

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

QLISANR, LLC, QLISANR REALTY I, x Index
LLC and QLISANR REALTY II, LLC, Number 10226 2006
Plaintiffs, Motion
Date July 16, 2008
- against -
Motion
HOLLIS PARK MANOR NURSING HOME, INC., Cal. Number 28
HOLLIS PARK HOLDING LLC, HOLLIS
PARK REALTY LLC and AHRON EBERT, Motion Seq. No. 3
Defendants.
x

AHRON EBERT,
Defendant/Third-Party Plaintiff,
- against -

JOSEPH BRONNER, CHARLOTTE BALDINGER,
and MORRIS BALDINGER,
Third-Party Defendant.
x

The following papers numbered 1 to 15 read on this motion by third-party defendants Joseph Bronner, Charlotte Baldinger and Morris Baldinger for an order dismissing the third-party complaint on the grounds that it fails to state a cause of action, and that it is untimely, pursuant to CPLR 3211(a)(7) and (5). Defendant and third party plaintiff Ahron Ebert cross-moves for an order granting summary judgment dismissing the complaint. Plaintiffs cross-move for an order extending their time in which to file their motion for summary judgment until 30 days after the defendant Ahron Ebert appears for a deposition and the deposition is concluded.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation- Exhibits (A-E).....	1-4
Notice of Cross Motion-Affirmation-Exhibits (A-C).	6-8
Notice of Cross Motion-Affirmation-Exhibits (A-F).	9-12
Reply Affirmation-Exhibits (A).....	13-15
Memorandum of Law.....	
Memorandum of Law.....	
Reply Memorandum of Law.....	

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Defendant Hollis Park Nursing Home, Inc. operates a nursing home in Hollis Park, New York. Defendant Hollis Park Holding, LLC owns the real estate upon which the nursing home is situated and controls defendant Hollis Park Realty LLC, the owner of an adjacent property. Defendant Ahron Ebert holds 12.5% of the shares of Hollis Park Nursing Home, Inc., and a 12.5% membership interest in Hollis Park Holding LLC. On October 10, 2005, five of the members or shareholders of the defendant companies holding an 87.5% interest voted to approve the sale of these companies to the plaintiffs. Mr. Ebert abstained and on November 10, 2005 purportedly exercised his right of first refusal, under the respective shareholder and membership agreements.

On May 5, 2006, plaintiffs commenced this action for a declaration to the effect that Ahron Ebert failed to properly exercise his right of first refusal to purchase the assets of the co-defendants. Plaintiffs also assert claims for specific performance and for damages for tortious interference with contractual relations. Issue has long been joined and the parties attended a pretrial conference on February 1, 2008, at which time a so-ordered stipulation was issued which, among other things, permitted defendant Ahron Ebert to serve an amended answer within 10 days from the date of the conference.

The note of issue and certificate of readiness was filed on February 8, 2008. On February 10, 2008, Mr. Ebert's counsel served the co-defendants' counsel with an "Amended Verified Answer with Cross-Claims and Third Party Compliant." The cross claims against the corporate co-defendants assert two claims for breach of contract, and a claim for indemnification pursuant to the shareholder's agreement. Although the amended answer purportedly asserted a third-party claim against Joseph Bronner, Charlotte Baldinger and Morris Baldinger, the third-party action was not commenced until April 21, 2008.

On May 6, 2008, the Appellate Division, Second Department issued an order affirming this court's order entered on March 1, 2007, which denied the plaintiffs' motion for summary judgment on the first cause of action for declaratory relief. The court determined that "trial issues of fact exist as to, inter alia, whether the respondent, Ahron Ebert, improperly sought to exercise his right of first refusal by seeking to purchase only the assets of defendant Hollis Park Manor Nursing Home, Inc., (see Laramie Springtree Corp. v Equity Residential Props. Trust., 303 AD2d 464), or whether, on the other hand, he properly exercised his right of first refusal by agreeing to purchase all of the assets of the defendants Hollis Park Manor Nursing Home, Inc., Hollis Park Holding LLC, and Hollis Park Realty LLC (collectively the Company) pursuant to the agreement between the Company and the plaintiffs" (Olisanr, LLC v Hollis Park Manor Nursing Home, Inc., 51 AD3d 651 [2008]).

That branch of third-party defendants' motion to dismiss the third-party complaint on the grounds that it is untimely is denied. Contrary to the third-party defendants' assertions, the so-ordered stipulation of February 1, 2008, did not require Mr. Ebert to serve the third-party complaint within 10 days of the date of said order. Rather, the so-ordered stipulation did not address the issue of a proposed third-party action, and only required that the amended answer be served upon the then named defendants within the 10-day time period. The service of the amended answer containing a third-party complaint, however, could not serve to commence a third-party action. Third-party plaintiff commenced the third-party action by filing the third-party summons and complaint on April 21, 2008, and the third-party defendants do not assert that the causes of action for breach of fiduciary duty and breach of contract are barred by the statute of limitations.

Third-party defendants served the motion to dismiss the third-party complaint on May 8, 2008. Although it appears that the third-party claim for breach of fiduciary duty, is insufficient as it does not set forth the claim in detail (see Simon v Becherer, 7 AD3d 66, 72 [2004]; Berger v Scharf, 11 Misc 3d 1072A [2006]), an amended third-party apparently was served and filed, prior to this motion being fully submitted. Said amended third-party complaint, is alleged to have been timely amended as of right, and is referred to by counsel to third-party defendants in a reply affirmation, and by the parties in reply memoranda of law. However, as the amended third-party complaint was not submitted here, the court at present can make no determination as to the sufficiency of said pleading. Accordingly, that branch of the third-party defendants' motion which seeks to dismiss the original third-party complaint on the grounds that it is untimely is denied. The remainder of the motion

is denied, as the court can make no determination at this time as to the sufficiency of the amended third-party complaint.

Plaintiffs contract vendees, in their first cause of action for declaratory judgment seek a declaration to the effect that Ahron Ebert failed to properly exercise his right of first refusal to purchase the assets of Hollis Park Manor Nursing Home, Inc., Hollis Park Holding, LLC, and Hollis Park Realty LLC, (collectively the Company) and that plaintiffs' right to purchase said assets are superior to Ebert's. The second cause of action against the corporate defendants seeks specific performance of the contractual agreements to purchase said assets. The third cause of action against Ebert is for intentional interference with contractual relations. All three of the purchase agreements at issue here contain clauses which provide that "[t]he determination of whether or not the right of first refusal was properly and timely exercised shall be in the sole discretion of the Seller." It is noted that although Mr. Ebert's counsel made reference to the issue of standing in a footnote in the memorandum of law submitted on the appeal, defendant did not previously move on this affirmative defense, and chose to submit to the court's jurisdiction over the within matter, arguing that the court properly determined that a triable issue of fact exists as to the exercise of the right of first refusal. This court and the Appellate Division thus necessarily determined that a justiciable controversy exists as to whether or not the plaintiffs have a superior right to purchase the asserts to the Company. Plaintiffs, therefore, have standing to assert a claim for declaratory judgment, as well as a claim for intentional interference with contractual relations. Defendant and third-party plaintiff Ahron Ebert's cross motion for an order granting summary judgment dismissing the complaint, is denied.

Plaintiffs cross-move for an order extending their time in which to file their motion for summary judgment until 30 days after the defendant Ahron Ebert appears for a deposition and the deposition is concluded, is denied. The parties are given leave to complete their discovery and plaintiffs may make an appropriate application for summary judgment, demonstrating good cause for a late motion, pursuant to CPLR 3212(a), should they deem it necessary.

In view of the foregoing, third-party defendants' motion for an order dismissing the third-party complaint on the grounds that it fails to state a cause of action, and that it is untimely, is denied. Defendant and third-party plaintiff Ahron Ebert's cross motion for an order granting summary judgment dismissing the complaint, is denied. Plaintiffs' cross motion for an order

extending their time in which to file a motion for summary judgment against defendant Ahron Ebert is denied.

Dated: 10/7/08

J.S.C.