

Blank v Eckert

2020 NY Slip Op 31125(U)

May 1, 2020

Supreme Court, Kings County

Docket Number: 504430/2020

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: COMMERCIAL PART 8

-----X
SIDNEY BLANK, LEONARD ECKERT, STEVEN EXCKERT,
And Derivatively on behalf of all Shareholders
of SHELL ENTERPRISES INC., & SHELL LANES INC.,
Petitioners,

Decision and Order

-against-

May 1, 2020

Index #504430/2020

FRED ECKERT, SHELL ENTERPRISES INC., & SHELL
LANES INC., (NOMINAL RESPONDENTS),
Respondents,

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the respondent Fred Eckert from entering the premises located at 1 Buock Court in Kings County, ordering the transfer of the keys to the petitioner and to prevent Fred Eckert from exercising any control over the operations of the premises. Further, the petitioner has moved seeking to consolidate this action with another action (Index Number 520577/2018). The respondent has opposed the motions and has filed a cross-motion compelling arbitration. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The petitioner Sidney Blank is a fifty percent owner of Shell Enterprises Inc., and Shell Lanes Inc. Petitioners Leonard and Steven Eckert each own twelve and a half percent of the corporations and the respondent Fred Eckert owns twenty five percent of the corporations. The corporations were formed in 1959. Shell Enterprises owns the property and Shell Lanes is a bowling alley at the location. According to the Verified Petition, the respondent has been in the exclusive possession of the books and records of the corporations and has exclusively managed the corporation without the involvement of any of the other shareholders since at least 2015. The Petition alleges various improprieties including breach of fiduciary duty, waste, mismanagement, unjust enrichment, breach of contract and other claims. Indeed, on September 7, 2016 and again on November 8, 2016 petitioner Blank served a request seeking disclosure of books and records. Upon respondent's failure to produce any books and records Blank instituted an action against Fred Eckert. The action entitled *Blank v. Shell Enterprises, Shell Lanes and Fred Eckert*, Index Number 520577/2018 was a petition pursuant to Business Corporation Law §§624, 717 and 718. On May 8, 2019 the court issued an order requiring the respondent to supply books and records and at this juncture the respondent has not complied with that order. Further, the Verified Petition alleges the respondent has failed to pay real estate taxes for

2018 and 2019 and a foreclosure action has commenced. That action is entitled *NYCTL 2018-A Trust v. Shell Enterprises Inc.*, Index Number 505105/2019.

Further, a shareholder meeting was held on November 25, 2019 where it was resolved by majority vote that the respondent would vacate the premises by January 31, 2020 and that the business must cease operations by that date. Upon the respondent's failure to comply with that order this petition was filed alleging the improprieties noted and further seeking dissolution of the corporation. The petitioner has now moved seeking a preliminary injunction and to consolidate this action with the foreclosure action. The respondent opposes the motions. First, respondent argues the parties must submit to arbitration pursuant to an arbitration clause contained in the original operating agreement. In any event, respondent argues the grounds for a preliminary injunction have not been met. Lastly, respondent opposes the motion seeking consolidation.

Conclusions of Law

"It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions" (Westinghouse Elec. Corp. v. New York City

Tr. Auth., 82 NY2d 47, 603 NYS2d 404 [1993], citing, Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am., 37 NY2d 91 [1975]). "Therefore, 'New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration" (Smith Barney Shearson Inc. v. Sacharow, 91 NY2d 39, 666 NYS2d 990 [1997], quoting, Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 NY2d 88 [1991]).

Further, "there is no inflexible or mechanical rule as to what constitutes a waiver of the right to arbitrate. Rather, determination of the issue depends on the facts and circumstances of each particular case...among the factors to be considered are the extent of the party's participation in litigation and conduct inconsistent with the assertion of a right to arbitrate, the delay in seeking arbitration, and whether the other party has been prejudiced" (see, Reynolds & Reynolds Co., v. Goldsmith Motor Corp., 251 AD2d 312, 672 NYS2d 804 [2d Dept., 1998]). In this case although there was an arbitration clause the respondent waived such clause by participating in the 2018 action. The respondent argues the participation in the 2018 action does not constitute a waiver in this action because "first of all, that action only involved Sidney Blank as a petitioner, not the co-petitioners herein,

Leonard Eckert and Steven Eckert. Secondly, the only participation taken in the proceedings by Fred Eckert's attorney was the filing of a Notice of Appearance...No Answer, moving papers, or any pleadings whatsoever were filed by or on behalf of Fred Eckert in that prior proceeding" (see, Cross-Motion to Compel Arbitration, pages 9 and 10). First, the order dated May 8, 2019 was really a stipulation signed by Fred Eckert's counsel as well as petitioner's counsel agreeing to all the terms of the order. While it may be true no other papers were filed, however, engaging in specific actions in Supreme Court is surely a waiver of the right to then proceed in arbitration. As the court noted in Estate of Castellone v. JPMorgan Chase Bank, N.A., 60 AD3d 621, 875 NYS2d 130 [2d Dept., 2009] where a party "utilizes the tools of litigation, or participates in litigation for an unreasonable period without asserting the right to arbitrate" such party loses the right to compel arbitration. The 2018 petition was filed in September 2018 and respondent Eckert never sought to invoke the arbitration clause. This is true despite over a year of court appearances, negotiation and finally the so ordered stipulation dated May 2019. Further, there is no merit to the argument this action is 'new' and it is therefore improper to accumulate any participation in the 2018 action with this current action. While this action is new in the technical sense it is the natural progression and extension

of the 2018 action. The 2018 action could not be a platform for the relief sought in the current action since the 2018 action was limited in the relief sought.

Moreover, the mere fact that only Blank was a participant in the 2028 action did not somehow undermine respondent's ability to seek arbitration. The addition of the other petitioners in this action did not restart the clock allowing the respondent to compel arbitration. Therefore, this action is not new and the respondent's motion seeking to compel arbitration is denied since it has been waived by the failure to raise it at an appropriate time in the previous year.

Turning to the motion seeking a preliminary injunction, it is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]). To establish a likelihood of success on the merits the movant must demonstrate a clear right to relief from the undisputed facts (Cooper v. Board of White Sands Condominium, 89 AD3d 669, 931 NYS2d 696 [2d Dept., 2011]). The respondent does not dispute any of the allegations contained in the petition. Rather, the respondent merely argues that no

imminent action is being considered in the foreclosure action and that there has been insufficient proof presented regarding what documents support outstanding debts owed. Thus, essentially, the respondent concedes the petitioner has a likelihood of success on the merits. The respondent's arguments serve to object to the fact there is an imminent risk of harm without the injunction. However, there can be no question that allowing the foreclosure to continue, in light of the undisputed evidence of such foreclosures and non-payments, will surely result in irreparable harm. There is no requirement the harm must be "imminent" rather irreparable. There is no doubt that the potential loss of the property is an irreparable harm (Deutsch v. Grunwald, 165 AD3d 1035, 85 NYS3d 589 [2d Dept., 2018]). Therefore, based on the foregoing the motion seeking a preliminary injunction is granted. Mr. Eckert must yield all operational and management control of the corporation, turn the keys over to the petitioner and provide a complete and total set of all books and records as requested. The court will appoint a referee who will confer with Mr. Eckert about the operations of the business to facilitate a smooth transition of operations while the lawsuit continues.

Lastly, in efforts to maintain a unified grasp of the lawsuit the motion seeking to consolidate this action with the

foreclosure action is granted for purposes of joint trial only.

The clerk of the court shall provide this court with the

necessary court file to join that case (Index Number

505015/2019) with this matter.

So ordered.

ENTER:

Dated: May 1, 2020
Brooklyn, N.Y.



Hon. Leon Ruchelsman
JSC