Young S. Chung v Xie
2020 NY Slip Op 33844(U)
November 17, 2020
Supreme Court, Kings County
Docket Number: 503139/2020
Judge: Leon Ruchelsman

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

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YOUNG S. CHUNG, individually and on behalf of URBAN FRESH CORP. and 11 UM FOOD CORP.,

Plaintiffs, Decision and order

- against - Index No. 503139/2020

COLIN K. XIE, BARBARA JANUS, JUICEBROTHERS, LLC, AND DOES 1-100 November 17, 2020

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction ordering the defendant to contribute his share of a business loan. Further, the plaintiff has alleged the defendant has used company assets to pay personal debts. The defendant has cross-moved seeking an injunction alleging the plaintiff has taken business funds for personal use. The motions have been opposed respectively. Further, defendants Janus and Juicebrothers have moved seeking to dismiss the complaint as to them and the plaintiff has opposed that 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 Young Chung and the defendant Colin Xie are equal owners of two grocery stores, one located in Queens County and the other in Kings County. The plaintiff alleges the defendant has failed to pay his share of a business loan and owes over $58,000. The plaintiff asserts that he cannot continue to pay his share as well as defendant’s share and this can cause

great damage to the future of the business. In addition, the plaintiff alleges the defendant used over one million dollars of business money to pay for personal debts from August 2018 through June 2019. The defendant alleges the plaintiff utilized and basically stole over $400,000 of the business for his own personal needs and seeks an injunction prohibiting further such conduct. The motions seeking the injunctions as well as the motion to dismiss followed.

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]).

However, the plaintiff seeks to impose upon the defendant a mandatory injunction requiring him to pay his share of a business loan. A mandatory injunction is rarely granted and only under unusual circumstances to maintain the status quo pending trial (Matos v. City of New York, 21 AD3d 936, 801 NYS2d 610 [2d Dept., 2005]). Thus, where a party is engaged in unlawful conduct which is continuous then a mandatory injunction is proper (Rosenthal v. Helfer, 136 Misc2d 9, 516 NYS2d 1020 [Civil Court New York County, 1987]). Moreover, where a party acts deliberately and intentional a mandatory injunction requiring the party to cease is likewise proper (Marcus v. Village of Mamaroneck, 283 NY 325, 28 NE2d 856 [1940]).

In this case the plaintiff has not presented any evidence that mandating the defendant must contribute to the loan is of such unusual circumstances as to warrant the imposition of the injunction (Zoller v. HSBC Mortgage Corp., (USA), 135 AD3d 932, 24 NYS3d 168 [2d Dept., 2016]). This is particularly true since the allegations are over a year old minimizing the urgency of the request. More importantly, the entire lawsuit is about the failure of the defendant to pay his share of the loan and for the defendant to return any funds he improperly took from the corporation. Imposing a mandatory injunction would effectively resolve the entire lawsuit. In Spectrum Stanford LLC v. 400

Atlantic Title LLC, 162 AD3d 615, 81 NYS3d 5[1st Dept., 2018] the court stated that "a mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite" (id). Moreover, there are serious questions whether the plaintiff can even force the defendant to pay the loan since in truth the loan is the obligation of the corporation and the plaintiff and defendant are merely guarantors of such loan. Therefore, the motion seeking to require the defendant to pay his share of the loan is denied.

Moreover, concerning the allegation the plaintiff has essentially taken money of the business for his own personal needs, that is a mere money claim, without any accompanying emergency application. 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]). Therefore, the plaintiff's motion seeking an injunction is denied.

The defendant has moved seeking to enjoin the plaintiff from withdrawing any funds from the bank account of the business, other than in the ordinary course of business, on the grounds there are allegations the plaintiff has essentially stolen $400,000 from the business. Thus, in establishing a likelihood of success on the merits, the defendant 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, as noted, the plaintiff has stolen funds from the business. Of course, the plaintiff denies these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Specifically, the plaintiff counters that he loaned the business funds in which to operate and the checks made out to entities owned by the plaintiff are merely payments made pursuant to those loans. The plaintiff has provided some evidence that indeed the money he paid himself were payments for loans made to the business. 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, while the allegations may prove true, at this juncture there are factual disputes undermining the availability of any injunction.

Further, 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 defendant does not even allege anything other than money damages. The defendant does assert that if the plaintiff continues to loot the business it will be forced to close. However, even if that is true that such activity will cause the cessation of operations those are merely claims for damages which can be satisfied with money damages. Thus, while the defendant may prevail in all its claims against the plaintiff, the defendant has failed to establish that the denial of the injunction will affect anything other than economic or financial matters. Consequently, the motion seeking a preliminary injunction enjoining the plaintiff is denied.

Therefore, all motions seeking any injunctions in this case is hereby denied.

Turning to the motion to dismiss, the complaint alleges that, essentially, under the supervision of defendant Xie, defendant Janus utilized business assets for personal use. The Amended Complaint asserts two causes of action against Janus and Juicebrothers, for conversion and unjust enrichment.

Concerning the motion to dismiss, it is well settled that "[a] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them

every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Fiorenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). As the Court of Appeals explained "a conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession...Two key elements of conversion are (1) plaintiff's possessory right or interest in the property...and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (see, Colavito v. New York Organ Donor Network Inc., 8 NY3d 43, 827 NYS2d 96 [2006]). Therefore, where a defendant "interfered with plaintiff's right to possess the

property" (Hillcrest Homes, LLC v. Albion Mobile Homes, Inc., 117 AD3d 1434, 984 NYS2d 755 [4th Dept., 2014]) a conversion has occurred. In this case Janus was given a corporate credit card, a Plum card, by defendant Xie who owned half of the business. Whether or not Xie had authority to offer such card to Janus is a question in this contentious dispute between plaintiff and the defendant but it does not involve Janus at all who acted appropriately considering Xie's position in the company. The plaintiff argues that the issue of apparent authority is a question of fact and it is not appropriate to conclusively establish such authority without proper discovery. The plaintiff asserts that "whether such apparent authority to make the subject credit card charges existed is inherently a factual one not appropriately determined on a pre-answer, pre-discovery dismissal motion" (see, Plaintiff's Memorandum in Opposition to Motion to Dismiss, page 9). However, as the court noted in Zigabbara v. Falk, 143 AD2d 901, 533 NYS2d 536 [2d Dept., 1988], "a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" (id). Thus, the issue is not whether Xie had the authority to give Janus the Plum card. Rather, the issue is whether it was reasonable for Janus to rely upon Xie's representations concerning the card. The plaintiff argues it was not reasonable for Janus to rely upon the representations of Xie because the

Plum card carried the name of 11 UM Food Corp., and not the name of the actual grocery store, City Acres Market. However, according to the Amended Complaint (¶16) 11 UM Food Corp., is the owner of City Acres Market, which in turn is owned by the plaintiff and defendant (¶14). Thus, there is nothing suspicious and nothing demanding further inquiry why the card was issued in the name of the owner of the grocery store. This being the case there can be no real cause of action against Janus at all. Any issues regarding her possession of the card in general or the specific purchases in particular are really issues between the plaintiff Chung and the defendant Xie. As noted, there are obvious and serious contentions between the parties and the progression of this lawsuit will sharpen the issues and hopefully lead to a resolution. However, Janus and Juicebrothers are merely collateral to the underlying dispute and thus the plaintiff has failed to allege any causes of action against them. Consequently, the motion of Janus and Juicebrothers seeking to dismiss the complaint as to them is granted.

So ordered.

ENTER:

DATED: November 17, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC