

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

PRESENT: HON. JACQUELINE W. SILBERMANN
Administrative Judge Justice

PART _____

Michael Lehman et al.

INDEX NO. 600151/2003

- v -

Richard H. Mose et al.

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Administrative Order

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

~~Upon the foregoing papers, it is ordered that this motion~~

Counsel for Max Capital, LLC and related entities, Additional Counterclaim Defendants in this case, has requested of Mr. Justice Tolub, by letter dated October 7, 2004, that this case be transferred to Justice Charles E. Ramos of the Commercial Division on the ground that the case is related to one pending before him, *American Property Consultants v. Max Capital Management Corp.*, Index No. 603604/2002. Counsel further requests that the case should be transferred pursuant to Paragraph G of the *Guidelines for Assignment of Cases to the Commercial Division*. Counsel for the plaintiffs and defendants-counterclaimants oppose the request. Mr. Justice Tolub referred the application to the undersigned in view of the fact that transfers into the Division must be approved by the Administrative Judge.

~~Dated:~~ _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

There is some relation between the two cases in that in the Amended Verified Answer and Counterclaim in this case some properties are referred to that are included in the Division case. There are also two overlapping parties. However, the relationship between the cases is not a complete one. In the cited pleading, defendants refer to the Division case and state that claims will not be made against the Max parties in this case with respect to the properties referred to; that is, the properties are carved out of the claim portion of the pleading. Furthermore, the plaintiffs in this case and the additional counterclaim defendant Strategic Square Development Partners LLC are not parties to the Division case. Several parties to the Division case are not parties to this one. In addition, the central theory of the counterclaims is that "Plaintiff's [sic.] tortiously and maliciously induc[ed] Max's unwarranted refusal to pay APC its contractual consulting and advisory fees ..." Pleading ¶ 169. Six of the nine counterclaims are premised on this theory and they are not made against the Max parties. The three claims brought against the Max parties are for breach of contract, quantum meruit and unjust enrichment with regard to properties that are not part of the Division case. The focal point of the Division case, on the other hand, is the alleged failure of parties, including investors not parties here, to pay plaintiff American Property Consultants, Ltd. fees claimed to be due.

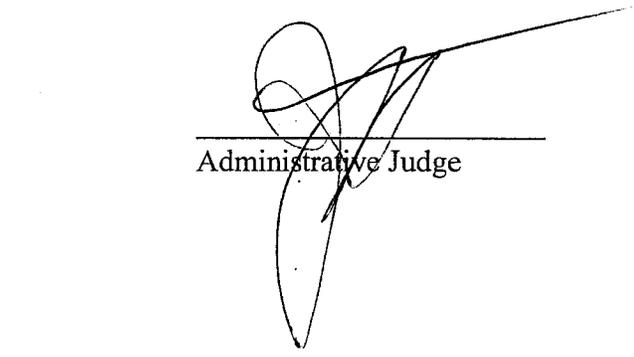
Thus, there might be some benefit to having both cases proceed before the same Justice. However, the relationship between the two cases is not so close as to compel a transfer on this basis in light of all relevant considerations.

The Max parties argue, in regard to Paragraph G of the *Guidelines*, that the case is suitable for the Division. That is true. Indeed, this case in its original form could have been brought in the Division since it involved professional business dealings and sums in excess of the Division's monetary threshold. None of the parties sought a transfer into the Division. The *Guidelines* contemplate that the question of whether a case should proceed in the Division should be resolved as soon as possible after an RJI is filed. Of course, the Max parties cannot be faulted for resting on their oars; they have only just been brought into this case. Nevertheless, the fact remains that this case has been pending before Mr. Justice Tolub since February 2003 and he has now acquired familiarity with it. There would be a loss of judicial resources if the case were now to be transferred to another Justice, who would have to work to acquire the knowledge that Justice Tolub already has. This cost must be weighed against the benefit that would flow from having these two cases before one Justice.

The Max parties might object and suggest that the *Guidelines* do not do enough to address the interests and concerns of parties who, like them, are, through no fault of theirs, added to cases some considerable time after an RJ is filed. There would be some force to such an observation. However, it is not clear that the *Guidelines*, however formulated, could hope to address satisfactorily all such situations. Whenever parties are added to a case a year or two after its initiation, there will be weighing in the balance against transfer into the Division the fact that another Justice will have by then acquired knowledge of the case that will go for naught in the event of a transfer. A partial answer to this hypothetical complaint may lie in the likelihood that, if a case is commercial to begin with (which it usually will be if it is later considered to be so by the additional party), the original parties will see to it that the case is assigned to the Division.

In view of all of these considerations, I conclude that the request to transfer this case to Mr. Justice Ramos in the Commercial Division should be denied.

Dated: 10/26/04



Administrative Judge