

**Princeton Glass & Stone Tile Wholesale Inc. v
Dandan Hu**

2018 NY Slip Op 33871(U)

January 8, 2018

Supreme Court, Nassau County

Docket Number: 611202-17

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**PRINCETON GLASS & STONE TILE
WHOLESALE INC. AND
PIAOYANG CHEN,**

Plaintiffs,

-against-

DANDAN HU AND JASMINE STUDIO INC.,

Defendants.
-----X

**TRIAL/IAS PART: 11
NASSAU COUNTY**

**Index No: 611202-17
Motion Seq. No. 1
Submission Date: 12/15/17**

Papers Read on this Motion:

- Order to Show Cause, Emergency Affirmation, Affirmations in Support, Affidavits in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Pan Reply Affirmation and Exhibits.....X**
- Li December 15, 2017 Correspondence and Annexed Documents.....X**

This matter is before the court on the motion by Plaintiffs Princeton Glass & Stone Tile Wholesale Inc. ("Princeton") and Piaoyang Chen ("Piao") ("Plaintiffs") filed October 31, 2017 and submitted December 15, 2017. For the reasons set forth below, the Court grants the motion to the extent that the Court directs that the temporary restraining order issued by the Court on November 3, 2017 shall remain in effect, pending further court order, on the condition that Plaintiffs post a bond in the amount of \$150,000 on or before January 26, 2018.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order 1) restraining, prohibiting, and enjoining Defendants Dandan Hu ("Dandan") and Jasmine Studio Inc. ("Jasmine") ("Defendants"), collectively or individually, from taking, removing, transferring, selling, using and/or displaying any assets of Princeton, including any of its inventory, models, samples, customer lists, data, pricing

structures, 2015 Ford truck, and/or assets of any kind whatsoever; and 2) restraining, prohibiting, and enjoining Defendants, collectively or individually, from competing with Princeton in any fashion and to any extent with respect to the importation and sale in the United States of mosaic stone, glass, marble and tile and soliciting any business from and/or doing any business whatsoever with any current, former, and/or prospective customers of Princeton.

Defendants oppose the motion.

B. The Parties' History

The Verified Complaint ("Complaint") alleges as follows:

On December 27, 2016, Foshan Saifei Glass Spar and Decoraterial Factory ("Foshan Saifei"), a company located in China, Dandan, Piao and Princeton entered into a Shareholders' Agreement. Princeton was formed to import mosaic flooring and wallcovering materials manufactured by Foshan Saifei for the purposes of selling and distributing the materials to retailers located in the United States. The principal and owner of Foshan Saifei is Tingjun Chen ("Tingjun"), the father of Piao. Dandan is Piao's wife's cousin.

As set forth in the Shareholders' Agreement, Foshan Saifei was issued 600 shares representing 60% of the issued and outstanding shares, Dandan was issued 300 shares representing 30% of the issued and outstanding shares, and Piao was issued 100 shares representing 10% of the issued and outstanding shares of Princeton. The initial capitalization was \$500,000, of which Foshan Saifei gave value in the amount of \$300,000, Dandan gave value in the amount of \$150,000 and Piao gave value in the amount of \$50,000. In light of the fact that Dandan did not have sufficient funds, Piao loaned Dandan \$30,000 of the \$150,000 that she provided.

The Complaint sets forth language from the restrictive covenants in the Shareholders' Agreement, specifically paragraph 6.2 of the Shareholders' Agreement, titled "Restrictions on Competitive Activities" and paragraph 6.4 of the Shareholders' Agreement titled "Protection of Confidential Information." Shortly after Princeton commenced business operations, Plaintiffs determined that Dandan had breached her contractual and fiduciary duties by conduct which included 1) embezzling hundreds of thousands of dollars from Princeton, of which at least \$65,000 was transferred to Dandan's personal bank account; 2) misappropriating Princeton's vehicle which was worth over \$20,000; 3) changing the locks to Princeton's office and warehouse; 4) refusing Piao access to the business premises; and 5) misappropriating Princeton's inventory. Plaintiffs also recently determined that Dandan formed Jasmine for the purpose of

competing with Princeton, has solicited and continues to solicit Princeton's customers, and has used and continues to use Princeton's assets and confidential information without Princeton's consent.

