

Ziglin v Hommel
2009 NY Slip Op 32636(U)
October 9, 2009
Supreme Court, New York County
Docket Number: 108578/2009
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROBERT ZIGLIN & ENABLEWARE, INC.,
Plaintiffs,
- v -
DONALD HOMMEL,
Defendant.

Index No.: 108578/2009
Motion Date: 08/12/09
Motion Seq. No.: 01
Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this show cause order for preliminary injunction for immediate turn over of books and records and an accounting.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3
Sur Replying Affidavit-Exhibits	4
Sur Sur Replying Affidavits-Exhibits	5

FILED
OCT 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Plaintiffs seek a preliminary injunction that directs defendant to immediately turn over the books and records of the corporate defendant, to cease withdrawal of any funds from the corporate defendant's bank account, to return funds of corporate defendant and for an accounting, inter alia. Defendant opposes the motion.

This action was commenced by the service of a summons with notice only and issue has not been joined.

The following facts are not in dispute.

Plaintiff Robert Ziglin ("Ziglin") is the Chief Executive Officer and one of two directors of plaintiff Enableware

Check One : FINAL DISPOSITION NON-FINAL DISPOSITION

("Enableware"), a business corporation chartered in the State of Delaware. The business of Enableware as an "information technology business...that works with its customers" to triple their" Enterprise Resource Planning productivity through automation. Plaintiff Ziglin and defendant Hommel were elected as the sole directors of the corporation.

On July 31, 2008, Enableware entered into a contract with Fordham University under which Enableware would earn a minimum of \$440,000 in fees for its services. At the same time, Enableware billed Fordham University for work performed, tendering an Invoice in the amount of \$247,500 and dated June 27, 2008 to the university.

On August 11, 2008, plaintiff Ziglin opened a corporate bank account at the Bank of America in the State of Arizona, with himself as the sole signatory. At a meeting of the board of directors that took place on August 11, 2008, the board authorized plaintiff Ziglin to disburse the funds from that account. It authorized that of the \$247,500 to be paid by Fordham University, \$100,000 would be paid to plaintiff Hommel for repayment of a personal loan that plaintiff made to Enableware; an additional \$100,000 would be paid to plaintiff Hommel for work that he performed; \$24,750 would be paid to Andy Vaughn as a ten percent commission; \$6,500 would be paid to

defendant Hommel for repayment of personal loan that he made to Enableware; and \$16,250 would remain in the corporate account. It also decided that with respect to accounts receivable from Fordham University for the work to be performed under the contract that would be paid on a monthly basis at a rate of \$120 per hour for each hour, plus travel expenses; \$73,250 would be deposited in a lockbox account to pay for maintenance work and support for the Fordham University project in the future, and \$19,250 would be paid to Andy Vaughn for his commission. The board also decided that defendant Hommel would receive further compensation to be negotiated as long as funds were available.

The parties' claims as to the other pertinent facts are diametrically opposed.

Plaintiff Ziglin contends that Enableware issued a total of 7,000,000 share certificates at a shareholders' meeting that took place on December 6, 2004. Of those shares, 4,233,500 were issued to plaintiff Ziglin, 2,388,500 were issued to defendant Hommel and the balance were issued to other investors. He argues that defendant Hommel has fabricated share documents and illegally transferred ownership of shares to which he is not entitled.

Ziglin contends that in early 2009, defendant Hommel falsely told Bank of America that he was the sole officer and director of Enableware, caused Bank of America to close the existing Phoenix account and to open another account in New York on behalf of

Enableware, transferred funds from the first account into that account, and designated his New York home as Enableware's address. He also contends that defendant Hommel received \$51,800 in receivables paid by Fordham University for work Enableware performed from November to December 2008, and \$48,300 from receivables paid by Fordham University for work completed through January 31, 2009. He states, on information and belief, that defendant Hommel failed to pay salaries and travel expenses of Enableware's employees and agents. He submits an affidavit from one founding shareholder/ employee who states that he was not paid by Enableware for work performed in 2005. He submits another affidavit of an employee who states that he was never paid for work performed in 2009.

Plaintiff claims that he filed a police report in Phoenix, but as the alleged crime took place in New York, the Phoenix police lacked jurisdiction to arrest defendant Hommel. He also states under oath that he filed a complaint with the Fraud Department of the Bank of America.

Defendant Hommel offers a version of the events that is diametrically opposed to plaintiff's. Defendant contends that it was plaintiff Ziglin who committed fraud when he opened up a corporate account in Phoenix, Arizona, where he is domiciled, notwithstanding that the business of Enableware has always been in New York. According to the minutes of the first meeting of

Enableware that took place on December 20, 2004, which are attached to defendant's responding papers, defendant Hommel and plaintiff Ziglin own the same number of shares in the corporation. As of February 1, 2009, each owned 4,233,500 shares.

Defendant annexes a board resolution that states that it was "duly passed on July 31, 2008", which authorizes Enableware to open an operating expenses checking account at Capital One, NA, and requires signatures of both plaintiff Ziglin and defendant Hommel.

Defendant Hommel also attaches correspondence from Fordham University that states that its contract with Enableware terminated in April 2009, which Hommel claims arose because of Ziglin's failure to perform. He alleges that Ziglin further failed to carry out the business of Enableware by withholding information necessary to close another contract with Fordham University and creating another corporate enter that solicited Fordham University in order to divert business from Enableware. Hommel also alleges that Ziglin harbors Enableware's assets and refuses to turn them over for Enableware's use, and is using corporate funds for other than the Enableware's business.

Defendant Hommel alleges that a majority of Enableware's shareholders elected him as sole director on February 6, 2009.

Defendant appends a copy of the purported shareholder resolutions to his papers.

The court shall grant plaintiffs limited provisional relief.

Plaintiff Ziglin seeks an injunction but cites no statutory or decisional authority for such relief. Plaintiffs have not yet served a Complaint so the nature of their action has not been revealed.

Were the complaint to ultimately plead a wrong solely to the corporation, for example, a breach of fiduciary duty resulting in a diminution of the value of stock, such allegation would give rise to a shareholder's derivative action only. Hahn v Stewart, 5 AD3d 285 (1st Dept 2004); Paradiso & DiMenna, Inc. v DiMenna, 232 AD2d 257 (1st Dept 1996). An accounting may be sought in such an action. BCL § 720. However, plaintiff has not pled the requisites for a shareholder's derivative action, i.e. that a majority of the shareholders, which he contends he constitutes, made a pre-suit demand upon the board of directors to prosecute the action. BCL § 626; Simon v Becherer, 7 AD3d 66 (1st Dept 2004). Since plaintiff has failed to demonstrate a likelihood of success on the merits of such a claim, he has not demonstrated entitlement to a provisional remedy.

In a judicial dissolution proceeding, Business Corporation Law 1115 allows the court, in its discretion, to grant an injunction to restrain the corporation and its directors and

officers from committing waste of corporate assets. "Business Corporation Law § 1115 (a) authorizes an injunction at any stage of an action or proceeding pursuant to Business Corporation Law article 11 'effective during the pendency of the action or special proceeding or such shorter period as it may specify in the injunction,' ..." Rust v Turgeon, 295 AD2d 962, 964 (4th Dept 2002). The Rust Court approved of injunctive relief to the extent that the court's equitable power was used to maintain the status quo during the pendency of the proceeding.

Plaintiff Ziglin argues that the actions of defendant Hommel justify such a restraint to prevent him from using corporate funds for non-corporate purposes. Plaintiffs' papers fail to set forth grounds for the granting of such relief since no action of special proceeding is pending under article 11. Plaintiff Ziglin submits no records that bear out his allegations that defendant Hommel received and transferred monies from one corporate account to another, let alone that he used such funds for non-corporate purposes. Plaintiffs have no standing to assert the claims of Enableware's employees, which merely constitute causes of action for unpaid wage earnings that such employees may assert against Enableware.

Given the apparent breakdown in trust between the co-owners of the Corporation, the court finds that injunctive relief is appropriate only to the extent that it maintains the status quo

during the pendency of this proceeding. Injunctive relief will be limited to requiring that the directors of the Corporation not commit acts that constitute grounds for dissolution contained in BCL 1104-a (a) (1) and (2), and that corporate records be made available pursuant to BCL 1104-a c.

As to plaintiff's application for an immediate turn over of books and records, the proper form for such relief is a special proceeding for a prerogative writ of mandamus to compel pursuant to Article 78 of the Civil Practice Laws & Rules. Plaintiff has yet to plead any causes of action, rendering such relief wholly premature.

There are clearly factual disputes between the parties on critical issues such as the identity of shareholders, legitimacy of certain stock certificates, the authority of the directors to open corporate bank accounts and deposit and disburse funds, the amount of funds disbursed and for what purpose, and the acts of any director that constitute violations that are set forth under BCL 1104-a. However, without a petition or complaint and joinder of issue, the court can fashion no further interim relief.

Accordingly, it is

ORDERED that the director or those in control of the Corporation are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or indirectly through any attorney, agent or employee, any illegal,

fraudulent or oppressive actions toward the Corporation and its shareholders; and it is further

ORDERED that the directors or those in control of the Corporation, shall make available for inspection and copying to the plaintiffs under reasonable working conditions the corporate financial books and records for the three preceding years; and it is further

ORDERED that plaintiffs shall serve and file a complaint or petition upon defendant within twenty days after service of a copy of this order with notice of entry on either side; and it is further

ORDERED that defendant shall serve and file an answer to such complaint or petition within thirty days after service of the complaint; and it is further

ORDERED that the parties shall appear in IAS Part 59, 111 Centre Street, for a preliminary conference on December 15, 2009, 9:30 AM.

This is the decision and order of the court.

Dated: October 9, 2009

FILED
OCT 16 2009
ENTER: COUNTY CLERK'S OFFICE
NEW YORK

[Signature]
J.S.C.

DEBRA A. JAMES