DANE VASILIC, individually and on behalf of Paragon Contracting, Inc., Plaintiff vs. GORAN LAZEVSKI, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION:ESSEX COUNTY DOCKET NO. C-212-05

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

Plaintiff is not entitled to the injunctive relief he seeks in his application for the simple reason that even if he could show a likelihood of success on the merits, which he cannot, he has adequate remedies available to him at law. Plaintiff seeks compensatory damages in the form of monetary relief. It is black-letter law that a claim for money damages is simply not an appropriate basis to ask a court to employ the extraordinary remedies of equity, especially a preliminary injunction.

In any event, plaintiff cannot show a probability of success on the merits for several reasons. First, there is a myriad of facts underlying this suit that are in dispute. Further, plaintiff's claim of shareholder oppression is rebutted by the fact that the parties' expectations were frustrated by plaintiff's failure to satisfy conditions precedent to the parties' agreement, including plaintiff's refusal to obtain an asbestos license to properly perform his work. Plaintiff's further refusal to do any work led to his removal from the payroll.

Additionally, plaintiff's threats to siphon the company's bank account necessitated Mr. Lazevski's actions to remove plaintiff from the corporate bank account. Mr. Lazevski's actions are therefore amply justified under the business judgment rule.

Finally, plaintiff has not acted in good faith in bringing this action because he has ignored plaintiff's requests to make an offer for sale of his 49% share in the corporation; he has unilaterally attempted to terminate the General Indemnity Agreement with the corporation's surety without Mr. Lazevski's permission or knowledge; and he never contacted Mr. Lazevski after he offered full cooperation with plaintiff's request to view the corporation's financial records.

STATEMENT OF FACTS

Paragon Contracting, Inc. ("Paragon") is a company involved in the business of asbestos removal. The company was founded by Goran Lazevski.

Plaintiff[1] obtained a 49% share in Paragon pursuant to a Shareholder Agreement that was signed on November 14, 2003. Plaintiff and Mr. Lazevski agreed that plaintiff would finance the projects of the corporation and supervise projects. Mr. Lazevski was to provide clients and manage all the administrative work related to projects. Lazevaski Cert. at ¶¶4-5.

Mr. Lazevski has always consulted plaintiff with respect to decisions regarding equipment rental, including scissor lifts,

[1] Mr. Lazevski does not intend to waive defenses relating to plaintiff's compliance, *vel non*, with R. 4:32-5 and related caselaw relating to derivative actions by shareholders. Because plaintiff is making his claims in his own name as well as a under a derivate rights theory, we address his claims on the merits only at this time.

power generators, and portable toilets. Id. at ¶6. The company purchased two trucks, which purchase was mutually agreed upon by plaintiff and Mr. Lazevski. Id. at ¶¶8-9.

The company acquired an office in Clifton, New Jersey. Plaintiff introduced Mr. Lazevski to Paragon's landlord. The office rental agreement was signed by Mr. Lazevski in his capacity as a director of the corporation; however, the decision to rent the space was based on mutual agreement between plaintiff and Mr. Lazevski. Id. at ¶7. Plaintiff never complained about any decisions regarding equipment rental, rental agreements or purchases, including truck purchases, until the filing of his complaint. Id. at ¶10.

Under New Jersey law, an asbestos license is required to supervise asbestos removal projects. Mr. Lazevski possesses such license. Indeed, New Jersey asbestos regulations require that only licensed personnel can enter a work area. N.J.S.A. 34:5A-35 *et seq.* See Exhibit B and C to Lazevski Cert. Mr. Lazevski had been urging plaintiff to take the necessary classes and exam to obtain his asbestos removal license since October 2003. Lazevski Cert. at ¶12. But he did not, and for that reason plaintiff could not fulfill his obligation to the company to manage the projects. As a result, the company was forced to hire contractors to conduct the supervision of company projects while plaintiff amused himself. Id. at ¶¶11-17.

In early February of this year, the company was not engaged in any active projects. On or about February 2, 2005, Mr. Lazevski told plaintiff that he was not performing his job because he was not taking the steps necessary to obtain his asbestos license. Id. at ¶20. Plaintiff responded to Mr. Lazevski's he, plaintiff, "was the boss," and that he would do what he wanted. Mr. Lazevski suggested that plaintiff go to Virginia to inspect a job that Paragon had wanted to bid on. Plaintiff refused to do so. Id. at ¶¶21-22. That same day, Mr. Lazevski informed plaintiff that Mr. Lazevski would take him off the payroll for refusing to do any work. Plaintiff responded that he would go directly to the bank and make withdrawals as he wished. Id. at ¶¶24-25. In order to protect Paragon's ability to operate, Mr. Lazevski took plaintiff off the bank account, based on his threats. Id. at ¶26.

After these incidents, plaintiff and Mr. Lazevski engaged in conversations regarding plaintiff's weekly pay, in which plaintiff maintained that he is entitled to a salary even if he refused to perform any work. Id. at ¶27. On or about February 7, 2005, plaintiff and his wife came to Mr. Lazevski's home and further discussed plaintiff's removal from the payroll. Id. at ¶27.

During this conversation, plaintiff told Mr. Lazevski that if it were not possible to resolve the situation, plaintiff

would pull out of the corporation in return for compensation. Mr. Lazevski told plaintiff to make him an offer. Id. at ¶¶29-30. When Mr. Lazevski did not hear from plaintiff after several days, he attempted to contact the plaintiff via telephone and in writing. Plaintiff never responded to Mr. Lazevski directly.

Instead, in March, 2005, Mr. Lazevski received a letter from plaintiff's legal counsel. Id. at ¶33. Mr. Lazevski contacted plaintiff's attorneys in March 2005 and requested that they contact him by March 30, 2005 to resolve the conflict between plaintiff and himself. Id. at ¶34. By this time, plaintiff had seriously defaulted in his obligations to the corporation, especially his responsibility to finance projects on behalf of the corporation. Plaintiff has not financed one project since January 2005.

Section 2.1 of the Shareholder Agreement provides, in part:

> 2.1 Offer of Shares of Corporation. If a Shareholder wishes to sell, transfer, assign or otherwise dispose of all or any part of his Shares, or if a Shareholder receives an offer to purchase all or any part of his Shares from any person other than the Shareholders or from any other entity and such Shareholder wishes to accept such offer and sell all or any part of his Shares, then such Shareholder (hereinafter the "Selling Shareholder") shall first offer to sell all or any such part of his Shares (hereinafter, for all or any such part, a s the case may be, the "Subject Shares") to the Corporation. Such offer shall be in writing and shall be given in accordance with the provisions of Section 12 below. under Section 12 of the Shareholder Agreement, Plaintiff is to provide in writing his intention to sell his shares of stock in Paragon. Plaintiff has never provided Mr. Lazevski or Mr. Lazevski's attorneys with a written request to

> sell his shares of stock, nor has he provided Mr. Lazevski with any specific oral request that provides a monetary amount. Plaintiff has never formally resigned from the corporation. While Mr. Lazevski waited for plaintiff to communicate his wishes under the terms of the Shareholder Agreement and to fulfill his obligations under such agreement, the company's activities were suspended.

Section 2.2 provides, in part, as follows:

> 2.2 Offer of Shares to Other Shareholders. If the Corporation accepts such offer as to less than all of t he Subject Shares, does not accept the offer or fails to respond to the offer within such thirty (30) day period, the Selling Shareholder shall then offer to sell the Subject Shares or, in the case of the Corporation's acceptance as to less than all of the Subjected Shares, the remaining Shares, to the other Shareholders. Such offer shall be in writing and shall be given in accordance with the provisions of Section 12 below.

Section 12 provides as follows:

> Section 12. NOTICE. Any notice required or permitted to be given hereunder shall be in writing and s hall be delivered in person to the recipient or sent to the recipient through the United States Mail, first class, at the address for such recipient set forth at the head of this Agreement or at such other address as such recipient shall have designated in a notice to the other parties hereto given in accordance with the terms of this Section.

In May 2005, plaintiff's attorney requested that Mr. Lazevski's attorney contact him. This office complied, speaking and writing to plaintiff's counsel and inviting plaintiff to suggest "how to proceed" to bring this dispute to a close. Coleman Cert. ¶6. During this time, and despite its knowledge

of the fact and identity of this representation, plaintiff's counsel sent ex parte correspondence to Paragon's corporate counsel, which had already properly refused to represent either side in this matter. Id. at ¶¶9-11. Further, plaintiff unilaterally and clandestinely purported to terminate the General Indemnity Agreement with the corporation's surety, also without Mr. Lazevski's permission or knowledge. Coleman Cert., at ¶7.

Further, plaintiff's attorneys had requested Paragon's corporate records. Mr. Lazevski produced all the corporate records in their entirety through his attorneys. See Exhibit B to Coleman Cert. Plaintiff's attorneys never requested additional information regarding the financial records, nor communicated in any way with Mr. Lazevski's attorneys after that. Id. at ¶¶7-12. Plaintiff has never made a formal offer to sell his 49% shares of stock in Paragon either to the corporation or to Mr. Lazevski, individually. Lazevski Cert. at ¶39. Rather than attempt any resolution pursuant to the shareholder agreement, plaintiff filed the instant action.

Mr. Lazevski received pay for work performed only. Mr. Lazevski did not receive any distribution of profits. Mr. Lazevski certainly never mismanaged the corporation and the financial records show this. Further, Mr. Lazevski has never

distributed corporate profits for his personal use, and the financial records show this as well. Id. at ¶¶49-50.

ARGUMENT

I. Plaintiff is Not Entitled to Emergent Relief Because He Has Failed to Demonstrate Irreparable Harm.

Plaintiff is not entitled to injunctive relief because he has adequate remedies available to him at law. A preliminary injunction should not be issued unless necessary to prevent irreparable harm. Crowe v. DeGioia, 90 N.J. 126, 131 (1982). It is axiomatic that harm is considered irreparable only if it cannot be adequately addressed by monetary damages. Id.

The moving party bears the burden of showing irreparable harm. Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1219 (D.N.J. 1976). Here, plaintiff seeks monetary relief for "corporate profits due and owing to him," sale of plaintiff's stock in Paragon Contracting, Inc. "for fair value," and "repayment" to Paragon of some unspecified funds. Plaintiff's Mem. of Law. at 3. It is clear from these demands that plaintiff can be made whole at the end of the litigation, if he prevails, by the payment of money. In Judice's Sunshine, supra, the court denied the granting of a preliminary injunction because the plaintiff was able to recover costs and attorneys fees should he prevail in litigation. Id. at 1222. The Court reasoned that "the possibility that adequate compensatory or

other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Id. The Judice's Sunshine's court's reasoning is applicable in this case. Therefore, plaintiff's application should be denied.

II. Plaintiff Has Not Shown a Probability of Success on the Merits.

A. The Material Facts are in Dispute.

Plaintiff cannot show a reasonable probability of success on the merits. First, Mr. Lazevski disputes essentially all the material facts underlying plaintiff's claims. Crowe v. DeGioia, 90 N.J. at 131 ("a preliminary injunction should not issue where all material facts are controverted"). For example, Mr. Lazevski disputes plaintiff's claims that Mr. Lazevski did not consult with him about matters pertaining to significant business matters, such as equipment and office rentals, and the purchase of a new truck. Lazevski Cert. at ¶¶6-10.

Further, Mr. Lazevski contests plaintiff's claims that Mr. Lazevski "exploited [plaintiff's] vulnerability by engaging in abusive exercise of corporate power by failing to agree to [plaintiff's] proposed terms for the purchase of his stock as a minority shareholder." Plaintiff's Memo. of Law at 9. In fact, plaintiff never presented to Mr. Lazevski or the corporation any proposed terms for the purchase of his stock, as provided for in

the Shareholder Agreement, despite Mr. Lazevski's request and the requirement of the Shareholder Agreement that plaintiff do so. Lazevski Cert.at ¶32; see also Shareholder Agreement, provisions 2.1, 2.2, and 12.

With respect to plaintiff's claims of shareholder oppression, Mr. Lazevski further disputes plaintiff's claim that the owners of the corporation did not have "specified duties" (even granting the absurd implication that, absent such a specification, plaintiff was free to do nothing at all to earn his salary). The understanding between the parties was that plaintiff was to finance projects and to supervise the projects to completion. Lazevski Cert.at ¶4. As part of his job, plaintiff was required to obtain an asbestos license to supervise projects. Plaintiff failed to do so. Therefore, there was no shareholder oppression in Mr. Lazevski removing plaintiff from the corporation's payroll.

Further, plaintiff claims that Mr. Lazevski mismanaged the corporation and distributed corporate profits for his personal use. Mr. Lazevski denies both of these allegations. Lazevski Cert. at ¶50-51, and the record supports this denial. Plaintiff's claim in his complaint, upon which he relies for application of an Order to Show Cause, that "since November 2003, Mr. Lazevski has mismanaged Paragon Contracting, Inc.," certainly does not warrant emergent relief at this stage, given

the remoteness in time. Complaint at ¶16. Moreover, plaintiff provides no specific examples to support these allegations.

It should be noted that plaintiff has ignored all of Mr. Lazevski's requests of an offer for sale of plaintiff's 49% shares in the corporation. Further, plaintiff never followed up with Mr. Lazevski's production of Paragon's corporate records and request for a non-litigation solution before filing this motion. Coleman Cert. at ¶¶7-12. Such bad faith does not warrant the granting of emergent relief. Therefore, the remaining relief plaintiff seeks – inspection of Paragon's financial records and an independent evaluation of the same — should also be denied.

B. Mr. Lazevski's Actions Do Not Constitute Shareholder Oppression.

Plaintiff claims that Mr. Lazevski acted in bad faith by engaging in "oppression" when plaintiff removed plaintiff from the company payroll. In determining whether shareholder oppression is present, courts must determine the minority shareholder's reasonable expectations of his or her role in the corporation, including non-monetary expectations. Brenner v. Berkowitz, 134 N.J. 488, 509 (1993). The New Jersey courts have reasoned that a minority shareholder's expectations must be "balanced against the corporation's ability to exercise its

business judgment and run its business efficiently." Muellenberg v. Bikon Corp., 143 N.J. 168, 179 (1996).

The facts show that Mr. Lazevski's actions are justifiable upon reliance on the business judgment rule. The business judgment rule "instructs that a decision made by a board of directors pertaining to the manner in which the corporate affairs are to be conducted should not be tampered with by the judiciary so long as the decision is one within the power delegated to the directors and there is no showing of bad faith." Exadaktilos v. Cinnaminson Realty Co., 167 N.J. Super 141, 141 (Law Div. 1979).

In Exadaktilos, the court held that the controlling shareholder's actions of discharging a minority shareholder from a corporation did not amount to shareholder oppression. Id. at 156. In that case, the minority shareholder was found to have "failed to get along with employees, causing the loss of key personnel, that he quit on more than one occasion, without reason or notice, and that he was not compatible with the other principals." Id. at 155. The court concluded that plaintiff's discharge was due to his "unsatisfactory performance." Id. The court reasoned that "the promise of employment was honored, the opportunity being lost to plaintiff through no fault of defendants." Id. at 156. Notably, the court relied on the fact that "the parties' expectation that plaintiff would at some

point participate in management was likewise thwarted by plaintiff's failure to satisfy the condition precedent to participate, i.e., that he learn the business." Id.

In the instant case, plaintiff was told from the beginning of the business relationship-- since October 2003-- to obtain an asbestos license. Because plaintiff did not possess an asbestos license, the company was forced to hire contractors to conduct the supervision of company projects. Id. at ¶8. This was an added and unnecessary expense on the company that could have been eliminated by plaintiff procuring the required license. Rather than secure the asbestos license, plaintiff spent time in the office drinking beer that should have been spent supervising projects. Therefore, defendant's actions are justified because of plaintiff's unsatisfactory performance. See, Exadaktilos, supra, at 155-56. The promise of employment made to plaintiff was honored, the opportunity being lost to plaintiff through no fault of Mr. Lazevski.

Further, in early February 2005, the business was not involved in any projects, yet plaintiff refused to take necessary steps to seek his asbestos license, despite the time at hand to do so. Plaintiff also refused to go to Virginia to examine a job that Paragon had wanted to bid on. Id. at ¶¶13-14. When informed that he would be taken off the payroll for refusing to do work, plaintiff threatened to unilaterally remove

money from the company bank account. In order to protect the company, Mr. Lazevski removed plaintiff's name from the bank account to prevent plaintiff from carrying out his threat. Mr. Lazevski's actions were conducted in good faith, as they were taken in order to run the business efficiently. Indeed, it would have been mismanagement to maintain plaintiff on the payroll given plaintiff's actions. For these reasons, a preliminary injunction and temporary and permanent restraints should be denied.

CONCLUSION

For the foregoing reasons, plaintiff's application for an Order to Show Cause seeking a preliminary injunction, with temporary and permanent restraints, should be denied in its entirety.

Respectfully submitted,

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Dated: August 30, 2005