

RANDALL LATONA,

Plaintiff,

DECISION AND ORDER

v.

Index #2007/07014

STEVEN DONNER
WALTER TUREK
ROCHESTER AMERKS, INC. and
ROCHESTER KNIGHTHAWKS, LLC,

Defendant.

Plaintiff, Randall Latona, moves by order to show cause for an order appointing a temporary receiver for the assets and property of Rochester Knighthawks, LLC and Rochester Amerks, Inc. pursuant to CPLR 6401, granting such powers to the receiver to manage the businesses of said entities as specified in the order of appointment. Plaintiff further seeks an order pursuant to CPLR 3124 and 3126 compelling defendants, Rochester Amerks, Inc., Rochester Knighthawks, LLC, and Steven Donner, to comply with plaintiff's notice to produce and plaintiff's first set of interrogatories. In the alternative, plaintiff seeks an order granting sanctions pursuant to CPLR 3126, resolving the action in plaintiff's favor and against defendants, and ordering that defendants pay plaintiff's costs and attorneys' fees in making the instant application.

This action is brought for the removal of defendant Donner

as CEO and director of the Amerks and Knighthawks, as well as for an accounting. Plaintiff alleges that Donner has mismanaged these entities and breached his fiduciary duties, thereby threatening the ultimate viability of the entities. No damages are sought, however. On this application, plaintiff seeks the appointment of a receiver to protect the entities' assets.

Plaintiff acquired ownership interests in the Amerks and Knighthawks in 2004, having paid a total of \$850,000 to acquire a 20% interest in both entities. Rochester Amerks, Inc. has two other shareholders, the individual defendants herein, each of whom possess a 40% share of the ownership and serve with plaintiff on the Board of Directors. Likewise, plaintiff owns 20% of the Rochester Knighthawks, LLC, and the individual defendants each own a 40% share.

In late 2005, plaintiff alleges that the Amerks and Knighthawks experienced cash flow problems and Donner requested that plaintiff and Turek advance funds to acquire existing debt and furnish additional working capital. On April 7, 2006, through an entity formed by plaintiff and Turek called T&L Funding Group, LLC, Turek and plaintiff furnished a \$2.1 million loan to Rochester Amerks, Inc., and Rochester Knighthawks, LLC. T&L also subsequently lent an additional \$145,000 to those entities. When these loan transactions closed, Donner and Turek agreed to name plaintiff CFO of both entities.

Plaintiff alleges extensive mismanagement and self-dealing on Donner's behalf. Plaintiff alleges that: Donner has advanced funds from the Amerks and Knighthawks to the Rochester Rhinos, a soccer team owned in part by Donner; the Amerks are indebted to the Hockey Company, the principal supplier of sticks and other equipment, and that Donner has reneged on several arrangements made with that entity wherein he promised to send funds if supplies were sent to the Amerks (the supplies were sent, but the funds promised were never disbursed); the American Hockey League has notified Donner that the team is in default for League dues, health and welfare trust payments, unpaid road trip bills, as well as the default to The Hockey Company (which constitutes a violation of the League contract), causing the League to threaten suspensions or termination of the franchise; the Knighthawks are in arrears to the National Lacrosse League in the approximate amount of \$20,000; one of the Amerks' parent teams, the Buffalo Sabres, has demanded payment of past due player fees and has brought a legal action against the Amerks as a result; since the Summer of 2006, the Amerks and Knighthawks have failed to pay suppliers, advertisers, and other vendors, leaving thousands of dollars in arrearage. Plaintiff further alleges that Donner insists upon employing individuals not actually required by either organization, for his own personal reasons, and that Donner permitted or caused the Amerks to pay personal expenses

for himself and other employees and carry health insurance as a favor to a friend, a non-employee. It is further alleged that Donner is risking the Amerks' relationship with the Buffalo Sabres, and risking the need for a more costly alternative agreement. Defendants vigorously deny impropriety in detailed affidavits.

As CFO, plaintiff has requested financial information from the entities to address the specific problems, as well as the general finances. Plaintiff alleges that both entities refuse to provide him with such information. Consequently, as CFO, plaintiff hired the Bonadio Group, LLP to assist him in his efforts. It is alleged that The Bonadio Group has also had no success in obtaining any financial information relative to the entities. Defendants respond that they delayed discovery during settlement negotiations, and that the discovery requested is now prepared for delivery.

Motion to Compel

_____CPLR §3124 states: "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." As a penalty for refusal to comply with discovery demands, CPLR §3126 permits a court to issue various forms of relief.

_____Plaintiff served a notice to produce and notice to take deposition on August 21, 2007, and a first set of interrogatories on October 2, 2007. Both the notice to produce and demand for interrogatories sought information and/or documentation concerning the financial transactions and affairs of the defendant entities.

Plaintiff's motion to compel is granted. Plaintiff is entitled to discovery of the items and information requested. Defendants are ordered to provide the responses to plaintiff within fifteen days of the date of this decision and order.

Receiver

Plaintiff seeks the appointment of a receiver pursuant to CPLR 6401, which states:

(a) Upon motion of a person having an apparent interest in *property which is the subject of an action* in the supreme or a county court, a temporary receiver of the *property* may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, *materially injured or destroyed*. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.

(emphasis supplied). "The appointment of a receiver is a drastic and intrusive remedy and may only be invoked in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting the interests

of that party." Secured Capital Corp. of N.Y. v. Dansker, 263 A.D.2d 503 (2d Dept. 1999). A temporary receiver is intended to preserve specific identifiable property that is the subject of litigation. Seigel, New York Practice, §332 (4th ed. 2005). 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, nor is it an action for money damages. This relief will be granted only where "the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting the interests of that party." Secured Capital Corp. of N.Y. v. Dansker, 263 A.D.2d 503 (2d Dept. 1999).

As this Court has had occasion to note, "The drastic remedy of the appointment of a receiver is to be invoked only where necessary for the protection of the parties.... 'There must be danger of irreparable loss, and courts of equity will exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established'" (DiBona v. General Rayfin Ltd., 45 A.D.2d 696, 357 N.Y.S.2d 71, quoting Laber v. Laber, 181 App. Div. 733, 735, 168 N.Y.S. 1040).

In re Armienti, 309 A.D.2d 659, 661 (1st Dept. 2003). It is well established that "courts ... exercise extreme caution in appointing receivers ... because such appointment [generally] results in the taking and withholding of possession of property from a party without an adjudication on the merits." Hahn v. Garay, 54 A.D.2d 629, 629 (1st Dept. 1976).

As plaintiffs point out, courts have appointed receivers in cases where (i) the plaintiff offered "clear and convincing proof" of a danger of irreparable loss, where defendant was on the verge of insolvency and might well dissipate proceeds due plaintiff, see Somerville House Management v. Am. Television Syndication Co., Inc., 100 A.D.2d 821, 822 (1st Dept. 1984), or (ii) the actions of various antagonists, e.g., corporate stockholders, with interdependent rights in certain property threaten the well-being or continued viability of the corporation, e.g., Modern Telecommunications, Inc. v. Dalessandro, 185 A.D.2d 218, 223-24 (1st Dept. 1992), although even this order was vacated as improperly granted sua sponte, Modern Telecommunications v. Dalessandro, 588 N.Y.S.2d 765 (1st Dept. 1992), or (iii) where a party's "unilateral actions and conduct . . . in apparent disregard of the agreements and prior orders of the Supreme Court indicate a danger of material injury to the property" that can warrant the appointment of a receiver. Singh v. Brunswick Hosp. Center, Inc., 2 A.D.3d 433, 434-35 (2d Dept. 2003). We have none of those situations proved by clear and convincing evidence here.

Here, this action was commenced to remove Donner as officer and director of the entities, require an accounting, declare any voting agreement between the individual defendants unenforceable, and require the election of replacement directors and managers of

the entities. Plaintiff has not demonstrated that an immediate danger exists that the property of the entities will be "lost, materially injured or destroyed." While plaintiff recites many defaults and credit woes of the defendant entities, some of which on this undisputed record have been cured and some of which are promised to be immediately cured, and alleges generally self dealing, the proof before the court at this juncture does not warrant the court granting the drastic remedy of appointing a temporary receiver. None of the admissible evidence submitted by plaintiff demonstrates that either entity is in imminent danger of being shut down. While the League has taken away certain privileges from the Amerks due to its delinquency, see plaintiff's Exhibit Q, the most recent correspondence from the League does not indicate an immediate threat to shut down the operations of the Amerks. The court further notes that there is even less indication that such drastic measures are in danger of being taken with respect to the Knighthawks. As in Hahn v. Garay, supra, "[th]ere is no sufficient demonstration of waste or mismanagement of the properties involved or that they are in any way threatened. In the absence of a showing that the properties and assets are in danger of dissipation, and in view of the nature of the businesses involved, the necessity of receivership or that a receiver would be able to continue the operation of the businesses, has not been demonstrated." Id. 54 A.D.2d 629. These

principles have particular application in the case of a "going concern." Glassner v. Kaufman, 19 A.D.2d 885 (1st Dept. 1963) ("appointment of a receiver of a going concern is a drastic remedy").

On the contrary, if the court imposes the drastic remedy requested by plaintiff at this juncture and appoints a temporary receiver, that order, if allowed to continue, would jeopardize the Affiliate Agreements the Amerks have with the Buffalo Sabres and Florida Panthers, as each entity could then declare the Amerks in default under their respective agreements and terminate the affiliation. Likewise, such an appointment would cause the Amerks membership in the American Hockey League to terminate automatically pursuant to the League's Constitution. If the court appoints a temporary receiver, such an action undeniably puts at least the Amerks in violation of their affiliate agreements with the Buffalo Sabres and Florida Panthers, and the court declines to take such an affirmative action. See generally, At The Airport, LLC v. Isata, LLC, 15 Misc.3d 1145(A) (Sup. Ct. Nassau Co. June 6, 2007). "Such interference, with its consequent inimical effect on the defendants' business, is not justified by plaintiff's proof." Shapiro v. Ostrow, 46 A.D.2d 859 (1st Dept. 1974).

The motion for the appointment of a receiver pursuant to
CPLR 6401 is denied.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November 16, 2007
Rochester, New York