

**Kay v Banchik**

2024 NY Slip Op 32494(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 650380/2024

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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JENNIFER KAY, JOSHUA COHEN,  
  
Plaintiff,

- v -

MITCHELL BANCHIK, MICHAEL ASCH, MNM2  
MANGAGEMENT INC., M.B.R.P. REST. INC., MIRABI  
INC., THIRD AVE. REST., INC., 442 AMSTERDAM REST.,  
CORP., MACDOUGAL REST. INC., 149 SECOND AVE.  
REST. INC., 134 WEST 3RD ST. REST. INC., 168  
ORCHARD ST. PARTNERS INC., 587 KING STREET  
RESTAURANT, LLC, 23 ANN STREET RESTAURANT  
LLC, B.B.L.L. INC. D/B/A CLEOS, KALEO INC. D/B/A JACK  
& GINGERS, 2258 WEST CHICAGO AVE PARTNERS LLC  
D/B/A FATSO'S, 1982 N. CLYBOURN PARTNERS LLC  
D/B/A FATSO'S, 442 AMSTERDAM REAL ESTATE CORP,  
300 EAST 76TH STREET PARTNERS LLC, 109  
MACDOUGAL STREET PARTNERS LLC, 430  
AMSTERDAM PARTNERS, LLC, 2048 WEST ARMITAGE  
PARTNERS LLC, 1939 WEST CHICAGO AVE PARTNERS  
LLC, MNM PROPERTIES, LLC, MB TRUST 1, MB TRUST 2,  
MA TRUST 1, MA TRUST 2

Defendant.

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INDEX NO. 650380/2024  
MOTION DATE 05/22/2024  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, and after oral argument, which took place on February 5, 2024, where Andreas Koutoudakis, Esq. appeared for Plaintiffs Jennifer Kay (“Ms. Kay”) and Joshua Cohen (“Mr. Cohen”) (collectively “Plaintiffs”), and Peter A. Mahler, Esq. and Becky (Hyun Jeong) Baek, Esq. appeared for all Defendants, Plaintiff’s motion for a preliminary injunction restraining Defendants from taking any action to approve the fair market value of any

shareholders' interests in the corporations and to provide to shareholders documents relied upon to determine and calculate said fair market value is denied.

## **I. Background**

This is an action seeking injunctive relief prohibiting Defendants from holding their annual meeting of shareholders (*see generally* NYSCEF Doc. 2). The Plaintiffs have already sued Defendants in a separate JAMS arbitration to determine the fair market value of shares of various named corporate defendants. Plaintiff Jennifer Kay also has a pending employment discrimination action in this court against Defendants Michael Asch and Mitchell Banchik under the caption *Kay v. Banchik*, Index No. 654454/2023. Plaintiffs, whose employment was recently terminated, are alleging that Defendants seek to devalue shares at the annual meeting so that the terminated employees' redemption price of their shares is far lower than the fair market value of the shares.

Plaintiffs allege violations of BCL 605, 619, and 623. Plaintiffs allege the notices for the 2024 annual shareholder meeting, wherein the fair market value of shares was to be determined, are fatally defective, in part because not all shareholders received them. Plaintiffs seek declaratory judgment stating that the notices were defective, injunctive relief enjoining any annual meeting from taking place until an independent evaluator can provide the fair market value of the shares, an accounting, and specific performance.<sup>1</sup>

In opposition, Defendants assert that all shareholders received the notices. Defendants also assert that the Governing Agreements explicitly state that the fair market value of shares is determined by an affirmative vote of the holders of the majority of shares at an annual shareholders meeting. This procedure has been followed without issue for 30 years, and Plaintiffs never voiced

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<sup>1</sup> Two months after filing their complaint and seeking injunctive relief, Plaintiffs amended their complaint to include causes of action for breach of fiduciary duty, seeking removal of controlling shareholders, unjust enrichment, conversion, attorneys' fees, and a cause of action for injunctive relief enjoining Defendants from incurring legal fees (NYSCEF Doc. 117).

any objection to this until they were terminated from their employment. Defendants assert that Plaintiffs are asking the Court to rewrite the Governing Agreements as nowhere is third-party appraisal contemplated. Defendants also argue that Plaintiff's request for injunctive relief is inequitable to the two dozen other shareholders who are not named parties. Defendants further claim there is no irreparable injury to Plaintiffs and to the extent they dispute the market value, they can litigate the issue in their existing JAMS arbitration, as required by the Governing Agreements.

## **II. Discussion**

### **A. Standard**

A preliminary injunction is an extraordinary provisional remedy requiring a special showing, including a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of the equities tipping in favor of the moving party (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255 [1st Dept 2009]). The Court must exercise great caution and only grant an injunction upon the clearest evidence (*Spectrum Stamford, LLC v 400 Atlantic Title, LLC*, 162 AD3d 615 [1st Dept 2018] quoting *Xerox Corp v Neises*, 31 AD2d 195 [1st Dept 1968]).

### **B. Merits**

Here, the Court finds Plaintiffs have not shown, by clear evidence, their likelihood of success on the merits. The Governing Agreements state that “[Price] shall be based upon the Corporation’s fair market value as determined by the affirmative vote of holders of a majority of all of the outstanding shares in the Corporation, at the annual meetings of the shareholders of the Corporation. The Corporation’s fair market value shall be re-determined annually...” The agreements are completely silent regarding the impartial appraisal that Plaintiffs request. Thus,

based on the record presented to this Court on this motion, it does not have the ability to direct the specific performance that Plaintiffs seek.

Defendants were following the procedure provided by the Governing Agreements – namely to determine fair market value by a vote of the majority of shareholders at the annual meeting. Based on the record, this was the procedure to determine fair market value for many years, and Plaintiffs’ never objected. Following a procedure which the Plaintiffs themselves took part in cannot avail them of the specific performance clause in the Governing Agreement, which states is viable only in the event of a breach of obligations under the agreement. By attempting to hold the Annual Meeting to determine the fair market value of the corporation, Defendants were not breaching any obligations, but following the obligations pursuant to the Governing Agreement. The Court may not look upon the agreed-upon terms of a contract to grant specific performance in circumstances other than those in which the parties agreed it would be available (*101123 LLC v Solis Realty LLC*, 23 AD3d 107 [1st Dept 2005]).

Further, although Plaintiffs claim Cohen did not receive any notice of the annual meeting, the evidence presented in opposition shows it was e-mailed to him. Pursuant to BCL § 605(a), “[i]f transmitted electronically, such notice is given when directed to the shareholder’s electronic mail address as supplied by the shareholder to the secretary of the corporation...” Moreover, while Plaintiffs allege the agenda for the meeting was not included in the notice in violation of BCL § 623, the purpose of BCL § 623 is primarily to protect minority shareholders who object to a merger or sale of property (*see, e.g. Van Horne v Ben-Dov*, 220 AD3d 500 [1st Dept 2023]; *Johnson v Asberry*, 190 AD3d 491, 493 [1st Dept 2021]; *Bear Pond Trail, LLC v American Tree Co., Inc.*, 61 AD3d 1195 [3d Dept 2009]; *American Premier Underwriters, Inc. v Abelow*, 54 AD3d 638 [1st

Dept 2008]). Here, there is no merger or sale taking place, but rather a vote of the shareholders to determine the fair market value of the corporations.

### **C. Irreparable Harm**

Moreover, the harm which Plaintiffs seek to prevent – namely a lowered valuation of the fair market value of their shares, is based entirely on speculation and is not imminent (*Matter of P & E. T. Foundation*, 204 AD3d 1460 [4th Dept 2022]; *U.S. Re Companies, Inc. v Scheerer*, 41 AD3d 152 [1st Dept 2007] [“speculation is not a basis for the imposition of a preliminary injunction”]; *Broadcast Music, Inc. v All-Industry Television Station Music License Committee*, 611 FSupp 868, 872 [SDNY 1985]). Plaintiffs’ alleged harm – namely a lesser valuation of their shares, is purely speculative as it assumes the majority of shareholders will agree to vote for a lesser valuation. Plaintiffs also fail to show that money damages is insufficient as they are seeking money damages in the JAMS arbitration as a result of the 2023 annual meeting valuation (*see Rick J. Jarvis Assoc. v Stotler*, 216 AD2d 649, 651 [3d Dept 1995] [quantifiable remedy precludes a finding of irreparable harm]).

### **D. Equities**

The Court likewise finds the balance of the equities do not tip in the favor of the moving party. There are numerous other shareholders who have not been joined, who purportedly desire to sell their shares, but are prohibited from doing so as the fair market value is in flux due to the Plaintiffs’ application (*Mariaux v Turtle Bay Towers Corp.*, 301 AD2d 460 [1st Dept 2003]). Moreover, it is inequitable for Plaintiffs to object to the annual meeting simply because they fear the fair market value may be assessed lower than what it previously was, especially after participating for many years in the very same procedure by which the fair market value was determined. Therefore, Plaintiffs’ motion for a preliminary injunction is denied.

Accordingly, it is hereby,

ORDERED that Plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this

Decision and Order, with notice of entry, on all parties via NYSCEF; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

7/12/2024  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE