

Kyung Rim Choi v Han Ik Cho
2014 NY Slip Op 33919(U)
March 4, 2014
Supreme Court, Nassau County
Docket Number: 600686-14
Judge: Timothy S. Driscoll
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**KYUNG RIM CHOI, a shareholder of BWAY & 5th, INC.,
suing in the right of BWAY & 5TH, INC.,**

Plaintiff,

-against-

**HAN IK CHO, STEVE S. KIM a/k/a SIN Y. KIM,
and BWAY & 5TH INC.,**

Defendants.
-----X

**TRIAL/IAS PART: 15
NASSAU COUNTY**

Index No. 600686-14

Motion Seq. No. 1

Submission Date: 2/27/14

Papers Read on this motion:

- Order to Show Cause, Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition, Affidavits in Opposition and Exhibits.....x¹**
- Correspondence dated February 24, 2014.....x**

This matter is before the court on the motion filed by Plaintiff Kyung Rim Choi, a shareholder of Bway & 5th, Inc., suing in the right of Bway & 5th, Inc., on February 19, 2014 and submitted on February 27, 2014, following oral argument before the Court. For the reasons set forth below, the Court grants the motion to the extent that the Court directs that the temporary restraining order issued by the Court on February 20, 2014 shall remain in effect, pending further court order, on the condition that Plaintiff post a bond in the sum of \$50,000 on or before March 28, 2014. The Court directs counsel for Plaintiff to serve a copy of this Order on Defendant Han Ik Cho, via certified mail, return receipt requested, on or before March 19, 2014.

¹ Although the opposition papers of Defendant Steve S. Kim a/k/a Sin Y. Kim are titled "Affirmation in Support of Motion to Vacate a Temporary Restraining Order and in Support of Defendant's Opposition to a Preliminary Injunction" and "Affidavit in Support," Defendant Steve S. Kim a/k/a Sin Y. Kim has not filed a motion, and those papers are submitted solely in opposition to Plaintiff's motion that is before the Court.

BACKGROUND

A. Relief Sought

Plaintiff Kyung Rim Choi (“Choi”), a shareholder of Bway & 5th, Inc. (“Corporation”), suing in the right of Bway & 5th, Inc., moves for an Order, pursuant to CPLR § 6301, enjoining and restraining Defendants Han Ik Cho (“Cho”), Steve S. Kim a/k/a Sin Y. Kim (“Kim”) and the Corporation from selling, disposing, transferring, assigning, alienating or distributing any property or money of the Corporation, except in the ordinary course of the business of the Corporation.

Defendant Kim opposes the motion.

B. The Parties’ History

The Verified Complaint (“Complaint”) (Ex. A to Choi Aff. in Supp.) alleges as follows:

The Corporation was formed on April 11, 2008. Choi, Cho and Kim are the shareholders of the Corporation, each owning 1/3 of the issued and outstanding capital stock of the Corporation. The Corporation owns and operates a restaurant food business located at 39 West 32nd Street, New York, New York (“Premises”), doing business as Korea Spoon (“Restaurant”). Defendants Cho and Kim control the business of the Corporation. Choi has had no involvement in the operation of the Corporation’s business. At all relevant times, Kim and Cho were officers and directors of the Corporation, and were in control of the Corporation’s assets, property, funds and business. The Corporation occupies the Premises under a written lease agreement dated April 17, 2008.

The Corporation maintains a bank account (“Account”) that Cho and Kim controlled. Plaintiff alleges that Kim and Cho have failed to pay the Corporation’s landlord (“Landlord”) and vendors, and have failed to pay sales tax to the State of New York (“State”). Kim and Cho have allegedly taken and diverted Corporation assets and money for their own benefit, and secreted money belonging to the Corporation in a safe deposit box .

Plaintiff alleges that on or about October 21, 2013, the Landlord commenced summary proceedings in the Civil Court of the City of New York, New York County, against the Corporation for non-payment of rent (“L&T Proceeding”) but Kim and Cho did not inform Plaintiff of the L&T Proceeding. On January 31, 2014, the court in the L&T Proceeding awarded judgment against the Corporation for non-payment of rent and awarded possession of the Premises to Landlord. A warrant of eviction has been, or will shortly be, issued to evict the

Corporation from the Premises. As of February 1, 2014, the Corporation owes \$305,528.37 in rent to the Landlord.

Plaintiff alleges that Kim and Cho have made, or caused to be made, false written entries of rental payments in the Corporation's business records with the intent of concealing their improper diversion of Corporation funds. From October 2013 to January 2014, Kim and Cho made thirteen (13) false written entries in the Corporation's bank records reflecting that thirteen (13) rent payments totaling \$141,000 were made to the Landlord, when the Landlord in fact received only seven (7) payments totaling \$71,000. Plaintiff alleges that Kim and Cho diverted \$70,000 that they falsely represented to be rent payments.

Plaintiff also alleges that, although approximately 30% of the Corporation's business income is received in the form of cash, there were no cash deposits made to the Account between October 2013 and January 2014. Plaintiff alleges that Kim and Cho diverted cash receipts for their own use during that time period.

Plaintiff alleges that in December 2013, deposits in the amount of \$330,485.05 were made into the Account. Cho and Kim, however, did not pay the rent for the Premises for December 2013. And during December 2013, Cho and Kim made cash withdrawals from the Account in excess of \$38,500 for their own benefit.

Plaintiff alleges that the Corporation has not paid the State sales tax of more than \$113,000.00 that it owes through the period ending October 2013. Plaintiff alleges that Kim and Cho, with the intent to avoid personal liability for unpaid sales tax, have made and filed, or caused to be made and filed, tax returns that falsely state that Choi is the president of the Corporation. As a result of these filings, the State has determined that Plaintiff is a "responsible person" (Compl. at ¶ 37) and imposed personal liability on Plaintiff for the unpaid sales tax. Plaintiff also alleges that the Corporation has not paid its vendors, and that more than \$200,000 is owed to the Corporation's vendors. Plaintiff alleges that, as a result of this conduct, Kim and Cho breached their fiduciary duty to the Corporation and its shareholders, failed to exercise due care in conducting the Corporation's affairs and have wasted and misappropriated the Corporation's assets.

Plaintiff alleges that, at a “purported meeting” of the Corporation’s shareholders on January 10, 2014 (Compl. at ¶ 45) (“Shareholder Meeting”), Plaintiff presented evidence of Kim and Cho’s improper conduct and demanded that the Corporation bring an action against Cho and Kim to recover improperly diverted funds. A vote was taken and Cho and Kim voted not to take action. Plaintiff alleges that it is futile to request that the Corporation bring an action against Kim and Cho because Kim and Cho are the owners of 66 & 2/3 % of the ownership interest in the Corporation, and it is Kim and Cho who have allegedly engaged in the wrongdoing that would be the subject of such an action.

Plaintiff seeks judgment granting the following relief: 1) money damages against Cho and Kim for the damages that the Corporation has sustained as a result of their conduct, 2) a direction that Kim and Cho be required to restore to the Corporation any monies wrongfully misappropriated by them, and that those monies be held in trust for the Corporation, 3) an order that Kim and Cho assign and transfer to the Corporation all of the Corporation’s assets that are in the possession of Kim and Cho, 4) an accounting to Plaintiff by Kim and Cho regarding monies related to the Premises that have been wrongfully diverted, and 5) an injunction restraining and enjoining Kim and Cho, during the pendency of this action and permanently, from disposing of any asset of the Corporation.

In support of the motion, Choi affirms the truth of the allegations in the Complaint regarding Cho and Kim’s operation and control of the Corporation, the L&T Proceeding and Cho and Kim’s diversion of Corporation assets. Choi provides documentation in support of Plaintiff’s motion, including the following: 1) the Notice of Petition and Petition in the L&T Proceeding (Ex. B to Choi Aff. in Supp.), 2) the rent statement issued by the Landlord reflecting the amount of rent owed by the Corporation as of February 1, 2014 (*id.* at Ex. C), 3) Account bank records from October, November and December 2013, and January 2014, including checks, reflecting the false notation that the purpose of the checks was to obtain a cashier’s check payable to Landlord’s agent (*id.* at Exs. D, E, F and G), 4) the statement of the Corporation’s accountant reflecting that the Corporation owes more than \$113,000 in sales tax through October 2013 (*id.* at Ex. H), 5) an August 27, 2013 Notice of Determination from the State stating that Choi is an “Officer/Responsible Person” for outstanding taxes (*id.* at Ex. I), and 6) a statement

reflecting that the Corporation owes more than \$200,000 to vendors, including \$51,756.32 owed to Fancy Foods (*id.* at Ex. K). Choi also affirms that Cho advised Choi that Cho and Kim had located a buyer for the Corporation's assets, who would pay \$1.2 million, and that those proceeds would be divided between Cho and Kim and Choi would not receive any of the funds. Choi submits that injunctive relief is necessary to preserve the Corporation's assets, and to satisfy the Corporation's obligations.

In opposition, Kim affirms that he has no involvement in the daily operation of the Restaurant, and that all of the Restaurant's daily operations are handled by the Restaurant's manager Young Hee Shin ("Shin") and the bookkeeper Soyoung Ahn ("Ahn"). The Corporation hired Shin because of her knowledge and experience, and because Kim and Cho lack the knowledge and experience necessary to manage the Restaurant. The Corporation, similarly, hired Ahn because of her experience and abilities, and Kim has given Ahn permission to sign Kim's name on checks used to pay the Corporation's obligations. Kim affirms that it is also his understanding that Cho has given Ahn permission to sign Cho's name on Corporate checks used to pay the Corporation's obligations. Kim affirms that, prior to the commencement of this action, Cho visited the Restaurant approximately twice per week to oversee the Restaurant's operations. Kim affirms that his own involvement in the Restaurant is limited to visits to the Restaurants twice per month, during which time he speaks with the Restaurant's staff and walks through the Premises, and he does not review the Restaurant's financial statements.

Kim affirms that the Restaurant opened for business in early 2012 and has been operating at a loss since its opening. In August 2013, the Landlord was going to shut down the Restaurant but the Restaurant made a rental payment in the amount of \$60,000, thereby avoiding the closing of the Restaurant. As the Corporation had only \$50,000 in cash available, Kim used \$10,000 of his own assets toward the \$60,000 rental payment, and expected the Corporation to reimburse him for that payment. On December 10, 2013, Kim prepared and signed a withdrawal/transfer slip (Ex. T to Kim Aff. in Opp.) and drew \$10,000 against the Account.

Kim affirms that in October 2013, the Restaurant was again at risk of being closed down due to the Corporation's failure to pay rent, and the L&T Proceeding was filed. Choi, Kim and Cho had a meeting at which time they decided to enter into a "conditional investment agreement whereby each of us was to invest \$10,000.00, but in the event any of us failed to make the agreed

investment the other shareholders would be relieved of their obligation under the agreement” (Kim Aff. in Opp. at ¶ 17). In late October, Kim and Cho fulfilled their obligation by providing the investment money to Ahn. Choi, however, failed to provide \$10,000 as agreed, which relieved Kim and Cho of their obligation to provide funds to the Corporation. Thus, Cho and Kim decided to withdraw their “conditional investments” (*id.* at ¶ 19) of \$10,000 in late December 2013, and Kim prepared two (2) withdrawal/transfer slips (Ex. U to Kim Aff. in Opp.). The first was in the amount of \$5,000, and was intended to reimburse Kim for one-half of his conditional investment. Kim affirms that he made a notation on the first withdrawal slip reflecting that he used this money to pay his retainer to legal counsel for legal services. The second was in the amount of \$10,000. Kim kept \$5,000 of this amount to reimburse himself for the remainder of his conditional investment, and the remaining \$5,000 was given to Cho as partial reimbursement for his conditional investment. Kim affirms that, at the times that he signed these withdrawal slips, Cho advised him that he was still owed a \$5,000 reimbursement of his conditional investment. Kim later learned that Cho had withdrawn \$15,000 on December 19, 2013, and affirms that he does not know why Cho withdrew funds in excess of what was owed to him. Kim affirms that, with the exception of the withdrawals described in his affidavit, he has not written checks, made deposits, or otherwise participated in financial transactions involving the Corporation. Kim affirms that Ahn performs those financial duties.

Kim affirms that he has never misappropriated or diverted the Corporations’ funds or assets for his personal use, or Cho’s personal use, and has never instructed Ahn, or any other Corporation employee, to misappropriate Corporation funds. Kim also affirms that he is not involved in the preparation of tax filings, and believes that the Corporation’s accountant prepares those filings. Kim affirms his belief that 20% or less of the Corporation’s income is received in the form of cash. He affirms that the Corporation stores its cash in the corporate safe (“Safe”) located at the Premises and that cash is used to pay wages and certain invoices as they come due, and no cash is deposited into the Account because those funds are exhausted by the payment of wages and invoices.

Kim affirms that in late 2013, he first learned of a Small Business Administration (“SBA”) loan that was made in the name of the Corporation. When Kim first invested in the Corporation in April 2010, Choi, Cho and the Corporation assured Kim that the Company had no outstanding liabilities. Pursuant to a subpoena, Kim received records reflecting that Choi had

obtained an SBA loan in the amount of \$900,000 by falsely representing that Choi and his wife were each 50% shareholders of the Corporation (*see* Ex. V to Kim Aff. in Opp.). Kim affirms that the Corporation's by-laws prohibit the Corporation from incurring debt without unanimous consent, but Kim was never advised of, and did not consent to, this loan. Kim affirms that this encumbrance has made it difficult to sell the Restaurant, and also affirms that Choi has failed to account to Cho and Kim regarding the funds obtained from the SBA loan.

Kim affirms that he attended the Meeting, at which all of the Corporation's shareholders appeared and participated. During the Meeting, Choi was removed, by vote, as a Director and Officer of the Corporation, based on suspicions regarding his fraudulent conduct with respect to the Corporation.

In further opposition to the motion, Ahn affirms that the Corporation hired her in April 2013 to work as a bookkeeper at the Restaurant. Her responsibilities include writing out checks drawn on the Account, which is maintained at the BBCN Bank ("BBCN") to pay the Corporation's creditors, including food and soda vendors, employees and the Landlord. Cho and Kim gave Ahn verbal authority to sign their names to Corporation checks for the sole purpose of paying Corporation creditors. Shin, as manager, provides Ahn with copies of vendor invoices that need to be paid, and Ahn prepares checks in the amount specified on the invoice, or makes a cash payment from the cash income that the Restaurant receives. All of the cash income that the Restaurant receives is stored in the Safe and used to pay wages and vendor invoices. Ahn affirms that no cash income is deposited into the Account, and she maintains a ledger on which she records all cash income and payments. Ahn and Shin provide information to the Corporation's accountant, who prepares the Corporation's tax filings. Aside from three instances in late December 2013, neither Cho nor Kim handled the Corporation's banking transactions, and Cho and Kim have never instructed Ahn to transfer Corporation assets to the shareholders.

Ahn affirms that rental payments on the Premises are remitted to Berik Management ("Berik"), the Landlord's agent. Ahn has always made rental payments to Berik by cashier's check or business check, which she delivered to the security guard at Berik's office building. In August 2013, the Restaurant was experiencing cash flow problems and fell behind on its rent payments, and the Landlord sought to close the Restaurant down unless \$60,000 in rent was paid. Ahn used \$50,000 of the Corporation's cash towards the rental payment and Kim contributed \$10,000 of his own money, with the expectation that he would be reimbursed. Ahn affirms that

the cash payment was recorded by Berik in its rental ledger and, in support, refers to Exhibit A to her affidavit, titled "Resident Ledger," which contains an entry dated August 13, 2013 in the amount of \$60,000 and the description "cash recd fm tenant deposited by Eddie."

Ahn affirms that the Restaurant faced similar cash flow problems in October 2013 and on October 21, 2013, Ahn attempted to allocate \$15,000 towards the payment of rent by writing out check number 2487 payable to "BBCN cashier's check" (*see* Ex. C to Ahn Aff. in Opp.) in the amount of \$15,000 and used that money to purchase cashier's check # 11001890 in the amount of \$15,000 payable to Berik (*id.*). At that time, however, the Corporation received an "urgent vendor invoice" (Ahn Aff. in Opp. at ¶ 19) and on October 22, 2013, Ahn was instructed to re-deposited cashier's check # 11001890 back into the Account. As a result of the Corporation's lack of funds to make its rental payment, Kim and Cho each provided \$10,000 to Ahn, to be used towards the rental payment, and advised Ahn that Choi also would provide \$10,000, but he never did. As per Cho's instructions, on October 28, 2013, Ahn wrote check # 2515 payable to "BBCN Cashier's check" in the amount of \$10,000 (*see* Ex. D to Ahn Aff. in Opp.) and used that money to purchase cashier's check # 11001917 in the amount of \$10,000, paid to the order of Berik (*id.*). And on October 29, 2013, Ahn wrote check # 2501 payable to "BBCN Cashier's check" in the amount of \$10,000, and used that money to purchase cashier's check # 11001924 in the amount of \$10,000, paid to the order of Berik (*see* Ex. E to Ahn Aff. in Opp.). Ahn then delivered both cashier's checks, numbers 11001917 and 11001924, to Berik and they recorded the payments in their ledger on October 30, 2013 (*see* Ex. A to Ahn Aff. in Opp.).

Ahn affirms that the Restaurant's financial difficulties continued throughout November and December 2013. Ahn attempted to allocate money toward the payment of rent but was forced to re-deposit the funds after purchasing cashier's checks in order to made payments to vendors to keep the restaurant operating. On November 18, 2013, Ahn wrote out check # 2582 payable to "BBCN Cashier's check" in the amount of \$15,000 (*see* Ex. F to Ahn Aff. in Opp.) and then used that money to purchase cashier's check # 11002047 in the amount of \$15,000, paid to the order of Berik (*id.*). Ahn provides affirmations regarding other checks written in December 2013 that were initially intended for rental payments, but had to be used to make payments to vendors (*see* Ahn Aff. in Opp. at ¶¶ 25, 26, 27 and 28, and Exs. G, H, I and J to Ahn Aff. in Opp.). Ahn affirms that Kim and Cho reimbursed themselves for their conditional investment by issuing and signing withdrawal/transfer slips drawn on the Account on December

19 and 24, 2013, and this was the only instance that Kim or Cho was involved with a transaction involving the Account.

In December 2013, Cho decided that, because the outstanding rent due was less than the \$300,000 security deposit held by the Landlord and in light of the Landlord's prior efforts to close down the Restaurant, the Corporation should withhold future rental payments, and Cho directed Ahn to hold all future rent payments in the Safe. The Restaurant was not shut down in December 2013 and Cho subsequently instructed Ahn to purchase several cashier's checks for rent payments in January 2014 and store them in the Safe. Between January 6 and 21, 2014, Ahn wrote out business checks payable to BBCN cashier's check and used that money to purchase cashier's checks payable to Berin (*see* Ahn Aff. in Opp. at ¶¶ 31-34 and Exs. L-O to Ahn Aff. in Opp.). On or about January 21, 2014, Cho instructed Ahn to deliver the cashier's checks to Berik because the outstanding rent was greater than the security deposit and the Restaurant was still operating. Ahn hand-delivered the cashier's checks to Berik, which recorded the payments in its ledger.

Ahn affirms that she also occasionally paid vendors with cashier's checks, and provides check numbers and amounts of checks used in October 2013 to pay vendors. And in October 2013, it was the Corporation's policy to pay its waiting staff their credit card tips in cash. On October 18, 2013, Ahn wrote out check, payable to cash, in the amount of \$2,924.00 (Ex. R to Ahn Aff. in Opp.), and the notation on that check reflects that this check was used to pay tips. Ahn affirms that the Corporation no longer follows this practice, and now pays tips to the waiting staff as part of their payroll check.

Ahn affirms that on October 22, 2013, she wrote out check # 2491 payable to BBCN cashier's check in the amount of \$10,000 and then used that money to purchase a cashier's check in the amount of \$10,000 (*see* Ex. S to Ahn Aff. in Opp.). These funds were intended to be used to retain counsel to represent the Corporation in litigation, but the attorney declined the case due to a conflict of interest. Accordingly, this cashier's check was redeposited into the Account on October 29, 2013.

On February 20, 2014 the Court issued a temporary restraining order ("TRO") directing that, pending further determination of this Court, Defendants Cho, Kim and the Corporation are restrained from selling, disposing, transferring, assigning, alienating or distributing any property or money of the Corporation, except in the ordinary course of business of the Corporation, and

negotiations regarding a proposed sale of the business can continue.

At oral argument on the instant motion, the Court also raised the issue of whether it would be appropriate to appoint a receiver to oversee the Corporation, and asked counsel for the parties to advise the Court of their position on that issue. By letter dated February 24, 2014, counsel for Plaintiff advised the Court that Plaintiff opposed the appointment of a receiver, in part because the appointment of a receiver would allow New Bank, which has loaned money to the Corporation, to declare a default and enforce its security interest by sale of the pledged Corporation assets.

C. The Parties' Positions

Plaintiff submits that he has demonstrated his right to the requested relief by establishing that Kim and Cho violated their fiduciary obligations by misappropriating the Corporation's assets, that Plaintiff will continue to be harmed without the requested relief and that the requested injunctive relief is necessary to preserve the Corporation's assets and satisfy Corporate obligations.

In opposition, Defendant Kim submits that the Court should deny the motion on the grounds that 1) Plaintiff has not established a likelihood of success on the merits because Plaintiff's allegations regarding the mismanagement of Corporation assets by Defendants have been "fully and thoroughly countered" by Kim's opposition (Grossman Aff. in Opp. at ¶ 35); 2) Plaintiff has not established that he will suffer irreparable injury without the requested injunctive relief because Plaintiff's claim of injury is based on conduct that did not in fact occur; and 3) Plaintiff has not demonstrated that a balancing of the equities favors Plaintiff in light of evidence presented which establishes that Plaintiff took out the SBA loan without authorization, which has adversely affected the parties' ability to sell the Corporation.

RULING OF THE COURT

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v.*

Romaine, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002).

The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); see *Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, 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 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); see also CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

The Court grants the motion to the extent that the Court directs that the TRO issued by the Court on February 20, 2014 shall remain in effect, pending further court order, on the condition that Plaintiff post a bond in the sum of \$50,000 on or before March 28, 2014. The Court concludes that Plaintiff has demonstrated a likelihood of success on the merits with respect to his allegations regarding Defendants' mismanagement of Corporation funds. While Kim and Ahn have provided lengthy and detailed explanations regarding checks written on the Corporation's Account, some of those explanations do not make sense, or lack supporting documentation. By way of example, Kim has affirmed that, with respect to the alleged "conditional investments" agreed to by the parties, Kim prepared a withdrawal/transfer slip in the amount of \$5,000 that was intended to reimburse Kim for one-half of his conditional investment but made a notation on the withdrawal slip reflecting that he used this money to pay his retainer to legal counsel. Kim does not explain why he made a notation on the withdrawal slip that is at

odds with his own description of the transaction. Similarly, Ahn provides extensive details regarding checks written on the Account, which includes her affirmation that monies originally intended for rent were instead provided to vendors. Ahn, however, provides no documentation, such as a receipt or invoice, supporting her claim that monies initially intended to be used to pay the rent were instead used to pay vendors.

The Court also concludes that Plaintiff has established that he will suffer irreparable injury without some injunctive relief. If the Corporation fails to pay rent, the Landlord will take over the Premises, resulting in the Restaurant ceasing to operate. Finally, in light of the L&T Proceeding, and the evidence presented by Plaintiff which supports his contention that Defendants have diverted funds that they falsely represented to be rent payments, the Court concludes that a balancing of the equities favors Plaintiff.

The Court directs counsel for Plaintiff to serve a copy of this Order on Defendant Han Ik Cho, via certified mail, return receipt requested, on or before March 19, 2014.


All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on March 31, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY
March 4, 2014



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
MAR 07 2014
NASSAU COUNTY
COUNTY CLERK'S OFFICE