SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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AFSHIN HAKAK,

Plaintiff,

**DECISION/ORDER**
**Index No. 652408/2016**

-against-

JOSEPH ALLAHAM, PHILLIP MENEGIS, JA RESTAURANT MANAGEMENT LLC, KPG HOSPITALITY INC., TMP OWNERS CORP., BB PRIME, INC., PRIME PIZZA AVENUE J, LLC, PGB 38 LLC, BROADWAY 21 LLC, JA PIZZA NY LLC

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this direct and derivative action for, inter alia, breach of contract, plaintiff Afshin Hakak ("Hakak" or "Plaintiff") moves (in Motion Seq. No. 1), by order to show cause, for the appointment of a temporary receiver for JA Pizza NY LLC (the "Company").

Plaintiff is a member and defendant Joseph Allaham ("Allaham") is the managing member of the Company, owning 49% and 51% respectively. The Company operates a pizzeria named "Pizza da Solo" at 550 Madison Avenue, New York. Defendant Phillip Menegis ("Menegis" and collectively with Allaham, the "Individual Defendants") is the Company's controller and manages the pizzeria's accounts payable. Plaintiff alleges that defendants JA Restaurant Management LLC, KPG Hospitality Inc., TMP Owners Corp., BB Prime, Inc., Prime Pizza Avenue J, LLC, PGB 38 LLC, and Broadway 21 LLC (collectively, the "Entity Defendants") are all businesses that are owned and controlled by the Individual Defendants. Plaintiff states that the restaurants owned by the Entity Defendants operate as a common enterprise and share employees and other resources.

Under JA Pizza NY LLC's Operating Agreement (the "Agreement"), Allaham was obligated to perform certain services[1] in exchange for 4% of the Company's net annual sales. According to Plaintiff, the Individual Defendants caused the Company to pay $100,000 to Allaham in management fees in 2013, which exceeded 4% of the net annual sales and is one basis for Plaintiff's request for the appointment of a temporary receiver. As additional support for this motion, Plaintiff asserts that the Individual Defendants: "pocketed approximately $110,000 in Company cash;" "diverted Company money" to the Entity Defendants for no consideration; "misused Company money" in payment for Entity Defendants' expenses; "unilaterally closed the Company's bank account and opened a new one at a different bank without Plaintiff's requisite consent;" and "refused" to inform Plaintiff of the identity of the bank for the new account or give him signatory status.

Plaintiff's allegation about the unaccounted for cash is founded on his review of the Company's cash sales records from its Point of Sale ("POS") system and the Company's recorded bank cash deposits. Plaintiff accuses the Individual Defendants of "embezzling" funds in the amount of $109,145. In addition, Plaintiff alleges that the Individual Defendants issue Sales Summaries reflecting no sales for particular dates when he believes that the cash register Settlement Report actually shows sales for those dates. Plaintiff contends that the Individual Defendants diverted Company funds to pay

[1] Allaham's services include: "(1) restaurant/food service consultant; (2) menu and pricing; (3) hiring and firing staff; (4) supervision of food production and service; and (5) promotion and marketing."

the Entity Defendants' expenses for goods/services rather than distribute the funds to Plaintiff as a Company member. In support of this contention, Plaintiff cites to a doubling of cost of goods sold, an increase in the Company's kosher certification fees from 2014 to 2015, and questionable Company expenses (including costs for linens and uniforms).

Plaintiff filed this motion, on May 25, 2016, seeking a receiver to "(a) take and hold the real and personal property of the Company; (b) sue for, collect and sell debts or claims; (c) employ counsel for purposes necessary to the discharge of its obligations; and (d) file a petition with the Bankruptcy Court if the receiver deems it in the best interests of the Company and its members."

On May 26, 2016, following oral argument on Plaintiff's Order to Show Cause, I ordered the Individual Defendants to keep the cash in the premises, refrain from selling, transferring or dissipating any Company assets, and to engage in only ordinary course transactions. Further, I ordered the Individual Defendants to meet with Plaintiff at the bank and to add Plaintiff's name/signature to the new Company bank account. Lastly, I instructed the parties to keep track of spending and the allocation of revenues.

In a supplemental affidavit, dated June 8, 2016, Plaintiff argues that the Individual Defendants' post-TRO behavior violates the TRO and militates in favor of a temporary receiver. Specifically, Plaintiff states that although his receipt of daily Sales Summaries reflect the pizzeria's cash sales, none of this cash (nor any cash) is in the Company's safe. And, Plaintiff argues that the absence of cash in the safe violates the TRO's instruction to the Individual Defendants that Company cash remain on the premises. Further, Plaintiff

alleges that on June 2, 2016, the Individual Defendants transferred $3,000 from the Company's Flushing Bank account to an account belonging to 500 Rooftop LLC, an entity owned or controlled by defendant Allaham without "any legitimate basis." Lastly, Plaintiff states that the Individual Defendants continue to divert Company funds to pay the expenses of the Entity Defendants as evidenced by a Best Value invoice that Plaintiff claims shows that 168 cases of cheese were delivered to the pizzeria but that only 5 cases were still on the premises six days after delivery and therefore "[a]ll of the other cases must have been moved to Mr. Allaham's other restaurants."

In opposition, Individual Defendants counter that cash is used for vendor payments because seven vendors – whose products are required to make kosher pizza – must be paid COD as they will not accept checks from the pizzeria due to returned checks. The Individual Defendants also state that Plaintiff's "speculation" that the pizzeria has been paying vendors for products used by the Entity Defendants is unsupported. Menegis notes that Plaintiff's contention regarding the cheese is groundless because Plaintiff misread the product quantity in the invoice and the "other restaurants are all kosher meat" and cannot use cheese. According to Menegis, Plaintiff's accusation that the increase in the Company's Orthodox Union ("OU") kosher certification fees is attributable to the Individual Defendants' use of the pizzeria's money to pay these fees for multiple establishments "is absurd since there are separate OU invoices for each restaurant."

The Individual Defendants rebut Plaintiff's claims of excessive payments to defendant Allaham by pointing out that, with the exception of three months where

Allaham was paid 4% of the gross sales, no management fees were paid. Moreover, Menegis states that Plaintiff's implication of embezzlement/misappropriation is false in that this money was actually funds advanced and later reimbursed to the Entity Defendants by the Company "as repayment of loans necessary for the [pizzeria's] daily operation." In response to Plaintiff's allegations of cash missing from 2013 to 2014,[2] Menegis argues that a complete accounting is not possible because source documents for all cash disbursements, previously given to Plaintiff to satisfy a pre-suit request for an accounting, were not all returned.

Menegis, states that Pizza da Solo is operating at a deficit and cannot afford to pay a receiver. In fact, Allaham advocates shutting the Company down due to sales tax liability and continuing losses. Additionally, the Individual Defendants claim that it is actually Plaintiff who is "purposely interfering with the smooth operation of the business" by: 1) initially refusing to go to the bank to be added as signatory and later refusing to add his name unless Menegis removed his[3]; 2) falsely claiming to have a court order to confiscate all cash on the premises; and 3) harassing the pizzeria's kosher

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[2] Individual Defendants note that Plaintiff had exclusive control of the Company's cash flow during 2015.

[3] The Individual Defendants maintain that the wire transfer of Company funds, objected to by Plaintiff, was necessitated by Plaintiff's insistence that Menegis be removed as a signatory on the Company bank account. Menegis's non-signatory status precluded him from paying the Company's rent when Allaham was unavailable. To remedy the problem, Allaham wired the pizzeria rent money from the Company account to another business account where Menegis was a signatory and the rent was then paid from that account.

supervision rabbi rendering the rabbi unable to handle cash and forcing the pizzeria to hire another employee at additional expense to the Company.

**Discussion**

Pursuant to CPLR § 6401(a), upon the motion of any person with an interest in a property that is the subject of an action in supreme court, "a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed."

A plaintiff seeking a receiver appointment must show "clear proof of the danger of irreparable loss or damage." *Groh v. Halloran*, 86 A.D.2d 30, 33 (1st Dept. 1982). Courts must exercise extreme caution in appointing receivers because it is a drastic remedy and thus should only be invoked where necessary for the parties' protection. *In re Armienti*, 309 A.D.2d 659, 661 (1st Dept. 2003). Courts should also be cautious about appointing a receiver because "such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits." *Hahn v. Garay*, 54 A.D.2d 629 (1st Dept. 1976). Indeed, given the drastic nature of the remedy, the appointment of a temporary receiver for "a going concern" can properly be invoked only where there is a clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant." *Glassner v. Kaufman*, 19 A.D.2d 885, 885 (1st Dept. 1963).

Here, Plaintiff's allegations fail to clearly show that "there is a danger that the property will be removed from the state, or lost, materially injured or destroyed." CPLR

§ 6401(a). Hakak's allegations of embezzlement and misuse of Company funds are conclusory and lack sufficient evidentiary support. First, the documents submitted by Plaintiff in support of this motion, in and of themselves, are not proof of Individual Defendants' alleged misdeeds. For example, the "suspect" cheese invoice indicates that the Plaintiff, as Individual Defendants correctly point out, misstates that 168 cases of cheese were ordered when the number of cases is only 21 and, in any event, cannot be said to represent product for the Entity Defendants because they are non-dairy establishments.

Second, the Individual Defendants' opposition affidavits controvert many of Plaintiff's allegations, including their explanation of the use of cash for vendor payments. *See Board of Managers of Nob Hill Condominium Section II v. Board of Managers of Nob Hill Condominium Section I*, 100 A.D. 3d 673, 673 (2d Dept. 2012) (reversing lower court's appointment of a temporary receiver where "plaintiff failed to offer any nonspeculative allegations or evidence indicating that the defendants were committing waste or that there was a danger that the subject recreational facilities would be dissipated or lost absent the appointment of a temporary receiver."). Therefore, Plaintiff's allegations are insufficient as a basis for the appointment of a temporary receiver. *See Shapiro v. Ostrow*, 46 A.D.2d 859, 859 (1st Dept. 1974).

Further, Plaintiff does not contend that the pizzeria is insolvent. Rather, it is the Individual Defendants who aver that the pizzeria has difficulty in paying its debts and should be closed. The absence of an allegation of insolvency also weighs against appointing a receiver at this time. *See B.D. and F. Realty Corp. v. Lerner*, 232 A.D.2d

346, 346 (1st Dept. 1996). Hence, I deny plaintiff's motion to appoint a temporary receiver.

In accordance with the foregoing, it is

ORDERED that plaintiff's motion for the appointment of a temporary receiver for the benefit of JA Pizza NY LLC is denied; and it further

ORDERED that this action is respectfully referred to the Trial Support Office for reassignment to an IAS part because it does not meet the monetary threshold of the Commercial Division.

This constitutes the decision and order of the Court.

DATE: 1/6/17

SCARPULLA, SALIANN, JSC