

No. 1-19-0764

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 JUDICIAL DISTRICT

ALPHA BULK LOGISTICS, an Illinois limited liability company; and MICHAEL AGINS,)	Appeal from the Circuit Court of Cook County
)	
Plaintiffs-Appellants,)	
)	
v.)	
)	
THEODORE NETZKY, individually and as Trustee of the 2013 Clavey Trust; GLENN SEIDEN, individually and as beneficiary of the 2013 Clavey Trust; SEIDEN NETZKY LAW GROUP, LLC; BARRY NETZKY, individually and as Trustee of the New Boardwalk Trust #1, and as Trustee of the New Boardwalk Trust #2; WOLIN & ROSEN, LTD.; THE BARBARA GLASS TRUST; and RALPH PICKER & ASSOCIATES,)	No. 19 CH 4476
)	
Defendants-Appellees.)	The Honorable Celia Gamrath, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 **Held:** The circuit court did not abuse its discretion in denying a temporary restraining order which would have required certain defendants to sequester disputed funds claimed by the plaintiffs.

¶ 2 Plaintiffs-appellants Alpha Bulk Logistics, Inc. (Alpha) and Michael Agins, Alpha's founder, filed an 11-count verified complaint against various defendants under a host of tort and equity theories. For simplicity, we aggregate the defendants into two groups. The "nominal defendants" include Wolin & Rosen, Ltd., a law firm; the Barbara Glass Trust; and Ralph Picker & Associates, an accounting firm. We will characterize all remaining defendants as the "main" defendants. The underlying dispute concerns the main defendants' allegedly unlawful takeover of control of Alpha from Agins. Alpha and Agins moved for a temporary restraining order, requesting various forms of immediate relief against the defendants. The circuit court conducted a hearing on that motion on April 11, 2019. The motion was supported by the affidavit of Agins and certain exhibits which were incorporated into the verified complaint. No one formally testified at the hearing, but attorneys for both sides presented extensive arguments, and the transcript of the hearing exceeds 100 pages in length. At the time of the hearing, no defendants had yet answered the complaint.

¶ 3 After the hearing, the circuit court entered a written order finding: (1) that an emergency existed; (2) the plaintiffs had a clearly ascertainable right in need of protection; (3) there was a fair question that plaintiffs would succeed on the merits and would suffer irreparable harm in the absence of injunctive relief; and (4) there was no remedy at law. The court then entered a temporary restraining order, which it characterized as a "patch" pending a fuller hearing: (1) enjoining enforcement of a corporate resolution removing Alpha's manager; (2) requiring Alpha funds, including receipts from accounts receivable, to be deposited in Alpha's bank account and only disbursed upon signatures of Agins and defendant Barry Netzky; (3) requiring corporate decisions to be made jointly by Agins and Netzky; and (4) setting a briefing schedule and post-briefing status date on an anticipated motion for preliminary injunction.

¶ 4 However, the court did not grant all the relief which plaintiffs requested. It specifically denied the plaintiffs' request for a temporary restraining order to require the nominal defendants to sequester and hold certain money in constructive trust. The money at issue consists of five transfers: \$20,000 to Picker & Associates; \$24,975.26 to Wolin & Rosen for unspecified purposes; a \$25,000 retainer to Wolin & Rosen; \$100,000 "earned upon receipt" retainer to Wolin & Rosen; and \$100,000 to the Barbara Glass Trust, an unsecured creditor of Alpha whose note was personally guaranteed by defendant Theodore Netzky. On various dates during March, 2019, after seizing control of Alpha, some of the main defendants transmitted those five payments out of Alpha's bank account to the nominal defendants by wire transfer.

¶ 5 In explaining why it denied relief regarding these transfers, the court noted that the timing of the payments was suspicious and gave rise to conflict of interest concerns. Even so, it expressed a concern that the plaintiffs were seeking a prejudgment attachment of funds in the hands of third parties, and that they had a remedy at law in that a money judgment could be entered against entities that improperly received money from Alpha. The court further noted that "we're getting way ahead of the game to start disgorging or imposing some sort of constructive trust against nominal defendants" and "[t]o the extent those fees have been earned and charged, those monies are out the door."

¶ 6 Alpha and Agins then filed this appeal pursuant to Illinois Supreme Court Rule 307(d) (eff. Nov. 1, 2017) from the portion of the court's April 11, 2019 order which denied their request for a sequestration order as to the five disputed payments. The three nominal defendants have filed a memorandum in opposition. The Supreme Court Rules require this court to act with extreme expedition. See Ill. S. Ct. R. 307(d)(4) (eff. Nov. 1, 2017) ("the Appellate Court shall consider and decide the petition within five business days" of the deadline for filing responding

memoranda). Consequently, we have not recited the facts in detail in this order. Nonetheless, this court has thoroughly considered the submissions of the parties and all exhibits.

¶ 7 “A temporary restraining order is an emergency remedy issued to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue.” *Delgado v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 481, 483 (2007) citing *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 94 Ill.2d 535, 545 (1983). To be entitled to temporary injunctive relief, plaintiffs must demonstrate that they (1) possess a protectable right, (2) will suffer irreparable harm without the protection of an injunction, (3) have no adequate remedy at law, and (4) are likely to be successful on the merits of their action. *Murges v. Bowman*, 254 Ill.App.3d 1071, 1081 (1993). “The plaintiff is not required to make out a case which would entitle him to judgment at trial; rather, he only needs to show that he raises a ‘fair question’ about the existence of his right and that the court should preserve the status quo until the cause can be decided on the merits.” *Stocker Hinge Manufacturing Co.*, 94 Ill.2d 535, 542 (1983). Generally, we will affirm the circuit court’s denial of a temporary restraining order unless the court abused its discretion. *C.D. Peters Construction Co. v. Tri-City Regional Port District*, 281 Ill.App.3d 41, 47 (1996). An abuse of discretion exists where the trial court’s decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court. *Seymour v. Collins*, 2015 IL 118432, ¶ 41. This is a highly deferential standard of review.

¶ 8 On appeal, Alpha and Agins argue, *inter alia*, that the court erred by allowing a Wolin & Rosen attorney to step up to the bench and essentially submit unsworn testimony as to certain facts, and that the sequestration would not be an improper pre-judgment attachment because Alpha has a superior interest in the funds at issue. The nominal defendants contend that the

circuit court properly denied relief as to the five disputed payments because the complaint itself is vague about the purpose of the payments, there is an adequate remedy at law, and sequestering the funds would be an improper pre-judgment attachment.

¶ 9 We agree with the plaintiffs' first point that oral argument is not proper evidence at a hearing on a temporary restraining order. *Jurco v. Stewart*, 110 Ill. App. 3d 405, 409 (1982). We cannot be absolutely certain whether the court accepted the Wolin & Rosen attorney's arguments as evidence, but we must assume that it did not. See *People v. Naylor*, 229 Ill. 2d 584, 603 (2008) ("when a trial court is the trier of fact, a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion."). In light of the fleeting nature of the temporary restraining order and the fact that the error, if any, can be rectified at the forthcoming preliminary injunction hearing, we will not vacate or reverse the order on the basis of the attorney's unsworn "testimony". Instead, we will consider whether the court abused its discretion based on the record absent those comments.

¶ 10 That takes us to the main issue. Alpha and Agins characterize the five disputed payments as a "war chest" allowing the main defendants to use to fund this litigation battle against them. They argue, in essence, that it was illogical for the court to find the plaintiffs were likely wronged by the defendants' conduct but then not to defund their litigation "war chest". They also contend that Wolin & Rosen has a conflict which would prevent it from taking certain positions adverse to the plaintiffs.

¶ 11 While the circuit court concluded that plaintiffs were entitled to some forms of immediate relief with respect to the takeover of Alpha, it exercised sound discretion in not requiring Alpha's lawyers, accounting firm, or creditors to either disgorge or sequester money which they had received during the dispute. The plaintiffs have an adequate remedy at law if those sums were

improperly taken from them. See *Small v. Sussman*, 306 Ill. App. 3d 639, 647 (1999) (“When legal damages are an adequate remedy, the imposition of a constructive trust is inappropriate.”). The circuit court also limited injunctive relief to affect only defendants who were principals in Alpha, as opposed to the outsider nominal defendants. We cannot find that drawing a line between the two groups of defendants, one of which had a much greater stake and was more likely to have engaged in wrongful conduct than the other, amounted to an abuse of discretion. This demarcation was supported by the court’s requirement that both sides—that is, the plaintiffs and the main defendants—continue to participate in corporate decisions pending further proceedings. Accordingly, we find the circuit court did not abuse its discretion in denying a temporary restraining order as to the five disputed payments.

¶ 12 In this order, we have determined only that the circuit court did not abuse its discretion in denying the portion of plaintiff’s requested temporary restraining order at issue. We do not intend to resolve any contested issues of fact, nor to restrain the circuit court from proceeding differently once a fuller record is produced in support of a preliminary injunction, dispositive motion, or trial.

¶ 13 Affirmed.