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SHORT FORM ORDER

INDEX No. 10-38178

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MD # 002 - MD
003 - MD # 004 - MD

SYMEON MAVROPOULIS, individually and derivatively on behalf of ANDERSON TRIM SPECIALTY, INC., Plaintiff, - against -	REYNOLDS, CARONIA, GIANELLI, HAGNEY, LA PINTA & QUATELA, LLP Attorney for Plaintiff 35 Arkay Drive, P.O. Box 11177 Hauppauge, New York 11788
ERIC ANDERSON, THERESA ANDERSON, E. ANDERSON FRAMING INC., and E. ANDERSON ENTERPRISE INC., Defendants.	CHRISTOPHER J. CASSAR, P.C. Attorney for Defendants 13 East Carver Street Huntington, New York 11743

Upon the following papers numbered 1 to 56 read on this motion for preliminary injunction and appointment of a receiver, motion to dismiss, motion to disqualify attorney, and turnover motion; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11, 23 - 27, 28 - 36, 39 - 46 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 15, 37 - 38, 47 - 53 ; Replying Affidavits and supporting papers 16 - 22, 54 - 56 ; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff for the appointment of a receiver of Anderson Trim Specialty, Inc. (ATS) for the purpose of operating the business, and for a preliminary injunction is denied; and it is further

ORDERED that the motion by the defendants for an order pursuant to CPLR 3211 (a) (1), (2), (3), (5), and (7) dismissing the complaint is denied; and it is further

ORDERED that the motion (incorrectly designated as a cross motion) by plaintiff for an order disqualifying the law firm of Christopher J. Cassar, P.C. from representing the defendants is denied; and it is further

ORDERED that this motion by the defendants for an order directing the plaintiffs to turn over a 2004 Sprinter van, which the defendants claim to own, is denied.

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This is an action by the plaintiff Symeon Mavropoulis (Mavropoulis), individually and derivatively on behalf of ATS, alleging, *inter alia*, misappropriation of funds, conversion, breach of fiduciary duty, and unjust enrichment against defendant Eric Anderson (Anderson), defendant Theresa Anderson (Theresa), defendant E. Anderson Framing Inc. (Framing), and defendant E. Anderson Enterprises Inc. (Enterprises). In 2006, Mavropoulis and Anderson incorporated ATS, and each was issued 50% of the outstanding shares of the corporation. The complaint alleges that, prior to incorporating ATS, Mavropoulis was highly skilled in installing trim on newly constructed homes, and that he was actively engaged in his own business. Mavropoulis asserts that the intent in forming ATS was to make it an independent corporation that would provide work that Anderson was not capable of performing through his solely owned corporations, Framing and Enterprise, which only did framing work on newly constructed homes. He further asserts that Anderson improperly co-mingled ATS funds with his corporations, misappropriated ATS funds and profits by cashing checks made payable to ATS, utilized ATS real property, tools and employees to conduct the business of Framing and Enterprise, and otherwise acted in bad faith in dealing with him and ATS. Mavropoulis claims that the Internal Revenue Service and the local district attorney began an investigation of Anderson's activities, which prompted a discussion between them about dissolving ATS, and that Anderson then locked him out of ATS, claiming he was sole owner of the corporation.

The plaintiff moves by order to show cause for a preliminary injunction enjoining the individual defendants from taking any compensation from ATS or the corporate defendants, the defendants from wasting or altering the assets of the corporate parties except as necessary to continue their business operations, the defendants from altering any business records of the corporate parties, the defendants from interfering with the plaintiffs' access to the warehouse, offices and books and records of ATS, and the corporate defendants from using the real property, chattel property, employees and name of ATS, pending the outcome of this litigation, as well as additional relief. To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; **Aetna Ins. Co. v Capasso**, 75 NY2d 860; **Dixon v Malouf**, 61 AD3d 630; **Coinmach Corp. v Alley Pond Owners Corp.**, 25 AD3d 642). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see* **Dixon v Malouf**, *supra*; **Ruiz v Meloney**, 26 AD3d 485; **Ying Fung Moy v Hohi Umeki**, 10 AD3d 604). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see* **Dixon v Malouf**, *supra; **Ruiz v Meloney***, *supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (**Blueberries Gourmet v Aris Realty Corp.**, 255 AD2d 348; *see* **Hoeffner v John F. Frank, Inc.**, 302 AD2d 428; **Peterson v Corbin**, 275 AD2d 35; **Nalitt v City of New York**, 138 AD2d 580).

