

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Vadim Mikhlyn, Inga Mikhlyn, and
ABC All Consulting, Inc.,

Plaintiffs,

Index No CV 08 3367

-against-

DEFENDANTS' MEMORANDUM
IN OPPOSITION TO PLAINTIFFS'
REQUEST FOR A TEMPORARY
RESTRAINING ORDER

Ana Bove, Polina Dolginov,
Anna Bove Company, LLC,
Anna Bove Collections, Inc., and
Anna Bove Embroidery Supplies, Inc.,

Defendants.

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RELEVANT FACTS¹

In 2002, Defendant Anna Bove, along with Polina Dolginov began a business selling Anna Bove's unique machine and hand generated embroidery designs. The business began in Israel – where they both resided at the time. Since the inception of her business, Anna Bove worked with Polina Dolginov who was knowledgeable in computers, and Ms. Dolginov became the registrant and administrator of a number of websites to conduct the business. Ms. Dolginov also set up and registered an e-bay store in her name.

As the business grew and expanded, some time in 2004 Ms. Bove decided to expand her operations into the United States and employed her cousin Vadim Mikhlyn and his wife, Inga Mikhlyn (Plaintiffs), to assist in conducting the American business. All proceeded and the business continued to grow. Polina Dolginov remained the administrator and registrant of the various websites and an American PayPal account was

¹ These facts are drawn from the accompanying affidavits of Ana Bove and Polina Dolginov concurrently submitted herewith.

opened up, to which Vadim and Inga Mikhlyn had access to conduct the American side of the business at Ms. Bove's direction. All continued smoothly until the second half of 2007 when the Mikhlyns gained access to the passwords for the websites and changed the log-in information to preclude Anna and Polina from accessing their own websites. Ana Bove first learned in April 2008 that the Mikhlyns had hijacked the websites and misappropriated her entire business, including the company's bank accounts, PayPal accounts, inventory, and the entire customer list

Ultimately, Anna Bove, with Polina Dolginov's assistance was able to regain access and control of two of the websites. Shortly thereafter, Ms. Bove found that the Mikhlyns were offering her designs, which had previously been sold at \$20.00-\$30.00 per collection at Zero Dollars per collection as a bonus for ordering thread – using additional websites registered to Polina. The Mikhlyns made their money by selling defendants' threads and accessories. In addition, Ms. Bove has discovered that the Mikhlyns are running many other websites selling her designs.

Ana Bove realized she had to come to court to seek relief and gain back her business. She filed for and received a copyright registration for the web-based catalogue of her designs (VA1639284). In the process of preparing her case and securing funding therefore, Ana Bove was pre-empted by the current lawsuit.

To this point, the Mikhlyns have complete access to the business PayPal account, all the inventory of Ana Bove's business and continue to significantly disrupt Ms. Bove's ability to sell her own designs – by giving them away for free or at significantly reduced prices.

The motion papers filed by plaintiff have asserted a fictitious partnership, which

never existed, and which they now claim gave the Mikhlyns all right to take complete control of Ana Bove's business. A crucial piece of evidence – an invoice from Ms. Dolginov purporting to seek payment for transfer of domains and for “leave the company settlement” is fabricated. Please see the Declaration of Polina Dolginov for Defendant's detailed explanation.

The Mikhlyns continue to sell Ms. Bove's designs and in violation of her copyright, they also continue to infringe Ana Bove's trademarks through the designation of ABC in all of their websites and in some of their domain names. Moreover they are making unauthorized use of Anna Bove's name as they do not have her permission to use her name in the embroidery business. Ana Bove has been prevented from having access to the customers, her inventory and her money.

In conclusion, the only possible legal avenue the Plaintiffs' may have to explain their theft, is through their false assertion of a partnership. Because the Plaintiffs cannot produce a scintilla of evidence attesting to the existence of a partnership nor any other ownership interest – aside for a fabricated invoice, Defendant's maintain that the Plaintiffs are not likely to succeed on the merits and therefore their request for a preliminary injunction should not be granted. Plaintiffs have failed to set forth any rational basis as to why they should have exclusive use of the assets they are now using.

Additionally, the balance of hardships between competing “alleged” partners does not favor one or the other.

The requests that Defendants remove public statements concerning Defendants' position on Plaintiffs' activities should also be denied. Defendants stand by their statements as accurate.

POINT I

A. PRELIMINARY INJUNCTION SHOULD BE DENIED

1. PLAINTIFFS HAVE PROVIDED NO EVIDENCE OF A PARTNERSHIP

The only way for Plaintiffs to even stay in court in this matter is to show that a partnership existed between themselves and Ana Bove. If there is no partnership, essentially Plaintiffs have no standing in this case to assert their claims, and they have no cover for their theft of Ana Bove's ABC embroidery business, including its assets, inventory and customer lists.

Defendants successfully retrieved two of their websites after discovering Plaintiffs' scheme, and the only way for Plaintiffs to keep what they stole was to make it seem like their work in the business created a partnership between the parties.

Even assuming the existence of a partnership, Plaintiffs had no right to exclude Defendants by hijacking the business and Defendants' websites, and stealing Defendants' embroidery designs and cross stitch designs. At most, such former "partners" would have the right to continue their respective business, and let the marketplace determine the better business. There is absolutely no legal basis for an alleged partner to take the entirety of the alleged partnership business and exclude other partners from conducting business. Thus, as to the balancing of hardships test, even if plaintiffs could somehow create a partnership between them and Ana Bove, that would not give them the right to exclude Ana Bove from continuing her embroidery business. At best, two former

partners could continue to compete, and there is no basis to exclude Ana Bove from the marketplace. The balance of hardships falls equally on both and does not favor plaintiffs

Plaintiffs must provide clear and convincing evidence of an existence of a partnership. “To demonstrate an existence of a partnership, a plaintiff must prove four elements: (1) the parties’ sharing of profits and losses; (2) the parties’ joint control and management of the business; (3) the contribution by each party of property, financial resources, effort, skill, or knowledge to the business; and (4) the parties’ intention to be partners.” Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d 164, 172 (S.D.N.Y., 2004); Estate of Michael Albin v. Mertz, LLC, 2006 U.S. Dist. LEXIS 15710, *28-29 (S.D.N.Y. March 15, 2006).

There is not a scintilla of evidence that Ana Bove or Polina Dolginov were considered or wanted Plaintiffs to be their partners. Such an assertion in this case is news to Defendants. Plaintiffs cited the Brodsky v. Stadlen, 256 N.Y.S.2d 478, 479 (N.Y. App. Div. 1998) standards to determine an existence of a partnership. However, Plaintiffs failed to address all of the factors under both Brodsky and Kidz Cloz standards. Plaintiffs never addressed compensation, parties’ intention to be partners, joint liability to creditors, compensation, and contribution of capital. Since Plaintiffs failed to address some of the partnership factors under both tests, it is unfair to now demand that the Court take such drastic action, especially if the damage will irreparably harm Defendants.

Focusing on the merits of Plaintiffs’ burden and their evidence provided to support their allegations, Plaintiffs clearly failed to provide clear and convincing evidence that Defendants intended for Plaintiffs to be partners in the business. The requirement that the parties have agreed to share in the profits and losses is an

“indispensable essential of a contract of partnership . . .” Steinbeck v. Gerosa, 4 N.Y. 2d 302, 317 (1958); see also Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d at 171-172. If there was no agreement as to the manner in which the parties were to share in the profits and the losses, the agreement did not create a partnership. Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d at 171-172; Ziesing v. Kelly, 152 F. Supp. 2d 347, 348 (S.D.N.Y. 2001).

Plaintiffs hardly touched on the sharing of losses. Other than a conclusory statement that the parties agreed, Plaintiffs did not offer one scintilla of evidence to support their claim that the parties shared losses. As the parties had never even discussed losses, certainly they did not have an agreement to share losses, thus, this indispensable essential of a contract of partnership is missing as a matter of law. . . .” Steinbeck v. Gerosa, 4 N.Y. 2d at 317; Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d at 175; Sea Carriers Corporation v. Empire Programs, 2008 U.S. Dist. LEXIS 49205, at *24-25 (S.D.N.Y. June 26, 2008)

In addition, Plaintiffs’ Complaint frequently makes conclusory allegations of a partnership. However, repeatedly “calling an organization a partnership does not make it one.” Even more important, Plaintiffs failed to state an allegation in their complaint that the parties agreed to share in the profits and losses of the partnership. Kosower v. Gutowitz, 2001 U.S. Dist. LEXIS 19111, (S.D.N.Y. Nov. 21, 2001) at *17. “It is axiomatic that the essential elements of a partnership must include an agreement between the principals to share the losses as well as the profits.” Kosower v. Gutowitz, 2001 U.S. Dist. LEXIS 19111 at *16-17

Aside from that, Plaintiffs failed to provide clear and convincing evidence to demonstrate parties' intent to share profits, especially on the part of defendants. The only evidence proffered by Plaintiffs to buttress their profit claims is the existence of a corporation, ABC All Consulting Inc., and the ABC Consulting Shares issued solely to Plaintiffs. However, the existence of a corporation owned by Plaintiffs (created for their computer consulting business) hardly constitutes indicia of a partnership between plaintiffs and defendants. Merely "[c]alling an organization a partnership does not make it one." Kosower v. Gutowitz, 2001 U.S. Dist. LEXIS 19111 at *16-17; Kidz Cloz, 320 F. Supp. 2d at 171-172. In addition, if there was such a profit sharing arrangement, Plaintiffs would have also issued shares to Defendants. After all, one who does not have a proprietary interest in a business except to share profits as compensation for services is not a partner. Kidz Cloz, Inc. v. Officially For Kids, Inc., 320 F. Supp. 2d at 175. Since all of the ABC Consulting shares were only issued to Plaintiffs, Plaintiffs failed to explain how this evidence's intent on Defendants' part to share profits. Moreover, the shares were issued in March of 2008, well after Plaintiffs had grasped the entire business and at the conclusion of their work with Ana

Plaintiffs list many instances of their writing checks and disbursing funds from the various ABC embroidery businesses as evidence of their ownership. These are discussed in some detail below. But the central point, as stated by Ms. Bove, is that she gave the Mikhlins authority to handle the funds for the company, as she trusted them. She never considered them partners, and their writing and controlling such funds does not constitute such a partnership. To her regret, she now realizes the Plaintiffs may have used company funds for their personal benefit.

Plaintiffs also make other claims as evidence to show sharing of profits and losses. However, Plaintiffs provided nothing rising to the level of clear and convincing evidence to support those allegations. For instance, Plaintiffs alleged that Defendants never paid them money, but that they paid money to Defendants. “There is not a shred of evidence that Ana paid, or controlled payment, to the Mikhlyns.” Vadim Aff., ¶12. Yet, this allegation only further proves Defendants’ lack of intent to share profits and losses with Plaintiffs instead of proving Defendants’ intent to share profit and losses. Of course, as supported by Ana Bove’s and Polina Dolginov’s affidavits and exhibits attached to Ana Bove’s affidavit, she has continually directed and controlled payment to all employees including plaintiffs since founding the business in 2002. All the money that flowed through the ABC embroidery businesses was supposed to be used to pay for the business. The plaintiffs never contributed any of their own capital and continued to draw salaries of \$1,000.00 up to \$4,000 a month paid by Ana Bove to Inga, even when Ana Bove and Polina Dolignov took in average \$1,500.00 a month (sometimes \$1,000.00, sometimes more, sometimes nothing). Vadim Mikhlyn practically did not work until 2007 (worked 5-7 days a year picking up supplies from customs), and when he eventually started to participate, he started to receive a small salary, since he contributed very little.

Finally, Plaintiff Vadim’s allegations regarding Plaintiffs writing themselves checks and paying themselves actually distorts the picture. Defendant Bove learned from a conversation with Plaintiff Inga Mikhlyn that Plaintiffs were using the ABC All Consulting proceeds to pay for personal things such as decorating their apartment, paying

two mortgages – for a house in Brooklyn, a second home in the Poconos, various home improvements and for the purchase of two cars.

Another factor highlighted under both tests is the contribution of property, financial resources, effort, skill, or knowledge to the business. Plaintiffs failed to provide clear and convincing, or any, evidence to support their position that they personally contributed their own property or financial resources to the business. “Almost all of the money flowing into and out of the business passed through the bank account of ABC, Inc., over which Vadim and Inga had exclusive signing authority. When Vadim and Inga drew money from the embroidery business, they wrote themselves checks from the ABC Inc. bank account (and often paid Ana and Polina).” Plaintiffs’ memorandum of law, p. 10. Plaintiffs cannot argue that the ABC All Consulting income was from the sale proceeds from the ABC Embroidery Domain websites originated and created by Ana Bove and Polina Dolginov since 2002.

Defendant Bove concedes that Plaintiffs’ citizenship in the United States and their skills in computers and alleged bookkeeping were helpful in enabling her to set up operations in the United States to reduce the cost of dropshipping. However, plaintiffs have failed to provide clear and convincing evidence, or any evidence, showing that Defendants wanted Plaintiffs to be partners in the business because of their effort, skill or knowledge of the business. After all, when Plaintiffs joined Defendants’ business in 2004, Plaintiffs did not have a background or training in the embroidery design business.² Moreover, Plaintiffs were paid regular salaries in compensation for their skills/services provided.

² The only document plaintiffs have submitted supporting the most remote theory of a partnership (Plaintiffs’ exhibit D of Vadim’s Declaration) is fabricated. See affidavits of Ana Bove and Polina Dolginov for explanation as to why such document is fabricated.

Finally, Plaintiffs argue that their evidence clearly demonstrates ownership, management and control. Before going into the merits of Plaintiffs' evidence on this issue, Plaintiffs argue that Defendants failed to provide evidence to prove that there was no partnership. "There is a total absence of evidence to support Ana's contrary version of events" Plaintiff's Memorandum of Law, p 11. However, the movant has the burden of making the required *prima facie* showing, otherwise, failure to do so warrants denial of the requested injunction. American Direct Marketing v. Azad Intern., 783 F.Supp 84, 91 (E.D.N.Y. 1992)

Second, Plaintiffs cite to a number of other allegations in their papers to justify their position. However, these allegations and evidence do not constitute clear and convincing evidence showing ownership and control. Defendants admit that Plaintiffs played a significant role in terms of assisting and organizing the business, especially with operations in the United States. Indeed, Ana Bove was and has been directing her business. See business plan directing employees' activities, attached as Exhibit B to Ana Bove's Declaration. On the other hand, Plaintiffs provide no evidence to demonstrate ownership, management and control. Plaintiffs claim that the ABC All Business entity was created for partnership operations. However, calling an organization a partnership does not make it a partnership. Their other statements such as being the sole owners of two Anna Bove domain names, Anna Bove Collections being a registered d/b/a name for ABC All Consulting, indicate plaintiffs' true intent of stealing Ana Bove's businesses.

The only other indicia of a partnership is a trademark application for ThreadDelight filed by plaintiffs in the name of all four parties. However, Plaintiffs failed to provide evidence that Defendants signed this document. Since the trademark

application was filed electronically, Plaintiffs never demonstrated the identity of the filer. In addition, just because someone's name is on a trademark application does not make them partners, especially when those people did not sign or personally file such application.

While plaintiffs' claim Ana Bove was not directing the business, plaintiffs' own exhibit contradicts this. Note that exhibit E of Vadim's declaration was only partially translated by plaintiffs. The part plaintiffs omitted which has been translated by defendants and is attached as Exhibit M to Ana Bove's Declaration shows the direction Ana Bove was giving to Inga for payments for Polina which Inga conceded were Ana's sole direction which Inga would follow.

Plaintiffs admit Defendants were the ones who started the ABC-Cross-Stitch-Patterns.com and the ABC-Embroidery-Design.com websites ("ABC websites")(See exhibit B of Inga Mihklyn's Declaration) On those websites, Defendants publicized Defendant Bove as the creator of the embroidery and cross stitch designs for approximately two years. Plaintiffs interestingly make no mention of this fact in their papers. The ABC Cross-Stitch-Patterns.com site publicized that Defendant Bove's role was to create embroidery and cross-stitch designs and digitize the designs, and that Defendant Dolginov managed the technical aspect of the internet embroidery design business (Exhibit N to Ana Bove's Declaration). The ABC-Embroidery-Design website announced to the consumers that the ABC Cross Stitch site was its sister site, and that Defendants were also responsible for the designs on that site. Both sites had links to each other. A similar note was posted on Defendants' e-bay store up until March of 2008

After Plaintiffs joined the business in the middle of 2004 to expand operations into the United States, Defendant Bove's name continued to be displayed on both websites. Defendant's name "Anna Bove" continued to be used in conjunction with embroidery designs and cross stitch designs through both ABC websites (Exhibit E to Ana Bove's Declaration). In fact, Defendant Bove's name was not only shown on the ABC websites, but the mark, "Anna Bove Collections, Inc." was exploited in conjunction with Defendant's Bove name on the same page of the ABC websites. Furthermore, the ABC embroidery design websites also contained strong use of Defendant's name on their websites. (Exhibit E to Ana Bove's Declaration). Because of this continuous association between the embroidery designs and Defendant Anna Bove and the mark Anna Bove Collections, Inc., the public continued to rightfully and correctly associate Defendant Bove as the designer and creator for the embroidery and cross-stitch designs on the ABC websites. (See declarations of customers, an advertiser and a dealer of ABC embroidery business attached as Exhibits I to Ana Bove's Declaration).

Furthermore, evidence of intentional copying raises a presumption of creating consumer confusion. Centaur Communications Ltd v. A/S/M Communications, 830 F.2d 1217,1228 (2d Cir 1987). Likewise, in this case, there is strong, compelling evidence that Plaintiffs' actions were done in bad faith to confuse the customers and steal Defendants' business. After Defendants got their ABC websites back, Defendants discovered a series of new ABC embroidery websites that exploited Defendants' name (Exhibit P to Ana Bove's Declaration). Plaintiffs' websites also literally copied Defendants' embroidery and cross stitch designs and the website designs that existed before Plaintiffs joined the company (Exhibit F to Ana Bove's Declaration).

Plaintiffs claim that “[d]efendant never exploited her actual name or the name ‘Anna Bove’ in commerce, except in connection with the partnership.” p. 15 of Plaintiffs’ memorandum. Plaintiffs cited Tillery v. Leonard & Sciolla, LLP, 437 F Supp 2d 312 (E.D. Penn 2006) to support their case, but in that case, a former partner’s attempt to prohibit the partnership’s use of his surname name had no basis especially where the former partner never used his name for a product or business except in connection with the partnership. However, the evidence provided herein clearly indicates that Anna Bove used her name and identified herself as the designer of the embroidery designs and cross-stitch on the two websites and on the e-bay store since 2002 which is at least two years before Plaintiffs became involved.

A. The Balancing of the Equities Weighs Against the Issuance of the Injunction

Defendants started the embroidery design and cross stitch business in 2002. They created a successful business together from scratch that involved the sale of embroidery designs and cross stitch designs and other embroidery items. In 2004, Plaintiffs sought out Defendant Bove and requested financial help, and Defendant Bove, in her desire to help Plaintiff Vadim, agreed to employ Plaintiffs in the business. The agreement was that Plaintiffs would assist Defendants by organizing operations in the United States since most of the customers in 2004 were based in the United States, and this set-up would enable Defendants to enhance their profit margin.

After the Plaintiffs joined the business in 2004, Defendants still maintained the ABC websites until 2007. In 2004, Plaintiffs incorporated ABC All Consulting for a computer consulting business plaintiffs continued to work in Defendants’ portion of the

United States based business. In 2007, Defendants instructed Vadim to consolidate all of the domains into one account.

Subsequently, because Defendants trusted Plaintiffs, Defendants did not realize that Plaintiffs basically hijacked Defendants' business until March, 2008 by seizing the ABC domain names belonging to Defendants and locking Defendants out from the ABC Domain websites, profiting from Defendants' business by controlling the cash receipts and inventory and selling Defendants' embroidery and cross stitch designs and other embroidery items along with Defendants' items, and using Defendant's name ANNA BOVE as a trademark. Plaintiffs basically stole Defendants' business.

Now, in their desperate attempt to keep their proceeds of their theft, Plaintiffs are manufacturing uncertainty out of thin air as a vehicle to get everything back. They allege that there is some uncertainty as to the partnership, ownership of the domain names, the websites, the design files, and the trademarks. However, in reality, Plaintiffs have provided no evidence except a fabricated document that provides any support of the existence of any relationship. The document, no matter how construed, is not any evidence of a business partnership with Ana Bove.

Aside from authenticity and evidentiary issues relating to the document, the document provides no indication that Plaintiff Vadim has the contractual right to control the ABC Domain websites. The words on the document provide no clear indication as to Plaintiff Vadim having a contractual right to control the websites. For instance, the words, "a settlement, including domain transfers," do not come close to meaning that Plaintiff Vadim has the contractual right to control the ABC Domain websites to the exclusion of Ana Bove.

Second, Plaintiffs refer to an instant message conversation between Defendant Bove and Plaintiff Vadim. However, even though the conversation confirms the transfer of the domain names to Plaintiffs' control for the reasons set forth above, the conversation does not support plaintiffs' contention that Vadim had a contractual right to exclusively control the ABC sites to the detriment of Ana Bove.

In addition, when there is a dispute as to ownership of a domain name registration, a court would consider parol evidence to assist it in the determination as to the rightful owner of the domain name registration. 1800PostCards, Inc v. Morel, 153 F Supp. 2d , 359, 363-364 S.D.N.Y. 2001). The 1-800PostCards case cited by Plaintiffs talks about ownership and control of a website. In that case, plaintiff had purchased assets from a defendant company, including the website. Incidentally, another defendant in that case, who was a shareholder of plaintiff, actually became the registrant for the domain name, acquired control of the website and changed the website password to block administrative access by Plaintiff to the website.

The Court explained that the issue in the case was whether the rights to change the password to the website was among the assets sold by defendant Company to plaintiff. The Court acknowledged there was some confusion as to ownership of the registration of the website since defendant shareholder was listed as the registrant. The Court acknowledged that because the registration listed defendant Shareholder as the registrant, the legal title belonged to defendant Shareholder.

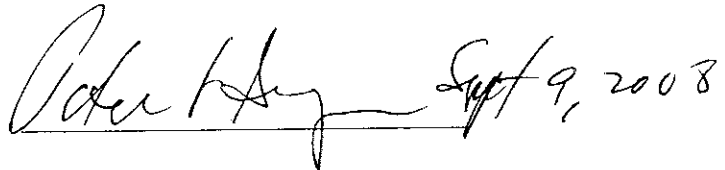
On the other hand, "this nuance makes little difference for present purposes." 1800PostCards, Inc v. Morel, 153 F.Supp.2d at 364. The Court explained that since plaintiff purchased the asset, including the website, they should have been the

owner/registrant of the website, thus the password should have been given to plaintiff, not defendant shareholder. Hence, since the sales agreement involved the transfer of the defendant's company assets for consideration, including the website, Plaintiff was the equitable owner of the domain name registration. In contrast, Plaintiffs herein can show no purchase of partnership rights nor any partnership agreement with Ana Bove or Polina Dolginov. Their assertion of partnership is an attempt to cover their improper theft of Defendants' business.

CONCLUSION

In view of this memorandum, supporting affidavits and exhibits, Plaintiffs' request for a temporary restraining order should be denied.

Respectfully submitted,



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