Wafer v Wafer
2013 NY Slip Op 32555(U)
October 10, 2013
Sup Ct, Suffolk County
Docket Number: 16881-13
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

INDEX No. 16881-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/16/13
ADJ. DATES 9/6/13
Mot. Seq. # 001 - MOTD
CDISP Y____ N x
PC Scheduled: 11/15/13

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G. SCOTT WAFER, individually and as shareholder of VSCR, INC., MASTERS REINSURANCE, LTD. and YANKEES REINSURANCE, LTD. suing in the right of VSCR, INC., MATERS REINSURANCE, LTD. and YANKEES REINSURANCE, LTD.,

Plaintiffs,

-against-

GEORGE J. WAFER, MARIAN WAFER, VEHICLE MANUFACTURERS, INC.. VEHICLE MANUFACTURERS, INC. d/b/a VEHICLE MANUFACTURERS SERVICES, VSCR, INC., MASTERS REINSURANCE, LTD. and YANKEES REINSURANCE, LTD.,

Defendants.

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Upon the following papers numbered 1 to 11 read on this motion for preliminary injunctive relief ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ____; Answering papers 5-6 ; Replying papers 7-9 ; Other 10-11 (verified answer) ; [Not Considered: Defendants' sur-reply] it is,

ORDERED that this motion (#001) by the plaintiff for preliminary injunctive relief is considered under CPLR 6301 and is granted, conditionally, only to the limited extent set forth below; and it is further

ORDERED that a preliminary conference shall be held on Friday **November 15, 2013** in Part 45, at 9:30 a.m. in the courtroom of the undersigned located on the first floor of the Annex Building of the Supreme Court at One Court Street, Riverhead, New York, 11901.

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In June of 2013, plaintiff, G. Scott Wafer, commenced this action individually and as a shareholder of V.S.C.R. Inc., Masters Reinsurance, Ltd. and Yankees Reinsurance, Ltd., suing in the right of V.S.C.R. Inc., Masters Reinsurance, Ltd. and Yankees Reinsurance, Ltd. against defendants, George J. Wafer, Marian Wafer, Vehicle Manufacturers, Inc. a/k/a Vehicle Manufacturers, Inc. d/b/a Vehicle Manufacturers Services (collectively referred to as "VMI/VMS"), V.S.C.R., Inc. ("VSCR"), Masters Reinsurance, Ltd. ("Masters"), and Yankees Reinsurance, Ltd. ("Yankees"). The parties are engaged in the business of brokering automobile warranties and insuring or reinsuring the parties to such warranties.

Plaintiff, George Scott Wafer (hereinafter plaintiff or "Scott"), claims to be a 50% owner of defendants VSCR and Masters and a 40% owner of Yankees. Defendant, George J. Wafer [hereinafter "George"], the father of the plaintiff, disputes the plaintiff's claim of any ownership interest in the defendant Yankees. Although the plaintiff admits that defendant George is the sole owner of defendant VMI/VMS, the plaintiff claims an entitlement to a 40% ownership interest in defendant VMI/VMS which defendant George allegedly promised to give in exchange for the work the plaintiff performed for VMI/VMS. The plaintiff managed and performed other services for VMI/VMS until August of 2012 when he was terminated from such employ by defendant George. The plaintiff claims that immediately upon his departure, George issued a 40% interest in VMI/VMS to his wife, defendant Marian Wafer, and that they took the profits and distributions of VSCR, Masters, and Yankees and deposited them into their personal accounts and/or those of VMI/VMS all to the plaintiff's detriment (*see* Complaint ¶¶ 62; 63). It is further claimed that since August of 2012, defendants George and Marian have used corporate profits, distributions, monies and assets for non-corporate purposes of VSCR, Masters and Yankees to their detriment (*see* Complaint ¶ 64).

This conduct on the part of defendants George and Marian is the subject of the plaintiff's First cause of action wherein he demands permanent injunctive relief forever "enjoining the Defendants from continuing to transfer and/or otherwise loot, waste an/or otherwise convert and/or dispose of the corporate Defendants' profits, distributions and/or assets" (*see* Complaint ¶ 78; *see also* Wherefore Clause). In the Second cause of action, the plaintiff demands an accounting from defendants George, VSCR, Masters and Yankees of the profits and distributions of VSCR, Masters and Yankees. In the Third cause of action an accounting of diverted assets from defendants George, Marian and VMI/VMS is demanded. A claim for the imposition of a constructive trust on all profits, distribution and assets and stock attributable to the plaintiff's claimed 40% ownership in VMI/VMS is demanded in the Fourth cause of while a constructive trust upon the allegedly diverted profits, distributions and transferred assets of VSCR, Masters and Yankees is the subject of the Fifth cause of action. Although labeled as a claim for damages, the plaintiff's Sixth cause of action sounds in specific performance of defendant George's alleged promise to turn over to the plaintiff a 40% interest in VMI/VMS. The last two causes of action sound in the recovery of money damages from each corporate defendant under theories of corporate diversion and conversion of their profits, distributions and earnings.

Issue was joined by the defendants service of a verified answer in August 2013. It contains counterclaims which include: 1) an action for an accounting; 2) declaratory relief; 3) money damages

for conversion; 4) money damages for fraud; and 5) money damages for unjust enrichment. The defendants vigorously deny the material allegations of facts advanced in the complaint including that the plaintiff owns any interest in Yankees and that he was at any time promised a 40% interest in VMI/VMS. Although defendants admit that the plaintiff was employed by VMI/VMS, they allege that he was well paid for his services and was terminated in August of 2012 for cause. The circumstances of such cause provide the factual backdrop upon which some or all of the defendants' counterclaims are based.

By order to show cause dated June 28, 2013, the plaintiff interposed this motion for preliminary injunctive relief enjoining "the *defendants* from withdrawing any monies from the bank and/or trust accounts of the defendants, VSCR, Masters and/or Yankees, transferring, distributing, selling and/or divesting themselves of any profits, distributions, assets, monies, property or shares of capital stock of the defendant corporations presently in their possession, custody or control" [emphasis added]. The motion is supported by, among other documentation, an affirmation of counsel and an affidavit of plaintiff, G. Scott Wafer.

The motion is opposed by the defendants in papers consisting of an affirmation of counsel, an affidavit of defendant, George J. Wafer, and other documentary exhibits. In opposition, plaintiff has submitted reply papers consisting of an affirmation of counsel, an affirmation of plaintiff, G. Scott Wafer, and other documentary exhibits. A sur-reply submitted by the defendants, to which the plaintiff objects, has not been considered by the court as the same is not in accord with the provisions of CPLR Article 22 and the rules of the Commercial Division at 22 NYCRR 202.70, *et. seq.*

Upon due consideration of the papers submitted in support of and in opposition to the instant motion, the court grants this motion conditionally only to the limited extent set forth below.

By statutory fiat, "[a] preliminary injunction may be granted 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, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (CPLR 6301). To constitute the "subject of the action" within the contemplation of CPLR 6301, the property or assets for which restraint is sought must be unique or sufficiently specific and the very object of the claim giving rise to the demand for preliminary injunctive relief (***Credit Agricole Indosuez v Rossiyskiy Kredit Bank***, 94 N.Y.2d 541, 548, 708 NYS2d 26 [2000]; ***Coby Group, LLC v Hasenfeld***, 46 AD3d 593, 847 NYS2d 239 [2d Dept 2007]). Monies that are not part of any specific res or fund are not regarded as the "subject of the action" and thus are not the proper targets of a preliminary injunction (*see* ***Etzion v Etzion***, 62 AD3d 646, 880 NYS2d 79 [2d Dept 2009]; ***Winter v Brown***, 49 AD3d 526, 853 NYS2d 361 [2d Dept 2008]).

Appellate case authorities have long measured a party's right to preliminary relief as resting upon a clear and convincing showing the following; a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Nobu Next Door, LLC v Fine Arts Hous., Inc.***, 4 NY3d 839, 800 NYS2d 48 [2008]; ***County of Suffolk v Givens,*** 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013]; ***Greystone Staffing, Inc. v Warner***, 106 AD3d 954, 2013 WL 2228792 [2d Dept 2013]; ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court, as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]; ***Tatum v Newell Funding, LLC,*** 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]). Consequently, a clear legal right to relief, which is plain from facts presented that are generally undisputed, must be established (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***Gagnon Bus Co., Inc. v Vallo Transp., Ltd.***, 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]).

Factors militating against the granting of preliminary injunctive relief include: 1) the absence of a jurisdictionally proper predicate claim for injunctive relief (*see* CPLR 6301; ***BSI, LLC v Toscano***, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]); 2) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Di Fabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 636–637, 887 NYS2d 168 [2d Dept 2009]; ***Mar v Liquid Mgt. Partners, LLC,*** 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; ***Dana Distr., Inc. v Crown Imports, LLC,*** 48 AD3d 613, 853 NYS2d 111 [2d Dept 2008]; ***White Bay Enter. v Newsday, Inc.***, 258 AD2d 520, 685 NYS2d 257 [1999]); 3) that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 795 NYS2d 690 [2d Dept. 2005]). A preliminary injunction is thus not a proper remedy where it appears that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Mar v Liquid Mgt. Partners, LLC,*** 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; ***Dana Distrib., Inc. v Crown Imports, LLC,*** 48 AD3d 613, *supra*). Nor is it appropriately issued where the irreparable harm claimed is remote or speculative or where it is economic in nature (*see* ***County of Suffolk v Givens***, 106 AD3d 943, *supra*; ***Rowland v Dushin,*** 82 AD3d 738, 917 NYS2d 702 [2d Dept ,2011]; ***Family-Friendly Media, Inc. v Recorder Tel. Network,*** 74AD3d738, 903 NYS2d 80 [2d Dept 2010]). It addition, it is clear that while the existence of disputed issues of fact alone will not justify the denial of a motion for a preliminary injunction (*see* CPLR 6312[c]), the motion should not be granted where there are issues that "'subvert the plaintiff's likelihood of success on the merits ... to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (***Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.***, 53 AD3d 612, 862 NYS2d 551 [2d Dept 2008], *quoting*, ***Milbrandt & Co. v Griffin***, 1 AD3d 327, 328, 766 NYS2d 588 [2d Dept 2003]).

Here, the plaintiff seeks to provisionally enjoin all of the named defendants from withdrawing monies on deposit in banks or in reserve or trust accounts of VSCR, Masters or Yankees and "from transferring, distributing, selling and/or divesting themselves of any profits, distributions, assets, monies, property or shares of capital stock of the *defendant corporations* presently in their possession, custody or control". Except for the undefined "property" and "assets" and the "capital stock shares" of each of the corporate defendants, the requested preliminary injunction targets the money on deposit in certain bank and reserve trust accounts and corporate monies, profits and distributions all of which are purely economic in nature.

Review of the submissions of the plaintiff reveals no clear demonstration that, in the absence of a judicial restraint as to the bank or trust accounts of VSCR, Masters or Yankees and the profits, distributions or monies of each of the four corporate defendants, the plaintiff will be irreparably harmed since he can be fully recompensed for any loss thereof, to the extent that the defendants are found liable therefor, by an award of money damages. Nor has there been any demonstration that these assets are of the type which qualify as the "subject of the action" as that term is used in CPLR 6301 and that the defendants have or have threatened to do an act in violation of the plaintiff's rights with respect thereto that would tend to render the judgment ineffectual. Even if the misappropriation or conversion of corporate assets other than money may support injunctive relief, there has been no showing of a likelihood of success on the merits of these claims since the record is devoid of any evidence of the defendants threatened or actual engagement in any *wrongful* conduct with respect thereto (*see* ***Icy Splash Food & Beverage, Inc. v Henckel***, 14 AD3d 595, 789 NYS2d 505 [2d Dept 2005]). Morever, the equities do not appear to be balanced in favor of the plaintiff, since the sharp factual disputes regarding the material allegations advanced in the pleadings and paper submissions on this motion militates against any finding of a likelihood of success on the merits of the plaintiff's pleaded claims for this relief. Preliminary injunctive relief is thus denied with respect to restraint upon the monies on deposit in banks or in reserve or trust accounts of VSCR, Masters or Yankees or upon the transfer, distribution sale and/or divestiture of any profits, distributions or monies of the defendants corporations.

In contrast, the "shares of capital stocks" in each of the corporate defendants and their "property" and "assets" not consisting of monies in bank or trust accounts, or other monies, distributions or profits, are items which may qualify as the "subject of the action" for purposes of CPLR 6301. With respect to the defendants, VSCR and Masters, the plaintiff's 50% interest has been admitted by defendant George and his claimed 40% interest in Yankees, while disputed by such defendant, has some evidentiary support in the record. However, no clear and convincing showing that any real and imminent, destructive harm to the plaintiff's interests in the "capital stock" shares, "property" or "assets" of any of these three corporations is or has been threatened or accomplished by any of the defendants or that there exists any potential harm of an irreparable nature tending to render a judgment in favor of the plaintiff ineffectual (*see* ***Reuschenberg v Town of Huntington***, 16 AD3d 568, 791 NYS2d 652 [2d Dept 2005]; ***North Shore Auto & Towing v Nassau County***, 18 Misc3d 1108(A), 856 NYS2d 25 [Sup. Ct. Nassau County 2007]). Indeed, the plaintiff's interposition of personal claims for the recovery of money damages resulting from losses of his interests in the stock, or in the property or

assets of these three corporate defendants, if any, demonstrates the availability of a remedy at law which has not been shown to be inadequate (*see* ***In re Rice***, 105 AD3d 962, 963 NYS2d 327 [2d Dept 2013]). In this regard, the court notes that although claims for corporate control or a loss or dilution of an existing entitlement on the part of the plaintiff's to participate in business decisions or matters of corporate governance will support a preliminary injunction (*see* ***Datwani v Datwani***, 102 AD3d 616, 959 NYS2d 153 [1st Dept 2013]; ***Yemini v Goldberg***, 60 AD3d 935, 876 NYS2d 89 [2d Dept 2009]; ***Cooperstown Capital, LLC v Patton***, 60 AD3d 1251, 876 NYS2d 186 [3d Dept 2009]; ***Parrott v Pasadena Capital Corp.***, 1997 WL 13205 [EDNY1997]), there are no express claims here of any loss of shareholder status or an ouster from VSCR and Masters, the two corporations in which the plaintiff indisputably holds a 50% interest. To the extent that nuanced references to a diminution of the plaintiff's right, if any, to participate in the corporate governance of these corporations or in Yankees, in which only 40% interest is claimed, is discernible from the record, they are insufficient to warrant the issuance preliminary injunctive relief. Under these circumstances, neither the existence of the plaintiff's pleaded claim for an accounting of the assets of defendants VSCR, Masters and Yankees nor the claim for imposition of a constructive trust upon allegedly diverted profits, distributions and assets of these three defendant corporations is sufficient to warrant the granting of injunctive relief with respect thereto. Preliminary injunctive relief with respect to the stock shares, property and assets of corporate defendants VSCR and Masters and Yankees is thus denied.

Left for consideration is the plaintiff's entitlement to preliminary injunctive relief with respect to the capital stock shares, property and/or assets of defendant VMI/VMS, in which, the plaintiff has never had a legal ownership interest. Instead, the plaintiff's interests in these collective corporate defendants was limited to his employment thereby which terminated some thirteen months ago. The plaintiff's claim of entitlement to a 40% ownership interest in VMI/VMS is thus wholly dependent upon the success of his claim for the imposition of a constructive trust upon such interest or the success of his alternative claim for specific performance of defendant George's alleged promise to give the plaintiff a 40% interest therein due to the plaintiff's performance of services therefor.

While both of these claims provide a jurisdictional predicate for the issuance of preliminary injunctive relief (*see* ***Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.***, 82 AD3d 691, 917 NYS2d 680 [2d Dept 2011]; ***Shayne v Guelpa***, 38 AD3d 877, 831 NYS2d 343 [2d Dept.2007]), the three prong test for issuance of preliminary injunction must be met in order for any such injunction to issue. Upon a review of the record here and with mindful appreciation that the purpose of a preliminary injunction is to maintain the status quo during the pendency of an action, the court finds that a sufficient, albeit minimally sufficient, showing of the three elements necessary for the grant of a preliminary injunction with respect to the capital stock shares of VMI/VMS that is limited to a restraint against the transfer thereof is warranted pending resolution of the ownership claims with respect thereto. Obvious irreparable harm will be sustained if the existing stock shares were put beyond the reach of the court due to a transfer of such shares by the defendant owners thereof. A balance of the equities tips in favor of the plaintiff with respect to preserving the present ownership of VMI/VMS as no hardship to the defendants from maintenance of the current ownership will accrue therefrom. Although the existence

of a promise to confer a 40% interest in that corporation is very much contested, there has been a sufficient minimal showing thereof for purposes of a grant of a preliminary injunction limited to a restraint upon the transfer of the stock shares of VMI/VMS. No such showing was made, however, with respect to the "property" or "assets" as no such property or assets of a non-economic or money nature has been identified as being in imminent danger by loss or destruction at the hands of the defendants.

Accordingly, the defendants are hereby restrained and enjoined from transferring, encumbering or pledging the stock shares owned by them in defendant VMI/VMS pending further order of the court. Such relief is, however, conditioned upon the plaintiff's posting of an undertaking in the amount of $200,000.00 that conforms to CPLR 6312(b), within thirty (30) days of the date of this order and service of proof of such posting upon the defendants' counsel by facsimile within three (3) days thereof. In the event that the plaintiff fails to post this undertaking or to serve notice thereof upon the defendants' counsel within the time required by this order, the limited preliminary injunction herein granted shall immediately lift and terminate.

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In view of the foregoing, the instant motion (#001) by the plaintiff for a preliminary injunction is granted, conditionally, to the limited extent set forth above. All other relief demanded is denied. Counsel are directed to appear for the preliminary conference scheduled above.

Dated: 10/10/13

THOMAS F. WHELAN, J.S.C.