

<p>Skillet v Citizens Parking, Inc.</p>
<p>2018 NY Slip Op 31198(U)</p>
<p>June 12, 2018</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 651254/2018</p>
<p>Judge: O. Peter Sherwood</p>
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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JERRY SKILLETT and SKILLETT CITIZENS, LLC,
directly and derivatively, on behalf of CITIZENS
PARKING SHAREHOLDERS, LP and
CITIZENS PARKING, INC.,

Plaintiffs,
-against-

CITIZENS PARKING, INC.; CITIZENS PARKING
SHAREHOLDERS GP, LLC; HPS INVESTMENT
PARTNERS, LLC, f/k/a HIGHBRIDGE PRINCIPAL
STRATEGIES, LLC; HIGHBRIDGE PRINCIPAL
STRATEGIES - MEZZANINE PARTNERS II
DELAWARE SUBSIDIARY, LLC; HIGHBRIDGE
PRINCIPAL STRATEGIES - AP MEZZANINE
PARTNERS II, L.P.; HIGHBRIDGE PRINCIPAL
STRATEGIES - OFFSHORE MEZZANINE PARTNERS
MASTER FUND II, L.P.; HIGHBRIDGE PRINCIPAL
STRATEGIES - INSTITUTIONAL MEZZANINE
PARTNERS II SUBSIDIARY, L.P.; TFO PARKING
HOLDINGS LLC; KCK LTD.; CITIZENS PARKING
PARTNERS, LLC; ANTARCTICA INFRASTRUCTURE
PARTNERS, LLC; ANDREAS BOYE; SCOT P.
FRENCH; JON HEDLEY; NAEL KASSAR; PHILIPP
KLINGELHOFER; and CHANDRA R. PATEL,

DECISION AND ORDER
Index No.: 651254/2018

Motion Sequence No.: 001

Defendants,

-and-

CITIZENS PARKING SHAREHOLDERS, LP and
CITIZENS PARKING, INC.

Nominal Defendants.

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O. PETER SHERWOOD, J.:

BACKGROUND

This is a motion for preliminary injunction. These facts are taken from the verified complaint.

Plaintiffs Jerry Skillett, the former Chief Executive Officer of Defendant Citizens Parking, Inc. (the Company) and Skillet Citizens, LLC bring this suit directly and derivatively on behalf of the Company and Citizens Parking Shareholders, LP (Citizens LP) against the Company, Citizen Parking Shareholders GP, LLC (Citizens GP), HPS Investment Partners, LLC f/k/a Highbridge Principal Strategies, LLC and various affiliated entities (together, Highbridge or Highbridge Funds), and various funds and directors.

In 2014-15, Skillett organized a transaction which merged several parking garage businesses into one. Highbridge Funds provided some of the capital and financing to the Company. Defendant Antarctica Infrastructure Partners, LLC (Antarctica) provided equity capital and entered into an asset management agreement with the Company. Plaintiffs claim Highbridge Funds and Antarctica put their personal interests ahead of those of the Company and engaged in self-dealing, to the Company's detriment. Highbridge caused the Company to give Antarctica a no-show job where Antarctica would collect millions of dollars in management fees in exchange for doing nothing. Highbridge Funds also used its board control to saddle the Company with predatory "payment in kind" (PIK) debt at above-market interest rates. Highbridge and its board proxies then got the Company to take on more debt and effectively bled the Company dry.

Skillett is an employee of the Company, who had warned the board not to pursue a transaction which had overleveraged the Company (the QuikPark transaction), and had also spoken out against another employee, Rafael Llopiz, who eventually received an extortionate payment to leave his employment ahead of accusations of harassment by female employees. To get rid of Skillett without triggering a key man provision in the Company's financing, Highbridge Funds pushed him out of his leadership position. He makes the following claims:

- 1) On behalf of Citizens LP the Company, for breaches of fiduciary duty against Citizens GP, and several individuals referred to in the complaint as the "Highbridge-Controlled Directors", and the "Antarctica Directors"
- 2) On behalf of Citizens LP and the Company, for aiding and abetting breaches of fiduciary duty, against Highbridge Funds and Antarctica
- 3) On behalf of Citizens LP and the Company, for fraud, against Highbridge Funds, Highbridge-Controlled Directors, Antarctica, and Antarctica-Controlled Directors

- 4) On behalf of Citizens LP and the Company, for unjust enrichment against Highbridge Funds and Antarctica
- 5) On behalf of Citizens LP and the Company, for civil conspiracy, against all defendants
- 6) On behalf of Citizens LP and the Company, for violation of the faithless servant doctrine against Antarctica
- 7) By Skillett, for breach of contract (Skillett's employment agreement), against the Company
- 8) By Skillett, for breach of implied covenant of good faith and fair dealing (of his employment agreement), against the Company
- 9) By Skillett, for declaratory judgment (that Skillett's second employment agreement, which demoted him, is invalid, and his employment is governed by the first agreement), against the Company
- 10) By Skillett, for unauthorized wage deductions in violation of NYLL, against the Company
- 11) By Skillett, for rescission of the agreements signed by Skillett in connection with the loan of \$25 million for the purchase of the Llopiz shares, against the Company and Citizens LP

THE INSTANT MOTION

In this motion for a preliminary injunction, plaintiffs seek an order to restrain defendants from terminating various of Skillett's rights as a partner of Citizens LP, terminating or reducing Skillett's benefits, accelerating the promissory note made by Skillett to the Company, reducing the interest of Skillett or Skillet Citizens LP in Citizens LP, or causing Citizens LP or the Company to engage in (1) any transaction with HPS Investment Partners, LLC other than the regular payment of interest on the senior unsecured note; (2) any transaction with Antarctica other than the regular management fees; and (3) any transaction outside the ordinary course of business without first providing 30 days written notice to Skillett.

1. Plaintiffs' Arguments

Plaintiffs argue that defendants acted to remove Skillett from his position with the Company and dilute his equity interests as retaliation for his actions in seeking to protect the Company's minority owners and for complaining about the Company's violation of NY Labor

Law. Highbridge Funds and Antarctica own 96% of the Company and appointed all of the directors, except Skillett (Memo at 1). Skillett owns 0.85% of voting equity. He brought this action on March 15, 2018, asserting various breaches of fiduciary duty. Two weeks later, the Company fired Skillett and reduced his ownership interest, stating that, while his termination was not for cause, and he would be subject to an 18 month garden leave, he would be paid only if he dismissed this suit (*id.* at 2). The termination also eliminated his consultation and inspection rights, which he had as a Qualified Limited Partner of Citizens LP. On April 5, the Company called a \$500,000 loan it had made to Skillett. Part of his ownership interest was pledged as collateral for this loan. On April 23, 2018, the Company reduced his wages. On May 3, it removed his parking privileges. On May 7, the Company stopped paying Skillett, a breach of his employment agreement. Since he was not fired for cause, he was entitled to 60 days' salary (*id.* at 11).

Although not alleged in the complaint, because the conduct post-dates filing of the complaint, Plaintiffs argue defendants' actions are prohibited by NY Labor Law, section 215. The section provides that

"[n]o employer . . . shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee . . . (iii) because such employee has caused to be instituted or is about to institute a proceeding under or related to this chapter. . . . 2.(a) An employee may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated the provisions of this section. The court shall have jurisdiction to restrain violations of this section . . . and to order all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of liquidated damages, costs and reasonable attorneys' fees [and] ordering rehiring or reinstatement of the employee to his or her former position . . . and an award of lost compensation and damages, costs and reasonable attorneys' fees."

Plaintiffs claim a likelihood of success on the merits of the derivative breach of fiduciary duty claim as a majority of the board was interested in the transactions at issue, the transactions were the subject of unfair dealing and pricing, and were to the benefit of the defendants rather than the Company. Skillett claims a likelihood of success on the merits on the labor law claims, since the Company has made unauthorized deductions from his wages by reducing the pay specified in his employment agreement, in violation of Labor Law, section 193 (a) which states that "[n]o employer shall make any deduction from the wages of an employee, except deductions which . . . (b) are expressly authorized in writing by the employee and are for the benefit of the employee".

Skillett also claims a likelihood of success on his retaliation claim, pursuant to Labor Law, section 215, as his employment was terminated for a protected activity.

Plaintiffs claim irreparable harm will ensue, without the injunction to stop further self-dealing transactions. Further, defendants have diluted Skillett's equity interest, and threaten to dilute it more, and to divest him of his voting power. The right to participate in the management of a company cannot be remedied by money damages (Memo at 22). The LP Partnership Agreement provides that the breach of any obligation pursuant to that agreement constitutes irreparable harm. Plaintiffs merely seek to maintain the status quo, and argue that there is little prejudice to defendants from an injunction, so the balance of equities falls in their favor. Finally, as the LP Partnership Agreement provides, and as there is no potential damage to defendants, plaintiffs ask they not be required to post a bond (*id.* at 25).

2. Defendants' Arguments

Defendants cast Skillett as a disgruntled former employee who agreed to step down, pursuant to a new employment agreement, the Second Amended and Restated Employment Agreement dated as of November 10, 2017 (the Second EA) (Opp at 1, 7, citing Exhibit 21 to Gill Aff, NYSCEF Doc. No. 62). Defendants contend the injunctive relief sought goes too far, giving Skillett, the owner of less than 1% of the voting shares, outsize influence by requiring defendants to give him thirty (30) days' written notice of transactions outside the ordinary course of business (*id.*). Skillett was an at-will employee, and has no vested right to be Chief Executive Officer (CEO) of the Company. Even as CEO, he would not have had the powers he seeks in this motion. He could not have vetoed transactions between Citizens LP and its shareholders, and would not have a right to the advance notice of transactions demanded. Skillett fails to show any such transactions are contemplated, let alone imminent transactions, or any that are capable of causing harm which cannot be compensated for with money damages (citing *Golden v Steam Heat, Inc.*, 216 AD2d 440 [2d Dept 1995]).

Defendants contend Skillett approved of the transactions about which he now complains, and signed his approval for the debt financing (*id.* at 5, citing Exhibits 3, 5-9 to Gill Aff, NYSCEF Docs. No. 44, 46-50). While Skillett complains of the management contract with Antarctica, he also signed off on it (Opp at 6, citing Exhibits 10-14 to Gill Aff, NYSCEF Docs. No. 51-55). He also approved the Quik Park transaction (Opp at 6, citing Exhibits 15, 17, 8, 9 to Gill Aff, NYSCEF

Docs. No. 56, 58, 49-50). In November 2017, Skillet participated in negotiating the Second EA, which he signed on November 16, 2017. On November 17, Chandra Patel countersigned the Second EA for the Company on p15, but accidentally failed to sign an earlier signature page, p10. The parties proceeded under the Second EA and Skillet stepped down as CEO, taking the title of President and accepting a reduction in salary and bonus structure (Opp at 8). As permitted by both the original and Second EA, the Company terminated Skillet's employment effective April 11, 2018 and he was no longer entitled to pay. The termination of Skillet's employment also triggers the requirement that the entire principal of a promissory note he had signed be paid. His has not paid the amount due (*id.* at 9). Skillet's termination as an employee also triggered a clause of the Class D Partnership Admission Letter terminating his status as a partner of Citizens LP (but not his Class D interests) upon termination of his employment (*id.*).

Defendants argue that the requested injunctive relief would dramatically alter the status quo, including the fact that the Company has a new CEO. Further, the fact that plaintiffs invoke Labor Law 215 does not mean that the standards of CPLR 6301 can be waived (Opp at 12).

Defendants contend plaintiffs have not shown a likelihood of success on the merits, because Skillet has submitted little evidence in support of his claim, and "failed to meet his evidentiary burden to support his petition by affidavit and other competent proof" (*id.* at 13, quoting *Faberge Intern. Inc. v Di Pino*, 109 AD2d 235, 239 [1st Dept 1985]). Further, defendants argue that the claims in the complaint will fail, as a result of defendants' motion to dismiss (Opp at 14). In any event, the retaliation claim cannot support injunctive relief, as no retaliation claim is asserted in the complaint, and CPLR 6301 allows a preliminary injunction to be granted only when there is a threat of "an act in violation of the plaintiff's rights respecting the subject of the action."

Moreover, Skillet will not suffer irreparable harm, as he never possessed the power he seeks in this motion (Opp at 16). Further, does not seek to enjoin any specific transaction and has not asserted any basis for interfering with the Company's business (*id.*). The divestment of certain Class D interests does not constitute dilution, since those shares have no voting rights. Also, the complaint seeks to rescind the transaction through which Skillet acquired those shares (*id.* at 19). Insofar as Skillet is concerned about the loss of some of his Class A stock, that happens only if he fails to pay the debt he incurred under the 2014 Note (*id.*). He asks for protection for his contractual

consultation and inspection rights, but he has those rights only as a Qualified Limited Partner. He ceased to be a Qualified Limited Partner when his employment terminated (*id.* at 20).

Defendants also contend that plaintiffs failed to show a balancing of the equities falls in their favor (*id.* at 21). Even at the peak of his power, Skillet did not have the authority he seeks from the court now (*id.*). The requested relief would cripple the Company and change the status quo, so should be denied.

In the event the court grants a preliminary injunction, defendants contend the court must require an undertaking. The bond waiver in the Limited Partnership Agreement is inapplicable because plaintiffs are not arguing breach of that agreement (*id.* at 24). Additionally, that agreement is irrelevant because the injunction seeks to grant Skillet dramatic new rights, and such an extreme request requires an undertaking (*id.*).

DISCUSSION

The issuance of a preliminary injunction is governed by CPLR 6301, which provides, in pertinent part:

“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 plaintiffs rights respecting the subject of the action, and tending to render the judgment ineffectual”

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). “The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts” (*id.*). A preliminary injunction is a drastic remedy and the party seeking it has the burden of demonstrating a clear right to relief factually and convincingly through affidavits and other proof supplying evidentiary detail (see *Koultukis v Phillips*, 285 AD2d 433, 435 [1st Dept 2001]; *Armbruster v Gipp*, 103 AD2d 1014 [4th Dept 1984]; *Related Properties, Inc. v Town Bd of Town/Village*, 22 AD3d 587 [2d Dept 2005]. On this motion, plaintiffs have failed to meet their burden.

As to the element of likelihood of success on the merits, the Company argues that Skillett voluntarily relinquished the position of CEO in November 2017, months before the retaliation of which he now complains. Further, he signed off on many of the very corporate actions he now asserts were improper. He ceased being a partner in Citizens LP when he was terminated as is provided for in the Class D Admission Letter pursuant to which he was granted partnership status. Skillett, who is an indirect owner of less than 1% of shares in the Company, seeks to drastically alter the status quo by (1) requiring the Company to give him “30 days of advance written notice” of major transactions and (2) severely limiting the right of the Company to engage in significant transaction with defendants Antarctica and HPS Investment Partners (together owners of 96% of the Company). Skillett would also have the court restore his interest in Class A stock and Class D interests, despite lack of proof demonstrating a clear right to said stock. Skillett would also have the court (1) require continuation of his compensation and benefits even through his entitlement thereto is disputed and (2) prevent the Company from accelerating the Promissory Note, dated February 28, 2014 where plaintiff merely claims without proof that he is current on the Note (*see Plaintiffs’ Order to Show Cause, pp 3-4, NYSCEF Doc. No. 24*).

Plaintiffs have also failed to show irreparable harm. Skillett vacated the CEO position by agreement in November 2017, but claims irreparable harm from loss of authority he once may have held while in that position. Having vacated the office of CEO, Skillett cannot now claim irreparable harm flowing from a loss of powers he once wielded, especially since he does not seek reinstatement on this motion. Skillett also claims irreparable harm from failure of the Company to continue his post-employment compensation but this claim is compensable in money damages and is capable of calculation. Accordingly, irreparable harm cannot be shown (*see Trump on the Ocean, LLC v Ash, 81 AD3d 713, 716 [2d Dept 2011]*).

As to balancing of the equities, plaintiffs have not carried their burden of showing that in the absence of a preliminary injunction they will suffer more harm than the imposition of an injunction would inflict of the defendants. As discussed above, Skillett has no authority to direct the company in the manner he seeks. If granted, the injunction being sought would severely restrict the freedom of the company to conduct its business. Accordingly, plaintiffs have failed to meet the third element of proof (*see Copart of Connecticut, Inc. v Long Island Auto Realty, 42 AD3d 420, 421 [2d Dept 2007]*).

Accordingly, it is hereby

ORDERED that plaintiffs' motion for preliminary injunction brought on by an Order to Show Cause is DENIED.

This constitutes the decision and order of the court.

DATED: June 12, 2018

E N T E R,


O. PETER SHERWOOD J.S.C.