SHORT FORM ORDER

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

DAVID ERICKSON,

Plaintiff,

INDEX No. 608315/15

MOTION DATE: March 18, 2016
Motion Sequence #001, 002, 003

-against-

JOHN ROBERT ERICKSON, GERARD BOURKE and J. EKSTROM & SONS, INC.,

Defendants.

The following papers read on this motion:

Order to Show Cause..... XX
Cross-Motion..... X
Affidavit/Affirmation in Support..... XXX
Affirmation in Opposition..... X
Reply Affidavit..... XXX

Motion (sequence # 1) by plaintiff David Erickson for a preliminary injunction is **granted** to the extent indicated below. Motion (sequence # 2) by plaintiff for an order restraining defendant John Erickson from using the funds of defendant J. Ekstrom & Sons, Inc. to defend this action is **granted**. Motion (sequence # 3) by defendant John Erickson to dismiss the first and third causes of action for failure to state a cause of action is **denied**.

This is an action for common law dissolution of a close corporation. Plaintiff David Erickson is a one third owner of defendant J. Ekstrom & Sons, Inc. J. Ekstrom is involved in the plumbing business. Defendant John Erickson, who is David Erickson's brother, and defendant Gerard Bourke are the other 1/3 owners of the company. The parties purchased the J. Ekstrom & Sons in August 2007.

David Erickson alleges that in February 2015 he learned that John Erickson was conducting an illicit affair with David's wife, who is also an employee of the company. Plaintiff further alleges that John Erickson used the company credit card for travel, gasoline, and other personal expenses.

This action was commenced on December 24, 2015. In the first cause of action, plaintiff seeks common law dissolution of J. Ekstrom & Sons. In the second cause of action, plaintiff seeks an accounting of the affairs of the company. In the third cause of action, plaintiff seeks a permanent injunction, restraining defendants from excluding him from the business, denying him access to the books and records, and diverting company assets.

By order to show cause dated December 30, 2015, plaintiff moves for a preliminary injunction, restraining defendants from excluding him from the business, altering his terms of employment, denying him access to the books and records, and disbursing J. Ekstrom funds, except in the ordinary course of business. In the order to show cause, Justice Peck issued a temporary restraining order, prohibiting defendants from, among other actions, disbursing company funds except to defray usual and necessary expenses incurred in the regular course of business.

By order to show cause dated January 19, 2016, plaintiff moves for an order restraining defendants from using the funds of defendant J. Ekstrom & Sons, Inc. to defend this action. Plaintiff alleges that on January 5, 2016 J. Ekstrom issued a check in the amount of $10,000 payable to defendant Erickson's counsel. Plaintiff argues that the corporation is merely a "nominal party" and the dispute is between the shareholders. Plaintiff argues that defendant Erickson is not authorized to retain counsel for J. Eckstrom and expending the company's funds for the defense of the action is a violation of the temporary restraining order.

By notice of cross-motion dated January 25, 2016, defendant John Erickson moves to dismiss the first and third causes of action for failure to state a cause of action. Defendant expresses remorse for the affair and asserts that plaintiff has been hostile, combative, and defiant, which has made their "business relationship unworkable." Defendant alleges that

he discussed plaintiff's attitude with Gerard Bourke, the other 1/3 shareholder, and they agreed that, if plaintiff would not "work cooperatively," he would be "terminated." Defendant argues that, because the amount of corporate funds which were used for personal expenses is de minimis, plaintiff has not sufficiently allegedly looting, which is necessary for a common law dissolution.

The remedy of common law dissolution is available to minority shareholders when the majority shareholders and/or the corporate officers or directors engage in "egregious conduct," such as palpably breaching the fiduciary duty which they owe to minority shareholders (***Matter of Kemp v Beatley***, 64 NY2d 63, 69-70 [1984]; ***Fedele v Seybert***, 250 AD2d 519, 521 [1st Dept 1998]; see also ***Gjuraj v Uplift Elevator Corp.***, 110 AD3d 540, 542 [1st Dept 2013]; but see, ***Matter of Candlewood Holdings, Inc.***, 124 AD3d 775, 776 [2d Dept 2015][common law dissolution available only if officers or directors accused of looting the corporation and violating their fiduciary duty]). Corporate oppression of a minority shareholder is particularly egregious, where it is engaged in for the purpose of forcing the minority shareholder out of the company (***Leibert v Clapp***, 13 NY2d 313 [1963];

By admittedly engaging in an illicit affair with the wife of his brother and business partner, defendant John Erickson clearly engaged in egregious conduct. Regardless of defendant's expressed remorse, such conduct, once discovered, is reasonably likely to drive the other shareholder out of the company. The fact that Erickson engaged in the illicit activity with an employee of the company enhances the breach of fiduciary duty because it might have subjected the company to liability for sexual harassment. On this motion to dismiss, the court must give plaintiff the benefit of the possible favorable inference that John Erickson looted J. Ekstrom & Sons by using a substantial amount of company funds for personal expenses. Thus, plaintiff has stated a claim for common law dissolution even under the Second Department's more stringent standard. Accordingly, defendant Erickson's motion to dismiss the first cause of action for common law dissolution is **denied**.

Had plaintiff commenced a statutory proceeding for the judicial dissolution of J. Ekstrom & Sons, a broad range of injunctive relief would have been available (See, Business Corporation Law § 1115). It appears that injunctive relief is also available under common law dissolution, at least to the extent that a shareholder seeks to restrain another shareholder from excluding him from the corporation or otherwise diluting his interest (***Lemle v Lemle***, 92 AD3d 494, 500 [1st Dept 2012]).

Plaintiff seeks injunctive relief, not only to prohibit his exclusion from the business, but also to gain access to the books and records, and to prevent further diversion of company assets. The additional relief requested by plaintiff is necessary to prevent the dilution of his interest in J. Ekstrom & Sons. Defendant Erickson's motion to dismiss the third cause of action for injunctive relief is **denied**.

In order to be entitled to a preliminary injunction, plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860 [1990]). Plaintiff has established a likelihood of success of establishing that defendant Erickson has engaged in egregious conduct with respect to his fellow shareholder and the corporation. Additionally, plaintiff has established a danger of irreparable injury and balance of equities in his favor. Accordingly, plaintiff's motion for a preliminary injunction is **granted** to the extent that, pending final judgment, defendants are restrained from excluding plaintiff from the business, altering his terms of employment, denying him access to the books and records, and disbursing J. Ekstrom funds, except in the ordinary course of business.

In arguing that the corporation cannot indemnify defendants for their defense costs, plaintiff relies upon cases in which dissolution was sought, not under the common law, but pursuant to a statutory BCL proceeding (***Boucher v Carriage House Realty***, 105 AD3d 951 [2d Dept 2013][deadlock under BCL § 1104]; ***Matter of Park Inn Ford***, 249 AD2d 307 [2d Dept 1998][special circumstances under BCL § 1104-a]). For certain purposes, it is significant whether a minority shareholder has commenced a statutory or common law dissolution proceeding. For example, when a minority shareholder seeks common law dissolution, the majority shareholders have no statutory right to elect to purchase the minority shareholder's shares pursuant to BCL § 1118 (***Fedele v Seybert***, 250 AD2d 519 [1st Dept 1998]). Nevertheless, even under common law dissolution, a buy-out of the minority shareholder's interest at fair value may be directed by the court as an appropriate remedy (***Gjuraj v Uplift Elevator Corp.***, **supra**, 110 AD3d at 542).

While the form of the dissolution petition is significant for purposes of a buy-out election, defendants have not established that a different rule should apply for purposes of reimbursement of defense costs. Accordingly, plaintiff's motion for an order restraining defendant John Erickson from using the funds of defendant J. Ekstrom & Sons, Inc. to defend this action is **granted**. Defendant Erickson is directed to repay J. Ekstrom & Sons, Inc. $10,000 within five days of service of a copy of this order. Plaintiff's motion to disqualify defendant's counsel is **denied**.

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A Preliminary Conference has been scheduled for May 26, 2016 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Dated APR 19 2016

Stephen A. Bucaria
J.S.C.

ENTERED

APR 25 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE