

Volodarsky v Moonlight Ambulette Serv., Inc.

2011 NY Slip Op 34157(U)

May 10, 2011

Supreme Court, Kings County

Docket Number: 25484/08

Judge: Bert A. Bunyan

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At an IAS Term, Part 8 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 10th day of May, 2011.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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DAVID VOLODARSKY, DERIVATIVELY AS A SHAREHOLDER OF MOONLIGHT AMBULETTE SERVICE, INC., AND DAVID VOLODARSKY, INDIVIDUALLY,

Plaintiff,

- against -

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MOONLIGHT AMBULETTE SERVICE, INC., GREAT AMBULETTE SERVICE, INC., MODEL HANDICAP TRANSPORTATION SERVICE, INC., PRINCIPAL TRANSPORTATION SERVICES, INC., BRIGHTSTAR TRANSPORTATION, INC., ANATOLY ROSENTHAL, ANA ROSENTHAL, MICHAEL POGREBINSKY, BELLA KHAFI A/K/A BELLA IBRAGIMOVA, AS SUCCESSOR IN INTEREST TO ISAAC KHAFI (DECEASED), BELLA KHAFI, INDIVIDUALLY, MENAHEM SIMKHO TRANSPORTATION, INC., AND SIMKHO YOSUPOV,

Defendants.

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The following papers numbered 1 to 3 read on these motions :

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 _____
Opposing Affidavits (Affirmations) _____	2 _____
Reply Affidavits (Affirmations) _____	3 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, plaintiff David Volodarsky, derivatively as a shareholder of Moonlight Ambulette Service, Inc., (Moonlight) and individually, moves for an order: (1) pursuant to CPLR 6301 issuing a preliminary injunction restraining defendants from transferring, assigning, selling, hypothecating, encumbering or otherwise disposing of the assets of Great Ambulette Service, Inc. (Great) and Principal Transportation, Inc., (Principal); (2) pursuant to CPLR 6301 issuing a preliminary injunction restraining defendants from destroying and removing from the offices of Great and Principal all corporate books and records and other related corporate records and documents; and (3) an order pursuant to CPLR 6401 appointing a temporary receiver in order to prevent the systematic waste of the corporate assets of Great and Principal.

Plaintiff's motion, to the extent that it requests injunctive relief and the appointment of a receiver, is denied.¹

Plaintiff alleges that defendants Anatoly Rosenthal, Bella Khafi, as successor in interest to Isaac Khafi, deceased, and Michael Progrebinsky, who, with plaintiff, were the shareholders of Moonlight, transferred the assets and business operations of Moonlight to Great and Principal in order to destroy the value of plaintiff's ownership interest in Moonlight. Moonlight is an ambulette service that plaintiff formed and that was originally solely owned by plaintiff. After selling a portion of his shares, plaintiff held 29.5 percent

¹ Defendants' motion to quash non-party subpoenas, and the portion of plaintiff's motion compelling defendants to comply with discovery requests were addressed in an order dated February 16, 2011.

of Moonlight's shares, Khafi and Rosenthal each held 29 percent and defendant Michael Pogrebinsky held 12.5 percent. Following alleged erratic behavior by plaintiff, the Board of Directors of Moonlight terminated plaintiff from his then positions as president and director of Moonlight. Moonlight and plaintiff thereafter arbitrated their dispute with respect to this removal, and, in his award, the arbitrator found that the removal of plaintiff from his positions as president and director of Moonlight was appropriate, but that plaintiff could not be compelled to sell his 29.5 percent ownership interest in Moonlight, and had a continued right to distributions and dividends based on his stock ownership of Moonlight.

Plaintiff contends that, following the arbitrator's determination, Isaac Khafi² and defendants Anatoly Rosenthal and Michael Pogrebinsky, purchased another ambulance service which it renamed Great.³ Plaintiff further contends that defendants operated Great out of the same address as Moonlight and that defendants ultimately transferred all of the assets and business operations of Moonlight - including its vehicles, employees, and accounts - to Great. After plaintiff commenced this action, plaintiff asserts that defendants started a third corporation, Principal, and transferred assets of Moonlight and Great to it.⁴

² Khafi's wife, defendant Bella Khafi, apparently succeeded to Khafi's interest in Moonlight after his death in 2008.

³ Defendants do not dispute that the original shareholders of Great were non-party Edward Zhubrak and the wives of Rosenthal, Pogrebinsky and Khafi. In addition, Rosenthal concedes that he assisted in the development of Great, although he denies that he did so at the expense of Moonlight.

⁴ Plaintiff similarly alleges that defendants transferred Moonlight's assets and business operations to defendants Brightstar Transportation Services, Inc., (Brightstar), Menahem Simkha Transportation, Inc., (Menahem) and Model Transportation Company, Inc., (Model).

Based on these allegations, plaintiff has alleged causes of action premised on conversion, breach of fiduciary duty, self dealing, fraud, conspiracy to commit fraud and conversion of corporate assets, breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, for the imposition of a constructive trust and for a restraining order. For all of the causes of action, except the causes of action for the imposition of a constructive trust and for a restraining order, plaintiff has requested monetary damages. With respect to the constructive trust cause of action, plaintiff requests that the court declare that he has a 29.5 percent interest in defendant companies Great, Brightstar, Menahem, Principal and Model. In the cause of action for a restraining order, plaintiff requests a restraining order preventing defendants from, *inter alia*, transferring, assigning, or encumbering the assets of Great, Brightstar, Menahem, Principal and Model.

Plaintiff now cross-moves for a preliminary injunction barring defendants from, *inter alia*, transferring or encumbrancing the assets of Great and Principal. As is relevant here, a court may grant a preliminary injunction “in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the *subject of the action*, and tending to render the judgment ineffectual” (emphasis added) (CPLR 6301).⁵ A party is not entitled to a

⁵ CPLR 6301 contains a second ground for a preliminary injunction where the movant has a cause of action that includes a request for a permanent restraining order. As noted hereafter, this ground of relief does not apply to this action because plaintiff’s cause of action for a restraining order is incidental to his claim for monetary relief. In any event, to the extent that this ground is applicable, plaintiff, as discussed below, has failed to demonstrate irreparable harm.

preliminary injunction where the ultimate objective or *subject* of the action is a money judgment (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545-551 [2000]; *Fatima v Twenty Seven-Twenty Four Realty*, 65 AD3d 1079 [2009]; *Halmar Distribs. v Approved Mfg. Corp.*, 49 AD2d 841 [1975]). As noted above, plaintiff requests monetary damages in all of the causes of action except the cause of action for a constructive trust and the cause of action for a restraining order. The cause of action for a restraining order is incidental and in aid of the monetary relief plaintiff seeks and fails to provide an independent basis for a preliminary injunction (*see Credit Agricole Indosuez*, 94 NY2d at 549). Similarly, the inclusion of the cause of action for the imposition of a constructive trust does not alter the primary character of this action as one for money damages (*see Sutton, DeLeeuw, Clark & Darcy v Beck*, 155 AD2d 962, 963 [1989]).

In any event, even if the subject of this action is deemed of a kind that warrants injunctive relief, plaintiff has failed to demonstrate that he would be irreparably harmed if a preliminary injunction is not granted.⁶ Notably, in this respect, plaintiff does not claim that an award of monetary damages would be insufficient if defendants waste assets that may be deemed to belong to plaintiff through the creation of a constructive trust (*see Somers Assoc. v Corvino*, 156 AD2d 218, 219 [1989]; *Rosenthal v Rochester Button Co.*, 148 AD2d 375, 376 [1989]; *Haulage Enters. Corp. v Hempstead Resources Recovery Corp.*, 74 AD2d

⁶ Given the finding that plaintiff has failed to demonstrate irreparable harm, the court has not addressed whether plaintiff has demonstrated the other requirements for a preliminary injunction, namely a likelihood or probability of success on the merits and the balance of the equities favor the granting of the injunction (*see DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636 [2009]).

863, 864 [1980]; *see also DiFabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2009]; *Shapiro v Shorestein*, 157 AD2d 833, 835 [1990]). Rather, plaintiff only argues that defendants will act in a way that will make it more difficult to collect any damages. However, plaintiff offers little more than speculation that defendants will frustrate efforts to collect any financial award (*see Montour v White*, 212 AD2d 891, 893 [1995]; *Rosenthal*, 148 AD2d at 376-377). In this regard, the evidence that defendants purchased and/or are owners of other entities is not evidence that defendants are wasting or disposing of the assets of Great or Principal (*cf. Mitchell v Fidelity Borrowing LLC*, 34 AD3d 366, 366-367 [2006]). That plaintiff's proof may allow an inference that defendants wrongfully transferred assets of Moonlight to Great does not compel an inference that defendants will do the same with the assets of Great and Principal (*cf. Natoli v Milazzo*, 65 AD3d 1309, 1310 [2009]). As plaintiff's cross-motion papers fail to show his entitlement to a preliminary injunction, his request may be denied without holding a hearing (*see DiFabio*, 66 AD3d at 170).

Turning to plaintiff's request for the appointment of a receiver, movants may obtain the appointment of a receiver upon the submission of clear and convincing evidence of irreparable loss or waste to the subject of the action and that a receiver is necessary to protect their interest (*see Natoli*, 65 AD3d at 1310; *Matter of Armienti & Brooks*, 309 AD2d 659, 661 [2003]). Given that the standard for the appointment of a receiver is higher than that for obtaining a preliminary injunction, the conclusions that the true subject of the action is monetary damages, and, in any event, that plaintiff has failed to demonstrate irreparable

harm likewise warrant the denial the portion of plaintiff's motion for the appointment of a receiver (*see Natoli*, 65 AD3d at 1310; *Matter of Armienti & Brooks*, 309 AD2d at 661; *Brody v Mills*, 278 App Div 771 [1951]).

Finally, plaintiff requests a preliminary injunction restraining defendants from destroying the books and records of Great and Principal or from removing the books and records from the offices of Great and Principal. Such a request for a preliminary injunction might be appropriate prior to the commencement of an action to preserve evidence for discovery (*see Spraggins v Current Cab Corp.*, 127 Misc 2d 774, 774-775 [Sup Ct New York County 1985]; CPLR 3102[c]; *see also Schwartz v Lubin*, 6 AD2d 108, 111 [1958][granted preliminary injunction to preserve governmental records for purposes of a administrative hearing]). However, once an action is commenced, and defendants are on notice that they should produce, and, at the very least, preserve possible evidentiary material, defendants have a legal duty to preserve the material that a plaintiff can enforce through the discovery sanctions of CPLR 3126 and/or common-law spoliation principles (*see Adrian v Good Neighbor Apt. Assocs.*, 277 AD2d 146 [2000], *lv dismissed* 96 NY2d 754 [2001]; *Squitteri v City of New York*, 248 AD2d 201, 202 [1998]; *Kirkland v New York City Housing Auth.*, 236 AD2d 170, 174 [1997]; *see also Ortega v City of New York*, 9 NY3d 69 [2007]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 586-587 [2009]). Accordingly, plaintiff has other adequate legal remedies relating to the books, records and related materials possessed by Great and Principal, and thus has failed to demonstrate that he would be irreparably harmed if a preliminary injunction is not issued (*see Lyons v A.T.*

Wall, 2009 WL 3401247 [DRI 2009]). Moreover, plaintiff has also failed to demonstrate that defendants have destroyed or are likely to destroy evidence relevant to this action (*see id.*; *see also Treppel v Biovail*, 233 FRD 363, 371-372 [SDNY 2006]).

This constitutes the decision and order of the court.

E N T E R,

A handwritten signature in black ink, appearing to be 'B. Bunyan', enclosed within a large, loopy oval scribble.

J. S. C.

**HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT**