Ciment v. SpanTran, Inc., 2017 BL 10593 (Sup. Ct. Jan. 06, 2017) [2017 BL 10593]

Pagination
* BL

New York Supreme Court

IVAN CIMENT, Plaintiff, - against - SPANTRAN, INC. and MORNINGSIDE EVALUATIONS, INC., Defendants. Index No. 655680/2016

655680/2016

January 6, 2017, Decided

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Hon. Charles E. Ramos, J.S.C.

Charles E. Ramos

Plaintiff Ivan Ciment ("Plaintiff") moves, pursuant to **CPLR 6301** , for an order to enjoin Defendants SpanTran Inc. ("Spantran") and Morningside Evaluations, Inc. ("Evaluations") (collectively, "Defendants") from taking actions that violate the shareholders agreement ("Shareholders Agreement"), dated April 1, 2001, including, but not limited to: (I) reconstituting or changing the composition of the board of directors; (ii) borrowing, lending, investing, or guaranteeing in amounts of $20,0000 or above (iii) acquiring another entity or business;(iv) merging SpanTran or Evaluations with one another or with other entities; and (v) SpanTran's indemnification of Josh Eisen's personal criminal action ("Eisen").

Background

According to the complaint, Plaintiff is a natural person residing at 235 West 76th Street, New York, New York. Plaintiff, Eisen, Baruki Cohen ("Cohen"), and Josh Rosman ("Rosman"), founded Morningside Translations, Inc., ("Translations"), (collectively, "Founders"), a company which provides professional translation services for business, academic, and governmental enterprises in over 100 different languages. The Founders executed the Shareholders Agreement in 2001, distributing the shares as follows: Eisen with 61%, Plaintiff with 10%, and Rosman and Cohen owned the rest in equally. A change in ownership resulted in Eisen owning 51% and Plaintiff owning 34% of the issued and outstanding shares, leaving several employees with the remainder.

Section I of the Shareholders Agreement provides that it shall "apply to [Translations] and all business entities owned by [Translations]". Although Translations had not acquired any other entities at the time the, Shareholders Agreement was executed, the parties contemplated that Translations would grow significantly throughout the years (*See* Poretz Aff. ¶3). Section I also provides that any amendment to the Shareholders Agreement must be on the unanimous consent of the shareholders.

Section II of the Shareholders Agreement states that all agreements between shareholders or individuals which affect the rights of shareholders must be in writing and acknowledged, also in writing, by the other shareholders. Section II further provides, in relevant part:

> Actions which amend the Corporation's certificate of incorporation or bylaws, this Agreement or the Shareholders Agreement, dilute the interests of any shareholder, or which have the intent and effect of substituting this corporation with another corporation possessing substantially the same assets and conducting the same business shall require the unanimous vote of shareholders.

(Poretz Aff., Exh. A at § II)

Section V through VII-A of the Shareholders Agreement sets the salary for each shareholder. An amendment to the Shareholders Agreement, effective **[*2]** January 1, 2005, increased Eisen's salary to $80,000 so long as he works a five-day work week and Plaintiff's salary to $80,000 without such requirement.

Section X(6) of the Shareholders Agreement requires the "vote or written consent of all...board members or the act shall be void" in the following circumstances:

> I. Causing the Corporation to merge with another corporation or to dissolve or to liquidate;
> ii. Any transaction involving at least 35% of the assets of the Corporation in quantity or value;
> iii. Causing the Corporation to undertake, execute or perform any action, contract or commitment which would fundamentally or materially change or affect the nature, status, economic position, control or purpose of the Corporation;
> iv. Causing the Corporation to enter into and/or settle a contest (ie: litigation) involving a court of law or involving any third party claims in excess of $25,000;
> v. Causing the Corporation to borrow, lend, invest or guarantee in amounts of $20,000 or above.

(Poretz Aff., Exh. A at § X.6)

Section XIX of the Shareholders Agreement, entitled Indemnification, provides, in relevant part:

> Each Shareholder shall indemnify and hold harmless the Corporation and the other Shareholder from and against all claims, actions, demands, costs, expenses, damages and losses as a result of any, claim, or legal proceeding brought by either a third party or by a party to this Agreement relating to any material gross negligence, material or reckless misconduct or fraud committed by such Shareholder in the course of the Corporation's business or otherwise, such indemnification to include, without limitation, any amounts paid or to be paid in satisfaction of judgments, in settlement or compromise, or as fines and penalties, together with attorneys' fees and disbursements reasonably incurred in connection with the defense of or disposition of any action, suit or proceeding...

(Poretz Aff., Exh. A at § XIX)

Translations grew rapidly throughout the years. On May 2, 2007, Eisen, as purchaser, and Barbara B. Glave, as seller, entered into a stock sale and purchase agreement ("Stock Sale and Purchase Agreement") for the acquisition of SpanTran Educational Services. However, prior to the execution of the stock sale and purchase agreement for SpanTran, pursuant to a supplemental agreement dated April 26, 2007, Plaintiff and Eisen jointly purchased SpanTran, with Eisen owning 61% and Plaintiff owning 39% ("April 26th Supplemental Document").

Subsequently, in 2011, Evaluations, a division of Translations, spun off into its own independent entity ("Spin-off Agreement"). According to Section 2.1 of the Spin-off Agreement, "all of the issued and outstanding capital stock of each of Tekademic and MEI will be registered in the names of, and owned by, the holders of Tekademic Common Stock on the Record Date" (*See* Eisen Aff., Exh. 3). Similar to SpanTran, Evaluations does not have its own governing documents.

Cohen and Rosman subsequently sold their shares to Plaintiff and Eisen, leaving the parties to this action as the sole shareholders of Translations and other related entities. **[*3]** This shift was memorialized in a subsequent amendment to the Shareholders Agreement dated May 31, 2005.

On July 31, 2014, Plaintiff and Eisen entered into an interim agreement ("Interim Agreement"), which amended the Shareholders Agreement and defined Translations, Evaluations, and SpanTran as the common entities (the "Common Entities"). The Interim Agreement also states that Plaintiff and Eisen were involved in negotiating new ownership and governance documents for the Common Entities. However, as of this date, the Parties have not yet negotiated new governance documents for the Common Entities. The Interim Agreement also expressly provides that all other agreements between the parties remain in full force and effect.

Throughout the years, Plaintiff and Eisen had multiple business disputes. Eisen allegedly sought to "reconfigure" the Board of Directors to deprive Plaintiff of his rights as provided in the Shareholders Agreement. Eisen also purportedly arranged to merge SpanTran and Evaluations into one entity without Plaintiff's approval and to appoint a compensation consultant to determine his compensation. Additionally, Eisen also attempted to seek indemnification from SpanTran to pay for the legal fees in his pending criminal court case.

On October 26, 2016, Plaintiff commenced the instant action, seeking a judgment declaring that the Shareholders

Agreement applies to Evaluations and SpanTran and that Plaintiff is a director of each entity, thereby requiring his consent for all such matters as set forth in the Shareholders Agreement. Simultaneously, Plaintiff has moved by way of order to show cause to enjoin Defendants from taking any action that violates the Shareholders Agreement.

On October 28, 2016, this Court granted the Plaintiff's temporary restraining order, pending determination of the underlying application.

Discussion

A party seeking preliminary injunctive relief pursuant to **CPLR 6301** must demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in his or her favor (*W.T. Grant Co. v Srogi*, 52 NY2d 496, 420 N.E.2d 953, 438 N.Y.S.2d 761 [1981]).

A. Likelihood of Success on the Merits

A plaintiff need not demonstrate a certainty of success (*Doe v Dinkins*, 192 AD2d 270, 275-76, 600 N.Y.S.2d 939 [1st Dept 1993]). The existence of a factual dispute does not prevent a party from establishing a likelihood of success on the merits (*Sau Thi Ma v Xaun T. Lien*, 198 AD2d 186, 604 N.Y.S.2d 84 [1st Dept 1993]).

Plaintiff contends that he has established a claim for declaratory judgment because of the applicability of the Shareholders Agreement and the Interim Agreement to SpanTran and Evaluations, thereby giving Plaintiff minority rights in such entities. Plaintiff argues that the Shareholders Agreement applies' to "all business entities owned by [Translations]" in the absence of an agreement proving otherwise (Poretz Aff. Exh. A at § I). According to Plaintiff, since Plaintiff and Eisen have yet to negotiate subsequent agreements, the Shareholders Agreement continues to govern SpanTran **[*4]** and Evaluations, both as Common Entities. Moreover, because Plaintiff and Eisen intended that the Shareholders Agreement would extend to Common Entities, there was no urgent need to draft additional documents.

Conversely, Defendants argue that the Shareholders Agreement does not apply to future entities absent explicit language in the agreement itself. In support of their argument, Defendants cite to *Ellington v EMI Music, Inc.*, where the Court of Appeals concluded that, "absent explicit language demonstrating the parties' intent, the term 'affiliates' only refers to those in existence when the contract was executed" (24 NY3d 239, 246, 997 N.Y.S.2d 339, 21 N.E.3d 1000 [2014]).

The Court rejects Defendants' arguments, and finds *Ellington* to be inapposite because, here, it is undisputed that Translations did not own any entities when the Shareholders Agreement was executed but both Plaintiff and Eisen had contemplated for future growth. Instead, the phrase "all other entities owned" was included in Section I of the Shareholders Agreement to demonstrate an intent by the parties to include future entities. The Shareholders Agreement specifically contemplated the possibility that Translations would acquire additional companies under the same division of ownership. Further, it is important to note that the minutes from the July 31, 2014 meeting of SpanTran Board of Directors lists Plaintiff as a Director of the company (*See* Poretz Aff. Exh. C).

Defendants argue, in the alternative, that both SpanTran and Evaluations are owned by individual shareholders instead of Translations, and therefore the Shareholders Agreement does not apply. Defendants point to Paragraph 13 of the Complaint, wherein Plaintiff alleges that Eisen owns approximately 51% and he owns 34% of the issued shares of Translations. A supplemental agreement dated April 26, 2007 ("April 26th Supplemental Agreement"), also states that Plaintiff owns 34% of the outstanding shares and Eisen owns 51% of the outstanding shares of Translations. Thus, according to Defendants, Plaintiff and Eisen, and not Translations, are the sole owners of SpanTran.

A question of fact remains as to whether the parties intended that the Shareholders Agreement, including its protections against majority shareholder oppression, apply to SpanTran and Evaluations. The fact that SpanTran and Translations have the same division of ownership combined with the April 26th Supplemental Agreement evidencing Plaintiff's rights in SpanTran suggests that the Shareholders Agreement extends to SpanTran as well.

Nonetheless, issues of fact alone will not justify denial of a motion for preliminary injunction under **CPLR 6312(e)** if a Plaintiff has otherwise demonstrated a clear right to relief (*See Four Times Sq. Assoc. L.L.C. v Cigna Invs., Inc.*, 306 AD2d 4, 5, 764 N.Y.S.2d 1 [1st Dept 2003]).

B. Irreparable Injury if Relief is not Granted

Plaintiff alleges that he will suffer irreparable injury beyond monetary damages due to Defendants' threats to change the status quo, resulting in Plaintiff's loss of corporate control of SpanTran and Evaluations. **[*5]** Should an injunction be denied, Plaintiff will be deprived of the opportunity to object to the merger of SpanTran and Evaluations, the change in composition of the Board of Directors, and the acquisition

of another business entity, which Eisen is threatening, all of which violate Section X(6) of the Shareholders Agreement.

Plaintiff also alleges that he will suffer irreparable harm should SpanTran indemnify Eisen for criminal defense attorney costs related to his charge for stalking in the fourth degree (*See* Poretz Aff. ¶¶ 18-22). Plaintiff asserts that indemnification for private behavior violates fundamental corporate law as well as Section XIX of the Shareholders Agreement.

Since the abovementioned actions impact Plaintiff's minority shareholder rights, they must be agreed to in writing, as provided in Section II of the Shareholders Agreement. Further, should Eisen's attempts be successful, Plaintiff has reason to be concerned that he could be prohibited from visiting the Common Entities' offices, would not receive financial information relating to the Common Entities, and be prevented from speaking with his fellow employees.

In contrast, Defendants argue that the abovementioned actions will not result in irreparable harm because Plaintiff, as a minority shareholder, lacks standing to prohibit these actions. Defendants further argue that, even if the Shareholders Agreement were to apply, any of the resulting harm, such as bringing in a compensation expert to determine salaries, would be compensable with money damages.

Plaintiff has made adequate showing of irreparable harm by establishing that failure to maintain the status quo will deprive Plaintiff of his bargained-for minority rights. Maintaining the status quo will ensure that Defendants will not implement fundamental corporate changes without Plaintiff's consent or take prohibited actions, such as having SpanTran indemnify Eisen for the fees for his private criminal conduct (*See Walker & Zanger v Zanger*, 245 AD2d 144, 144, 666 N.Y.S.2d 152 [1st Dept 1997]).

Plaintiff has also effectively demonstrated that money damages are insufficient to compensate him for the denial of bargained-for minority rights as set forth in the Shareholders Agreement (*See Sirius Satellite Radio v Chinatown Apts., Inc.*, 303 AD2d 261, 756 N.Y.S.2d 557 [1st Dept 2003]). Such bargained-for minority rights allow Plaintiff to participate in the decision to merge SpanTran and Evaluations, hire a compensation expert, and shift the management of SpanTran's Board of Directors. Additionally, the loss of decision making rights and corporate control is not capable of being calculated to a reasonable degree of certainty (*Casita, LP v Maplewood Equity Partners (Offshore) Ltd.*, 17 Misc3d 1137[A], 9, **851 N.Y.S.2d 68** , **2007 NY Slip Op 52322[U]** [Sup Ct, NY County 2007]).

C. Balance of the equities

The "balancing of the equities" usually requires that the court look to the relative prejudice to each party accruing from a grant or a denial of the requested relief (Ma, **198 AD2d at 186-87**).

Defendants assert that an injunction will impede Eisen's ability to regularly operate the **[*6]** business. However, it would be inequitable to allow Defendants to breach the Shareholders Agreement until the Court can determine the parties' ultimate rights. Defendants further allege that it would be unjust to provide Plaintiff with additional minority protections that he could have and should have bargained for earlier.

Plaintiff asserts that enforcement of the Shareholders Agreement and Interim Agreement, thereby preserving the status quo, will not result in any harm to Defendants. Plaintiff represents that in the past year, there has been a continuous flow of e-mails from Eisen to Plaintiff, employees of the Common Entities, and Plaintiff's wife, each containing anti-Semitic slurs and derogatory comments (*See* Poretz's Aff. Exh. H).

According to Plaintiff, it would be inequitable to allow the recipients of these emails to continue to be the subject of such abuse and hostility. It also must be noted that in June 2016, Eisen was arrested and charged with stalking in the fourth degree after he sent similar harassing and verbally abusive emails to Plaintiff's wife. Defendants have failed to dispute these allegations. It would be unjust to allow Eisen to utilize his position as a majority shareholder to harass and manipulate his employees and their family members.

Defendants have failed to establish that they will suffer hardship merely from being bound by their contractual obligations (*See Somers Assoc. v Corvino*, 156 AD2d 218, 548 N.Y.S.2d 480 [1st Dept 1989]). It is evident that Plaintiff will be prejudiced absent injunctive relief, as he would be prohibited from taking part in the corporate governance of the Common Entities, as well as be the subject of the appalling emails. Defendants have failed to set forth any calculable and specific harm that will result from the granting of an injunction.

This Court is persuaded that the equities tip in Plaintiff's favor, and reject Defendants' argument that any harm experienced by the Plaintiff is too speculative.

Pending a determination on the merits, a preliminary injunction will serve to maintain the status quo, thereby prohibiting any future violations of the Shareholders Agreement and any further harm to Plaintiff.

Accordingly, it is further

ORDERED that Plaintiff's motion for a preliminary injunction is granted.

Settle order on notice.

Dated: January 6, 2017

ENTER:

/s/ Charles E. Ramos

J.S.C.

General Information

Judge(s)	Charles E. Ramos
Topic(s)	Mergers & Acquisitions; Civil Procedure; Corporate Law
Industries	Professional Services
Date Filed	2017-01-06 00:00:00
Court	New York Supreme Court
Parties	IVAN CIMENT, Plaintiff, - against - SPANTRAN, INC. and MORNINGSIDE EVALUATIONS, INC., Defendants. Index No. 655680/2016