The Complaint contains eight (8) causes of action:

1) against Dandan for breach of paragraph 6.4 of the Shareholders' Agreement based on her use and/or disclosure of Princeton's Confidential Information;

2) against Dandan for breach of fiduciary duty based on the allegation that she was appointed a Director of Princeton and engaged in conduct, including embezzlement, that constituted a breach of her fiduciary duties;

3) against Dandan for conversion based on her misappropriation of Princeton's cash, inventory and motor vehicle;

4) against Dandan and Jasmine - a request for a permanent injunction restraining, prohibiting and enjoining Defendants from continuing to conduct business in competition with Princeton;

5) against Dandan and Jasmine for unfair competition based on the allegation that Dandan misappropriated Princeton's assets and formed Jasmine to unfairly compete with Princeton;

6) against Dandan and Jasmine for injurious falsehood based on the allegation that Dandan has made false and injurious statements to individuals, including Princeton's customers, impugning the reputation of Princeton and Piao, including the statement that Princeton is out of business and is unable to fulfill orders that might be placed by customers;

7) against Dandan for malicious prosecution based on the allegations that a) following Plaintiffs' demand in April and May of 2017 for an accounting, Dandan filed a criminal complaint in Kings County, New York alleging that on October 28, 2016, Piao had committed criminal acts against her, specifically forcible touching, sexual abuse in the third degree, and harassment in the second degree; b) these charges were baseless and undertaken maliciously; c) the criminal proceeding was terminated in favor of Piao; and d) as a result of Dandan's malicious acts, Piao was incarcerated and was required to post bail; and

8) against Dandan for abuse of process based on the allegation that, in connection with the events described in the seventh cause of action, Dandan used the criminal process with the intent to do harm, without excuse or justification.

On November 3, 2017, the Court issued a temporary restraining order (“TRO”) which directed that, pending the hearing and determination of this motion, 1) Defendants, collectively or individually, are restrained, prohibited and enjoined from taking, removing, transferring, selling, using, and/or displaying any assets of Princeton, including any of its inventory, models, samples, customer lists, data, pricing structures, 2015 Ford Truck, and/or assets of any kind whatsoever; and 2) Defendants are restrained, prohibited and enjoined from competing with Princeton in any fashion and to any extent with respect to the importation and sale in the United States of mosaic stone, glass, marble and tile, and soliciting any business from and/or doing any business whatsoever with any current, former, and/or prospective customers of Princeton.

In support of the motion, Hengliang Lin (“Lin”) affirms that she is the sales representative for Princeton, and was hired by Princeton in June 2017. After beginning employment with Princeton, Lin contacted Princeton’s customers regarding potential sales orders. During these conversations, Lin learned that Dandan, who also went by the name Serena, had recently contacted Princeton’s customers and advised them that Princeton was no longer in existence “and that they could throw Princeton’s samples in the trash despite the fact that Princeton remained in operation” (Lin Aff. at ¶ 2). Lin affirms that a number of Princeton’s customers, including Pedulla Ceramic Tile and Express Brooklyn Tile, acknowledged Dandan’s misrepresentations (*see* Ex. A to Lin Aff.).

In further support of the motion, Lizi Chen (“Chen”) affirms that she is the manager of Princeton and the sister of Piao, the President of Princeton. Chen affirms the truth of the allegations in the Complaint and provides copies of the Shareholders’ Agreement (Ex. A). Chen affirms that, as reflected in the Forensic Investigation Reports she provides (Ex. B), which are dated May 25, 2017 and were updated on September 18, 2017, Dandan misappropriated a total of not less than \$202,483 of Princeton’s funds and inventory, which includes \$65,000 that was transferred from Princeton’s bank account to Dandan’s personal savings account. Princeton, through its counsel, requested an accounting from Dandan and her attorney and the return of Princeton’s assets, but Dandan did not return that property to Princeton. Chen also affirms the truth of the allegations in the Complaint regarding Dandan filing a false report accusing Piao of crimes that he did not commit. She affirms that Plaintiffs subsequently learned that Dandan had advised numerous individuals, including employees of Princeton’s customers, about the criminal charges against Piao, and shared photographs of Piao in police custody.

