

<b>Nemirovsky v Brailovskiy</b>
2018 NY Slip Op 30432(U)
March 13, 2018
Supreme Court, Kings County
Docket Number: 515145/15
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.

-----X

FELIX NEMIROVSKY and BORIS KURBATSKY,  
individually and on behalf of HARMONY FUNERAL  
HOME INC.,

Plaintiffs,

- against -

Index No. 515145/15

WIDNER ALEKSANDR BRAILOVSKIY,  
DMITRIY BRAILOFSKIY and HARMONY  
FUNERAL HOME INC.,

Defendants.

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The following papers numbered 1 to 14 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed\_\_\_\_\_

1-2, 3, 4-5, 6-7, 8

Opposing Affidavits (Affirmations)\_\_\_\_\_

9, 10, 11, 12, 13

Reply Affidavits (Affirmations)\_\_\_\_\_

14

\_\_\_\_\_ Affidavit (Affirmation)\_\_\_\_\_

Other Papers\_\_\_\_\_

\_\_\_\_\_

Upon the foregoing papers, plaintiffs Felix Nemirovsky (Felix) and Boris Kurbatsky, individually and on behalf of Harmony Funeral Home Inc. (Harmony) move for an order 1) directing defendants Widner Aleksandr Brailovskiy (Aleksandr), Dmitriy Brailovskiy (Dmitriy) and Harmony to communicate with Harmony's bank(s) to authorize Felix to have

direct access to all banking records regarding Harmony, 2) directing Harmony to instruct its bank to forward duplicates of monthly bank statements and other communications directly to Felix, 3) prohibiting Aleksandr and Dmitriy from acting directly or indirectly to interfere with plaintiffs' continuing access to the corporate bank account and 4) prohibiting Aleksandr or Dmitriy from changing, adding or closing any of Harmony's bank accounts without further order of this court (Motion Sequence No. 7). Plaintiffs move, by order to show cause, for an order 1) permitting plaintiffs to fully reinstate this matter by permitting plaintiffs to amend the complaint, 2) staying defendants from taking any steps in furtherance of the purported corporate resolution dated July 7, 2017 and 3) staying defendants from transferring or encumbering any of Harmony's property or assets or transacting business except in the ordinary course of business (Motion Sequence No. 8). Defendants move for an order, pursuant to CPLR 2304, quashing the subpoena issued by plaintiffs' counsel (Motion Sequence No. 9). Plaintiffs move, by order to show cause, for an order 1) directing that defendants immediately provide the identity of any transferees including, but not limited to the names and addresses of same, the date of any transfer and the nature and interest of any transfer, 2) directing defendants to produce the information and documents demanded in the subpoena dated September 28, 2017 and 3) permitting plaintiffs to file an amended complaint within 20 days of the receipt of the information and documents requested herein (Motion Sequence No. 10). Defendants move, by order to show cause, for an order, pursuant to

CPLR 6213, vacating the order to show cause signed on October 6, 2017 (Motion Sequence No. 11).

Plaintiffs, who each hold a 25% interest in Harmony, commenced this derivative action to recover damages for breach of fiduciary duty and conversion of corporate assets by Aleksandr and Dmitriy, who are also each 25% shareholders of the corporation. The shareholders' agreement, dated July 2, 2015, contained the following arbitration provision:

Any dispute or controversy arising among the parties hereto regarding any term, covenant or condition of this Agreement or the breach thereof shall, upon written demand of any party hereto, be submitted to and determined by arbitration before the American Arbitration Association, in Kings County, in the State of New York, by a panel of three arbitrators, in accordance with the rules of the Association then in effect. Any award or decision rendered shall be made by means of a written opinion explaining the arbitrators' reasons for the award or decision, and the award or decision shall be final and binding upon the parties hereto. The arbitrators may not amend or vary any provision of this Agreement. Judgment upon the award or decision rendered by the arbitrators may be entered in any court of competent jurisdiction.

Shortly after the commencement of this action, plaintiffs filed a proposed order to show cause for an order a) requiring defendants to permit plaintiffs and their agents to inspect the accounts, minutes, books and records of Harmony, and to make copies thereof as desired, b) requiring defendants to permit plaintiffs and their agents unrestricted access to Harmony's business premises, c) restraining Harmony and its directors and officers from transacting any unauthorized business and from exercising any corporate powers, except on consent of plaintiffs, d) restraining Harmony, its directors and officers from paying out or



otherwise transferring or delivering any property of Harmony, except on consent of plaintiffs in order to preserve the property and carry on the business of Harmony and e) directing the individual defendants to return to the corporation all assets taken from the corporation in derogation of the shareholders' agreement. The order to show cause was resolved by stipulation dated December 17, 2015 (so ordered by Justice Martin M. Solomon) whereby defendants agreed to provide plaintiffs access to Harmony's corporate books and banking records, provide plaintiffs with keys to Harmony's premises and permit plaintiffs to work at the premises. On February 11, 2016, the parties entered into another stipulation (so ordered by Justice Solomon), whereby the parties agreed, among other items, that full access shall be given to Harmony's corporate books and bank accounts during business hours, that no original records or documents shall be removed from the premises, that the parties may continue to operate Harmony's business in the usual course and that plaintiffs shall be entitled to passwords to Harmony's bank accounts and shall be entitled to copies of checks and payments.

On February 16, 2016, defendants moved to dismiss this action on the ground that the shareholders agreement contains a broad arbitration clause providing that all disputes arising from the agreement shall be resolved in arbitration. On March 17, 2016, the parties entered into and filed a stipulation of discontinuance without prejudice.

By order to show cause, signed on December 1, 2016, plaintiffs moved for an order compelling defendants to comply with the terms of the stipulations of December 17, 2015

and February 11, 2016, staying the arbitration proceedings pending at the time between the parties until defendants provide plaintiffs with certain items of discovery and “restoral and maintenance of this case to full active status for purposes of enforcing this Court’s prior Orders and monitoring future compliance of prior Orders and any further Order which the Court may see fit to issue concerning this Order to Show Cause.” In its order dated December 16, 2016, this court determined that the prior orders of Justice Solomon will remain in full force and effect, directed the parties to proceed to arbitration as per the shareholders’ agreement and directed that plaintiffs be provided with a key to the basement of Harmony’s premises. The court stated that “all other relief requested is denied.”

Subsequently, two additional applications were made by plaintiffs seeking, among other items, an order compelling defendants to provide keys to Harmony’s premises and access to Harmony’s bank accounts. On April 21, 2017, this court issued an order “advising all parties that all prior orders of the court are in effect and must be complied with.”

The discord among the parties ostensibly persisted thereafter. On July 7, 2017, a meeting of Harmony’s board of directors (which was comprised of all four shareholders) was held for the purpose of a capital call. Plaintiffs were not present at the meeting and, consequently, it was resolved that plaintiffs shall be divested of their shares and Aleksandr and Dmitriy shall each assume said interests to become 50% shareholders.

The motions brought by plaintiff seek, as in the past, an order directing cooperation from Aleksandr and Dmitriy with respect to plaintiffs’ shareholder rights and further seek items of discovery, injunctive relief and, in essence, an order relieving plaintiffs from the

stipulation of discontinuance. Defendants seek to quash subpoenas from plaintiffs seeking records of share transfers and further seek to vacate the temporary restraining order embodied in the order to show cause signed on October 6, 2017.

Based upon the review of the parties' submissions and the record adduced in this matter, it is the finding of this court that because the instant action was discontinued by stipulation of discontinuance signed by counsel for all parties and filed on March 17, 2016, the court is without jurisdiction to determine the motions presently before it (Motion Sequences Nos. 7-11). CPLR 3217 (a) (2) provides:

(a) Without an order. Any party asserting a claim may discontinue it without an order

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2. by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action.

Although a trial court has the power "to exercise supervisory control over all phases of pending actions and proceedings" (*Teitelbaum Holdings v Gold*, 48 NY2d 51, 54 [1979]), it lacks jurisdiction to entertain a motion after the action has been "unequivocally terminated . . . [by the execution of] an express, unconditional stipulation of discontinuance" (*id.* at 56). "When an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified" (*Newman v Newman*, 245 AD2d 353, 354 [2d Dept 1997]; *see Brown v Cleveland Trust Co.*, 233 NY 399 [1922]; *Weldotron Corp.*



*v Arbee Scales*, 161 AD2d 708 [2d Dept 1990]). Because the court is divested of jurisdiction by reason of the discontinuance, it may not even entertain a motion to vacate the stipulation of discontinuance and restore the action; the movant must instead commence a new plenary action (see *Estate of Abrams v Seaview Assn. of Fire Is. N.Y., Inc.*, 151 AD3d 809, 810 [2d Dept 2017]; *Matter of Serpico*, 62 AD3d 887, 887-888 [2d Dept 2009]) *Moshe v Town of Ramapo*, 54 AD3d 1030 [2d Dept 2008]).

Accordingly, all motions are denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL