STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

NORMAN A. PAPPAS TRUST U/A/D 9/4/1974; JAMES A. JACOB TRUST U/A/D 12/8/1983,

Plaintiffs,

Case No. 21-185649-CB
Hon. Michael Warren

v

JAMES VOSOTAS; DANIEL VOSOTAS; DW DETROIT LLC; VOS HOLDINGS I, LLC; VOS HOSPITALITY, LLC; VOS MANAGER I, LLC; VOS CRE I, LLC,

Defendants.

OPINION AND ORDER DENYING
DEFENDANTS' EMERGENCY MOTION TO DISSOLVE INJUNCTION

At a session of said Court, held in the
County of Oakland, State of Michigan
October 29, 2021.

PRESENT: HON. MICHAEL WARREN

OPINION

I
Overview

Before the Court is Defendants' Emergency Motion to Dissolve Injunction. Having reviewed the Motion and Response thereto, and otherwise being fully informed in the

premises, the Court hereby dispenses with oral argument as it would not assist the Court in rendering a decision.[1] MCR 2.119(E)(3).

At stake is whether this Court should maintain preliminary injunctive relief when (1) the public interest favors maintaining an injunction, (2) the harms of maintaining the relief favors the granting of an injunction, (3) the Plaintiffs have shown a likelihood of success on the merits, and (4) there is a showing of irreparable harm if injunctive relief is not maintained? Because the answer is "yes," the preliminary injunction is maintained, and the Motion is denied.

Also is at stake is whether the Defendants should be sanctioned for making an argument not grounded in fact or law, but in fact directly contrary to the Defendants' prior positions? Because this argument is sanctionable under MCR 1.109, the answer is "yes," and sanctions are assessed against the Defendants.

II
The Court has Acted in Conformity with MCR 3.310(A)(5)

A
The 6 Month Rule

The Defendants argue that maintaining the injunction is unwarranted because it violates the timeframe established in set forth MCR 3.310(A)(5) which provides that "If a

[1] The Plaintiffs have filed a 13-page Reply without leave of the Court and in violation of MCR 2.119. Although on occasion such replies have been accepted by this Court, this not an occasion that warrants the exercise of this discretion. Quite simply, there is nothing surprising or unexpected in the Response that justifies such a Reply.

preliminary injunction is granted, the court shall promptly schedule a pretrial conference. The trial on the action on the merits must be held within 6 months after the injunction is granted, unless good cause is shown or the parties stipulate to a longer period." The Defendants argue that because no trial on the merits was held within 6 months, that the injunction has actually already expired.

B
The Defendants Have Stipulated & Good Cause Exists to Hold Trial after 6 Months

The Defendants curiously omit key markers of the procedural posture of this case. The case was filed on January 11, 2011. The Amended Complaint was filed two days later. Several parties were not served until February 1, 2021. A Second Amended Complaint was filed the next day. A Motion for Preliminary Injunction was filed on February 3, 2021. After an exhaustive hearing, the Court issued a preliminary injunction on February 11, 2021. A slew of new parties were served on February 15, 2021. On February 24, 2021, the Defendants filed a Motion for Summary Disposition Under MCR 2.116(C)(10). On March 2, 2021, the Court issued a Notice and Order to Appear for Case Management Conference to be held on March 30, 2021. On March 11, 2021, the Court denied the Defendants' Emergency Motion to Modify Injunction and for Reconsideration. The parties filed a Joint Case Management Plan on March 23, 2021. The Court conducted the Case Management Conference on March 30, 2021 and issued an Amended Scheduling Order on that very day. The Court issued the Amended Scheduling Order after reviewing the Joint Case Management Plan and undergoing a thorough discussion with the parties about the

timeframe for the case. In the Joint Case Management Plan, the parties specifically recommended that discovery be completed by October 1 2021, that dispositive motions would be filed no later than November 1, 2021, and that trial would occur in March 2021. The Amended Scheduling Order followed the recommendation for the close of discovery and actually shortened the deadline for dispositive motions to October 15, 2021. The trial date was set on June 13, 2022 because of the tremendous unavoidable backlog on the Court's summary disposition docket. On August 18, 2021, the parties filed a Joint Motion to Modify Certain Scheduling Order Dates, which asked to extend witness list dates, the production of expert reports, discovery (to December 1, 2021), and the summary disposition deadline to December 15, 2021. Although the Joint Motion was defective, by its grace, the Court relented and adjourned several dates at the request of the parties. However, the Court only adjourned the summary disposition date one month (there is little question that the parties will deluge the Court with hundreds of pages of summary disposition bedtime stories on or before this deadline) and maintained the trial date. That there was good cause to set a trial for the merits beyond the 6 months is evidenced by all of the foregoing. After all, the parties certainly believed they needed beyond 6 months (until it became inconvenient for the Defendants) in the Joint Case Management Plan and the joint motion to adjourn dates.

At no time did the Defendants suggest that the either Scheduling Order *was too long* - to the contrary, the Defendants agreed to the Scheduling Order dates *or wanted longer.* And now they come and complain that the case should have been decided

already? This argument is not "well grounded in fact" and is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ." *Id.* To the contrary, it is grounded in a fiction (in which the Defendants did not go along with the scheduling of dates the entire time) and flies in the face of the unambiguous language of the Rule of Court. That a new law firm is making these arguments is not an excuse. This argument is specious, frivolous, and violative of MCR 1.109(E)(5)(b).[2] Sanctions are warranted.

In addition, the Defendants' far-fetched argument that the injunction has already expired because 6 months has lapsed is completely baseless. Nothing in MCR 3.310 provides that if a trial court fails to try a case on the merits within 6 months after an injunction is levied that the injunction automatically expires. Nor is there any citation to any jurisprudence to suggest the same.

III
The Preliminary Injunction Stands on the Merits

A
The Law Generally

Under MCR 3.310(A), this Court has the authority to grant a preliminary injunction. The burden is on the party seeking injunctive relief to prove why such relief should be issued. MCR 3.310(A)(4) ("At the hearing on an order to show cause why a

[2] The Court also incorporates by reference the other arguments and authorities cited by the Plaintiffs in connection with this argument.

preliminary injunction should not issue, the party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued"). "Whether a preliminary injunction should issue is determined by a four-factor analysis . . . ." *MSEA v Dep't of Mental Health*, 421 Mich 152, 157 (1984). This analysis must address the following factors:

> 1) Harm to the public interest if an injunction issues;
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> 2) Whether harm to the moving party in the absence of injunctive relief outweighs the harm to the opposing party if a stay is granted;
>
> 3) The strength of the moving party's demonstration that the moving party is likely to prevail on the merits; and
>
> 4) Demonstration that the applicant will suffer irreparable injury if injunctive relief is not granted.
>
> [*MSEA*, 421 Mich at 157-158.]

In addition, this inquiry "often includes the consideration of whether an adequate legal remedy is available to the applicant." *Id.* at 158. Other considerations to be addressed when considering injunctive relief "are whether it will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief prior to a hearing on the merits." *Campau v McMath*, 185 Mich App 724, 729 (1990). See also *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998). Moreover, "[t]he general rule is that whenever courts have found a mandatory injunction essential to the preservation of the status quo and a serious inconvenience and loss would result to plaintiff and there would be no great loss to defendant, they will grant it." *Steggles v National Discount Corp*, 326 Mich 44, 50 (1949).

See also *Gates v Detroit, & Mackinac Railway Co*, 151 Mich 548, 552 (1908); *L & L Concession Co v Goldhar-Zimner Theatre Enterprises, Inc*, 332 Mich 382,388 (1952), quoting *Steggles*, 326 Mich at 50. Furthermore, this Court's ruling "must not be arbitrary and must be based on the facts of the particular case." *Thermatool*, 227 Mich App at 376. Generally, the granting of such relief falls within the broad discretion of the court. *Steggles*, 326 Mich at 50 (holding that granting injunctive relief "is largely a matter of discretion of the trial court"); *Campau*, 331 Mich at 729 (the Court of Appeals "will not overturn a trial court's grant or denial of a preliminary injunction save for an abuse of discretion." *Bratton v DAIIE*, 120 Mich App 73, 79 (1982).

"[A]n injunction is always subject to modification or dissolution if the facts merit it." *Opal Lake Ass'n v Michaywe' Ltd Partnership*, 47 Mich App 354, 367 1979). For the reasons articulated in the Response, the Motion and requested relief is denied.

A
Application of the Law

1
Harm to the Public Interest

Under this factor of the analysis, this Court must address whether the public policy of Michigan is furthered or undermined by the granting of the injunctive relief. In this particular case, the public interest favors granting an injunction. Michigan law generally favors enforcing written contracts. See, e.g. Const 1963, art 1, § 10 ("No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted"); MCL

566.132; *Rory v Cont'l Ins Co*, 473 Mich 457, 468 (2005) (internal footnotes and quotation marks omitted) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.") Operating Agreements are simply a form of contract applicable to owners and managers of limited liability companies. In addition, Michigan's public policy is to foster business enterprises and to enforce their governing documents. See, e.g., MCL 450.1101 *et seq.* (Michigan Business Corporation Act, Act 82 of 1972; MCL 450.4101 *et seq.* (Michigan Limited Liability Act, Act 23 of 1993); MCL 449.1 *et seq.* (Uniform Partnership Act, Act 72 of 1917).

As noted below, as the Plaintiffs have shown they are likely to prevail, the public policy factor favors the Plaintiffs.

2
Balance of Harm

Under this prong of the analysis, this Court must evaluate whether the harm suffered by the nonmoving parties caused by granting the proposed injunctive relief will outweigh the harm suffered by the moving party if the injunctive relief is denied.

In the instant case, the Plaintiffs have shown that they are likely to prevail on the argument that that the Defendants have breached the operating agreement and breached their fiduciary duties. The escrowing of the funds from the sale of the last remaining valuable asset of and in connection with the LLC preserves the Plaintiffs' rights. This factor favors the Plaintiffs.

The Defendants argue that taxes, expenses, and other bills are required to be paid, and that the injunction is preventing them from entering into new financial transactions. First, much of this is either rehashed old argument or could have been argued (and neglected to be so argued) when the preliminary injunction was put in place. Second, in essence, this argument proves the Plaintiffs' need for the escrow. There is little doubt that if the escrow is not maintained the Defendants will spend most - if not all - the money. This factor continues to favor the Plaintiffs.

3
The Merits

Under this prong of the analysis, the moving party must demonstrate that it is likely to prevail on the merits of a fully litigated action.

For the reasons argued by the Plaintiffs, the terms of the Operative Agreements were likely breached by Defendants and/or Defendants breached fiduciary duties by creating a fraudulent transaction that undervalued the price of the membership interest

acquired. In light of the foregoing, the Plaintiffs have shown they have at least a fair probability of success on the merits.

4
Irreparable Harm

Irreparable harm means harm that cannot be remedied by damages. *Thermatool,* 227 Mich App at 377. In other words, "to establish irreparable injury, the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Id.* Moreover, the "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Id.* Our Supreme Court elaborated in *Michigan Coalition of State Employee Union v Civil Service Comm'n*, 465 Mich 212, 225-226 (2001) (footnote omitted) in the context of injunctive relief sought pursuant to Const 1963, art 11, § 5:

> Thus, it is clear that in 1940 it was beyond dispute in the legal community that a party needed to make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction. Moreover, there is no basis to conclude that the requirements to secure a preliminary injunction changed in any pertinent way between the adoption of the amendment in 1940 and the adoption of its successor, § 5, in the present Michigan Constitution in 1963, or even up to this day. The requirement of a showing of irreparable harm remains as it did a century ago. In our latest statement on this issue in *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158 (1984), this Court reiterated the requirement of a showing of irreparable harm as a prerequisite for a preliminary injunction, explaining that it was a requirement for the issuance of a preliminary injunction to demonstrate 'that the applicant will suffer irreparable injury if a preliminary injunction is not granted.'
>
> Accordingly, we conclude that a particularized showing of irreparable harm was, and still is, as our law is understood, an

> indispensable requirement to obtain a preliminary injunction. Moreover, the people, in causing the Michigan Constitution to be amended in 1940, evidenced no desire, as they had done with standing, to modify the traditional rules that had pertained with regard to this requirement for a preliminary injunction. Therefore, when considering the request for a preliminary injunction in this matter, the trial court and the Court of Appeals were in error in granting any preliminary injunction without a showing of concrete irreparable harm to the interests of a party before the Court.

This prong strongly favors the Plaintiffs because the Plaintiffs have demonstrated there is irreparable harm to minority owners of a limited liability company if the governance documents are not followed and fiduciary duties are violated, and funds from the sale of the last remaining valuable asset of and in connection with the LLC is not held to preserve the Plaintiffs' interests and rights.

Interestingly, the Defendants originally argued that there was no irreparable harm warranting the imposition of an injunction because any damages can be assessed as monetary damages. [Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, filed February 5, 2021, pp 10-11.] Akin to their about-face involving MCR 3.310, they now argue the opposite - that *their* monetary damages are irreparable. Trying to eat their cake and eat it too is not a successful tactic. To the extent the Defendants are right that any damages they might suffer are irreparable, the same argument applies with at least equal force to the Plaintiffs. In any event, as noted above, the Plaintiffs have true additional irreparable harm involving the governance of the LLC and the violation of fiduciary duties.

Furthermore, the Defendants' argument that an injunction is an improper pre-judgment asset freeze is baseless for the reasons identified by the Plaintiffs. The injunction is in place to preserve the governance rules of the LLC and protect the Plaintiffs from the Defendants' violating their fiduciary duties, not to preserve assets for a judgment.

ORDER

Based on the foregoing Opinion, Defendant's Emergency Motion to Dissolve Injunction is DENIED. In addition, the Defendants are hereby SANCTIONED the reasonable attorney fees and costs incurred by the Plaintiffs in having to respond to the argument that the injunction violates MCR 3.310(A)(5), the amount of such sanctions shall be fixed by stipulation or upon Motion.