Eikenberry v Lamson
2020 NY Slip Op 33992(U)
November 30, 2020
Supreme Court, Kings County
Docket Number: 516653/20
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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KRISTEN L. EIKENBERRY,

Plaintiffs Decision and order

- against - Index No. 516653/20

RICHARD JOSEPH LAMSON,

Defendants, November 30, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction restraining the defendant from transferring any partnership assets and providing the plaintiff with access to all partnership distributions and from cancelling health insurance, her cell phone and the use of an automobile. The defendant opposes the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

According to the complaint in 1995 and 1996 the plaintiff and defendant entered into a romantic relationship as well as a partnership called EL Partnership together developing and renovating real estate in New York and New Jersey. Essentially, the complaint alleges that as the relationship deteriorated the defendant began to divert alleged partnership assets without plaintiff's knowledge and to exclude her from all decisions related to the partnership. Further, the complaint alleges that in addition to various bank accounts the partnership also owns 330 Atlantic Ave Development LLC, Easy Wind LLC, Fairmont

Industries Supply LLC, Fairmont Industries Inc, HTHP Leasing Inc., Two Route 17 South LLC, and properties located at Birdsong Farm in Delhi New York, 297 Pacific Street in Brooklyn and 110 North Atlantic in Beach Haven New Jersey and 28 Sidney Avenue in Rutherford New Jersey. The complaint alleges the plaintiff's association and involvement in the properties and entities listed demonstrates her active participation in the partnership. Thus, following the breakdown of the relationship and the actions of defendant regarding alleged partnership assets the plaintiff instituted this lawsuit and has alleged a breach of fiduciary duty, breach of contract, unjust enrichment, a constructive trust, fraudulent conveyances, dissolution and seeks an accounting.

The plaintiff has moved seeking an injunction to restrain the defendant from further depleting partnership assets and for other relief. The defendant opposes the motion arguing that no partnership was ever created therefore the plaintiff is not a partner and has no right to restrain defendant's activities in any way.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of

an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009]). Further, each of the above elements must be proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

The entire basis for relief is premised upon the allegation the plaintiff and defendant were partners. This preliminary question must be explored. It is well settled that a partnership or joint venture need not be in writing to be enforceable (see, Blank v, Nadler, 143 AD2d 966, 533 NYS2d 891 [2d Dept., 1988]). Moreover, the existence of an oral agreement is generally a question of fact (see, Martin v. Cohen, 17 Misc3d 1116 (A), 851 NYS2d 64 [Supreme Court Suffolk County 2007]).

The defendant insists the plaintiff was never a partner and even if there are questions of fact in this regard she has no right to any of the injunctive relief she seeks. Thus, the documentary evidence in support of the existence of a partnership is the fact she is the registered agent and member and signatory

of the formation documents for HTHP Leasing LLC, and 330 Atlantic Avenue Development LLC and is listed as a member on a Morgan Stanley account application which specifically states is designed for "partnerships, limited liability entities, sole proprietorships, corporations and unincorporated associations accounts for U.S. Taxpayers" (see, Morgan Stanley Account Application and Client Agreement, page 1) for 330 Atlantic Avenue Development LLC. Indeed, on the second page of the application the plaintiff is listed as a 'beneficial owner' which is defined as someone who "owns 25 percent or more of the equity interests of the...legal entity named in this account application" (id). On the following page the application contains a section entitled 'key controller' which must be completed for all entities and which is defined as someone "with significant responsibility to control or manage or direct the legal entity named in the application" (id). The plaintiff is listed in this section as a member of the entity and signed the application as a member of the entity. Further, the New York City Department of Buildings issued a Work Permit for 330 Atlantic Avenue to the plaintiff on January 2, 2020.

Moreover, the plaintiff is listed as the member of Easy Wind LLC on the corporate formation documents and although not listed as a beneficial member on a similar account application with Morgan Stanley, is listed as a key controller of the entity.

The defendant argues that in spite of that evidence there are no questions of fact whether the plaintiff was a partner. The defendant asserts that "while Plaintiff's name is associated with some of the companies I have operated—*including, among other things, being listed as "manager" of certain LLC's, holding licenses issued to those companies, and/or being an account holder on some bank accounts associated with those companies*—Plaintiff's representation that she and I entered into a "partnership" in 1996 and "agreed that we would both share equally in profits and losses as partners" is a complete and utter fabrication" (see, Affirmation of Richard Lamson, ¶7). Rather, the defendant insists the plaintiff's inclusion and association with any of the business entities or bank accounts was merely an expedient whereby the plaintiff would have access to funds in case the defendant would pass away.

Nevertheless, the defendant fails to explain why the different interpretations of the plaintiff's role do not create questions of fact. This is all the more curious because the defendant admits the plaintiff was listed as a member of 330 Atlantic Avenue Development LLC when it was formed in Wyoming for the reasons stated above (see, Affirmation of Richard Lamson, ¶47). A review of these filings demonstrates that the filing dated June 12, 2019 at 12:34 PM contains articles of organization which lists the plaintiff as the organizer then lists the

plaintiff's name following the word 'Signature' followed by the appearance of her name again on the line below following the words 'Print Name'. The following page of the filing contains an acknowledgment where again the plaintiff's name appears twice, the first following the word 'Signature' and then one line below following the words 'Print Name' and the date is listed as June 12, 2019. The next page is a Consent to Appointment by Registered Agent Form and again the plaintiff's name appears twice, the first following the word 'Signature' and then one line below following the words 'Print Name' and the date is listed as June 12, 2019. The last page of the filing contains the seal of the State of Wyoming and the signature of the Secretary of State of Wyoming and underneath that signature the notation that states "filed online by Kristen Eikenberry on June 12, 2019" (see, Limited Liability Company Articles of Organization included within Plaintiff's Order to Show Cause, Exhibit A).

A similar document has been presented that was contained in an e-mail where at the exact same time and date the same filing was submitted but this time the organizer of the entity is missing and the signature notation is followed by the name Robert Lamson and the 'Print Name' notation is likewise followed by the name Robert Lamson. However, the acknowledgment of this document following the notation 'Signature' states the name Robert Lamson, however, where the document asks to 'Print Name' the name that

appears is Kristen Eikenberry, an obvious impossibility. More importantly this document does not contain the Seal of the State of Wyoming nor is it signed by the Secretary of State of Wyoming. The document does state that it was filed by Richard Lamson (see, Limited Liability Company Articles of Organization included within Plaintiff's Order to Show Cause, Exhibit H). Assuming arguments the seal and signature are missing due to the fact the e-mail could not capture them, there has been no explanation how the signature could consist of one individual and the 'Print Name' of another on the very same document. Further, in correspondence between Mr. Lamson and Mr. Schupbach, Mr. Lamson submitted the filing documents for 330 Atlantic Avenue Development LLC which corrected the earlier inconsistency wherein Mr. Lamson is the signatory on the acknowledgment and Richard Lamson is also listed where it says 'Print Name'. In addition both the seal of the State of Wyoming and the signature of the secretary of state are included. Lastly, these filing documents list Richard Lamson as the organizer of the entity. It is true that a certificate of reinstatement was filed on August 9, 2020 and such certificate is signed by Mr. Lamson. However, the earlier inconsistencies remain unexplained. This is particularly curious since, as noted, Mr. Lamson admitted that Ms. Eikenberry was listed as the organizer of the corporation, albeit for reasons that did not evince any partnership interests on her

part. This unexplained inconsistency surely raises questions of fact as to the true reason the plaintiff, according to some documents filed, was listed as the organizer and member of 330 Atlantic Avenue Development LLC.

Concerning the bank account for 330 Atlantic Avenue Development LLC with Morgan Stanley the defendant asserts that "when I first opened the 330 Account, I listed Plaintiff as the account holder even though the funds I used to open the account were mine. Because Plaintiff (who is the mother of my four children) and I were never married, I sometimes opened bank accounts in her name (or named us jointly) so that Plaintiff would have access to the funds in the event that something happened to me. At no point did I tell Plaintiff that putting her name on the accounts would trump the corporate formalities of the companies associated with those accounts, and under no circumstances did I intend to make Plaintiff a "partner" in any of my businesses by putting her name on accounts" (see, Affirmation of Richard Lamson, ¶84). However, as noted, that account was not a personal account, rather it was an account specifically for partnerships and corporations and the plaintiff was listed on the account as a beneficial owner and key controller of the entity. There are certainly questions of fact presented whether the plaintiff was more than just the 'wife' or domestic partner of the defendant. Issues of financing or how

partnership assets should be divided and the fact the plaintiff might not have contributed the same amount of funds to 330 Atlantic Avenue Development LLC or any other entity that is the subject of this lawsuit have no bearing on whether a partnership was created but rather only speak to the percentages each party would be entitled to in the event of a dissolution. It may be true there are some corporations listed in the complaint to which the plaintiff cannot demonstrate any ownership. However, again, that merely points to the ownership interests of the entire business enterprise of the couple and does not undermine the possible existence of a partnership at all.

Thus, the plaintiff is not required to present "conclusive proof" of its entitlement to an injunction and "a court may exercise its discretion in granting a preliminary injunction even where questions of fact exist" (Vanderbilt Brookland LLC v. Vanderbilt Myrtle Inc., 147 AD3d 1104, 48 NYS3d 251 [2d Dept., 2017]). This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept., 2009]). As the court stated in Ma v. Lien, 198 AD2d 196, 604 NYS2d 84 [1st Dept., 1993], citing earlier authority "where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of

likelihood of success on the merits should be accordingly reduced" (id).

As noted there are surely questions of fact whether a de facto partnership existed between the plaintiff and defendant. Without the injunction the defendant would have the means and the ability to render these alleged partnership assets beyond the reach of the plaintiff.

However, to obtain an injunction the movant must demonstrate irreparable harm. It is well settled that any alleged loss which can be compensated by money damages is not irreparable harm (Family Friendly Media Inc., v. Recorder Television Network, 74 AD3d 738, 903 NYS2d 80 [2d Dept., 2010]).

The plaintiff argues that she "is facing irreparable harm absent injunctive relief prohibiting Lamson from transferring Partnership assets. New York courts recognize that the deprivation of a parties' income constitutes irreparable harm" (see, Memorandum of Law in Support of Injunction, page 12). There is authority for the proposition raised by the plaintiff here that a termination of her stream of income and hence a deprivation of her ability to purchase necessities constitutes irreparable harm. It is true the Supreme Court has held that "it seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury" (Sampson v. Murray, 415 US 61, 94 S.Ct 97, 39 L.Ed2d 166 [1974]).

In Sampson, a civil service employee sued arguing her termination had not followed specific termination protocols. She sought and obtained an injunction on the grounds the loss of her employment constituted irreparable harm. The Supreme Court reversed noting that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm" (id). However, in a different context with equally compelling persuasiveness, there are cases that hold "for people at the economic margin of existence" the deprivation of income in the present could not be made up by a later money judgement (see, Chu Drua Cha v. Noot, 696 F2d 594 [8th Cir. 1982]). To be sure, the plaintiff cannot be characterized as someone in poverty, however, "the hunger or indignities that one may have to suffer from the unavailability of funds cannot be fully remedied by future payment of those sums. When the money is essential for life's basic necessities, the considerations go beyond the merely 'financial' ones that defendants say this case involves" (see, Reed v. Lukhard, 578 F.Supp 40 [Western District of Virginia 1983]).

Thus, considering all the facts of this case in the court's discretion, the court concludes the plaintiff has demonstrated

irreparable harm and a possible likelihood of success on the merits and that an injunction is proper. However, the contours of the injunction must be explicated. First, the defendant is permitted to expend any partnership[1] funds for any expenses necessary for ongoing projects. Further, there is no injunction regarding any partnership funds utilized in the ordinary course of business. The defendant is stayed and enjoined from transferring all other partnership assets without plaintiff's consent. Further, consistent with the evidence presented regarding the plaintiff's financial status the defendant shall make distributions to the plaintiff from partnership accounts wherein the plaintiff appears on such accounts sufficient to provide for her basic cost of living needs.

Lastly, the defendant is enjoined from cancelling the plaintiff's health insurance or automobile and is ordered to return plaintiff's cell phone with all information intact and accessible.

So ordered.

ENTER:

DATED: November 30, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

[1] The Court is referring to these funds as 'Partnership funds' for sake of convenience and is fully aware the status of such funds is contested.