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| <b>Rivco Constr., LLC v Stapleton</b>  |
| 2018 NY Slip Op 32006(U)   |
| August 17, 2018  |
| Supreme Court, New York County   |
| Docket Number: 653459/2018   |
| Judge: Debra A. James  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES**

**PART**

**IAS MOTION 60EFM**

*Justice*

X

**INDEX NO. 653459/2018**

RIVCO CONSTRUCTION, LLC, PATRICK COSTIGAN, and BRIAN COSTIGAN,

**MOTION DATE 08/17/2018**

Plaintiffs,

**MOTION SEQ. NO. 002**

- v -

JOSEPH STAPLETON,

**DECISION AND ORDER**

Defendant.

X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44

were read on this motion to/for

INJUNCTION/RESTRAINING ORDER

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiffs for a preliminary injunction is DENIED; and it is further

ORDERED that the temporary restraining order issued on July 26, 2018 is VACATED; and it is further

ORDERED that the above denial is without prejudice to plaintiffs moving, nunc pro tunc, for an order holding defendant Stapleton in contempt of the temporary restraining order issued on July 26, 2018, should they prevail at arbitration; and it is further

ORDERED that counsel shall appear for a discovery preliminary conference in IAS Part 59, 60 Centre Street, Room 331, New York, New York on December 18, 2018, 9:30 AM.

DECISION

On their motion for a preliminary injunction, plaintiffs submit an affidavit, that of defendant Brian Costigan, only for the first time in reply to defendant's opposition papers. Such affidavit, which improperly raises facts for the first time in reply, must be disregarded. See McNair v Lee, 24 AD3d 159, 160 (1<sup>st</sup> Dept. 2005).

In addition, the Show Cause Order did not provide for service of reply papers; nor did plaintiffs seek leave to do so. Plaintiffs urge that, nevertheless, the court should consider such affidavit to the extent that it alleges facts that arose after July 26, 2018, the date of OSC filing.

Specifically, in his affidavit, plaintiff Costigan states that defendant Stapleton violated the temporary restraining order issued on that date when, on August 8, 2018, defendant Stapleton participated in a meeting with JRM, a client of Rivco, which plaintiff Costigan personally witnessed.

The court does not take lightly defendant Stapleton's purported violation of the temporary restraining order.<sup>1</sup>

Nonetheless, even if it took place, such violation does not establish a likelihood of success on the merits of plaintiffs' cause of action for breach of the Operating Agreement. The facts of defendant's alleged violation of the Operating Agreement were available at the time of the initial OSC filings. Defendant is correct that a preliminary injunction is a "drastic remedy", and that for plaintiffs to be entitled to such relief, they must make "a clear showing of likelihood of success on the merits, that the [plaintiffs] will suffer irreparable injury unless the relief sought is granted and that the balancing of equities lies in favor of movant". Faberge Intern. Inc. v. Di Pino, 109 AD3d 235, 240 (1st Dept. 1985). "Proof of such elements must be by affidavit and other competent proof, with evidentiary detail." Faberge, supra (underlining supplied); see also CPLR 6312(a). Plaintiffs submission of the bare Operating Agreement and the affirmation of their attorney does not meet such statutory requirement.

Nor does the opposing affidavit of defendant Stapleton provide any evidence that plaintiffs are likely to succeed on the merits of their claim. On the contrary, defendant contends

<sup>1</sup>Plaintiffs may move for an order holding defendant Stapleton in contempt of the temporary restraining order, should they ultimately prevail in the arbitration.

that it was plaintiffs who breached the Operating Agreement by terminating his employment without just cause. In addition in the Answer submitted in opposition, which defendant Stapleton personally verified<sup>2</sup>, he alleges that the issues before the court are subject to a pending arbitration.

Although by the clear terms of the Operating Agreement, the enforceability of the noncomplete clause and any confidentiality duties thereunder are not subject to arbitration, the question of the propriety of plaintiffs' termination of defendant's employment thereunder is properly before the arbitrator pursuant to Section 24.5 of the Operating Agreement. Both sides agree that the evidentiary hearing in such arbitration is scheduled to begin August 21, 2018. Without resolution of the issue whether plaintiffs terminated defendant for cause, which must await the determination of the arbitration, plaintiffs cannot make a clear showing of a likelihood of success of the merits of their claim. Se Moreover, plaintiffs offer no refutation of defendant's assertion that he filed his demand for arbitration on October 11, 2017, nine months before plaintiffs sought injunctive relief here. Thus, laches is a further basis for the court to decline to grant an extraordinary equitable remedy to plaintiffs.

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<sup>2</sup> "A verified [by the party, as opposed to his attorney] pleading may be utilized whenever the latter is required." CPLR 105(u); see also Feffer v Malpeso, 210 AD2d 60 (1st Dept. 1994).

Likewise, in their initial supporting papers, plaintiffs failed to come forward with any competent evidence, such as an affidavit, that demonstrates that they will suffer irreparable injury should the preliminary injunction not be issued or that the equities balance in their favor. For the same reasons, an extension of the temporary restraining order is not justified.

8/17/2018  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: