

Lankin v Kantor

2016 NY Slip Op 30607(U)

April 8, 2016

Supreme Court, Kings County

Docket Number: 508097/2015

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of April, 2016.

PRESENT:

HON. SYLVIA G. ASH,
Justice.

-----X
RADISLAV LANKIN, individually and on
behalf of UNIVERSAL SOFTWARE
CORP.,

Plaintiff,

- against -

EDWARD KANTOR and ARTEM BUTUSOV.,

Defendant(s).

- and -

UNIVERSAL SOFTWARE CORP.,

Nominal Defendant.
-----X

DECISION AND ORDER

Index # 508097/2015

Motion Seq. # 1 - 3

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Other _____ Affidavit (Affirmation) _____

1-6
7-9
10-11

Upon the foregoing papers, Plaintiff's motion for a preliminary injunction is granted to the extent that the temporary restraining order ("TRO") granted on July 6, 2015, by the Honorable Carolyn E. Demarest shall be maintained until this matter is resolved, and accordingly, that Defendants are enjoined from transferring any assets of UNIVERSAL SOFTWARE CORP. ("Universal") outside of the normal course of business, and further, that Defendants are enjoined from certificating or transferring any shares of Universal until further Order of this Court. Plaintiff's

motion seeking an order punishing Defendants for contempt is denied. Defendants' cross-motion for sanctions against Plaintiff is also denied.

Background

Universal is in the business of developing and licensing software called EMSOW, which is "a cloud-to-cloud end-to-end business management solution for point-of-care medical diagnostic imaging providers" (Affidavit of Edward Kantor, Paragraph 6, Opposition to Plaintiff's Motion for Injunctive Relief). EMSOW's licensees include doctors, radiology technicians, and other medical professionals. Universal was founded in 2010 by Plaintiff RADISLAV LANKIN ("Lankin") and Defendant EDWARD KANTOR ("Kantor"). According to the Certificate of Incorporation, Universal was authorized to issue 200 shares, 150 of which were issued equally to Lankin, Kantor and Defendant ARTEM BUTUSOV ("Butosov"), Universal's main IT developer, who also receives a salary for his IT services. At the first board meeting, Kantor was nominated to be President; Lankin as Vice President and Treasurer; and Butosov as Secretary.

Lankin states that he and Kantor have managed and financed Universal's business since its inception and have been Universal's principal officers and decision makers. Lankin also states that he and Kantor were involved in other businesses together but have recently parted ways, and as a result, Kantor has taken an aggressive position against him with regards to Universal. Specifically, Lankin alleges that, starting on May 28, 2015, Kantor and Butosov have done everything in their power to oust him from Universal, including his formal removal from the board of directors on June 26, 2015.

On July 1, 2015, Lankin commenced the instant action seeking, among other things,¹ an injunction restraining Defendants from (1) liquidating any assets of Universal; (2) transferring any assets of Universal, including intellectual property, and more specifically, EMSOW to any persons, company and/or corporation; (3) certificating or transferring any shares of Universal; (4) making any

¹ Rankin's remainder causes of action are: a declaratory judgment that he is still Universal's Vice President and Treasurer on the grounds that Defendants failed to adhere to proper corporate formalities for his removal, breach of fiduciary duty and the implied covenant of good faith and fair dealing; fraud; conversion; usurping of corporate opportunity; tortious interference; an accounting, constructive trust; and his improper removal from the board of directors.

changes to the Board of Directors of Universal; (5) transferring, utilizing or otherwise withdrawing any money from Universal; (6) making any decisions without the express written consent of Rankin; and (7) opening any subsidiaries of Universal.

In moving for the foregoing injunctive relief with the instant order to show cause, Rankin argues that his removal was effectuated without cause in violation of New York's Business Corporation Law for the purpose of introducing third parties to Universal who intend to open a new company in Russia utilizing Universal's asset (EMSOW). Rankin also contends that Defendants are mismanaging Universal by turning away business brought in by Rankin and unilaterally canceling Universal's workers' compensation policy.

