SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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PATRICIA DEERIN as Executor of the Estate of Douglas Deerin,

Plaintiff,

-against-

OCEAN RICH FOODS, LLC, a/k/a OCEAN EDGE FOODS, RICHARD MARINO, and DEAN BERMAN,

Defendants.

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TRIAL/IAS PART: 15
NASSAU COUNTY

Index No. 600536-2014
Motion Seq. No. 1
Submission Date: 3/12/14

Papers Read on this motion:

Order to Show Cause, Affirmation in Support and Exhibits.....x
Emergency Affirmation.....x
Affirmation in Opposition and Exhibits.....x

This matter is before the court on the motion filed by Plaintiff Patricia Deerin as Executor of the Estate of Douglas Deerin ("Plaintiff") on February 5, 2014 and submitted on March 12, 2014. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 6301, restraining, enjoining and prohibiting the spending, transferring, distributing, secreting, liquidating, hypothecating, pledging, disbursing or otherwise disposing of the $1.5 million of life insurance proceeds from the life insurance policy on the life of Douglas Deerin received by Ocean Rich Foods, LLC.

Defendants Ocean Rich Foods, LLC d/b/a Ocean Edge Foods ("Company"), Richard Marino ("Marino") and Dean Berman ("Berman") ("Defendants") oppose the motion.

B. The Parties' History

The Verified Complaint ("Complaint") alleges as follows:

Marino, Berman and Douglas Deerin ("Deerin") were all members of the Company until Deerin's death on January 28, 2013, at which time Deerin's estate ("Estate") became the owner of his interest. Marino, Berman and the Estate each currently own 1/3 of the Company.

In January 2009, Marino, Berman and Deerin entered into a Cross-Purchase Agreement ("Agreement") which states that life insurance policies had been taken out in the amount of $1.5 million on the lives of each of the three members of the Company, and that "The Company shall be the sole owner of the policies purchased by and issued to it" (Compl. at ¶ 9). The Agreement specifies that the Company was the owner and beneficiary of John Hancock Policy No. 81 602 369 in the amount of $1.5, insuring the life of Deerin ("Policy"). The Agreement provides that, upon the death of a member, "The Company shall pay such life insurance proceeds to the legal representative of the deceased Member as part payment or payment in full, as the case may be, on account of the purchase price of the interest of the deceased Member" (Compl. at ¶ 11).

The Complaint contains six (6) causes of action: 1) Marino and Berman breached the Agreement by refusing to pay the life insurance proceeds to Deerin's Estate in exchange for its membership interest in the Company, 2) Marino and Berman breached their fiduciary duty to Deerin and, upon his death, to Deerin's Estate by failing to distribute the life insurance proceeds to the Estate; 3) Marino and Berman breached the implied covenant of good faith and fair dealing by failing to distribute the life insurance proceeds to the Estate; 4) Marino and Berman, parties to the Agreement, are liable for tortious interference with contract by failing to distribute the life insurance proceeds to the Estate; 5) pursuant to New York Limited Liability Company Law ("LLCL") § 509, Plaintiff should receive the fair market value of 1/3 of the Company, as determined by an independent appraiser; and 6) Plaintiff seeks dissolution of the Company, pursuant to LLCL § 702, on the grounds that it is financially unfeasible to continue the operations of the Company.

In support of the motion, counsel for Plaintiff provides an unsigned copy of the Agreement which states that it is "made as of this ___ day of January, 2009" between Marino, Berman and Deerin, the Members of the Company (Ex. A to Haber Aff. in Supp.). Counsel for Plaintiff affirms that while Deerin was alive he pledged his home, in which Plaintiff currently lives, as collateral to assist the Company in obtaining a line of credit. He affirms that Defendants

have "refused to assist the Plaintiff in removing her home and any other assets Deerin pledged as collateral on the line of credit" (Haber Aff. in Supp. at ¶ 8), have refused to assist Plaintiff in obtaining information regarding the Estate's assets pledged as collateral, refused to provide Plaintiff with information regarding the Policy and refused to provide Plaintiff with other information regarding the operations of the Company, even though Plaintiff is now responsible for a 1/3 interest in the Company as Executor of the Estate. On February 19, 2014, the Court (Brandveen, J.) denied Plaintiff's application for a temporary restraining order.

In opposition to the motion, counsel for Defendants provides a copy of the Policy to which the Complaint refers (Ex. B to Ryan Aff. in Opp.), which is dated January 28, 2008, one year before the alleged Agreement and five years before the death of Deerin on January 28, 2013. The Policy provides that the Company is the "owner" and sole beneficiary of the Policy. Counsel for Defendants also notes that the Policy is a "key person" policy.

C. The Parties' Positions

Plaintiff submits that she has demonstrated a likelihood of success on the merits on her claim for $1.5 million in life insurance proceeds taken out on the life of Deerin and owed to Plaintiff pursuant to the Agreement or, alternatively, for 1/3 of the fair market value of the Company. Plaintiff contends, further, that she will suffer irreparable harm without injunctive relief because if Defendants are permitted to spend the Policy proceeds, then the Company will not be able to pay a judgment awarded to Plaintiff. In addition, if the Company borrows more money, or further encumbers property of the Estate that is currently collateral for any loans or line of credits that the Company might have, the Company may not have the financial ability to reimburse the Estate for any losses that it might incur. Finally, Plaintiff submits that a balancing of the equities favors her in light of the fact that Plaintiff has not received the proceeds from the Policy, as required by the Agreement, and because Defendants may spend or otherwise distribute assets of the Estate that have been used as collateral for outstanding loans or lines of credit on behalf of the Company without the requested injunctive relief.

Defendants oppose the motion, submitting that 1) Plaintiff cannot demonstrate a likelihood of success on the merits in light of the fact that the Agreement on which Plaintiff relies was never signed by Deerin, Marino, Berman or the Company; 2) the purported irreparable

harm to which Plaintiff refers, specifically the possibility that the Company might not be able to pay a judgment awarded to Plaintiff, is economic loss which does not constitute irreparable injury for purposes of a preliminary injunction; and 3) Plaintiff has not demonstrated that a balancing of the equities favors Plaintiff because Plaintiff cannot establish a legal right to the insurance proceeds that have been paid to the Company, pursuant to the express terms of the Policy.

RULING OF THE COURT

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d

327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

The Court denies the motion. Plaintiff has not established a likelihood of success on the merits in light of the fact that the Agreement on which Plaintiff relies is unsigned, and Defendants have produced the Policy which designates the Company as the beneficiary of the Policy. Plaintiff has also not established that she will suffer irreparable harm without the requested relief as her concern that Defendants will spend the proceeds of the Policy is an injury that is compensable by money damages. Finally, Plaintiff has not demonstrated that a balancing of the equities favors her, in light of the fact that the Agreement on which she relies is unsigned, and Defendants have produced the Policy which designates the Company as the beneficiary.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on May 13, 2014 at 9:30 a.m.

ENTER

DATED: Mineola, NY
March 21, 2014

HON. TIMOTHY S. DRISCOLL
J.S.C.