

**Weber v Barnett**

2022 NY Slip Op 33829(U)

November 9, 2022

Supreme Court, Kings County

Docket Number: Index No. 508333/2022

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: PART 16

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YOEL WEBER and YOEL LEONOROVITZ, Individually  
and derivatively on behalf of HORSEPOWER  
ELECTRIC AND MAINTENANCE CORP.,

Plaintiff, Decision and order

- against -

Index No. 508333/2022

GARY BARNETT, HP STOCK LLC and EXTELL  
DEVELOPMENT COMPANY,

Defendants, November 9, 2022

-----x  
GARY BARNETT,

Third-Party Plaintiff,

- against -

PASCACK GROUP LLC and PASCACK WL HOLDINGS  
LLC,

Third-Party Defendants,

-----x  
PRESENT: HON. LEON RUCHELSMAN

The Plaintiffs have moved seeking to an injunction preventing the defendants from breaching the shareholder agreement and to the defendants to arrange for a letter of credit. The defendants oppose the motion. Papers have been submitted by the parties and arguments held. After reviewing the arguments of the parties this court now makes the following determination.

As recorded in a prior order, Horsepower Electric and Maintenance Corp., is equally owned by plaintiffs Yoel Weber, Yoel Leonorovitz and an entity called HP Stock LLC pursuant to an operating agreement dated October 28, 2014. Gary Barnett is the managing member of HP Stock. Horsepower Electric is an electrical subcontractor in the construction industry. Pursuant to the

operating agreement Horsepower Electric was required to prioritize its work on behalf of defendant Extell Development Company, an entity owned by Barnett. The Verified Complaint alleges various wrongs committed by Barnett including reducing the profits to which Horsepower Electric was entitled, failing to pay Horsepower Electric for work performed on Extell projects and other acts and omissions. The Verified Complaint alleges causes of action for breach of fiduciary duty, breach of contract, unjust enrichment, tortious interference, quantum meruit and attorney's fees.

The plaintiffs now seek an injunction essentially preventing the defendants from allegedly further breaching the operating agreement operating and from allegedly continuing to breach their fiduciary duties. Specifically, the plaintiffs allege the defendants allowed payments for various work performed by Horsepower Electric in less than amounts required in the shareholder agreement, failed to pay Horsepower Electric sums it is owed for work performed, failed to maintain line of credit and bonding for Horsepower Electric as required under the shareholder agreement and failed to include Horsepower Electric in insurance programs to reduce Horsepower Electric's premiums (see, Memorandum in Support, pages 7,8 [NYSCEF Doc. No. 40]). The plaintiffs now seek an injunction to prevent the further breaches of the shareholder agreement as noted.

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.

In this case, the plaintiffs assert the defendants have breached their duties to Horsepower Electric. The defendants deny any wrongdoing. Even if the plaintiff's allegations are sufficient to demonstrate a likelihood of success on the merits, concerning the central allegation of the complaint, namely that defendants have undermined Horsepower's Electric financial stability, 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 plaintiffs do not even allege anything other than money damages. Thus, the entire basis for the injunction, namely to insure Horsepower Electric is paid the sums it is owed and to prevent the further erosion of money it is owed are merely claims for damages which can be satisfied with money damages. Thus, while the plaintiffs may prevail in all its claims against the defendants, the plaintiffs have 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 insure and secure funds in which to pay the company. This is not irreparable harm and is an improper basis upon which to obtain an injunction.

Turning to the portion of the relief that seeks to require the defendants to take certain actions, indeed, the central aspect of this motion, the court will consider the request to impose such mandatory injunction. 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 intentionally which affects the plaintiff's rights or where the party engages in unlawful conduct which is capable of repetition then a mandatory injunction requiring the party to cease is likewise proper (Marcus v. Village of Mamaroneck, 283 NY 325, 28 NE2d 856 [1940], Rombom v. Weberman, 2002 WL 1461890 [Supreme Court Kings County 2002]).

The plaintiffs assert the defendants have failed to comply with Paragraphs 17.2 and 17.3 of the Shareholder Agreement. Those paragraphs require the defendants to "arrange for a line of credit

facility for the Corporation, in the Corporation's name, with a favorable rate of interest, which shall be lower than that customarily paid by the Corporation for a similar type of facility. Such line of credit facility will be repaid by the Corporation and, if required, personally guaranteed jointly and severally by the Shareholders (in the case of the corporate Shareholder, by an acceptable affiliate)" (§17.2) and to "arrange and facilitate increased surety bonding for the Corporation with reference to projects requiring bonding and which, upon review by the Corporate Shareholder, carry profit of not less than twenty (20%) percent and overhead of not greater than fifteen (15%) percent. The initial surety bonding facility shall be arranged on an as-needed basis, with a maximum initial capacity of One Hundred Million (\$100,000,000.00) Dollars, to be reviewed annually as of January 1, 2016" (§17.3) [NYSCEF Doc. No. 36]). Thus, the plaintiff Weber asserts that "in or around late 2021, HPE requested that HP Stock and/or Barnett arrange for and/or maintain a letter of credit facility in the amount of \$12.5 million and a bonding facility in the amount of \$100 million in order for HPE to continue operating its business. In furtherance of the aforementioned request and in response to HP Stock and Barnett's request, HPE provided all requested financial records and related documentation in order to assist HP Stock and/or Barnett in obtaining the necessary letter of credit facility and bonding facility. HPE has offered to allow a

forensic accountant of Barnett's choosing to review the financial records in order to satisfy Barnett's requests" (see, Affidavit of Yoel Weber, ¶¶30, 31 [NYSCEF Doc. No. 34]). Further, the plaintiffs insist the defendants failed to enter into a forbearance agreement with BankUnited in order to avoid default on a loan (*id.*, at ¶33).

However, paragraph 13.1 of the Shareholder Agreement states that nineteen "major decisions" require the unanimous consent of all shareholders, including "the borrowing of funds or the pledging, mortgaging or otherwise encumbering of an Corporate property other than in the ordinary course of business" (¶13.1(3)) and the "establishment of any third-party lines of credit or loan arrangements, institutional, private or otherwise, other than in the ordinary course of business" (¶13.1(9)).

Thus, notwithstanding paragraph 17, it is clear that certain major decisions contemplated in paragraph 13 and urged by the plaintiffs in this motion require unanimous consent. Further, the defendants have presented cogent reasons why they are unwilling to agree to the requests of the plaintiff. The reasons consist of the reluctance to increase the debt of Horsepower Electric and the denial by the plaintiffs to provide the books and records of Horsepower Electric so a more informed decision could be made. To be sure, the positions of the parties might be motivated by their strategies in this lawsuit as a whole, the mere fact the parties are litigants must be taken into consideration, nevertheless, the

plaintiffs have failed to demonstrate the defendants have acted in bad faith or unreasonably in not agreeing to the plaintiff's requests. Therefore, there is no basis to impose a mandatory injunction and consequently, the motion seeking such injunction is denied.

So ordered.

ENTER:



DATED: November 9, 2022  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC