; *Quick v Quick*, 69 AD3d 827 [2d Dept 2010]; *EdCia Corp. v McCormack*, 44 AD3d 991 [2d Dept 2007]).

Here, the defendant states in her affidavit that it is in her own interest to no longer have responsibility as a fiduciary for the Retirement Account since, as she admits, she no longer has any interest in the account. Thus, it is plain from the undisputed facts that Dr. Rogers must transfer her control of the Retirement Account to Dr. Carollo and/ or Endodontic Associates of Bayside, PLLC.

Apart from the relief sought herein related to the Retirement Account, plaintiffs do not claim to have any personal knowledge of the facts, and their bare conclusory allegations, as stated in their counsel's memorandum of law, that "it seems apparent that the defendant failed to turn over all of the bank accounts and securities accounts of the Defendant necessary to perfect title of the company" are insufficient to satisfy plaintiffs' burden of demonstrating a likelihood of success on the merits, a balancing of the equities and irreparable injury (see *Benjamin Kurzban & Son, Inc. v Board of Education*, 129 AD2d 756, 757 [2d Dept 1987]; *L & J Roost v Department of Consumer Affairs*, 128 AD2d 677 [2d Dept 1987]). Furthermore, plaintiffs' requests for *pendente lite* relief related to other accounts, security accounts, cash or cash equivalents in which plaintiff has an interest that should be turned over pursuant to the parties' purchase agreement "are not of such extraordinary nature as to warrant injunctive relief pending the resolution of the litigation" (*Board of Mgrs. of Wharfside Condominium v. Nehrich*, 73 AD3d 822 [2d Dept 2010]).

With respect to the branch of plaintiff's motion seeking an award of costs and expenses including attorneys' fees, such expenses are an incident of litigation except where provided by statute or contract (see *Hooper Assocs v AGS Computers*, 74 NY2d 487 [1989]). Here, Section X of the purchase agreement provides that "[i]n the event that any suit, action or arbitration shall be commenced by either party...the prevailing party in such suit, action or arbitration shall be entitled to receive the costs and disbursements incurred by such party in connection therewith...." Inasmuch as there has been no settlement or other disposition of the within action, the Court finds that the movants' request for an order awarding plaintiffs the costs and expenses, including plaintiffs' legal fees, for making the motion herein is prematurely made.

Accordingly, the motion is granted to the extent that the branches seeking an order compelling defendant, Elaine Rogers, DDS, to honor and comply with the terms and conditions of the purchase agreement dated October 6, 2014 by the immediate turn over of all bank records, statements of account and the like which detail the various transactions, account balances and related activities concerning a certain retirement account entitled Elaine Rogers-Tulman TTR FBO Elaine Rogers DMD PS & Employee Savings Plan FBO Elaine Rogers, UA 01/01/02 with TD Ameritrade ("Retirement Account"), transfer of the defendant's interest in the Retirement Account to Dr. Carollo and/ or Endodontic Associates of Bayside, PLLC, and transfer of control of the Retirement Account to Dr. Carollo and/ or Endodontic Associates of Bayside, PLLC are granted, and the motion is otherwise denied.

Dated: 8/10/15

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VALERIE BRATHWAITE NELSON, J.S.C.

FILED
AUG 12 2015
COUNTY CLERK
QUEENS COUNTY