

<b>Brailovsky v Kurbatsky</b>
2018 NY Slip Op 30430(U)
March 13, 2018
Supreme Court, Kings County
Docket Number: 500967/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13<sup>th</sup> day of March, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.

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ALEKSANDER BRAILOVSKY, INDIVIDUALLY AND ON  
BEHALF OF CARIBE CATERING HALL, INC.,

PLAINTIFF,

- AGAINST -

Index No. 500967/16

BORIS KURBATSKY, FELIX NEMIROVSKY,  
AND CARIBE CATERING HALL, INC.,

DEFENDANTS.

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The following papers numbered 1 to 10 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_  
Other Papers \_\_\_\_\_

1-5 \_\_\_\_\_  
6-7 \_\_\_\_\_  
8-9, 10 \_\_\_\_\_  
\_\_\_\_\_ \_\_\_\_\_  
\_\_\_\_\_ \_\_\_\_\_

Upon the foregoing papers, defendants Boris Kurbatsky (Boris), Felix Nemirovsky (Felix) and Caribe Catering Hall, Inc. (Caribe) move, by order to show cause, for an order 1) modifying this court's order dated March 3, 2016 allowing defendants to take over the day-to-day operation of Caribe as per a special meeting held on February 10, 2017, 2) directing plaintiff Aleksander Brailovsky to turn over to Boris or Felix all keys, records, bank

cards, computer passwords, equipment and material of any kind owned by Caribe, 3) directing plaintiff to turn over to Felix or Boris the corporate “black book” of Caribe and 4) directing plaintiff to turn over to Felix or Boris all financial records of Caribe in plaintiff’s possession.

Plaintiff commenced the instant derivative action against defendants for breach of fiduciary duty and conversion of Caribe’s assets. According to the complaint, plaintiff is a 33.4% shareholder in Caribe, while defendants each hold a 33% interest in the corporation. Plaintiff alleges that defendants diverted revenue, income and assets of the corporation without accounting for same and refused plaintiff access to corporate books and records. On January 21, 2015 (the date this action was commenced) plaintiff filed a proposed order to show cause seeking an order 1) restraining defendants from accessing any corporate books, records and bank accounts, 2) restraining defendants from interfering with the legitimate business of Caribe in the operation of its catering hall, 3) restraining defendants from transacting any business or exercising corporate power, except on consent of all parties, 4) restraining defendants from using the corporate facilities for any corporation business, except on consent of all parties, 5) restraining defendants from paying out or transferring or delivering any property of Caribe, except on consent of all parties, 6) granting temporary corporate control and access to plaintiff and 7) directing individual defendants to return corporation assets taken in derogation of the shareholders’ agreement. On January 26, 2016, the court signed the order to show cause wherein plaintiff was temporarily granted “full

control and access to the corporation.” Defendants failed to appear on the return date of the order to show cause (February 11, 2016). By short form order dated March 3, 2016, this court denied a subsequent motion by defendants to open their default on the order to show cause. In a separate order dated March 3, 2016, this court granted plaintiff the following relief: a) Boris and Felix are restrained and enjoined from transacting any business without written consent of plaintiff or a court order; b) Boris and Felix are restrained and enjoined from paying or otherwise transferring or delivering any property of Caribe; c) Boris and Felix are restrained and enjoined from using the facilities of Caribe in any manner; d) Boris and Felix are restrained and enjoined from limiting or hindering plaintiff’s full access to Caribe’s business premises and to all of Caribe’s accounts, minutes, books and records and e) plaintiff is temporarily granted full control and access to Caribe. The court further ordered that defendants shall immediately return all books, records, minutes and accounts of Caribe to plaintiff.

During a shareholders’ meeting held on February 10, 2017, the board of directors adopted a resolution to return control of Caribe to Boris and Felix.<sup>1</sup> On July 14, 2017, plaintiff sent Boris and Felix a notice for a capital call meeting to be held on July 20, 2017. Attached to the notice was a schedule stating that the sum of \$100,000.00 was due from each defendant to reimburse plaintiff for his capital contribution and maintain the current operations of the corporation. Upon the failure of defendants to appear at the capital call

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<sup>1</sup>The board of directors of Caribe consisted of the three shareholders (plaintiff, Boris and Felix). According to the meeting transcript, plaintiff was present at the meeting but voluntarily departed before a vote was taken.

meeting, plaintiff, the sole director present, issued a corporate resolution reducing the shares of defendants to zero and increasing plaintiff's interest to 100%.

While defendants' motion is identified as one for "modification" of the March 3, 2016 order, it is in effect a motion to renew their prior motion to vacate its default based on the February 10, 2017 corporate resolution issued by Boris and Felix. "A motion for leave to renew is addressed to the sound discretion of the court" (*Matheus v Weiss*, 20 AD3d 454, 454-455 [2d Dept 2005]). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]; see *Hodzic v M. Cary, Inc.*, 151 AD3d 1034 [2d Dept 2017]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820, 822 [2d Dept 2007]).

The court declines to vacate or otherwise reconsider the March 3, 2016 order, which affords plaintiff injunctive relief. The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (see *Dixon v Malouf*, 61 AD3d 630, 630 [2d Dept 2009]; *Ruiz v Meloney*, 26 AD3d 485, 486 [2d Dept 2006]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 604 [2d Dept 2004] ). CPLR 6301 provides that 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." The decision to grant or deny a preliminary injunction rests in the sound discretion of the court (see *Dixon v Malouf*, 61 AD3d at 630; *Ruiz v Meloney*, 26 AD3d at 486). In this matter, plaintiff maintains that he has made the sole

contribution of capital toward Caribe, in the amount of \$179,585.00, and alleges that defendants have engaged in self-dealing, diverted the assets of the corporation and denied plaintiff access to corporate books and records. There is no dispute that a significant level of animus exists between defendants and plaintiff. Defendants, who collectively own the majority of the shares, may conceivably issue any corporate resolution which inures solely to their benefit and/or is adverse to plaintiff, as was the case on February 10, 2017. While the March 3, 2016 order effectively placed control of the corporation in a shareholder who, in his complaint, asserts to be a minority 33.4% shareholder, the court finds the order is necessary to prevent the possible dissipation of corporate assets and assure that plaintiff may recover upon a judgment in his favor. The March 3, 2016 order does not state that it is only effective until such time a vote of Caribe's board of directors resolves otherwise. There would have been no purpose in issuing the March 3, 2016 order granting protection to plaintiff if the order could be vitiated by corporate resolution issued upon defendants' majority vote.

Accordingly, defendants' motion is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



HON. LAWRENCE KNIPEL