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2024 NY Slip Op 31611(U)

March 14, 2024

Supreme Court, Kings County

Docket Number: Index No. 535794/2023

Judge: Rupert V. Barry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

KINGS COUNTY CLERK 05/07/2024

NYSCEF DOC. NO. 110

Index No.: 535794/2023

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At an IAS Term, Part 13 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at 320 Jay Street, Brooklyn, New York on the 14th day of March 2024

PRESENT:

HON. RUPERT V. BARRY, A.J.S.C.

MILLER, CHAIM

Plaintiff, Motion Seq. Nos.:1 & 2

Cal No.: 48 & 49 -against-

Index No.: 535794/2023

XI HUI WU, CHUN PETER DONG and: SILVERMAN, SHIN & SCHNEIDER, PLLC

Defendants. **DECISION & ORDER** 

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Recitation, as required by CPLR 2219(a), of the papers considered in review of Plaintiff's order to show cause (Motion Seq. No.:1) for, among other things, declaratory and injunctive relief, and Defendants cross-motion (Motion Seq. No.: 2) to stay this matter and compel arbitration pursuant to CPLR 7503: NYSCEF Doc. Nos.: 1-77.

Upon the foregoing cited papers, this Court finds as follows:

This matter arises from allegations by Plaintiff that Defendants fraudulently deprived him of his 20% managing member ownership interest in 9008 Queens Blvd Loft LLC (hereafter "9008 LLC"). Plaintiff alleged that the Release and Estoppel Certificate dated April 15, 2015, the vehicle through which he asserts this fraud was undertaken, contained a forgery of his signature. In support of the assertion that his signature was forged on the Release and Estoppel Certificate dated April 15, 2015, Plaintiff submitted the affidavit of notary Miroslava Simanovsky. Plaintiff, now moves this Court for, among other things, (i) a declaration that Defendants fraudulently deprived Plaintiff of his 20% ownership interest in 9008 LLC, and (ii) an injunction prohibiting Defendants from disbursing or releasing the funds that were generated by the sale of the Queens properties (hereafter

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the "Queens Property")<sup>1</sup> that was owned by 9008 LLC, and which funds were currently being

held in escrow by Silverman, Shine, and Schnider PLLC with the Webster Bank.<sup>2</sup>

Defendants filed a cross-motion to stay this action and compel arbitration.

Defendants assert that Plaintiff tendered his 20% share in 9008 LLC as collateral for a 4.75

million dollar loan Plaintiff received from Ai Yun Chen. Defendants then assert that Plaintiff

defaulted on the loan to Ai Yun Chen. Defendants further assert that Plaintiff borrowed 2 million

dollars from Defendants to pay off Ai Yun Chen and in exchange Defendants received Plaintiff's

20% interest in 9008 LLC as collateral. When Plaintiff defaulted on Plaintiff's 2 million dollar

loan from Defendants, Defendants asserted, per the loan agreement, they acquired Plaintiff's 20%

interest in 9008 LLC.

Plaintiff alleged that after the fraudulently executed release of Plaintiff's 20% share in 9008

LLC, the "Queens Property" owned by 9008 LLC was sold for \$125,000,000.00, and Plaintiff was

excluded from voting on the sale and receiving any funds from the sale.

For a movant to prevail on an application for a preliminary injunction, the movant must

establish "(1) the likelihood of success on the merits, (2) irreparable injury absent granting the

preliminary injunction, and (3) a balancing of the equities in the movants favor" (Ying Fung Moy

v Hohi Umeki, 10 AD3d 604 [2d Dept 2004]).

 $^1$  Prior to December 2, 2016, 9008 LLC was the owner of real property located at 89-52/90-02 Queens Boulevard a/k/a/ 57-19 Hoffman Drive, Elmhurst, New York 11373 and 87-28  $58^{th}$  Avenue a/k/a 58-02 Hoffman

Drive, Elmhurst, New York 11373 (collectively, the "Queens Property").

<sup>2</sup> Plaintiff further alleged that a prior so-ordered stipulation was violated from Queens County that directed Defendants to hold \$10,000,000.00 of the disputed funds in escrow until his claims were resolved. As Plaintiff was not a party to the stipulation in the Queens Court action, this Court finds that that stipulation has no bearing on this Court decision.

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This Court finds that Plaintiff failed to submit sufficient credible evidence to prevail even

on the first prong required for the granting of the equitable relief Plaintiff seeks. Plaintiff has failed

to establish Plaintiff's likelihood of success on the merits. Interestingly, in his papers, Plaintiff

does not reference the loan by Ai Yun Chen to Plaintiff, or Plaintiff's 20% interest in 9008 LLC

being tendered as collateral for that loan. Additionally, Plaintiff does not reference in his papers,

the 2 million dollar loan made by Defendants to Plaintiff so that Plaintiff could pay off the default

on Plaintiff's loan from Ai Yun Chen. Nor did Plaintiff address Defendants assertion that

Defendants received Plaintiff's 20% interest in 9008 LLC for Defendants loaning Plaintiff that 2

million dollars. Moreover, the affidavit of Miroslava Simanovsky is far from persuasive. In her

affidavit, Ms. Simanavsky states in substance that (i) "...I have no recollection or documentation

that would refresh my recollection that I notarized the 'Release and Estoppel Certificate'..." and

(ii) "The notary signature on the 'Release and Estoppel Certificate' ... does not appear to me to be

my signature." Ms. Simanavaky's protestation falls considerably short of what would be needed

to persuade this Court that Plaintiff has made a *prima facie* showing that his signature on the April

15, 2015, Release and Estoppel Certificate was forged.

Furthermore, in that the relief Defendants seek is a stay of the proceedings and arbitration

as to the contested issues, this Court finds that Plaintiff has also failed to show irreparable injury

to Plaintiff absent granting his requested injunctive relief, and that balancing of the equites favor

Plaintiff. In short, Plaintiff has failed to make a prima facie showing of Plaintiff's entitlement to

any of the relief Plaintiff seeks in Plaintiff's application to this Court.

"Arbitration is a matter of contract, grounded in agreement of the parties" (Matter of

Belzberg v Verus Invs. Holdings Inc., 21 NY3d 626, 630 [2d Dept 2013]).

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Turning now to Defendants crossclaim for a stay of the instant proceedings and to compel

arbitration in this case. Defendants submitted the Amended and Restated Operating Agreement of

Queens Blvd Loft LLC (hereafter "the Agreement") signed by Plaintiff on July 28, 2014. Plaintiff

does not dispute the validity of the Agreement and indeed references the Agreement in his

complaint. Section 14.17 of the Agreement references the repayment of the loan of Ai Yun Chen

and section 14.19 clearly indicates that any dispute arising out of the agreement shall be decided

before the American Arbitration Association.

This Court finds that Defendants have provided sufficient credible evidence to support the

relief they seek in their application to this Court. Accordingly, it is

**ORDERED**, that Plaintiff's motion for injunctive and declaratory relief DENIED in its

entirety. It is further

**ORDERED**, that Defendants' motion to stay the proceedings in this case and compel

arbitration with American Arbitration Association is GRANTED.

This constitutes the decision and order of this Court.

\*All applications not specifically addressed herein are denied.

HON. RUPERT V. BARRY, A.J.S.C.

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