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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

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

Decision and Order

Plaintiff,

-against-

MOTION SEQUENCE:05
INDEX NO.:601902-14

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

In an action to recover damages for, *inter alia*, breach of contract and breach of fiduciary duty, the Plaintiff moves for an order pursuant to CPLR 6401 for the appointment of a temporary receiver to: "(i) enter the offices of MSN Air Services, Inc. ("MSN") and take control over and possession of (a) its books and records and (b) all revenue generated by the operation of MSN's business along with its bank accounts and any investment accounts, if any, and to pay all valid bills of MSN in the ordinary course of its business and (ii) permit plaintiff to review and copy any of the books and records of MSN upon reasonable notice."

In support of his application, the Plaintiff stated that a temporary receiver is necessary to: protect MSN's assets from further looting by Defendant; continue MSN's operations; and to secure MSN's books and records so that Plaintiff, as shareholder and director, may inspect them (Affirmation in Support at ¶¶ 2, 8).¹ Plaintiff further states that, although he is a director and

¹ Plaintiff is a director, officer, and 45% shareholder in MSN (Affirmation in Support at ¶ 3; Affidavit in Support at ¶ 2).

officer of MSN, the Defendant has “wrongfully dominated its operations by, *inter alia*, removing [Plaintiff] from MSN’s bank accounts; refusing to consult [Plaintiff] concerning MSN’s business operations; and refusing to allow [Plaintiff] to participate in the business operations of MSN” (Affirmation in Support at ¶ 4; Affidavit in Support at ¶ 8). Inasmuch as Defendant has refused the Plaintiff access to MSN’s books and records, the Plaintiff wants access to those books and records “to determine the extent of [Defendant’s] looting of corporate assets” (Affirmation in Support at ¶ 6; Affidavit in Support at ¶ 9).

Pursuant to CPLR 6401(a), entitled “Appointment of temporary receiver; joinder of moving party”:

Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed . . .

“The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits” (*Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d 631 [2d Dept 2008], quoting *Schachner v Sikowitz*, 94 AD2d 709, 709 [2d Dept 1983]). Therefore, a motion seeking such appointment “should be granted only where the moving party has made a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the moving party’s interests” (*Suissa v Baron*, 107 AD3d 689 [2d Dept 2013]; *Natoli v Milazzo*, 65 AD3d 1309 [2d Dept 2009]; *Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d at 631, *supra*, quoting *Lee v 183 Port Richmond Ave. Realty*, 303 AD2d 379, 380 [2d Dept 2003]; *Domansky v Berkovitch*, 259 AD2d 331 [1999] [Supreme Court has the discretion, upon a motion by a party with an “apparent interest” in the “property which is the subject of an action,” to appoint a temporary receiver of the property “where there is danger that the property will be . . . lost, materially injured or destroyed”]).

Here, the Plaintiff made a satisfactory showing that the assets of MSN are in danger of being looted, and that the appointment of a receiver is necessary to conserve the assets and protect the Plaintiff’s interests (*see* CPLR 6401[a]; *St. Julien v LaGuerre*, 39 AD3d 532, 533 [2d Dept 2007]; *Singh v Brunswick Hosp. Ctr.*, 2 AD3d 433, 434 [2d Dept 2003] [documentary evidence sufficiently established, *inter alia*, that the unilateral actions and conduct of the defendants in apparent willful disregard of the agreements and prior orders of the Supreme Court indicate a danger of material injury to the property unless a receiver was appointed]).

In this regard, the court notes that the Defendant has failed to produce all documents

responsive to Plaintiff's First Demand for Production of Documents dated August 27, 2014. In a decision and order dated June 15, 2015, this court granted the branch of Plaintiff's motion for an order pursuant to CPLR 3126 striking the Defendant's answer unless, within thirty days of the date thereof, the Defendant served upon the Plaintiff, to the extent not already provided, responses to Plaintiff's First Demand for Production of Documents (*see Wolf v Rand*, 216 AD2d 99 [1st Dept 1995]; *Adinolfi v Adinolfi*, 168 AD2d 401 [2d Dept 1990] [defendant satisfied her burden warranting the appointment of a temporary receiver wherein the record demonstrated, *inter alia*, that the plaintiff had a history of failing to comply with standing court orders directing discovery]).

The court further notes that defense counsel moved to withdraw from representation (which was granted by the court) based upon the Defendant having been "uncooperative" with defense counsel's "efforts to comply with the Court's June 15, 2015 order and the discovery in this matter" (Vitulli Affirmation in Support of Motion at ¶ 13 [Motion Seq. No. 4]). According to defense counsel at that time, it "has been very difficult to represent the client [Defendant] in that he has not been responsive to assist in the discovery of this matter" and the "firm has been unable to work with the Defendant in complying with the discovery demands" (Vitulli Affirmation in Support of Motion at ¶¶ 11, 16 [Motion Seq. No. 4]).

Moreover, Plaintiff asserts in his affidavit that: he has not been consulted as to "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"; he has been removed from being a signatory on MSN bank accounts and Defendant has taken control of MSN's banking and "used that exclusive control to misappropriate corporate funds for his personal use"; he has been denied access to MSN's books and records; Defendant has paid distributions to himself (including salary, executive allowances and loan repayments) without making any distributions to the Plaintiff, in violation of the Shareholder's Agreement (*see Rosan v Vassell*, 1998 WL 35421481 [Sup Ct New York County 1998] [the appointment of a receiver was appropriate where plaintiff, 25% stockholder, President and Director of a corporation was frozen out of the corporation's functions and business affairs]).² As held by the court in *Kesten v Morris* (22 Misc2d 498 [Sup Ct Special Term New York County 1959]):

[T]he factual picture presented by all of the affidavits and exhibits indicate, in my opinion, that many of the charges of waste, dissipation of corporate funds and improper management have foundation in fact for the charges made and that the

² Examples of Defendant's misappropriations include, but are not limited to Defendant using MSN funds to pay for his children's education and his home mortgage (in the amount of \$122,772.32). The Plaintiff also states that the 2009 general ledger show loans and executive allowances payable to the Plaintiff in the amount of \$62,622.00 that he never received.

business and assets of the corporation should be preserved until ultimate disposition of this litigation. The court may appoint a receiver notwithstanding the present solvency of a corporation where there is danger of dissipation and waste of its assets and funds.

Conclusion

Based on the foregoing, it is hereby

Ordered that the motion of the Plaintiff for the appointment of a temporary receiver pursuant to CPLR 6401 is granted. The court shall issue an order of appointment herewith; the receiver shall, in all respects, comply with NYCRR 36.

Dated: January 8, 2016


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

ENTERED
JAN 12 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE