

STATE OF MAINE
COURT
CUMBERLAND, SS.

BUSINESS AND CONSUMER
LOCATION: PORTLAND
Docket No. BCD-CV-16-19

SANDRA L. NAPOLITANO,)
Individually and on behalf of)
WINDHAM Q, LLC,)
)
 Plaintiff,)
)
 v.) ORDER ON PLAINTIFF'S MOTION
) FOR PRELIMINARY INJUNCTIVE
) RELIEF
)
 ARTHUR NAPOLITANO, SR. and)
 STEPHEN NAPOLITANO,)
)
 Defendants.)

Plaintiff Sandra L. Napolitano, individually and on behalf of Windham Q, LLC (“Windham Q”), has filed a motion pursuant to Maine Rule of Civil Procedure 65 for an order granting preliminary injunctive relief against Defendants Arthur and Stephen Napolitano. Based on the following, Plaintiff’s motion for preliminary injunctive relief is denied.

BACKGROUND

Plaintiff and Defendant Arthur Napolitano are husband and wife. (Sandra Napolitano Aff. ¶ 2.) According to Plaintiff’s affidavit, Plaintiff and Arthur Napolitano are each 50% members and the sole managers of Windham Q, LLC, which operates a Dairy Queen franchise located in Windham, Maine. (*Id.*) Defendant Stephen Napolitano is Arthur Napolitano’s son and the general manager of the Dairy Queen store. (*Id.* ¶ 4.)

According to Plaintiff’s affidavit, in the spring of 2013, she became concerned that Stephen Napolitano was using Windham Q’s funds to pay his personal expenses. (*Id.* ¶¶ 3-4.) Plaintiff requested that Arthur investigate the matter. (*Id.* ¶ 5.) Arthur Napolitano assured her that Windham Q had not paid any non-business expenses. (*Id.*) Plaintiff became concerned

about Windham Q's expenses again in May 2014 and requested that a forensic audit of Windham Q be conducted. (*Id.* ¶¶ 6, 8.) Arthur opposed the audit. (*Id.* ¶ 9.)

Stephen Napolitano asserts that Windham Q's payment of certain personal expenses was approved as part of his benefits package as the general manager of the Dairy Queen. (Stephen Napolitano Aff. ¶ 4.) Stephen asserts that, in response to Plaintiff's complaints about the expenses, Arthur Napolitano increased his compensation and curtailed the practice of using Windham Q's credit card to pay certain expenses. (*Id.* ¶ 9.) Plaintiff asserts that Arthur did not discuss Windham Q's payment of Stephen's personal expenses with her and she did not approve the practice. (Sandra Napolitano Aff. ¶¶ 12, 19.)

According to Plaintiff, Stephen Napolitano wrote a letter to her attorney in October 2014 admitting that certain personal expenses were paid for using Windham Q's funds and stating that he was reimbursing Windham Q for those expenses. (*Id.* ¶ 14.) Plaintiff does not believe that Stephen fully reimbursed Windham Q for all of the personal expenses paid by the company. (*Id.* ¶ 15.) Plaintiff requested Arthur Napolitano remove Stephen as the general manager of the Dairy Queen, but Arthur refused to do so. (*Id.* ¶ 16.)

Plaintiff filed a civil complaint, individually and on behalf of Windham Q, with the Superior Court on August 26, 2015. Plaintiff's complaint asserts claims for breach of fiduciary duty, conversion, to recover money owed, unjust enrichment, and fraud against Arthur and claims for conversion, to recover money owed, unjust enrichment, fraud, breach of duty of loyalty, and breach of contract against Stephen. Plaintiff's complaint also seeks an order reconstituting the governance of Windham Q and removing Arthur and Stephen from any positions overseeing the operation of Windham Q.

Arthur Napolitano filed an answer to the civil complaint on September 18, 2015. Stephen Napolitano filed his answer on September 24, 2015. Stephen Napolitano amended his answer on February 11, 2016, and added a counterclaim against Plaintiff seeking a declaratory judgment that the parties had agreed that Stephen would receive an ownership interest in Windham Q in exchange for agreeing to work as the general manager of the Dairy Queen store. (Stephen Napolitano Am. Ans. & Countercl. ¶¶ 13-14.)

Arthur Napolitano also filed a complaint for divorce with the District Court on September 29, 2015. Plaintiff filed an answer and counterclaim for divorce on October 6, 2015. On January 13, 2016, the District Court appointed a Referee to conduct an audit of Windham Q, to produce an audit report, and to monitor and report on the financial and operational performance during the pendency of the divorce action. (FM-16-02, Order of Appointment 1.)

Both the civil action and family action were accepted for transfer to the Business and Consumer Court in June 2016. Although not consolidated, the two cases are being coordinated before the Business and Consumer Court. The Referee filed his first report in the family action on August 5, 2016 (the “Referee’s Report”).

Plaintiff filed a motion for preliminary injunctive relief on August 9, 2016. Plaintiff seeks a preliminary injunction ordering the following: (1) that Stephen Napolitano be removed as general manager; (2) that the scope of the Referee’s role be expanded to include (a) hiring a neutral third-party general manager to oversee the day-to-day operations of the Dairy Queen store, and (b) continued oversight of Windham Q’s finances; (3) that a new accountant be hired by Windham Q at the recommendation of the Referee; (4) that the new accountant conduct a complete review of the prior six tax years to determine if the parties’ tax returns and Stephen

Napolitano's W-2s should be amended; (5) that Defendants pay the costs of the Referee; and (6) any other relief the court deems just. (Pl. Mot. Prelim. Inj. 18-19.)

Defendants filed an opposition to the motion for preliminary injunctive relief on August 31, 2016. Plaintiff replied on September 8, 2016. Plaintiff also filed an "addendum" to her reply on October 11, 2016. Oral argument on all pending motions in this case was held on October 12, 2016.

STANDARD OF REVIEW

Ordinarily, to obtain a preliminary injunction, a plaintiff must produce *prima facie* evidence of the following: (1) the plaintiff will suffer "irreparable injury" if the injunction is not granted; (2) the irreparable injury to the plaintiff outweighs any harm to the defendant from granting the injunction; (3) the plaintiff is likely to succeed on the merits of his or her claims; and (4) the public interest will not be adversely affected by granting the injunction. *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129. Failure to demonstrate that any one of the criteria is met requires the motion for preliminary injunction be denied. *Id.* ¶ 10. In determining whether to issue a preliminary injunction, the court may rely on evidence presented in sworn depositions, affidavits, oral testimony, or a verified complaint. 3 Harvey, *Maine Civil Practice* § 65:4 at 333 (3d ed. 2011).

Because Plaintiff's motion seeks an injunction compelling Defendants to take affirmative actions, Plaintiff's motion is one for mandatory injunctive relief. See Horton & McGehee, *Maine Civil Remedies* § 5-2 at 100 (4th ed. 2004). The purpose of a preliminary injunction is to preserve the status quo pending final judgment. *Dep't of Envtl. Prot. v. Emerson*, 563 A.2d 762, 771 (Me. 1989). Because a mandatory injunction, by its very nature, will alter the status quo,

courts do not readily enter mandatory preliminary injunctions. *Id.* However, the mere fact that a preliminary injunction sought by a plaintiff has mandatory aspects does not *ipso facto* render the motion invalid. *Id.* Rather, to obtain a mandatory preliminary injunction, the plaintiff must meet a higher burden. Horton & McGehee, *Maine Civil Remedies* § 5-2 n.14 at 100. In addition to the other criteria, the plaintiff must show “a **clear** likelihood of success on the merits.” *Emerson*, 563 A.2d at 771 (emphasis supplied).

ANALYSIS

As discussed above, Plaintiff seeks a mandatory preliminary injunction removing Stephen Napolitano as general manager, removing Windham Q’s accountant, and expanding the role of the Referee. (Pl. Mot. Prelim. Inj. 18-19.) Plaintiff argues that if the mandatory preliminary injunction is not granted, Stephen Napolitano will continue to mismanage Windham Q, continue to use Plaintiff’s and Arthur Napolitano’s money to pay his personal expenses, and that Windham Q will continue to file “improper” tax returns. (*Id.* at 16.)

A. The Referee’s Report

The court first addresses the threshold matter of the Referee’s Report. Plaintiff largely relies on the Referee’s Report filed in the related divorce action as evidentiary support for her motion. (*Id.* at 5-11.) However, because the Referee’s Report is not sworn evidence, it cannot be considered by the court in deciding the motion for preliminary injunction.¹ As previously

¹ In their opposition, Defendants assert that the Referee’s Report is not admissible evidence in this case because it was filed in the separate divorce action. (Defs. Opp’n to Pl. Mot. Prelim. Inj. 11-12.) In her reply, Plaintiff asserts, at a trial management conference on June 7, 2015, the parties verbally agreed that the Referee’s Report would apply to both proceedings. (Pl. Reply to Defs. Opp’n to Pl. Mot. Prelim. Inj. 2.) Because the court finds that the Referee’s Report is not properly before the court on the motion for preliminary injunctive relief, the court need not decide that this juncture whether the Referee’s Report is admissible in the civil action.

discussed, in determining whether to issue a preliminary injunction, the court may rely on evidence presented in sworn depositions, affidavits, oral testimony, or a verified complaint. 3 Harvey, *Maine Civil Practice* § 65:4 at 333.

The Referee's Report has not been sworn to and no affidavit has been filed by the Referee stating under oath that the contents of the Report, to the best of his personal knowledge, are true and accurate. Therefore, because Plaintiff largely relies on the unsworn Referee's Report, Plaintiff has not provided sufficient, proper evidence in order to obtain preliminary injunctive relief.²

B. The Merits of the Motion for Preliminary Injunction

Moreover, even if the court were to consider the Referee's Report, Plaintiff has still failed to produce *prima facie* evidence that she or Windham Q will suffer an "irreparable injury" if the preliminary injunction is not granted. An "irreparable injury" is an injury "for which there is no adequate remedy at law." *Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10, 837 A.2d 129 (internal quotation marks and citation omitted). Although there is no comprehensive rule for measuring the adequacy of a legal remedy, where a plaintiff is entitled to money damages and the plaintiff has not demonstrated that damages would be uncollectable from the defendant, the legal remedy will be deemed adequate. Horton & McGehee, *Maine Civil Remedies* § 5-3(a) at 101-02; *Levesque v. Pelletier*, 144 Me. 245, 249, 68 A.2d 9, 11 (1949).

² Additionally, attached to Plaintiff's reply and her "addendum" are a number of additional exhibits purported to show that Stephen Napolitano used Windham Q's credit card to pay for personal expenses. See (Pl. Reply to Defs. Opp'n to Pl. Mot. Prelim. Inj. Exs. D-G, J; Pl. Addendum to Reply Exs. L-O.) Like the Referee's Report, no affidavit has been filed swearing to the authenticity of these documents. Therefore, like the Referee's Report those exhibits cannot be considered by the court. See 3 Harvey, *Maine Civil Practice* § 65:4 at 333. Also like the Referee's Report, even if the court were to consider these documents, there is no indication that Plaintiff would not be entitled to damages or that such damages would be uncollectable from Defendants. See Horton & McGehee, *Maine Civil Remedies* § 5-3(a) at 101-02; *Levesque*, 144 Me. at 249, 68 A.2d at 11.

In his Report, the Referee identified numerous credit card charges to the business from 2012 to 2014 “where the business purpose was not readily apparent.” (Referee Report 13.) These included gas charges, drugstore charges, EZ Pass tolls, groceries, maintenance charges, office supplies, car maintenance, travel expenses, medical charges, Amazon and iTunes charges, meal charges, department store charges, and \$167,775.00 of other questionable charges. (*Id.* at 13-14.) The Referee also noted numerous annual expenses where the business purpose was “not clearly determinable.” (*Id.* at 11.) These expenses included automobile repairs, cable television, internet payments to multiple vendors, tolls, travel expenses, and yard work. (*Id.* at 8-11.) The Referee also noted a “high rate” of variance between the business’s register tapes and daily deposits, which demonstrated a significant system failure, made validating the daily deposit amounts difficult, and revealed certain commingling of personal and company funds. (*Id.* at 15-18.)

Even if the Referee’s findings constitute *prima facie* evidence of an injury to Plaintiff and Windham Q, Plaintiff has not demonstrated that she is without an adequate remedy at law. Plaintiff has not cited, and the court is not aware of, any legal authority that would prevent Plaintiff from recovering monetary damages for the above injuries. Plaintiff has also not put forth any evidence that monetary damages would be uncollectable from Defendants. Thus, Plaintiff has not demonstrated an injury for which there is no adequate remedy at law.

Moreover, additional findings in the Referee’s Report actually demonstrate that Plaintiff is unlikely to suffer irreparable injury if the preliminary injunction is not granted. In his report, the Referee noted that a number of questionable expenses had actually declined in 2015 and 2016. (*Id.* at 11.) The Referee noted that there had been a complete stop in payments by

Windham Q for auto repairs, gas, tolls, travel, and yard work, and a decline in payments for office expenses, supplies, and telephone expenses. (*Id.* at 8-11.) Thus, based on the findings in the Referee's Report, the alleged injuries to Plaintiff have ceased or declined in the past two years. Therefore, contrary to Plaintiff's assertions, the Referee's Report actually demonstrates it is unlikely that she will suffer a continued, irreparable injury if the preliminary injunction is not granted.

Plaintiff argues that Stephen Napolitano has ceased his alleged tortious behavior while under the scrutiny of the Referee and this court. (Pl. Mot. Prelim. Inj. 16.) Plaintiff argues that, if the Referee's role is not expanded, Stephen Napolitano will likely resume his alleged tortious behavior. (*Id.*) Plaintiff has cited no evidence to support this speculation. (*Id.*)

Therefore, even if the court were to consider the Referee's Report, Plaintiff has still failed to demonstrate an irreparable injury in order to obtain a mandatory preliminary injunction. Because failure to demonstrate that any one of the criteria is met requires the motion be denied, the court would not even reach the other criteria for preliminary injunctive relief. *See Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10, 837 A.2d 129.

CONCLUSION

Based on the foregoing, Plaintiff Sandra L. Napolitano's motion, individually and on behalf of Windham Q, LLC, pursuant to Maine Rule of Civil Procedure 65 for preliminary injunctive relief is **DENIED**.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: October 25, 2016

/s

Richard Mulhern

8 Judge, Business & Consumer Court