

Meagher v Doscher

2015 NY Slip Op 32773(U)

February 19, 2015

Supreme Court, Suffolk County

Docket Number: 060807/2014

Judge: Jerry Garguilo

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INDEX NO. 06807/2014
02/19/2015

SHORT FORM ORDER

INDEX NO. 06807/2014
& 068379/2014

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

HON. JERRY GARGUILO
SUPREME COURT JUSTICE

MICHAEL MEAGHER, MICHAEL MEYER, and
STEPHEN SMITH,

Plaintiffs,

-against-

DREW DOSCHER,

Defendant,

and

148 SOUTH EMERSON PARTNERS, LLC,

Nominal Defendant.

INDEX NO.: 06807/2014

ORIG. RETURN DATE: 12/09/14
FINAL SUBMISSION DATE: 1/21/15
MOTION SEQ#001
MOTION: MG

MICHAEL J. MEYER, individually and derivatively
on behalf of 148 SOUTH EMERSON ASSOCIATES,
LLC.,

Plaintiff,

and

MICHAEL MEAGHER & STEPHEN SMITH,

Nominal Plaintiffs,

-against-

148 SOUTH EMERSON, ASSOCIATES, LLC and
DREW DOSCHER,

Defendants.

INDEX NO.: 068379/2014

ORIG. RETURN DATE: 1/15/15
FINAL SUBMISSION DATE: 1/21/15
MOTION SEQ#002
MOTION: MOTNDECD

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Before the Court are petitions involving two, Limited Liability Corporations. More particularly, 148 South Emerson Partners, LLC and 148 South Emerson Associates, LLC. Sometime in the past, four sophisticated business persons, Michael Meagher, Michael Meyer, Stephen Smith and Drew Doscher purchased a valuable piece of property in Montauk, New York, and formed an entity known as 148 South Emerson Partners, LLC to take title. It is not disputed that upon formation the four individuals, noted hereinabove, each enjoyed a 25% equity stake in the "Partners" entity. The property is waterfront and was improved with a structure. Thereafter, the four men decided to open and operate a restaurant to be named "The Sloppy Tuna." The LLC (148 South Emerson Associates, LLC) was formed to own, manage and operate The Sloppy Tuna.

As time progressed, it became apparent to the aforementioned individuals that opening and operating a restaurant in Montauk is easier said than done. The restaurant venture became embroiled in a web of administrative, bureaucratic, as well as law enforcement red tape.

Michael Meagher and Stephen Smith clearly wanted out of the restaurant business. All named parties and entities agree that a time came when Mr. Meagher and Mr. Smith were paid for their equity stake in 148 South Emerson Associates, LLC, thereby departing from the restaurant business, known as "The Sloppy Tuna."

The issues before the Court deal with the equity stake or non-equity stake of Meagher and Smith in the LLC (148 South Emerson Partners, LLC). Mr. Doscher claims an enforceable agreement exists whereby Messrs. Meagher and Smith surrendered their interest in the real estate for a price. Messrs. Meagher, Meyer and Smith dispute any such agreement.

As concerns the Realty, the Defendant-Respondent through Doscher presents the Court with evidence of payment to Messrs. Meagher and Smith for their respective equity stake in the property. That evidence consists of checks that were delivered to Meagher and

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Smith. The checks are drawn from the account of The Sloppy Tuna. However, although the checks were delivered, they were never negotiated. As a result thereof, the Plaintiffs/Petitioners present a petition for a declaratory judgment settling the issue of ownership in the “Partners” LLC.

A separate petition is presented by Michael Meyer. That petition brought pursuant to CPLR § 6401(a), seeks the appointment of a temporary receiver to take “all action necessary to protect and preserve the accounts of 148 South Emerson Associates, LLC on the ground that Michael Meyer has an apparent interest in that property, and there is a danger that the property will be materially injured.

The Court has considered the following in connection with Petitioners’ application seeking declaratory relief: Plaintiffs’ Notice of Motion, Affidavit of Michael Meagher, Memorandum of Law In Support of Plaintiffs’ Motion For Summary Judgment, Defendant Drew Doscher’s Counsel’s Affirmation In Opposition, Memorandum Of Law In Opposition To Plaintiffs’ Motion For Summary Judgment, Plaintiffs’ Reply Memorandum Of Law In Support of Plaintiffs’ Motion For Summary Judgment, Affidavit of Michael Meyer, Affidavit of Michael Meagher and Affidavit of Stephen Smith with all Exhibits.

In connection with Petitioner’s application seeking a temporary receiver, the Court has considered the following: Plaintiff’s Order To Show Cause, Affirmation In Support of James M. Catterson, Affidavit of Michael Meyer, Supplemental Affirmation of James M. Catterson, Memorandum of Law In Support Of Plaintiff’s Motion For The Appointment of A Receiver, Defendant Drew Doscher’s Counsel’s Affirmation In Opposition and Memorandum of Law In Opposition To Plaintiff’s Motion For A Temporary Receivership, Reply Memorandum of Law In Support of Plaintiff’s Motion For Summary Judgment, Affidavit of Michael Meyer, Affidavit of Michael Meagher, Affidavit of Stephen Smith with all Exhibits.

With regard to Petitioners’ first motion for summary judgment granting them the declaratory relief sought, a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985], *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A comprehensive review of all submissions supports a finding that Michael Meagher and Stephen Smith assigned their units of 148 South Emerson Associates, LLC (the Restaurant) to Drew Doscher and Michael Meyer. As noted hereinabove, all the individuals appearing in the caption are sophisticated business people. At the matter indexed 060807/2014, the Petitioners-Plaintiffs seek summary judgment declaring that the interest of Michael Meagher and Stephen Smith in 148 South Emerson Partners, LLC (the Land)

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remains unassigned, sold, transferred and/or hypothecated.

The Defendant/Respondent, Drew Doscher, opposes the application and in fact, claims that the assignment of units of Emerson Associates represents a transfer of Meagher and Smith's ownership interest not only in Emerson Associates, but also Emerson Partners. The Defendant-Respondent claims to have issued checks from the Emerson Associates account to Meagher and Smith as a partial payment of their interest in Emerson Partners. Those checks followed a cover letter whereby counsel for Doscher notes that "in keeping with the verbal agreement between [the parties], here is the second annual principal pay down for your deposit into The Sloppy Tuna." Neither Meagher, nor Smith negotiated the checks.

An issue before the Court is whether or not Meagher and Smith continue to own an equal, 25% interest in Emerson Partners. There is no paper trail in the way of contract, correspondence, e-mail, or the like, evidencing the assignment propounded by the Defendant-Respondent, Drew Doscher.

Therefore, as to the matter found at Index Number 060807/2014, the petition is **GRANTED**.

It is, **ORDERED, ADJUDGED AND DECREED** that Michael J. Meyer and Stephen Smith each continue to own a 25% interest in the LLC, known as 148 South Emerson Partners.

The second application, that of Michael J. Meyer, individually and derivatively on behalf of 148 South Emerson Associates, LLC and Michael Meagher and Stephen Smith as nominal plaintiffs against 148 South Emerson Associates, LLC and Drew Doscher seeks an order appointing a temporary receiver "to take all action necessary to protect and preserve the accounts of 148 Emerson Associates, LLC, upon the ground that Michael J. Meyer has an apparent interest in the property, which is the subject of the action herein, and there is a danger that the property will be materially injured." As noted throughout this decision, 148 South Emerson Associates, LLC is the entity which owns and operates the restaurant (The Sloppy Tuna) in Montauk, New York.

CPLR § 6401, entitled "Appointment and Powers of Temporary Receiver" provides: "Upon motion of a person having an apparent interest in property...a temporary receiver of the property may be appointed...where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. However, "... the 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" (*Vardaris Tech, Inc. v Paleros, Inc.*, 49 AD3d 631, 632, 853 NYS2d 601 [2nd Dept. 2008](internal quotation marks omitted); see *Quick v Quick*, 69 AD3d 828, 829, 892 NYS2d 583 [2nd Dept. 2010]).

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Thus, a temporary receivership 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 interest in the property (see *Quick v Quick, supra.*; *Vardaris Tech, Inc. v. Paleros, Inc., supra.*).

Before a Receiver is appointed, it should appear that the plaintiff is clearly entitled to the interest the plaintiff claims in the property for which the Receiver is sought, or the facts alleged in the Affidavits offered in support, should tend strongly to establish the right of receivership.

Of grave concern to the Court, is litigation pending in the United States District Court for the Northern District of Georgia, Atlanta Division. That action, captioned Montauk USA, LLC, plaintiff against 148 South Emerson Associates, LLC, et al., involves a property interest. The Respondent-Defendant through Doscher is a principal of the Plaintiff in the federal action. The Court has been provided a copy of U.S. District Judge Lee Martin May's order of January 30, 2015 extending 148 South Emerson Associates, LLCs time to answer or respond to February 20, 2015. The defendant in the federal action is a plaintiff in the action before this Court. In essence, Mr. Doscher is suing "Associates", a company in which he is a principal.

