

Feinberg v Silverberg
2011 NY Slip Op 32299(U)
August 18, 2011
Supreme Court, Nassau County
Docket Number: 3120/2011
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 7

SAMUEL FEINBERG, individually and
SAMUEL FEINBERG, a shareholder of
L&E INTERNATIONAL LTD., using in the
right of L&E INTERNATIONAL LTD.

Plaintiffs,

INDEX NO.: 3120/2011
MOTION DATE: 6/22/11
MOTION SEQUENCE: 001

-against-

ERROL SILVERBERG, VICTOR HECHT,
RICK KREMER and L&E INTERNATIONAL LTD.,
a nominal defendant.

Defendants.

The following papers read on this motion:

- Sequence #1 Motion by Plaintiffs for Injunctive Relief 1.
- Memorandum of Law in Support of Plaintiffs' Motion for Injunction..... 2,
- Summons and Complaint 3.
- Emergency Affirmation of Matthew Dollinger, Esq. 4.
- Affidavit of Errol Silverberg 6.
- Affidavit of Victor Hecht 7.
- Affirmation of D. Reeves Carter, Esq. in Opposition to Plaintiff's Motion and
in Support of Cross-Motion 8.
- Memorandum of Law in Opposition to Plaintiff's Motion and in Support of
Defendants' Cross-Motion 9.
- Affirmation of Matthew Dollinger, Esq. In Opposition to Cross-Motion10.
- Reply Memorandum of Law in Further Support Preliminary Injunction 14.
- Reply Affidavit of Samuel Feinberg in Further Support of Injunction15.

PRELIMINARY STATEMENT

Upon an Order to Show Cause and a hearing held on March 4, 2011, the court granted the plaintiff a Temporary Restraining Order which granted the following relief:

- (1) enjoining Silverberg from preventing or interfering with Feinberg's duties and rights as shareholder and President, Treasurer, and Director of L&E;
- (2) enjoining Silverberg from further depriving Feinberg of compensation payments from L&E as such payments were authorized prior to February 1, 2011;
- (3) enjoining all defendants from further violations of the Shareholders Agreement and By-laws of L& E;
- (4) enjoining all defendants from interfering with the Board of Directors' functions under Article 4, Section 2 of the By-Laws; and
- (5) enjoining all defendants from interfering with plaintiff's access to L&E's books and records, valuable papers, and other materials.

Now before the court is an order to show cause for a preliminary injunction which would adopt the relief that was granted by Temporary Restraining Order and seeks the following additional relief:

- (6) enjoining Victor Hecht from continuing as a signatory on the bank accounts of L&E and L&E's affiliates
- (7) enjoining Brian Barney from continuing as a signatory on the bank accounts of L&E and L&E's affiliates
- (8) enjoining Silverberg from any further involvement with L&E and enjoining Silverberg from access to corporate documents, finances, books and records, confidential and proprietary information, and corporate meetings.

The defendants have withdrawn their cross-motions which sought to compel arbitration and to dismiss certain causes of action. The court held a hearing on the preliminary injunction on June 22, 2011 and reserved decision on the preliminary injunction and what remains of the cross-motion. The court now grants plaintiff's request for a Preliminary Injunction with all relief requested therein except the removal of Silverberg from the control and management of L&E. Feinberg's request to remove Silverberg from the control and management of L&E in essence asks this court to appoint Feinberg as receiver for L&E. Feinberg has not made an appropriate motion under CPLR § 6401 for the Appointment of a Receiver.

BACKGROUND

L&E is a closely held corporation founded by Feinberg and Silverberg in 1993. Feinberg is the President and Treasurer; Silverberg is the Vice President and Secretary. The company is a global supplier of packaging material, with many overseas offices and warehouses. The business has historically proven successful, with gross revenues of over \$100,000,000 on occasion. Each of the parties are 50% shareholders of L&E.

Victor Hecht ("Hecht") is the Chief Financial Officer of L&E. Rick Kremer ("Kremer") is the in-house general counsel for L&E. Brian Barney ("Barney") is an employee with responsibilities involving the business of L&E in Asia. Jerry Silva and Rosalie Silva were original shareholders, but sold their shares to Silverberg and Feinberg, who are now the sole members of the Board of Directors. A Shareholders' Agreement and By-laws govern the operation of L&E.

According to the Complaint, Silverberg developed a plan to oust Feinberg and gain complete control over L&E. The plan allegedly involved the willing cooperation of Hecht, Barney and Kremer. Plaintiff claims that these parties have conducted secret meetings, usurped Feinberg's authority and committed acts designed to isolate Feinberg from the operation of L&E.

Plaintiff further alleges that, in violation of the Shareholders Agreement and By-laws, defendants have made decisions which are required to obtain approval of the Board of Directors. Included in these allegations is a claim that Silverberg has terminated Feinberg's compensation and distributions. He further claims that Hecht has inadequately performed his duties as financial officer to the extent that the outside accountants have been unable to certify the financial records. Kremer, he alleges, has breached his fiduciary obligations to the company by serving the interests of Silverberg over those of L&E.

Plaintiff specifically alleges that Silverberg has excluded Feinberg from his role as head of the sales department; usurped the functions of the sales department; opened a secret bank account in Hong Kong to siphon funds from L&E; deprived Feinberg of meaningful participation in the company; undermined his business relationships with suppliers; unilaterally vested his son, Ian, with undisclosed authority in the company; established business relationships with individuals and entities which were not in the best interest of the company; assisted L&E's

general counsel form a shell corporation which is being paid by L&E; breached an agreement by not paying agreed-upon monthly compensation; unilaterally announced that no dividends or distributions would be paid, despite the requirement that such decisions be made by the Board of Directors. Silverberg asserts financial reasons for the withholding of dividends and distributions.

DISCUSSION

Either a plaintiff or defendant may move for a Temporary Restraining Order or Preliminary Injunction (*see* CPLR § 6001) in order to preserve the status quo until the case can be fully adjudicated on the merits. (*See Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 NY2d 236 [1992]).

The Civil Practice Law and Rules establishes the standard for the court's authority to grant a preliminary injunction or a temporary restraining order in Section 6301:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

This language has been held to mean that “[t]o establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction.” (*De Fabio v. Omnipoint Communications, et al.*, 66 AD3d 635, 636 [2d Dept. 2009] and citations therein).

Likelihood of Success

The plaintiff has sufficiently shown a likelihood of success on the merits of his claims. Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise

of a court's formidable equity power in cases where the movant's position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4th Dept. 1976]).

The plaintiff has submitted documentary evidence as well as transcripts of defendants' conversations which strongly support the plaintiff's allegations that he has been shut out of the corporation. The plaintiff has provided the Shareholders Agreement and the By-laws, which confirm that plaintiff has been wrongfully denied access to the corporation and has been denied his voice in management of the corporation. The bargained-for Shareholder Agreement provides that "the following actions shall be taken by the Corporation only after the unanimous approval of the Board of Directors *** the declaration or payment of dividends or distributions upon the Shares; *** the entering into or termination of any employment agreement by the Corporation." (Feinberg Aff., Ex. 1, Shareholder Agreement §§1.3, 1.3.j & 1.3.l).

Errol Silverberg submits an Affidavit in which he claims incredulity and surprise toward Feinberg's claims (*see, e.g.*, Silverberg Aff. at ¶¶ 11-15, 25). However, a transcript of a telephone conference in which Silverberg discusses this court's TRO is particularly damning to Silverberg's credibility. (Feinberg Reply Aff., Ex. 71 at pp. 25-27). Silverberg reveals in this conversation his plan to oust Silverberg by forcing a breach on L&E's contracts and then offering L&E's clients identical contracts by a new company formed by Silverberg and his associates. (*Id.* at 30 ["So if we shut the lights on this sucker, at the same time we march into Adidas and say, hey, this is what's happening here... Forget about the name of the company..."])

Similarly, the statements by Brian Barney and Victor Hecht in this conversation support Feinberg's allegations that they have aligned themselves with Silverberg to the detriment of Feinberg's control and management of L&E and they have conspired with Silverberg to deprive Feinberg of any salary. (*Id.* at pp. 27-31 Victor, for example, states, "You know, two-man board, two owners, who needs all that crap?" (*Id.* at 30). As signatories on L&E's various accounts, Victor and Brian have facilitated Silverberg's ouster of Feinberg, and therefore Feinberg is also likely to succeed in claims that Brian's and Victor's actions have been wrongful and in violation of fiduciary duties, either as managers of L&E or as employees of L&E, and not of Silverberg personally.

Irreparable Injury

The plaintiff has also established irreparable injury if the requested relief is not granted. “Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient.” (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 [2d Dept. 1995]). Thus, “[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm”. (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 [2d Dept. 2007]).

Generally the courts of this state have recognized that when the control and management of a close corporation is at stake, money damages for violations of a shareholders’ agreement or corporate by-laws are insufficient and the element of irreparable injury is established. (*Yemini v. Goldberg*, 60 AD3d 935 [2d Dept. 2009]). Additionally, where as here, the payment of compensation to one of the owners of the corporation is at stake, money damages may be insufficient. (See *Davis v. Rondina*, 741 F.Supp. 1115, 1125 [S.D.N.Y.1990] [holding that damages could not compensate plaintiff for “loss of the opportunity to continue to manage the company which she has helped to build and for which she has guaranteed substantial loans”]; *Street v. Vitti*, 685 F.Supp. 379, 384 [S.D.N.Y.1988] [enjoining a majority shareholder from terminating the employment of plaintiffs who were minority shareholders];...

Di Nardo v. Renzi (No. 8977, 1987 WL 10014 [Del.Ch. April 24, 1987]) is an analogous case involving a dispute between two shareholders who each owned fifty percent of the company’s shares. The relations between the two had deteriorated and the defendant stopped paying the plaintiff’s salary, changed the locks on the company’s doors, and forced a sale of the plaintiff’s shares. The Delaware court found that the plaintiff would suffer irreparable injuries from the defendant’s conduct and the court issued a preliminary injunction which enjoined the defendant from interfering with plaintiff’s right to participate in the company and receive his previous salary. Courts applying New York law to analogous circumstances have followed *DiNardo*. For example, the Southern District of New York granted a preliminary injunction that required defendants to enjoin from withholding salary payments to the plaintiff who was also a minority shareholder. (*Davis v. Rondina*, 741 F.Supp. 1115 [1990]).

In cases such as the instant matter, the withholding of a salary (or of dividends and distributions, as alleged by Silverberg) creates both, compensable damages for any payments that

have been wrongfully withheld, and a *non-compensable* injury to the plaintiff's rights under the Shareholder's Agreement or Corporate By-laws, because the plaintiff has a right to participate in decisions regarding compensation and any distributions. As the Second Circuit has explained: "the plaintiff's] right to participate in the management of [the corporation] has intrinsic value. It derives its value as a trump card of sorts, available to [the plaintiff] as a check on [defendant] in order to preserve the balance of power in the joint venture.... [This is] a right that is irretrievably lost upon breach, and may not be compensable by non-speculative damages." (*Wisdom Import Sales Co., L.L.C. v Labatt Brewing Co., Ltd.*, 339 F3d 101, 114 [2d Cir 2003]). Indeed, where such rights were bargained for and central to preserving the balance of power between the shareholders in a close corporation, enforcement is necessary and a preliminary injunction will be granted to restore the balance of power as it existed prior to the breach. (*Id.*)

In this case, it is patently clear that the withholding of salary or dividend payments to Feinberg is part of Silverberg's plan to force Silverberg out of the company and thus usurp the balance of power that is reflected in the Shareholders' Agreement. Indeed, the telephone conversation which was transcribed reveals an apparent effort to deprive Silverberg even of services provided by his company to employees, such as use of company cars, in order to further Silverberg's efforts to oust Feinberg. (Feinberg Reply Aff. at p. 32). Silverberg contends that the withholding of payments to Feinberg was authorized under BCL § 510 because such payments, in the form of dividends, would have made the company insolvent. However, parties may contract around various default terms in the BCL through terms negotiated and agreed to in the By-laws or Shareholder Agreement. Under Silverberg's and Feinberg's Shareholder Agreement, decisions on dividends or distributions are to be made unanimously. Further, Silverberg's allegation that L&E is insolvent is incredible. Indeed, the recorded and transcribed telephone conversation reveals Silverberg as admitting in relation to employee bonuses that he does "have the money." (*Id.* at 36 ["Not because I don't have the money and now have the money"]).

The deprivation of salary or dividend payments to Feinberg, who is a 50% owner of L&E, is in a real sense oppression by Silverberg and that damages from such oppression may not be fully quantifiable, such that a preliminary injunction is appropriate. As the Court of Appeals has

articulated, “[a] shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.” (*Matter of Kemp & Beatley*, 64 NY2d 63, 72-73 [1984]). The element of irreparable injury is satisfied with respect to the relief requested.

Balance of Equities

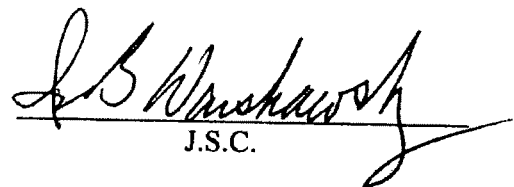
A balance of the equities in this case strongly favors a preliminary injunction to protect Feinberg’s legal rights in L&E. In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry, and in this case, the inquiry is much the same as that conducted for the element of irreparable injury. Silverberg presents no compelling reasons to deny Feinberg’s application for a Preliminary Injunction. Silverberg’s allegations that Feinberg would run L&E to the ground or is guilty of gross-mismanagement are not the sort of allegations that excuse oppressive conduct among shareholders. (*See, e.g., Davis v. Rondina*, 741 F.Supp. 1115 [1990] [rejecting counter-claims that defendant was justified in cutting out plaintiff for gross mis-management]). However, the court cannot order the removal of Silverberg, despite his oppressive conduct, since Silverberg is still a 50% owner of L&E and the harm from loss of control and management in L&E is admittedly not capable of compensation, such that the equities cannot outweigh the injury to Silverberg from depriving him of his rights under the Shareholder Agreement and By-laws. The proper motion for such relief must be the Appointment of a Receiver under CPLR § 6401, supposing that such a receiver is qualified and will preserve the interests of all parties in the corporation pending the resolution of this case.

This court grants Feinberg's motion for a Preliminary Injunction. Pending the full resolution of this case, the court ENJOINS:

- (1) Silverberg from preventing or interfering with Feinberg's duties and rights as shareholder and President, Treasurer, and Director of L&E;
- (2) Silverberg from further depriving Feinberg of compensation payments from L&E as such payments were authorized prior to February 1, 2011;
- (3) all defendants from further violations of the Shareholders Agreement and By-laws of L& E;
- (4) all defendants from interfering with the Board of Directors' functions under Article 4, Section 2 of the By-Laws;
- (5) all defendants from interfering with plaintiff's access to L&E's books and records, valuable papers, and other materials;
- (6) Victor Hecht from continuing as a signatory on the bank accounts of L&E and L&E's affiliates; and
- (7) Brian Barney from continuing as a signatory on the bank accounts of L&E and L&E's affiliates

Further, given the balance of the equities and Feinberg's likelihood of success on the merits, the court ORDERS that the undertaking pursuant to CPLR § 6301 is reduced to \$5,000. This constitutes the Decision and Order of the Court.

DATED: August 18, 2011


J.S.C.

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AUG 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE