

**Carollo v Rogers**

2016 NY Slip Op 30648(U)

March 29, 2016

Supreme Court, Queens County

Docket Number: 701773/15

Judge: Valerie Brathwaite Nelson

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 7

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

Index No. 701773/15

Motion Date: 12/1/15

Plaintiffs,

Motion Seq. No.: 6

-against-

ELAINE ROGERS, DDS,

By:  
HON. VALERIE BRATHWAITE NELSON

Defendant.

Dated: 3/29/16

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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.

On March 31, 2015, plaintiffs submitted a motion, brought by order to show cause, for an order compelling the defendant to honor and comply with the terms and conditions of a 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

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purchase agreement; and (f) to pay for the costs and expenses, including plaintiffs' legal fees, for having to make the within motion.

By Order dated August 10, 2015, the Court granted the branches of the motion 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.

The remaining branches of the motion were denied on the basis that, inter alia, plaintiffs did 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" were 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]).

In addition, with respect to the branch of plaintiffs' motion seeking an award of costs and expenses including attorneys' fees, the Court found that such expenses are an incident of litigation except where provided by statute or contract (*see Hooper Assocs v AGS Computers*, 74 NY2d 487 [1989]). The Court noted that 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 had been no settlement or other disposition of the within action, the Court found that the movants' request for an order awarding plaintiffs the costs and expenses, including plaintiffs' legal fees for making the motion therein, was prematurely made.

Plaintiffs move herein for an order, pursuant to CPLR 2221, granting renewal of their motion compelling the defendant to honor and comply with the terms and conditions of a purchase agreement dated October 6, 2014.

The court in its discretion may grant renewal, in the interests of justice, upon facts that were not known to the movant where the movant offers reasonable justification for failing to submit them on the earlier motion (*see CPLR §2221(e)(2),(3); Heaven v. McGowan*, 2007 NY Slip Op. 03883.; *O'Connell v. Post*, 27 AD3d 631 [2006]; *Renna v. Gullo*, 19 AD3d 472 [2005]). Moreover, “the requirement that a motion for leave to renew be based upon newly-discovered facts is a flexible one and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion (*Lawman v Gap, Inc.*, 38 AD3d 852[2007] citing *Gadson v New York City Hous. Author.*, 263 AD2d 464]). Here, plaintiffs seek to renew their application based on new facts that have come to light that, plaintiffs assert, concern the existence of retirement accounts in addition to the “Court Ordered [Retirement] Account”, all of which the defendant and/or spouse have some form of control over and in which the Retirement Monies of employees have been placed. In this regard, plaintiffs submit, inter alia, the prior order of the Court dated August 10, 2015, an affirmation of counsel, and an affidavit from Stewart Lask, EA, an enrolled agent with the IRS and the principal of the accounting firm Grove Avenue Associates II, LLC, together with bank records of various accounts with TD Ameritrade controlled by the defendant. Counsel affirms that, on or about July 25, 2015, TD Ameritrade responded to a subpoena by providing plaintiffs’ counsel with said records of various accounts controlled by the defendant. Plaintiffs submit said bank records together with the affidavit of Mr. Lask, who attests to having reviewed the bank records to ensure that all retirement monies are traceable and accounted for so that upon any turn over from defendant to plaintiffs, plaintiffs may begin to faithfully execute its duty as a fiduciary to the employees regarding their retirement monies. According to Mr. Lask, his review of the submitted bank records shows, among other things: i) the existence of multiple retirement accounts with zero balances; ii) questionable recent liquidation of certain Retirement Accounts set up for the benefit of plaintiff Endodontic Associates of Bayside, PLLC, that were transferred into the personal accounts of the defendant (Defendant’s Personal Accounts); iii) Defendant’s Personal Accounts clearly contain retirement monies; iv) the defendant now wishes to turn over to plaintiff a certain PSP Account, which is distinct from the “Court Ordered [Retirement] Account;” and v) questionable involvement of defendant’s spouse, who has control over retirement accounts which generally should not be controlled by anyone but the defendant as the defendant is the named fiduciary on the retirement accounts. Mr. Lask opines that, after reviewing the bank records, it would not be in plaintiffs’ interest to take control or become fiduciaries of the “Court Ordered [Retirement] Account” or any of the retirement accounts without more information from the defendant because of the potential of possible fraudulent activity and/or, at best, poor bookkeeping regarding the retirement accounts.

The Court finds that plaintiffs' within motion is based upon new or additional facts that were unavailable at the time of the original motion and thus contains reasonable justification for failing to submit them on the earlier motion. Therefore, the Court grants the branch of the within motion for renewal of plaintiffs' motion for an order compelling the defendant to honor and comply with the terms and conditions of the purchase agreement dated October 6, 2014 and, upon renewal, now decides the motion as follows:

In their complaint filed on February 25, 2015, plaintiffs allege, *inter alia*, that Dr. Carollo acquired the 50% ownership interest of her former partner, defendant 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 and possibly other bank accounts and securities accounts as well.

In support of the motion, plaintiffs submit, *inter alia*, a copy of the pleadings, the aforementioned purchase agreement dated October 6, 2014, certain correspondence dated August 14, 2015 from defendant to TD Ameritrade, the aforementioned affirmation of counsel, an affidavit from plaintiff Stella Carollo, DDS, the aforementioned bank records and affidavit from Stewart Lask, EA.

Section II of the purchase agreement, entitled "Sale of Interest," in part provides that, "[i]n addition to the [Defendant's] Fifty 50% percent interest being transferred herein, this purchase shall include all of the following of [Defendant's] interest transferred to [Dr. Carollo] whether owned by [the Company] or [Defendant] individually...(d) The bank accounts, security accounts...and cash or cash equivalents of the [Defendant]...[Defendant's] interest in, and rights under all contracts including...agreements, leases, permits, licenses approvals and other rights of the [Defendant] with respect to the ownership or operation of the practice."

Section VI(a) of said purchase agreement, entitled "Representations and Warranties of Seller," in part provides that, "[Defendant] represents and warrants to [Dr. Carollo] as follows: a. [Defendant] has not entered into any contract or obligation which may bind [the Company] and which is not set forth upon the books and records of [the Company] or otherwise known by [Dr. Carollo]...."

Elaine Rogers UA 1-1-99 (“Pension Account”), for which defendant is the sole trustee and Jeffrey Tulman, her spouse, has power of attorney over, at one time contained retirement monies; the bank records indicate that in April 2012, the defendant or spouse removed approximately \$1,265,233.39 to the PSP Account. Furthermore, according to Mr. Lask, TD Ameritrade account number 883-617411, which is entitled Elaine Rogers PSP FBO Elaine Rogers UA 1-1-99 (“PSP Account”), for which defendant is the sole trustee and Jeffrey Tulman, her spouse, has power of attorney over, contained or contains retirement monies; the bank records indicate that in June 2014, the defendant or spouse transferred approximately three million dollars (\$3,000,000.00) from the “PSP Account” to, upon Mr. Lask’s information and belief, the defendant’s personal accounts, leaving the “PSP Account” with a balance of \$133,563.37 at the end of February 2015. Mr. Lask concludes that the mere “turn over” of this “Court Ordered [Retirement] Account,” i.e. the PSP account with a balance of \$133,563.37, will not resolve the query of the accounting regarding the retirement monies of the employees.

In opposition, defendant Elaine Rogers, DDS<sup>1</sup> submits an affirmation from her attorney in this action, Scott B. Tulman, and her own affidavit. In her affidavit, defendant states, “I again affirm that with the exception of the one existing retirement account in issue with approximately \$133,000, which Plaintiffs refused to accept, there are no other accounts in which Plaintiffs have an interest. All other pension monies have been lawfully and properly distributed in accordance with my fiduciary duty as trustee.” In addition, defendant states, “I have reviewed my attorney’s affirmation in opposition to this motion and I attest to the factual accuracy of the facts set forth in the affirmation.” In the affirmation of defendant’s counsel, Mr. Tulman provides the history of defendant’s dental practice, the period of time when her association with plaintiff Stella Carollo, DDS began, the approximate date when the two parties entered into a partnership as the owners of plaintiff Endodontic Associates of Bayside, PLLC, and makes further assertions regarding the manner in which the partnership ended, including his assertion that Dr. Carollo alone had access to the books and records of Endodontic Associates, noting that in June 2014, plaintiff changed the locks to the door to bar defendant from the premises, seized all of the books and records at the location, fired the accountant, fired the pension actuary and denied defendant access to the premises and the books and records. Mr. Tulman states that the \$133,000.00 in the Court Ordered [Retirement] Account” still awaits plaintiffs’ acceptance of control, that defendant is the sole owner of the “Personal IRA,” which has nothing to do with Endodontic Associates, provides the history of the “Retirement Income Plan Account,” including the participation by certain

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<sup>1</sup>The Court notes that in the bank records submitted herein, a Trust Account Application dated February 4, 2010 for Elaine Rogers DMD Retirement Income Plan For the Benefit of Employees (the Retirement Income Plan Account), the trustee’s full legal name is given as Elaine Rogers-Tulman.

employees and defendant, who he states closed the account and paid out all participants without complaint. Mr. Tulman also provides the history of the “Pension Account,” including the participation by “certain employees” and defendant, who he states closed the account and rolled over the funds into the existing PSP plan, i.e. the “Court Ordered [Retirement] Plan” with a balance of approximately \$133,000. Mr. Tulman also states that, with regard to Mr. Lask’s assertions that the defendant or spouse transferred approximately three million dollars (\$3,000,000.00) from the PSP Account (the Court Ordered “Retirement Account”) to the defendant’s personal accounts, defendant opened a 401K account in June 2014, under the account number ending in 7365, in which she was the sole participant and, as such, said 401K plan is irrelevant to this action.

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]). Here, the evidence submitted in support of the motion demonstrates the existence of multiple retirement accounts with zero balances; questionable recent liquidation of certain retirement accounts set up for the benefit of plaintiff Endodontic Associates of Bayside, PLLC, that were transferred into the personal accounts of the defendant; that defendant’s personal accounts contain retirement monies; and that the defendant now wishes to turn over to plaintiff a certain PSP Account, which is distinct from the Retirement Account this Court ordered be turned over to plaintiffs. In opposition, defendant relies upon the facts set forth in her attorney’s affirmation, who fails to provide a basis for any of the assertions contained therein. Moreover, the defendant has failed to provide the affidavit of a witness with knowledge of facts, as defendant’s affidavit, with the exception of merely affirming the existence of one retirement account with approximately \$133,000, states only that there are no other accounts in which plaintiffs have an interest, and that all other pension monies have been lawfully and properly distributed in accordance with her fiduciary duty as trustee, but

does not contain any information supporting her counsel's assertions (*see Vineyards Hills Developers, Inc. v. Dewkett Eng'g, P.C.*, 56 A.D.3d 763 [2d Dept 2008]). The Court finds that the evidence submitted in support of the motion demonstrates 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 movants' position.

“The Supreme Court of New York, being a court of equity as well as law (*see N.Y. Const. art. VI, § 7(a)*), [is] empowered to grant relief consistent with the equitable principle that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime” (*Campbell v Thomas*, 73 A.D.3d 103, 116 [2d Dept 2010]). Thus, while ordinarily the function of a preliminary injunction is to preserve the status quo of the parties or the res at issue until a final determination of the merits can be made, “[t]here is no question that in a proper case Supreme Court has power as a court of equity to grant a temporary injunction which mandates specific conduct...” (*McCain v. Koch*, 70 N.Y.2d 109, 116 [1987]). Here, the plaintiffs have submitted sufficient evidence showing that they and their employees are in danger of being permanently deprived of the retirement monies owed to them due to defendant's breach of the purchase agreement, in addition to the defendant's possible violation of the Court's order dated August 10, 2015. Thus, in order to ensure that the retirement monies of plaintiffs, as well as all past, current and future employees of plaintiff Endodontic Associates, are correctly accounted for, defendant must provide the information plaintiffs seek so that plaintiffs may ensure there is not only a proper accounting of all retirement monies, but that the retirement monies of the employees are in fact properly situated with the plaintiffs.

Accordingly, plaintiffs' motion is granted to the extent that, in addition to the relief granted by the prior order of the Court dated August 10, 2015 with respect to the so-called “Court Ordered [Retirement] Account,” the branches of the within motion 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 (a) turn over of all bank records, statements of account and the like which detail the various transactions, account balances and related activities concerning TD Ameritrade account number 867-969813 (the aforementioned “Personal IRA”), TD Ameritrade account number 883-617425 (the aforementioned “Retirement Income Plan Account”), TD Ameritrade account number 883-617414 (the aforementioned “Pension Account”), TD Ameritrade account number 883-617411 (the aforementioned “PSP Account”), and (b) accounting of the defendant to the plaintiff of all the aforementioned 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

aforementioned accounts to Dr. Carollo and/ or the Company; (d) transfer of control of the aforementioned accounts 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, including but not limited to defendant's personal 401K plan opened in June 2014 under the account number ending in 7365, are granted.

For the reasons previously given by the Court in the prior order dated August 10, 2015, the branch of plaintiffs' motion seeking an award of costs and expenses including attorneys' fees, is denied as premature.

The foregoing relief is conditioned on plaintiffs' filing an undertaking pursuant to CPLR 6312 in an amount to be fixed in the order to be entered. Upon settlement of the order the parties may submit recommendations as to the amount of the undertaking.

Settle order.



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VALERIE BRATHWAITE NELSON, J.S.C.

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