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POINT I

RESPONDENT'S ARGUMENTS REFLECT THE LACK OF MERIT TO ITS LEGAL POSITION AS TO OWNERSHIP OF THE COMPANY AND ESTABLISH THE LOWER COURT'S ERRONEOUS RULING

The essence of Appellant's legal position is that the lower court erred in its decision denying a preliminary injunction. Respondent's brief contains arguments which ignore basic facts, are based on a rewriting of history, and collapse under their own weight.

An examination of Respondent's argument vis a vis the issuance of Stock Certificates No. 1 and 2, which establish Appellant's 80% ownership of the Company, reveals Appellant's entitlement to injunctive relief. This is the entire analysis regarding these certificates:

1. It is undisputed that Bedbathstore.com, LLC was duly formed on January 9, 2002 (R. 31);

2. It is undisputed that Stock Certificates No. 1 and 2 were prepared by the Company's attorney, David Kaplan ("Kaplan") (R.403);

3. It is undisputed that Stock Certificates No. 1 and 2 were signed by both Appellant and Respondent on January 14, 2002 (R. 255); Respondent concedes that these are the only certificates that he signed reflecting ownership interest in the Company (R. 297-8);

4. In Respondent's Brief (at page 8), with no support in the record, Respondent alleges that he temporarily "parked" 80% of the Company with Appellant (which Appellant denies); he does not allege that this was done with Appellant's knowledge and consent;

5. In the hearing, Respondent testified, incredibly, that he instructed Kaplan to cancel Stock Certificate No. 1 on the same day it was issued (R. 255, 281); this testimony flies in the face of Respondent's instructions to Kaplan in 2003 to issue new stock certificates and have Stock Certificates No. 1 and 2 returned to him so he could cancel them.

This is the extent of Respondent's contention with respect to Stock Certificates No. 1 and 2. However, this contention completely flies in the face of the timeline reflected by the documentary evidence (as analyzed in Appellant's Brief at pages 15-23), which include Respondent's efforts to issue new stock certificates and have Appellant return Stock Certificate No. 1 for cancellation. Respondent completely ignores this timeline in its brief as did the lower court.[1]

The nonsensical nature of Respondent's contention is belied by his contention (at page 10 of Respondent's Brief) that the parties agreed, by executing the Operating Agreement (R. 848) on March 7, 2003, that Appellant would have a

[1] He also ignores his acknowledged belief that Appellant owned 15% of the Company in 2002. (R. 258, 262)

40% ownership interest in the Company and Respondent would have a 60% interest.[2] Appellant refused to execute the stock certificates reflecting this ownership interest pursuant to Kaplan's March 14, 2003 letter. (R. 492) This corroborates Appellant's brief that his ownership interest in the Company never changed from 80%.

Respondent otherwise has shown through its brief a web of lies spinning out of control; to wit:

(1) Respondent states (at page 2 of Respondent's Brief), that "Appellant's motion before the trial court...sought to oust his father, the Respondent, from the day to day operations..." of the Company; this is a lie, as Appellant is only seeking to have his rights protected and declared by this Court, and never sought to oust his father;

(2) Respondent states (at page 4 of Respondent's Brief) that Bedbathstore.com, LLC is a "succeeding business" to Mildred's for Fine Linens, pointing only to the fact that the Company's website reflects "40 years of industry knowledge" which is referring to Respondent's 40 years of experience; this does not even remotely establish the Company's status a successor to Mildred's;

[2] Appellant testified that he did not have Schedule A when he signed the signature page of the Operating Agreement.

(3) Contrary to Respondent's contention (at page 5 of Respondent's Brief), it was Appellant, not Respondent, who came up with the concept and name for the Company (R. 149, 157);

(4) Contrary to Respondent's contention (at page 7 of Respondent's Brief), Appellant was building the Company's website while in college and immediately after graduating college even while he was training for a position at a life insurance company (R. 190);

(5) Contrary to Respondent's contention (at page 7 of Respondent's Brief), Kaplan did not testify that, at the time the Company was formed, Respondent was its sole owner;[3] he only testified that that was the best of his recollection (R. 430), which flies in the face of Stock Certificates No. 1 and 2;

(6) Contrary to Respondent's contention (at page 8 of Respondent's Brief), Respondent did not control the Company from its inception; rather, he controlled the financial books and records to Appellant's exclusion so he could treat the Company as his personal "piggy bank";

(7) Contrary to Respondent's contention (at page 9 of Respondent's Brief), it was Appellant, not Respondent, who was responsible for hiring and firing employees (R. 511);

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[3] On the contrary, Kaplan testified that he never consulted with Appellant to see whether he was in agreement to have his shares cancelled. (R. 400)

