

Almanzar v Rodriguez
2018 NY Slip Op 31649(U)
July 13, 2018
Supreme Court, New York County
Docket Number: 653324/2018
Judge: Andrea Masley
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NYSCEF DOC. NO. 45

RECEIVED NYSCEF: 07/16/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MADELIN ALMANZAR,

Plaintiff,

Index No. 653324/2018

- against -

RENE RODRIGUEZ, DC 544 W 27TH LLC D/B/A EL
JEFE

Defendants.

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Masley, J.:

Plaintiff Madelin Almanzar moves, pursuant to CPLR 6301, for a preliminary injunction, or pursuant to CPLR 6401, for a receiver to manage Don Coqui at 186 Dykman Street, NY, NY 10040.

According to the June 28, 2018 complaint, verified by counsel, plaintiff paid defendant Rene Rodriguez \$480,000 of \$540,000 of the purchase price for DC544 W 27th LLC (the Company), invested in renovations, and managed the restaurant for months before defendant admittedly locked her out. Complaint ¶3. Defendant was the 100% owner of the Company until July 24, 2017 when the parties entered an agreement whereby defendant agreed to sell a 66.66% interest in the Company to plaintiff and Juan Sanchez. When Mr. Sanchez could not comply, he negotiated with defendant to purchase 15.67% leaving defendant with 51% and plaintiff with 33.33%.

After entering into this agreement, the parties closed down the restaurant to renovate. Plaintiff alleges that the parties shared the overhead expenses during the renovation period from August 201[7] to December 26, 201[7]¹. On December 26, 2017, the Company opened for business as a new restaurant called "El Jefe." Complaint ¶22. Plaintiff alleges that after El Jefe's first several months in business, defendant agreed to sell plaintiff his remaining 51% interest in the Company.

¹ Paragraph 21 of the Verified Complaint mistakenly alleges that the period was "August 2018 - December 26, 2018."

As of May 8, 2018, plaintiff had paid defendant \$480,000 toward purchasing his

51% interest. Complaint ¶26. On February 4, 2018, defendant left all managerial duties to plaintiff. Plaintiff allegedly purchased Mr. Sanchez's share. Complaint ¶30. While Plaintiff believed the parties had come to an agreement, defendant failed to effectuate assignment of the lease, failed to turnover control of the bank account and failed to cooperate to transfer the liquor licence. Complaint ¶33. In March 2018, defendant began paying himself \$3000 per week from the Company's account and paying an accountant \$500 per week. Complaint ¶¶35 and 36. Defendant returned to the restaurant on June 20, 2018 and locked plaintiff out. Complaint ¶47. He changed the point of sale system, locked out the bookkeeper, ^{and} fired employees. Complaint ¶¶49 and 50.

Plaintiff asserts claims for (1) breach of contract; (2) fraud; (3) breach of fiduciary duty; (4) unjust enrichment; (5) gross negligence; (6) constructive trust; and (7) an accounting. Plaintiff seeks to enjoin defendant from control; specific performance; declarative judgment that plaintiff controls the company; damages; punitive damages; and a constructive trust.

On July 3, 2018, plaintiff filed a motion by OSC pursuant to CPLR 6401 requesting a temporary receiver; providing access to the books and records; and, pursuant to CPLR 6301, for an injunction. The court issued a TRO to maintain the status quo, prohibiting the transfer of assets; preserving computer data; prohibiting the destruction of computers or other evidence; providing plaintiff with access to the POS and security cameras; and providing a key for emergency use only.

The parties returned to court on July 11, 2018. Despite this court's order authorizing defendant to manage the restaurant in the interim, defendant failed to timely deliver the key to plaintiff and failed to use the POS system on July 3, 4, 5. The entries in the POS systems on July 9 of \$993.48 and July 11 of \$899.92 are at odds with entries on

the same days of the week: June 4 of \$7,974.16 and June 11 of \$7,285.43 and

Wednesdays June 6 of \$14,312.49 and June 13 of \$2,228.39, days plaintiff was managing the restaurant. Plaintiff's concerns of defendant's mismanagement are supported by unpaid rent of \$42,629.69 and an eviction action, and debt to Con Ed of \$21,820.54. A decline in sales of over 80% under defendant's management is sufficient, at this juncture, to establish irreparable harm. While harm is not irreparable if an adequate remedy at law exists such as damages (*U.S. Re Cos. v Scheerer*, 41 AD3d 152, 155 [1st Dept 2007] [availability of quantifiable money damages precludes finding irreparable harm]), without financial records, plaintiff cannot establish money damages if the business fails under defendant's leadership. Defendant's refusal to use the POS system by entering cash sales robs plaintiff of the data to establish damages.

Plaintiff establishes that she complied with the agreement to purchase 33.33% and paid defendant an additional \$290,000 of \$350,000 for his 51%. However, defendant insists that "as majority owner of the Company Defendant had the legal authority to make distributions to himself, and [the] decision can be made in his sole business judgment." Florek Affirmation at 5. Accordingly, defendant has established that plaintiff has a likelihood of success.

Finally, the equities favor plaintiff. Defendant claims that he wants to conclude the sale to plaintiff, but she has failed to provide the information necessary to ^{assessing} ~~assessing~~ the lease or transfer the liquor license. Accordingly, defendant fails to identify any equitable basis outweighing her interest in managing the restaurant successfully. Moreover, as a new business owner, it would be impossible for plaintiff to prove lost profit. *See Ashland Management v Janien*, 82 NY2d 395 (1993). For these reasons, and those stated on the record, plaintiff has satisfied the requirements for a preliminary injunction at this stage.

For injunctive relief under CPLR 6301, plaintiff must establish likelihood of success

on the merits of the action; the danger of irreparable harm in the absence of a preliminary injunction; and a balance of equities in favor of the moving party. For the reasons stated above, as well as the reasons stated on the record, plaintiff has satisfied this burden, and the motion is granted.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction enjoining defendant is granted pending further order of this court; and it is further

ORDERED that the parties shall maintain the status quo. Neither party may waste corporate assets or use corporate assets for personal use. Neither party is authorized to buy, sell, dispose or borrow against any restaurant assets or equipment; and it is further

ORDERED defendant shall deliver the key to plaintiff if not already delivered; and it is further

ORDERED that plaintiff's attorney shall hold in escrow \$60,000, the balance due to defendant under the alleged agreement. Plaintiff shall deliver the funds to counsel within 14 days; and it is further

ORDERED that the parties shall protect and preserve all phone, computer and electronic evidence; and it is further

ORDERED that all income and expenses shall be entered into the POS system at the restaurant; and it is further

ORDERED that plaintiff shall manage the restaurant and defendant shall not interfere. Plaintiff has authority to hire and fire. Parties shall use company accounts for business purposes only for operating expenses. Neither party shall remove funds as dividends, salary, or any other payment to themselves. Plaintiff shall comply with all federal, state and local laws; and it is further

ORDERED, that if defendant wishes to visit the restaurant, he will arrange the time

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and date with his attorney who shall confer with plaintiff's counsel. Counsel are directed to

make themselves available to their clients for this purpose; and it is further

ORDERED that plaintiff shall provide defendant's counsel with the password for the security cameras by Friday, July 13, 2018 at 12 noon;

ORDERED that defendant shall provide a copy of the lease to plaintiff by 12 noon on Friday, July 13, 2018; and it is further

ORDERED that parties shall cooperate to assign the lease and transfer the liquor license.

DATED: July 13, 2018

ENTER: 
HON. ANDREA MASLEY
J.S.C.