

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IAS PART 19

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LI GANG MA,
Plaintiff,

-against-

HONG GUANG HU,
Defendant.

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INDEX NO. 8508/06

MOTION SEQ. NO.: 4

BY: AGATE, A.

MOTION DATE: October 28, 2008

MOTION CAL NO.: 20

Defendant and third-party plaintiffs seek an order (1) compelling plaintiff to lift all restraints currently existing on any account of defendant, including certain Amerasia Bank accounts; (2) enjoining third-party defendants from destroying or disposing of financial records of third-party plaintiff Sun Rise International Inc. and New Orient International Inc., and any other documents or evidence regarding the income, assets, expenses, or disposal of assets of the third-party plaintiff, and the corporate third-party defendants (3) enjoining third-party defendants, their agents, relatives and employees from spending, selling, transferring, encumbering or wasting any assets of Sun Rise International, Inc. and Hong Guang Hu or transferring the same to another individual or entity including New Orient International and Li Gang Ma, including such assets as all bank accounts of Sun Rise International Inc.; any and all monies removed from any and all bank accounts of Sun Rise International, Inc., since April 2, 2004; and any and all chattels of Sun Rise International, Inc.

Third-party defendants New Orient International Inc, and Li Gang Ma, as an officer of Sun Rise International Inc. cross-move for an order (1) enjoining third-party plaintiffs, their agents and employees and anyone acting on in concert therewith from destroying and or disposing of any financial records of third-party plaintiffs and Sun Rise International Inc., and any other documents or evidence regarding the income, assets, expenses, or disposal of assets of the third-party plaintiff and Sun Rise International, Inc., (2) enjoining third-party plaintiffs, agents, employees and anyone from acting in concert therewith from selling, spending, transferring, encumbering or in any way wasting assets of Sun Rise International, Inc., and (3) awarding third-party defendants costs and attorney fees in connection with this application.

Plaintiff Ma and defendant Hu are each 50% shareholders in Sun Rise International Inc (Sun Rise). Prior to the commencement of this action, the parties agreed to dissolve the corporation and end their partnership. Plaintiff in his complaint alleges that Hu looted the company's assets, by appropriating funds belonging the corporation and removing a forklift from the corporation's premises. Plaintiff also alleges that Hu's actions constitute a breach of the partnership agreement; seeks judicial dissolution of the corporation; and injunctive relief. Defendant Hu in his answer has interposed seven affirmative defenses and eleven counterclaims against Ma for an accounting; for breach of

the parties' business agreement; conversion of defendant's and Sun Rise's assets; a temporary injunction enjoining plaintiff from destroying or disposing of the financial records of Ma, Sun Rise and New Orient; an injunction enjoining plaintiff, his agents, relatives and employees from spending, selling, transferring, encumbering or in any way wasting the assets of Sun Rise; breach of fiduciary duty; corporate waste; fraudulent conveyance of corporate assets; tortious interference with business relations, the performance of a contract and business; unjust enrichment; and the imposition of a constructive trust.

In the third party action Hu, individually and as a stockholder of Sun Rise, alleges causes of action for a corporate accounting as to Sun Rise; a judgment compelling Ma to provide him with access to the Sun Rise's financial records and a preliminary restraining order enjoining Ma from destroying or disposing of any financial records of Sun Rise and New Orient or other documents pertaining to their income, assets and expenses, and from disposing of such assets; an order enjoining all third-party defendants, their agents, relatives and employees from spending, selling, transferring, encumbering or wasting any assets of Sun Rise, including any and all bank accounts of Sun Rise, any and all money removed from any bank accounts of Sun Rise since April 2, 2004; any phone number or account of Sun Rise; breach of fiduciary duty; corporate waste; fraudulent conveyance of corporate assets;

tortious interference with business relations, with performance of a contract and with business; unjust enrichment; and unfair business practices. Third-party defendants served the third-party answer, with nine affirmative defenses, on the same day they served the within cross motion for injunctive relief.

The court may grant a preliminary injunction only where a party shows: (1) probability of success on the merits; (2) danger of irreparable injury in the absence of an injunction; and (3) balance of the equities in its favor (Nobu Next Door v Fine Arts Hous., 4 NY3d 839, 840 [2005]; Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]). The court is mindful, however, that "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits" (Gambar Enterprises, Inc. v Kelly Servs., Inc., 69 AD2d 297, 306 [1979] [internal quotation marks and citation omitted]). Therefore, a preliminary injunction may also be granted where injunctive relief is deemed necessary to maintain the status quo, even if the movant's success on the merits cannot be determined at the time that the application for a preliminary injunction is brought (Mr. Natural, Inc. v Unadulterated Food Products, Inc., 152 AD2d 729, 730 [1989] ["the existence of a factual dispute will not bar the granting of a preliminary injunction if one is necessary to preserve the status

quo and the party to be enjoined will suffer no great hardship as a result of its issuance"]; accord U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626, 628 [1988]; Burmax Co. v B & S Indus., Inc., 135 AD2d 599, 600 [1987]). Moreover, 'where . . . the denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced" (State v City of New York, 275 AD2d 740, 741 [2000]; Republic of Lebanon v Sotheby's, 167 AD2d 142, 145 [1990] [same]; see also Bisca v Bisca, 108 Misc2d 227, 233 [1981] ["(where) the purpose (of a preliminary injunction) is only to preserve the status quo, the strength and clarity of plaintiff's showing in support of the application as to his or her probabilities of success in the action, are not so important"]).

Thus, a preliminary injunction to maintain the status quo may be granted even where the court "has grave doubts regarding the likelihood of plaintiff['s] success on the merits" as long as the court finds that "if [the] preliminary injunction is not granted, any subsequent judgment might be rendered ineffectual" (Schlusser v United Presbyterian Home at Syosset, Inc., 56 AD2d 615 [1977]). Generally, such a preliminary injunction is granted where injunctive relief will prevent the potential dissolution of an existing valuable asset or some comparable potential irreparable harm (see e.g. Mr. Natural Inc., 152 AD2d at 730 [preliminary injunction necessary to maintain status quo despite factual

disputes as to merits of claim where "there (was) no assurance that the plaintiff (would) be able to stay in business pending trial" and was in "real danger of losing its business or suffering dissolution" if injunctive relief were not imposed]; U.S. Ice Cream Corp., 136 AD2d at 628 [finding preliminary injunction necessary to maintain status quo where there was "no assurance that the plaintiffs (would) be able to stay in business pending trial" and noting that interference with an ongoing business warranted injunctive relief even where factual disputes exist]; Burmax Co., Inc., 135 AD2d at 600 [preliminary injunction enjoining the distribution of assets was appropriate where injunctive relief was necessary to preserve the status quo and "the defendants w(ould) suffer no great hardship as a result of the issuance of the preliminary injunction"]).

That branch of defendant and third-party plaintiff's motion which seeks to compel Mr. Ma to release his bank accounts is denied as moot. This request has been withdrawn, as plaintiff has released said accounts.

Although Mr. Hu refers to an oral business agreement between the parties, and Sun Rise was incorporated, no other corporate formalities were observed. Mr. Hu and Mr. Ma, in support of their respective positions have submitted inconclusive and contradictory documentary evidence, and conflicting affidavits which present sharp disputes of fact in regard to the alleged

business relationship and agreements between the parties. Thus neither party has sufficiently demonstrated a likelihood of success on the merits as to the main action, the counterclaims or the third-party action. Plaintiff and third-party defendants' reliance upon the default judgment is misplaced, as said judgment was vacated in its entirety by the Appellate Division in its order of August 5, 2008. However, in order to ensure that the assets of Sun Rise, and its financial documents are preserved, injunctive relief in order to preserve the status quo is warranted here.

Therefore, that branch of defendant Hu and third-party plaintiff's motion for an order enjoining and restraining plaintiff and third-party defendants, and all persons acting on their behalf, from destroying or disposing of financial records or any other documents or evidence regarding the income, assets, expenses, or disposal of assets any other of third-party plaintiff Sun Rise International Inc. and third-party defendant New Orient International Inc., and enjoining third-party defendants, their agents, and employees from spending, selling, transferring, encumbering or wasting any assets, including chattels of Sun Rise International, Inc. and Hong Guang Hu, is granted, upon condition that defendant and third-party plaintiffs post an undertaking in an amount to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof of recommendations as to the amount of the undertaking to be fixed

(CPLR 6312[b]).

That branch of third-party defendants' cross motion for an order enjoining third-party plaintiffs, their agents and employees and anyone acting on their behalf from destroying and or disposing of any financial records or any other documents or evidence regarding the income, assets, expenses, or disposal of assets of the third-party plaintiff and Sun Rise International, Inc of third-party plaintiffs and Sun Rise, and enjoining third-party plaintiffs, their agents, employees and anyone acting on their behalf from selling, spending, transferring, encumbering or in any way wasting assets of Sun Rise International, is granted, upon condition that plaintiff and third-party defendants post an understanding in an amount to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof of recommendations.

That branch of third party defendant's cross motion which seeks costs and attorney fees in connection with the cross motion is denied.

Settle order.

Dated: January 5, 2009

AUGUSTUS C. AGATE, J.S.C.