Henry v Gustman
2018 NY Slip Op 31914(U)
July 23, 2018
Supreme Court, Kings County
Docket Number: 509496/18
Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
--x
MICHAEL L. HENRY,

Plaintiff,

- against -

BRIAN ROSS GUSTMAN,

Defendant,
--x

Decision and order

Index No. 509496/18
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July 23, 2018

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction and in accordance with New York Partnership Law §63 seeks an order granting a judicial dissolution of Gustman & Henry, LLP. The petitioner also alleges that respondent committed fraud, breached his fiduciary duty and has also committed defamation against the petitioner. The respondent opposes the motion and denies all of the allegations and has cross-moved for injunctive relief against the petitioner as well claiming fraud and breach of oral contract. After reviewing all of the arguments this court now makes the following determination.

The petitioner Michael Henry ("Henry"), and the respondent, Brian Gustman ("Gustman"), formed a partnership in New York on or about July 3, 2017 for the purposes of practicing general law. The partnership never implemented an operation agreement. The petitioner contends the partnership interest was divided equally between both petitioner and respondent, both being granted 50 percent interests. The respondent denies this contention and claims that it was jointly agreed the respondent would be allocated 65 percent while the petitioner would be granted 35 percent of the partnership membership interest. In July 2017, the respondent opened a Chase Ink Business Credit Card to be used for business expenses. The petitioner alleges he paid for business expenses out of his own pocket. It is disputed whether the petitioner was denied being reimbursed for his out-of-pocket business expenditures. Additionally, petitioner claims that throughout 2017 respondent refused to compensate petitioner his rightful distributions to match his 50 percent interest. These actions left the petitioner in a precarious financial situation which forced him to borrow money to sustain himself. Despite this, in March 2018 respondent approached petitioner informing him of the Partnership's net profit which needed to be accounted for by both petitioner and respondent equally. Respondent denies the accuracy of petitioner's facts as they pertain to these events. According to petitioner, in 2018 respondent began to make executive decisions like hiring new employees and selecting new offices without affording petitioner any prior notice. The respondent denies this and offers evidence that petitioner was present for and aware of at least some of the hiring undertaken. During the month of April 2018, petitioner expressed to respondent a desire to dissolve the partnership and the parties could not come to an agreement regarding a monetary buyout to dissolve the partnership. On April 30, 2018, petitioner withdrew $7,000.00 and on May 1, 2018 petitioner withdrew $14,110.00 from the operating account, amounts he alleges he was entitled to secure. Thereafter, respondent made numerous postings on social media defaming the reputation of petitioner. The petitioner has now moved seeking injunctive relief seeking to prevent further acts of defamation against him from respondent, as well as, preventing respondent from further utilizing the business accounts of the partnership.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009], Ricca v. Ouzounian, 51 AD3d 997, 859 NYS2d 238 [2d Dept., 2008]). The Second Department has stated that each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits of the case, the petitioner must establish a prima facie case or cause of action (McLaughlin, Piven, Vogel, Inc., v. W. J. Nolan & Co., 114 AD2d 165, 498 NYS2d 146 [2d Dept., 1986]). In this case the basis for the injunction is grounded in the fact it is alleged the respondent has not compensated petitioner what he is owed. Of course, the defendant denies these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. It is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]). Thus, although there is a dispute as to the precise amount to which the petitioner is entitled, there has been little opposition demonstrating the petitioner should not be entitled to the relief sought. As noted, the amount of relief is subject to dispute and will be resolved during the course of the litigation. The disputed facts as thus not "key facts" rendering the relief "speculation and conjecture" (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]). Therefore, the petitioner has satisfied the first prong.

In order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). Thus, harm to one's business reputation is a sufficient harm providing a basis seeking an injunction (see, Klein, Wagner & Morris v. Lawrence A. Klein P.C., 186 AD2d 631, NYS2d 424 [2d Dept., 1992]). In addition "it is well settled in New York that the loss of the business relationship which ostensibly took time and money to cultivate, constitutes irreparable harm that cannot be compensated by money damages" (see, Liberty Ashes, Inc., v.

Taormina, 43 Misc3d 1213(A), 988 NYS2d 523 [Supreme Court Nassau County 2014]). This does not concern defamation claims which will be addressed below but rather actions taken by respondent concerning the business and financial disputes which harm petitioner's ability to pursue his profession and to cultivate client relationships. Therefore, the second prong has been satisfied.

Regarding the third and final prong, namely the balancing of the equities, it is true that this is a subjective test. The Second Department has stated that in balancing the equities, it "must be shown that the irreparable injury to be sustained…is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction" (McLaughlin, supra). The harm caused to the petitioner is readily apparent. On the other hand, any harm caused to the respondent through the imposition of the injunction is hard to quantify. Thus, considering the equities in this particular case it is clear that the balance of the equities favors the petitioner.

Consequently, petitioner's motion seeking an injunction enjoining the respondent from destroying or altering or secreting any company books and records or from transferring any income except in the ordinary course of business is granted.

In relevant part, defamation is defined "as the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (Foster v. Churchill, 87 NY2d 744,642 NYS2d 583 [1996]. But, if the statement made, no matter how damaging in the public's eye, is the truth then the statement does not constitute defamation (Rinaldi v. Holt, Rinehart & Winston, 42 NY2d 369, 397 NYS2d 943 [1977]).

In the present case, Mr. Henry withdrew over $14,000 from the partnership's bank account. Mr. Henry believed he was entitled to that money due to the partnership's revenue split agreement, a 50% 50% split. Mr. Gustman is under the belief that the agreement was 65% to Mr. Gustman and 35% to Mr. Henry. Believing that Mr. Henry stole money from the partnership's operating account, Mr. Gustman dispatched numerous posts on Twitter accusing Mr. Henry of stealing, calling him a fraud, and tweeting that Mr. Henry cannot be trusted. The revenue splits are in dispute because no operating agreement was ever signed between Mr. Henry and Mr. Gustman. Therefore, the Twitter posts cannot be verified as true until the revenue split disagreement is solved. Therefore, based on the foregoing the motion seeking to dismiss the claim for defamation per se against respondent is denied.

In accordance with Section 63 of New York Partnership Law the court has the authority to decree a dissolution on application by or for a partner if certain conditions are met (Shomron ex rel. R&L Realty Associates v. Fuks, 13 MIsc3d 1228(A), 831 NYS2d 356 [Supreme Court, New York County 2006]). The conditions include whenever: (a) A partner has been declared incompetent in any judicial proceeding or is shown to be of unsound mind, (b) A partner becomes in any other way incapable of performing his part of the partnership contract, (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business, (d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him, (e) The business of the partnership can only be carried on at a loss, (f) Other circumstances render a dissolution equitable (see, Partnership Law §63).

As it applies to the current case, points (d) and (f) might provide a basis for granting a judicial dissolution, however, since there exists factual disputes between the respondent and the petitioner, no such dissolution can be granted at this time. It would be premature for a court to grant a dissolution on the grounds that a partner has willfully breached the partnership agreement before resolving the truth behind that accusation. Likewise, it would be difficult to determine whether other circumstances render a dissolution equitable.

Therefore, based on the foregoing the motion for judicial dissolution of Gustman & Henry, LLP is denied.

So Ordered.

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Dated: July 23, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC