

<b>Bregianos v Kosmetech Corp.</b>
2021 NY Slip Op 32496(U)
November 29, 2021
Supreme Court, Kings County
Docket Number: Index No. 501950/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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ANTONIA BREGIANOS, derivatively on behalf  
of Kosmetech Corp.,

Plaintiff,

Decision and order

- against -

Index No. 501950/21

KOSMETECH CORP., SECANT LOGISTICS INC.,  
DIMITRI KONTELEON & HELEN KNOTELEON,

Defendants,

November 29, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a preliminary injunction pursuant to CPLR §6301. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, essentially, the plaintiff a fifty percent owner of Kosmetech Corp. has sued the other fifty percent owner, defendant Dimitri Konteleon and his wife alleging they diverted a million dollars from the corporation to their own privately owned entity. The plaintiff has now moved seeking two forms of relief. The first is a demand the defendants return the sum of \$81,629.95 which they allege the defendants took to pay attorney's fees defending this action. The second is a request enjoining the defendants from incurring any debt and from paying any of Kosmetech's bills without the express consent of the plaintiff. As noted the motion is opposed on the grounds it has no merit.

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" (Noby 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]). Moreover, the plaintiff also seeks to impose upon the defendant a mandatory injunction requiring them to return corporate funds utilized to pay attorney's fees.

A mandatory injunction is rarely granted and only under unusual circumstances to maintain the status quo pending trial (Matos v. City of New York, 21 AD3d 936, 801 NYS2d 610 [2d Dept., 2005]). Thus, where a party is engaged in unlawful conduct which is continuous then a mandatory injunction is proper (Rosenthal v. Helfer, 136 Misc2d 9, 516 NYS2d 1020 [Civil Court New York

County, 1987]). Moreover, where a party acts deliberately and intentionally which affects the plaintiff's rights or where the party engages in unlawful conduct which is capable of repetition then a mandatory injunction requiring the party to cease is likewise proper (Marcus v. Village of Mamaroneck, 283 NY 325, 28 NE2d 856 [1940], Rombom v. Weberman, 2002 WL 1461890 [Supreme Court Kings County 2002]).

In this case the plaintiff has not presented any evidence that mandating the defendant return the attorney's fees is of such unusual circumstances as to warrant the imposition of the injunction (Zoller v. HSBC Mortgage Corp., (USA), 135 AD3d 932, 24 NYS3d 168 [2d Dept., 2016]). This is particularly true since this lawsuit is about whether the defendants acted properly in their management of the business and whether their defense of this action is therefore proper. Thus, imposing a mandatory injunction would effectively resolve this portion of the lawsuit. In Spectrum Stanford LLC v. 400 Atlantic Title LLC, 162 AD3d 615, 81 NYS3d 5 [1st Dept., 2018] the court stated that "a mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite" (id). The plaintiff argues that pursuant to Business Corporation Law §720, §721, §722, §723 and §724 the defendants must first obtain the right to indemnification either from the

corporation or by court order (see, Federico v. Brancato, 188 AD3d 1158, 137 NYS3d 502 [2d Dept., 2020]). While those provisions apply to individual directors and officers and not to the corporation itself being sued derivatively there is insufficient evidence such expenses were used for attorney's fees for the individual defendants and not the corporation itself. The entire basis for the mandatory injunction request is based upon a single line item in an income statement termed "Legal Fees- Kosmetech Corporation" (see, Income Statement, submitted as Exhibit 'H' to plaintiff's Order to Show Cause). However, there is no evidence such fees were expended for the individuals and not the corporation. The plaintiff argues the defendants used the corporation's funds to pay the legal fees of the defendant's other wholly owned entity. Thus, plaintiff asserts "that Kosmetech has paid the legal fees of the Konteleon's other shell entity, Secant" (see, Affirmation in Support, ¶ 21). However, that allegation is not substantiated at all. Further, as noted, even if the funds were used to defend the individuals there has been no showing why such mandatory injunction must be issued.

Therefore, based on the foregoing, the motion seeking to require the return of attorney's fees is denied.

Turning to the request to enjoin the defendants from acting without the plaintiff's participation, as recorded in the prior order, the court already noted the plaintiff's have not presented

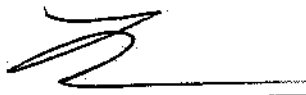
anything harm other than money damages which is insufficient to obtain any injunction. In this motion, support for an injunction is not even argued at all. Antonia Bregianos does assert that "in view of the self-dealing and unauthorized actions by defendants, I fear that defendants will continue to misappropriate and divert corporate assets. Accordingly, I respectfully request that this Court restrain and enjoin the defendants, *pendete lite*, from using the credit of Kosmetech and/or making or incurring any credit card charges or incurring any other liability in the name of Kosmetech without the prior written consent of the plaintiff in all instances pending the final determination of this action" (see, Affirmation of Antonia Bregianos, ¶ 43). However, simply alleging corporate funds are being diverted, even if true, is not an irreparable harm warranting an injunction. At root, those allegations are mere money claims which cannot support the granting of any injunction.

Therefore, based on the foregoing, the motion seeking any injunction is denied.

So ordered.

ENTER:

DATED: November 29, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC