SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. KENNETH A. DAVIS,**

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

In matter of the Application of
Thomas Moonis, as Executor of the
Estate of Denise Moonis,

Plaintiff,

SUBMISSION DATE: 8/6/08
INDEX No.: 4000/08

-against-

Harran Transportation Company, Inc.,
New York Airbus, Ltd., CBS Lines, Inc.,
George Semke, in his individual and
as president of Harran Transportation
Company, NY Airbus, Inc., CBS, Inc.,
Prime Industries, Inc. and other
Affliated Companies,

MOTION SEQUENCE # 1,2

Defendants.

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion/ Order to Show Cause..... | XX |
| Answering Papers..... | X |
| Reply..... | |
| Briefs: Plaintiff's/Petitioner's..... | |
| Defendant's/Respondent's..... | X |

Plaintiff's, Thomas Moonis, as Executor of the Estate of Denise Moonis, application by Order to Show Cause for preliminary injunctive relief enjoining, non party, Edward Christiansen, from distributing certain funds held in escrow, is denied.

Cross motion by defendants, George Semke and Prime Industrial Corp., sued herein as Prime Industries, Inc. ("Prime") pursuant to CPLR 3211(a)(1), (5) and (7), for an Order dismissing plaintiff's complaint, is granted.

This action arises from a series of loans made by plaintiff, Thomas Moonis' father, also named Thomas Moonis, to the defendant companies. (Plaintiff's father, Thomas Moonis, will hereinafter be referred to as "Moonis Senior.") Moonis Senior died on February 11,

1998 at which time the loans remained outstanding. Pursuant to his last will and testament, all interests in the aforementioned companies, including the balance due on the loans, vested in his wife and plaintiff's mother, Denise Moonis. Denise Moonis passed away on August 23, 2004. Plaintiff is the Executor of the Estate of Denise Moonis. Plaintiff alleges that by certain accounts, the aforementioned loans originally were in the aggregate amount of $417,783 and that the true amount presently due the Estate of Denise Moonis cannot be determined until the litigation of the instant complaint and the accompanying discovery of information and documents in the custody of the defendants is complete.

Defendant George Semke works for the defendant, CBS Lines, Inc. ("CBS") located in Coram, New York. He became associated with Moonis Senior in 1968 when, together, they purchased Jersualem Avenue Bus Line, Inc. (formerly the parent company of defendant Harran Transportation Company, Inc.). Thereafter, Semke and Moonis Senior purchased several other bus lines together forming corporations including defendants, CBS and New York AirBus, Ltd. ("NY Airbus"). NY Airbus was a bus company in which Thomas Moonis and George Semke were the sole equal shareholders. NY Airbus merged into Harran and the two entities became known as Harran Transportation Company, Inc. CBS Lines, Inc. is another separate bus company which is currently engaged in business. Each company was acquired and run as separate independent corporations and each corporation maintained separate accounts and business records. Both, Moonis Senior and George Semke were equal shareholders and were the officers and directors of the companies they created. Defendant, George Semke, acknowledges that Moonis Senior had advanced loans to certain entities, which upon his death, were outstanding. However, Semke asserts in support of his cross motion to dismiss the complaint that he "personally do[es] not owe money to Moonis, and neither does Prime [Industrial Corp.]" (*Semke Aff.*, ¶20). Prime Industrial Corp. is a New York corporation in which there are three shareholders of record: Moonis Senior (42.5% of the outstanding shares); George Semke (42.5% of the outstanding shares) and Joseph Fernandez (15% of the outstanding shares). Prime was organized for the purpose of acquiring and building a bus terminal for the operating companies - i.e., the defendants herein: Harran Transportation, Inc., NY Airbus and CBS. Prime was also the owner of the real estate and improvements at 30 Mahan Street, West Babylon New York, where the respective bus companies leased the property for their use as a bus terminal.

The underlying disputes apparently first arose when Moonis Senior wanted to sell his interest in the companies to George Semke. Pursuant to the shareholders' agreements of each company, the corporations had a right of first refusal. Thereafter the remaining shareholders had the right to acquire the shares. Apparently, a purchase price for the purchase of Moonis Senior's

shares could not be agreed upon at which time, pursuant to each of the agreements, the dispute as to the valuation of the shares was submitted to arbitration. The arbitration continued after Moonis Senior's demise. Eventually, the parties, George Semke and the Estate of Thomas Moonis, settled the arbitration proceeding by an agreement dated October 13, 1999. Of note, this agreement provided in pertinent part, as follows:

> George Semke...and the Estate of Thomas Moonis...intend the following agreement to resolve all outstanding disputes between them. Additionally, they are acting not only in their individual capacity but also as principles [sic]/shareholders and officers as the case may be of...Prime Industrial Corporation...and the Operating Companies set forth below. They have agreed as follows:
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> 1. The parties agree that [Harran, NY Airbus, and CBS] (hereinafter the Operating Companies) shall be put up for sale...to an independent third party...
>
> 2. The proceeds of any such sale of the Operating Companies shall be allocated as follows: 30% shall be paid to George Semke...30% shall also be paid to Moonis...but the amount payable to Moonis as a result of said 30% shall not exceed $400,000. The remaining proceeds over the foregoing premiums shall be divided between Moonis and Semke on a 50-50 basis.
> * * *
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> 4. The parties agree that the premium proceeds payable to Moonis (i.e., the 30% payable to Moonis) shall reduce the indebtedness owing to Moonis from Airbus, Prime Harborfront Corporation and Prime Edison Associates as and to the extent said funds are paid and Semke agrees that he will take and will (with Moonis) cause Airbus, Prime Harborfront and Prime Edison to take whatever action is legally permissible to uphold such payment as a loan repayment to Moonis and that he will not take any action or permit Prime Harborfront Corporation or Prime Edison Associates to take inconsistent action. Notwithstanding the foregoing, the $400,000 shall be payable and shall be paid to Moonis regardless of the actual loan amount outstanding. To the extent the actual premium paid to Moonis is less than $400,000 with the result that there remains a loan indebtedness outstanding, such outstanding amount is acknowledged as an ongoing continuing indebtedness of Prime Harborfront Corporation and/or Prime Edison Associates due to the Estate of Thomas Moonis.
>
> 5. The parties agree that if there is any disagreement or dispute as to the interpretation of this agreement or as to the implementation of this agreement...the dispute will be

presented to the existing panel of arbitrators who shall continue to have jurisdiction over this matter.

The companies were offered for sale. Ultimately in December 2006, defendant Harran ceased operations. At that time, the plaintiff, together with George Semke and Joe Fernandez (the third shareholder in Prime) all agreed that they would market the property owned by Prime for sale. In the spring of 2007, Prime received an offer that allowed it first to sell a cellular telephone easement on its West Bablyon property and then to sell the remaining fee on an all cash basis to a well qualified buyer. The shareholders then met and executed a resolution to sell the property. At that time, however, plaintiff asserted that there were outstanding issues concerning the loans made by his father to Harran Transportation, Co., New York Airbus, Inc., and CBS Lines, Inc. and that he would withhold his consent to the sale unless the parties executed an escrow agreement to afford him additional time to investigate and assert those claims. On November 27, 2007, George Semke, Thomas Moonis as the Executor of the Estate of Denise Moonis, and Edward Christensen, Esq. executed an escrow agreement which stated, as follows:

> This escrow agreement is made and entered...by George Semke, Thomas Moonis, as executor of the Estate of Denise Moonis and Edward A. Christensen, Esq. (the "Escrow Agent").
>
> * * *
>
> Whereas, [Prime]...has entered into a contract for the sale of its real property known as 30 Mahan Street, West Babylon, New York (the "Real Property").
>
> Whereas a closing of the sale of the Real Property is scheduled to take place on November 27, 2007, and
>
> Whereas, George Semke and the Estate of Denise Moonis are shareholders of Prime, and
>
> Whereas, George Semke and Estate of Denise Moonis are the shareholder of [Harran] and certain other related and/or affiliated entities (the "Related Entities"), and
>
> Whereas, there may be disputes between the parties concerning their rights in and to the Related Entities, and
>
> Whereas the parties are desirous of the sale of the Real Property be completed notwithstanding the differences between them,
>
> Now Therefore, in consideration of the mutual promises contained herein, and other and good consideration, the receipt and sufficiency of which are hereby acknowledged, the

undersigned parties hereto agree as follows:

* * *

From the funds received by Prime from the closing of the sale of the Real Property the sum of One Million Dollars...shall be wired transferred to the IOLA account of the Escrow Agent, representing equal shares from each of the parties as if such share was to be paid to each in accordance with each parties share interest in Prime.

* * *

All funds held by the Escrow Agent pursuant to the terms of this agreement shall be held by the Escrow Agent for a period of ninety days from the date of the closing of the sale of the Real Property (the "Termination Date").

On the Termination Day, the Escrow Agent shall distribute Fifty Percent (50%), of the balance in the Escrow Account to each of George Semke and to Thomas Moonis as Executor of the Estate of Denise Moonis.

The funds maintained in the escrow Account shall not be distributed as set forth above, if and only if an order or judgment is entered into the Supreme Court of the State of New York (the "Court"), enjoining or otherwise restraining the Escrow Agent from distributing the funds as set forth above.

In the event a written request has been made to the Court, but has not been decided by the Court prior to the Termination Date, the Escrow Agent shall nevertheless make the Distributions set forth above, unless the request for such an injunction was filed prior to the Seventy Fifth Day after the Closing Date, in which instance the escrow Agent shall hold the funds pending the order of the Court.

The closing of the sale of Prime's West Babylon property took place on November 27, 2007. Thus, pursuant to the terms of the Escrow Agreement, February 26, 2008 was the Termination Date. However, by letter dated February 8, 2008, George Semke extended the Termination Date to March 21, 2008 provided that if the plaintiff was going to make an application to the Court enjoining or otherwise restraining the Escrow Agent from distributing the escrow funds, he had until March 3, 2008 to do so. Plaintiff's instant motion by Order to Show Cause was brought on March 3, 2008.

Applying the traditional tripartite test for preliminary injunctive relief, i.e., likelihood of success on the merits, irreparable injury and a balancing of the equities (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]), plaintiff has failed to demonstrate his entitlement to injunctive relief. It is noted at the outset that while a court has no power to grant relief against an entity not named as a party and not properly summoned before the

court (*Hartloff v. Hartloff*, 296 AD2d 849, 850 [4th Dept. 2002]), Edward Christiansen's knowledge of the injunction as well as his knowledge of plaintiff's claims, nevertheless, renders him capable of being bound by an injunction.

To obtain a preliminary injunction restraining the defendant and the defendant's escrowee from releasing or disbursing certain funds held by the escrowee, plaintiff, Moonis, is required to show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor (*Evans-Freke v. Showcase Contr. Corp.*, 3 AD3d 549 [2nd Dept. 2004]). Plaintiff has failed to demonstrate a likelihood of success on the merits (*William M. Blake Agency v. Leon*, 283 AD2d 423, 424 [2nd Dept. 2001]; *Schrager v. Klein*, 267 AD2d 296, 297 [2nd Dept. 1999]). The complaint alleges that there were several corporations, and that the defendant, Semke was a shareholder, officer and director. It states that there were loans to the corporations that require discovery and accounting, and that there needs to be discovery and a determination as to the amount of the loans. However, it remains undisputed that the loans were not given to Semke and/or Prime, and absent a guarantee or some extenuating circumstances which did not occur, and were not alleged in the complaint, Semke and Prime are not obligated thereby. Plaintiff has also failed to establish or even allege an irreparable injury. At best, plaintiff has an action for money damages against the corporations to whom Moonis Senior may have loaned monies (*Leo v. Levi*, 304 AD2d 621, 623 [2nd Dept. 2003]; *Schrager v. Klein*, 267 AD2d 296 [2nd Dept. 1999]). Finally, in light of the previous two factors, this Court finds that the equities hardly tip in the plaintiff's favor. For these reasons, plaintiff's application for preliminary injunctive relief is denied.

Turning to defendants, George Semke and Prime's cross motion to dismiss plaintiff's complaint, this Court notes that on a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; *Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). While it is true that the allegations are to be liberally construed and documentary evidence must conclusively dispose of a plaintiff 's claim (*Manfro v. McGivney*, 11 AD3d 662 [2nd Dept. 2004]; *Jorjill Holding Ltd. v. Grieco Associates, Inc.*, 6 AD3d 500, 501 [2nd Dept. 2004]), it is also true that "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such

consideration" (*Maas v. Cornell University*, 94 NY2d 87, 91 [1999]; *Morris v. Morris*, 306 AD2d 449 [2nd Dept. 2003]).

Plaintiff's complaint at ¶5 alleges that upon information and belief, the plaintiff's father, Moonis Senior, loaned monies to certain companies including but not necessarily limited to defendants, NY Airbus, Prime Harborfront Corp., and Prime Edison Associates, Inc. In support of his contention, plaintiff annexes a letter which outlines certain loan obligations on account of these defendants. In further support of his allegations, plaintiff also annexes a letter referring to loan balances in 1990 from Harran, NY Airbus, and CBS. Yet, nowhere does the plaintiff assert that the loans were made by Moonis to Semke or that Semke guaranteed loans to the corporations. As stated above, there is no theory advanced in the complaint as to why Semke and/or Prime are liable for monies allegedly loaned to the other corporate defendants or why the monies belonging to Semke should be restrained or a attached in this proceeding.

Further, the mere fact that there were a series of closely held corporations with interlocking officers and directors, does not mean those officers/directors, or affiliated companies would be responsible for each other's loans. Presumably, the deceased and George Semke, created the companies for the very purpose of isolating each company from the various risks and liabilities of the others. Clearly, the monies pledged in escrow belong to George Semke and the Estate of Denise Moonis. This is why the agreement was signed by George Semke (individually) and the Estate of Denise Moonis. Thus, plaintiff's argument that Semke should be liable for the loans because he executed the escrow agreement in his individual capacity is entirely meritless.

For these reasons, defendants' cross motion to dismiss plaintiff's complaint is granted.

This decision constitutes the order of the court.

Dated: SEP 05 2008

KENNETH A. DAVIS J.S.C.

ENTERED
SEP 11 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE