

Zacharias v Wassef
2020 NY Slip Op 32161(U)
July 3, 2020
Supreme Court, New York County
Docket Number: 654548/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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MICHAEL ZACHARIAS, MECHANICAL VERTICAL PARKING SYSTEMS, LLC	INDEX NO.	<u>654548/2016</u>
Plaintiff,	MOTION DATE	<u>08/28/2019</u>
- v -	MOTION SEQ. NO.	<u>011</u>
MAX WASSEF, PARKMATIC CAR PARKING SYSTEMS, LLC,	DECISION + ORDER ON MOTION	
Defendant.		

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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document nos. 341, 342, 343, 344, 345, 346, 347, 348, 349, 350 were read on this motion to discharge plaintiffs' undertaking (motion sequence no. 11).

In this action, plaintiff Michael Zacharias, individually and derivatively as a member of Mechanical Vertical Parking Systems, LLC (Mechanical), seeks dissolution of Mechanical, injunctive relief and monetary damages against defendants Max Wassef a/k/a Magdi Wassef and Parkmatic Parking Systems, LLC., based upon Wassef's alleged wrongful diversion of corporate assets, opportunities, and business and client information, breaches of fiduciary duty, unjust enrichment, self-dealing, unfair competition, gross negligence, and violations of New York General Obligations Law §§ 360-L and 349. (Am. Compl. at ¶ 1 [NYSCEF Doc. No. 7].) By Decision and Order dated October 11, 2016, this court granted plaintiffs' motion for a preliminary injunction against defendants and set plaintiffs' undertaking pursuant to CPLR 6203 (b) in the amount of \$250,000, which was duly filed by plaintiffs on October 14, 2016.

(Preliminary Injunction Order at 10-11 [NYSCEF Doc. No. 344]; Undertaking [NYSCEF Doc. No. 67].) On this motion, plaintiffs seek an order cancelling and discharging the undertaking.

CPLR 6312 (b) requires that “prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court.” The amount of the undertaking is within the court’s discretion. (See, e.g. 7th Sense, Inc. v Liu, 220 AD 2d 215, 217 [1st Dep’t 1995].) The court acts within its discretion in setting an undertaking rationally related to the enjoined party’s potential damages if the preliminary injunction is determined to be unwarranted. (See, e.g. Ithilien Realty Corp v 180 Ludlow Dev, LLC, 80 AD 3d 455, 455 [1st Dept 2011].) Plaintiffs argue that “the Court should exercise its discretion and cancel and discharge the Undertaking while maintaining the preliminary injunction.” (Pl.s’ Memo. in Supp. at 2 [NYSCEF Doc. No. 349].) Plaintiffs concede that the relief sought by the motion is “extraordinary,” but warranted “where, as here, the defendant has willfully ignored the Orders of this Court, including the preliminary injunction granted herein— rendering the restraining device useless (and with almost certainty ensuring an ineffectual judgment.” (Id. at 1.)

The court holds that defendants’ protracted failures to comply with this court’s orders support the court’s exercise of discretion to reduce the undertaking to a nominal amount. The record of this case, as cited by plaintiffs in support of the motion, evidences defendants’ manifest disregard of this court’s orders and plaintiffs’ rights to relief thereunder, including the Preliminary Injunction Order. (See Pl.s’ Aff. in Supp. and Exs. A-F thereto [NYSCEF Doc. Nos. 342-348].) By order dated June 13, 2017, this court held defendants in contempt for failure to comply with the Preliminary Injunction Order. (Contempt Order at 11-12 [NYSCEF Doc. No.

232].)¹ To date, defendants have not purged their contempt. (Pl.s' Aff. in Supp. at ¶¶ 6-7.) Following defendants' failure to comply with the Contempt Order, this court granted plaintiffs' motion, pursuant to Judiciary Law 773, for an award of plaintiffs' attorney's fees and expenses incurred as a result of defendants' contempt. (Nov. 22, 2017 Decision and Order [NYSCEF Doc. 284].) Judgment in the amount of \$95,058.98 was entered upon that Decision and Order on February 1, 2019. (Judgment [NYSCEF Doc. No. 334].) Defendants, however, have also failed to pay the Judgment.

In opposition to the motion, defendants do not appear to dispute, or even defend, their multiple and protracted failures to comply with the orders and judgment. (See Defs.' Aff. in Opp. [NYSCEF Doc. No. 350].) Defendants argue, however, that the existing undertaking should remain in place because the undertaking "must be sufficient to cover 'all damages' that the defendants may sustain from the injunction" and, if cancelled, "the enjoined party would be left without a remedy if the preliminary injunction is later determined to have been unwarranted." (*Id.* at ¶¶ 16, 22.) Defendants' argument may correctly address the general purpose of the CPLR 6203 (b) undertaking requirement—to provide security for the relief granted by the preliminary injunction; but it ignores the actual facts on the record before the court. Defendants have sustained no potential damages because they have never complied with the Preliminary Injunction. Further, defendants' brazen disregard of the related Contempt Order and Judgment for Judiciary Law 773 fines, taken together with the passage of nearly four years

¹ In addition, the Contempt Order granted in part defendants' cross-motion to vacate or modify the Preliminary Injunction by granting defendants injunctive relief against plaintiffs and set defendants' own CPLR 6312 (b) undertaking at \$250,000. (Contempt Order at 13-14.) Defendants also failed to post the undertaking. (Pl.s' Aff. in Support at ¶ 9.)

since entry of the Preliminary Injunction, make the likelihood that defendants will incur potential damages, based on some future compliance, remote at best. Thus, even if the Preliminary Injunction were later found to have been unwarranted, defendants would not be entitled to any remedy secured by the undertaking.

The \$250,000 undertaking required by the Preliminary Injunction was rationally related to defendants' potential damages arising from compliance with the order based upon the evidence submitted to the court on the record of that motion. Due to defendants' conduct in the intervening years, the \$250,000 undertaking is no longer rationally related to any potential damages, because there are none. It would be manifestly unjust to require plaintiffs to maintain an undertaking for injunctive relief with which defendants have never complied. As defendants argue, the "requirement of an undertaking is mandatory." (Def.s' Aff. in Opp. at ¶ 15; see also CPLR 6312 (b).) Under the circumstances presented here, however, the court in its discretion holds that the Preliminary Injunction Order shall be amended to set the undertaking in the nominal amount of \$100.

It is accordingly hereby ORDERED that plaintiffs' motion for an order cancelling and discharging the undertaking in the amount of \$250,000 filed by plaintiffs in accordance with the Decision and Order, dated October 11, 2016, is granted to the extent that it is

ORDERED that the Undertaking on Preliminary Injunction dated October 14, 2016 (NYSCEF Doc No. 67) in the amount of \$250,000 is discharged and cancelled; and it is further

ORDERED that the undertaking for the preliminary injunction granted pursuant to the Decision and Order, dated October 11, 2016, is fixed in the sum of one hundred dollars (\$100)

conditioned that plaintiffs, if it is finally determined that they are not entitled to an injunction, will pay to defendants all damages and costs which may be sustained by reason of this injunction. Said undertaking shall be posted by cash or surety bond within seven days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

Dated: New York, New York
July 3, 2020



MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE