

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Joan B. Carey
Administrative Order

YL SHEFFIELD LLC and SH 57TH LLC, individually and derivatively on behalf of 322 WEST 57TH LLC, 322 WEST 57TH OWNER LLC, 322 WEST 57TH I LLC, 322 WEST 57TH II LLC, 322 WEST 57TH III-A LLC, 322 WEST 57TH III-B LLC, 322 WEST 57TH III LLC, and 322 WEST 57TH IV LLC,

Plaintiffs,

- v -

INDEX NO. 601782/09

WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP. COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006 TFL2, et al.,

Defendants, and

322 WEST 57TH OWNER LLC, 322 WEST 57TH I LLC, 322 WEST 57TH II LLC, 322 WEST 57TH III-A LLC, 322 WEST 57TH III-B LLC, 322 WEST 57TH III LLC, 322 WEST 57TH IV LLC, and 322 WEST 57TH LLC,

Nominal Defendants.

Administrative Order:

By letters dated June 18, 2009, defendants SE West 57 Property, LLC, SE West 57 Management, LLC, Kent Swig, Swig Equities, LLC and Falcon Pacific Construction, LLC (the Swig defendants) object to the reassignment of this action from Commercial Division Part 60 (Fried, J.) to I.A.S. Part 61 (Sherwood, J.). By letter dated June 19, 2009, plaintiffs argue that the case should remain with Justice Sherwood and contend that the reassignment was appropriate. For the following reasons, I am ordering the case be re-assigned back to Justice Fried.

The Sheffield is a condominium development located at 322 West 57th Street, New York, New York. On May 4, 2009, two owners of units in The Sheffield commenced a mandamus proceeding against the board of managers, alleged to be wholly controlled by the sponsor, 322 West 57TH Owner, LLC, and its three principals Kent Swig, Yair Levy and Serge Hoyda. The unit owners alleged that the board of managers had failed to collect over \$5 million in common charges on the condominium's unsold units and had not filed liens on the unsold units to protect the condominium. That proceeding, entitled Wagner v. The Board of Managers of the 322 West 57th Street Condominium, Index No. 106231/09 (the Wagner action), was assigned to the Hon. O. Peter Sherwood. Justice Sherwood denied the petitioners' application for a temporary restraining order on May 5th. Thereafter, the dispute was resolved by the parties pursuant to a written stipulation dated May 28, 2009, and the proceeding was discontinued by order dated June 4, 2009.

The instant action was commenced on June 9, 2009 on behalf of Yair Levy and Serge Hoyda, who allegedly own a 70% controlling interest in 322 West 57TH Owner, LLC. The complaint alleges that their partner, defendant Kent Swig, has engaged in a host of financial wrongdoing and self-dealing in connection with the financing, refinancing, development and operation of the Sheffield, including, but not limited to, siphoning off as much as \$50 million of the available building loan advances to companies controlled by him, payoffs to lenders, and failing to pay the common charges at issue in the Wagner action and settling that lawsuit without plaintiffs' consent. Plaintiffs have also moved, by order to show cause, for the appointment of a temporary receiver to replace Swig as operations manager of the derivative plaintiff companies.

This action was filed as a commercial case, and assigned to the Hon. Bernard Fried. By order dated June 10, 2009, Justice Fried, sua sponte, determined that this action was related to the Wagner action, and transferred this action to Justice Sherwood. On June 16, 2009, Justice Sherwood signed the order to show cause, setting down a return date of July 8, 2009.

Counsel for the Swig defendants argues that this action is actually more closely related to two other actions that are currently pending before Justice Fried in the Commercial Division. These two actions, respectively, entitled Square Mile Structured Debt (One) LLC v. Kent M. Swig, Index No. 603825/08, and Square Mile Structured Debt (One) LLC v. Kent M. Swig, et al., Index No. 603821/08 (collectively, the Square Mile actions), and allegedly involve claims by two lenders regarding financial transactions relating to the Sheffield.

In view of the fact that the Wagner action was a disposed matter, the transfer of this action to Justice Sherwood was not appropriate. See Operations Manual, § I(B). In addition, I do not agree that this action is substantially related to the Wagner action or that judicial economy is served by its assignment to Justice Sherwood for four reasons.

First, the claims in this action encompass a much broader dispute between the members of the entities that owns the sponsor. Compared to the limited relief sought in the Wagner action regarding the collection of common charges on the unsold units, the complaint's fifteen causes of action in this action seek more than \$50 million in damages for breach of contract, breach of fiduciary duty, fraud, misrepresentation, monies had and received and conversion. Also named in this lawsuit are numerous commercial

lenders and financial parties, none of whom were parties to the Wagner action. Plaintiffs seek various declaratory and injunctive relief, including the reformation of commercial mortgage and mezzanine loans. This is the type of complex commercial dispute that the Commercial Division was created to handle.

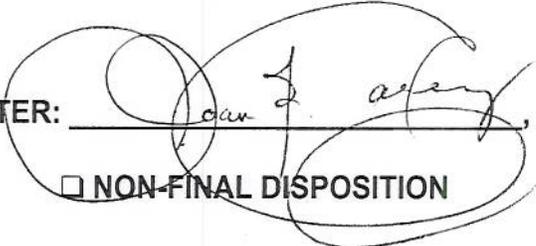
Second, I agree that this action is more closely related to the Square mile actions, since those actions also concern the financing of this condominium project.

Third, Justice Sherwood had a very limited and brief involvement in the Wagner action, which was settled by the parties (at least those that appeared), after his denial of a temporary restraining order. And while counsel for the plaintiffs contends that the \$5 million in common charges at issue in the Wagner action remains unpaid, there is no claim that the terms of the stipulation have been violated (i.e., that a sale or refinance of the unsold apartments has occurred triggering the sponsor's obligation to pay the common charges). The complaint herein merely alleges that the settlement of the Wagner action without plaintiffs' consent was a breach of the parties' operating agreement (see Complaint, ¶¶ 147-150).

Fourth, plaintiffs' counsel filed this action as a commercial case and it clearly meets the standards for assignment to the Commercial Division. However, in view of plaintiffs' concerns over additional delay, I have concurred with Justice Fried and he has agreed to hear oral argument on the pending order to show cause on July 8th at 9:30 a.m. as previously scheduled. In addition, I have forwarded counsel's letters dated June 24 and 25, 2009 regarding plaintiffs' application to hold an evidentiary hearing on that date to Justice Fried for his consideration.

Accordingly, the Motion Support Office is directed to reassign this case back to the Commercial Division and to the Hon. Bernard Fried (Part 60) and to mark its records accordingly. This determination is final and not subject to any further review or appeal.

Dated: June 30, 2009

ENTER:  A.J.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION