Harkins v Stern
2021 NY Slip Op 32445(U)
November 16, 2021
Supreme Court, Kings County
Docket Number: Index No. 507004/21
Judge: Leon Ruchelsman

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

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STEVEN HARKINS, individually and derivatively On behalf of LB INTERNATIONAL INC. and GOLDEN HILL COMPANY MARKETING INC.,

Plaintiffs,

-against-

Index No. 507004/21

JOSEPH STERN

Defendant,

and

November 16, 2021

LB INTERNATIONAL INC. and GOLDEN HILL COMPANY MARKETING INC.,

Nominal Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendant Joseph Stern has moved essentially seeking to vacate an injunction imposed pursuant to CPLR §6301 in Nassau County. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On November 18, 2019, Justice Vito DeStefano of Supreme Court Nassau County granted an ex parte temporary restraining order preventing the defendant from making any transfers, debits or withdrawals from any bank accounts of LB International or Golden Hill, from opening or closing any accounts of those entities or incurring any debt related to those companies. On May 11, 2020 the court in Nassau County issued another order which further prohibited the defendant from transacting any business on behalf of the two companies and "from directing any

aspect of the business" (see, Order dated May 11, 2020). Numerous requests to vacate the injunction were denied. The case was ultimately transferred to Kings County and now, once again, the defendant has moved seeking to vacate the injunction and for other reliefs.

Conclusions of Law

The question whether to vacate the injunction necessarily requires a determination whether an injunction that was imposed should continue to be imposed. Thus, the question that must be addressed is whether an injunction is proper.

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]).

Considering the first prong, establishing a likelihood of success on the merits, the movant must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). It has already been determined the plaintiff maintains a likelihood of success on the merits. The plaintiff has presented evidence the defendant committed fraud, forgery and misappropriation of funds. The defendant counters that it is the plaintiff who lied about the financial prospects of the company and misled the defendant. Of course, the defendant denies he committed any improprieties.

Clearly, there are factual questions that require resolution. However, even if issues of fact exist it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]). 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]). Thus, the moving party is not required to present 'conclusive proof' of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not

preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hohi Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]).

The plaintiff alleges the defendant "committed identity theft, forgery and fraud to raise the money for the joint acquisition of LB; fraudulently used Harkins' name and social security number to obtain multiple loans; diverted millions of dollars from the Companies' bank accounts to personally enrich himself and repay those fraudulent loans; and fraudulently used Harkins' name to acquire a Telsa" (see, Memorandum of Law in Opposition, page 7). The plaintiff offers partial answers to explain some of those allegations, leaving some of them, including the acquisition of a Tesla, unrebutted. Moreover, concerning the alleged fraud, the plaintiff presented evidence that defendant forged plaintiff's signature for a merchant cash advance that was dated June 13, 2019 and then doctored the date to June 19, 2019 which is after the agreement of June 17, 2019. In disputing that allegation the defendant asserts that "there are, in fact, two separate BFS Merchant Agreements. The first, dated June 13, 2019, signed by Harkins and Stern, was for $500,000. This agreement was uploaded by BFS in its separate action filed in Suffolk County Supreme Court. The second agreement, dated June 19, 2019, and also signed by Harkins and Stern, was for $800,000. After the acquisition of LBI, the

loan was reformed to reflect the increased amount of the loan" (see, Memorandum in Reply, page 9). However, the contract dated June 13, 2019 was for $800,000 not $500,000. Thus, the undated notice connected with the June 19, 2019 merchant cash advance for $800,000 which states that both the plaintiff and defendant agree to transfer the remaining balance of $525,000 due on the June 13 contract to be included within the second contract is difficult to comprehend since it is highly unlikely the company already paid almost $300,000 in the span of a week. Moreover, that notice is not executed by the funder, Building Funding Source. Thus, the notice may violate Section 3.1(j) of the merchant agreement which states that merchant may not "perform any act that reduces the value of any Collateral granted under this agreement" (id). Thus, a unilateral transfer of amounts borrowed could potentially violate that provision. In any event, there is evidence that only once agreement was executed which raises serious issues about the defendant's conduct.

Therefore, there is a sufficient basis to maintain the injunction and the motion seeking to vacate such injunction is denied. However, the defendant is hereby permitted to review the Companies' books and records and the plaintiff must make those records available. Further, the plaintiff is hereby ordered to provide a full and complete accounting of the Companies' finances in accordance with Justice Vito DeStefano's prior Order of May

15, 2020. Thus, the plaintiff shall produce all bank statements, tax returns, QuickBooks reports, financial statements, balance sheets, expense reports, payroll information, loan applications and documents, factor bills and invoices, and cash receipts etc. for the Companies from January 1, 2016 to the present.

Turning to other issues , the request for a temporary receiver is granted. Mr. Jeffrey Miller Esq., of Miller, Leiby & Associates, PC, 32 Broadway, 13th Floor, New York, NY 10004 (212) 227-4200 is hereby appointed pursuant to CPLR §6401 in order to prevent irreparable loss, damage, mismanagement and/or depletion of company assets.

Further, the defendant's application for leave to serve and file the Proposed Verified Amended Answer with Counterclaims annexed to its moving papers is hereby granted pursuant to CPLR §3025(b).

So ordered.

ENTER:

DATED: November 16, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC