

Kanbir v Albayrak

2020 NY Slip Op 31581(U)

April 14, 2020

Supreme Court, Queens County

Docket Number: 712031/2018

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS
Justice

IAS PART 4

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TANER KANBIR AND KUDRA DILEK AZMAN,

Index
No.: 712031/2018

Plaintiff(s),

Motion
Dated: May 21, 2019

-against-

Motion
Cal. No.: 7

AHMET ALBAYRAK AND CUTE CAT LLC.

Motion
Seq. No.: 3

Defendant(s).

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The following papers numbered 1-5 read on this motion by plaintiffs for an Order: (1) enjoining defendants and their representatives, and agents from transferring, pledging, diverting or disposing of the assets of defendant Cute Cat [CAT] except in the ordinary course of business during the pendency of this action; (2) permitting plaintiff's and their representatives' to obtain daily access during normal business hours to the physical premises upon which defendant CAT's café business operates during the pendency of this action and (3) granting plaintiff's and their representatives immediate access to the books and records of defendant CAT.

	PAPERS NUMBERED
Notice of Motion/OSC - Affid.-Exhibits.....	EF 30, 33-41
Answering Affidavits - Exhibits	EF 31-32

Upon the foregoing papers it is ordered that this motion by plaintiffs is determined as follows:

Order of this Court dated September 30, 2019, this motion was held in abeyance pending expiration of a stay of this action.

Now, upon expiration of the stay and upon the record before the Court, plaintiffs' motion is granted in part and denied in part.

Plaintiffs allege that in or about December 2016, Cute Cat LLC (the company) was formed to operate a café. Kudra Dilek Azman (Azman) held 50% interest in the company, Taner Kanbir (Kanbir) held 20% interest in the company, and Ahmet Albayrak (Albayrak) held 30% interest in the company. It is alleged that for purposes of Albayrak obtaining an immigration investor visa, an Amended and Restated Operating Agreement dated March 1, 2017 was executed by Azman and Albayrak which changed the membership interest so that Azman and Albayrak each held 50% interest in the company. In 2018, plaintiffs became aware that defendant Albayrak was using the company's assets for his personal gain and had opened a new business bank account to which plaintiffs had no access. That same year Albayrak ousted plaintiffs from the management of the company, has used the threat of force, violence and claims of intimidation by plaintiffs to prevent plaintiffs from access to the premises, and refused to provide plaintiff's access to the company books and records.

Plaintiffs commenced the instant action by the filing of a Verified Complaint which asserts causes of action for Breach of Fiduciary Duty (First), Declaratory Judgment (Second), Misappropriation (Third), Dissolution (Fourth), and Unjust Enrichment (Fifth). Plaintiffs now move for injunctive relief. Although the verified complaint alleges five causes of action, plaintiffs' motion only addresses the First Cause of Action for Breach of Fiduciary Duty.

The branch of plaintiffs' motion for a preliminary injunction is denied.

Plaintiffs contend that a preliminary injunction is warranted since they have meet all of the elements for a preliminary injunction. First, plaintiffs contend there is a likelihood of success on their claims based on breach of fiduciary duty since defendant Albayrak, as the managing member of the company, has a fiduciary duty to the company and its members, which Albayrak breached when he ousted plaintiffs from management, refused to allow them access to the premises, withheld profits from plaintiffs, diverted company funds to finance his privately owned business, and failed to keep up with the company's financial obligations, including not paying the rent. Second, plaintiffs contend they will suffer irreparable harm without the issuance of a preliminary injunction because Albayrak is putting the company in financial risk by diverting company funds for his personal use and failing to timely pay creditors, including the landlord, thereby endangering the company's ability to remain operational. Additionally, Albayrak may enter into contracts with third parties, affecting plaintiffs' rights, obligations and liabilities. Third, plaintiffs contend that a balancing of the equities favors plaintiffs since any burden on defendant Albayrak from the issuance of an injunction will be minimal compared to the irreparable harm plaintiffs will suffer if an injunction is not granted.

In opposition to plaintiffs' motion, defendant Albayrak contends that he owns half of the company and has always run the café. Kanbir handled the books and records from the time the café opened in May 2017 to March 2018. Albayrak and Kanbir had a falling out in March 2018 when Albayrak discovered that Kanbir was misappropriating company funds by

making unauthorized cash payments to himself. Plaintiffs have not been to the café since August 3, 2018. Albayrak never received a request from plaintiffs to review the books and records, nor has he prevented plaintiffs from doing so. The Company was delinquent on some of its bills, however the delinquencies are being paid. Albayrak is a guarantor on the lease so he would not default on paying the rent. The only time Albayrak ever met, saw, or spoke with Azman was on March 11, 2019 in plaintiffs' prior attorney's office. Plaintiffs never worked in the café.

Defendant further contends that the parties' sharply contested issues of fact prevent the granting of a preliminary injunction. Furthermore, a preliminary injunction would disturb the status quo established by plaintiffs, that is, that Albayrak ran the business and plaintiffs have not come to the premises since March 2018. Defendant further argues that plaintiffs' motion contains self-serving unsubstantiated allegations which can not warrant the granting of a preliminary injunction. Specifically, Albayrak argues first, that plaintiffs can not establish the likelihood of success on the merits as to the First cause of action for Breach of Fiduciary Duty as to Kanbir who is not a party to the Amended Operating Agreement, or Azam based on plaintiffs' unsubstantiated statements. Secondly, plaintiffs can not establish irreparable harm since they have failed to tender any proof of their allegations, and, in any event, the injuries plaintiffs allege to have sustained can be compensated by money damages. Third, a balancing of the equities tips in defendant's favor since a preliminary injunction would disturb the status quo established by plaintiffs themselves.

Defendant further argues procedurally, that plaintiffs failed to upload their motion in compliance with the electronic filing Rules.

The function of a preliminary injunction is to maintain the status quo until a determination as to the ultimate rights of the parties can be made (*Chana v. Machon Chana Women's Institute, Inc.*, 162 AD3d 635 [2018]; *4th Ave. Realty Holding Corp. v. Pappas*, 254 AD2d 250 [1998]). In order to prevail on an application for preliminary injunctive relief, the movant has the burden of clearly demonstrating: (1) the likelihood of ultimate success on the merits; (2) the danger of irreparable injury to the movant in the absence of an injunction and (3) that a balancing of the equities favors the movant's position (*Zoller v. HSBC Mortgage Corp. (USA)*, 135 AD3d 932 [2016]; *Aetna Insur. Co. v. Capasso*, 75 N.Y.2d 860; *Doe v. Axelrod*, 73 NY2d 748; *Matos v. City of New York*, 21 AD3d 936 [2005]; *Hightower v. Reid*, 5 AD3d 440 [2004]; *W.T. Grant v. Srogi*, 52 NY2d 496; *Anastasi v. Majopon Realty Corp.*, 181 AD2d 706 [1992]; *Coinmach Corp. v. Alley Pond Owners Corp.*, 25 AD3d 642 [2006]; *Ruiz v. Meloney*, 26 AD3d 485 [2006]; *Moy v. Umeki*, 10 AD3d 604 [2004]; *Zanghi v. State of New York*, 204 AD2d 313 [1994]). It is well settled that a preliminary injunction is a drastic remedy which should not be granted unless a clear right to such relief is established under the law, and upon undisputed facts set forth in the moving papers (*MacIntyre v. Metropolitan Life Insur. Co.*, 221 AD.2d 602 [1998]; *Anastasi v. Majopon Realty Corp.*, 181 A.D.2d 706 [1992]; *Merrill Lynch Realty Assoc. v. Burr*, 140 A.D.2d 589 [1988]). The burden of showing an undisputed right rests upon the movant (*Peterson v. Corbin*, 275 AD2d

35 [2000]). The determination to grant or deny a preliminary injunction rests in the sound discretion of the Court (*Coinmach Corp. v. Alley Pond Owners Corp.*, 25 AD3d 642 [2006]).

In the instant action, plaintiffs have failed to sufficiently demonstrate a clear legal right to preliminary injunctive relief. The affidavits of the parties demonstrate substantial factual issues exist between the parties. Given the conflicting affidavits submitted in support and opposition to the instant motion, plaintiff has failed to demonstrate a likelihood of success on the merits (*Nalitt v. New York*, 138 AD2d 580 [1988]), or that a balancing of the equities favors plaintiffs' position. Where, as here, sharply disputed issues of fact exist, plaintiff is not entitled to preliminary injunctive relief (*Pearlgreen Corp. v. Chu*, 8 AD3d 460 [2004]; *Blueberries Gourmet, Inc. v. Aris Realty Corp.*, 255 A.D.2d 348 [1998]; *Merrill Lynch v. Burr, supra*; *MacIntyre v. Metropolitan Life, supra*; *Family Affair Haircutters, Inc. v. Detling*, 110 A.D.2d 745 [1985]).

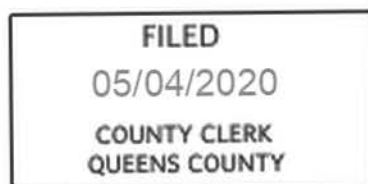
Plaintiffs also failed to meet their burden of demonstrating the danger of irreparable harm in the absence of an injunction. Where, as here, a litigant can be fully recompensed by a monetary award, a preliminary injunction will not issue since no irreparable harm will be sustained in the absence of such relief (*Rice v. Rice*, 105 AD3d 962 [2013]; *306 Rutledge, LLC v. City of New York*, 90 AD3d 1026 [2011]; *Mar v. Liquid Management Partners, LLC*, 62 AD3d 762 [2009]; *Neos v. Lacey*, 291 AD2d 434 [2002]; *Price Paper and Twine Company v. Miller*, 182 AD2d 748 [1992]; *Shapiro v. Shorestein*, 157 AD2d 833 [1990]). Here, the irreparable harm claimed by plaintiffs are can be compensated by money damages.

The branches of plaintiffs' motion for an order permitting plaintiffs and their representatives to have daily access to the premises where the café is operated, and immediate access to the books and records of Cute Cat LLC, are granted as to plaintiff Azam, only. It is undisputed that Azam, is a party to the Amended and Restated Operating Agreement and a Member of Cute Cat LLC.

These branches of plaintiffs' motion are, however, denied as to plaintiff Kanbir inasmuch as Kanbir is not a party to the Amended and Restated Operating Agreement of Cute Cat LLC, nor have plaintiffs submitted any documentary proof (or undisputed affidavit) evidencing Kanbir's alleged interest in the company.

Dated:

4/14/20



MARGUERITE A. GRAYS
J.S.C.