

<b>Tommasi v Tommasi</b>
2020 NY Slip Op 31507(U)
May 19, 2020
Supreme Court, Kings County
Docket Number: 517226/2019
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X  
MICHAEL TOMMASI, individually and derivatively  
On behalf of M&A METALS INC., D/B/A INTERIOR  
METALS,

Plaintiffs,

Decision and Order

-against-

May 19, 2020

Index #517226/2019

ANTONELLA TOMMASI and M&A METALS INC.,  
D/B/A INTERIOR METALS,

Defendants,

-----X  
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff Michael and defendant Antonella who were married to each other own M & M Metals Inc., b/d/a Interior Metals. Antonella owns 51% while Michael owns the remaining 49%. During December 2018 Antonella fired Michael, who had been acting as the chairman of the board, which prompted this lawsuit. Michael asserts that his firing was without cause and that subsequently Antonella has depleted the company. Further, Michael has accused Antonella of forging his signature to a

document wherein he sold his remaining shares to Antonella. Michael now moves seeking to prevent Antonella from exercising any actions regarding the company. The motion is opposed.

#### Conclusions of Law

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]). Thus, while 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 [1<sup>st</sup> Dept., 1991]) some evidence of likelihood of success must be presented. This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept., 2009]). Thus, the moving party is not required to present 'conclusive

proof' of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hoho Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]).

Michael's basis for the injunction is premised upon two distinct activities committed by Antonella which he argues demonstrate a likelihood of success on the merits. The first consists of allegations of looting. Thus, Michael asserts Antonella engaged in schemes with entities 451 Sharrotts LLC, Machri Industries, paid personal expenses such as her attorney, therapist, home security, paid for car leases, restaurants, hotels, vacations and other miscellaneous expenses all from the company's accounts. Second, that Antonella engaged in fraud by affixing Michael's signature to a document, the buy/sell agreement, which he never really signed.

Antonella objects to all the allegations of looting and has presented evidence which certainly raises questions whether looting ever took place. She has presented evidence that all the allegations were proper business expenses that had taken place in the past and indeed has sufficiently documented the propriety of the expenses at least to raise questions of fact whether Michael has a likelihood of success on the merits.

Thus, Michael has not presented sufficient proof and has merely has presented conclusory allegations of disputed improper conduct. Consequently, since "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1<sup>st</sup> Dept., 1985]).


Turning to the allegation of fraud, while that is a serious accusation which will require further inquiry, the basis for the injunction does not really rest upon that conduct. Thus, Michael is not seeking to enjoin Antonella from running the company because she allegedly affixed Michael's signature in an improper way. Rather, that conduct was merely presented to buttress Michael's characterization of Antonella as someone not trustworthy to carry out the functions of the company. However, as noted, Michael has failed to adequately demonstrate Antonella committed looting sufficient to enjoin her from managing the company. Further, a motion seeking an injunction is an improper vehicle to make a definite determination concerning the serious allegation of fraud alleged. Moreover, any disputes regarding discovery will be dealt with either by conference and if necessary a motion. The failure, if any, of any discovery, does not support any injunctive relief.

Therefore, based on the foregoing, the motion seeking an injunction is consequently denied.

So ordered.

ENTER:

Dated: May 19, 2020  
Brooklyn, N.Y.

  
\_\_\_\_\_  
Hon. Leon Ruchelsman  
JSC