

Haart v Scaglia

2022 NY Slip Op 33506(U)

October 13, 2022

Supreme Court, New York County

Docket Number: Index No. 652373/2022

Judge: Andrew S. Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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JULIA HAART,

Plaintiff,

- v -

SILVIO SCAGLIA, PAOLO BARBIERI, JEFFREY
FEINMAN, DDK & COMPANY, LLP, FREEDOM
HOLDING, INC.

Defendant.

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INDEX NO. 652373/2022

MOTION DATE 09/23/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 12, 13, 22, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, Julia Haart’s order to show cause (mtn. seq. no. 001) must be denied.

In support of a preliminary injunction, the moving party must demonstrate (i) a likelihood of success on the merits, (ii) the risk of irreparable harm if the provisional relief is withheld, and (iii) balance of the equities in favor of the moving party (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Simply put, Ms. Haart fails to satisfy this heavy burden.

Reference is made to *Haart v. Scaglia and Freedom Holding, Inc. and Elite World Group, LLC* (the **Corporate Case**), 2022 WL 3108806 (Del. Ch. 2022) (NYSCEF Doc. No. 31). In the Corporate Case, the Delaware Court (which is the court of primary jurisdiction as it relates to Ms. Haart’s corporate claims) entered a Status Quo Order (the **Status Quo Order**, NYSCEF Doc. No. 32) in which the Delaware Court prohibited the following actions:

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Motion No. 001

- (a) ***Amending the certificate of incorporation or bylaws of Freedom, the limited liability company operating agreement of EWG, or any governance document of either Freedom or EWG;***
- (b) ***Issuing or transferring any stock, membership, or other equity interest in Freedom*** or EWG, or any option, warrant, of right therein, provided, however, that this limitation shall be without prejudice to Haart's contentions as alleged in her Amended Petition in this action with respect to her having acquired ownership of Freedom common and preferred stock and rights thereto;
- (c) Selling or entering into an agreement to sell or letter of intent to sell Freedom, EWG, or any direct or indirect subsidiary of EWG, or any interest in any of the foregoing, whether by merger, asset sale, stock or membership or equity sale, dissolution, restructuring, or otherwise; provided, however, that Freedom shall be permitted to continue the process already begun prior to this action, and consistent with Freedom's representation to its auditor prior to this dispute, to sell Regina delle Alpi s.r.l., which owns CampZero hotel.
- (d) ***Declaring or paying any dividend, distribution, or other compensation or payment, directly or indirectly, to Scaglia or Haart; provided, however, that (i) Freedom shall be able to pay one or more dividends to Scaglia in respect of his shares of preferred stock in an aggregate amount of not more than \$350,000 per month, to the extent it has in the ordinary course for at least one year;*** paying this dividend going forward shall be deemed to be a representation by Scaglia's counsel that it has been paid in the ordinary course for at least one year. The dividend shall be payable on the condition that, for every \$1 so distributed to Scaglia, Freedom shall place in an escrow account \$1, which amount shall be released from escrow and payable to Haart (without interest) in proportion to the amount of Freedom's preferred stock (if any) she is determined to have owned as of the record date for such distribution, with any remainder thereafter returned to Freedom. For the avoidance of doubt, EWG shall be permitted to continue paying a management fee to Freedom pursuant to the Management Services Agreement between EWG and Freedom dated April 1, 2020, as thereafter amended.
- (e) Paying, reimbursing, advancing, or lending, to or for the benefit of Scaglia or Haart, directly or indirectly, all or any part of any fees or expenses incurred with legal representation of Scaglia or Haart individually, in connection with this or any other action against each other;
- (f) ***Engaging in, or agreeing or committing to engage in, any transaction involving the acquisition, transfer, encumbrance, pledge, loan, or other disposition, directly or indirectly, of any asset(s) of or for Freedom*** or EWG, with a value in excess of \$250,000; or committing Freedom or EWG to incur any indebtedness or other financial obligation in excess of \$250,000; provided, however, that Freedom shall be

permitted to take all acts in furtherance of incurring a second-lien mortgage or renegotiating the terms of the first-lien mortgage on the property held by SW Vestry, LLC at 70 Vestry Street, New York, NY 10013 (the “Vestry Residence”), which process was begun in the ordinary course prior to this dispute.

(g) Selling the Vestry Residence; provided, however, that Freedom may continue the process already begun prior to this action, and consistent with Freedom’s representation to its auditor prior to this dispute, of marketing the Vestry Residence to potential buyers.

(NYSCEF Doc. No. 32, at 3-5 [emphasis added]).

This is in sum and substance the same relief that Ms. Haart seeks here:

Ordering Defendants Silvio Scaglia and FHI not to take any actions that have the effect of diluting Haart’s shares of FHI, selling or transferring his and/or her shares of FHI, selling or transferring any assets of FHI or its subsidiaries, or liquidating FHI or any of its subsidiaries.

(NYSCEF Doc. No. 6, at 1).

Following a two-day bench trial on April 19 and 20, 2022 involving over 300 exhibits, the Delaware Court held that Ms. Haart does not own half of Freedom’s preferred shares (NYSCEF Doc. No. 31, at 3). This issue was fully and fairly litigated by Ms. Haart before that Court and is therefore settled (*Becker v. State*, 274 AD2d 532, 532 [2nd Dept 2000]). The parties in the Corporate Case disputed (and continue to dispute) whether Ms. Haart owns 49.99995957% of the preferred shares of Freedom. The Delaware Court did not make a finding as to her contention that the Stock Power conveyed those shares to her. However, the Court commented that the preferred shares could not have been transferred as part of Silvio Scaglia’s apology and otherwise found Ms. Haart’s testimony not credible:

Specifically, Haart testified that the ERAs transferred the preferred stock as Scaglia's apology. Id. 136. This is chronologically impossible: Haart did not learn about the preferred stock until March 2020, months after the 2019 ERA was executed. And as explained below, the 2020 ERA was largely unchanged and was executed to correct errors in the 2019 ERA. Haart's testimony that Scaglia used the ERAs to apologize to Haart is not credible. And in any case, Haart's understanding of the documents' purpose does not change or overcome their plain meaning

(NYSCEF Doc. No. 31, at 14, n 56).

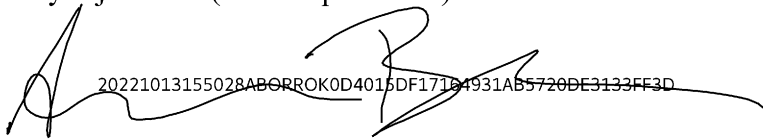
At the conclusion of the Corporate Case, and notwithstanding that the Delaware Court accepted her assertion for its analysis that the Stock Power transferred her a minority interest in Freedom, the Delaware Court vacated the Status Quo Order and the parties continue to dispute whether she owns preferred shares. Ms. Haart has appealed the decision and order of the Delaware Court and of course may seek redress in this manner. She can not however collaterally attack the Delaware Court's determination here as to the ownership of the preferred shares and otherwise demonstrate a likelihood of success on the merits in this Court. (See *Fam. Aff. Haircutters, Inc. v. Detling*, 110 AD2d 745, 747 [2nd Dept 1985]; *Sutton, DeLeeuw, Clark & Darcy v. Beck*, 155 AD2d 962, 963 [4th Dept 1989])

Ms. Haart also can not demonstrate irreparable harm. Nothing in the record suggests any present or immediate harm to any interest she holds that could not be compensated by money damages (*Derfner Mgt. Inc. v Lenhill Realty Corp.*, 105 AD3d 683, 683 [1st Dept 2013]). The Delaware Court has already held that she is not entitled to reinstatement either as a director or an officer because Mr. Scaglia owns the majority interest in Freedom.

Under the circumstances of this case as set forth above, the balance of the equities also does not weigh in favor of granting the injunction (*Greystone Staffing, Inc. v. Warner*, 106 AD3d 954, 954 [2nd Dept 2013]).

Accordingly, it is

ORDERED that Ms. Haart’s motion for preliminary injunction (mnt. seq. no. 001) is denied.



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10/13/2022

DATE

ANDREW S. BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE