Spivak v Bertrand
2016 NY Slip Op 30216(U)
February 8, 2016
Supreme Court, New York County
Docket Number: 653712/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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BENJAMIN SPIVAK, individually and derivatively on behalf of EYEBALL ON THE FLOOR, INC., and EYEBALL DIGITAL, INC.,

Plaintiff,

-against-

ERIC BERTRAND, THE ERIC BERTRAND TRUST, LIMORE SHUR, EYEBALL ON THE FLOOR, INC., and MODUS OPERANDI, LLC,

Defendants,

EYEBALL DIGITAL, INC., and EYEBALL ON THE FLOOR, INC.,

Nominal Defendants.

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DECISION AND ORDER

Index No. 653712/2015

HON. ANIL C. SINGH, J.:

Plaintiff Benjamin Spivak moves by order to show cause pursuant to CPLR 6301 for a preliminary injunction to enjoin the majority shareholders from taking any steps to cancel plaintiff's shares in two companies or to force him to involuntarily transfer the shares. Defendants oppose the motion.

The material facts are as follows.

Eyeball on the Floor, Inc. ("Eyeball") is a branding, advertising, and design

services company founded by defendant Limore Shur in 1994. Eyeball has approximately 30 employees and also contracts with freelancers. In 2011, Shur, who was at the time Eyeball's sole shareholder, sold a minority stake to two of his employees – namely, plaintiff Benjamin Spivak and defendant Eric Bertrand.

Spivak received a 25% equity ownership in Eyeball, one of the three seats on the board of directors, corporate officer positions, and an employment agreement with the company. The employment agreement signed by Spivak and Shur was entered into on January 1, 2012, for an initial term ending December 31, 2015. Bertrand received a 15% equity ownership in the company under a separate consulting agreement.

In 2012, Shur moved to Los Angeles to establish a West Coast office for Eyeball. At that time, Shur appointed Spivak to serve as Eyeball's "managing partner" and placed him in charge of Eyeball's day-to-day operations in New York. As Eyeball expanded to include offices in Los Angeles and Miami, Spivak's responsibilities expanded to include the oversight and management of the staff in those offices as well.

In September 2014, Bertrand and Shur began pursuing a merger between Eyeball (including its digital group, Eyeball Digital, Inc.) and Modus Operandi ("ModOp"), a digital advertising agency with approximately 90 employees,

through the sale of each entity's respective assets to a newly-formed entity.

When Spivak informed Shur and Bertrand that he opposed the merger, Bertrand and Shur in July or August of 2015 offered to buy-out Spivak's interest in Eyeball for approximately $300,000.00. Spivak rejected the offer, making a $3 million counteroffer.

On September 3, 2015, Shur and Bertrand noticed a special meeting of Eyeball's board of directors and voted to terminate Spivak's employment agreement. Shur and Bertrand then notified Spivak that his employment agreement would not be renewed after the initial term ended on December 31, 2015. No reason was given for the termination.

In response, Spivak commenced an arbitration proceeding asserting that Spivak's employment agreement did not give Eyeball the right to terminate him without cause at the conclusion of the initial term.

Upon receiving Spivak's arbitration demand and reviewing Spivak's employment agreement, Shur and Bertrand contend that they discovered for the first time that there was a scrivener's error in the agreement creating an ambiguity over whether Spivak's employment agreement could be terminated without cause as of the end of 2015.

On October 20, 2015, Eyeball sent Spivak a letter notifying him that his

employment was being terminated for cause. Defendants contend that, during the initial term of Spivak's employment agreement, Spivak violated the terms of his employment agreement by neglecting his duties and engaging in conduct detrimental to Eyeball's interests.

Plaintiff alleges that Bertrand and Shur's termination of Spivak for cause is pretextual and false as their primary motive was to trigger the Involuntary Transfer provision pursuant to Section 5 of Eyeball's Amended and Restated Stockholders Agreement, which forces a shareholder terminated for cause to offer his shares to the other shareholders at a heavily discounted price within a 75-day period.

Plaintiff contends that Bertrand and Shur are now in a race against time to effectuate their forced buy-out of Spivak's shares at a heavily discounted price prior to the shareholder vote on the planned merger for the following five improper reasons:

1) By eliminating Spivak as a shareholder, Bertrand and Shur are attempting to circumvent BCL section 623, New York's dissenting shareholder statute, which obligates a corporation to purchase at fair value the shares of a minority shareholder who dissents to a merger;

2) Bertrand and Shur are attempting to personally gain from forcing Spivak to sell his shares at a heavily discounted price prior to the planned merger;

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3) A forcible buy-out of Spivak's shares results in Bertrand and Shur obtaining a majority interest in the consolidated company with a 60% ownership stake;

4) As Spivak has notified Bertrand and Shur that Eyeball on the Floor's planned merger with ModOp requires his consent pursuant to Article II, Section 6 of the bylaws, eliminating Spivak as a shareholder removes that potential obstacle to the merger; and

5) In terminating Spivak for cause, Bertrand and Shur are attempting to avoid having the consolidated company assume Eyeball on the Floor's obligations to Spivak under his employment agreement.

The Alleged Scrivener's Error in Spivak's Employment Agreement

Section 4 of Spivak's employment agreement states in pertinent part as follows:

> 4. TERM AND TERMINATION OF EMPLOYMENT. The initial term of employment is for a period commencing on the date of this Agreement and continuing until December 31, 2015 unless terminated earlier for "Cause" (as such term is defined in Section 4.3 hereof, the "Initial Term"). **Following the successful completion of the Initial Term, the term of this Agreement shall automatically renew for successive one-year renewals for a period of three (3) years thereafter; following which, this Agreement shall automatically renew for successive one year terms unless terminated by either party on not less than ninety (90) days' written notice for any reason or immediately for Cause** (the Initial Term and all additional terms shall be referred to as the "Term")

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provided that:

. . .

> 4.3. Termination by the Company for Cause. The Employee's services under this agreement may be terminated effective immediately at any time for "Cause" by written notice by the Company to the Employee specifying the cause, which shall be evaluated, in good faith, by the Employer. The following acts or omissions by the Employee shall constitute "Cause": (A) deliberate dishonesty detrimental to the best interests of the Company that would cause a negative consequence on the Company; (B) conduct of the Employee involving any immoral acts which could impair the reputation of the Employee or the Company, including the conviction of any felonies or crimes of moral turpitude; (C) inattention to or neglect of duties and responsibilities assigned to the Employee pursuant to this Agreement that has been brought to the attention of Employee in writing at least sixty (60) days prior to the termination and Employee has failed to cure any alleged deficits within such 60-day period or (D) a material and substantial breach by the Employee of any of the provisions of this Agreement including, but not limited to, a breach of his representations and warranties and Employee's failure to cure such breach within sixty (60) days following written notice from the President of the Company to the Employee reasonably identifying the breach in question, or (E) the Employee ceases to own stock in the Company.

(Employment Agreement of Benjamin Spivak, pp. 3-4, para. 4, NYSCEF Doc. No. 32) (emphasis added).

In contrast to Spivak's employment agreement, defendant Bertrand signed a consulting agreement. The length and term of Bertrand's consulting agreement, as well as the circumstances under which he could be terminated by the company without cause, are set forth in section 4.1 of Bertrand's consulting contract, which

states as follows:

> Consultant's engagement under this agreement shall commence on the date hereof and extend through December 31, 2015 or until sooner terminated for cause in accordance with section 4.2 (the "Initial Term"). **Following the successful completion of the initial term, the term of the agreement shall automatically renew for successive one year terms (each, an "Additional Term") unless terminated by either party on not less than ninety (90) days' written notice to the other party.** In the event that consultant or the company sends a termination notice as contemplated by the preceding sentence, consultant's retention by the company shall terminate at the conclusion of the initial term or additional term then in effect and during which such notice is given (the Initial Term and all Additional Terms shall be referred to hereinafter as the "Term"). (emphasis added)

The defendants contend that the attorney who drafted the Spivak and Bertrand agreements committed a scrivener's error in that the parties' mutual agreement and intended result regarding the term of Bertrand's consulting agreement and Spivak's employment agreement – as well as the circumstances under which either could be terminated by the company without cause – is reflected in section 4.1 of Bertrand's consulting agreement.

Limore Shur in a sworn affidavit states that, due to a drafting error that was not known to him at the time Spivak's employment agreement was prepared and signed, section 4 of Spivak's employment agreement was drafted in a way that did not conform to the analogous provision in Bertrand's consulting agreement. Shur contends that, instead of providing for only an initial term followed by three

additional one-year renewal terms which can be terminated by either party, section 4 of Spivak's employment agreement states that there will be an initial term, after which the agreement automatically renews for three successive one-year renewal terms, followed by three more one-year renewal terms which can be terminated by either party. Finally, Shur asserts that no one – including Spivak – brought this discrepancy to Shur's attention prior to the time Shur signed Spivak's employment agreement on behalf of Eyeball.

The Stockholders' Agreement and the Corporate Bylaws

Contemporaneously with the execution of the individual agreements, Shur, Spivak, Bertrand and Eyeball also all entered into a stockholders' agreement. The stockholders' agreement provides that if any stockholder ceases to be employed by Eyeball for any reason, that stockholder is contractually obligated to transfer his shares to the other stockholders (an "involuntary transfer") (Amended and Restated Stockholders Agreement, p. 5, para. 5, NYSCEF Doc. No. 33).

Article 2, Section 6 of the corporate by-laws state that, if there is a sale of assets outside of the ordinary course, the affirmative vote of shareholders holding at least ninety percent (90%) of the stock is required (Amended and Restated By-Laws, p. 2, NYSCEF Doc. No. 35).

Plaintiff contends that under this provision of the by-laws, minority

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shareholders preserve the right to prevent certain transactions from taking place and one of those transactions, which is relevant here, is that minority shareholders, were allowed to stop a transaction that involved a sale of a company's assets. Further, plaintiff contends that under section 5 of the stockholders agreement, if Spivak's employment were to terminate for any reason – for cause, without cause, voluntarily – he is required to relinquish his shares in Eyeball.

Injunctive Relief

A preliminary injunction is a drastic remedy which will not be granted unless the movant satisfies his or her burden of establishing a clear right to such relief under the law and undisputed facts (see County of Orange v. Lockey, 111 A.D.2d 896, 897 [2d Dept., 1985]). The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court (Nobu Next Door, LLC v. Fine Arts Housing, Inc. 4 N.Y.3d 839 [2005]). In exercising its discretion, the courts have articulated a three-part test which is applied when a party seeks preliminary injunctive relief. To be entitled to a preliminary injunction, the plaintiff must demonstrate: 1) a probability of success on the merits; 2) danger of irreparable injury in the absence of the injunction; and 3) a balancing of the equities in its favor (id.).

The movant must show "by affidavit and such other evidence as may be

submitted," that: 1) there is a cause of action; and 2) one of the grounds set forth for a preliminary injunction in CPLR 6301 exists.[1]

Plaintiff's submissions must contain sufficient evidence to enable the court to assess the plaintiff's right to the preliminary injunction. Bare conclusory allegations, and allegations consisting of speculation and conjecture, are insufficient (Peterson v. Corbin, 275 A.D.2d 35 [2d Dept., 2000].

Likelihood of Success on the Merits

Under the first prong of the test, the movant must demonstrate that it is likely to ultimately succeed on the merits of the action (Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 [1990]). Even when the facts are in dispute, the court can find that a plaintiff has a likelihood of success on the merits from the evidence presented, even though such evidence may not be conclusive (Demartini v. Chatham Green, 169 A.D.2d 689, 690 [1st Dept., 1991]).

The defendants assert that plaintiff has failed to satisfy his burden of likelihood of success on the merits, for there is a scrivener's error in Spivak's employment agreement.

"A scrivener's error constitutes a mistake in the reduction of an agreement

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[1]CPLR 6312(a). Pursuant to CPLR 105(u), a verified pleading may be used in the same manner as an affidavit.

to writing" (Rosalie Estates, Inc. v. Colonia Insurance Co., 227 A.D.2d 335, 337 [1st Dep't 1996]). "A written agreement may be reformed for mutual mistake where the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (Ebasco Constructors, Inc. v. Aetna Insurance Co., 260 A.D.2d 287, 290 [1st Dep't 1999] (internal quotation marks and citation omitted)).

The evidence necessary to warrant reformation of a written instrument has been summarized as follows:

> There is a heavy presumption that a deliberately prepared and executed written instrument accurately reflects the true intention of the parties. To overcome this presumption and warrant a trial on a claim for reformation, the plaintiff must come forth with a high level of proof, free of contradiction or equivocation, that the instrument is not written as intended by both parties. The party seeking reformation bears the burden of proving by clear and convincing evidence that the instrument is not correct due to an error in the reduction of the agreement to writing, or that it was executed under mutual mistake or unilateral mistake coupled with fraud. This means that the plaintiff must show, in no uncertain terms, not only that mistake or fraud exists, but also exactly what the parties agreed upon, particularly if the negotiations were conducted by sophisticated, counseled people.
>
> ...
>
> Where the mistake lies in the basis of the agreement itself rather than in its reduction to writing, it is incumbent upon the proponent of reformation to show that the mistake is mutual; that is, that both parties intended the same agreement, which is different than what is reflected in the written instrument. It is not necessary, however, to prove a mutual mistake where the alleged error occurred in the

> reduction of the agreement to writing. To succeed on a reformation claim on unilateral mistake, the plaintiff bears the burden of proving both its own mistake and fraudulent concealment by the other party.

(16 N.Y. Jur.2d Cancellation of Instruments section 92).

Where a defendant argues that, due to an alleged scrivener's error, the plaintiff has failed to show a likelihood of success on the merits, the court's analysis is focused squarely on the nature of the evidence offered by the defendants. The Second Department's opinion in Sumiko Enterprises, Inc. v. Town Realty Co., 259 A.D.2d 483 [2d Dept., 1999], illustrates this concept in action.

In Sumiko, the plaintiff commenced an action for a judgment declaring that an option period under a certain agreement between the parties did not expire until a specific time later than that claimed by the defendants, and enjoining the defendants from interfering with the plaintiff's rights under the agreement. The trial court denied plaintiff's motion for a preliminary injunction enjoining the sale of the property which was the subject of the agreement. On appeal, the Second Department affirmed, stating that

> the Supreme Court properly exercised its discretion in denying the plaintiff's motion for a preliminary injunction. Although the option agreement executed by the parties in December 1995 stated on its face that the option period would expire on December 31, 1998, in opposition to the plaintiff's motion for a preliminary injunction, the defendants submitted documentary evidence indicating that the

> parties actually agreed upon a two-year option period, to expire on December 31, 1997. The defendants produced an affidavit from the plaintiff's former attorney, stating that it was his understanding that the term of the option agreement would be a period of two years. In view of the sharp factual dispute regarding whether the December 31, 1998, date which appears in the option agreement is a scrivener's error which may be corrected by reformation of the agreement, we cannot conclude that the plaintiff met its burden of demonstrating an ultimate likelihood of success on the merits.

(Sumiko, 259 A.D.2d at 483 (internal citations omitted)).

By contrast, the defendants in the instant matter have submitted no affidavit whatsoever from the attorney who drafted the agreements. Instead, only the defendants themselves have submitted sworn affidavits, and those affidavits are conclusory and self-serving.

Defendant Shur contends in his sworn affidavit that Spivak, Bertrand and Shur all agreed and intended that Spivak and Bertrand would be treated equally in terms of salary, benefits, length of contract term, and circumstances under which Spivak and Bertrand's respective agreements could be terminated. In a word, Shur contends that the agreements of Spivak and Bertrand were to "conform" to one another. By contrast, Spivak contends that Spivak's employment agreement was an entirely separate agreement containing different provisions than Bertrand's consulting agreement.

A comparison of the two agreements clearly demonstrates that the

agreements are, indeed, fundamentally different. For example, the Spivak agreement, which bears the title "Employment Agreement," states that Spivak is an employee of the company who was serving as the Vice-President and Secretary of the company (Spivak Aff., exhibit 2, p. 1). By contrast, the Bertrand agreement, which bears the title "Consulting Agreement," states that Bertrand was being retained by the company as a consultant to provide services customarily performed by a Chief Operating Officer and Chief Financial Officer, and that Bertrand's relationship to the company was that of an independent contractor (Shur Aff., exhibit D, pp. 1-2). Spivak's agreement requires him to work 30 hours a week, while Bertrand's does not. Spivak's agreement prohibits him from doing work for other companies, while Bertrand's does not.

In addition, the provisions of the agreements regarding benefits are significantly different. Under the heading "Other Benefits," Spivak's agreement states:

> A. Employee shall be provided with family dental and health insurance for himself and his spouse, with the company paying for 100% of the cost of such coverage.
>
> B. Employee shall be provided with 3 days of vacation per month and six days of paid time off per year.
>
> C. The company shall allow the employee to contribute [to] the company's 401(k) plan, pursuant to the company's 401(k) program.

(Spivak Aff., Exhibit 2, p. 2).

By contrast, under the heading "Other Benefits" in Bertrand's consulting agreement, the sole benefit listed is that the "consultant shall be provided with 3 days of vacation per month and six days of paid time off per year" (NYSCEF Doc., No. 68, p. 5).

In light of the separate agreements containing such significantly materially different provisions, defendants' contention that the parties intended the term of the Spivak employment agreement to be a mirror image of the term of the Bertrand consulting agreement is not convincing.

For the above reasons, the Court finds that on the present record the plaintiff has met his burden of establishing a likelihood of success on the merits relying on, among other things, the employment agreement, the shareholders' agreement, and the bylaws.

Irreparable Injury

It is axiomatic that a plaintiff cannot establish irreparable injury if there is an adequate remedy available at law. The legal remedy, however, must be as complete, practical and efficient as the equitable remedy.

Irreparable injury is an injury that is neither remote nor speculative, but rather actual and imminent (Khan v. State University of New York Health Science

Center at Brooklyn, 271 A.D.2d 656 [2d Dept., 2000]).

Defendants contend that plaintiff has not shown that he will suffer irreparable harm which would entitle him to a preliminary injunction. They argue that most of plaintiff's claims in his complaint seek money damages as relief and that entitlement to money damages is not a harm which is irreparable.

However, plaintiff in his sworn affidavit asserts that he will suffer more than monetary harm. The alleged harm – an opportunity for defendants to shift the balance of power and assume management and control of the company – may properly be viewed as irreparable injury. Moreover, under the circumstances of this case, plaintiff's request to maintain the status quo by continuing to enforce the existing shareholder and employment agreements and bylaws through the pendency of the action is proper even if the injury were purely monetary (see, for example, Arthur Young & Co. v. Black, 97 A.D.2d 369, 370 [1st Dept., 1983]).

It is well settled under New York law that an irreparable injury may exist where there is a threatened loss of management and control of a closely held corporation.

For example, in Casita, LP v. MapleWood Equity Partners (Offshore) Ltd., 60 A.D.3d 488 [1st Dept., 2009], the First Department held that the trial court did not err when it held that a corporation's capital call to cover litigation expenses

and follow on investments was untimely and plaintiff would be irreparably harmed absent a preliminary injunction enjoining defendant from holding plaintiff in default because such a finding would result in plaintiff losing voting power and decision-making rights.

In Yemini v. Goldberg, 60 A.D.3d 935 [2d Dept., 2009], the Second Department stated unambiguously that money damages are not sufficient where control and management of a corporation and its holdings are at stake.

Another enlightening opinion is Matter of Madelone v. Whitten, 18 Misc.3d 1131(A) [Sup. Ct., Albany Cty., 2008], which was an action commenced to enforce the terms of an operating agreement. The Court held that plaintiff (who allegedly held 43% of a privately held company's voting rights) would be irreparably harmed where defendants had acknowledged that absent a preliminary injunction they would set in motion a process that would result in plaintiff's termination as a member and employee of the company.

The final case illustrating that an irreparable injury may exist where there is a threatened loss of management and control is Louis Foodservice Corp. v. Konstantinos Vouyiouklis, 2002 WL 31663230 (Sup. Ct., Kings Cty, 2002). The Court concluded that the loss of control of a closely held business would result in irreparable harm to plaintiff. Accordingly, the Court granted plaintiff's motion to

enjoin defendants, who claimed to be selected or appointed directors, from noticing, calling, conducting or participating in any regular or special meeting of the shareholders or the board of directors for the purpose of removing plaintiff as president of the closely held company.

Based on the above cases, the plaintiff will be irreparable injured unless an injunction is granted. Spivak will be stripped of his rights under the bylaws, allowing the merger to go through without Spivak being given an opportunity to vote on the merger.

Balancing the Equities

In balancing the equities the court must weigh the harm each side will suffer in the absence or face of injunctive relief. To prevail, plaintiff must show that the irreparable injury it will sustain absent the injunction is more burdensome than the harm that would be caused to the defendant if the injunction is granted (Dong-Puo Yang v. 75 Rockefeller Café Corp. 50 A.D.3d 320 [1st Dept., 2008]).

Plaintiff contends that a preliminary injunction preserves the status quo requiring the defendants to comply with the bylaws requiring obtaining Spivak's consent on a sale of assets. Plaintiff asserts that maintaining the status quo does not harm the defendants in any way and that divesting Spivak of his shares would force him to pay money today.

In response, defendants contend that Eyeball and Eyeball Digital are financially distressed and, if they are enjoined from consummating a strategic merger with ModOp, it is unlikely that either Eyeball or Eyeball Digital can remain in business through the conclusion of this litigation. Further, defendants assert that if the companies go out of business, in addition to the loss of all shareholder value, at least 50 employees and long-term freelancers will lose their jobs.

In short, the Court finds that the equities weigh in favor of Spivak. The defendants notified Spivak that he was fired not long after he expressed his unwillingness to go along with merger. It appears that the defendants are unfairly attempting to force Spivak out of the company because of his dissenting position on the merger. Furthermore, defendants have not submitted evidence in support of their contention that the companies are financially distressed and will not survive absent a merger.

Undertaking

Before granting a preliminary injunction, the movant must give an undertaking in an amount fixed by the court (CPLR 6311). "The fixing of the amount of an undertaking is a matter within the sound discretion of the court, and will not be disturbed absent an improvident exercise of discretion" (Lelekakis v.

Kamamis, 303 A.D.2d 380 [2d Dept., 2003]). It is well settled that the amount must be rationally related to defendants' potential damages if the preliminary injunction later proves to have been unwarranted (Madison/Fifth Associates LLC v. 1841-1843 Ocean Parkway, LLC, 50 A.D.3d 533, 534 [1st Dept., 2008]).

"It is improper to require, as a condition of a preliminary injunction, an undertaking in an amount which would result in a denial of the relief to which the plaintiffs show themselves to be entitled" (67 N.Y.Jur.2d Injunctions 172, citing Zonghetti v. Jeromack, 150 A.D.2d 561 (holding that plaintiffs were required to post only $100,000 undertaking as prerequisite to granting injunctive relief, not $740,000 undertaking originally required by trial court); see also Modugno v. Merritt-Chapman Scott Corp., 17 Misc.2d 679 [Supreme Ct., Special Term, Queens Cty., 1959], and Barouh Eaton Allen Corp. v. International Business Machines Corp., 1980 WL 4693 [Supreme Ct., Special Term, Kings Cty., 1980]).

On the other hand, the amount of the bond must not be insufficient (Weitzen v. 130 E. 65th St. Sponsor Corp., 86 A.D.2d 511 [1st Dept., 1982]).

In the instant matter, plaintiff urges the Court to fix the undertaking in the sum of $5,000. Defendants contend that it should be fixed in the sum of $12,000,000.

On this record, the Court finds that the amount of the undertaking sought by

the defendants would effectively deny plaintiff injunctive relief. Mr. Spivak clearly does not have the financial resources necessary to secure such an excessive undertaking. The amount of the undertaking must not result in the denial of the equitable relief to which the plaintiff is entitled.

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the undertaking is fixed in the sum of $30,000 which shall be filed within 30 days of the date of this order; and it is further

ORDERED that the defendants and their agents, employees and representatives during the pendency of this action are enjoined from cancelling plaintiff Benjamin Spivak's shares in Eyeball on the Floor, Inc., and/or Eyeball Digital, Inc., or forcing him to involuntarily transfer such shares; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, on March 2, 2016, at 10:00 AM.

Date: February 8, 2016

ENTER:

Anil C. Singh