

<b>Yampolsky v Tsaryuk</b>
2021 NY Slip Op 31579(U)
May 6, 2021
Supreme Court, Kings County
Docket Number: 505323/2021
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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ALEXANDER YAMPOLSKY, suing individually  
and derivatively on behalf of SUPREME TRUCKING  
GROUP LLC,

Plaintiffs, Decision and order

- against -

Index No. 505323/2021

DMITRY TSARYUK, MOLDTRANS EXPRESS INC.,  
TD BANK

May 6, 2021

Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction seeking to restrain the defendant from transferring any funds in any manner from bank accounts of Supreme Trucking Group LLC. The defendant has opposed 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 Alexander Yampolsky and the defendant Dmitry Tsaryuk are both shareholders of Supreme Trucking Group LLC, a company engaged in the trucking business. The plaintiff alleges the defendant has failed to give him the distributions due and has essentially stolen money from the company and has diverted the funds of the company to another entity, defendant Moldtrans Express Inc., and has opened new bank accounts in attempts to shield the money from the plaintiff. The plaintiff initiated this lawsuit alleging breach of contract, conversion and fraud and now seeks an injunction prohibiting further such conduct. The court initially granted a temporary restraining order only

permitting use any of the company funds in the ordinary course of business. The defendant seeks to terminate such order and to deny the motion seeking any injunction.

#### 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]).

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 [1<sup>st</sup> Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the moving party cannot satisfy the necessary elements then an injunction must be denied (Digestive Liver Disease P.C. v. Patel, 18 AD3d 423, 793 NYS2d 773 [2d Dept., 2005]).

In this case, the plaintiff asserts the defendant has stolen money and that he is an equal partner of the company. The defendant denies any wrongdoing and notes the plaintiff is only a ten percent owner of the company and has, in turn, accused the plaintiff of looting the company. While the operating agreement indicates the plaintiff is a ten percent owner, the plaintiff insists that a further oral agreement changed his share to fifty percent. The defendant disputes any oral modification and contests the fact he engaged in any wrongdoing at all and in fact accuses the plaintiff of engaging in wrongdoing. Of course, the continuation of discovery and a trial, if necessary, will determine whether the plaintiff will be able to prove the claims alleged and prevail on the allegations of conversion and fraud on the part of the defendant. However, at this juncture, the plaintiff has only raised contested and disputed claims of

usurpation and diversion of funds and the extent to which any such usurpation constitutes a harm to plaintiff.

Even if the plaintiff's allegations were sufficient to demonstrate a likelihood of success on the merits, concerning the central allegation of the complaint, namely that defendant has essentially taken money of the business for his own personal needs, that is a mere money claim, without any accompanying emergency application. 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 does assert that if the plaintiff continues to loot the business it will negatively affect his ownership interests in the company. However, 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. 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]). An injunction based upon purely monetary damages is improper even


if the passage of time will render any judgement obtained ineffectual (Rosenthal v. Rochester Button Company, 148 AD2d 375, 539 NYS2d 11 [st Dept., 1989]). As noted, the entire injunction sought is merely to protect the further dissipation of the assets of the company. This is not irreparable harm and is an improper basis upon which to obtain an injunction.

Therefore, the plaintiff's motion seeking an injunction is denied. Further, the temporary restraining order imposed is hereby vacated and the request for a receiver is denied.

So ordered.

ENTER:

DATED: May 6, 2021  
Brooklyn N.Y.

  
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Hon. Leon Richelsman  
JSC