(8) Contrary to Respondent's contention (at page 13 of Respondent's Brief) that Appellant's employment record was "by no means pristine," it was Respondent, not Appellant, who placed the Company in precarious financial position that exists (as verified in Kathryn Meng's affidavit R. 1097-1117) in exercising his duties as the Company's CEO;

(9) In arguing (at page 14 of Respondent's Brief) that Appellant only had a status as an employee, Respondent completely ignores the significant and substantial indicia of ownership as reflected in the record (as discussed at pages 31-33 of Appellant's Brief);

(10) Contrary to Respondent's contention (at pages 16-17 of Respondent's Brief), Appellant was compelled to seek police and Family Court assistance because of Respondent's oppressive conduct (as discussed at pages 24-26 of Appellant's Brief); Respondent does not deny that conduct;

(11) Respondent's anticipated contention that the tax filings belie his argument that Respondent was the 100% owner of the Company only beg the question - - and does not answer the question - - as to ownership; the conduct of the parties otherwise reflect conduct consistent with Appellant's majority ownership (see pages 31-33 of Appellant's Brief);

(12) Contrary to Respondent's contention (at page 21 of Respondent's Brief), the Appellant's Brief is accurate in all respects; by way of example, despite Respondent's contention that he is not "bleeding the Company dry," Kathryn Meng verified that "the Company's financial statements show a bankrupt company - - one on the brink of collapse." (R. 1107)

At the hearing and in Respondent's Brief, Respondent attempted to portray himself as an honest, loyal, hard-working, family man. The facts -- ignored by the lower court -- reveal that he was a scheming, manipulative and controlling individual who concocted a story out of whole cloth and lied about everything before the court below:

(a) He admittedly tried to "hide" his assets from his wife, from whom he was contemplating a divorce;

(b) He admittedly filed a false tax return in 2002 (which renders all his tax filings suspect, a crucial fact ignored by the lower court;

(c) He intimidated and controlled Appellant and threatened him, wishing he were dead;

(d) He used the Company as his personal "piggy bank;"

(e) His daughter (not Appellant) embezzled $50,000 from the Company (R. 937);

(f) He pays his youngest son Daniel, a recovering drug addict living in Florida, for a "no show" job in order to avoid paying income taxes;

(g) He lied to this Court by stating that he made a significant financial investment in the Company; in fact, he invested in the real estate company (R. 940);

(h) As observed by Kathryn Meng, Respondent was causing the Company to engage in "financial practices that, if continued, would destroy the Company" (R. 1099);

(i) As observed by Kathryn Meng, Respondent was causing personal credit cards to be paid entirely from Company funds making it difficult to separate personal and business expenses (R. 1100);

(j) As observed by Kathryn Meng, Respondent has caused the Company to engage in fiscal practices being such that a financial disaster may be imminent (R. 1103);

(k) As observed by Kathryn Meng, Respondent has caused the Company to have financial statements that show a bankrupt company – one on the brink of collapse (R. 1107);

(l) Ms. Meng's frustration with Respondent's lack of cooperation with her court-appointed mandate is exemplified by the following statement: "attempts to obtain financial information and learn the true fiscal condition of the

Company is blocked by the conduct of Paul (R. 1108)."

The bottom line is that the Stock Certificates No. 1 (establishing Appellant as the 80% owner of the Company) and 2 coupled with the Operating Agreement reflecting Appellant and Respondent with managing member status coupled with Appellant's conduct vis a vis his position, duties, and responsibilities to the Company confirm Appellant's ownership as a matter of law and far outweighs Respondent's meritless argument that Appellant's tax filings have any bearing whatsoever on the ownership issue. The lower court's decision defies logic based on the overwhelming credible evidence against it and should be reversed.

The reversal of the lower court's arbitrary, capricious, and erroneous decision is essential to Appellant's right as, if this relief is not granted, he will never be able to recover his rights from the outrageous injustice which has been caused by the lower court's decision.

A. Appellant Made the Requisite Showing

Despite Respondent's assertions to the contrary, as demonstrated in Appellant's main brief, absent a reversal of the lower court's decision, there is no assurance that the business will survive pending trial. The interference with an ongoing business as engaged in by Respondent, particularly one involving a unique product offering and an exclusive web presence, risks irreparable injury and is clearly enjoinable.

In view of all of the submissions, Appellant has clearly shown: (a) a likelihood of success on the merits, (b) irreparable injury absent the granting of the temporary restraining order and injunction, and (c) a balancing of the equities in his favor.

POINT II

PLAINTIFF'S CAUSES OF ACTION ARE TIMELY

Respondent's argument that Appellant's causes of action are time barred is without merit.

Since Appellant's First, Third and Fourth Causes of Action seek declaratory judgments, the six year Statute of Limitations applicable to accounting claims, breach of contract, breach of fiduciary duty and fraud claims which underlies the causes of action controls the time in which the action must be commenced. CPLR § 213. *Gandhi v. Nayak,* 148 A.D.2d 390, 539 N.Y.S.2d 335 (1st Dept. 1989).

Each of these causes of action should be afforded the benefit of the two-year discovery rule on the facts and circumstances set forth in the proceedings below. CPLR § 203 (g), § 213 (8). Appellant demonstrated below that the fraud at issue could not have been discovered before the two-year period prior to the commencement of the action.

It was only recently that the parties have grown to become dramatically at odds over the management and control of the Company, the utilization of its assets, the execution of its core competency and agreed upon business plan, and the general day-to-day operations of the business. (R. 178-180; 196–200; 208–210; 213–215; 45–46) As a result of this tension, it was uncovered that the Respondent has used his position as a member of Bedbathstore.com, LLC in disregard of

Appellant's rights and to secretly profit without the consent and knowledge of Appellant. (R. 175-178; 515; 517; 45-46; 48; 49)

It was shown below that Respondent refused to provide information in order for Appellant to review the appropriateness of certain deductions and expenses incurred by Respondent and to ascertain the profitability of the company. (R. 178-180; 194-196; 212-217; 48; 515; 517; 519) Whenever Appellant would ask Respondent what the Company profits were, Respondent would respond that there were no profits, and leave it at that. While Appellant was operating and building the Company, Respondent was controlling and manipulating the books and records of the Company, to Appellant's detriment and exclusion, essentially using Bedbathstore.com, LLC as his personal "piggy bank." (R. 214)

It is well established that a defendant may also be estopped from pleading the statute of limitations where the plaintiff was induced, as in this case, by fraud, misrepresentation or deception to refrain from timely commencing an action. *Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259 (1978). The active fraudulent concealment by Respondent was clearly demonstrated below.

The record is replete with Respondent's overreaching and abusive conduct, whereby he manipulated his son, the Appellant, and kept him in the dark as to the financial matters regarding the business at issue. Given the family relationship of the parties, Appellant reasonably relied on the recently discovered fraud,

misstatements and deception of Respondent.

Moreover, these causes of action for injunctive and declaratory relief, as well as the Second Cause of Action for a constructive trust, are based on acts of misconduct by Respondent which are of a continuing nature. As such, the causes of action are deemed to have accrued on the date of the last wrongful act. *Selkirk v. State of New York*, 249 A.D.2d 818, 671 N.Y.S.2d 824 (1998). The conduct complained of by Appellant continued up to and after the commencement of the action below, and continues to this date. Moreover, the Respondent has made no showing to warrant a finding that the alleged course of misconduct has ended.

To the extent the causes of action are for an accounting of the affairs of the limited liability company, it should be is noted that a partner generally retains a continuing right to an accounting so long as the partnership is in existence (*see* Partnership Law §§43, 44). By analogy, such a right should be afforded to a limited liability member. See generally, *McGuire Children, LLC v. Huntress*, 24 Misc.3d 1202A, 889 N.Y.S.2d 883 (Sup. Ct. Erie Co. 2009).

Finally, it has been stated that the statute of limitations on a constructive trust (Appellant's Second Cause of Action) is six years, generally accruing from the date of transfer of the property. CPLR 213(1); *Morando v. Morando*, 41 A.D.3d 559, 840 N.Y.S.2d 593 (2nd Dept 2007). However, the accrual date may also be measured from the time the trustee repudiates an agreement to transfer the

property. *Zane v. Minion*, 63 A.D.3d 1151, 882 N.Y.S.2d 255 (2nd Dept 2009).

In this case Appellant has shown that Respondent first repudiated Appellant's ownership interest immediately before or upon commencement of this action, and as such, the statute of limitations would run from the date of commencement, January 5, 2011, and, thus, the cause of action is timely. As a result, Respondent's argument that the claim for the imposition of a constructive trust is untimely on statute of limitations grounds is unavailable because a consideration of the merits is necessary to decide the actual accrual date of the cause of action.

Regarding the purported unclean hands of the Appellant, the alleged misappropriation of corporate assets matter was resolved as an officer loan to Appellant and not a misdeed at all. (R. 198 - 199) See generally, *Beacher v. Estate of Beacher*, 2010 U.S. Dist. LEXIS 134884 (E.D.N.Y. 2010) (court found the contentions at issue did not support an unclean hands defense since the alleged "fraud", if true, was not committed against the defendant but against the government and/or the state and thus, is not directly related to the subject matter at issue in the litigation; namely, the stock ownership of BBE corporation).

In this case the Appellant should not be deprived justice by reason of an officer loan that he has been paying back as agreed. (R. 198 - 199)

CONCLUSION

By reason of the foregoing, this Court should reverse the lower court's denial of the preliminary injunctive relief sought by Appellant against Respondent, and grant in the entirety, the affirmative relief sought.

Dated: East Meadow, New York
May 26, 2011

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