Dineen v Pratt
2017 NY Slip Op 32719(U)
February 15, 2017
Supreme Court, Westchester County
Docket Number: 62053/15
Judge: Linda S. Jamieson

[* 1]

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec __x__ Seq. No.__1___ Type __SJ_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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PATRICIA C. DINEEN, individually and PATRICIA C. DINEEN, a shareholder in the right of APPLESEED VENTURES, INC.,

Plaintiff,

-against-

Index No. 62053/15

DECISION AND ORDER

BARBARA J. PRATT, RANDAL PRATT, WHITE HILL ORCHARDS, INC. and APPLESEED VENTURES, INC.,

Defendants.

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The following papers numbered 1 to 7 were read on this motion:

Paper	Number
Order to Show Cause, Affidavit and Exhibits[1]	1
Amended Order to Show Cause, Affirmation and Exhibits	2
Memorandum of Law in Support	3
Affirmation and Exhibits in Opposition	4
Affirmation and Exhibits in Opposition	5
Reply Affirmation	6
Transcript of Proceedings	7

[1]Plaintiff needs to take more care when submitting Working Copies to the Court. She failed to submit the entire complaint at Exhibit B.

There is one motion before the Court,[2] in this case between sisters arising out of the operation of a family business, Wilkens Farm. Plaintiff is the sister who claims to have been squeezed out of the business, Appleseed Ventures, Inc. ("Appleseed") by her sister, defendant Barbara J. Pratt ("Barbara"). Randal Pratt is Barbara's husband. White Hill Orchards, Inc. ("White Hill") is a company that Barbara started in May 2011.

The present motion is plaintiff's motion for (1) a temporary restraining order[3] and preliminary injunction preventing defendants from (a) taking any actions to interfere with the leases of Appleseed; (b) transferring, assigning or otherwise disturbing the assets of Appleseed and White Hill; (2) a preliminary and permanent injunction restoring Appleseed to the premises under the leases dated March 1995 and July 1989, and directing defendants to refrain from interfering with Appleseed's possession of the premises under the leases; (3) a receiver to operate Appleseed; and (4) an accounting.

It is well-settled that "To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if

[2]For some inexplicable reason, the Court did not have this motion marked as "open." It was only after counsel pointed out that this motion was not yet decided that the Court located the motion.

[3]Considering how long this motion has been pending, it is more than obvious that no temporary restraining order is necessary.

a preliminary injunction is not granted, and (3) a balance of equities in his or her favor." *Bashian & Farber, LLP v. Syms*, No. 2015-00169, 2017 WL 424829, at *3 (2d Dept. Feb. 1, 2017). The Second Department found, in that case, that "the plaintiffs failed to establish that they would sustain irreparable injury if a preliminary injunction was not granted. Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." *Id.*

Nearly all of plaintiff's claims in this action seek money damages. As the Second Department has explained, there can be no preliminary injunctive relief if money damages can compensate the movant for the alleged harm. *See also Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 82 (2d Dept. 2010)("economic loss, which is compensable by money damages, does not constitute irreparable harm."). A review of the complaint shows that the only claims that do not seek money damages are: the Fourteenth Cause of Action, for the imposition of a constructive trust;[4] the

[4]A review of this claim in the complaint shows that it is sketchily drawn. It essentially alleges that because of the conversion and other wrongs perpetrated by defendants, they should not enjoy the benefits of the assets that they have converted. As a result, plaintiff argues, there should be a constructive trust. While preliminary injunctions are often granted to maintain the status quo in constructive trust cases, in this case, money damages may suffice, should plaintiff prevail at trial. *See, e.g., Sutton, DeLeeuw, Clark & Darcy v. Beck*, 155 A.D.2d 962, 963, 547 N.Y.S.2d 773, 774 (4th Dept. 1989) ("although the actions seek to impose a constructive trust upon an annuity fund, plaintiffs' claim is essentially one for money damages.").

Sixteenth Cause of Action, seeking to declare the lease to White Hill to be invalid; and the Seventeenth, for a permanent injunction. With respect to the Sixteenth Cause of Action, the Court notes that defendants have already agreed, on the Record and in their papers, to take no further action with respect to the lease prior to the conclusion of this action. This agreement obviates the need for a preliminary injunction with respect to the lease. In sum, given that money damages can compensate plaintiff for all of the claims she alleges, there is no basis for a preliminary injunction. *See Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 740, 903 N.Y.S.2d 80, 82 (2d Dept. 2010) (no preliminary injunction where movant "failed to demonstrate that any harm it would suffer would not be compensable by money damages.").

Turning next to the request for a receiver, CPLR § 6401 states that "a temporary receiver of the property may be appointed . . . at any time prior to judgment . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." In the first instance, the Court observes that the property at issue here is all real property, which cannot be removed from the state or lost. Nor are there any allegations that the property would be materially injured or destroyed; indeed, in the litany of problems that

plaintiff sets forth, not one of them is directed to the injury or destruction of the farm and its operations. Rather, all of plaintiff's allegations relate to embezzlement, self-dealing and other financial mismanagement. As the Second Department has held, "The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits. Therefore, a motion seeking such appointment should be granted only where the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party's interests." *Vardaris Tech, Inc. v. Paleros Inc.*, 49 A.D.3d 631, 632, 853 N.Y.S.2d 601, 602 (2d Dept. 2008). The Court finds that a receiver is not warranted here, because any damages are financial, and do not involve waste to the property at issue. *See Bd. of Managers of Nob Hill Condo. Section II v. Bd. of Managers of Nob Hill Condo. Section I*, 100 A.D.3d 673, 954 N.Y.S.2d 145, 146 (2d Dept. 2012) ("Here, the 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.").

Turning to the request for an accounting, the Court finds that to the extent that plaintiff seeks a formal accounting pursuant to Business Corporation Law § 624, it does not appear

that plaintiff filed a formal written demand as set forth in Section 624(b). This is required before she can take advantage of the Court's assistance pursuant to Section 624(d) in obtaining the information sought.

Notwithstanding the Business Corporation Law, it appears to the Court that all of the information that plaintiff seeks was, or should have been, produced in discovery in this matter (or its predecessor matter). As the parties have not addressed what discovery remains outstanding, if any, the Court cannot rule on this relief at this juncture. However, before plaintiff makes a motion relating to discovery, the parties must first confer, and then plaintiff must seek the Court's permission at a conference pursuant to the Commercial Division Rules.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
February 27, 2017

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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