At issue in the federal litigation are proprietary rights to the mark "Sloppy Tuna." As there is a deadlock between officers and directors of the Plaintiff, 148 South Emerson Associates, LLC, the federal action is on the brink of a default. Additionally, on or about October 18, 2013, the Plaintiff in the federal action, Montauk USA, LLC, a Georgia Limited Liability Company, entered into a license agreement with 148 South Emerson Associates, LLC (the Plaintiff-Petitioner herein). The last page of the license agreement is executed on behalf of the licensor, Montauk USA, LLC by a Mark Horowitz. The licensee executing the document on behalf of 148 South Emerson Associates, LLC is a Defendant herein, Doscher. The significant point being that Mr. Doscher has bound "Associates" to pay his Georgia company for the use of the disputed mark.

The litigation in Georgia involves ownership of the name, trademark and the like of "The Sloppy Tuna." The very nature of the litigation expresses the belief of all parties that the mark is valuable. The Defendant herein Mr. Doscher, through his agent at Montauk USA, LLC has purportedly bound Plaintiff herein to pay licensing fees "which shall be the greater of Twenty Thousand Dollars (\$20,000.00) per month, or six percent (6%) of the gross revenues of the licensee." Additionally, the termination of the purported license is found at ¶3 wherein it notes "this license shall remain in full force and effect until terminated by thirty (30) days written notice from the licensor to the licensee."

It has been represented to the Court that the Defendant herein, Drew Doscher, actually opposed the application of the Plaintiff herein, 148 South Emerson Associates, LLC, to

extend its time to answer the Complaint in Georgia pending the decision herein.

This Court finds that significant property interests are at issue in the federal action. The Court further finds that a Receiver is necessary to communicate with the Federal District Court and engage counsel on behalf of the Plaintiff herein for the purposes of answering the Complaint in the federal action, investigating the merits of each of the claims in the federal action and proceeding to defend the action on the merits if the defenses are meritorious and not-frivolous.

Plaintiff's counsel is directed to submit an Order for the Court's review and execution forthwith appointing Charles C. Russo, Esq. Receiver to address all aspects of the Federal litigation.

Although the aforesaid Order empowers the Receiver to engage counsel in connection with the suit filed against the Plaintiff-Petitioner, said Receiver shall first seek the Court's permission to engage counsel. The Court is mindful that the federal litigation stems from the Plaintiff's-Petitioner's challenge in the patent trademark office of the Defendant's ownership of the Sloppy Tuna Trademark.

The Plaintiffs-Petitioners claim duties of the Receiver should be extended. Petitioners claim the following:

1. Drew Doscher has been using monies from company accounts to support his favorite charities as well as his friends and family.

More particularly, their allegations of payments to Mr. Doscher's father for what might be termed Public Relations.

2. Drew Doscher has improperly severed control over the management of the company and improperly authorized his fiancée to act as agent for the company.
3. Drew Doscher has used company funds to pay legal fees supporting personal litigation.
4. Drew Doscher has mismanaged the company, resulting in unpaid bills, numerous late fees, fines and wasted corporate assets. Petitioner also claims Mr. Doscher allowed the IRS to impose liens against the company.

In response, the Defendant-Respondent, Drew Doscher, justifies all expenses as incurred in due course. There is one exception. That exception being the use of company

funds to finance his legal fees in both New York and Georgia. It is somewhat bold that Doscher is funding his litigation in federal court against 148 South Emerson Associates, LLC with cash from Associates.

Therefore, it is further

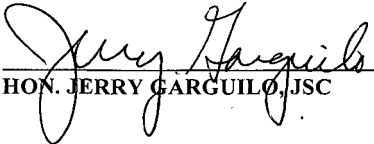
ORDERED, ADJUDGED AND DECREED that the Receiver shall also enter upon the premises with full authority to examine and inspect all financial records of 148 South Emerson Associates, LLC and report to the Court as to the source of funds utilized by the Defendant-Respondent, Drew Doscher, in connection with litigation involving 148 South Emerson Associates, LLC, Montauk USA, LLC, and 148 South Emerson Partners, LLC.

During said inspection(s), each party may have a representative present. In the event the Receiver requires the aid and assistance of an accountant, he shall petition the Court prior to engagement.

The Court reserves its decision concerning an expansion of the duty and responsibilities of the Receiver pending the report noted hereinabove.

The foregoing constitutes the decision and **ORDER** of this Court.

Dated: February 19, 2015


HON. JERRY GARGUILO, JSC