

Zacharias v Wassef
2017 NY Slip Op 31276(U)
June 13, 2017
Supreme Court, New York County
Docket Number: 654548/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

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

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

Index No.: 654548/2016

Plaintiffs,

DECISION/ORDER

– against –

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

_____ x

This action arises out of the breakdown in the business relationship between plaintiff Michael Zacharias and defendant Max Wassef, the two members of plaintiff Mechanical Vertical Parking Systems, LLC (Mechanical), a limited liability company that develops and sells mechanical parking systems. The complaint pleads, among other things, that Wassef breached his fiduciary duties to Zacharias and Mechanical by diverting certain funds and business opportunities belonging to Mechanical to defendant Parkmatic Car Parking Systems, LLC (PCPS), a company in which Wassef is the sole member and in which plaintiffs have no interest.

By Decision and Order, dated October 11, 2016, this court granted a motion by plaintiffs for a preliminary injunction. (Zacharias v Wassef, 2016 WL 5931370, * 5-6 [Sup Ct, NY County, Oct. 11, 2016] [the Injunction].) The Injunction bars defendants from, among other things, “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.” The Injunction, however, expressly permits Wassef to solicit,

conduct business with, or otherwise communicate with any such person or entity “for the purpose of providing services on behalf of Mechanical.” (*Id.*, at * 5-6.) The Injunction also bars defendants from “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.” (*Id.*, at * 6.) Familiarity with the Injunction and the arguments and evidence described in that decision and order is presumed.

Plaintiffs now move for an order, pursuant to Judiciary Law § 753 (A), holding defendants in contempt of court for their alleged violations of the Injunction and, pursuant to Judiciary Law § 773, awarding Zacharias the attorney’s fees, costs and expenses he incurred in connection with the litigation of this motion.

By separate motion, plaintiffs also seek an order, pursuant to CPLR 6301, enjoining defendants and Wassef’s former company, non-party Parking In Motion, Inc. (Parking In Motion), from transferring, dissipating, or disposing of monies received by them in connection with four projects, known as the College Station Ford, Asia Building, Quik Park, and Koepfel Nissan projects, in the total sum of \$1,273.324.02. This motion also seeks an attachment, pursuant to CPLR 6201 (3), of defendants’ assets, including but not limited to any monies presently contained or hereinafter deposited into four bank accounts belonging to defendants or Parking In Motion.

Defendants cross-move for an order vacating the Injunction or, in the alternative, modifying the Injunction to enjoin Zacharias, as well as defendants, from engaging in conduct specified in the Injunction, and from competing with Mechanical under the name VertiPark. The cross-motion also seeks to modify the Injunction so as to permit Wassef “to perform and complete all pending projects to be specifically identified and determined by the Court pending

the adjudication on the merits of all claims and counterclaims asserted in this action with a full reservation of all rights by the parties and to allow all funds to be accounted for through a segregated account established under the supervision of the Court.” (Notice of Cross-Motion, at 2.)

Plaintiffs also move for leave to serve a second amended complaint, adding Parking In Motion, Inc. as a defendant in the action. Defendants cross-move to dismiss various of the claims asserted in the proposed amended complaint.

On June 6, 2017, the court held an evidentiary hearing on plaintiffs’ motion for contempt. This decision determines the contempt motion, plaintiffs’ motion for an additional injunction and an attachment, and defendants’ cross-motion to vacate the Injunction and for other relief. Decision is reserved on the motion for leave to amend and cross-motion to dismiss.

Contempt Motion

In order to find a party in civil contempt, “it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court’s order, although it is not necessary that the order actually have been served upon the party. Fourth, prejudice to the right of a party to the litigation must be demonstrated.” (El-Dehdan v El-Dehdan, 26 NY3d 19, 29 [2015] [internal quotation marks, brackets, and citations omitted]; McCormick v Axelrod, 59 NY2d 574, 583 [1983], amended on other grounds 60 NY2d 652.) The elements of civil contempt must be established by clear and convincing evidence. (El-Dehdan, 26 NY3d at 29.) “Willfulness” is not a required element of civil contempt. Rather, “the contemnor must have a consciousness that reflects an awareness of

the act that is other than ‘unwitting conduct.’” (Id., at 35; accord Board of Directors of Windsor Owners Corp. v Platt, 148 AD3d 645, 646 [1st Dept 2017].)

The court rejects defendants’ contention that the Injunction is not clear and unequivocal because it does not specify by name the persons or entities with whom or which defendants are prohibited from contacting and doing business. Mechanical is not a large business. The record shows, and Wassef does not dispute, that he has been actively involved in Mechanical’s communications with customers and the performance of its contracts. Wassef has also had access to Mechanical’s books and records. In addition, defendants were put on notice, through the original injunction motion and through discovery requests, that the entities that are the subject of this contempt motion were entities Mechanical claimed as customers. While this court did not make factual findings in the Injunction as to whether these entities were, in fact, clients or prospective customers of Mechanical, or entities that had “contacted or been contacted by Mechanical regarding Mechanical’s services as of the date of” the Injunction (at * 6), such specificity was not required for defendants to understand the scope of what was prohibited. The Injunction is a lawful order which clearly and unequivocally barred defendants from doing business with persons or entities they knew or reasonably should have known had previously been in communication with Mechanical regarding Mechanical’s services. The Injunction also unconditionally prohibited defendants from using the Parkmatic name in competition with Mechanical. Although Wassef testified at the hearing that he was not familiar with each and every term of the Injunction, he acknowledged that he had knowledge of the Injunction and had discussed it with his attorney. To the extent that he failed to ascertain the “precise terms” of the Injunction, such failure was unreasonable. (See McCormick, 59 NY2d at 585.)

This contempt motion is based upon defendants' alleged diversion of funds and business in connection with four projects, which the parties have referred to as the College Station Ford, Koeppel Nissan, Quik Park, and Asia Building projects. At the hearing, plaintiffs elicited evidence regarding the College Station Ford and Koeppel Nissan projects, but not the other two projects.

The clear and convincing evidence shows that defendants had knowledge of and disobeyed the Injunction by performing work for and collecting money from two entities that defendants knew had dealings with Mechanical before the ultimate breakdown in the parties' relationship in or about July or August 2016. First, defendants do not dispute that they sent two invoices, dated December 11 and December 15, 2016, for payment on a project for College Station Ford. Defendants used the Parkmatic name on both invoices, and acknowledge that they collected a check for \$72,730 in payment of such invoices on or about December 20, 2016. The evidence also shows that defendants were aware of College Station Ford's prior dealings with Mechanical. Greg Ward, a sales representative of Mechanical, testified credibly at the evidentiary hearing that College Station Ford was a client cultivated by him for Mechanical in early 2016. On June 6, 2016, shortly before the ultimate breakdown in the relationship between Zacharias and Wassef, Mechanical submitted a bid proposal to College Station Ford for the same work listed on the invoices from defendants in December 2016. (Pls.' Exh. 4.) The evidence also includes a second bid proposal for the same project, dated July 28, 2016, featuring the Parkmatic logo, but listing the address of Wassef's company, PCPS, instead of Mechanical. (Pls.' Exh. 5.) Although Wassef expressed some doubt at the evidentiary hearing as to the authenticity of the July 28 bid proposal from PCPS, he did not deny that PCPS entered into a contract with College Station Ford for the same price only a few days later, on August 1, 2016

(Pls.’ Exh. 6), or that he and PCPS performed work on the contract after October 11, 2016, the date of this court’s issuance of the Injunction. The timing and similarity of the proposals demonstrate that Wassef was aware of the earlier Mechanical proposal and thus of Mechanical’s interest in the project.

Wassef further admitted at the hearing that he issued an invoice, dated October 18, 2016 (Pls.’ Exh. 18), for a shipment of equipment to Koeppe Nissan Inc. (Koeppe Nissan). This invoice also bears the Parkmatic name and PCPS’s address. Wassef admitted that, on December 30, 2016, PCPS received \$202,633—i.e., a 50% deposit of the invoice amount. (Pls.’ Exhs. 10, 18.) Again, the evidence convincingly demonstrates that this invoice was issued notwithstanding defendants’ understanding that Mechanical had prior dealings with Koeppe Nissan. Wassef testified that his relationship with Koeppe Nissan predated the formation of Mechanical, and that the project he billed for on October 18 was related to the 2016 renewal of a lease of equipment originally entered into in 2010 by Wassef’s prior company, Parking In Motion. The record shows, however, that Mechanical was the first to bid on the renewal of the lease, on July 12, 2016. (Pls.’ Exh. 16.) On August 4, 2016, using the Parkmatic logo, PCPS sent an invoice to Koeppe Nissan for the work described in Mechanical’s proposal.¹ (Pls.’ Exh. 17.) The record also shows that Mechanical performed work for a Koeppe Nissan entity as early as October 2015.² (See Pls.’ Exh. 1-1.)

Wassef testified credibly at the hearing that the Parkmatic business is his “life’s work,” and he appears to have held a genuine belief that he had the right to use the Parkmatic name and

¹ Mechanical’s July 12, 2016 bid proposal is addressed to Koeppe Auto Group-Nissan. PCPS’s August 4, 2016 invoice is addressed to Koeppe Nissan, Inc. The entities have the same address. Wassef did not claim at the hearing that these were different Koeppe Nissan entities.

² Although Wassef testified that he received the \$228,500 balance due under the August 4, 2016 invoice from PCPS to Koeppe Nissan (Pls.’ Exh. 17), the evidence does not clearly show when or how that payment was received. Wassef accordingly cannot be found in contempt based upon his receipt of such funds.

to complete work on contracts he had entered into before October 11, 2016, notwithstanding the Injunction. Consistent with this belief, defendants proceeded with the College Station Ford and Koeppel Nissan projects, for which they had entered into contracts prior to the issuance of the Injunction. In contrast, there was not convincing evidence that defendants received funds from contracts that Mechanical had entered into with clients—i.e., the Quik Park and Asia Building contracts.

The principal issue in this litigation is whether Wassef provided the Parkmatic name and his book of business to Mechanical as a membership contribution. This court's Injunction, which is clear and unequivocal, aimed to preserve the status quo until that issue could be resolved, Mechanical dissolved, and the parties' respective rights to compete determined. To that end, the court did not make any factual findings about which persons and projects were customers or corporate opportunities of Mechanical, or whether or not Zacharias and Wassef and their respective companies are entitled to compete for such customers and projects.³ Instead, the court specified categories of conduct which, if engaged in before these matters were resolved, would cause irreparable harm to plaintiffs. Although the court finds that defendants' disobedience of the Injunction did not evidence the willfulness necessary to support a finding of criminal contempt, plaintiffs have convincingly shown that, by working on and receiving money from projects which may ultimately be determined to belong to Mechanical or to have been corporate opportunities available to either side, and by using the Parkmatic name in doing so, defendants have "defeated, impaired, impeded, or prejudiced" plaintiffs' rights and remedies.

³ As noted in the decision on the motion for a preliminary injunction, the parties did not execute an operating agreement. (Injunction, at *4 n 3.) The parties' contributions to the business remain to be determined on a fully developed factual record.

(See Judiciary Law § 753 [A]; McCormick, 59 NY2d at 583.) The court accordingly finds that defendants are in civil contempt of the Injunction.

However, the parties have not yet demonstrated, and the court has not yet determined, the parties' respective rights to use the Parkmatic name and to compete for Mechanical's customers. The court accordingly finds that plaintiffs have not, on this motion, demonstrated actual damages as a result of defendants' conduct.

The court further finds that defendants should be given an opportunity to purge their contempt. At the hearing, Wassef forthrightly acknowledged his use of the Parkmatic name after the issuance of the Injunction and spontaneously apologized for such use. Moreover, the record shows that Zacharias has also used the goodwill of Mechanical to promote a new business, known as VertiPark, which he formed after the ultimate breakdown of the parties' relationship, at or about the same time that Wassef incorporated PCPS. Zacharias did not deny at the hearing that he erected signage on Mechanical projects advertising his new company. The record also shows that Zacharias used one of Mechanical's old phone numbers as the number for his new business. A Google search for "Mechanical Vertical Parking Systems" also turns up a result for VertiPark under the heading "VertiPark Mechanical Vertical Parking Systems." Although this evidence does not excuse defendants' disobedience of this court's Injunction, defendants should be given an opportunity under these circumstances to purge their contempt.

Defendants may purge their contempt by either depositing into escrow with plaintiffs' counsel the amount of \$275,363 (representing payments received by defendants after the date of the Injunction of \$72,730 for the College Station Ford project, and \$202,633 for the Koepfel Nissan project), or posting cash or a surety bond with the Clerk of the Court in such amount, within ten days after service of a copy of this order with notice of entry. In the event defendants

fail to purge their contempt, the court will entertain an application for a fine not exceeding the amount of plaintiffs' costs and expenses, plus two hundred and fifty dollars, pursuant to Judiciary Law § 773.

Injunction/Attachment

Plaintiffs also move for an additional preliminary injunction restraining defendants and non-party Parking In Motion from transferring any monies received by defendants or Parking In Motion from the College Station Ford, Koeppl Nissan, Quik Park, and Asia Building projects, in the total sum of \$1,273,324.02. By the same motion, plaintiffs seek an order of attachment of the assets of defendants and Parking In Motion. Defendants cross-move to vacate or modify the prior Injunction issued on October 11, 2016.

The branch of the motion for an additional preliminary injunction will be granted to the extent of enjoining defendants from transferring any monies received from the College Station Ford, Koeppl Nissan, Quik Park, and Asia Building projects. There is no dispute that monies received from the Quik Park and Asia Building projects are due to Mechanical. As to Quik Park, the parties entered into a stipulation, so-ordered by this court on October 3, 2016, in which they agreed that all monies due from the Quik Park project are due and payable to Mechanical. (Dougherty Aff. In Supp. Of Contempt Motion, Exh. A.) Wassef also admitted that "the contract with Asia Building was entered into with Mechanical." (Wassef Aff. In Opp. To Contempt & Attachment Motions, ¶ 74.) As discussed above in connection with the contempt motion, defendants have received monies on account of the College Station Ford and Koeppl Nissan projects in violation of this court's Injunction.

For the reasons stated on the initial motion for a preliminary injunction, a restraint of disposition of these assets is therefore appropriate. The court will restrain only the named

defendants and those under their control from disposing of these assets. On this motion, the court need not and does not make any specific findings as to the identities of the persons or entities under defendants' control.

As to the attachment motion, CPLR 6212 (a) requires that "the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." Notwithstanding the satisfaction of these statutory requirements, the grant of attachment remains an exercise of discretion. (See VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 59-60 [1st Dept 2013]; Capital Ventures Intl. v Republic of Argentina, 443 F3d 214, 219-222 [2d Cir 2006]; Sylmark Holdings Ltd. v Silicone Zone Intl. Ltd., 5 Misc3d 285, 301 [Sup Ct, NY County, Aug. 9, 2004, Cahn, J.].) In addition to the statutory requirements, Courts must consider the need for the attachment. (See CPLR 6223; Capital Ventures Intl., 443 F3d at 219-222.)

The ground for attachment asserted by plaintiffs is set forth in in CPLR 6201 (3), which provides that "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts." The court holds that plaintiffs have not established this ground. Defendants' transfer of his house in 2009 and his maintenance of a bank account in Egypt cannot serve to show that he has disposed of or secreted property, or is about to do so—particularly under these circumstances, in which plaintiffs have identified several bank accounts that defendants maintain in New York. Plaintiffs' further assertion that defendants' contempt of the injunction establishes that he has

secreted or will secrete assets is also unpersuasive. As discussed in connection with the contempt motion, Wassef unequivocally acknowledged defendants' use of the Parkmatic name and their continued work on contracts that they had entered into before the issuance of the Injunction. Although defendants' violation of the Injunction cannot be condoned, plaintiffs do not submit authority, and the court does not find, that an intent to defraud or to secrete assets may be inferred based on defendants' civil contempt of the Injunction, without more. The branch of the motion for an attachment will accordingly be denied.

Cross-Motion to Vacate or Modify Injunction

Defendants fail to establish any basis for vacatur of the Injunction issued on October 11, 2016. Based on defendants' showing that Zacharias has used the goodwill of Mechanical to promote his new business, however, the court holds that Zacharias should also be subject to the Injunction. Finally, the court denies defendants' request that the court specifically identify all pending projects that defendants may complete pending resolution of the action. Determination of this request would require determination of the ultimate issues in this action, including but not limited to the identity of the customers that belong to Mechanical. Nothing in this decision will prevent the parties from conferring—and the court urges the parties to confer—with a view to reaching an agreement as to the identity of customers that may be served by Zacharias and Wassef, respectively, and as to a mechanism for holding in escrow or distributing any revenues received from such projects pending resolution of the action. In addition, the action will be placed on an expedited schedule.

The court has considered the parties' remaining arguments and finds them unavailing.

It is accordingly hereby

1. ORDERED that the motion of plaintiffs Michael Zacharias and Mechanical Vertical

Parking Systems, LLC (Mechanical) (collectively, plaintiffs) for an order holding defendants Max Wassef a/k/a Magdi Wassef and Parkmatic Car Parking Systems, LLC (PCPS) (collectively, defendants) in contempt of this court’s preliminary injunction, dated October 11, 2016 (the Injunction), and for costs and expenses is granted solely to the extent that it is

- (i) ORDERED that defendants are in civil contempt of court for their disobedience of this court’s Injunction; and it is further
- (ii) ORDERED that defendants may purge their contempt by either depositing into escrow with plaintiffs’ counsel the amount of \$275,363, or posting cash or a surety bond with the Clerk of the Court in such amount, within ten days after service of a copy of this order with notice of entry; and it is further
- (iii) ORDERED that, should defendants fail to purge their contempt as permitted above, the court will entertain a motion by plaintiffs for a fine not exceeding the amount of plaintiffs’ costs and expenses in connection with this motion, plus two hundred and fifty dollars, pursuant to Judiciary Law § 773; and it is further

2. ORDERED that plaintiffs’ motion for an additional preliminary injunction and for an attachment of the assets of defendants and of non-party Parking In Motion, Inc. is granted solely to the extent that it is

- (i) ORDERED that defendants 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 transferring, divesting, diverting, disposing of, hypothecating, dissipating or otherwise removing any monies received by defendants from the College Station Ford, Koeppl Nissan,

Quik Park, and Asia Building projects. Provided that: Nothing herein shall prohibit defendants from depositing into escrow with plaintiffs' counsel the amount of \$275,363, or posting cash or a surety bond with the Clerk of the Court in such amount, as permitted in paragraph 1 (ii) of this order; and it is further

3. ORDERED that defendants' cross-motion to vacate or modify the Injunction is granted solely to the extent that it is

(i) ORDERED that plaintiff Michael Zacharias and his respective agents, affiliates, employees and/or representatives, and all persons acting in concert with him or on his behalf, are hereby enjoined, pending the resolution of this action or further order of this court, from the following:

(a) 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 Zacharias from soliciting, conducting business with, or otherwise communicating with any such person or entity for the purpose of providing services on behalf of Mechanical;

(b) 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

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

- (ii) ORDERED that the parties shall, within seven days of service of a copy of this order with notice of entry, take all steps necessary to enable Zacharias, Wassef, and Mechanical each to access the books and records of Mechanical; and it is further
- (iii) ORDERED that Zacharias shall, within ten days of service of a copy of this order with notice of entry, (a) cease use of Mechanical's telephone number in connection with VertiPark business, and (b) remove all VertiPark signage from projects on which Mechanical has performed work; and it is further
- (iv) ORDERED that defendants shall give an undertaking in the sum of two hundred and fifty thousand dollars (\$250,000) conditioned that defendants, if it is finally determined that they are not entitled to an injunction, will pay to plaintiffs 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; and it is further

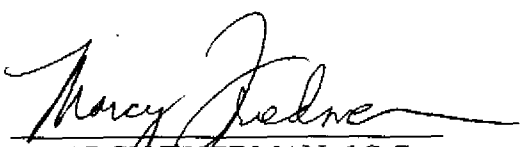
4. ORDERED that the branch of defendants' cross-motion to vacate the court's prior Injunction is denied; and it is further

5. ORDERED that the Injunction, issued on October 11, 2016, shall remain in full force and effect; and it is further

6. ORDERED that the parties shall appear for a compliance conference on July 6, 2017 at 2:30 p.m. in Part 60, Rm. 248, 60 Centre St., New York, NY, 1007.

This constitutes the decision and order of the court.

Dated: New York, New York
June 13, 2017


MARCY FRIEDMAN, J.S.C.