

Gutnick v Jacobson

2020 NY Slip Op 33570(U)

October 27, 2020

Supreme Court, Kings County

Docket Number: 507226/2019

Judge: Leon Ruchelsman

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

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MEYER GUTNICK, BEDFORD REALTY MANAGEMENT,
LLC, 1704 OCEAN AVENUE, LLC,,

Plaintiffs, Decision and order

- against -

Index No. 507226/2019

YERACHMEAL JACOBSON, MARC JACOBOWITZ,
BLUEJAY MANAGEMENT, LLC, BLUEJAY
CAPITAL, LLC, SKY HIGH REALTY GROUP LLC,
1704 OCEAN AVENUE, LLC,

October 27, 2020

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the defendant from taking any action which will limit the plaintiff's interest in the company and from making any distributions which will likewise reduce plaintiff's share of the company. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

The plaintiff invested over one million dollars and is a 15% owner of 1704 Ocean Avenue LLC, an entity created to buy, develop and sell property located at 1704, 1708 and 1712 Ocean Parkway in Kings County. An operating agreement was executed between the parties on January 8, 2015 and another side agreement on February 16, 2015. The complaint alleges the defendants violated the agreements by failing to give the plaintiff sufficient time in which to invest additional funds and that

failure caused a dilution of his ownership share from 15% to 11.17%. The complaint further alleges the defendants failed to make contributions and failed to provide or maintain records. Moreover, the complaint alleges the defendants unlawfully expelled the plaintiff from the company. The complaint alleges, breach of contract, breach of a fiduciary duty, fraud, conversion, unjust enrichment and negligence. The plaintiff has now moved seeking to enjoin the defendants from taking any action that would further dilute his share including making any distributions to other members of the company. The defendants oppose the motion arguing that an injunction is not proper.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d

690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is that it is alleged the defendants have breached the agreement in many significant ways. Of course, the defendants deny these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Specifically, the defendants assert they provided the plaintiff with all documents he requested and even reviewed the documents together with defendant and his accountant. Further, the defendants assert that plaintiff intentionally defamed the corporation and the managing members by spreading untrue rumors that the managing members failed to maintain adequate books and records. Indeed, the defendants have initiated a lawsuit against plaintiff alleging defamation. 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 [1st

Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "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 [1st Dept., 1985]). Thus, the Complaint states that after the managing members sought to raise additional capital "plaintiff emailed and texted the Managing Members repeating his request to meet on four occasions, but the Managing Members ignored him or promised to send the information later, which they never did" (see, Complaint, ¶ 75). The defendants note these allegations are unfounded and there is scant evidence supporting them. Thus, while the allegations may prove true, at this juncture there are factual disputes undermining the availability of any injunction.

In order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). The plaintiff does not even allege anything other than money damages. The plaintiff argues that where the primary asset of the corporation is real property then a preliminary injunction is appropriate "since alienation of the corporation's property constitutes conduct that would defeat the purpose of a law suit" (see, Memorandum in Support, page 12). However, the case cited

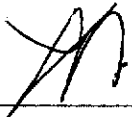
in support of that proposition, 5303 Realty v. O & Y Equity Corp., 64 NY2d 313, 486 NYS2d 877 [1984] deals with the rules of notices of pendency which only apply to land and not a case such as this which concerns an investment in the form of an asset purchased by the corporation. Notably, that case observed that "one of the important factors in this regard is that the likelihood of success on the merits is irrelevant to determining the validity of the notice of pendency" (id). Of course, that requirement is necessary when determining the appropriateness of an injunction, clearly distinguishing these two legal expedients. It is true the Section 11.9 of operating agreement states that "irreparable injury will result from a breach of any Provision of this Agreement and that money damages will be inadequate to fully remedy the injury" (id), however, that provision cannot supercede governing law concerning the criteria for an injunction. As the Supreme Court has observed, there is no 'right' to an injunction (Yakus v. U.S., 321 US 414, 64 S.Ct 660 [1944]). Furthermore, in Ticor Title Insurance Company v. Cohen, 173 F.3d 63 [2d Cir. 1999] the court held that money damages were insufficient because the harm was not financial but was incalculable since an employee's contribution cannot be quantified. Thus, the court noted non-compete clauses are generally viewed as injuries that are irreparable and the proper subject of an injunction. The case of Monteleone v. Leverage Group, 2008 WL 4541124 [E.D.N.Y. 2008]

likewise does not demand a contrary result. That case does not stand for the proposition that the dissipation of one's investment is a valid basis upon which to grant an injunction. Rather, that case did not concern an injunction, rather it concerned attachment and is therefore inapplicable to the facts of this case. Thus, any alleged loss which can be compensated by money damages is not irreparable harm (Family Friendly Media Inc., v. Recorder Television Network, 74 AD3d 738, 903 NYS2d 80 [2d Dept., 2010]). As noted, since the plaintiff has not alleged anything other than monetary damages the plaintiff has failed to allege any irreparable harm. Thus, while the plaintiff may prevail in all its claims against the defendant, the plaintiff has failed to establish that the denial of the injunction will affect anything other than economic or financial matter. Consequently, the motion seeking a preliminary injunction enjoining the defendants is denied.

So ordered.

ENTER:

DATED: October 27, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC