Jong Yien Ho v Li Yu Yen
2017 NY Slip Op 32732(U)
November 13, 2017
Supreme Court, Queens County
Docket Number: 709235/2017
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

x

JONG YIEN HO, both individually and derivatively on behalf of KISSENA HTL, LLC,

Plaintiff(s)

-against-

LI YU YEN, MAY TSAI and MARK PAUL LO,

Defendant(s)

-and-

KISSENA HTL, LLC.

Nominal Defendant(s)

x

Index Number 709235 2017

Motion Date October 3, 2017

Motion Cal. Number 10

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by plaintiff Jong Yien Ho for a preliminary injunction, *inter alia,* directing the defendants to reinstate him as a member of Kissena HTL, LLC.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-6
Reply Affidavits.....	7
Memoranda of Law	8-9

Upon the foregoing papers it is ordered that the motion is denied.

I. The Allegations of Plaintiff Jong Yien Ho

In 2013, plaintiff Jong Yien Ho learned that the Free Synagogue of Flushing was willing to lease property adjacent to his restaurant known as 41-60 Kissena Boulevard,

Flushing, New York. Ho convinced the synagogue to sell him the property for $17,000,000 rather than lease it. After disclosing his intention to purchase and develop the property to Mark Paul Lo, a local real estate broker, for the purpose of finding an investor willing to contribute capital, Lo convinced Ho to take defendant Li Yu Yen and defendant May Tsai as partners. Ho, Yen, and Tsai agreed to the formation of a company to be called Kissena HTL LLC (the company) with each having a one-third interest. On or about April 29, 2014, the synagogue and the company entered into a contract for the sale of the property, and although the parties set an original closing date long ago, delays occurred, and the closing date was scheduled in or about July, 2017.

Yen and Tsai reduced Ho's membership interest to approximately 4%, and the other two members eventually expelled him from the company. The expulsion was wrongful, and based on a false claim that Ho misappropriated company funds.

II. The Allegations of Defendant Li Yu Yen

The three founding members of the company agreed to have equal membership interests on the condition that each contribute one-third of the purchase price for the acquisition of the property. They understood and agreed that the actual membership interest of a member would vary according to the actual percentage of contributed capital. The total contributions made by Ho to the company from 2014 through 2015 totaled only around $60,000, and as of the tax year 2016, Ho's membership interest had decreased to approximately 3.75%.

In late 2015 and thereafter, Tsai and Yen learned that Ho had wrongfully retained rents owed to the company amounting to over $100,000, and those rents were needed for the acquisition and development of the property. In 2017, the company confirmed that Ho had stolen approximately $228,000 in rent revenues, and the company brought an action against him now pending in the New York State Supreme Court, County of Queens (*Kisssena HTL, LLC v. Jong Yien Ho*, Index No. 704709/17).

In or about March, 2017, the majority members adopted a company operating agreement whose Article V provided in relevant part: "[a] member may be expelled by an affirmative vote of *** the members holding a majority of the membership interests other than the expelled member if the member sought to be expelled has ***(ii) committed fraud, theft, or gross negligence injuring the company or one or more members of the company, (iii) engaged in wrongful conduct that adversely and materially affects the business or operation of the company ***". On or about April 3, 2017, the majority members expelled Ho from the company.

III. Procedural History

The plaintiff began the instant action by the filing of a Summons and Complaint on July 6, 2017. The Complaint alleges causes of action for, *inter alia*, breach of the agreements among the parties for the formation and operation of the company, breach of fiduciary duty, and corporate waste. The plaintiff seeks, *inter alia,* injunctive relief, an accounting, a declaration that his expulsion was wrongful and that he owns 33.3% of the company, and $30,000,000 in damages.

The plaintiff obtained an order dated July 11, 2017 compelling the defendants to show cause why an order should not be entered, *inter alia*, "i, Directing that Plaintiff be reinstated as an equal one-third (33.333%) member of the Company; ii. Directing defendants to permit Plaintiff to participate in the contracted for purchase of the property; ***iv. Directing defendants to account for all funds of the Company received and dispersed since its inception;. v. Directing defendants to give plaintiff daily access to all books and records of the company ***".

The plaintiff sought a temporary restraining order mirroring the request for a preliminary injunction, but this court struck all of its provisions with the exception of (1) a direction that the defendants deposit all monies received from current tenants in the company's checking account and (2) a prohibition against "discarding, destroying, manipulating, or tampering with said books and records of the company."

IV. Discussion

The motion for a preliminary injunction has no merit.

"A mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action ***" (*Matos v. City of New York*, 21 AD3d 936, 937; *Zoller v. HSBC Mortg. Corp. (USA)*, 135 AD3d 933). In the case at bar, the plaintiff did not show that there are unusual circumstances that require mandatory injunctive relief against the defendants pending the resolution of the action (*see, Zoller v. HSBC Mortg. Corp. (USA), supra*). Moreover, "injunctive relief should be prospective, and ordinarily should not be granted to operate on acts already performed ***" (*Allen v. Pollack*, 289 AD2d 426, 427; *Flaum v. Birnbaum*, 115 AD2d 1004). The defendants allegedly" locked" the plaintiff out of the company in 2015. Plaintiff Ho's allegations of past violations of his rights and resulting harm do not warrant the issuance of a preliminary injunction. "[A] plaintiff must allege that there was a violation

of a right presently occurring, or threatened and imminent ***" (*Swartz v. Swartz*, 145 AD3d 818, 828 [internal quotation marks and citation omitted]).

A party moving for a preliminary injunction has the burden of establishing by clear and convincing evidence: (1) a likelihood of ultimate success on the merits; (2) irreparable injury if the provisional relief is withheld; and (3) a weight of the equities in his favor (*Doe v Axelrod*, 73 NY2d 748; *Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212). Plaintiff Ho failed to carry this burden. In regard to the likelihood of success on the merits, the evidence in this case is not clear and convincing that plaintiff Ho has a 33% membership interest in the company and that he was wrongfully expelled. The facts are in such sharp dispute that the Court cannot conclude that the plaintiff established a clear right to a preliminary injunction (*see, Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 AD3d 612). In regard to irreparable injury, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d 991, 994; *see, Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738). In regard to the weight of the equities, the plaintiff did not show that absent a preliminary injunction he will sustain an irreparable injury which would be more burdensome than the harm that would be caused to the defendants through imposition of an injunction (*see, Reuschenberg v Town of Huntington*, 16 AD3d 568; *Credit Index, L.L.C. v Riskwise Intern.* L.L.C., 282 AD2d 246; *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165; *Metropolitan Package Store Assn., Inc. v Koch*, 80 AD2d 940; *Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.*, 70 AD2d 1021; 67A NY Jur 2d, Injunctions § 31). In view of plaintiff Ho's allegations that he has "been in the restaurant business and in other businesses in one form or another for over thirty (30) years", and that he has been an owner and operator of a restaurant in Flushing for over twenty years, his claim that he must participate in Kissena HTL LLC in order to meet the needs of his family lacks credibility.

The plaintiff also improperly seeks by way of a preliminary injunction the ultimate relief he seeks in this action. The purpose of a motion for a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (*Masjid Usman, Inc. v. Beech 140, LLC*, 68 AD3d 942; *Wheaton/TMW Fourth Ave., LP v. New* York *City Dept. of Bldgs.*, 65 AD3d 1051). "[A]sent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment ***" (*SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727, 728; *Board of Managers of Wharfside Condominium v. Nehrich*, 73 AD3d 822).

Dated: NOV 13 2017

J.S.C.

FILED
NOV 17 2017
COUNTY CLERK
QUEENS COUNTY

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