

Teitelbaum v Sternchos
2020 NY Slip Op 32138(U)
July 2, 2020
Supreme Court, Kings County
Docket Number: 507114/2020
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

**ERNEST TEITELBAUM, individually and derivatively
as member on behalf of VESCOM SYSTEMS, LLC,
et al,**

Plaintiffs,

-against-

**STANLEY STERNCHOS, MARTHA STERNCHOS,
MICHAEL S. BARONE, BARONE TRANSPORT, INC.,
et al,**

Defendants.

DECISION / ORDER

Index No. 507114/2020

Motion Seq. No. 1, 2, 3 & 4

Date Submitted: 7/2/20

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion
for a preliminary injunction and defendants' cross motions***

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation (affidavit) and Exhibits Annexed	<u>1-14, 18-24</u>
Notice of Cross Motion, Affirmation (affidavit) and Exhibits Annexed	<u>25-30, 40-53</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>54-55</u>
Reply Affirmation.....	_____

**Upon the foregoing cited papers, the Decision/Order on these motions is as
follows:**

This is a derivative action brought by a member of a New York Limited Liability Company against another member and her spouse, for allegedly fraudulently converting and/or dissipating and/or selling the assets of the business without permission or authority. The action was commenced by Order to Show Cause (mot. seq. 1), with a TRO against the Sternchos defendants. Before the return date, plaintiffs' counsel filed an Amended Order to Show Cause (mot. seq. 2), which was also signed by the judge in Part 72 (Ex

Parte applications) and served on the then-defendants. It has a more extensive and specific TRO and states that it supersedes the first Order to Show Cause. “Nominal Defendant” Person (one of the owners of the LLC) then filed a pre-answer cross motion (mot. seq. 3) for “Summary Judgment in Lieu of Counterclaim, and an order pursuant to CPLR 3213 directing entry of judgment against Vescom Systems, LLC in the amount of \$956,638.00 with interest thereon from May 15, 2020 at \$419.12 per day.” A few days later, plaintiffs’ counsel amended the Complaint as of right and added several other defendants, who are claimed to have shipped and/or purchased the assets of Vescom Systems LLC from the Sternchos defendants. The Sternchos defendants then filed a pre-answer cross motion (mot. seq. 4) on 6/25/20 “to vacate the temporary restraining order.” All of the motions were argued before the undersigned on July 2, 2020.

Plaintiffs’ counsel withdrew the first Order to Show Cause on the record (mot. seq. 1) as superseded by the second, the Amended Order to Show Cause (mot. seq. 2). The motion papers support plaintiffs’ motion for a preliminary injunction, and counsel for the Sternchos defendants impliedly acknowledged this, while objecting to the TRO provisions in the Order to Show Cause as overly broad.

To demonstrate entitlement to a preliminary injunction directing a party to perform a particular act or requiring a party to refrain from certain behavior, the plaintiff must demonstrate by clear and convincing evidence that it is likely to succeed on the merits of the claim, that absent an injunction, it will suffer irreparable injury that cannot be compensated by money damages, and that the equities weigh decidedly in favor of the plaintiff (*W. T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Chernoff Diamond & Co. v Fitzmaurice, Inc.*, 234 AD2d 200, 201 [1st Dept 1996]; see CPLR 6301). The decision to grant or deny a demand for a preliminary injunction lies within the sound discretion of the court (*Zoller v*

HSBC Mtge. Corp. (USA), 135 AD3d 932, 933 [2d Dept 2016]).

Here, plaintiffs have demonstrated a likelihood of success on the merits in this action, and the necessity of preventing the dissipation of assets. A plaintiff need only submit evidence sufficient to demonstrate a prima facie showing of a right to relief (*Terrell v Terrell*, 279 AD2d 301, 303 [1st Dept 2001]).

Accordingly,

IT IS ORDERED THAT the Sternchos defendants and any third party acting on said defendants' behalf or in concert with either or both of them, and all other persons acting under the jurisdiction, supervision and/or direction of the Sternchos defendants, directly or through any attorney, agent, servant, employee or other person under the supervision or control of the Sternchos defendants, or either of them, are enjoined and restrained, during the pendency of this action or further order of the court, from doing or suffering to be done, any of the following acts:

- (1) from withdrawing, liquidating, selling, transferring, removing, borrowing against, disposing of, pledging or otherwise hypothecating or encumbering any monies, stocks, shares, bonds, financial instruments, or business assets of any nature, including but not limited to real estate, vehicles, equipment, inventory, supplies, accounts receivables, customer lists, business checking accounts, business savings accounts/certificates of deposit and any other financial instruments held in or by any bank, brokerage, financial advisor or similar financial institution, which items are the property of Vescom Systems LLC;
- (2) withdrawing any monies or writing any checks from Citibank N.A. Account No.: 6863937840 or any other bank account at Citibank N.A., belonging to Vescom Systems, LLC., which accounts are hereby frozen pending further order of the

court, as neither Stanley Sternchos nor Martha Sternchos are authorized signatories to any bank account belonging to Vescom Systems, LLC; and

(3) Opening any bank or brokerage accounts in the name of Vescom Systems LLC.

IT IS FURTHER ORDERED that all of the other restraints in the Order to Show Cause dated May 4, 2020, and in the Amended Order to Show Cause dated May 7, 2020, are hereby lifted. Specifically, but not meant to be a complete list, the restraints on the personal bank accounts of defendant Martha Sternchos are hereby terminated.

Turning to defendant Person's pre-answer motion for a money judgment "pursuant to CPLR 3213 in lieu of counterclaim," the court finds that it must be denied as procedurally improper. The only permissible pre-answer motion is to dismiss pursuant to CPLR 3211. The defendant is not seeking dismissal, but rather affirmative relief which can only be granted after he answers the complaint and asserts a proper counterclaim upon which either summary judgment or a default judgment can be granted. A motion for summary judgment in lieu of complaint is a creature of statute and its procedures must be specifically followed. Here, there is no Summons, no Index number, and no service of process.

Defendants are granted thirty (30) days from today's date to Answer the Complaint.

In conclusion, the plaintiffs' motion is granted to the extent specified herein, the cross motion of "nominal defendant" Joel Person is denied and the cross motion of the Sternchos defendants is granted in part, as specified herein.

This constitutes the decision and order of the court.

Dated: July 2, 2020

ENTER:



Hon. Debra Silber, J.S.C.