Chen affirms that, after Plaintiffs learned of Dandan's alleged misappropriation of Princeton's funds and misrepresentations to customers, Dandan broke into Princeton's warehouse on multiple occasions and appears to have removed additional inventory, as well as Princeton's motor vehicle, a truck that Princeton purchased for approximately \$24,000. Plaintiffs also recently learned that Dandan formed Jasmine to unfairly compete with Princeton, and has been using Princeton's Confidential Information, including customer lists and samples, to conduct Jasmine's business and compete with Princeton, in violation of the restrictive covenants in the Shareholders' Agreement.

In opposition to the motion, counsel for Defendants ("Defendants' Counsel") submits that Plaintiffs' cause of action alleging breach of fiduciary duty must fail because Dandan has been fired and ceased to be a director of Princeton, thereby severing her fiduciary relationship with Princeton. Defendants' Counsel notes that Plaintiffs' motion does not mention that firing, and affirms that Plaintiffs' prior counsel David Greenberg sent an email message to Defendants' Counsel on May 17, 2017 (Ex. 1 to Li Aff. In Opp.) which includes the statement that "In order to preserve the company's assets, [Dandan's] employment and ability to conduct business on behalf of [Princeton] was hereby terminated as shown in the documents Mr. Pan sent to you yesterday." Defendants' Counsel submits that Princeton fired Dandan, without proper notice and procedure, in an effort to deny her the benefits of her investment. Defendants' Counsel submits, further, that Plaintiffs, in terminating Dandan, failed to comply with the notice requirements at Section 9 of the Shareholders' Agreement which requires that all notices must be by registered or certified mail.

Defendants' Counsel submits, further, that Plaintiffs' cause of action for breach of contract must also fail because Plaintiff passed and adopted a corporate resolution denying Dandan the benefits of her investment, in violation of the Shareholders' Agreement. Defendants' Counsel also provides a Notice of Special Meeting of Princeton dated April 25, 2017, advising the shareholders and board of directors of a special meeting to be held on April 27, 2017 (Ex. 2 to Li Aff. In Opp.). Defendants' Counsel affirms that this Notice was not sent to Dandan by certified mail, as required by the Shareholders' Agreement. The corporate resolutions adopted by Princeton on April 27, 2017 (Ex. 3 to Li Aff. In Opp.) included, but were not limited to, requiring Dandan to return the company car she was in possession of, cancelling the telephone number that Dandan was using to conduct the company's business, removing Dandan's name from Princeton's opening bank account, and revoking Dandan's right to sign

checks on the company's behalf.

Defendants' Counsel submits, further, that there is no evidence in support of Plaintiffs' allegation in the Complaint that Tingjun is the principal and owner of Foshan Saifei and, therefore, there remain questions as to whether Tingjun was authorized to vote at any meeting and, therefore, whether the resolutions passed were valid. Defendants' Counsel affirms that Tingjun has never been to the United States, and joined the meeting via video chat, as reflected in the April 25, 2017 notice, although the April 27, 2017 resolution states that Tingjun attended the meeting. Defendants' Counsel suggests that the close family relationship between the two Chen shareholders supports the inference that Princeton's action against Dandan was calculated to "squeeze" her out of the corporation (Li Aff. In Opp. at ¶ 16) without giving her the benefit of her investment, in violation of the Shareholders' Agreement.

Defendants' Counsel submits, further, that Plaintiffs have not demonstrated a likelihood of success with respect to their conversion claim because Dandan has a viable defense of corporate consent and acquiescence. Defendants' Counsel notes that the April 2017 resolution, while making reference to Dandan's alleged conversion of corporate assets, expressly provides for a salary provision to Dandan, suggesting that Princeton expected Dandan to receive certain corporate assets in connection with her withdrawal from Princeton.

Defendants' Counsel contends, further, that Plaintiffs have not established, and cannot establish, irreparable harm. First, Defendants' Counsel notes, the April 27, 2017 resolution contains various measures which appear to be designed to protect Princeton's interest after Dandan's removal, including the removal of Dandan from the corporate bank account. In addition, Princeton provides no proof in support of its assertion that its marble design was unique in the market. Moreover, Defendants submit, it is too speculative for Plaintiffs to assert that Dandan's alleged interaction with Princeton's customer base will affect Princeton, given the vast size of the market for marble and tiles, and the unpredictability of customer decision making.

