

SCAN

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
ESTATES CAB CORP.,

Plaintiff-Movant,

-against-

**PAUL MULLER, JR. and VICTORIA SCHRAFT
MULLER,**

Defendant-Respondent.
-----X

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 002002-11
Motion Seq. No: 1
Submission Date: 2/16/11**

The following papers have been read on this motion:

**Order to Show Cause, Affidavit in Support,
Affirmation in Support and Exhibits.....X
Affidavits of Service.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiff Estates Cab Corp. ("Plaintiff" or "Corporation") on February 9, 2011 and submitted on February 16, 2011. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order 1) directing Defendants Paul Muller Jr. ("Paul") and Victoria Schraft Muller ("Victoria") (collectively "Defendants") immediately to turn custody of the Corporate Seal and all other corporate properties in their possession, including all legal documents, records, accounts, invoices, letters, and chattels of every type or description of Plaintiff, acquired during Defendants' occupancy of the Corporation, into the possession of Marcia Muller ("Marcia"), Chief Executive Officer and sole shareholder of the Corporation, or

her lawful agents and assigns; 2) directing Defendants to immediately and permanently vacate and surrender the premises ("Premises") owned by the Corporation at 106 Steamboat Road, Great Neck, New York 11024 into the exclusive care, control and custody of Marcia, or her lawful agents and assigns; 3) permanently enjoining Defendants from entering the Premises; 4) permanently enjoining Defendants from acting in any capacity in which they hold themselves out, jointly or severally, as owners, directors, officers, employers, employees, or agents of the Corporation, or as the owners, landlords, or agents of the owner/landlord, of the Premises, to any person, entity, company, corporation or municipality, for any purposes; and 5) declaring Marcia the sole owner of the Corporation, invested with all executive powers and privileges attendant thereto and directing that, should the Corporate Seal be lost, a new Seal be issued on her request.

Defendants have submitted no opposition or other response to Plaintiff's Order to Show Cause.

B. The Parties' History

Marcia affirms as follows in her Affidavit in Support:

Marcia is the sole owner and shareholder, and Chief Executive Officer, of the Corporation which she formed in 1972 to purchase, own and manage the Premises. Marcia is the mother of Defendant Paul. Marcia used the Premises to operate her taxicab companies which operated primarily in the area of Great Neck, new York.

Since the formation of the Corporation, numerous companies ("Taxi Companies"), owned in whole or in part by Marcia, have used the Premises as the location from which they operated their businesses. These Taxi Companies did not have a formal lease with the Corporation, and were not legal tenants at the Premises; Marcia submits that they were "invitees" (Marcia Aff. at ¶ 11).

Paul owns a company called PFM Management Corp. ("PFM"), which uses the Premises as a base of operations. Paul is also a co-owner, with Marcia's other son Glenn, of a company called Friendly Airport Service, Inc. ("Friendly"). Marcia avers that neither PFM nor Friendly has a formal lease with the Corporation.

Marcia anticipated that the Corporation and the Taxi Companies (collectively "Businesses"), for which Paul and Glenn worked over the years, would become family

businesses. Paul, however, began to exert greater managerial control over the Businesses. Although Marcia designated him Principal Executive Officer of the Corporation, Paul never received shares or an ownership interest in the Corporation, and there is no employment contract between the Corporation and Paul.

While declining to discuss the details, Marcia affirms that there has been a breakdown in her personal relationships with Paul and his wife, Defendant Victoria, and the parties are no longer on good terms. In support, Marcia provides a letter from Paul (Ex. E to Marcia Aff.). That letter includes Paul's direction to Marcia that 1) she should pay a particular bill or she will "lose" the Corporation; 2) she should stop calling him; 3) she should leave him alone; and 4) she and Glenn are "nothing but drunks." Paul also advised Marcia in the letter that he was looking for a new office and, in more colorful language, told Marcia that if she did not refrain from interfering with him, he would begin interfering with her. Marcia avers that Paul and Victoria, who are now separated, have been forcing Marcia and Glenn out of the Businesses and attempting to exert control over the Businesses and Premises. As a result of the Defendants' involvement, the Businesses have suffered a financial decline.

Marcia affirms that Paul has diverted money from the Businesses, and paid significant Business funds to himself and to Victoria for maintenance and child support, resulting in losses to the Corporation of approximately \$400,000.00. She avers, further, that the Defendants' mismanagement included failure to pay property taxes on the Premises resulting in a default, the sale of the tax lien, and a threat of foreclosure by the lien holder (Ex. F to Marcia Aff.).

Marcia affirms that she has attempted unsuccessfully to resolve this matter amicably. She believes that the Corporate Seal is lost, or in Defendants' possession, and that other Corporate documentation is in the Defendants' possession. Marcia submits that she needs to regain possession of the Premises and the Corporate documentation to save the Premises from foreclosure and preserve the Businesses. Marcia made a Corporate Resolution ("Resolution") (Ex. B to Marcia Aff.) dated March 7, 2011 in which it was resolved, *inter alia*, that 1) Paul was terminated, effective immediately, as Principal Executive Officer of the Corporation; 2) the Defendants were banned from the Premises; 3) Marcia was authorized to enforce the eviction and/or removal of the Defendants from the Premises; and 4) the Corporation shall compel the

Defendants to surrender all Corporation property in their possession to the Corporation.

In his Affirmation in Support, counsel for Plaintiff submits that Marcia's designation of Paul as the Principal Executive Officer of the Corporation did not confer any ownership interest in the Corporation on him, or remove Marcia as the Chief Executive Officer. Counsel provides a printout from the New York Department of State, Division of Corporations reflecting that, as of February 4, 2011, Marcia was the Chairman or Chief Executive Officer of the Corporation, and designating Paul as the "Principal Executive Office" (Ex. A to Previto Aff.).

Plaintiff has provided Affidavits of Service reflecting the service of the Order to Show Cause and supporting papers on Paul and Victoria on February 11, 2011 at the Premises by service on a person of suitable age and discretion, specifically an individual named Mr. Arsh, and the subsequent mailing of the Order to Show Cause to the Defendants at the Premises.

C. The Parties Positions

Plaintiff submits that, in light of Marcia's allegations regarding the Defendants' waste of Corporate assets, the purported termination of Paul as Principal Executive Officer by the Resolution, and the Defendants' refusal to vacate the Premises voluntarily, Plaintiff has demonstrated its right to the requested injunctive relief.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v. Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *see Abinanti v. Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v. Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c). The existence of a factual dispute, however, will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance. *Melvin v. Union College*, 195 A.D.2d 447, 448 (2d Dept. 1993).

Mandatory injunctive relief should not be granted *pendente lite* without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 (2d Dept. 2007).

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction. It is to be invoked only to give protection for the future, and prevent repeated violations of the plaintiff's property rights. *Merkos L'Inyonei v. Sharf*, 59 A.D.3d 403 (2d Dept. 2009).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Application of these Principles to the Instant Action

The Court denies Plaintiff's Order to Show Cause. First, Plaintiff has not demonstrated a likelihood of success on the merits because she has not produced documentation, other than the lien foreclosure document, supporting her allegations of Defendants' mismanagement, and attempts to take control, of the Corporation. Moreover, there is no basis from which the Court can conclude that it was the mismanagement by Defendants, as opposed to Plaintiff, that resulted in the Corporation's inability to pay its tax obligations. In addition, the letter from Paul on which Plaintiff relies confirms that the relationship among the parties is fractured but also reflects Paul's position that it is Plaintiff who is responsible for the Corporation's difficulties.

Moreover, Plaintiff's application includes a request for mandatory relief, specifically that the Defendants be directed to vacate the Premises and turn over certain property to Plaintiff. The Court concludes that, in light of the absence of documentary evidence supporting Plaintiff's allegations of waste and mismanagement by Defendants, and Defendants' efforts to take control of the Corporation, Plaintiff has not demonstrated the extraordinary circumstances required to warrant the requested mandatory injunctive relief or established that permanent injunctive relief is appropriate. Finally, in light of Plaintiff's allegations that Defendants' improper conduct included the diversion of Corporate funds, which has resulted in the financial decline of the Corporation, the Court concludes that Plaintiff's alleged injury is compensable by money damages.

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause in its entirety.

All matters not decided herein are hereby denied.

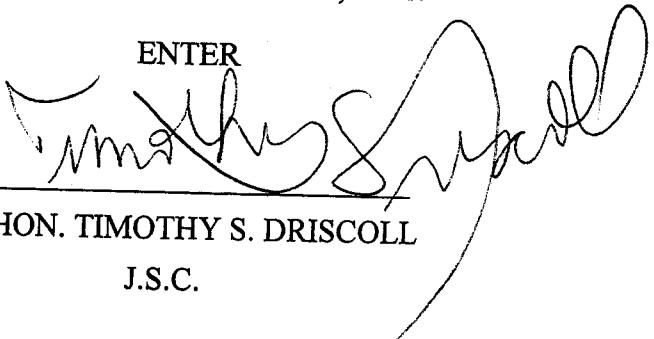
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a conference before the Court on April 12, 2011 at 9:30 a.m. The Court directs Plaintiff's counsel to serve a copy of this Order on the Defendants, via certified mail, return receipt requested, on or before March 25, 2011.

DATED: Mineola, NY

March 4, 2011

ENTERED
MAR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.