Here, the plaintiff has not sufficiently demonstrated his entitlement to injunctive relief pending the determination of the action (*see* CPLR 6301). A review of the record indicates that the plaintiff has not shown a likelihood of success on the merits. The Court does not address the merits of the competing claims made by the parties but, instead, notes that there is sufficient competing evidence to call into question the plaintiff 's ability to succeed on the merits of his claims. In addition, the record does not reveal irreparable harm in the absence of a preliminary injunction. The plaintiff also has not established that he does not have an adequate remedy at law to recover for any alleged misappropriation of his funds, or those of ATS, should he be successful in his action against the defendants.

Irrespective of the Court's findings herein, the motion papers fail to properly address the subject of an undertaking, which is a mandatory prerequisite to an injunction (*see* CPLR 6312 [b]). The sum fixed by the Court for the undertaking must be sufficient to compensate the party being enjoined for the damages and costs sustained as a result of the issuance of the preliminary injunction in the event that it is later determined that the requester was not entitled to the injunctive relief (CPLR 6312 [b]; **Carter v Konstantatos**, 156 AD2d 632). The absence of an undertaking renders the preliminary injunction voidable (**Olechna v Town of Smithtown**, 51 AD2d 1036).

In addition, the appointment of a receiver at this time appears to be a moot point. The plaintiff asserts that the business has been co-opted by Anderson and integrated into his solely owned corporations, Framing and Enterprise. In addition, Anderson swears that ATS has had no income or profits from the date that Mavropoulis left the corporation. In any event, the utility of issuing a receiver of ATS for the purposes of carrying on its business operations has not been established.

The defendants move pursuant to CPLR 3211 (a) (1), (2), (3), (5), and (7) for an order dismissing the complaint. Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (**Leon v Martinez**, 84 NY2d 83; **Vitarelle v Vitarelle**, 65 AD3d 1034; **Mazur Bros. Realty, LLC v State of New York**, 59 AD3d 401). In support of their motion, the defendants submit the affirmation of their attorney, Eric Anderson's affidavit, and a copy of a document which they purport to be a written agreement, signed by the plaintiff surrendering his shares of stock in ATS, resigning as an officer of ATS, and distributing the assets of said corporation. The defendants assert that, in light of the agreement, they have established a defense as a matter of law, and that Mavropoulis has no standing to bring the instant action.

In opposition to the motion, Mavropoulis asserts that Anderson told him that the document was merely a review of ATS's current status, and that a formal agreement would be drafted by the corporate attorney. A review of the document reveals that it does not contain material terms regarding a purported surrender or sale of corporate stock. In addition, it is merely initialed by Mavropoulis after a single clause which reads: "Lawyer agreement to follow."

The Court finds that the document does not conclusively resolve all factual issues, nor does it establish a defense as a matter of law. The submitted document does not establish that the defendants have a defense against the plaintiff's claim that he was locked out of ATS, that the purported agreement did not constitute a final agreement and a meeting of the minds regarding the dissolution of ATS, and that Anderson misappropriated funds due ATS. In addition, the defendants do not dispute Mavropoulis's claim that he was not paid for the alleged surrender of his shares of stock in ATS. Accordingly, this branch of the defendants motion is denied.

On a motion to dismiss pursuant to CPLR §3211, pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (**Leon v Martinez**, 84 NY2d 83). Under CPLR 3211 (a) (7), the Court is limited to examining the pleading to determine whether it states a cause of action (**Guggenheimer v Ginzburg**, 43 NY2d 268). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (**Pacific Carlton Development Corp. v 752 Pacific, LLC**, 62 AD3d 677;

Gjonlekaj v Sot, 308 AD2d 471). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (**Leon v. Martinez**, *supra*; **International Oil Field Supply Services Corp. v Fadeyi**, 35 AD3d 372; **Thomas McGee v City of Rensselaer**, 174 Misc2d 491). Upon a motion to dismiss for failure to state a cause of action, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (**Chan Ming v Chui Pak Hoi et al,** 163 AD2d 268).

The defendants do not articulate their specific objections to any of the 12 causes of action set forth in the complaint. Instead, the defendants merely assert that Mavropoulis is no longer a shareholder of ATS. Looking at the complaint in the light most favorable to the plaintiff, the Court finds that the facts alleged in the complaint set forth cognizable legal theories for each cause of action asserted therein. Accordingly, the defendants' motion to dismiss the complaint is denied.

The plaintiff moves for an order disqualifying the law firm of Christopher J. Cassar, P.C. from representing the defendants in this action. The gravamen of the plaintiff's argument is that said law firm acted as counsel for ATS, Framing and Enterprise, that during its representation of ATS it had "continual confidential attorney-client communications" with the plaintiff, and that it may have consulted with Anderson in connection with how the subject corporations would conduct business. In addition, Mavropoulis claims that the principal in the law firm bartered with Anderson to obtain trim work by ATS in exchange for legal fees in representing Framing and Enterprise, making him a material witness in the instant action.

The disqualification of an attorney is a matter that rests solely in the discretion of the trial court (*see* **Boyd v Trent**, 287 AD2d 475), and a client's right to the counsel of its own choosing is an invaluable right that should not be tampered with unless a clear showing of disqualification has been made (**S & S Hotel Ventures Ltd. v 777 S.H. Corp.**, 69 NY2d 437; **Zutler v Drivershield *Corp.***, 15 AD3d 397). The burden is on the proponent of disqualification to make that showing (*see* **Lipshitz v Stein**, 65 AD3d 573; **Petrossian v Grossman**, 219 AD2d 587). Here, plaintiff has not satisfied his burden of establishing the necessity for the disqualification of defendant's counsel (*see* **S & S Hotel Ventures Ltd. v 777 S.H. Corp.**, *supra*; **Cicero & Pastore v Patchogue Nursing Ctr.**, 149 AD2d 647).

A party seeking disqualification of its adversary's lawyer must prove that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse. Only "where the movant satisfies all three inquiries does the irrebuttable presumption of disqualification arise" (**Tekni-Plex, Inc. v Meyner & Landis**, 89 NY2d 123, 132). A lawyer for a corporation represents the corporation, not its directors, officers, employees, or members (*see* **Talvy v American Red Cross in Greater N.Y.**, 205 AD2d 143, *affd* 87 NY2d 826; *see also* Rules of Professional Conduct § 1.13 (a) [22 NYCRR 1200.13]), unless the parties have expressly agreed otherwise in the circumstances of a particular matter (**Cooke v Laidlaw Adams & Peck**, 126 AD2d 453). Here, the plaintiff failed to establish that an attorney-client relationship existed, and failed to allege that the Cassar firm obtained any confidential information from him or that there is a reasonable probability that such information will be disclosed during the course of this litigation (**Jamaica Pub. Serv. Co. v AIU Ins. Co.**, 92 NY2d 631; **Wissler v Ashkinazy**, 299 AD2d 352). In addition, plaintiff has failed to submit any

evidence that the principal of the firm will be a necessary witness in this action (**Talvy v American Red Cross in Greater N.Y.**, *supra*). Accordingly, the plaintiff's motion which seeks disqualification of the defendants' attorney is denied.

The defendants move for on order "requesting return of the defendant's 2004 Sprinter van currently in the plaintiff's custody." However, the defendants do not articulate the legal authority enabling the Court to issue such an order. The Court notes that a judgment has not been rendered against the plaintiff, nor has a petition for a turnover proceeding been filed or served upon the plaintiff pursuant to CPLR 5225 (a). In addition, the defendants have not interposed a counterclaim for replevin in the instant action. CPLR 7101 creates a cause of action in replevin "to try the right to possession of a chattel" and to determine whether the plaintiff or defendant has the superior possessory right (McKinney's Cons Laws of NY, Book 7B, CPLR 7101, p 385) and not who has title (**GMAC, LLC v Ramp Chevrolet**, 2009 NY Slip Op 31496U; **Scutti Pontiac v Rund**, 92 Misc2d 881). Accordingly, the defendants' motion "requesting return" of said van is denied.

Dated: February 10, 2012

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION