

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

FRANKLIN PIMENTEL, X
- against -
IOSIF AMINOV and OLGA BUGA
a/k/a OLGA BUGA AMINOV X

INDEX NO. 22164/08
MOTION SEQ. NO. 1
BY: KITZES, J.
MOTION DATE: February 25, 2009
MOTION CAL NO: 44
DATED: March 23, 2009

Plaintiff Franklin Pimentel has moved for a preliminary injunction, inter alia, prohibiting defendant Iosif Aminov and defendant Olga Buga from enforcing a promissory note he executed on or about March 4, 2008. The defendants have cross-moved for summary judgment dismissing the complaint against them.

Plaintiff Pimentel alleges the following: In or about January, 2008, the defendants contacted him about investing in a food market located at 97-48 63rd Road, Rego Park, New York. Universal Food I, Inc., then wholly owned by the defendants, operated the food market under the name "Universal Food." The defendants made representations to Pimentel regarding the business of the food market, and they provided him with gross and net sales records. Relying on the representations of the defendants, the plaintiff entered into a contract (the transfer agreement) dated March 4, 2008 pursuant to which defendant Aminov and defendant Buga

sold him eight and two shares of stock in Universal Food I, Inc. respectively, amounting to a half interest in the corporation. Plaintiff Pimentel agreed to pay \$350,000 for the stock, and the defendant sellers agreed to take part of the payment in the form of a promissory note for \$125,000 due on September 4, 2008. The plaintiff further agreed that the purchased stock would be placed in escrow until he paid the promissory note in full, although the transfer agreement provided that he was to "enjoy and exercise all rights of ownership of said shares ***." After he began to participate in the operation of the business, he discovered that the defendants had made false representations concerning the sales and prospects of the business and had also engaged in the creation of false sales records. While the sales records of the food market showed large single item sales made in the approximate amount of \$2,000 per day for the months prior to his purchase of the business interest, these purported sales, amounting to over \$10,000 per week, never reoccurred after he became an owner. The defendants have also diverted corporate funds and improperly removed property used at the food market. Moreover, TGF Production LLC and Anzor Pichkhadze have brought an action in the New York State Supreme Court, County of Queens, alleging, inter alia, that Aminov and Buga have breached agreements to give Pichkhadze an ownership interest in Universal Food I, Inc. and that they have failed to repay

promissory notes (TGF Production LLC v Univesal Food I, Inc., Index No. 28990/08).

On the other hand, the defendants allege that the plaintiff does little or nothing around the food mart and that the business has deteriorated due to his misconduct. Defendant Buga further alleges that she uses corporate funds only for business purposes.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) Defendant Buga and defendant Aminov failed to carry this burden. The plaintiff has stated a cause of action for fraud in the inducement. (See, Silber v Muschel, 190 AD2d 727.) The plaintiff's nonpayment of the promissory note due on September 4, 2008, is not a defense to the cause of action for fraud in the inducement. "[F]raud in the inducement like a material breach, excuses performance by the other party to a contract ***." (National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Associates, 257 AD2d 1, 6, quoting National Union Fire Ins. Co. of Pittsburgh, Pa. v Turtur, 892 F2d 199, 204.) The plaintiff has also stated a cause of action for breach of fiduciary duty. Those shareholders who are in control of a close corporation owe a fiduciary duty to the other shareholders (see,

O'Neill v. Warburg, Pincus & Co., 39 AD3d 281; Richbell Info. Servs. v Jupiter Partners, 309 AD2d 288), and "an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or her duties ***." (Chemfab Corp. v Integrated Liner Technologies, 263 AD2d 788, 789; see, Mega Group Inc. v Halton 290 AD2d 673.) The plaintiff's non-payment of the promissory note is not a defense to the cause of action for breach of fiduciary duty, since the transfer agreement gave him the rights of a shareholder upon partial payment for the shares. Paragraph 6 of the transfer agreement expressly provided: "Notwithstanding the fact that the shares are held in escrow, Transferee shall have, enjoy, and exercise all rights of ownership of said shares ***." The plaintiff has "standing" to assert a cause of action for breach of fiduciary duty.

Accordingly, the defendants' cross motion for summary judgment is denied.

Turning to the plaintiff's motion for a preliminary injunction, he had the burden of showing (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a weight of the equities in his favor. (See, Aetna Insurance Co. v Capasso, 75 NY2d 860.) Plaintiff Pimentel successfully carried this burden to the extent indicated herein. In regard to the first requirement, the

plaintiff demonstrated a likelihood of success on the merits by showing that his causes of action for fraud in the inducement and breach of fiduciary duty have prima facie merit. (See, Witham v VFinance Investments, Inc., 52 AD3d 403; Trimboli v Irwin, 18 AD3d 866.) Although factual issues exist in this case, they do not in themselves preclude the issuance of a preliminary injunction. (See, CPLR 6312[c]; Egan v New York Care Plus Ins. Co., 266 AD2d 600; Board of Managers of 235 East 22nd Street Condominium v Lavy Corp., 233 AD2d 158.) In regard to the second requirement, the record shows that equitable relief is a more efficient remedy than monetary damages. (See, People by Abrams v Anderson, 137 AD2d 259; Poling Transp. Corp. v A & P Tanker Corp., 84 AD2d 796.) Universal Food I, Inc. operates a cash business, and damages would be difficult to prove. (See, Gundermann & Gundermann Ins. v Brassill, 46 AD3d 615.) In regard to the third requirement, plaintiff Pimentel demonstrated that the alleged irreparable injury to be sustained by him is more burdensome than the harm that will be caused to the defendants through imposition of the injunction. (See, Reuschenberg v Town of Huntington, 16 AD3d 568; Credit Index, L.L.C. v Riskwise Intern. L.L.C., 282 AD2d 246; Mr. Natural, Inc. v Unadulterated Food Products, Inc., 152 AD2d 729; McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc., 114 AD2d 165; Metropolitan Package Store Ass'n, Inc. v Koch, 80 AD2d 940; Nassau

Roofing & Sheet Metal Co., Inc. v Facilities Development Corp.,
70 AD2d 1021; 67A NY Jur2d, "Injunctions," § 31.)

Accordingly, the plaintiff's motion for a preliminary injunction is granted to the extent that, unless otherwise agreed, the defendants are (1) prohibited from removing any cash, credit card receipts, debit card receipts, food stamps, and other income and assets of Universal Food I, Inc. except with the knowledge and consent of the plaintiff, (2) prohibited from depositing any cash, credit card receipts, debit card receipts, food stamps, and other income into a bank account other than one under the joint control of the parties, (3) prohibited from denying the plaintiff access to the business records of Universal Food I, Inc., and (4) directed to pay all proper bills issued to Universal Food I, Inc. on a timely basis and with the knowledge and consent of the plaintiff. The parties may submit affidavits concerning the proper amount of the undertaking as the time of the settlement of the order.

Settle order.

J.S.C.