

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

STEVEN SOBEL and CHAOUKI BOUZAYENE,
each individually and each as a holder of a one
third membership interest in HARRY'S HOT
DOGS OF BAY PLAZA, LLC,

Plaintiff,

-against-

MICHAEL TULCHINER

Defendant.

INDEX No. 607651/16

MOTION DATE: 11/7/16
Motion Sequence 001, 002

The following papers read on this motion:

Notice of Motion.....	XX
Affirmation in Support.....	XX
Memorandum of Law.....	XX
Affirmation in Opposition.....	XX
Reply Affidavit.....	X

Motion by plaintiffs Steven Sobel and Chaouki Bouzayene for a preliminary injunction is **granted** to the extent indicated below. Motion by plaintiffs to disqualify defendant Michael Tulchiner's counsel is **denied**.

This is an action for breach of fiduciary duty. Plaintiffs Steven Sobel and Chaouki Bouzayene claim to each own a 1/3 interest in Harry's Hot Dogs of Bay Plaza, LLC. The company operates a Nathan's franchise at the Bay Plaza Mall in the Bronx. Defendant Michael Tulchiner holds a 1/3 interest in the company.

Nathan's issued the franchise to Harry's Hot Dogs on November 11, 2014. In December 2014, Bouzayene, Tulchiner, and Allison Sobel, who is Steven's wife, signed

personal guarantees of Harry's Hot Dogs' obligations under the franchise agreement. Sobel and Bouzayene operated the restaurant, while Tulchiner invested \$600,000 and was in charge of financial matters.

Tulchiner claims that Bouzayene was stealing cash from the company and that Sobel failed to devote sufficient time to the business. Sobel and Bouzayene claim that the intent was always for the them to be equal partners with Tulchiner but he failed to prepare the necessary documents. On September 20, 2016, Tulchiner sent a notice to Bouzayene purporting to terminate his employment with Harry's Hot Dogs. On September 21, 2016, Tulchiner purported to terminate Sobel's employment with the company.

This action was commenced on October 4, 2016. Plaintiffs assert claims for wrongful termination, breach of fiduciary duty, an accounting, fraud, self-dealing, constructive trust, unjust enrichment, conversion, and a declaratory judgment as to their interests in the company.

By order to show cause dated October 7, 2016, plaintiffs seek a preliminary injunction restraining Tulchiner from withdrawing any funds from Harry's Hot Dogs' bank account, failing to deposit receipts into the company bank account, issuing any distributions, diverting business opportunities, incurring obligations other than in the ordinary course of business and other relief. In the order to show cause, the court issued a temporary restraining order, restraining Tulchiner from withdrawing any funds from Harry's Hot Dogs' bank account, failing to deposit receipts into the company bank account, issuing any distributions, diverting business opportunities, taking any other action not in the ordinary course of business, depleting inventory, incurring obligations other than in the ordinary course of business, using company funds to pay defendant's legal fees, denying plaintiffs access to the books and records, or transferring ownership of his interest in Harry's Hot Dogs.

In opposition, defendant Tulchiner argues that he has sole ownership of the company and that plaintiff improperly confuse direct and derivative claims.

The application for a food service permit, which was filed with the New York City Department of Health, shows plaintiffs as owners of Harry's Hot Dogs. Additionally, the required information sheet for the franchise closing agreement shows Bouzayene and Allison Sobel as 1/3 owners of the company. The court concludes that plaintiffs have established a likelihood of success on the merits that they are each 1/3 members of Harry's Hot Dogs. Plaintiffs' motion for a preliminary injunction is **granted** to the extent that the temporary restraining order issued on October 7, 2016 shall continue pending final judgment in the action.

By notice of motion dated October 19, 2016, plaintiffs move to disqualify Neil Shapiro, Esq. and the law firm of Herrick, Feinstein LLP from representing defendant Michael Tulchiner in this action. Plaintiffs allege that Shapiro was introduced to them by Tulchiner as the attorney who was to handle the franchise. Plaintiffs further allege that Herrick Feinstein was involved in the drafting of the Harry's Hot Dogs operating agreement. In opposition, defendant argues that Herrick Feinstein is not in possession of any confidential information.

Disqualification motions present "competing concerns" (*Jamaica Pub Svc v AIU Ins*, 92 NY2d 631, 638 [1998]). Balanced against the vital interest in avoiding the appearance of impropriety is concern for a party's right to representation by counsel of choice (*Id*). Moreover, there is a danger that disqualification motions are merely "weapons for strategic advantage" (*Id*). While the former client need not disclose secrets and confidences to prevail, it must provide sufficient information to show a "reasonable probability" that Professional Conduct Rule 1.9[c], protecting confidential information of the former client, would be violated (*Id*).

Plaintiffs have failed to show a reasonable probability that Neil Shapiro or Herrick Feinstein will use confidential information to plaintiffs' disadvantage. Accordingly, plaintiffs' motion to disqualify defendant's counsel is **denied**.

Please be advised that a Preliminary Conference has been scheduled for **January 27, 2017 at 9:30 a.m.** in Chambers of the undersigned. Please be further advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Date: NOV 16 2016

Stephen A. Bucari
J.S.C.

ENTERED

NOV 22 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE