

Hersko v Hersko

2024 NY Slip Op 32607(U)

July 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 520492/2021

Judge: Wayne Saitta

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of July 2024.

P R E S E N T:

HON. WAYNE SAIITTA, Justice.

-----X

ISAAC HERSKO a/k/a YITZCHOK SHLOMO
HERSKO,

Plaintiff,

Index No 520492/2021

-against-

BARRY HERSKO a/k/a ZEV DOV HERSKO
a/k/a BEREL HERSKO, BELLA HERSKO,
WILSON-HINS ASSOCIATES, INC, CLARK
WILSON, INC., WILSON PROPERTIES &
EQUITIES, INC., WILSON FLAT, INC., WILSON
HAN ASSOCIATES, INC., WILSON-MER
ASSOCIATES, INC., B. CLARK ASSOCIATES, INC.,
516 KINGSTON, LLC and

DECISION AND ORDER

MS #32

ABRAHAM WEISEL, as escrow agent,

Defendants.

-----X

The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and
Exhibits

650-663, 666

Cross-motions Affidavits (Affirmations)
and Exhibits

669-682

Answering Affidavit (Affirmation)

683-688

Reply Affidavit (Affirmation)

690

Supplemental Affidavit (Affirmation)

The case involves a dispute between two brothers over ownership of nine properties in Brooklyn (the Properties) and other investments. The Properties are all in the name of the Defendant corporations or LLC's that are owned or controlled by

Defendant BARRY HERSKO. Plaintiff claims that he is entitled to an equal interest in these properties and investments.

Plaintiff moves for an injunction directing Defendants to deposit all rent revenue of the corporations that own the Properties, including cash receipts, exclusively into bank accounts maintained by each corporation; and enjoining Defendants from transferring, encumbering, exchanging, pledging, loaning, borrowing, or otherwise disposing of, directly or indirectly, any funds of Defendant corporations, except those necessary expenses incurred in the ordinary course of business absent prior written consent of Plaintiff ISAAC HERSKO; and compelling Defendants to produce copies of all statements of each account into which the Defendants have deposited rent receipts for the past three years.

The complaint alleges that Plaintiff ISAAC HERSKO and his brother BARRY HERSKO were business partners and that they entered into an agreement that they would invest in real properties and that separate and distinct entities would be formed to purchase and hold title to each Property, but that BARRY HERSKO would be listed as the sole shareholder of these companies.

The brothers entered into a written agreement which provided among other things that ISAAC HERSKO and BARRY HERSKO were equal partners in their business dealings related to the Properties, including, but not limited to, profits from the Properties.

By decision and order dated April 21, 2022, Justice Rothenberg granted Plaintiff's motion for leave to enter a default judgment finding that Plaintiff submitted "proof of the facts constituting the claims in a factually detailed affidavit" and that the Defendants in opposing the motion, did not "dispute the allegations contained in the complaint or provide any factual support to establish a defense to the claims". The Appellate Division

affirmed those parts of the April 21, 2022 order which granted Plaintiff leave to file a default judgment.

In the same decision, Justice Rothenberg denied Plaintiff's motion to appoint a receiver to manage the Properties, finding that Plaintiff did not demonstrate a danger of irreparable loss or material injury to the Properties, and that the value of the real properties provide sufficient security to protect Plaintiff's interests.

Subsequently, by decision and order dated October 7, 2022, Justice Rothenberg denied Plaintiff's motion for an order directing Defendant BARRY HERSKO to deposit rental income from the Properties in an escrow account held by his attorneys, finding that Plaintiff did not demonstrate that he will be unable to execute on any judgment and citing her earlier finding that the value of the Properties provide sufficient security to protect Plaintiff's interests.

In this current motion, Plaintiff seeks a pre-judgment preliminary injunction to require Defendants to deposit all rental income in accounts maintained by the corporations that own each Property and to restrict the use of such income to the expenses incurred in managing the Properties, except with Plaintiff's consent. Plaintiff also seeks an order compelling Defendants to produce copies of all statements of each account for the past three years.

It is well established that to be granted a preliminary injunction, a movant must demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors their position (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]; *Zoller v. HSBC Mortg. Corp. (USA)*, 135 AD3d 932 [2d Dept 2016]; *Doe v. Axelrod*, 73 NY2d 748 [1988]).

A mandatory injunction such as sought here is limited to unusual or extraordinary circumstances in which the plaintiff shows a clear right to such relief (*Second on Second Café, Inc. v. Hing Sing Trading, Inc.*, 66 AD3d 255 [1st Dept 2009]; *Rosa Hairstylists, Inc. v. Jaber Food Corp.*, 218 AD2d 793 [2d Dept 1995]).

Here, Plaintiff has demonstrated a likelihood of success on the merits. At this point, the affirmance of the order granting leave to enter a default judgment has established the likelihood of success necessary to obtain preliminary injunctive relief. It is res judicata that Plaintiff is entitled to an equal share in the Properties and the income from the Properties.

However, Plaintiff has not shown that he faces irreparable harm if pre-judgment injunction is not granted.

Irreparable harm must be imminent, not speculative or remote (*Golden v. Steam Heat, Inc.*, 216 AD2d 440 [2d Dept 1995]).

Economic loss which is compensable by money damages, does not constitute irreparable harm (*In re Rice*, 105 AD3d 962 [2d Dept 2013]; *Fam.-Friendly Media*, 74 AD3d 738 [2d Dept 2010]). The Court of Appeals has rejected the argument that CPLR 6301 is a basis for granting an injunction to prevent the dissipation of assets necessary to satisfy the anticipated money judgment (*Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 NY2d 541, [2000]). The mere danger of asset-stripping is not a sufficient basis to make an exception to the requirement to show irreparable harm (*id.* at 548).

Lastly, that portion of the motion to compel Defendants to produce statements of accounts into which the Defendants have deposited rent receipts for the past three years, is a discovery matter and should be made to the Special Master Hon. Leonard Austin.

WHEREFORE, it is hereby ORDERED that that portion of Plaintiff's motion seeking a preliminary injunction directing Defendants to deposit all rent revenue of the corporations that own the Properties, including cash receipts, exclusively into bank accounts maintained by each corporation; and enjoining Defendants from transferring, encumbering, exchanging, pledging, loaning, borrowing, or otherwise disposing of, directly or indirectly, any funds of Corporate Defendants, except those necessary expenses incurred in the ordinary course of business absent prior written consent of Plaintiff ISAAC HERSKO, is denied; and it is further,

ORDERED that that portion of Plaintiff's motion to compel Defendants to produce copies of all statements of each account into which the Defendants have deposited rent receipts for the past three years is denied without prejudice to bringing such application before the Special Master, the Hon. Leonard Austin.

This constitutes the Decision and Order of the Court.

E N T E R:



JSC