Finally, Defendants submit, a balancing of the equities favors Defendants. Defendants contend that Dandan is a victim of oppressive corporate conduct designed to deprive her of the fruit of her investment. Defendants submit that the Court should consider Plaintiffs' failure to comply with the Shareholders Agreement notice requirements as evidence of Plaintiffs' unclean hands.

Defendants' Counsel also provided the Court with a letter dated December 15, 2017 containing the following: 1) a letter from attorney Jiali Pan ("Pan") dated May 16, 2017, which Defendants contend contain loss figures and statements regarding Dandan's employment that are inconsistent with the allegations in the Complaint, 2) a proposed liquidation agreement by Princeton, 3) Princeton's official product website on Biannco Carra White Marble, and corresponding unit price list, and 4) Defendant Jasmine's price list. Defendants' Counsel submits that Plaintiffs' "unilateral reduction of product price beyond prevailing market price for the same in an effort to [dominate] the market" (Li Corresp. at ¶ 5) defeats movants' contention that they will suffer irreparable harm.

In reply, Pan affirms that he is an attorney with a law firm that has represented Princeton in the past with respect to certain corporate matters. Pan disputes certain assertions by Defendants' Counsel in his opposition. Pan disputes Li's contention that Dandan, as a result of her termination by Princeton, necessarily ceased to be a director of Princeton and owed no further fiduciary duty to Princeton. Pan affirms that, even if Dandan was advised that she could no longer represent herself as an agent or employee of Princeton, she never ceased to be a director and shareholder of Princeton, and the Li affirmation in opposition provides no evidence to the contrary. Pan disputes Li's contention that the April 27, 2017 resolution effectively removed Dandan from the Board of Princeton (*see* Li Aff. In Opp. at ¶ 12). Pan affirms that he prepared the April Board Resolution and, therefore, is aware of the reason for its preparation and what it accomplished. Pan affirms that the April Board Resolution did not remove Dandan as a director of Princeton and, had Dandan been removed as a director of Princeton, the April Board Resolution would have expressly provided for her removal. Rather, Pan affirms, the April Board Resolution addressed Dandan's alleged employment with Princeton and the claims that Princeton had against Dandan for her alleged conversion of Princeton assets and other wrongful conduct. Pan affirms that her continued status as a director was "essentially confirmed" (Pan Aff. at ¶ 3) at paragraph 11 of the April Board Resolution because, after providing that Dandan was no longer authorized to manage Princeton's operations, the April Board Resolution also stated that Dandan nonetheless "remains in the same position in Princeton." In addition, according to Section 3.1 of the Shareholders' Agreement, Princeton's Board of Directors was Piao, Dandan and Tingjun, with Tingjun designed as the Chairman as the Board of Directors. Thus, Pan submits, the April Board Resolution was never intended to remove Dandan from the Board of Princeton.

Pan affirms that the April Board Resolution was “effectively a settlement offer to Dandan” (Pan Aff. at ¶ 4), making specific reference to paragraph 9 of the Resolution which provided *inter alia* that if Dandan complied with the Resolution, the funds that Dandan transferred from Princeton’s account would be treated “towards a return of her portion of her investment.” Dandan, however, never accepted the settlement offer, and made a counter offer for liquidation. In response, Pan drafted a liquidation agreement for review (Ex. B to Pan Aff.) but Li advised Plaintiffs that Dandan would not accept the liquidation agreement. Pan affirms that Princeton and Pan made repeated attempts to communicate with Dandan to resolve the claims against her and her ownership interest in Princeton, and provides a copy of correspondence dated May 16, 2017 (Ex. C to Pan Aff.). In that letter, Pan advised Dandan’s attorney that only Dandan’s authority as an employee of Princeton, not her status as a director and minority shareholder, was removed by the April Board Resolution.

Pan also disputes Li’s contention that Dandan did not receive the Notice of Special Meeting dated April 25, 2017. Pan affirms that the only reason that the notice was not sent via certified mail was that Dandan had refused to disclose her address, and the only information that Plaintiffs had for Dandan was her cell phone number and email address. To ensure that Dandan was informed of the meeting, when Dandan and Pan communicated via text message on April 25, 2017 at 11:18 a.m., Pan advised her about the meeting and asked her to confirm whether she would attend. Pan advised her of the meeting again on April 27, 2017, and took a photograph of the notice that he sent to her via text message at 9:37 a.m. on April 27, 2017 (Ex. D to Pan Aff.) but Dandan failed to attend the meeting.

C. The Parties’ Positions

Plaintiffs submit that they have demonstrated their right to injunctive relief by 1) demonstrating that Dandan converted Princeton’s assets, violated her fiduciary duty to Princeton as a director of Princeton by establishing Jasmine to compete with Princeton, made misrepresentations to Princeton’s customers, falsely accused Piao of a crime that he did not commit and advised Princeton’s customers of that arrest; 2) establishing that Plaintiffs will suffer irreparable harm without injunctive relief because Defendants will continue unfairly competing with Princeton, thereby depriving Princeton of sales revenue that would enable it to remain in operation; and 3) establishing that a balancing of the equities favors Plaintiffs, in light of Defendants’ alleged wrongdoing.

Defendants oppose the motion submitting that 1) Plaintiffs have not established a likelihood of success because, in light of the fact that Dandan was fired from Princeton without proper notice, she no longer has any fiduciary obligation to Princeton and its other directors and shareholders, and because, in light of the fact that the April 2017 resolution provides for certain payments to Dandan, there is support for the inference that Princeton consented to Dandan taking certain funds; 2) Plaintiffs cannot establish that they will suffer irreparable harm without injunctive relief because Princeton has already taken measures, through the April 2017 resolution, to minimize any harm following the termination of Dandan's employment, and because it is speculative to assert that Plaintiffs may lose business as a result of Dandan's interactions with Princeton's client base; and 3) a balancing of the equities favors Defendants in light of Plaintiffs' alleged failure to comply with the notice requirements in planning and conducting the April 2017 meeting, and because Plaintiffs' conduct suggests that they tried to remove Dandan without fully compensating her. Defendants' Counsel submits that Defendants have meritorious counterclaims for dissolution pursuant to BCL § 1104-a, an accounting and violation of fiduciary duty.

RULING OF THE COURT

A. Injunctive Relief

To demonstrate entitlement to a preliminary injunction under CPLR § 6301, the movant must demonstrate a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction. *Matter of Advanced Digital Security Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 A.D.3d 612, 613 (2d Dept. 2008) citing *Matter of K.W.F. Realty Corp. v. Kaufman*, 16 A.D.3d 688, 689-90 (2d Dept. 2005); *Olabi v. Mayfield*, 8 A.D.3d 459 (2d Dept. 2004). A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Application of these Principles to the Instant Action

The Court grants the motion to the extent that the Court directs that the temporary restraining order issued by the Court on November 3, 2017 shall remain in effect, pending further court order, on the condition that Plaintiffs post a bond in the amount of \$150,000 on or before January 26, 2018. Plaintiffs have demonstrated their right to injunctive relief by 1) demonstrating a likelihood of success on the merits with respect to their allegations, *inter alia*, that Dandan converted money belonging to Princeton to her own personal use, violated her fiduciary duty as a director of Princeton, in which capacity she remained after the April 2017 resolution, by forming Jasmine to compete with Princeton, and made negative remarks about Plaintiffs to Princeton customers with the intent that those customers would become customers of Jasmine; 2) establishing that Plaintiffs may suffer irreparable harm without injunctive relief because Dandan, who appears still to be a director of Princeton with a fiduciary duty to that company, may otherwise continue to improperly compete with Princeton and deprive Princeton of funds that it needs to remain in business; and 3) a balancing of the equities favors Plaintiffs in light of Plaintiffs' allegations regarding Dandan's conduct, which Dandan has not disputed via sworn affidavit, which may have injured Princeton's relationships with its customers, and may continue to injure those relationship without injunctive relief.

All matters not decided herein are hereby denied.

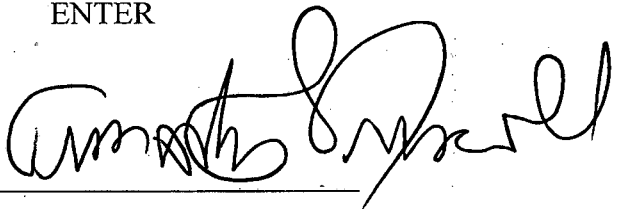
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on at January 11, 2018 at 10:30 a.m.

DATED: Mineola, NY

January 8, 2018

ENTER



ENTERED

HON. TIMOTHY S. DRISCOLL

J.S.C.

JAN 11 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE