

Kamal v Hashmat

2021 NY Slip Op 32377(U)

November 16, 2021

Supreme Court, New York County

Docket Number: Index No. 652710/2017

Judge: Peter J. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----X

IMAN KAMAL,

Plaintiff,

- v -

BILAL HASHMAT, ALI HASHMAT, MARIAN HASHMAT,
AIZID HASHMAT, HASHMAT FAMILY TRUST, HOWARD
GILL, ESTATE OF HILDA GILL, ANDREW GILL, MARK
GILL, BABU EASOW, V SANDERSON, BABAR RAO,
JOHN MUNNEY, TIMOTHY PATCHETT, ESTATE OF
ROBERT C. FRITTS, KABOT PARTNERS,
CUREMD.COM, INC.,

Defendant.

-----X

CUREMD.COM, INC.

Plaintiff,

-against-

IMAN KAMAL

Defendant.

-----X

INDEX NO. 652710/2017

MOTION DATE 07/28/2021,
07/28/2021

MOTION SEQ. NO. 011 012

**DECISION + ORDER ON
MOTION**

Third-Party

Index No. 595628/2018

HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 444, 449, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 512, 514, 518, 519, 524, 525, 526, 527, 528, 529, 530, 531, 532, 534, 535, 537

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 012) 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 445, 450, 509, 510, 513, 515, 520, 521, 522, 523, 533, 536, 538, 539, 540

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Under motion sequence 011, Defendants CureMD.com, Inc. (“CureMD”), Bilal Hashmat, Marian Hashmat, Aizid Hashmat, Hashmat Family Trust, Howard L. Gill, Estate of Hilda Gill, Andrew Gill, Mark Gill, Babu Easow, V. Thomas Sanderson, Babar Rao, John Muney, Timothy Patchett, and Estate of Robert C. Fritts (collectively, the “CureMD Defendants”) move pursuant to CPLR §3212, granting summary judgment in favor of the CureMD Defendants. Specifically the CureMD Defendants request an order: (1) declaring that Plaintiff Estate of Kamal Hashmat is not the sole shareholder of CureMD; (2) declaring as moot the relief sought in the Complaint’s third cause of action, namely, that Plaintiff Estate of Kamal Hashmat is a majority shareholder of CureMD, based on Iman Kamal’s deposition admission that she no longer asserts in this action that the Estate of Kamal Hashmat is a majority shareholder of CureMD; (3) declaring that the Plaintiff Estate of Kamal Hashmat owns 30.89% of the outstanding shares of CureMD; (4) dismissing the Complaint’s first cause of action seeking a declaration from the Court as to the share ownership of all of the CureMD shareholders because there is no present justiciable controversy, and there are necessary and indispensable parties who have been confirmed by the CureMD Board of Directors as valid shareholders whom Plaintiff has not sued, and whose rights could be affected if the Court were to determine share ownership without having jurisdiction over all the shareholders; (5) denying Plaintiff Estate of Kamal Hashmat the right to a permanent or mandatory injunction and an equitable accounting as alleged in the Complaint’s second cause of action; (6) dismissing with prejudice each of the causes of action in Plaintiff’s Complaint, filed on May 19, 2017; (7) awarding the CureMD Defendants their attorneys’ fees and the costs in this action; and (8) granting the CureMD Defendants such other and further relief as the Court may deem just, proper and equitable.

Plaintiff cross moves for summary judgment and an order declaring that Plaintiff is the sole shareholder of CureMD and requiring all Defendants to act in accordance with that declaration.

Under motion sequence 012, Defendant Ali Hashmat moves for partial summary judgment 1) declaring that Plaintiff Estate of Kamal Hashmat is not the sole shareholder of CureMD.com, Inc. ("CureMD"); (2) declaring that defendant Ali Hashmat is a shareholder of CureMD; and (3) declaring that defendant Ali Hashmat owns 14.63% of the total existing shares of CureMD; and (4) granting defendant Ali Hashmat such other and further relief as the Court may deem just, proper and equitable.

The motions are herein consolidated for decision.

Background

Plaintiff Iman Kamal, as Administratrix of the Estate of Kamal Hashmat, has brought three causes of action, the first and third are for declaratory judgment seeking to establish that she is the sole shareholder of CureMD.com Inc. ("CureMD"), or, if she is not the sole shareholder, to obtain a judicial declaration stating that she is the majority shareholder and listing "the name of each actual and valid Shareholder of CureMD, their respective share interest, when such shares were issued and the consideration therefor" (NYSCEF Doc. 1 ¶76). The second cause of action is for a permanent injunction and mandatory injunction consistent with the declaratory judgment to 1) enjoin the violation of the Estate's rights and privileges regarding CureMD and 2) compel the Hashmat Defendants to take all acts/actions consistent with the Declaratory Judgment, including but not limited to, turning over to the Estate the business premises, financial books, records, email system, contracts, bank accounts and assets of

CureMD, and directing the Hashmat Defendants to render a true and complete accounting of all transactions of CureMD (*Id.* at ¶78).

The CureMD Defendants contend that Iman has not sued several shareholders, including Robert Goff, Dr. Gudmundur Vikar Einarsson, Alan Charnow, Omar Ghory, Kristy McGuinness, and Asif Rashid.

Plaintiff has brought several actions stemming from the same underlying facts as the present matter: Index No. 651956/2017 for a purported breach of a promissory note, which CureMD has counterclaimed, Index No. 656306/2018 for dissolution of CureMD and appointment of a temporary receiver, and for injunctive relief enjoining CureMD from disbursing any monies except pursuant to a written operating budget agreed to by Iman, and Index No. 654414/2017 a shareholder derivative action against her brother-in-law Bilal Hashmat.

Analysis

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the “light most favorable to the party opposing the motion” (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or

conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Issues of credibility are not to be resolved on summary judgment (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

Plaintiff's position is that Kamal Hashmat ("Kamal") was the sole shareholder pursuant to Share Certificate No. 1, which transferred 200 shares to Kamal on December 20, 1999 (NYSCEF Doc. No. 453). Plaintiff maintains that any and all subsequent issuances of share certificates are void.

Specifically, Plaintiff contends that she signed a release in November 2015 agreeing to reduce her stock ownership from 100% to 30.89% upon condition that the "global settlement" recommended by CureMD's former counsel, and adopted by the Corporation, was fully implemented. However, CureMD then repudiated and abandoned the global settlement, which Plaintiff argues invalidates her signed release and any subsequent issuance of share certificates.

In opposition to Plaintiff's position, the CureMD Defendants argue that On August 22, 2000, Kamal executed a Certificate of Amendment of CureMD's Certificate of Incorporation (the "Amendment"), increasing the number of authorized shares from 200 to 20 million shares, and changing the no par value status to par value of \$0.001 per share (NYSCEF Doc. No. 355). Further, the CureMD Defendants contend that as the Certificate of Amendment was not correctly filed in 2000, Plaintiff herself approved the increase of CureMD's 200 shares of common stock to 20 million authorized shares (NYSCEF Doc. No. 368), and that the 2000 amendment was then filed on February 20, 2015 with the New York Secretary of State.

Defendant Ali Hashmat ("Defendant Ali") contends that to the extent that he opposes the CureMD Defendants' papers, he is seeking summary judgment declaring his ownership interest

as a 14.63% shareholder of CureMD. Defendant Ali joins in the CureMD Defendants' arguments that Plaintiff is not the sole nor the majority shareholder of CureMD.

First and Third Causes of Action

“The primary purpose of [a] declaratory judgment[] is to adjudicate the parties' rights before a ‘wrong’ actually occurs in the hope that later litigation will be unnecessary” (*Klostermann v Cuomo*, 61 NY2d 525, 538, 475 NYS2d 247 [1984] [citation omitted]). While under appropriate circumstances, summary judgment may lie within the confines of a declaratory judgment action (*see Russell v Town of Pittsford*, 94 AD2d 410, 412, 464 NYS2d 906 [1983]), the test of its applicability is no different than in any civil action (*Subdivisions, Inc. v Town of Sullivan*, 75 AD3d 978, 980, 905 NYS2d 367, 370 [2010]).

To state a *prima facie* claim for a declaratory judgment, a plaintiff need only to allege facts demonstrating that there is an actual, justiciable controversy, involving substantial legal rights (*Abate v All City Ins. Co.*, 214 AD 2d 627, 625 NYS2d 587, 588 [2d Dept 1995]; *Playtogs Factory Outlet v County of Orange*, 51 AD2d 772, 379 NYS2d 859, 861 [2d Dept 1976]). Where the requested declaratory judgment may have an immediate and direct impact on the parties' conduct, declaratory relief should be granted (*Remsen Apartments, Inc. v Nayman*, 89 AD2d 1014, 454 NYS2d 456, 458 [2d Dept 1982]). There are significant issues of fact and credibility that preclude granting of the CureMD Defendants and Defendant Ali's motion for summary judgment as to either. Similarly, Plaintiff has not met her burden in support of her cross motion for summary judgment.

Second Cause of Action

As to the second cause of action, “[t]o sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a ‘violation of a right presently

occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Caruso v Bumgarner*, 120 AD3d 1174, 1175, 992 NYS2d 102 [2014], quoting *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). " 'A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction' " (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408, 873 NYS2d 148 [2009]; *Aponte v Est. of Aponte*, 172 AD3d 970, 974, 101 NYS3d 132, 137-38 [2019]).

Plaintiff cannot establish a *prima facie* case on his permanent injunction cause of action as the complaint fails to sufficiently allege that a permanent injunction is necessary to protect the plaintiff from a threatened or probable risk posed by Defendants, or that monetary damages would be inadequate compensation (*see generally Massaro v Jaina Network Sys., Inc.*, 106 AD3d 701, 703, 964 NYS2d 588 [2d Dept 2013]). Accordingly, the second cause of action is dismissed.

It is hereby,

ORDERED that motion sequence 011 is granted solely to the extent that Plaintiff's second cause of action is dismissed; and it is further

ORDERED that Plaintiff's cross motion under motion sequence 011 is denied; and it is further

ORDERED that Defendant Ali's motion for summary judgment under motion sequence 012 is denied.

11/16/2021
DATE



SHAWN KELLY, 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