

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

EDWARD A. RADBURN, individually and
derivatively on behalf of M S N AIR
SERVICES, INC.,

Decision and Order

Plaintiff,

MOTION SEQUENCE:01, 02
INDEX NO.:601902-14

-against-

ROOPNARINE SINGH a/k/a RUDY SINGH,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Order to Show Cause	1
Memorandum of Law in Support	2
Affidavit in Further Support of Motion and in Opposition to Cross Motion	3
Memorandum of Law in Further Support of Motion and in Opposition to Cross Motion	4
Notice of Cross Motion	5
Reply Affirmation	6

Plaintiff moves for an order pursuant to CPLR Article 63 restraining Defendant from “transferring, disposing of or encumbering any assets of MSN Air Services, Inc.; from taking any action that would have the effect of diluting [Plaintiff’s] interest in MSN; from incurring any debt other than in the ordinary course of its business; from making any distributions or payments to himself or to any third party on his behalf or for his benefit unless a pro rata amount equal to plaintiff’s 45% interest in MSN is simultaneously paid; and from destroying, disposing of, modifying or removing any of the records of MSN Air Services, Inc., including but not limited to its financial records whether in hard copy or if stored electronically.” The Defendant cross-moves for an order pursuant to CPLR 3211(a)(1), (3), (4), (5), and (7).

Factual and Procedural Background

According to the Shareholders' Agreement for MSN Air Services, Inc. ("MSN") entered into on August 7, 2006, Plaintiff, Edward A. Radburn ("Plaintiff" or "Radburn"), was a 45% shareholder in, and director of, MSN and Defendant Roopnarine Singh ("Defendant" or "Singh") was the President of MSN and owned the remaining 55% percent of shares (Ex. "A" to Order to Show Cause at pp 1-2). MSN is a domestic corporation in the business of air cargo/freight shipping, with its principal place of business located at JFK International Airport, Jamaica, New York.

On October 16, 2009, Plaintiff commenced a special proceeding in the Queens County Supreme Court pursuant to Business Corporation Law § 1104-a seeking a judicial dissolution of MSN.¹ The Defendant answered the petition and elected to purchase the Plaintiff's shares pursuant to Business Corporation Law § 1118.

By order of the Queens County Supreme Court dated July 23, 2010 (Golia, J.), "petitioner's motion for judicial dissolution [was] stayed until the fair value of petitioner's shares has been determined" and the attorneys for both sides were directed to appear for a conference to determine how and by whom the shares would be valued (Ex. "B" to Cross Motion).²

¹ The Queens action was entitled *In the Matter of the Application of Edward A. Radburn holder of shares representing twenty percent or more of all outstanding shares entitled to Vote in an Election of Directors, for the Dissolution of MSN Air Services, Inc. a domestic Corporation* (Index No. 24784/09).

² In the Queens action, Singh responded to the petition for dissolution by answering and then by electing to purchase Radburn's shares pursuant to Business Corporation Law § 1118(a). At the time of Singh's election, "the issue [was] the fair value of the petitioner's share" (Ex. "B" to Cross Motion).

Section 1104-a [of the Business Corporation Law] was adopted in order to provide a remedy to minority shareholders who have suffered abuse at the hands of the majority and lacked a means for salvaging the value of their investments. Section 1104-a permits a minority shareholder to seek dissolution upon a showing that those in control have been guilty of illegal, fraudulent or oppressive actions towards to the complainants or that the property or assets of the corporation are being looted, wasted or diverted for non-corporate purposes by those in control. But the Legislature also provided a defensive mechanism for the other shareholders and the corporation, giving them, in Section 1118, the absolute right to avoid the dissolution and any possibility of liquidation by electing to purchase the petitioner's shares at "fair value" (*Matter of Piekos*, 28 Misc3d 1220(A) [Sup Ct New York 2010] [citations omitted]).

According to the Court of Appeals:

[W]hatever the true facts regarding oppression or wrongdoing, the corporation and the remaining shareholders have the unconditioned right within 90 days of the petition (and later within the

By order of the court dated August 3, 2012, Justice Golia marked the proceeding off the calendar "without prejudice to restore the proceeding to the calendar upon motion on notice, with affirmation from counsel stating that the matter is ready to proceed" (Ex. "C" to Cross Motion).³

By order to show cause, the Plaintiff commenced the instant action, both individually and derivatively on behalf of MSN, asserting causes of action for an accounting, breach of contract (the Shareholders' Agreement), breach of fiduciary duty, and unjust enrichment.⁴ Plaintiff also seeks provisional relief pursuant to CPLR Article 63 restraining the Defendant from "transferring, disposing of or encumbering any assets of MSN Air Services, Inc.; from taking any action that would have the effect of diluting [Plaintiff's] interest in MSN; from incurring any debt other than in the ordinary course of its business; from making any distributions or payments to himself or to any third party on his behalf or for his benefit unless a pro rata amount equal to plaintiff's 45% interest in MSN is simultaneously paid; and from destroying, disposing of, modifying or removing any of the records of MSN Air Services, Inc., including but not limited to its financial records whether in hard copy or if stored electronically."

court's discretion), to avoid the potential drain and risk of dissolution proceedings by simply offering to buy out the minority interest; the minority is protected by a court-approved determination of fair value and other terms and conditions of the purchase.

* * * *

[T]he trial court's findings on the issue of wrongdoing were superfluous in light of the fact, . . . that respondent had elected to buy petitioner's shares pursuant to Business Corporation Law § 1118. Fixing blame is material under 1104-a, but not under 1118 (*Matter of Pace Photographers, Inc.*, 71 NY2d at 745-46, *supra*).

³ According to the Defendant, the Plaintiff repeatedly failed to appear for conferences in the Queens action (Affirmation in Support of Cross Motion at ¶ 8).

⁴ The Shareholders' Agreement provided that Plaintiff and Defendant were to be full time employees of the corporation entitled to full time employment, with salary and benefits in accordance with industry standard (Ex. "A" to Order to Show Cause at p 3). The Plaintiff claims that Defendant has "failed and refused to pay plaintiff any salary for the three years he was there, even though Singh paid salary to himself" and that Defendant "failed and refused to consult with plaintiff as a director and officer of MSN as to the general business matters, election of officers, the day to day operation of MSN's business, salaries of employees and as to the hiring and firing of employees". In addition, Plaintiff states that the Shareholders' Agreement provides that net profits or losses would be distributed or shared by the shareholders but that Defendant has been paying distributions to himself but not to the Plaintiff (Complaint at ¶¶ 18, 21, 22-23). Plaintiff also contends that his demands for access to MSN's books have been wrongfully denied as Defendant continues to refuse Plaintiff from participating in the business affairs of MSN, has removed Plaintiff's name from the corporate account and continues to account for the income generated by the business (Complaint at ¶¶ 31, 33, 35).

In an order dated April 30, 2014, the court (DeStefano, J.) granted a temporary restraining order ("TRO") restraining Defendant from "destroying, disposing of, modifying or removing any of the records of MSN Air Services, Inc., including but not limited to its financial records whether in hard copy or if stored electronically".

The Defendant cross-moves for an order pursuant to CPLR 3211(a)(1), (3), (4), (5), and (7) dismissing the action. According to the Defendant, the Queens action is still alive, "no action of any kind has taken place in the nearly two (2) years since it was 'marked off'" and the "proper remedy, if any, would be for the plaintiff herein to move to restore the Queens Action" (Affirmation in Support of Cross Motion at ¶ 11).

For the reasons that follow, the motion is granted and the cross motion is denied.

The Court's Determination

Defendant's Cross Motion to Dismiss

Defendant seeks dismissal of the complaint on several grounds. First, the Defendant argues that "another action is pending in the Queens County Supreme Court involving the same parties and based upon the same causes of action, and as such, this action must be dismissed". Specifically, the Defendant states that no action of any kind has taken place in the nearly two years since the dissolution action was "marked off" and, thus, the "proper remedy, if any, would be for the plaintiff herein to move to restore the Queens action" (Affirmation in Support of Cross Motion at ¶ 11).

CPLR 3211(a)(4) provides for the dismissal of an action when there is another action pending between the same parties for the same cause of action in a court of any state.

Assuming that the Queens action can be considered "pending", the branch of Defendant's motion to dismiss on the ground of another action pending must nevertheless be denied as the Queens proceeding does not involve the same parties nor does it involve the same causes of action. The Queens action was a proceeding seeking dissolution of MSN, an accounting, and the appointment of a receiver (Ex. "A" to Cross Motion). The instant action, in contrast, seeks money damages against the majority shareholder, brought by Radburn, both individually and derivatively, and does not involve the dissolution of MSN nor the value of Radburn's 45% shareholders' interest in MSN.

The Defendant also argues that "[t]he same issues between the same parties have already been adjudicated in the Queens County Supreme Court, and that Court issued an Order in the matter. Thus, Radburn's instant action is barred by *res judicata* and collateral estoppel"

(Affirmation in Support of Cross Motion at ¶ 59). Contrary to Defendant's contention, the doctrines of *res judicata* and collateral estoppel are inapplicable to the instant matter given the absence of a final adjudication on the merits in the Queens action. Moreover, as noted earlier, the issues at bar do not involve the same parties or the same causes of action (*see Blum v Valentine*, 87 AD3d 1100 [2d Dept 2011]; *Willard v Meehan*, 35 AD3d 488 [2d Dept 2006]).

The Defendant's argument that dismissal is warranted on the ground of laches is similarly without merit. "The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party" (*Markell v Markell*, 91 AD3d 832, 834 [2d Dept 2012], quoting *Skrodelis v Norbergs*, 272 AD2d 316, 316 [2d Dept 2000]).

Here, the Defendant claims that he has been prejudiced inasmuch as the Plaintiff is now seeking to obtain an increased value of its 45% shareholder interest as compared to the value of his share at the time the dissolution proceeding was commenced in October 2009. Defendant's argument is unavailing, however, as dissolution under Business Corporation Law § 1104-a, and the value of Radburn's 45% shareholder interest, is not sought in the instant action. The Defendant's claim that he "worked very hard to improve the business and increase the value of MSN stock since October 15, 2009" (the commencement of the dissolution proceeding) and that the Plaintiff "now attempts to take advantage of the increased value of MSN stock after a five (5) year period" and that such "delay in the plaintiff's action (or rather inaction) is undeniably tactical and serves only to prejudice the defendant" (Affirmation in Support of Cross Motion at ¶¶ 45-47) is irrelevant.

Plaintiff's Motion for an Injunction

The Plaintiff moves for an order pursuant to CPLR Article 63 restraining Defendant from "transferring, disposing of or encumbering any assets of MSN"; from "taking any action that would have the effect of diluting [Plaintiff's] interest in MSN; from incurring any debt other than in the ordinary course of its business; from making any distributions or payments to himself or to any third party on his behalf or for his benefit unless a pro rata amount equal to plaintiff's 45% interest in MSN is simultaneously paid; and from destroying, disposing of, modifying or removing any of the records of MSN Air Services, Inc., including but not limited to its financial records whether in hard copy or if stored electronically."⁵

⁵ The court notes that the Plaintiff's order to show cause does not seek immediate access to the books and records of MSN, which is only sought in Plaintiff's Memorandum of Law (Memorandum of Law in Support of Plaintiff's Motion at p 2).

Initially, the court concludes that, at this juncture, the Plaintiff is still a 45% shareholder of MSN and the value of Plaintiff's shares has not yet been determined notwithstanding Defendant's 2009 election to purchase the Plaintiff's shares pursuant to Business Corporation Law § 1118 (Ex. "D" to Plaintiff's Motion).⁶

On a motion for a preliminary injunction, the moving party must demonstrate by clear and convincing evidence, a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2d Dept 2010]). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual, not to determine the ultimate rights of the parties. As such, absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought in the complaint (*Reichman v Reichman*, 88 AD3d 680 [2d Dept 2011]; *SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2d Dept 2005]). In addition, mandatory preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d at 727, *supra*). "The mere existence of an issue of fact will not itself be grounds for the denial of the motion" (*Arcamone-Makinano . Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]). The decision whether to grant or deny a preliminary injunction is within the sound discretion of the court (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d at 738, *supra*; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2d Dept 2009]).

The first cause of action in the Plaintiff's complaint seeks to have the Defendant account for: the profits and losses generated by the operations of MSN; the salary and benefits paid to Defendant that were in excess of industry standards; and salary and benefits were not paid to Plaintiff in accordance with industry standard.

The court notes that a shareholder in a close corporation has the right to an accounting (*Seretis v Fashion Vault Corp.*, 110 AD3d 547 [1st Dept 2013]). In light of this well settled principle, coupled with the Plaintiff's unrefuted affidavit indicating numerous violations of the

⁶ In the absence of any evidence indicating that Plaintiff sold or transferred his shares, he is still a shareholder. The court notes that the Shareholders' Agreement dated August 7, 2006 indicates a total of 200 outstanding shares of stock, with 55% of these shares belonging to Defendant and 45% belonging to the Plaintiff. Notwithstanding the Shareholders' Agreement, a stock certificate dated November 13, 2007 indicating that Defendant was owner of all 200 outstanding shares. However, the stock certificate is dated two years prior to the commencement of the dissolution proceeding in Queens County. Moreover, the Defendant stated in his affidavit submitted in the Queens County dissolution proceeding that the Plaintiff was a 45% shareholder and Defendant a 55% shareholder.

Shareholders' Agreement, including that: Plaintiff was not paid a salary while Defendant was paid a salary; Defendant has failed to consult with Plaintiff, as a director and officer of MSN, as to MSN's day to day operations and general business matters; Defendant has paid distributions to himself without making distributions to Plaintiff (Affidavit in Support of Motion at ¶ 9-13), the court concludes that Plaintiff has established a likelihood of success on the merits on the accounting claim.

With respect to irreparable harm, some of the relief sought in Plaintiff's motion, i.e., the protection of MSN's records, cannot be fully compensated with an award of money damages if such records were destroyed, and thus, under these circumstances, injunctive relief is warranted.

Last, when considering the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief (*Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806 [2d Dept 2008]). Specifically, to obtain an injunction, the movant is required to show that irreparable injury to be sustained is more burdensome to him than the harm that would be caused to the party opposing the injunction if the injunction were granted (*Lombard v Station Square Inn Apartments Corp.*, 94 AD3d 717 [2d Dept 2012]). Here, the harm to be sustained by the Plaintiff if the injunction were not granted is more burdensome than the harm, if any, caused if the injunction were granted especially in view of the fact that the provisional relief sought will, in effect, simply maintain the status quo pending the litigation.

Based on the foregoing, it is hereby

Ordered that the Plaintiff's motion for a preliminary injunction is granted; and it is further

Ordered that the Plaintiff is directed to post an undertaking in the amount of \$5,000 within 10 days of the date hereof; and it is further

Ordered that the Defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: August 18, 2014


Hon. Vito M. DeStefano, J.S.C.

ENTERED

AUG 25 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE