

SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

**HONORABLE LEONARD B. AUSTIN**

Justice

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ARI YEMINI (also known as ARIEH YEMINI), both individually and in his capacity as a member of Peninsula Holdings, LLC, and PENINSULA HOLDINGS, LLC,

Plaintiffs,

- against -

ODED GOLDBERG, and GOLDBERG COMMODITIES INC., as the assignee of Oded Goldberg in and to Peninsula Holdings, LLC and ALAN MOORE,

Defendants,

- and -

ANO, INC., STERN, ADLER & ASSOCIATES, LLP f/k/a STERN, ADLER & WASSERMAN, JANET STERN and STEVEN ADLER,

Additional  
Counterclaim-Defendants,

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ODED GOLDBERG, and GOLDBERG COMMODITIES INC.,

Third-party Plaintiffs,

- against -

STERN, ADLER & ASSOCIATES, LLP f/k/a STERN, ADLER & WASSERMAN, JANET STERN and STEVEN ADLER,

Third-party Defendants.

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POST HEARING DECISION

PRELIMINARY STATEMENT

The hearing in this matter was conducted over eleven days between April 18 and July 12, 2006. It was held based upon the application of Defendants Oded Goldberg (“Goldberg”) and Goldberg Commodities Inc. (“Commodities”) seeking a preliminary injunction with regard to a meeting of the shareholders of Candlewood Holdings, Inc. (“Candlewood”).

The shareholders of Candlewood are ANO, Inc. (“ANO”) and Rosalie Moore, wife of Defendant Alan Moore (“Moore”). Moore is the president of Candlewood.

The genesis of the application before the Court is the claim that either Goldberg or Commodities owns fifty (50%) percent of ANO along with Plaintiff Ari Yemini (“Yemini”).

An order to show cause was brought by Goldberg and Commodities seeking to enjoin a shareholders’ meeting of Candlewood at which Yemini claims to be the sole shareholder of ANO, which now controls two-thirds of the outstanding shares of Candlewood. The order to show cause was granted on March 30, 2006.

Based upon the conference, which was held pursuant to the Uniform Commercial Division Rule 24 (a) (22 NYCRR Part 70), it was clear that the question of ownership of ANO was hotly contested between Yemini and the moving Defendants. Since the shareholders meeting was imminent, a temporary restraining order was granted. However, in order to expedite a hearing on the application for a preliminary injunction,

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Yemini did not submit any papers in opposition to the motion. Instead, the parties agreed to an abbreviated discovery schedule relative to the issues presented on the application and an immediate hearing thereafter on the question of who owns stock in ANO and thereby controls Candlewood.

#### FINDINGS OF FACT

ANO was created in June 1999. On July 1, 1999, several significant events relating to this matter occurred.

First, ANO purchased one-half of the outstanding stock of Candlewood (Dx B and H)<sup>1</sup>. Later, in 2000, ANO's interest in Candlewood was increased from a fifty percent interest to a two-thirds interest.

The other significant event was that, on July 1, 1999, Yemini and Goldberg entered into a Nominee Agreement (Dx A). In the Nominee Agreement, Goldberg was denominated the "Principal" and Yemini was denominated the "Nominee". It set forth the terms of their understanding.

The first introductory clause to the Nominee Agreement states,

"WHEREAS, the Principal is the true owner of fifty (50%) percent of the common stock of ANO, Inc., a New York corporation (the 'corporation')".

Although both Yemini and Goldberg executed the Nominee Agreement, no ANO stock

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<sup>1</sup> Hearing exhibits for Plaintiff are referred to as (Px\_\_) and for Defendants are referred to as (Dx \_\_).

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certificate was ever issued to Goldberg at any time after July 1, 1999, nor was any demand made therefor.

Aside from the Nominee Agreement and the name of the corporation,<sup>2</sup> there are no indicia of ownership of ANO or any interest therein by Goldberg or Commodities. The only ANO stock certificate ever issued was issued to Yemini on June 22, 1999 (Px 18/Dx F). Likewise, on June 22, 1999, corporate resolutions were adopted by the sole director and shareholder of ANO, Yemini (Px 18). Likewise, there is no mention of any ownership interest by Goldberg or Commodities in the ANO stock transfer ledger (Px 18).

Notwithstanding the Nominee Agreement, a Shareholders' Agreement for Candlewood was entered into on July 1, 1999 (Px 8). That is the same date as the Nominee Agreement. Also, on that date, an Employment Agreement was entered into by Candlewood, employing Moore (Dx K).

Significantly, Goldberg testified that he was present at the time that the various documents were executed at the law office of Stern, Adler & Wasserman ("SA&W").<sup>3</sup> He was aware of the Candlewood Shareholders' Agreement and the Moore Employment Agreement which both identify Yemini as the sole shareholder of ANO. At

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<sup>2</sup>The name ANO is derived from the names Ari N Oded.

<sup>3</sup>After the hearing herein, Goldberg and Commodities interposed a third-party complaint, sounding in legal malpractice, against SA&W, its partners and successor firm, Stern, Adler & Associates, LLP.

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no point, on that date or thereafter until this application, did Goldberg or Commodities assert any rights as an ANO shareholder.

The Candlewood Shareholders' Agreement, in ¶ 1.5, prohibits the transfer of any ANO stock without the written consent of Moore. Paragraph 1.5 states, "as of the date hereof, ANO, Inc. represents that Ari Yemini is the sole shareholder of ANO." No evidence was submitted during the hearing that reflects an approval on the part of Moore for the transfer of any ANO stock to Goldberg or Commodities although, at the hearing, Moore and Goldberg were clearly aligned.

Throughout the relationship between Goldberg and Yemini, they communicated with each other with regard to various business matters on an almost daily basis. In fact, they did become business partners in other ventures such as Peninsula Holdings, LLC which is a subject of this litigation.

Whenever Yemini would have a meeting with regard to ANO or Candlewood, Goldberg was present although no substantive participation was ascribed to him. This is true with regard to various business meetings at the office of Yemini's attorney, SA&W. Goldberg was present as a "friend" and "advisor". His name appeared regularly on SA&W billing as having been present (Dx AA)<sup>4</sup>.

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<sup>4</sup>Although Goldberg contends he was involved in substantive issues relating to Candlewood, extensive examination of SA&W partners, Steven Adler and Janet Stern and their files revealed no support for such contention.

Originally, in 1998, Yemini was represented by Janet Stern, Esq. He retained her to represent him in a lawsuit. At that time, she noted that Yemini and Goldberg were always together and that they were "buddies".

Yet, these buddies had a very strange business relationship. Various significant divergences in testimony were presented. First, and most significant, it was unclear as to with whom Yemini was dealing. That is, Goldberg testified that almost immediately following the Nominee Agreement, he "transferred" his interest in ANO to Commodities. There is absolutely no written indicia of the transfer. Goldberg told no one of this decision and, as he consistently did throughout the course of the hearing, made it impossible to know whether the putative owner of ANO stock was Commodities or himself, individually. The transfer of the stock of ANO was done solely "in his head" without notice or announcement. It seemed that title to the ANO stock changed to suit Goldberg's needs.

Second, a real issue as to who contributed the capital of ANO so as to enable it to purchase its interest in Candlewood was presented. Stern's testimony that her husband, then boyfriend, Yemini, complained with regard to Goldberg's not contributing his share is belied by the documentary evidence which establishes that it was Yemini who was deficient in funding the project. The terms of Goldberg's involvement were never established in the documents submitted during the hearing.

Third, there appears to have been no demand for the turnover of the ANO stock at any time by either Goldberg or Commodities until the commencement of this action in

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August 2005. This is consistent with various acts on the part of Goldberg and Commodities which belie their claims of ownership and an interest in the ANO stock.

They are:

- In 1999 through 2004, ANO filed corporate tax returns, apparently with Goldberg's knowledge, all of which identified Yemini as the 100% shareholder of ANO (Px 18b).
- Although Goldberg testified that he immediately transferred, in his own mind, his interest in ANO to Commodities, no Commodities tax return from 1999 to 2003 reflected any ownership in ANO by Commodities.
- As part of his matrimonial action, Goldberg was required to file an Affidavit of Net Worth. He did so without reflecting any ownership in ANO (Px 14).
- In a loan application dated May 1, 2002, Goldberg listed only real estate as his assets. No mention of Commodities or ANO were set forth in his application dated May 12, 2002 (Px 17). That application was certified to be true under penalty of perjury.
- Although Goldberg was present, the Candlewood Shareholders Agreement was executed identifying Yemini as the sole shareholder of ANO (Px 8). This is true even though the various corporate documents were discussed with Goldberg and Yemini as well as Moore according to Stern and Adler in their testimony (Dx AA).
- When Candlewood needed an infusion of cash, Goldberg loaned it \$1,500,000. A loan agreement was entered into on November 29, 2000 (Dx O). A second version of the loan agreement was entered into as of that same date (Dx CC). The only difference between the two agreements was that, in the first agreement, Goldberg and Yemini were cited as equal owners of ANO. In the second agreement, at Goldberg's insistence, because of the pendency of his matrimonial, his claimed ownership was deleted.

On May 14, 2005, Goldberg revoked the Nominee Agreement (Dx G). However, he did not demand the turnover of any ANO stock to which he may have been entitled even though at that point he claimed that Commodities owned the stock.

CONCLUSIONS OF LAW

A. Preliminary Injunction Standard

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) the party seeking the preliminary injunction will suffer irreparable harm in the absence of an injunction; and (3) a balancing of the equities favors the granting of an injunction. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); Doe v. Axelrod, 73 N.Y.2d 748 (1988); and Olabi v. Mayfield, 8 A.D.3d 459 (2<sup>nd</sup> Dept. 2004).

The movant has the burden of establishing a *prima facie* entitlement to such relief. Gagnon Bus Co., Inc. v. Vallo Transportation, Ltd., 13 A.D.3d 334 (2<sup>nd</sup> Dept. 2004); and William M. Blake Agency, Inc. v. Leon, 283 A.D.2d 423 (2<sup>nd</sup> Dept. 2001). A preliminary injunction will be granted only if there is a clear right to the relief upon the law and the undisputed facts. JDOC Construction LLC v. Balabanow, 306 A.D.2d 318 (2<sup>nd</sup> Dept. 2003); Peterson v. Corbin, 275 A.D.2d 35 (2<sup>nd</sup> Dept. 2000); Carman v. Congregation De Mita of New York, Inc., 269 A.D.2d 416 (2<sup>nd</sup> Dept. 2000); and Anastasi v. Majopon Realty Corp., 181 A.D.2d 706 (2<sup>nd</sup> Dept. 1992).

On this application, there are several significant factual issues regarding Goldberg/Commodities' ownership interest in ANO.

B. Likelihood of Success on the Merits

1. *Estoppel*

In 2002, Goldberg was involved in post-matrimonial proceedings.<sup>5</sup> He did not list his interest in ANO as an asset in the Affidavit of Net Worth filed in the matrimonial action (Px 14). In fact, a loan agreement entered into when Goldberg's matrimonial was pending was recast to omit Goldberg's mention of ownership interest in ANO (Dx O, Dx CC).

The doctrine of judicial estoppel or estoppel against inconsistent positions prevents a party who asserted a factual position in a prior action from taking an inconsistent position in subsequent litigation. Black v. White & Case, 280 A.D.2d 407 (1<sup>st</sup> Dept. 2001); and McCaffrey v. Schaffer, 251 A.D.2d 300 (2<sup>nd</sup> Dept. 1998). "The doctrine rests upon the principle that a litigant 'should not be permitted \* \* \* to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise' (Note, *op. cit.*, 59 Harv L Rev 1132)." Environmental Concern, Inc. v. Larchwood Construction Corp., 101 A.D.2d 591, 593 (2<sup>nd</sup> Dept. 1984). The doctrine is invoked to prevent a party from adopting contrary positions because the courts cannot tolerate a party playing "fast and loose with the courts". *Id.* at 594. See also, Ford Motor Credit Co. v. Colonial Funding Corp., 215 A.D.2d 434 (2<sup>nd</sup> Dept. 1995).

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<sup>5</sup>Apparently the underlying matrimonial action terminated prior to July 1, 1999.

Goldberg's claim that Commodities or he is an owner of 50% of the shares of ANO is in direct conflict with the position he took in his matrimonial action. This raises a serious factual issue regarding his ownership interest in ANO. In response, Goldberg/Commodities argue that Commodities always owned the ANO stock. If that is the case, Commodities cannot rely upon the Nominee Agreement since it was not a signatory. Goldberg cannot rely upon the Nominee Agreement because he never personally owned the stock. Likewise, the Candlewood loan agreement (Dx O) may be viewed as having been corrected to reflect Goldberg's non-ownership of the ANO stock because he never owned it or he was obfuscating in his matrimonial.

In addition, Goldberg's obligation to pay only one-half of the expert and law guardian fees in his matrimonial was predicated on a finding that he was in a poor financial condition and had "small liquid assets" (Court exhibit II)<sup>6</sup>. That finding was made after Goldberg's failure to disclose his interest in ANO or that of Commodities. Goldberg/Commodities cannot now claim ownership in ANO when denied or omitted in his matrimonial submissions. Festinger v. Edrich, 32 A.D. 3d 412 (2<sup>nd</sup> Dept. 2006). See, Ford Motor Credit Co. v. Colonial Funding Corp., 215 A.D. 2d 435 (2<sup>nd</sup> Dept. 1995).

A preliminary injunction is an equitable remedy. One of the basic maxims of equity is that a party seeking equitable relief must come to the court with clean hands.

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<sup>6</sup>That the Matrimonial Court's ultimate allocation of fees changed does not alter the fact that Goldberg benefitted, albeit temporarily, from the omissions from his Net Worth affidavit.

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Haskins v. Thomajan, 99 A.D.2d 463 (2<sup>nd</sup> Dept. 1984). See also, Tepper v. Berger, 119 A.D.2d 668, 669 (2<sup>nd</sup> Dept. 1986), where the Appellate Division held:

"Where a litigant has himself been guilty of inequitable conduct with reference to the subject matter of the transaction in suit, a court of equity will refuse him affirmative aid" (see, *Levy v. Braverman*, 24 A.D.2d 430, 260 N.Y.S.2d 681). When equitable relief is sought, moral considerations of fundamental importance require that the litigant come into court with 'clean hands' (see, *Pecorella v. Greater Buffalo Press*, 107 A.D.2d 1064, 1065, 486 N.Y.S.2d 562)."

Goldberg does not have clean hands. He sought to hide his interest in ANO from his wife in his post-judgment matrimonial action. He did not list his interest in ANO on a loan application he filed in 2002 (Px 17). See, Walker v. Walker, 289 A.D. 2d 225 (2<sup>nd</sup> Dept. 2001). See also, Festinger v. Edrich, *supra*.

Commodities also has unclean hands relating to ownership in ANO. None of the Commodities income tax returns reflect that Commodities owned an interest in ANO. (Px 18b).

A party, such as Goldberg or Commodities, who has hidden an interest in ANO from his wife in a matrimonial action, has failed to disclose this interest to a lender and repeatedly failed to disclose the interest in ANO to the tax authorities, has unclean hands and cannot obtain equitable relief.

None of ANO's corporate records reflect Goldberg or Commodities' interest in ANO. The only stock certificate ever issued was issued to Yemeni. The Candlewood

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Shareholders' Agreement indicated Yemeni is the sole shareholder in ANO. Goldberg was present and participated in the meetings which resulted in the creation of the various ANO and Candlewood corporate documents and agreements.

That is, Goldberg knew that ANO's corporate records reflected that Yemeni was its sole shareholder. Goldberg was present when the Candlewood Shareholders' Agreement was executed and did not dispute or contest the representation made in that agreement that Yemeni was Candlewood's sole shareholder.

Goldberg's claim to ownership in ANO is premised on the Nominee Agreement. However, that agreement is contradicted by numerous other facts. At best, Goldberg has demonstrated a possibility but not a likelihood of success on the merits. On this basis alone, his application for a preliminary injunction must be denied.

## 2. *Statute of Limitations*

Defendants urge that among the indicia of Goldberg/Commodities' ownership in ANO stock is Goldberg's personal involvement in the business affairs of ANO and Candlewood as well as Valle Auto Mall and Transplus, Candlewood subsidiaries, and his financial support of the venture. Such actions when coupled with the testimony at the hearing would point to the imposition of a constructive trust whereby there is a claim of a fiduciary or confidential relationship, a promise, a transfer in reliance thereon and unjust enrichment. See, Sharp v. Kosmwalski, 40 N.Y. 2d 119, 121 (1976).

By order granted on October 30, 2006, this Court permitted Defendants to amend their answer to include a counterclaim to impose a constructive trust over the disputed

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ANO stock. In so doing, this Court rejected Yemini's assertion that such counterclaim was absolutely barred by the applicable six year statute of limitations. CPLR 213; and Eickler v. Pecora, 12 A.D. 3d 635 (2<sup>nd</sup> Dept. 2004). See also, Boronow v. Boronow, 71 N.Y. 2d 284 (1988); and Socia v. Socia, 35 A.D. 3d 841 (2<sup>nd</sup> Dept. 2006).

In so doing, this Court found that "[t]he date upon which the cause of action accrued as a matter of law" militated in favor of allowing amendment of the answer. That was not, however, a finding that such claim was timely asserted.

On the papers submitted on the motion to amend, as well as during the hearing, the question of when the statute of limitations started to run remained unanswered even though it is clear that it begins to run "upon the occurrence of the wrongful act giving rise to the duty of restitution. . ." Boronow v. Boronow, *supra* at 737. See also, Kaufman v. Cohen, 307 A.D. 2d 113 (1<sup>st</sup> Dept. 2003). In this case, arguably it occurred when the Nominee Agreement was executed, July 1, 1999. See, Eickler v. Pecora, *supra*.

While the motion to amend the answer was granted in the face of a question of when the statute of limitations started to run, such circumstances place into doubt Goldberg/Commodities' likelihood of success on the merits.

C. Balancing of the Equities

A balancing of the equities weighs against the granting of a preliminary injunction. If the Court were to issue a preliminary injunction, Candlewood would be unable to conduct a shareholders meeting since Yemini and Goldberg/Commodities

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would be deadlocked. This would paralyze Candlewood's operation.

If the preliminary injunction is denied, Yemini will be able to vote ANO's shares in Candlewood. Yemini would remain subject to his fiduciary duty owed to ANO as its president and director. Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557 (1984). See also, Lindner Fund, Inc. v. Waldbaum's, Inc., 82 N.Y.2d 219 (1993); and Busino v. Meachem, 270 A.D.2d 606 (3<sup>rd</sup> Dept. 2000).

D. Irreparable Harm

If Yemini acts in a manner inconsistent with the best interest of ANO and the Court ultimately finds that Goldberg or Commodities is a shareholder in ANO, an action on behalf of the corporation to recover damages for breach of fiduciary duty against Yemini can be maintained. This negates Defendants' claim of irreparable harm. See, Icy Splash Food & Beverage v. Henckel, 14 A.D. 3d 595 (2<sup>nd</sup> Dept. 2005).

E. Conclusion

Since Defendants have not been able to show a clear right to the preliminary injunction they seek on the law and undisputed facts, the application must be denied. JDOC Construction LLC v. Balabanow, *supra*; Peterson v. Corbin, *supra*; and Carman v. Congregation De Mita of New York, Inc., *supra*.

Settle order on ten (10) days notice.

Dated: Mineola, NY  
May 29, 2007

  
Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**

JUN 05 2007