

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 4-25-03

Submission Date: 5-23-03

Motion Sequence No.: 001,002/MOT D

MILLENNIUM ALLIANCE GROUP, LLC,
Plaintiff, X

COUNSEL FOR PLAINTIFF

Nixon Peabody, LLP

990 Stewart Avenue

Garden City, New York 11530-4838

- against -

FAHMI ARANKI, a/k/a "FRED ARANKI,"
and SEAMAN & EISEMANN, INC.,
Defendants. X

COUNSEL FOR DEFENDANT

Leeds, Morelli & Brown, P.C.

One Old Country Road

Carle Place, New York 11514

ORDER

The following papers were read on Plaintiff's motion for a preliminary injunction and Defendants' cross-motion for an appointment of a temporary receiver, an accounting, sanctions and a preliminary injunction:

- Order to Show Cause dated April 1, 2003;
- Affidavit of James McKinnon sworn to on March 28, 2003;
- Affidavit of Kive I. Strickoff sworn to on March 28, 2003;
- Affirmation of Santo Borruso, Esq. dated March 28, 2003;
- Defendant's Memorandum of Law;
- Notice of Cross-motion dated April 18, 2003;
- Affirmation of Steven Morelli, Esq. dated April 18, 2003;
- Affidavit of Fahmi Aranki sworn to on April 18, 2003;
- Affidavit of Michelle Aranki sworn to on April 18, 2003;
- Defendant's Memorandum of Law;

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Affidavit of James McKinnon sworn to on May 14, 2003;
Defendant's Reply Memorandum of Law;
Affidavit of Fahmi Aranki sworn to on May 23, 2003;
Affidavit of Michelle Aranki sworn to on May 23, 2003;
Defendant's Reply Memorandum of Law;
Affirmation of Steven Morelli, Esq. dated May 22, 2003.

INTRODUCTION

Plaintiff moves for preliminary injunctive relief enjoining Defendants, their agents, and employees, from: (i) exercising any rights with respect to the property of Millennium Alliance Group, LLC. ("Millennium"), including its assets and bank accounts; (ii) taking any action with respect to the books and files of Millennium; (iii) exercising any rights as members of Millennium's Board of Managers; and (iv) directing them to preserve all of their books and files, including all writings and documents, pending the determination of this action.

Defendants cross-move for the appointment of a temporary receiver, an accounting, sanctions for frivolous conduct, and preliminary injunctive relief enjoining Millennium's Board of Managers from : (a) paying commissions or profit shares to Millennium's members; (b) paying any individuals or entities, including Millennium's attorneys and accountants, with funds drawn from Defendants' commissions and/or Millennium's escrow accounts; (c) paying any individuals or entities, including Millennium's attorneys and accountants, with funds transferred from Millennium's escrow accounts to Millennium's operating accounts; and (d) withdrawing funds from and/or transferring funds from Millennium's escrow accounts for reasons unrelated to the payment of Millennium's clients' insurance premiums.

BACKGROUND

Millennium is a foreign limited liability company, formed on March 1, 1998, as a joint venture between two existing insurance agencies and their owners. The existing agencies were Seaman & Eisemann, Inc. ("Seaman"), controlled largely by Defendant Fahmi Aranki and McKinnon Doxsee Agency Inc. ("Doxsee"), controlled by James McKinnon. The joint venturers, and their respective interests, in Millennium are as follows: Defendant Seaman- 35%; Doxsee - 35%; Defendant Fahmi Aranki - 10%; Robert Feuchter (a former joint owner of Seaman with Aranki) - 10%; and James McKinnon - 10%.

Millennium is a full service insurance agency that markets life, property, casualty, and health insurance products. McKinnon and Feuchter were to recruit other insurance companies to join Millennium and make it profitable by the sharing of resources, office space, staff, equipment and opportunities. Aranki's role was to manage Millennium. As Millennium failed to meet growth projections, it began to experience financial difficulties. The relationship of the individual joint venturers deteriorated, with each accusing the other of financial improprieties.

Defendant Stanley Joseph ("Joseph"), and his firm Perry & Joseph LLC, worked for Seaman. Perry & Joseph, LLC was the original accountant for Millennium. Defendant Michele Aranki is the daughter of Defendant Fahmi Aranki. She also had worked for Seaman and was hired as Millennium's Accounting Manager.

In 2001, after Feuchter left Millennium, a Board of Managers was formed

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consisting of Fahmi Aranki, Seaman salesman Christopher Duffy, James McKinnon, Doxsee salesman Frank Gallina, and an alleged neutral member, Jim Kerin, owner of Kerin Enterprises. In June, 2002, Aranki resigned from the Board of Managers. A week later Duffy resigned. In February, 2003, Michelle Aranki was terminated. In April, 2003, Seaman was denied its share of commissions. This action was commenced shortly thereafter.

In its amended complaint, Millennium alleges seven causes of action; to wit: conversion, unjust enrichment, negligence, breach of the duty of loyalty, breach of fiduciary duty, an accounting, permanent injunctive relief, and accounting malpractice against Joseph and Perry & Joseph LLC. On this motion, Millennium seeks preliminary injunctive relief essentially precluding Defendants from participating in the joint venture and having access to Millennium's property and back accounts. According to Plaintiff, the crux of the matter is the alleged wrongful diversion of \$360,000.00 from Millennium to Seaman by means of two checks prepared and signed by Michele Aranki pursuant to her father's instructions in 1998 and an improper reconciliation for 1998 pursuant to which Seaman owes Millennium approximately \$85,000.00 although Millennium was actually charged \$158,000.00 by Seaman.

In their amended answer, Defendants deny Plaintiff's claims and allege four affirmative defenses. In addition, Defendants Fahmi Aranki and Seaman further allege twelve counterclaims against Millennium and the following counterclaim Defendants: Millennium's Board of Managers, and individuals Feuchter, McKinnon, Gallina and

Kerin. The counterclaims include claims arising from various breaches of fiduciary duty, conversion, unjust enrichment, breach of good faith and fair dealing, waste, abuse of process, requests for appointment of a receiver and an accounting, conspiracy and self-dealing. On their cross-motion, Defendants/counterclaim Plaintiffs seek injunctive relief essentially precluding Millenium from using any funds in its escrow accounts for any purpose except to pay insurance premiums for clients. The basis for this request is the testimony by Michele Aranki that Millenium was using escrow funds for insurance premiums to pay its own operating expenses.

DISCUSSION

A. Plaintiff's Motion for a Preliminary Injunction

The decision to grant a preliminary injunction is a matter committed to the sound discretion of the trial court. Doe v. Axelrod, 73 N.Y. 2d 748, 750 (1988). See also, Mosseri v. Fried, 289 A.D. 2d 545 (2nd Dept. 2001). To prevail on a motion for a preliminary injunction, the movant must show (1) a likelihood of success on the merits; (2) irreparable harm unless the injunction is granted; and (3) a balance of equities in the movant's favor. See, e.g., Doe v. Axelrod, *supra*; and Mosseri v. Fried, *supra*.

Preliminary injunctive relief is a drastic remedy which will not be granted unless the moving party demonstrates a clear right to relief under the law and the undisputed facts. Hoeffner v. John F. Frank Inc., 302 A.D. 2d 428, 429 (2nd Dept. 2003); Mosseri v. Fried, *supra* at 546. Irreparable injury means an injury for which money damages are insufficient. Walsh v. Design Concepts Ltd, 221 A.D. 2d 454, 455 (2nd Dept.1995). See

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also, White Bay Enterprises, Ltd v. Newsday Inc., 258 A.D. 2d 520, 521 (2nd Dept. 1999). The mere danger of asset stripping is not a sufficient basis for making an exception to the rule that preliminary injunctions are not available to preserve a fund for eventual execution of judgment in suits for money damages. See, Credit Agricole v. Rossiyskiy, 94 N.Y. 2d 541, 548 (2000). Where sharp issues of fact are presented, and compensation is available in the form of money damages, the movant has failed to meet its burden for preliminary injunctive relief. Walsh v. Design Concepts Ltd., *supra*. Similarly, there can be no injunction where the facts are in sharp dispute, the movant has failed to establish its likelihood of success on the merits. Dental Health Assocs. v. Zangeneh, 267 A.D. 2d 421 (2nd Dept. 1999). Applying these principles to the instant case, the record is insufficient to support Millennium's request for injunctive relief.

Here, Defendants insist they have provided Millennium with all of the documentary evidence that it has requested. The point is well made that the events which are the subject of Millennium's request for injunctive relief took place five years ago, and, in any event, these events are expressly denied by Defendants. Furthermore, no showing has been made that Millennium will not receive full redress through monetary damages. Under these circumstances, Millennium has failed to meet its burden to warrant any of the injunctive relief sought.

B. Defendants' Cross-motion

1. *Preliminary Injunction*

Turning to the relief sought by Defendants, insurance statutes and regulations

create a fiduciary responsibility with respect to premiums received by an insurance agency which are not immediately remitted to the insurers. Insurance Law 2120; 11 NYCRR 20.3(b). Such “premium funds” may not be commingled with other funds.

In opposition to Defendants’ cross-motion, McKinnon admits the substance of Defendants’ claim when he states “Millennium is no longer ‘out of trust’” (McKinnon Reply Aff., p.2). The fact that Millennium was, at some point, improperly using “premium funds” for operating expenses greatly disturbs this Court and warrants a severe admonition that Millennium must scrupulously segregate “premium funds” as required by law. However, there is no proof before this Court that Millennium is currently using “premium funds” for anything other than payment of premiums.

Injunctive relief should be prospective in nature. Ordinarily, a preliminary injunction should not be granted with respect to an act already accomplished. Flaum v Birnbaum, 115 A.D. 2d 1004, 1005 (4th Dept. 1985). See generally, Allen v. Pollack, 289 A.D. 2d 426 (2nd Dept. 2001). In the absence of proof that Millennium is currently engaged in the improper use of “premium funds,” the injunctive relief sought by Defendants must be denied.

2. *Temporary Receiver*

Appointment of a temporary receiver is statutorily authorized “where there is danger that the property” which is the subject of the action “will be removed from the state, or lost, materially injured or destroyed.” CPLR 6401. Such a drastic and intrusive remedy may only be invoked where the moving party has made a clear evidentiary

showing of the necessity of conserving the property, and thereby protecting the interests of that party. Lee v. 183 Port Richmond Ave Realty Inc., 303 A.D. 2d 379, 380 (2nd Dept. 2003); and Secured Capital Corp of N.Y. v. Dansker, 263 A.D. 2d 503 (2nd Dept. 1999).

On this record, there has been no clear evidentiary showing that any property belonging to Defendants will be materially injured or destroyed. Plaintiff argues that the opposite will occur, namely, if a receiver is appointed, Millennium's principal insurance carriers may cease doing all business with it. Under all of the circumstances of this case, the appointment of a temporary receiver must be denied.

3. *Sanctions*

At this early stage of this litigation, the Court is not convinced that Plaintiff's application for preliminary injunctive relief was entirely frivolous such as to warrant sanctions, notwithstanding the fact that the basis of their application consists of events that took place five years ago. For this reason, Defendants' request that Plaintiff's attorneys be sanctioned for frivolous conduct must be denied at this time.

4. *Accounting*

Finally, Defendants request an accounting and Millennium expressly consents to such relief. Consequently, Defendants' request for an order directing an accounting shall be granted.

Accordingly, it is,

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ORDERED, that Plaintiff's motion for preliminary injunctive relief is **denied**; and it is further,

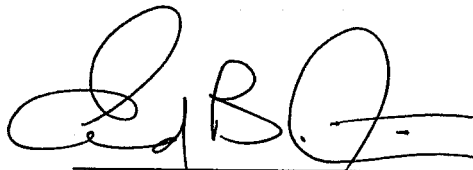
ORDERED, that Defendants' cross-motion for preliminary injunctive relief, appointment of a temporary receiver, and sanctions for frivolous conduct is **denied**; and it is further,

ORDERED, that Defendants' request for an accounting is **granted** on consent; and it is further,

ORDERED, that counsel for the parties shall appear for a Preliminary Conference on September 29, 2003, at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
August 29, 2003


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

ENTERED

SEP 05 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE