

Mazurek v Rogers

2021 NY Slip Op 31922(U)

February 11, 2021

Supreme Court, Bronx County

Docket Number: 35108/2019E

Judge: Eddie J. McShan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-32

DOROTHEA MAZUREK, individually
and derivatively on behalf of
1090 UNIVERSITY AVE., LLC,
3929 CARPENTER AVE., LLC,
4026 CARPENTER AVE., LLC,

DECISION AND ORDER

Index No. 35108/2019E

Plaintiffs,

-against-

ETHER ROGERS,

Defendant,

Present:
HON. EDDIE J. MCSHAN

and
1090 UNIVERSITY AVE., LLC,
3929 CARPENTER AVE., LLC,
4026 CARPENTER AVE., LLC,

Nominal Defendants.

The following Papers Numbered: 1 to 22 were read on this Order to Show Cause seeking various injunctive relief:

No	on Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause-Exhibits and Affirmation Annexed -----		<u>1 – 7</u>
Answering Affidavit, Amended Cross-Motion and Exhibits- (Oral Argument and Exhibit) -----		<u>8 – 17</u>
Replying Affirmation and Exhibits -----		<u>18 – 22</u>
Other -----		

Upon the foregoing cited papers, the Decision/Order of this Motion is as follows:

Before this Court is Defendant’s Order to Show Cause seeking various injunctive relief pursuant to CPLR Article 63, including: (1) an order granting Defendant temporary, preliminary and permanent injunctive relief restraining and enjoining Plaintiff Dorothea Mazurek and/or her agents, servants, lawyers, employees from directing, instructing, harassing, intimidating, or taking any action: [a] interfering with the filing of federal and state taxes for years 2018, 2019 and 2020 for 1090 University Ave., LLC, 3929 Carpenter Ave., LLC, and/or 4026 Carpenter Ave., LLC (“LLCs”); [b] interfering with the LLCs’ business, especially with the LLCs’ property management company, Midboro Management; and [c] making false statements against Defendant to third parties that do business with the LLCs. Defendant also seeks a declaratory

judgment that entitles her to make day-to-day decisions pursuant to Section 412 of New York Limited Liability Company Law. Plaintiff opposed the Defendant's applications.

Initially, the Court notes that Defendant withdrew on the record her application for injunctive relief restraining and enjoining Plaintiff Dorothea Mazurek and/or her agents from directing, instructing, harassing, intimidating or taking any action that would interfere with the LLCs' property management company Midboro Management as evidenced by this Court's October 8, 2020 Order. The parties originally consented to retain Midboro Management to manage the subject properties, 3929 Carpenter Avenue, Bronx, New York; and 4026 Carpenter Avenue, Bronx, New York. However, the parties did not retain Midboro Management resulting in this Court's December 9, 2020 Order which amended the October 8, 2020 Order to the extent that the parties were directed to retain Remedial Property Management. Accordingly, Defendant's application seeking declaratory judgment that entitles her as managing member of the LLCs to make day-to-day decisions is denied. Remedial Property Management shall continue to make the day-to-day decisions regarding the management of subject buildings in accordance with this Court's December 9, 2020 Order. Neither party shall interfere with the day-to-day management of the subject properties in accordance with the December 9, 2020 Order. The Court considers the remaining applications as follows.

Injunctive Relief: Tax Returns

Defendant seeks injunctive relief restraining and enjoining Plaintiff Mazurek and/or her agents, servants, lawyers, employees from directing, instructing, harassing, intimidating, or taking any action interfering with the filing of federal and state taxes for the LLCs. Defendant notes that failure to file a tax return is a federal crime punishable as a misdemeanor or felony. Defendant asserts that Plaintiff and her attorney have purposely obstructed the filing of the LLCs' taxes. In support, Defendant annexes a purported chain of email conversations between Plaintiff and Defendant in August 2018. Defendant contends that she has made repeated demands for the K1s because failing to file taxes is a departure from the LLCs' regular practice.

Defendant insists that Plaintiff's unlawful actions are causing irreparable harm and exposing the Defendant as well as the LLCs and its members to civil and possibly criminal prosecution.

Defendant argues that she is likely to prevail on the merits of the action because Plaintiff has made false accusations that the LLCs' taxes cannot be done until the accounts are reconciled. Defendant asserts that contrary to Plaintiff's contentions, the proper amounts of distributions to each member are irrelevant for purposes of filing the LLCs' tax returns. In support, Defendant annexes the affidavit of the certified public accountant, Mr. Paul Rubin, who indicates that the Defendant declared business expenses in the amount of approximately \$550,000 which were not legitimate business expenses causing distribution inequities amongst the LLCs' members. Mr. Rubin reasons that "[t]he inequities between the [LLCs]' members have nothing to do with the net number of increase [sic] or losses of the Companies, and therefore federal taxes should be filed, and K1s filed for the Companies, so that the member-partners can file their taxes." Mr. Rubin also suggests, "It is my understanding that since no Companies' taxes have been filed for 2018, 2019 or 2020, federal financial penalties are accruing against each Company member at the rate of \$500 per month for each violation per Company."

Plaintiff vehemently opposes Defendant's application arguing that the Defendant seeks the imposition of the extreme remedy of injunctive relief based on "broad, conclusory and self-serving allegations, unsupported by a scintilla of fact, of Defendant, her counsel and her accountant." Plaintiff insists that the Defendant has failed to establish that she will suffer irreparable harm absent the issuance of injunctive relief. Plaintiff emphasizes that injunctive relief requires a showing of actual and imminent injury, and asserts that the Defendant merely alleges potential civil and criminal liability. Plaintiff suggests that both Defendant's previous and present attorneys were aware of the proper procedures for filing the tax returns and the consequences of filing inaccurate returns. Plaintiff asserts that the imposition of potential late filing fees is not as severe as the penalties for filing false or inaccurate tax returns if the LLCs report the \$550,000 Defendant improperly took from the LLCs as business expenses. Plaintiff

contends that in the past the Defendant improperly reported distributions to the LLCs' members as business expenses in order to reduce the income tax bill.

Plaintiff suggests that Defendant's present attorney acknowledged that the parties' 2019 management agreement requires approval of both co-managing members to approve the LLCs' decisions, including the approval of the tax returns before the accountant could file them. Plaintiff refers to an email dated October 2, 2019 at 2:43:10 from Karen Winner which she fails to annex. Plaintiff contends that the parties initially agreed that the 2018 and 2019 tax returns would accurately reflect Defendant's personal use of LLCs' funds, and not as business expenses. Plaintiff argues that if permitted to file the tax returns for 2018-2020 without first determining what monies the Defendant misappropriated, she avoids the tax consequences of accounting for the monies she took, and which she reported as illegitimate tax expenses instead of distributions to herself. Plaintiff insists that it is Defendant's refusal to agree to the amounts she must repay to the LLCs which prevent the parties from properly filing accurate tax returns. Plaintiff relies on the 8-page affidavit of her forensic accounting expert, Mr. Andrew P. Ross, to strongly oppose Defendant's application to file the 2018 and 2019 tax returns. Mr. Ross states that without quantifying and properly classifying Defendant's personal expenses will lead to misallocation of gains to the members. Mr. Ross contends that the civil penalties Defendant's expert refers to "pale in comparison to the civil, and perhaps criminal penalties for filing false income tax returns".

Caselaw has long determined that "[a] preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Residential Bd. Of Mgrs. Of Columbia Condominium v Alden*, 178 AD2d 121 [1st Dept 1991] citing *Gamber Enters. V Kelly Servs.*, 69 AD2d 297 [4th Dept 1979]). Moreover, injunctive relief should be denied where the parties present conflicting affidavits that raise sharp issues of fact (*Residential Bd. Of Mgrs. Of Columbia Condominium*, 178 AD2d 121). The parties on this record present conflicting affidavits from their respective

accountants on whether tax returns may be properly filed without Defendant declaring the proper business expenses the LLCs are entitled to deduct. Clearly questions of fact exist regarding whether the tax returns can accurately be filed without first determining the amounts, if any, Defendant took from the LLCs and used for personal reasons which is the crux of this litigation.

In addition, the Court finds that Defendant failed to make a showing of irreparable injury during the pendency of the lawsuit warranting the issuance of the temporary restraining orders (*see for example Meissner v Yun*, 126 AD3d 565 [1st Dept 2015]). Defendant does not allege a specific irreparable harm other than a speculative statement by her forensic accountant stating that based on his “understanding”, federal financial penalties are accruing against each LLC member at the rate of \$500 per month. Defendant’s further speculation that the parties may be subject to civil and criminal penalties “do not show the kind of urgency contemplated by the statute” (*see Yonkers Racing Corp., v Catskill Regional Off-Track Betting Corp.*, 143 AD2d 345 [2d Dept 1988]). Moreover, Plaintiff’s suggestion that the LLCs and the parties may face more serious harm if inaccurate tax returns are filed create additional questions of fact warranting denial of the preliminary injunction (*Residential Bd. Of Mgrs. Of Columbia Condominium*, 178 AD2d 121).

Injunctive Relief Against Plaintiff’s Attorney

Defendant also seeks injunctive relief restraining and enjoining Plaintiff Dorothea and/or her agents, servants, lawyers, employees from making false statements against Defendant to third parties that do business with the LLCs. Defendant asserts that Plaintiff’s attorney, Mr. Moon, has concocted a false narrative and time-line to blame her for the two rent-stabilized buildings being in distress and suffering losses. Defendant contends that Mr. Moon has made false statements against her to third parties, and to this Court. Defendant suggests that Mr. Moon made false statements to a mold assessment company which resulted in that company “backing out” of the potential work required by a housing court order. Defendant also suggests that Mr. Moon falsely claimed to a bank officer at the Bank of America in Virginia that she illegally

withdrew funds although she was fully authorized to do so. Defendant contends that a property manager declined to serve as the buildings' property manager following a call with Mr. Moon. Defendant states that she has filed an ethics grievance complaint against Mr. Moon.

Plaintiff vehemently opposes Defendant's application seeking to enjoin Plaintiff's attorney from making any purported "disparaging falsehoods" or "injurious false statements" arguing that it has no basis in law. Plaintiff argues that Defendant is in essence seeking a gag order without identifying any false statements made against her. Plaintiff denies making any false statements. Plaintiff asserts that Defendant's speculative allegations fail to meet the standard necessary warranting the issuance of the injunction.

The Court finds that the attorney's conflicting affirmations create questions of fact warranting denial of the injunctive relief as requested (*Residential Bd. Of Mgrs. Of Columbia Condominium*, 178 AD2d 121). The Court also finds that the Defendant failed to establish the requisite immediate irreparable injury caused by the allegedly false statements other than two companies "backing out" from dealing with the LLCs. Defendant did not demonstrate on this record how an award of money damages would not be a sufficient remedy for Plaintiff's attorney causing the two companies not to deal with the LLCs (*Meissner*, 126 AD3d 565). Accordingly, Defendant's application for injunctive relief is denied.

Sanctions

Plaintiff's application seeking to sanction Defendant's attorney is denied in its entirety. The Court notes that Defendant failed to cross-move for such relief.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that the Defendant's applications for injunctive relief are denied in their entirety in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that Defendant's application for declaratory relief is denied in accordance with the Court's findings hereinabove; and it is further

ORDERED AND ADJUDGED that Plaintiff's application to sanction Defendant's attorney is hereby denied.

The foregoing shall constitute the decision and order of this Court.

Dated: February 11, 2021



J.S.C.