

Elting v Shawe

2014 NY Slip Op 32125(U)

August 4, 2014

Sup Ct, New York County

Docket Number: 651423/2014

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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 ELIZABETH ELTING, on behalf of herself and :
 derivatively on behalf of nominal defendant :
 TRANSPERFECT GLOBAL, INC., :
 :
 Plaintiff, :
 :
 -against- :
 :
 PHILIP SHAWE, :
 :
 Defendant, :
 and :
 :
 TRANSPERFECT GLOBAL, INC., and :
 TRANSPERFECT TRANSLATIONS :
 INTERNATIONAL, INC., :
 :
 Nominal Defendants. :
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Index No. 651423/2014
 DECISION AND ORDER
 Motion Sequence Nos. 001, 003, 004

MELVIN L. SCHWEITZER, J.:

Elizabeth Elting (Ms. Elting) asserts various claims, both directly, and derivatively on behalf of TransPerfect Global, Inc. (TPG), seeking removal of Philip Shawe (Mr. Shawe) as a director and officer of TransPerfect Translations International, Inc. (TPI), dissolution of TPI, and relief for breach of fiduciary duty. Pursuant to CPLR 6301, she moves for a preliminary injunction which would bar Mr. Shawe from management of TPI. She also moves to supplement the temporary restraining order issued by the court, and for dissolution of TPI.

Background

Structure of the Business Entity

Ms. Elting and Mr. Shawe are co-CEOs and the only directors of TPG, a Delaware corporation, which provides international translation services. TPG is the parent holding company of TPI. TPI is also an international translations services company, incorporated in

New York and headquartered in New York City. TPI, with its subsidiaries, has approximately 2,500 employees and \$353 million in annual revenues. This amount constitutes 90% of the revenues of TPG. Ms. Elting and Mr. Shawe are co-CEOs and the only directors of TPI. TPI's sister subsidiaries collectively have approximately 800 employees and \$40 million in annual revenues.

As part of a corporate restructuring in 2008, the then shareholders of TPI – Ms. Elting, Mr. Shawe, and Mr. Shawe's mother, Shirley Shawe (a 1 percent shareholder) – transferred their shares in TPI to TPG. As a result of the restructuring, TPG owns 100 percent of TPI's capital stock, and Ms. Elting, Mr. Shawe, and Shirley Shawe own 50 percent, 49 percent, and 1 percent, respectively, of TPG's capital stock.

Over the years, Mr. Shawe and Ms. Elting divided responsibility for TPI operations in accordance with their respective talents and skills. Ms. Elting leads the document translation and interpretation services divisions, and Mr. Shawe leads the document website and software localization, technology solutions and supplemental services divisions. There are also shared divisions that relate to the general management of TPI, which they run jointly.

Allegations of Mr. Shawe's Misconduct

Ms. Elting alleges that Mr. Shawe has engaged in erratic and abusive behavior, including:

- Secretly implementing raises and bonuses in violation of more than 20 years of TPI policy requiring that Mr. Shawe and Ms. Elting jointly approve such action – including issuing a directive to TPI's Chief Information Officer, Yu-Kai Ng (Mr. Ng) to take the computer of Gale Boodram (Ms. Boodram), the employee who handles payroll, "out of adp and kill her phones," causing a "payroll crisis" at TPI;

- Refusing to agree to ADP Payroll Services' (ADP) subsequent requests for joint instruction from Ms. Elting and Mr. Shawe regarding payroll, which exacerbated the crisis, nearly causing TPI to miss payroll for its 2,250 domestic employees;
- Persistently and profanely harassing, abusing, threatening and intimidating Ms. Boodram;
- Blocking emails from TPI's bank, payroll company, and accountants from reaching TPI; and
- Violating Ms. Elting's direct instruction concerning the payment of her personal income taxes, resulting in a double payment of her taxes.

Mr. Shawe eliminated Ms. Boodram's access to TPI's computer network on May 7, 2014, which nearly prevented TPI from paying bonuses and commissions to hundreds of employees that were about to be due and salaries to its domestic employees. This conduct instigated Ms. Elting to commence this action, and to obtain a TRO (issued by Justice Scarpulla).

Ms. Elting alleges further misconduct by Mr. Shawe after issuance of the TRO, including conduct that violates the TRO. Despite being restrained from interfering with payroll, Mr. Shawe delayed a crucial approval to ADP to restore ordinary payroll procedures at a time when ADP was threatening to stop payroll payments. This required Ms. Elting's counsel to provide ADP with a copy of the TRO in order to facilitate the payroll payment process. In addition, despite being restrained from communicating "directly or indirectly" with Ms. Boodram and from disparaging her, Mr. Shawe included her on an incendiary email. Mr. Shawe also sent over 200 emails to employees, including Ms. Elting, demanding raises for employees who participated in Mr. Shawe's attempt to make unilateral changes to payroll, and

making misrepresentations that Ms. Elting's counsel was "bugging" TPI emails. She also alleges Mr. Shawe is endangering TPI's tax status by refusing to pay additional distributions necessary to ensure the proportionality of tax payments. This refusal allegedly exposes both Ms. Elting and Mr. Shawe to potentially ruinous tax liability.

Allegations of Ms. Elting's Misconduct

Mr. Shawe contends that Ms. Elting became increasingly hostile in early 2013, and demanded excessive distributions. Further, on a number of occasions, Ms. Elting refused to consider any acquisition opportunities. Mr. Shawe asserts that Ms. Elting was taking actions designed to seize control of the banking and accounting functions of TPI, and to retaliate against the back office employees who she deemed loyal to him. He alleges a pattern of financial misconduct by Ms. Elting, including unauthorized distributions of TPI funds. One such distribution was made in the amount of \$21 million to pay for Ms. Elting's personal taxes, at a time when TPI needed the cash. At least \$9 million of this distribution was transferred over Mr. Shawe's explicit objection, and by coercing finance department employees.

Mr. Shawe alleges that in August 2013, despite his instructions, Ms. Boodram processed payroll for his divisions, without including Fiona Asmah (Ms. Asmah), the employee Mr. Shawe designated to handle payroll for his divisions. He also alleges that Ms. Boodram, with Ms. Elting's authorization, paid herself a \$25,000 bonus, directly contrary to a previous agreement between the parties that no change would be made in her compensation without joint consent. Mr. Shawe also alleges that Ms. Elting's personal housekeeper was carried on TPI's books as an "executive assistant," and that Ms. Elting misappropriated TPG funds by causing

TPG to pay approximately \$144,000 to the law firm of Kramer Levin Naftalis & Frankel LLP for her personal account.

In accordance with TPI's normal process, annual raises for the shared services group were entered by the human resources group (HR) into the payroll system. In March 2014, however, Ms. Elting instructed both HR and Ms. Boodram to withhold raises for certain employees reporting to Roy Trujillo (Mr. Trujillo) and Mr. Ng, both of whom she perceived as loyal to Mr. Shawe, after which she left the country on a business trip to Asia. Upon discovering this, Mr. Shawe unilaterally had the finance staff put through a supplemental payroll for employees whose raises had been blocked by Ms. Elting. When Ms. Elting returned from Asia, she reversed the supplemental payroll over Mr. Shawe's objection, and without any notice to employees. In the face of complaints from employees, and the risks posed under New York Labor Law, Ms. Elting reprocessed the raises except for those to Ms. Asmah and Mr. Ng. Additionally, on March 8, 2014, Ms. Elting and Ms. Boodram locked out Mr. Ng from his historical access to ADP.

Temporary Restraining Order

On May 8, 2014, Justice Scarpulla issued a TRO that prohibited Mr. Shawe from: (i) interfering with TPI's payroll, (ii) changing or restricting access to TPI's computer systems, and (iii) communicating with Ms. Boodram. On June 26, 2014, the court modified the TRO with an order appointing the Hon. Harold B. Beeler as Special Master to assist both parties in continuing to run the corporation. The Special Master serves as a bridge between the parties

with respect to key decisions or actions involving the operation of the business, and any other decisions or actions that could materially affect the business or its employers.

Discussion

To obtain a preliminary injunction under CPLR 6301, a plaintiff must demonstrate (i) irreparable harm, (ii) a likelihood of success on the merits, and (iii) that the equities tip in the plaintiff's favor. See *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 (1981); *Borenstein v Rochel Prop. Inc.*, 176 AD2d 171, 172 (1st Dept 1991). Preliminary injunctions are drastic remedies requiring a clear showing that these requirements have been met. *William M. Blake Agency, Inc. v Leon*, 283 AD2d 423, 424 (2d Dept 2001); *Peterson v Corbin*, 275 AD2d 35, 36 (2d Dept 2000); *Scotto v Mei*, 219 AD2d 181, 183 (1st Dept 1996).

Irreparable Harm

Ms. Elting has failed to prove that Mr. Shawe's conduct has caused her or TPI to suffer material harm. Although there have been several instances in which Mr. Shawe has acted impetuously, and these were not conducive to the proper management of TPI, his past actions have never resulted in material damage to TPI. For instance, even if the court accepts Ms. Elting's allegation that "[Mr.] Shawe has put Transperfect on the precipice of missing payroll," the fact remains that payroll was never actually missed. Nor have they resulted in excluding Ms. Elting, except on very limited bases, from participating in the management of TPI. In establishing whether the irreparable harm requirement for a preliminary injunction is met, the court must assess whether Mr. Shawe's past behavior is predictive of irreparable harm if the injunction is denied and TRO lifted.

It would be speculative for the court to predict irreparable harm if Mr. Shawe is not enjoined based on his past behavior, however mean-spirited and erratic it has been shown to be at times, because it ultimately did not cause material harm to TPI. In the aggregate, the incidents of which Ms. Elting complains simply are not sufficiently predictive that Mr. Shawe in the future will materially damage TPI. In this respect, she has failed to show the irreparable harm necessary for preliminary injunctive relief.

In addition, Mr. Shawe's behavior has not "unnecessarily frustrate[d] efforts to obtain or preserve [Ms. Elting's] right to participate in the management" of TPI, *Wisdom Import Sales Co. v Labatt Brewing Co.*, 339 F3d 101, 114-115 (2nd Cir 2003), nor can the court say it threatens to do so without injunctive relief. Mr. Shawe and Ms. Elting clearly no longer have a healthy working relationship. The solution to this problem may very well be for one of them to leave, or to sell the enterprise. The court is unmoved, however, by Ms. Elting's argument that Mr. Shawe initiated the series of *contretemps* that have gone on during the past year. It is not clear who drew first blood. The court observes misbehavior by both parties. And under these circumstances, it certainly is not the court's place to step in and resolve the ongoing problems by excluding Mr. Shawe from management of TPI. While Mr. Shawe may be a thorn in Ms. Elting's side, she has not shown that he will be able to exclude her from the day-to-day management of the company. Ms. Elting fails to show irreparable harm, in this case to herself, necessary for the court to grant preliminary injunctive relief.

Because the plaintiff has failed to demonstrate irreparable harm, it is unnecessary for the court to consider likelihood of success on the merits and balancing of the equities.

The TRO of the court has previously been vacated.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that plaintiff's motion to supplement the Temporary Restraining Order is

dismissed as MOOT; and it is further

ORDERED that plaintiff's petition for dissolution is DENIED.

Dated: August 4, 2014

ENTER:



A handwritten signature in cursive script, appearing to read "Melvin L. Schweitzer", is written over a horizontal line. Below the line, the initials "J.S.C." are printed. The signature extends significantly below the line, with a long vertical stroke on the right side.

J.S.C.

MELVIN L. SCHWEITZER