Kalamotousakis v Karp
2020 NY Slip Op 32231(U)
July 7, 2020
Supreme Court, New York County
Docket Number: 655880/2019
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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THOMAS J. KALAMOTOUSAKIS,

Plaintiff,

- v -

CHAD L. KARP, MARK D. LAZARUS, and LAZARUS KARP, LLP,

Defendant.

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INDEX NO. 655880/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 40, 41, 42, 43, 44, 45, 46, 50, 53
were read on this motion to/for PRELIMINARY INJUNCTION

This action arises from the break-up of a three-partner law firm, Lazarus, Karp & Kalamotousakis (LKK). By letter dated May 8, 2019, plaintiff Thomas Kalamotousakis notified the other firm partners, the individual defendants Chad Karp and Mark Lazarus, that "I hereby withdraw from [LKK], effective immediately" and that "the Firm is now dissolved. . . ." (Compl., ¶ 1 [NYSCEF Doc. No. 1]; Notice of Dissolution, NYSCEF Doc. No. 2.) There is no dispute that the partnership has been in dissolution since May 8, 2019. Kalamotousakis has since established his own practice, and Karp and Lazarus have established a new partnership, defendant Lazarus Karp, LLC (LK). Plaintiff Thomas Kalamotousakis moves by order to show cause for appointment of a temporary receiver for the management and control of LKK assets and for a preliminary injunction. The preliminary injunction seeks, among other things, to enjoin defendants from controlling partnership assets and denying plaintiff access to partnership books and records and computer programs, and to direct the deposit, into an escrow account under the

joint custody and control of plaintiff and defendants, of cash on hand as of May 8, 2019 and accounts receivable for pre-May 8, 2019 services. In addition, the motion seeks an accounting and defendants' posting of a bond. (Order to Show Cause [NYSCEF Doc. No. 38].)

Plaintiff attests that defendants "systematically locked [him] out of the LKK computerized accounting system as well as the LKK's computerized case management system so as to prevent [him] from participating in the day to day operations of LKK. The Partner Defendants further proceeded to execute a purported assignment of all the assets of LKK to their new firm, such as sub-leases, accounts receivables, physical assets and intellectual property, without [his] consent or any compensation to [him]." (Kalamotousakis Aff., ¶ 6 [NYSCEF Doc. No. 8].) Plaintiff also attests that "the individual Defendants had requested LKK clients to make checks payable to their new firm Lazarus Karp, LLP" and that, despite his request that checks be issued to LKK, "due to the Partner Defendants' continuing illicit conduct in self-dealing and breach of their duties to LKK . . . , [plaintiff] ha[s] no way of knowing if those checks were ultimately reissued and/or negotiated and how much of the accounts receivable of LKK have been misappropriated . . . ." (Id., ¶¶ 8-9.)

Defendant Karp attests that plaintiff has in his office "the corporate records, vendor contracts, corporate tax returns, and the escrow and operating account physical checks," that he "changed the locks to his office door" and "has refused to surrender such records, or even put them in a location where [defendants] have access." (Karp Aff., ¶¶ 14, 19 [NYSCEF Doc. No. 18].) He further attests that fees plaintiff and his staff earned "even for work performed before his Withdrawal Date from the Firm, have not been deposited into the Firm's bank account" and that plaintiff has "refused to provide [defendants] with an accounting of the Firm's

Escrow\IOLA account (the "Escrow Account"), which he maintained (and continues to maintain) exclusive control over." (Id., ¶¶ 26-27.)

On October 18, 2019, this court heard oral argument on the branch of this motion for a temporary restraining order and the appointment of a temporary receiver. The court declined at that juncture to appoint a temporary receiver. (Tr. Oct. 18, 2019, at 4 [NYSCEF Doc. No. 53].) The court ordered that "[p]laintiff shall provide access to the escrow account records, including such records on software" and that "[t]he parties are directed to communicate with the phone provider . . . to authorize a phone system that routes telephone calls (1) to defs Karp, Lazarus & Lazarus Karp, LLP and (2) to plaintiff Kalamotousakis & The Kalamotousakis Law Group, P.C., respectively." (OSC, at 4-5; see OSC [vii].) The court also ordered "on consent, access to the books and records, including the software of LKK." (Tr. Oct. 19, 2019, at 29; see OSC [iv] and [v].) The court holds that this relief should be continued by the preliminary injunction. (See NY Partnership Law § 41.)

Plaintiff requests a temporary receiver to manage and control LKK's assets, including vendor contracts, the partnership lease, partnership accounts receivable, and payment of partnership expenses. (OSC, at [i] [A]-[D].) CPLR 6401 provides that a temporary receiver may be appointed "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." (CPLR 6401.) "The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties. . . . There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established." (Matter of Armienti [v Brooks], 309 AD2d 659, 661 [1st Dept 2003] [internal quotation marks and citations omitted].) The case for a temporary receiver is not clearly

established here. Plaintiff fails to make a factual showing that any assets that may have been transferred were not transferred for payment of legitimate partnership expenses or that there is a risk of irreparable loss.

The court turns to the other categories of injunctive relief sought by plaintiff's motion. It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and a balance of equities in the movant's favor. (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; W.T. Grant Co. v Srogi, 52 NY2d 496, 517 [1981]; CPLR 6301.) The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].) Generally, the function of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits." (Spectrum Stamford, LLC v 400 Atlantic Title, LLC, 162 AD3d 615, 616 [1st Dept 2018].)

Harms that are compensable by money damages do not constitute irreparable injury. (Meissner v Yun, 126 AD3d 565, 566 [1st Dept 2015]; see Matter of J.O.M. Corp. [v Department of Health of State of N.Y.], 173 AD2d 153, 154 [1st Dept 1991].) Monetary damages that are "capable of calculation, albeit with some difficulty, are not irreparable." (SportsChannel America Assocs. v National Hockey League, 186 AD2d 417, 418 [1st Dept 1992] [emphasis in original].) Movants must make a "clear showing" of irreparable harm, specifically "that an award of monetary damages would not adequately compensate them." (Zodkevitch v Feibush, 49 AD3d 424, 425 [1st Dept 2008].)

"Moreover, a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action." (Second on Second Cafe, Inc. v Hing Sing Trading, Inc., 66 AD3d 255, 264 [1st Dept 2009] [internal quotation marks and citations omitted].)

As a threshold matter, plaintiff argues that all decisions "as to the winding-up of the Partnership must necessarily be approved by unanimous consent of the partners, rather than by a mere majority." (Pl.'s Memo in Support, at 3 [NYSCEF Doc. No. 15].) In support of this argument, plaintiff cites New York Partnership Law § 40 (8), which provides: "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners." (NY Partnership Law § 40 [8].) Defendants argue that "[plaintiff] concedes that no written partnership agreement exists, so [defendants], constituting a majority of the partnership, have the authority to decide ordinary matters connected with the partnership." (Ds.' Memo in Opp., at 4 [NYSCEF Doc. No. 43].) Plaintiff and defendants both fail to cite any authority in support of their respective positions, and no party produces evidence of a written or oral partnership agreement. As noted above, plaintiff fails to make a factual showing that any transferred assets were not transferred for payment of legitimate partnership expenses.

Plaintiff also cites New York Partnership Law section 64 which recognizes that partners may act to the extent necessary to wind up partnership affairs, and thus provides: "Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership. . . ."

Plaintiff summarily claims that defendants acted in violation of this section, but provides no evidence or specific argument in support of that claim. (See Pl.'s Memo in Support, at 15.)

In sum, the court does not find on this record that a factual showing has been made the defendants have acted in contravention of any partnership agreements or beyond what is necessary to wind up partnership affairs. Nor has a legal showing been made that all decisions in winding up the partnership must be unanimous.

The court agrees with defendants that the majority of the relief sought by plaintiff on this motion is compensable by money damages, and therefore not properly awarded on a motion for a preliminary injunction. The motion will accordingly be denied to the extent it seeks to enjoin defendants from (1) the management or control of partnership assets (OSC, at [ii], [iii], and [ix]); (2) making any hiring or firing decisions (OSC, at [vi]); (3) the management or control of vendor contracts (OSC, at [xii]); (4) the management or control of accounts receivable (OSC, at [xiv]), and (5) the management, control, or payment of partnership expenses (OSC, at [xv].)

As to the request for relief enjoining defendants from the management, control, or assignment of the partnership lease (OSC, at [viii] and [xiii]), the court holds that plaintiff fails to make a showing of likelihood of success on the merits. The rider to the partnership's lease expressly provides in paragraph 66: "The Lease may be assigned to a successor partnership of which the then current partners collectively comprise a majority interest." (NYSCEF Doc. No. 13.)

Plaintiff also requests that the court direct defendants to place into a joint escrow account with plaintiff all cash on hand and cash balances of the partnership as of May 8, 2019; all revenues of the partnership prior to May 8, 2019; all funds relating to accounts receivable and work in process of the partnership prior to May 8, 2019; and all funds in defendants' accounts

relating to revenues prior to May 8, 2019. (OSC, at [xvi].) Plaintiff further requests that the court require the individual defendants to post a bond of $250,000 in plaintiff's favor. (Id., at [xix].)

In support of these requests, plaintiff argues that "the Partnership assets included over $600,000 in receivables and other assets, that have now apparently been transferred to the Defendants' new law firm, defendant LK LLP. . . . Defendants have provided no evidence that these funds are still available with respect to an equitable distribution to the partners after an accounting. . . ." (Pl.'s Reply Memo, at 6 [NYSCEF Doc. No. 46].) Plaintiff further argues that "funds that are equivalent to these assets should be deposited into escrow by the Defendants, to ensure that once the full accounting is completed, the funds can then be distributed accordingly. . . ." (Id., at 7.)

While these requests relate to the requests above that are compensable by money damages, they "seek security for a potential money judgment" and are not appropriately sought here, as opposed to on a motion for an attachment provided that a proper showing can be made pursuant to CPLR 6201. (See Zodkevitch, 49 AD3d at 425.) The court declines to grant these branches of the motion for a preliminary injunction.

Plaintiff further requests an order directing defendants to provide books and records of LLK to an accountant for an accounting, and directing defendants to provide an accounting for monies deposited into LK accounts for services rendered prior to May 8, 2019. (OSC, at [x] and [xi].) Defendants have indicated that they do not oppose the request for an accounting if plaintiff also accounts for fees from services rendered prior to the dissolution date. (Karp Aff., at n 1.) Due to the coronavirus emergency, the court is not able at this time to refer the matter to a special referee for an accounting. The parties are accordingly directed to confer as to whether

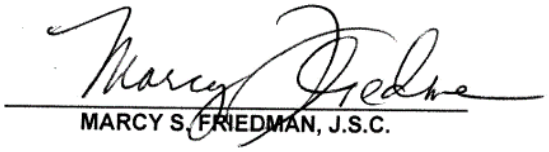
they will agree, in order to expedite the winding up of the partnership, to retain a private referee to perform the accounting.

Plaintiff's remaining two requests are to enjoin defendants from failing to turn over files and data of any client upon that client's demand, and enjoining defendants from preventing plaintiff's access to the premises and facilities. (OSC, at [xvii] and [xviii].) The first request will be denied, as plaintiff makes no showing that defendants have failed to turn over a client file where a client has demanded and been legally entitled to the file. The second request will also be denied as plaintiff makes no showing that he has been denied access to the premises or "facilities."

It is hereby ORDERED that the motion of plaintiff Kalamotousakis for a preliminary injunction and other relief is granted solely to the extent that

It is ORDERED that the injunctive relief granted in the temporary restraining order shall continue pending the hearing of this action.

This constitutes the decision and order of the court.



7/7/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE