

**Matter of 1650 Realty Assoc., LLC v Golden Touch
Mgt., Inc.**

2011 NY Slip Op 34235(U)

July 13, 2011

Supreme Court, Nassau County

Docket Number: 005408/11

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

In the Matter of the Application of 1650 REALTY
ASSOCIATES, LLC and 1671 REALTY
ASSOCIATES, LLC,

INDEX No. 005408/11

Petitioners,

MOTION DATE: May 6, 2011
Motion Sequence # 001

For an Order Appointing a Temporary Receiver
and/or the Issuance of a Temporary Restraining
Order and/or the Issuance of an Order
Transferring the Books and Records of the
Petitioners to IVY PROPERTY MANAGEMENT,
INC.,

-against-

GOLDEN TOUCH MANAGEMENT, INC., PARO
MANAGEMENT CO., INC., JANGLA REALTY
CORP., SERHOF REALTY, CORP., RONALD
SWARTZ and STEVEN SWARTZ,

Respondents.

The following papers read on this motion:

- Order to Show Cause..... X
- Affidavit in Opposition..... X
- Memorandum of Law..... X

Motion by petitioners for a preliminary injunction is **granted** to the extent indicated
below. Motion by petitioners for the appointment of a temporary receiver is **denied**.

Gladys Lind is the managing member of petitioners 1650 Realty Associates, LLC and 1671 Realty Associates, LLC. Gladys' father, Jacob Hoffman, died in August 1987. At the time of Hoffman's death, he held an ownership interest in 18 real estate partnerships. The partnerships held title to commercial properties located in Brooklyn and Queens. Hoffman had been represented by the law firm of Swartz & Swartz, and, after his death, they continued to represent his estate. Respondents Ronald Swartz and Steven Swartz were principals of the firm.

On June 30, 1991, Ronald Swartz, as president of respondent Golden Touch Management, Inc, entered into a management and leasing agreement with the surviving real estate partners, Gladys Lind, and the other beneficiaries of Jacob Hoffman's estate. The management agreement, which covered all 18 of the commercial properties, provided for a base management fee of \$325,000 per year. In addition, the manager was entitled to 50 % of the "Increased Cash Flow," 50 % of the "Net Sales Proceeds upon a sale of any property, and 50 % of the "Net Financing Proceeds" upon the refinancing of existing loans. The agreement was for a ten year term, subject to four automatic 10-year renewal periods. Golden Touch has managed all 18 of the properties since that time.

In 1998, the surviving partners and beneficial owners of the properties made certain ownership changes and distributed certain of the properties. It appears that at the time of the ownership changes, Gladys was not represented by Swartz and Swartz, but was represented by other counsel. Pursuant to the distribution plan, Gladys became the sole owner of two apartment buildings in Brooklyn, 1650 Ocean Parkway and 1671 East 17th Street, and relinquished her ownership interest in the other properties. Gladys then created petitioners 1650 Realty Associates, LLC and 1671 Realty Associates, LLC to hold title to the apartment buildings.

Gladys claims that in 2007 she discovered that the combined rent rolls of the two buildings was approximately \$1.2 million but that only \$166,573, or 14 % of the rent roll, was being distributed to her as income. Gladys further claims that in March 2011 she began to receive distribution checks, not from Golden Touch, but from respondents Paro Management Co, Jangla Realty Corp, and Serhof Realty Corp. According to Gladys, Jangla and Serhof own other properties, which are managed by Golden Touch, in which Gladys has no ownership interest. Thus, Gladys suggests that management expenses attributable to the other buildings may have been charged to her properties.

On March 22, 2011, Gladys notified Golden Touch that she was discharging them as

her property manager. Gladys further requested that Golden Touch transfer all of the financial records relating to the properties to Ivy Property Management, Inc, her new property manager.

This action was commenced on April 12, 2011. Petitioners seek an accounting as well as an order directing respondents to transfer the financial books and records to Ivy Property Management. By order to show cause dated April 12, 2011, petitioners move for a preliminary injunction restraining Golden Touch, Paro Management, Jangla and Serhof from 1) transferring any assets or monies belonging to petitioners without the written consent of their managing member, and 2) making any payments from petitioners' funds to respondents or their principals. Petitioners further request an order directing respondents to preserve all financial records concerning the operation of the buildings and to turn the records over to petitioners. Finally, petitioners request the appoint of a temporary receiver for the 1650 Ocean Parkway and 1671 East 17th Street properties.

In the order to show cause, the court granted a temporary restraining order prohibiting respondents from transferring their assets, except in the ordinary course of business. The court further restrained respondents from paying any of their principals' personal expenses with funds belonging to petitioners. Finally, the court directed respondents to preserve all financial records pertaining to respondents, or to the subject real properties, and to turn over all records relating to payments received on behalf of petitioners to Ivy Property Management.

In opposition, respondents assert that the original 18 properties had fallen into disrepair and had become financially distressed. Respondents assert that the long term management agreement was intended in essence to give Ronald and Steven Swartz a 50 % equity interest, in exchange for their giving up their legal careers and agreeing to rehabilitate the properties.

Respondents further assert that, on the recommendation of their accountants, they used the Yardi accounting system, whereby multiple bank accounts are "concentrated," while maintaining separate books and records for each property. Respondents further assert this procedure is "standard practice" for many management and real estate companies. Finally, respondents argue that petitioners are prevented from terminating the management contract under the doctrine of continued employment.

In order to be entitled to a preliminary injunction, defendants must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]).

Under the faithless servant doctrine, an agent who engages in repeated acts of disloyalty may forfeit the right to compensation (*William Floyd School District v Wright*, 61 AD3d 856 [2d Dept 2009]). Petitioners have not established a likelihood of success on the merits with respect to their claim that respondents have charged them with management expense not attributable to their properties. Thus, petitioners have not established that Golden Touch forfeited its right to compensation. Nevertheless, petitioners are entitled to a complete accounting.

A lawyer shall not enter into a business transaction with a client, if they have differing interests and the client expects the lawyer to exercise professional judgment for the protection of the client, unless the transaction is fair and reasonable to the client, and the client gives informed consent after being advised in writing of the desirability of seeking the advice of independent counsel (Rule 1.8 of the Professional Conduct Rules). Thus, Swartz & Swartz should not have entered into the management agreement with Gladys without first advising her in writing of the desirability of seeking other counsel.

An unconscionable contract is one which is so grossly unreasonable as to be unenforceable according to its literal terms because of an absence of meaningful choice on the part of one of the parties (“procedural unconscionability”) together with contract terms which are unreasonably favorable to the other party (“substantive unconscionability”) (*Lawrence v Miller*, 11 NY3d 588, 595 [2008]).

The court determines that petitioners have shown a likelihood of success on the merits with respect to their claim that the 50 year duration in the management agreement is unconscionable. Because Gladys was not advised as to the desirability of seeking independent counsel, she did not have a meaningful choice as to whether to sign the management agreement. The provision for a ten year term, and four automatic ten year renewals, is unreasonably favorable to Golden Touch, particularly in view of the compensation provisions which in effect granted the management agent a 50 % equity interest.

Accordingly, petitioner’s motion for a preliminary injunction is **granted** to the extent that respondents are enjoined, pending final judgment in this proceeding, from 1) transferring

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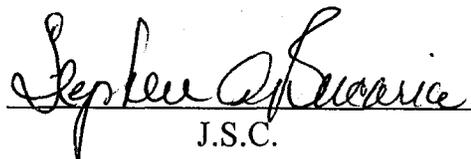
any assets or monies belonging to petitioners without the written consent of Gladys Lind, petitioner's managing member, and 2) making any payments from petitioners' funds to respondents or their principals, or anyone of their behalf. The preliminary injunction is conditioned upon petitioner's posting a bond in the amount of \$50,000 within fifteen days of the date of this order.

Respondents shall turn over to petitioners, or Ivy Property Management, all financial records relating to 1650 Ocean Parkway and 1671 East 17th Street, for the period April 12, 2005 to the present, in electronic format or hard copy, within 15 days of the date of this order. The temporary restraining order, directing respondents to preserve the financial records of the aforesaid properties, will continue in effect pending compliance with this order.

Petitioners have not established that there is a danger that either of the properties will be materially injured or destroyed prior to final judgment (CPLR § 6401). Accordingly, petitioner's motion for the appointment of a temporary receiver with respect to 1650 Ocean Parkway and 1671 East 17th Street is **denied**, with leave to renew upon a review of the financial records directed to be provided within 15 days of the date of this order.

So ordered.

Dated JUL 13 2011


J.S.C.

ENTERED
JUL 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE