SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

MICHAEL ZACHARIAS and MECHANICAL VERTICAL PARKING SYSTEMS, LLC D/B/A PARKMATIC,

Plaintiffs,

– against –

MAX WASSEF A/K/A MAGDI WASSEF and PARKMATIC CAR PARKING SYSTEMS, LLC,

Defendants.

Index No.: 654548/2016

DECISION/ORDER

Plaintiff Michael Zacharias, individually and derivatively on behalf of plaintiff Mechanical Vertical Parking Systems, LLC (Mechanical), brings this action for dissolution of Mechanical and for injunctive and monetary relief against defendants Max Wassef and Parkmatic Car Parking Systems, LLC (PCPS), based on Wassef's alleged breaches of fiduciary duty, self-dealing, unfair competition, and diversion of business from Mechanical to PCPS.

The amended complaint pleads that Zacharias and Wassef each hold a 50% membership interest in Mechanical, a New York limited liability company formed in January 2015 to develop and sell mechanical parking systems, and that Wassef formed PCPS in July 2016 to compete with Mechanical after Zacharias discovered that Wassef had been misappropriating Mechanical's funds and business opportunities for his own purposes. (Compl., ¶¶ 10, 18-19.) The amended complaint further pleads that Wassef has changed Mechanical's computer passwords, rendering the company unable to operate, and has used Mechanical's "Parkmatic" name and logo on invoices and bid proposals sent to Mechanical's current and prospective customers, in an effort to confuse customers and divert their business to PCPS. (Id., ¶¶ 21-22.)

Plaintiffs now move for a preliminary injunction enjoining defendants from, among other things: competing with Mechanical or soliciting or communicating with its current and prospective customers; entering Mechanical's place of business; transacting any business on behalf of Mechanical without leave of court; accessing any computer system or database of Mechanical; collecting any debt or other property of Mechanical; and using Mechanical's "Parkmatic" mark, or any mark likely to be confused with Mechanical's marks. Plaintiffs also seek a mandatory injunction compelling defendants to provide plaintiffs with the passwords to Mechanical's computer systems; redirect written correspondence and telephone calls received from Mechanical's current and prospective customers to plaintiffs; and sever any link between Mechanical's website and defendants' email addresses.

Discussion

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and a balance of equities in the movant's favor. (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; W.T. Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; CPLR 6301.) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].)

As to likelihood of success on the merits, "the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action. While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action, a party seeking the drastic remedy of a preliminary injunction must nevertheless establish a clear right to that relief under the law

and the undisputed facts upon the moving papers. Conclusory statements lacking factual evidentiary detail warrant denial of a motion seeking a preliminary injunction." (1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011] [internal citations, brackets and quotation marks omitted]; see also Barbes Rest. Inc. v ASRR Suzer 218, LLC, 140 AD3d 430, 431 [1st Dept 2016]; Four Times Sq. Assocs., L.L.C. v Cigna Invs., Inc., 306 AD2d 4, 5 [1st Dept 2003].) Where "the facts are in such sharp dispute that it cannot be said that the [movant] established a clear right to preliminary injunctive relief," the motion will be denied. (Omakaze Sushi Rest., Inc., v Lee, 57 AD3d 497, 497 [2d Dept 2008].)

In their opposition papers, defendants did not dispute that Wassef formed PCPS while a member of Mechanical, that he changed the passwords to Mechanical's computer systems, and that he took steps to redirect Mechanical's business to PCPS. Rather, defendants disputed that plaintiff Zacharias is a member of Mechanical, and that he has standing to bring this action. Defendants further disputed that Mechanical has ownership rights in the Parkmatic name and logo, which Wassef contends were developed and used by him years before the formation of Mechanical in 2015. (Wassef Aff., ¶¶ 4-5, 12; Defs.' Memo. In Opp., at 3-4.)