In opposition to Rankin's motion for an injunction, Kantor contends that Universal's bylaws provide that board directors may be removed with or without cause at any time by majority vote of the shareholders; that board vacancies may be filled by majority vote of the shareholders; and that shareholders may act by majority written consent in lieu of a shareholder meeting. In accordance with the foregoing, Kantor states Rankin was removed and replaced by non-party Mark Mazya, an experienced businessman, by written shareholder consent of himself and Butusov in accordance with Universal's bylaws. Kantor contends Rankin was removed from the board due to his incompetence and damaging conduct towards the company, namely that Rankin, whose primary role was the sourcing of new customers for Universal, began to engage new customers by promising extremely generous but unprofitable business terms in the hopes of winning new business for himself at a cost to Universal.

Additionally, Kantor contends Rankin's accusation that he is transferring or diverting Universal's assets to a Russian company is unfounded and that, in fact, Universal has outsourced coding work to Russian affiliates for years, which helps to maintain and update the EMSOW software program but that this has nothing to do with the alleged dissipation or transfer of Universal's assets. Kantor further argues that an injunction would inhibit Universal's directors from running the business without Rankin's destructive interference and prevent the company from raising the financing that it requires to continue to operate.

In reply, Rankin contends that the document proffered as Universal's bylaws is a form document that is unsigned and which may have been concocted by Defendants after the fact. Rankin also contends Defendants have recently filed a Certificate of Amendment with the New York State Division of Corporations to increase the number of authorized shares of common stock in an effort to dilute Rankin's shares, and that such document contains a misrepresentation that said amendment was authorized by the "unanimous written consent of the holders of all outstanding shares of the corporation" which is untrue since he did not give his consent.

Based on the aforementioned additional "offering," Rankin argues that Defendants are in violation of Justice Demarest's TRO prohibiting Defendants from "transferring the corporate assets outside the normal course of business" and thus moves to punish Defendants for contempt. Defendants cross-move for sanctions against Rankin for having made said contempt motion which they argue is frivolous.

Discussion

CPLR 6301 provides, in pertinent part, that "[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 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." "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Ruiz v Meloney*, 26 AD3d 485, 486 [2d Dept 2006]). A party seeking preliminary injunctive relief has the burden of demonstrating (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (*see Walter Karl, Inc. v Wood*, 137 AD2d 22, 26 [2d Dept 1988]).

Here, in consideration of the foregoing, the Court finds it appropriate to grant a limited injunction to maintain the status quo until this action is resolved.

As a preliminary matter, Rankin's contention that he was improperly removed as an officer of the board is unfounded. Based on the proffered bylaws, Rankin was properly removed as an officer by majority shareholder written consent without a meeting. Although Rankin contends the proffered bylaws may not be Universal's actual bylaws, Rankin fails to offer any evidence in support of this contention.

With regards to Universal's recent equity offering, although Defendants' action in this regard did not violate the TRO granted by Justice Demarest, at this juncture, the Court finds it appropriate to enjoin Defendants from selling additional shares of Universal. "The corollary of a stockholder's right to maintain his proportionate equity in a corporation by purchasing additional shares is the right not to purchase additional shares without being confronted with dilution of his existing equity if no valid business justification exists for the dilution" (*Katzowitz v Sidler*, 24 NY2d 512, 520 [Ct App 1969]). Here, under the circumstances, namely, Rankin's removal from the board, his allegation that the recent equity offering is intended solely to dilute his shares in Universal, and Defendants' failure to show that the equity offering is grounded in a legitimate business purpose,² the Court finds an injunction is appropriate at this time subject to modification by this Court.

Additionally, continuation of the TRO issued by Justice Demarest which prohibits transfer of Universal's intellectual property and other assets outside the normal course of business shall be maintained as such an injunction does not prejudice Defendants in managing the corporation in any material way and solely serves to maintain the status quo pending resolution of the instant litigation (*see Seaboard Nat. Bank v Reid*, 172 App Div 135, 137-138 [1st Dept 1916]).

² Defendants claim Universal is in "financial straits" with assets valued at \$39,598 against liabilities of \$177,377 with only \$26,206 cash at hand. However, approximately \$135,000 in liability is attributed to "Doctor Mobile" which is unexplained.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for a preliminary injunction is GRANTED to the extent GRANTED herein but is otherwise DENIED; it is further

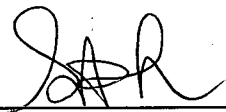
ORDERED that Plaintiff's motion for contempt is DENIED; it is further

ORDERED that Defendants' cross-motion for sanctions is DENIED; and it is further

ORDERED that a **discovery conference** shall be held before this Court on **Thursday, May 26, 2016 at 10:00**, Room 541, 360 Adams Street, Brooklyn, New York.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.