

Darwish Auto Group, LLC v TD Bank, N.A.

2022 NY Slip Op 34547(U)

August 30, 2022

Supreme Court, Albany County

Docket Number: Index No. 905851-22

Judge: Richard M. Platkin

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STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

DARWISH AUTO GROUP, LLC &
DARWISH GENERAL CORP.,

Plaintiffs,

DECISION & ORDER

-against-

TD BANK, N.A. &
WALID DARWISH,

Defendants.

Index No. 905851-22

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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[* 1]

Hon. Richard M. Platkin, A.J.S.C.

Plaintiffs Darwish Auto Group, LLC (“Darwish Auto”) and Darwish General Corp. (“Darwish General”) commenced this commercial action on August 2, 2022 through the electronic filing of a summons, complaint and proposed Order to Show Cause bringing on a motion for a preliminary injunction (*see* NYSCEF Doc Nos. 1-17). The interim relief sought by plaintiffs would require defendant TD Bank, N.A. (“TD Bank”) to implement a corporate resolution that specifies the levels of access that individuals within plaintiffs’ organizations have to the accounts held by TD Bank. Defendant Walid Darwish (“Darwish”) opposes the motion.¹

BACKGROUND

A. The Complaint

Plaintiffs own and manage ten automotive dealerships in upstate New York (“Dealerships”), and each of the dealerships and Darwish Auto maintain separate bank accounts with TD Bank (collectively, “TD Bank Accounts”) (*see* NYSCEF Doc No. 1 [“Complaint”], ¶¶ 2-3).

Plaintiffs recently learned that TD Bank permitted Darwish to unilaterally modify the access rights to the TD Bank Accounts without the knowledge or consent of plaintiffs or their lenders: 2427 Investments, Inc. (“Lender”) and DP RE Holdings, LLC (“Secondary Lender”) (collectively, “Lenders”) (*see id.*, ¶ 4).

After discovering the changes, plaintiffs, through their designated managers, took action to specify the names of the persons authorized to access the TD Bank Accounts and the type of access granted to each person (*see id.*, ¶ 5). Thus, by written “Action by Joint Consent of a Majority of the Members of the Management Committee and Board of Directors,” dated July 27,

¹ TD Bank did not submit answering papers.

2022, the management of Darwish Auto and Darwish General authorized access to the TD Bank Accounts by the appropriate representatives (*see id.*, ¶ 6; *see also* NYSCEF Doc No. 15 [“Resolution”]).

However, TD Bank refused to implement the authorizations set forth in the Resolution (*see* Complaint, ¶ 8). Without proper access to the TD Bank Accounts, plaintiffs allegedly will be unable to conduct business in the regular course (*see id.*, ¶ 9).

Plaintiffs seek a judicial declaration that: they have the right to determine access to the TD Bank Accounts; TD Bank is obliged to follow their direction, as set forth in the Resolution; and Darwish does not have the unilateral authority to alter such direction (*see id.*, ¶¶ 38-43).

B. The Preliminary Injunction Motion

Plaintiffs move for a preliminary injunction requiring TD Bank to provide access to the TD Bank Accounts in accordance with the Resolution (*see* NYSCEF Doc No. 21 [“OTSC”]). The motion is supported by the affidavit of David Yusko, who serves as the treasurer to Darwish Auto and Darwish General, chief financial officer of the Lender, and treasurer to the Secondary Lender (*see* NYSCEF Doc No. 8 [“Yusko Aff.”], ¶ 1).

In exchange for loans benefiting plaintiffs, “affiliates of the Lender received (i) a majority equity stake in the Secondary Lender, which through wholly-owned subsidiaries, owns the real estate that has been leased to the Dealerships, (ii) the right to acquire a majority equity stake in the Dealerships, which they are in the process of acquiring, and (iii) majority control of the management of Darwish Auto Group, Darwish General, and the Dealerships” (*id.*, ¶ 4). As a result, both plaintiffs are managed by committees, of which Darwish is a member (*see id.*, ¶¶ 5-12).

[* 3]

Plaintiffs discovered that Darwish caused access to the TD Bank Accounts to be modified without their knowledge or consent (*see id.*, ¶ 15). After they responded by adopting the Resolution to specify the individuals authorized to access the TD Bank Accounts and their levels of authorization, Yusko emailed the Resolution to TD Bank and requested immediate implementation (*see id.*, ¶¶ 18-19). However, TD Bank informed Yusko a few days later that it was declining to implement the Resolution based on older corporate documents designating Darwish as the sole manager and owner of plaintiffs (*see id.*, ¶ 20).

Plaintiffs maintain that their authorized representatives lack the necessary access to, and control over, the TD Bank Accounts, thereby preventing them from complying with their obligations to the Lenders and conducting the day-to-day business of plaintiffs and the Dealerships in a responsible fashion (*see id.*, ¶ 21). Plaintiffs are particularly concerned about their ability to exercise proper oversight over the large sums of money that flow in and out of the TD Bank Accounts on a daily basis (*see id.*, ¶ 22).

C. Darwish's Opposition

Darwish opposes the motion through an affidavit with exhibits and a memorandum of law (*see* NYSCEF Doc Nos. 26-31).

According to Darwish, Yusko agreed in April 2022 that he would “arrange for the implementation of check positive pay with TD Bank’s eTreasury as part of a daily reconciliation process to protect the dealership accounts from fraudulent checks,” but Yusko “failed to arrange for the implementation” (NYSCEF Doc No. 27 [“Darwish Aff.”], ¶¶ 5-6).

On July 26, 2022, Darwish learned that four fraudulent checks had been drawn on a TD Bank account associated with a dealership, one of which cleared on July 15, 2022 and another on July 18, 2022 (*see id.*, ¶ 7; *see also* NYSCEF Doc No. 28).

On the same date, Darwish determined that someone had logged into plaintiffs' online accounts at TD Bank with his credentials and about \$219,000 was transferred on July 25, 2022 (*see* Darwish Aff., ¶ 8; *see also* NYSCEF Doc No. 29). Darwish maintains that he did not consent to the creation of wire transfers with his credentials, but he acknowledges that the transaction was authorized by Melissa LaCarter, an employee of a related Dealership/entity and one of plaintiffs' authorized representatives (*see* Darwish Aff., ¶¶ 9-13, 25; Yusko Aff., ¶¶ 1, 17).

At that point, Darwish contacted TD Bank to request modifications of access to the TD Bank Accounts, which, among other things, made him the only person with administrative rights (*see id.*, ¶¶ 14-16). According to Darwish, this change allowed Yusko (and certain others) to initiate wire transfers, but only with the approval of Darwish or another specified individual (*see id.*, ¶ 21).

D. This Litigation

On August 3, 2022, the Court (Hartman, J.) signed the OTSC bringing on plaintiffs' application for a preliminary injunction requiring TD Bank to abide by the Resolution during the pendency of this action (*see* OTSC). The OTSC included a temporary restraining order ("TRO") requiring TD Bank to grant administrative access to the individuals specified in the Resolution for ordinary business purposes.

The OTSC originally was returnable on August 8, 2022, but under a so-ordered stipulation of counsel dated August 5, 2022 (*see* NYSCEF Doc No. 24), defendants' time to answer the OTSC was adjourned to August 15, 2022.

Following review of plaintiffs' moving papers and Darwish's answering papers, the Court determined that appearances were not required on the OTSC (*see* NYSCEF Doc No. 33), and this expedited Decision & Order follows.

ANALYSIS

A party seeking the drastic remedy of preliminary injunction must demonstrate “a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *see* CPLR 6301). Each of these elements must be established by clear and convincing evidence (*see Walsh v St. Mary’s Church*, 248 AD2d 792, 793 [3d Dept 1998]). “The decision to grant or deny a request for a preliminary injunction is committed to the sound discretion of the trial court” (*Biles v Whisher*, 160 AD3d 1159, 1160 [3d Dept 2018] [internal quotation marks and citation omitted]; *see Matter of Gerges v Koch*, 62 NY2d 84, 94-95 [1984]).

A. Likelihood of Success

Plaintiffs’ moving papers sufficiently establish that they are likely to succeed in obtaining a declaration that TD Bank is obliged to implement access to the TD Bank Accounts as set forth in the Resolution and that Darwish does not have the authority to direct otherwise.

Under the Operating Agreement for Darwish Auto, management of the limited liability company is vested in a committee of three managers, of which no manager alone has the authority to act (*see* NYSCEF Doc No. 10 [“Operating Agreement”], § 3.01; NYSCEF Doc No. 11). The powers of the management committee include the right to control the bank accounts of Darwish Auto and the Dealerships and to prescribe rights of access (*see* Operating Agreement, § 8.04).

Darwish General similarly is subject to a shareholder’s agreement vesting management rights in a board of directors consisting of three directors, none of whom may act alone (*see* NYSCEF Doc No. 12 [“Shareholder’s Agreement”], § 3.01; NYSCEF Doc No. 13). And the Shareholder’s Agreement gives the board of directors the right to control bank accounts and

prescribe access to them (*see* Shareholder's Agreement, § 8.04).

In light of the foregoing, plaintiffs are likely to succeed in demonstrating that their respective management committees have the right to determine access to the bank accounts held in the name of plaintiffs or the Dealerships, and the Resolution is a permissible exercise of this management authority (*see* Complaint, ¶ 39). Moreover, the same corporate documents establish that Darwish does not have the unilateral authority to alter access to the accounts absent the approval of a majority of Darwish Auto's management committee or Darwish Group's board of directors (*see id.*, ¶ 43 [c]).

In opposing the motion, Darwish contends that plaintiffs' claim for declaratory relief lacks a justiciable controversy insofar as it relates to him. He argues that plaintiffs "do not cite a single action by [Darwish] after the execution of the Resolution on July 27, 2022 in support of their application" (NYSCEF Doc No. 26 ["Opp Mem"], p. 4). As such, Darwish claims that plaintiffs merely allege a dispute with TD Bank (*see id.*).

The Court does not find Darwish's argument to be persuasive. The impetus for the Resolution was Darwish's unilateral and unauthorized action in contacting TD Bank and changing access to the TD Bank Accounts on July 26, 2022. Once TD Bank implemented his directives, however, there simply was no reason for Darwish to have taken any further action relative to the TD Bank Accounts.

And even if there existed some plausible reason for Darwish to engage in further meddling with the accounts, there was only a period of five (5) days in which he could have done so. Darwish contacted TD Bank on July 26, 2022; TD Bank implemented Darwish's directives the same day (*see* Darwish Aff., ¶¶ 15-20); Yusko's moving affidavit was sworn to on August 1, 2022; plaintiffs' emergency application for injunctive relief was filed on August 2, 2022; and the

Court issued a TRO on August 3, 2022. Thus, the absence of allegations relative to Darwish for the period from July 27, 2022 through issuance of the TRO on August 3, 2022 is not meaningful and certainly does not demonstrate the absence of a live controversy involving Darwish.

Moreover, it appears from the tenor of Darwish's affidavit that he believes that he is entitled to control access to the TD Bank Accounts without the knowledge or consent of plaintiffs. As such, the Court believes that there is a substantial likelihood that Darwish would engage in such conduct in the future if not restrained from doing so.

It also bears emphasis that the declaratory relief sought in the Complaint and the injunctive relief sought in the OTSC are directed primarily at TD Bank. Following TD Bank's refusal to implement the Resolution, plaintiffs commenced this action principally seeking a declaration that TD Bank must abide by the Resolution. Plaintiffs then moved for a preliminary injunction principally requiring TD Bank to abide by the Resolution during the pendency of this action. Thus, even if no allegations of wrongdoing had been lodged against him, Darwish's actions of July 26, 2022 in relation to the TD Bank Accounts precipitated a live controversy between plaintiffs and TD Bank and made Darwish a necessary party to such controversy.

For all of the foregoing reasons, the Court is satisfied that plaintiffs are likely to succeed on the merits of their declaratory judgment cause of action, and the injury they seek to avoid through a preliminary injunction is neither remote nor speculative.

B. Irreparable Harm

The second element necessary to obtain a preliminary injunction is proof of irreparable harm (*see Nobu Next Door*, 4 NY3d at 840). In this context, irreparable harm means an injury for which a monetary award alone cannot be adequate compensation (*see Town of Liberty Volunteer Ambulance Corp. v Catskill Regional Med. Ctr.*, 30 AD3d 739, 740 [3d Dept 2006]).

The claimed injury must be more than just a mere possibility; it must be imminent and likely to occur absent issuance of the requested injunction (*see Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]).

Plaintiffs submit credible evidence that Darwish's unauthorized changes to the access rights of the TD Bank Accounts threaten the ability of plaintiffs to: (1) meet their financial obligations, including obligations to the Lenders; (2) execute essential business transactions in the regular course of business, including payments to manufacturers, lenders, employees and other creditors; and (3) exercise adequate financial oversight over the numerous financial transactions to which plaintiffs and the Dealerships are party each day (*see Yusko Aff.*, ¶¶ 21-22).

In opposition, Darwish reiterates his claim that there is no reason to believe that he will attempt to act in contravention of the Resolution, a contention that the Court rejects for the reasons stated above.

Darwish further argues that the access directives he provided to TD Bank were needed to prevent fraudulent transfers but nonetheless preserved plaintiffs' ability to conduct normal operations. However, Darwish's contention that the changes he made "would have allowed each of the dealerships and the Companies to maintain fully operational status" (Opp Mem, p. 8) is not adequately supported by his affidavit. While Darwish describes in his affidavit the access levels that he caused to be put into place on July 26, 2022, he does not address in any meaningful way the operational impacts to plaintiffs and the Dealerships described in Yusko's affidavit. Additionally, the Court is skeptical of Darwish's self-serving and conclusory averments regarding plaintiffs' operational needs and, instead, chooses to credit the affidavit testimony of plaintiffs' designated financial manager.

C. Balancing of the Equities

Finally, a preliminary injunction will not issue unless the balance of equities tips in favor of such relief. Even accepting Darwish's claim that Yusko failed to implement the new "check positive pay" system that he promised in April 2022 (Darwish Aff., ¶¶ 5-6), the balance of equities tips decidedly in favor of granting the preliminary injunction requested by plaintiffs.

Plaintiffs have shown that they are entitled to control access to the TD Bank Accounts, free of unauthorized interference by Darwish or anyone else, and Darwish has failed to come forward with any colorable claim of authority to support his actions of July 26, 2022. The equities weigh heavily against the type of self-help implemented by Darwish.

Further, the preliminary injunction will not cause any hardship to Darwish so long as he refrains from taking action on behalf of plaintiffs or the Dealerships that are contrary to plaintiffs' governing documents, including the Resolution. In contrast, the denial of the injunction would burden plaintiffs with detecting, preventing and remedying unilateral efforts by Darwish to restore his administrative access to the TD Bank Accounts and deny such access to other authorized officers and employees of plaintiffs.

CONCLUSION

Based on the foregoing,² it is

² The Court has considered Darwish's remaining arguments and contentions but finds them to be without merit. In particular, the Court is satisfied that the Yusko affidavit, which was notarized in the State of Florida, is accompanied by an appropriate certificate of conformity (*see* CPLR 2309 [c]; Real Property Law § 299-a [1] [a]). Even accepting Darwish's contention that the initial certificate of conformity was not made by an attorney qualified to certify to conformity with the law of a jurisdiction to which he is not admitted (*see* Opp Mem, pp. 10-11), the defect was promptly remedied after being brought to plaintiffs' attention through Darwish's answering papers (*see* NYSCEF Doc No. 32). Based on the new certification, the Court is satisfied that the Yusko affidavit conforms with the law of the State of Florida relative to acknowledgments and notarizations and that the person certifying to such conformity is qualified to make such a certificate. In any event, "the absence of a certificate of conformity for oaths taken out of this state but in sister states, is a mere irregularity, not a fatal defect, which can be ignored in the absence of a showing of actual prejudice" (*LaSalle Bank, N.A. v Pace*, 31 Misc 3d 627, 630 [Sup Ct, Suffolk County 2011]), *aff'd* 100 AD3d 970 [2d Dept 2012]; *accord* *Sebrow v Sebrow*, 205 AD3d 563, 564

ORDERED that plaintiffs' motion for a preliminary injunction is granted; and it is further

ORDERED that TD Bank shall implement the Action by Joint Consent of a Majority of the Members of the Management Committee and Board of Directors, dated July 27, 2022, and grant the duly authorized corporate representatives of Darwish Auto and Darwish General access to all bank accounts held at TD Bank by Darwish Auto and the following motor vehicle dealerships owned and managed by Darwish Auto and Darwish General: (i) WD East Green, LLC d/b/a Wally's Ford of East Greenbush; (ii) WD Adams 2, LLC d/b/a Wally's Ford of Adams; (iii) WD Adams 3, LLC d/b/a Wally's Chrysler Jeep Dodge Ram of Adams; (iv) WD Amsterdam, LLC d/b/a Wally's Chrysler Jeep Dodge Ram of Amsterdam; (v) WD Nell 2, LLC d/b/a Wally's Chrysler Jeep Dodge Ram of Nelliston; (vi) WD Nell 3, LLC d/b/a Wally's Ford of Nelliston; (vii) WD Schen 2, LLC d/b/a Volkswagen of Schenectady; (viii) WD Water 3, LLC d/b/a Wally's Mitsubishi of Watertown; (ix) WD Latham, LLC d/b/a Wally's Nissan of Latham and (x) WD Seneca, LLC d/b/a Wally's Ford of Seneca Falls; and it is further

ORDERED that TD Bank is enjoined and restrained from acting upon any request or disposing of the funds in the TD Bank Accounts in any manner whatsoever except as directed by the authorized corporate representatives of Darwish Auto and Darwish General; and it is further

ORDERED that Walid Darwish is enjoined from attempting to take any action relative to the TD Bank Accounts, except as authorized in the Action by Joint Consent of a Majority of the Members of the Management Committee and Board of Directors, dated July 27, 2022; and it is further

[1st Dept 2022]). In this regard, Darwish did not identify any particular problem with the manner in which the Yusko affidavit was acknowledged and notarized or any other prejudice.

ORDERED that plaintiffs shall post an undertaking in the amount of ten thousand dollars (**\$10,000.00**), conditioned that plaintiffs, if it is finally determined that they were not entitled to an injunction, will pay to defendants all damages and costs which may be sustained by reason of the aforementioned injunction; and finally it is

ORDERED that plaintiffs shall request a preliminary conference following joinder of issue, at which the parties shall be prepared to discuss (1) their willingness to proceed to mediation or other form of alternative dispute resolution and (2) a schedule for the expedited completion of any necessary disclosure.


This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiffs shall promptly serve notice of entry on all parties entitled to such notice.

Dated: Albany, New York
August 30, 2022


RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 1, 4-17, 21, 24, 26-32.


08/31/2022