

No. 1-18-0169

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NICOLE LOFTUS,)	Appeal from the
)	Circuit Court of
Plaintiff-Respondent,)	Cook County
)	
v.)	No. 18 CH 710
)	
ZORCH INTERNATIONAL, INC.; WILLIAM)	
KACZYNSKI; JOHN KENNEDY; JOHN MEILNER;)	The Honorable
MATTHEW GRAY; AND MICHAEL WOLFE,)	Pamela McLean
)	Meyerson,
Defendants-Petitioners.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the circuit court’s January 19, 2018, order granting plaintiff’s petition for a temporary restraining order because the petition failed to allege sufficient facts to establish an ascertainable right in need of immediate protection, that plaintiff will suffer an irreparable injury absent TRO, or that plaintiff lacks an adequate remedy at law.

¶ 2 Plaintiff Nicole Loftus filed petitions for a temporary restraining order and preliminary and permanent injunctions seeking to enjoin a proposed merger or sale of defendant Zorch International, Inc. The circuit court granted plaintiff a temporary restraining order (TRO) and set

a discovery schedule but did not set a hearing date for the preliminary injunction. Defendants have appealed as a matter of right pursuant to Illinois Supreme Court Rule 307(d) (eff. Nov. 1, 2017). We reverse the circuit court's TRO.

¶ 3

BACKGROUND

¶ 4 On January 18, 2018, Nicole Loftus filed a "Verified Petition for Preliminary and Permanent Injunctive Relief" and a "Verified Petition for Temporary Restraining Order Without Notice and Motion to Compel Compliance with 805 ILCS 5/7.75" (the petition) against Zorch International, Inc., and the individual members of Zorch's board of directors, William Kaczynski, John Kennedy, John Meilner, Matthew Gray, and Michael Wolfe (collectively, defendants). The petition seeks an order (1) enjoining the sale or merger of Zorch to Satori Capital, LLC, a private equity firm, due to the existence of a competing nonbinding offer from a different private equity firm, LLR Partners, (2) compelling defendants to provide all documentation involving the proposed sale or merger to Satori, (3) compelling defendants to establish a formal bidding process, (4) compelling defendants to provide an "opinion of fairness from a licensed investment banker or business broker in regards to the offer by Satori and the offer by LLR," (5) compelling defendants to consider LLR's nonbinding offer (which by its own terms expired on January 23, 2018), and (6) for other various relief.

¶ 5 The following allegations are set forth in plaintiff's verified petition. Plaintiff is the founder and former chief executive officer of Zorch. She subsequently obtained financing from Bridge Street Capital Partners. Bridge Street's principal member is William Kaczynski, a member of Zorch's board. Bridge Street then gained control of Zorch, forced plaintiff out of her roles as CEO and member of the board of directors, and installed a board that is "loyal to or affiliated with the members of Bridge Street." Plaintiff is a minority shareholder who owns

1,000,000 shares of Zorch's Common Stock and approximately 450,000 shares of Series D-2 preferred stock. The petition does not identify the number of outstanding shares of each class of stock, how many classes of stock there are, or the differences between classes of shares.

¶ 6 On December 8, 2017, plaintiff learned that defendants had negotiated the sale of Zorch to Satori. She received a "consent package" asking her to consent to Satori's stock purchase. Plaintiff and other shareholders did not consent to the sale. The sale required the unanimous consent of Zorch's shareholders, and thus an outright sale was not possible. Defendants then structured the transaction as a merger so that unanimous consent was not required. Plaintiff asserts that the proposed merger would result in two of four classes of shareholders receiving nothing for their shares while the board members would receive full compensation. She asserts that on January 16, 2018, LLR Partners submitted a letter of intent detailing a nonbinding offer setting forth "the terms and conditions by which [it] would acquire the outstanding capital stock of Zorch ***." LLR proposed to purchase Zorch for \$23 million, which is \$2 million more than Satori's offer. Defendants have allegedly refused to consider LLR's offer because it would purportedly "place [p]laintiff in a management role and would likely result in the current CEO [Michael Wolfe] being removed from his position."

¶ 7 Plaintiff further alleged that if defendants were not enjoined from merging Zorch with Satori, she would suffer irreparable harm because it will "deprive [p]laintiff and others of the full value of her shares of the Company stock permanently, and [p]laintiff will lose the ability to regain control of the management of the Company she founded and worked at as CEO for 11 years ***." She asserted that she has no adequate remedy at law because money damages "would be insufficient to compensate for the loss of the value of the shares of stock and further would result in the loss of her opportunity to regain management of the Company which she formed

from its inception and built into a \$35 million revenue enterprise from scratch.” She asserted that as a shareholder she has a protected right in the sale or merger of the company and that the board’s failure to consider LLR’s offer would violate that right. Furthermore, she asserted that she has a right under section 7.75 of the Business Corporations Act (805 ILCS 5/7.75 (West 2016)) to be informed of the details of the sale or merger. Finally, she claimed that she had a reasonable likelihood of success on the merits because two classes of shareholders would receive nothing as a result of the merger and the board’s no-bid process without an opinion of fairness is evidence of bad faith and breach of its fiduciary duties.

¶ 8 On January 19, 2018, the circuit court conducted a hearing on plaintiff’s petition for a TRO. Counsel for defendants was present at the hearing. Among other things, defendants argued that the merger had not be finalized and no shareholder vote on the merger had been scheduled. After hearing oral argument from all parties, the circuit court made the following findings:

“I find that plaintiff has identified a clearly protected right, and that is the right to have a decision made with respect to the company in which she had an interest in accordance with the board’s proper exercise of its fiduciary duty.

The next two requirements, irreparable harm and no adequate remedy, are closely related, and the argument has been that if the deal went through plaintiff wouldn’t be able to be fully compensated by money damages, and the parties obviously disagree about that.

My finding is that plaintiff has made at least a credible verified allegation that she would no longer be able to have the opportunity to participate in control or regain control of the management of the company. And, again, I want to stress that I’m only talking

about a preliminary injunction for a period of time that would be in effect until we could have a hearing on a preliminary injunction.

So as to the likelihood of success on the merits plaintiff has raised in her petition, I find at least a fair question that the defendants have breached their fiduciary duty by engaging in actions that benefit themselves to the detriment of plaintiff and some of the other shareholders, which is not to say I'm making a finding that that has happened but what I need to look at is whether or not they've raised a fair question."

¶ 9 At the conclusion of the hearing, the circuit court stated "the [c]ourt, for the reasons stated on the record, grants the [TRO] and enjoins the sale or merger of Zorch *** until further order of [c]ourt." A handwritten order entered the same day enjoins defendants from proceeding with the merger or sale to Satori until further order of court, requires defendants to produce "all documents concerning the terms and conditions of the proposed sale to Satori," and sets forth a discovery schedule. No hearing on the preliminary injunction was scheduled. Instead, the circuit court continued the matter to February 21, 2018, "for status on discovery."

¶ 10 On January 22, 2018, defendants filed a timely notice of appeal pursuant to Supreme Court Rule 307(d).¹

¶ 11 ANALYSIS

¶ 12 Defendants move to reverse the TRO and raise three arguments in support on appeal. First, defendants argue that the TRO is invalid because it does not provide for a short hearing date. Second, defendants argue that plaintiff's petition failed to plead an ascertainable right in need of protection because there is no conceivable way that plaintiff could obtain control over Zorch. Finally, defendants argue that plaintiff failed to establish that she will suffer an

¹January 19, 2018, was a Friday, and defendants' notice of appeal was timely filed the following Monday.

irreparable injury or that she lacks an adequate remedy at law. We agree with defendants that plaintiff's petition does not allege sufficient facts to establish that she has an ascertainable right in need of immediate protection, that she will suffer an irreparable injury absent a TRO, or that she has shown that she lacks an adequate remedy at law. We therefore reverse the TRO.

¶ 13 A TRO is a drastic remedy to be used only in extraordinary circumstances and for a brief duration. *Bartlow v. Shannon*, 399 Ill. App. 3d 560, 567 (2010). A TRO is intended to preserve the status quo until a hearing can be held to determine whether the circuit court should grant a preliminary injunction. *Abdulhafedh v. Secretary of State*, 161 Ill. App. 3d 413, 416 (1987). In order to establish a right to a temporary restraining order, plaintiff must demonstrate (1) an ascertainable right in need of protection, (2) a likelihood of success on the merits, (3) irreparable harm in the absence of injunctive relief, and (4) the lack of an adequate remedy at law. *Bridgeview Bank Group v. Meyer*, 2016 IL App (1st) 160042, ¶ 12. A circuit court's decision granting a TRO is reviewed for an abuse of discretion. *Bradford v. Wynstone Property Owners' Ass'n*, 355 Ill. App. 3d 736, 739 (2005). An abuse of discretion occurs only when no reasonable person could adopt the view taken by the circuit court. *John Crane, Inc. v. Admiral Insurance Co.*, 391 Ill. App. 3d 693, 700 (2009).

¶ 14 Plaintiff's petition is devoid of factual allegations that she has an ascertainable right in need of protection through a TRO. Her petition alleges that she and all other Zorch shareholders has a "protected right in the sale or merger of [Zorch]," and that she "has a right to be informed of the details of any sale or merger, to seek additional bids for the sale or merger *** , to have her higher bid *** fairly considered *** , and to be treated by the Board in the manner prescribed by law ***." The petition, however, does not identify the source of these rights, nor does she direct us to any authority supporting her claim that such rights exists. Her petition

alleges that she has a right to inspect Zorch's corporate records, that the board has failed to comply with her requests for such records, and that the board has a fiduciary duty to its shareholders to consider other bids. But she fails to demonstrate how a shareholder's right to inspect records is a right that needs to be protected on an emergency basis through a TRO that indefinitely enjoins the merger, particularly where the board has not yet given notice of a shareholder's vote on the merger. In the absence of allegations that the merger is imminent, her right to inspect corporate records does not amount to an ascertainable right in need of immediate protection through a TRO that indefinitely enjoins the merger. And while her contention that the board owes her fiduciary duties is undoubtedly true, her petition only alleges conclusory declarations that the proposed merger would primarily benefit the board members; she fails to allege any facts to suggest that the board has actually breached a fiduciary duty owed to her. Furthermore, her petition fails to allege facts to support her conclusory allegation that the Satori merger would only "[enrich] the board and one class of shareholders."

¶ 15 Next, because plaintiff fails to allege any facts to establish an ascertainable right in need of immediate protection, she cannot establish that she would suffer an irreparable harm without a TRO. The circuit court concluded that plaintiff had made "a credible verified allegation that she would no longer be able to have the opportunity to participate in control or regain control of the management of [Zorch]." We fail to see how such a claim warrants an emergency injunction. First, plaintiff presents no factual basis or documentary support that she has a protected right to have an opportunity to participate in control of Zorch or to regain control of the management of the company. At the TRO hearing, it was undisputed that plaintiff is a 7% minority shareholder in Zorch and that she left the board of directors in 2013. The entry of a TRO would not preserve any of her management rights because she apparently has none, and the only rights she asserts in

her petition are the fiduciary duties owed her by the board and her right to request inspection of the corporate books. See 805 ILCS 5/7.75 (West 2016). Furthermore, any expectation that she might regain control of Zorch appears, at best, to be an expectation contingent on Zorch's acceptance of LLR's nonbinding offer being accepted, which is not a present ascertainable right in need of protection. Importantly, by its own terms, LLR's putative offer was set to expire on January 23, 2018, unless extended by agreement of the parties and cannot reasonably be considered as support for this part of plaintiff's claimed right in need of protection.

¶ 16 Finally, plaintiff's petition fails to establish that she lacks an adequate remedy at law. Plaintiff alleges that money damages could not "compensate her for the loss of the value of her Series D-2 preferred shares and would deprive her of any opportunity to regain management of Zorch which she founded and built into a \$35 million enterprise." Plaintiff's petition does not provide any supporting factual details about series D-2 preferred stock or how it might be affected by the merger. But regardless, at this stage of the proceedings, her position that she lacks an adequate remedy at law ignores our state's corporate law statutes governing dissenters' rights. Under the Business Corporation Act, nonconsenting minority shareholders to a transaction who believe the consideration paid was not fair are entitled to seek fair value of their shares. 805 ILCS 5/11.65, 11.70 (West 2016). Plaintiff's petition fails to show how the Business Corporation Act's mechanism for establishing the fair value of nonconsenting minority shareholders' shares is not an adequate remedy at law to compensate her for any alleged injury she might incur as a result of the merger. Finally, her allegation that she would lose an opportunity to regain management of the company she founded—but does not currently have any meaningful control of—is not a present ascertainable right in need of protection through a TRO.

And as noted above, LLR's nonbinding offer on which she bases her future expectation of control over Zorch has expired by its own terms.

¶ 17 Finally, we note that while we have concluded that plaintiff was not entitled to a TRO, we express no opinion with respect to whether plaintiff might prevail at a hearing on the preliminary injunction.

¶ 18 **CONCLUSION**

¶ 19 The circuit court abused its discretion in granting plaintiff's petition for a TRO. Plaintiff's petition for a TRO failed to establish an ascertainable right in need of immediate protection, that she will suffer an irreparable injury absent TRO, or that she lacks an adequate remedy at law. We therefore reverse the circuit court's January 19, 2018, order granting plaintiff's petition for a TRO and enjoining the sale or merger of Zorch until further order.

¶ 20 Reversed.