The court holds that Zacharias has demonstrated a likelihood of success on the merits of his claim that he is a member of Mechanical. The Articles of Organization of Mechanical do not list the company's members, and the parties did not execute an operating agreement. However, the mere failure of the parties to record their respective membership interests in writing is not determinative as to Zacharias's claims. (See Out of the Box Promotions, LLC v Koschitzki, 55 AD3d 575, 576-577 [2nd Dept 2008], affg 2007 WL 1374501, * 2 [Sup Ct, NY County, May 10, 2007, No. 29586/2006] [affirming denial of motion to dismiss action for breach of fiduciary duty on ground that plaintiff was not a member of a limited liability company, where the parties did

not execute an operating agreement naming the plaintiff as a member but other evidence of membership existed].)

Significantly, at the oral argument of the motion, defendants abandoned their contention that Zacharias is not a member of Mechanical, conceding that he holds at least a 49% membership interest in the company. Zacharias contends that he holds an equal interest. On this motion, the court need not determine the parties' respective percentages, as it is well settled that minority members of an LLC may bring a derivative action on behalf of an LLC. (Tzolis v Wolff, 10 NY3d 100 [2008] [members holding 25% interest in LLC may bring derivative action on LLC's behalf, despite lack of express authorization in the Limited Liability Company Law].)[1]

Further, even absent defendants' concession at oral argument as to Zacharias's membership in Mechanical, the record contains substantial evidence corroborating Zacharias's claim that he and Wassef are both members and that each has exercised some degree of managerial control over the company. This evidence included a Promissory Note, dated November 17, 2014, reflecting Zacharias's payment of $100,000 "as an initial investment by the Payee [Zacharias] for the purchase of a forty-nine (49%) interest (the 'Percentage'), in a company to be formed by the Maker [Parking in Motion, Inc. dba/ Parkmatic, a company of which Wassef was principal]." (Zacharias Reply Aff., Exh. D [emphasis in original].) In

[1] As defendants correctly argue, where a corporation has only two stockholders, each owning 50% of its shares, the stockholders generally lack authority to bring direct claims in the name of the corporation against one another. In such cases, "the proper remedy is a stockholder's derivative action." (Executive Leasing Co., Inc. v Leder, 191 AD2d 199, 200 [1st Dept 1993]; see also Sports Legends, Inc. v Carberry, 61 AD3d 449, 450 [1st Dept 2009], lv denied 15 NY3d 705 [dismissing direct claim of corporation by 50% shareholder against other 50% shareholder]; compare Family M. Found. Ltd. v Manus, 71 AD3d 598, 598 [1st Dept 2010], lv dismissed 15 NY3d 819 [holding that action was properly maintained by plaintiff corporation under the authority of its president and sole director, even though the parties disputed whether she owned all or one-third of the corporation's shares, distinguishing Executive Leasing Co., Inc.].) Here, Mechanical appears as a separate plaintiff in the caption, suggesting that Zacharias asserts direct claims on its behalf. The opening paragraph of the amended complaint, however, states that this action is brought derivatively on behalf of Mechanical. This minor confusion does not warrant denial of a preliminary injunction. Plaintiffs can take appropriate proceedings to correct the caption and to clarify the individual and derivative claims at issue.

addition, Zacharias produced evidence of checks and wire transfers to or for the benefit of Mechanical totaling an additional amount of approximately $400,000. (Id., Exh. C.) The evidence also included a January 5, 2015 BankUnited Limited Liability Company Resolution, which identifies Zacharias as the CFO of Mechanical and Wassef as its CEO, and which is signed by Zacharias and Wassef in these respective capacities and by Zacharias as the "Manager or Designated Member" of Mechanical. (Id., Exh. F.) Plaintiffs also produced an email showing that Wassef held himself out to a creditor as a member of "a new entity" with "new owners" (plural) doing business under the name Parkmatic. (See Email, dated June 28, 2016, from Wassef to Kim Hicks [Zacharias Reply Aff., Exh. H].)[2]

Zacharias has also made a showing of likelihood of success on the merits of his claim that defendants used the Parkmatic name and logo to solicit and/or bill Mechanical's current customers for services provided by Mechanical. For example, plaintiffs produced four invoices to four separate customers, dated between August 24, 2015 and May 24, 2016, on the PCPS letterhead and displaying the Parkmatic logo. (Zacharias Aff., Exh. B.) Zacharias attested that these invoices were for services performed by Mechanical. (Zacharias Aff., ¶ 23.)

In opposition, defendants did not dispute that Mechanical performed services for these customers, or that Wassef billed for those services on PCPS's behalf. The parties in fact stipulated, subsequent to this court's issuance of a temporary restraining order, that the work performed on a project covered by one of the above PCPS invoices, for a customer called Quik-Park, "is for the benefit of Mechanical and that any and all monies due under the QP Agreement

[2] Plaintiffs also submitted with their reply papers an unexecuted draft of an operating agreement for Mechanical, dated as of January 5, 2015 (i.e., contemporaneously with the formation of Mechanical). This document states that Zacharias and Wassef are each 35% members of Mechanical, with the remaining 30% membership interest unissued. (See Draft Operating Agreement, Exh. A [Zacharias Reply Aff., Exh. G].) Although Wassef disputes the percentage of Zacharias's interest in the LLC, it is noted that the percentage of Wassef's interest is also not established by any documentary evidence. He, like Zacharias, is not listed as a member in the Articles of Organization, and there is no operating agreement evidencing his percentage interest.

for work done by Wassef are due and owing to Mechanical." (Stipulation, dated Sept. 2016, ¶ 2 [Zacharias Reply Aff., Exh. A]; Quik-Park Invoice, dated Dec. 10, 2015 [Zacharias Aff., Exh. B, at 3].) In opposition, defendants also did not dispute that Mechanical, since its formation, has done business in New York using the Parkmatic name and logo. The record shows that Wassef consented to this use: A Certificate of Assumed Name, filed on behalf of Mechanical on January 8, 2015, bears his electronic signature. (Zacharias Reply Aff., Exh. I.)

Rather, defendants appear to take the position that, by virtue of Wassef's asserted majority membership of Mechanical, development and prior use of the Parkmatic name, and prior work with some of Mechanical's customers, Wassef has the authority to transfer these assets, business, and goodwill to his new company, PCPS, in which his co-member has no interest. (See Wassef Aff., ¶ 60.)

This argument ignores that, as a member who exercised managerial control over Mechanical, Wassef owed fiduciary duties to both Mechanical and Zacharias. (See Jones v Voskresenskaya, 125 AD3d 532, 533 [1st Dept 2015]; Pokoik v Pokoik, 115 AD3d 428, 429 [1st Dept 2014]; Limited Liability Company Law, §§ 401, 409, 412.) The fiduciary duties owed by a managing member include "'a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty.'" (Pokoik, 115 AD3d at 429, quoting Birnbaum v Birnbaum, 73 NY2d 461, 466 [1989]; see also Jones, 125 AD3d at 533 [reinstating breach of fiduciary duty claim by one 50% LLC member against other 50% member where complaint alleged that, following extensive negotiations for the LLC to perform

work for a third party, the defendant member was directly hired by the third party to do the work in her individual capacity].)

The Second Department's decision in Out of the Box Promotions, LLC (55 AD3d 575, supra), is particularly instructive, as it involves nearly identical facts. There, as here, the complaint alleged that the individual plaintiff and the individual defendant were each a 50% member of the plaintiff LLC. The complaint alleged that the defendant member had formed a separate LLC doing business under the name Out of the Box Group, without his co-member's knowledge, to misappropriate orders from current customers of the plaintiff LLC, the similarly named Out of the Box Promotions, LLC. (Id., at 576.) The Court held that the complaint pleaded the defendant member's breach of a fiduciary duty to both the plaintiff LLC and to his co-member. (See id., at 578.)

Wassef's claim that he has pre-existing rights to the Parkmatic name and logo and to the customers he did business with before forming Mechanical does not absolve him of his fiduciary duties. As discussed above, there is no operating agreement limiting Wassef's fiduciary duties or obligations to Mechanical and Zacharias. The parties dispute whether Wassef continues to own, or contributed to Mechanical, his pre-existing customers and the Parkmatic name and logo.[3] The

[3] In his affidavit in opposition, Wassef asserted that he owns the Parkmatic name and logo and the business relationships he developed under that name prior to the formation of Mechanical. (See Wassef Aff., ¶¶ 56-59.) Wassef further asserted that he has "licensed other distributors around the world to use the 'Parkmatic' name." (Id., ¶ 12.) At oral argument, counsel for Wassef appeared to claim that Wassef merely licensed Mechanical the right to use the name. Zacharias, in contrast, took the position that "the 'Parkmatic' name, highly stylized logo and all goodwill associated with the 'Parkmatic' name" was Wassef's contribution, in lieu of a cash contribution, to Mechanical. (Zacharias Reply Aff., ¶¶ 14, 18.) In response, Wassef's counsel claimed, without evidentiary support, that Wassef made a $200,000 cash contribution to the company.

The evidence in the record shows that Wassef's previous company, Parking in Motion, Inc., operated under the Parkmatic name in the years before Wassef met Zacharias. (See Wassef Aff., Exhs. B-I.) There is no evidence, however, that Wassef ever authorized, permitted, or licensed any companies other than Mechanical and Parking in Motion, Inc. to use the Parkmatic name. As noted above, a Certificate of Assumed Name bearing Wassef's electronic signature was filed on behalf of Mechanical on January 8, 2015. Parking in Motion, Inc. is now listed by its state of incorporation, Vermont, as an inactive entity. (Zacharias Reply Aff., Exh. J.) Without resolving the issue at this time, the court notes that this evidence is at least consistent with Zacharias's contention that Wassef agreed to contribute the Parkmatic name to Mechanical.

court need not resolve this dispute on this motion for a preliminary injunction. On the undisputed showing on this record that Wassef, while a member of Mechanical, solicited existing customers of Mechanical and used the Parkmatic name to conduct computing business, Zacharias has shown a likelihood of success on his claim that Wassef breached his fiduciary duties to Mechanical and Zacharias. Put another way, Zacharias has shown a likelihood of success on his claim that Wassef's fiduciary duties prohibited him from using the Parkmatic name to compete with Mechanical for Mechanical's current customers. (See 21st Century Diamond, LLC v Allfield Trading, LLC, 88 AD3d 558, 559 [1st Dept 2011] [holding that provision in LLC operating agreement permitting defendant majority member to "'compet[e] with the business of the Company'" did not entitle defendant majority member "to appropriate for itself a business opportunity that 21st Century had been pursuing"].)

Zacharias has also demonstrated the potential for irreparable harm absent an injunction and the balance of equities in his favor. The loss of customers, business, and good will constitute irreparable harm. (See Four Times Sq. Assocs., L.L.C., 306 AD2d at 6; Willis of New York, Inc. v DeFelice, 299 AD2d 240, 242 [1st Dept 2002]; Alside Div. of Assoc. Materials Inc. v Leclair, 295 AD2d 873, 874 [3d Dept 2002].)

As to the balance of the equities, an injunction prohibiting Wassef from soliciting Mechanical's current customers and from competing with Mechanical using the Parkmatic name and logo will preserve the status quo. Wassef will not be prejudiced by this relief, as discussed further below. Notably, Wassef, as a member of Mechanical, will continue to be entitled to a share of profits earned from work performed by Mechanical.

Although plaintiffs' moving papers requested broad injunctive relief (see supra at 2), plaintiffs represented at the oral argument that they do not seek to preclude Wassef from

competing with Mechanical for new customers using a different name — i.e., a name other than Parkmatic. They also represented that they do not seek to preclude Wassef from performing services for Mechanical's current customers, provided that the services are made and billed for on behalf of Mechanical.

The court therefore will not enjoin Wassef from entering Mechanical's place of business or taking other acts consistent with his rights and duties as a member of Mechanical. Conversely, the court will not permit Wassef to exclude Zacharias from the management of Mechanical's business, as Zacharias has made an unrebutted showing that he exercised managerial responsibilities as a member of Mechanical.

As previously noted, it is undisputed that Wassef changed Mechanical's computer passwords, and that plaintiffs have accordingly been prevented from accessing the company's customer lists, pricing information, and internal accounting, payroll, and invoicing software. (Zacharias Aff., ¶ 5.) It is also undisputed that Mechanical's website and telephone system have been set up so that price requests and calls from customers are routed directly to Wassef. (Id., ¶¶ 37-38.) These acts have frustrated Mechanical's ability to do business, may result in further irreparable harm, and warrant mandatory injunctive relief. (See Second on Second Café, Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 264 [1st Dept 2009] [holding that mandatory injunctive relief may be granted only "in unusual circumstances, where the granting of the relief is essential to maintain the status quo pending trial of the action"]; 67A NY Jur 2d Injunctions § 57.) Wassef will therefore be directed to turn over the password to Mechanical's computer systems; to take steps necessary to enable both Wassef and Zacharias to access any correspondence made through Mechanical's website, including but not limited to requests for price quotes; and to sever

any links between Mechanical's website and Wassef's personal telephone or cellular numbers or email addresses.

CPLR 6312 (b) requires that the plaintiff "give an undertaking in an amount to be set by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction . . . ." The undertaking must be "rationally related to the potential damages recoverable if the preliminary injunction is later determined to have been unwarranted." (1414 Holdings, LLC v BMS-PSO, LLC, 116 AD3d 641, 643-644 [1st Dept 2014].) Defendants have asked for an undertaking in the amount of $5,250,433.20, representing the total value of the bid proposals and pending contracts identified by plaintiffs in their moving papers. (Defs.' Memo. In Opp., at 19.) This figure ignores, among other things, the cost to defendants of performing such contracts and the share of profits Wassef will receive as a member of Mechanical. The court holds that defendants' proposal therefore is not rationally related to their potential damages if the preliminary injunction is determined to have been unwarranted. Absent any countervailing evidence, the court in its discretion determines that an undertaking in the amount of $250,000 will be satisfactory.

It is accordingly hereby ORDERED that the motion of plaintiffs Michael Zacharias and Mechanical Vertical Parking Systems, LLC d/b/a Parkmatic (Mechanical) is granted to the following extent:

1. It is ORDERED that defendants Max Wassef a/k/a Magdi Wassef and Parkmatic Car Parking Systems, LLC (PCPS) and their respective agents, affiliates, officers, directors, members, managers, employees and/or representatives, and all persons acting in concert with

them or on their behalf, are hereby enjoined, pending the resolution of this action or further order of this court, from the following:

(i) Directly or indirectly soliciting, conducting business with, or otherwise communicating with any persons or entities to whom or to which Mechanical has provided services as of the date of this order, or who or which have contacted or been contacted by Mechanical regarding Mechanical's services as of the date of this order. Provided that: Nothing herein shall prohibit defendant Wassef from soliciting, conducting business with, or otherwise communicating with any such person or entity for the purpose of providing services on behalf of Mechanical;

(ii) Directly or indirectly undertaking any business activities in competition with Mechanical under the name Parkmatic or under any name or logo that is likely to be confused with the Parkmatic mark or logo; and

(iii) Misappropriating any funds belonging to Mechanical or owed to Mechanical for services performed by Mechanical; and it is further

2. ORDERED that defendant Wassef shall, within seven days of service of a copy of this order with notice of entry, provide plaintiffs with the passwords and any other information necessary to access Mechanical's computer systems; and it is further

3. ORDERED that defendant Wassef shall, within seven days of service of a copy of this order with notice of entry, take steps necessary to enable both Wassef and Zacharias to access any correspondence made through Mechanical's website, including but not limited to requests for price quotes, and shall sever any links between Mechanical's website and Wassef's personal telephone or cellular numbers or email addresses; and it is further

4. ORDERED that the undertaking is fixed in the sum of two hundred and fifty thousand dollars ($250,000) conditioned that plaintiffs, if it is finally determined that they are not entitled to an injunction, will pay to defendants all damages and costs which may be sustained by reason of this injunction. Said undertaking shall be posted by cash or surety bond within seven days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
October 11, 2016

MARCY FRIEDMAN, J.S.C.