

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

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 10-20-06
Submission Date: 2-27-07
Motion Sequence No.: 001/MOT D

AT THE AIRPORT, a New York Limited
Liability Company,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Lynn & Gartner, LLP
330 Old Country Road, Suite 103
Mineola, New York 11501

ISATA, LLC, INTERNATIONAL
SHOPPES, INC., INTERNATIONAL
SHOPPES, LLC, MICHAEL HALPERN,
individually and as Manager of ISATA,
LLC, and STEVEN R. GREENBAUM,
individually and as manager of ISATA,
LLC, STATE OF NEW YORK, JOHN
"DOE", unknown creditor of ISATA,
LLC for claims in dissolution, "ABC"
CORPORATION, unknown creditor or
ISATA, LLC for claims in dissolution,

Defendants.

COUNSEL FOR DEFENDANT
Bracken & Margolin, LLP
One Suffolk Square - Suite 300
Islandia, New York 11749

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ORDER

The following papers were read on Plaintiff's application for the appointment of a temporary receiver for Isata:

Order to Show Cause dated September 27, 2006;
Affirmation of Robert P. Lynn, Jr., Esq. dated September 22, 2006;

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Affidavit of Anthony Petrucci sworn to on September 22, 2006;
Affidavit of Michael Halpern sworn to on October 9, 2006;
Defendants' Memorandum of Law;
Affirmation of Robert P. Lynn, Jr., Esq. dated October 16, 2006;
Affidavit of Anthony Petrucci sworn to on October 16, 2006;
Affidavit of Michael Halpern sworn to on October 25, 2006;
Defendant's Sur-Reply Memorandum of Law;

Sur-Reply Affidavit of Anthony Petrucci sworn to on November 2, 2006;
Supplemental Affidavit of Michael Halpern sworn to on February 6, 2007;
Supplemental Affidavit of Anthony Petrucci sworn to on February 18, 2007.

Plaintiff, At The Airport, LLC ("ATA"), moves for the appointment of a temporary receiver of Defendant Isata LLC ("Isata") pending its dissolution.

BACKGROUND

Isata is a limited liability company formed to operate duty free shops at John F. Kennedy International Airport ("JFK") in New York. ATA is a member of Isata owning a 20% interest. Anthony Petrucci ("Petrucci") is the member of ATA. Defendant International Shoppes, LLC ("Shoppes") is the other member of Isata; owning an 80% interest in Isata.

Defendants Michael Halpern ("Halpern") and Steven Greenbaum ("Greenbaum") are members of Shoppes. They are also the principals of Defendant International Shoppes, Inc. ("ISI"). ISI also operates duty free shops.

In March 1996, ATA and Shoppes obtained leases to jointly operate duty free shops at the International Arrivals Building at JFK. However, in order to operate a duty free shop at JFK, Isata needed to obtain a customs bond and approvals from the United States Customs Service ("Customs") and the Bureau of Alcohol, Tobacco and

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Firearms ("ATF"). Since Isata was obligated to pay rent starting in March 1996, the shops had to be opened as quickly as possible.

Halpern and Greenbaum advised ATA that the approvals and bonds issued to ISI could be expanded to cover Isata. On February 28, 1996, Isata and ISI entered into an agreement which permitted ISI to operate Isata's duty free shops at JFK as its agents ("February 1996 Agreement").

In addition to the JFK shops, Isata obtained a lease to operate a duty free shop at Philadelphia International Airport. ISI also operates that shop as agent of Isata.

The February 1996 Agreement provided that ISI would operate the business in accordance with the terms of the Operating Agreement and Expense Reimbursement Agreement. ISI was to have a separate accounting system for Isata, was to appoint an escrow agent to hold and distribute funds relating to Isata's operation and was to assign to Isata all leases ISI entered into on behalf of Isata.

The Expense Reimbursement Agreement provided that Isata would reimburse ISI for expenses ISI incurred in operating the business. It also set forth the services ISI would provide for Isata until it obtained the necessary approvals for operating its business.

Isata alleges that ISI has never complied with the February 1996 Agreement, the Operating Agreement or the Expense Reimbursement Agreement.

The February 1996 Agreement provided that once Isata obtained its Customs bond and other required approvals, ISI was to deliver the accounting system to Isata,

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instruct the escrow agent to deliver the net profits of the business to Isata, request the Port Authority to assign the leases of the premises from ISI to Isata and assign all contracts relating to the business to Isata. Isata received its approvals and bonds required by Customs and ATF in September 2001. Despite having obtained the approvals, ISI continues to operate and manage the shops at JFK and Philadelphia International Airport.

ATA alleges that ISI generates substantial income from the operation of the shops to which Isata holds the leases. Despite this, ATA has only received distributions sufficient to pay the tax liability arising from the operation of the business. ATA further alleges that it has been denied access to the business records of the shops. ATA has requested records from the separate accounting system that ISI was supposed to have established. ISI has never been provided those records.

ATA further alleges that ISI is overcharging Isata for warehouse space, has been understating revenue and overstating expenses and that ISI has been diverting revenue from Isata.

It is also claimed that ISI has failed to establish the separate accounting system required by the February 1996 Agreement and has failed to designate an escrow agent to administer Isata's funds.

ATA has commenced this within action seeking, *inter alia*, the judicial dissolution of Isata. ATA seeks the appointment of a temporary receiver in connection with its cause of action for the dissolution of Isata.

Defendants assert that ATA has not made the showing necessary to obtain the appointment of a receiver. They urge that the appointment of a receiver would destroy the business. That is, appointment of a receiver would constitute a default of the lease with the Port Authority which would permit the JFK lease to be terminated.

Defendants claim that ATA has had full access to all of Isata's financial records. A forensic accountant retained by ATA audited Isata's financial records for the years 2001, 2002 and 2003. The results of the audit have never been disclosed.

Members of Petrucci's family were employed in managerial and executive positions at Isata. They had full access to all of Isata's business records while they were employed by Isata.

Despite the audits and access to business records, Plaintiff has failed to present documentary evidence to demonstrate its claims.

Petrucci's employment was terminated when ATA and he filed an action in the United States District Court. Defendants allege that, upon the filing of the federal action, they realized Petrucci had violated his duty of confidentiality and loyalty.

Defendants assert there is no reason to appoint a receiver. There is no deadlock in the operation of Isata and it has adequate revenue to pay its expenses.

Defendants further assert that this action is an outgrowth of their unwillingness to comply with Petrucci's ever-escalating demand for salary and perquisites and that it is motivated by Isata's firing members of Petrucci's family.

DISCUSSION

CPLR 6401 permits the appointment of a temporary receiver to preserve specific identifiable property that is the subject of the action. Siegel, *New York Practice* 4th §332. The appointment of a temporary receiver is a drastic remedy that will be granted only if when the applicant has made a clear showing of necessity to conserve the property and protect the interest of the litigants. Schachnaer v. Silkowitz, 94 A.D.2d 709 (2nd Dept. 1983).

A temporary receiver will not be appointed if the relief being sought is money damages. Brody v. Mills, 278 App.Div. 771 (2nd Dept. 1951); and Mack v. Stanley, 74 App.Div. 145 (1st Dept. 1902). In this case, all of the causes of action seek money damages except for the cause of action seeking Isata's dissolution.

A temporary receiver may be appointed in an action for money damages if the subject of the action is a specific fund of money. Meurer v. Meurer, 21 A.D.2d 778 (1st Dept. 1964). This is not an action for a specific fund of money.

The party seeking a temporary receiver must establish that funds or the property are in danger of being materially injured or destroyed. Secured Capital Corp. of N.Y. v. Dansker, 263 A.D.2d 503 (2nd Dept. 1999). To the contrary, it appears that the appointment of a receiver would substantially injure or destroy Isata's property. The appointment of a receiver which is not vacated within 30 days is an event of default entitling the Port Authority to terminate Isata's lease.

ATA has failed to make a clear showing that the property of Isata is in danger of being materially injured or destroyed despite its apparent ability to do so. Isata's operations produce sufficient income to pay its operating expenses. See, B.D. and F. Realty Corp. v. Lerner, 232 A.D.2d 346 (1st Dept. 1996). There is no direct evidence that Isata's assets are being dissipated. See, Hahn v. Garay, 54 A.D.2d 629 (1st Dept. 1976). ATA asserts that the amount of the distributions it is receiving is inordinately small given the gross income of the business. In response, Defendants claim that ATA is receiving the same distribution as Shoppes. It asserts that the revenue generated by the business is being used to pay operating expenses and is being reinvested therein.

Furthermore, there is no evidence that the property that is the subject of this suit will be removed from the state, lost or destroyed. CPLR 6401(a); and Siegel, *New York Practice* 4th §332.

A temporary receiver acts merely as the custodian of the property during the pendency of the action. See, 1 New York Civil Practice CPLR P6401:1. Significantly, ATA is not seeking someone to take possession and maintain Isata's property during the pendency of the action. Rather, it is seeking the appointment of a receiver who will oversee the financial operation of Isata's business in the event of dissolution.

Since Isata has not made the requisite showing, its application for the appointment of a temporary receiver pursuant to CPLR Article 64 must be denied.

Limited Liability Company Law §703(a) does not provide for the appointment of a receiver in these circumstances. Section 703 (a) permits the court to appoint a receiver

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or liquidation trustee in connection with the winding up the affairs of a limited liability company. A limited liability company's business is wound up after the limited liability company has been dissolved. Limited Liability Company Law §701(a)(1),(2),(3),(4) or (5). Isata has not been dissolved. Thus, the Court cannot properly appoint a receiver pursuant to Limited Liability Company Law §703(a).

In effect, ATA is putting the cart before the horse since there must first be a finding of the right to judicial dissolution before a receiver can be appointed.

While ATA has conveyed a sense of oppression on the part of Shoppes in its conduct of Isata's business, it has failed to demonstrate a legal or factual predicate for the relief it seeks under CPLR Art. 64 or Limited Liability Company Law § 703. Thus, at this time, the motion for a temporary receiver must be denied.

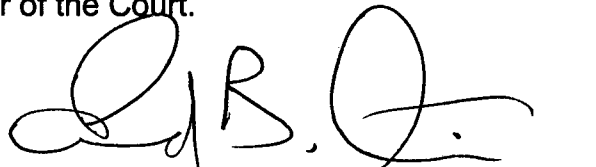
Accordingly, it is,

ORDERED, that Plaintiff's motion for the appointment of a temporary receiver for Isata, LLC is **denied**, without prejudice; and it is further,

ORDERED, that counsel shall appear for a conference of this matter on June 22, 2007 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
June 6, 2007


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

ENTERED

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