

**Premier Capital v Damon Realty Corp.**

2001 NY Slip Op 30049(U)

November 28, 2001

Supreme Court, New York County

Docket Number: 0103683/1996

Judge: Leland G. DeGrasse

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

PRESENT: LELAND DeGRASSE

PART 25

*Premier Capital  
et al -v-  
Damon Rely Corp  
et al*

INDEX NO. 10368396  
MOTION DATE 9/7/01  
MOTION SEQ. NO. 0/9  
MOTION CAL. NO. 112

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

	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

Motion is decided in accordance with accompanying Memorandum Decision.

NOV 28 2001

*45*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: \_\_\_\_\_

\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25  
..... - X

PREMIER CAPITAL AS THE ASSIGNEE OF THE  
FEDERAL DEPOSIT INSURANCE CORPORATION, AS  
RECEIVER FOR CAPITAL NATIONAL BANK OF  
NEW YORK,

Index No. :  
**103683/96**

Cal. No.:  
**119 of 9/7/01**

Plaintiff,

-against-

DAMON REALTY CORP., MARIA PORTES, CARLOS  
P. PORTES, C.P. PORTES ASSOCIATES, INC.  
NEW YORK CITY DEPARTMENT OF TAXATION AND  
FINANCE, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, et al.

Defendants.

----- X

**DeGRASSE, J.:**

Defendant Damon Realty Corp., ("Damon") and its president, defendant Carlos P. Portes ("Portes") move to reargue this court's decision dated March 5, 2001, which found that they were in contempt of this court's November 19, 1999 Order appointing a receiver and directing defendants to attorn rents to the receiver. This decision was embodied in a judgment dated June 11, 2001.

Plaintiff cross-moves against Damon and Portes for an order: 1) for sanctions, costs and attorneys' fees, 2) directing Damon's and Portes' attorney Solomon Abrahams ("Abrahams") to return a \$4000 fee he received from defendants allegedly paid out of rents misappropriated by defendants, 3) for contempt against Damon, Portes and Abrahams, and 4) for a warrant directing the Sheriff of the City of New York, or the Sheriff of any county of New York State, to arrest Portes for his failure to purge his contempt by attorning rents and providing an accounting to the

receiver, as directed by the June 11, 2001 judgment. This motion is joined by the receiver, who has submitted supporting papers.

#### FACTS AND PROCEDURAL HISTORY

The commercial building that is the subject of this action, located at 5037-5043 Broadway in Manhattan ("the building"), was occupied until January of this year by Portes and several companies controlled by him. As a result of Damon's default on its mortgage payments, Premier's predecessor in interest brought this foreclosure action in 1996.

The current receiver was appointed by the November 1999 Order pursuant to RPL § 254(10), RPAPL § 1325(1), and CPLR 6401.

The November 1999 Order directs, inter alia, that

any tenant(s) licensees, occupants or other person(s) in possession of such Premises attorn to said temporary receiver and pay over to said temporary receiver all rents, license fees, profits and other charges of such premises now due and unpaid, or that may hereafter become due; and that the defendants be enjoined and restrained from collecting the profits, rents and license fees and other charges for such Premises and from interfering in any manner with the property in the receiver's possession; ... and that all tenant(s), occupants, employees and licensees of the Premises and other person(s) liable for the rents be and hereby are enjoined from paying any rent, license fees, profits, or other charges for such Premises to the defendants, their agents, servants or attorneys ... .

The November 1999 order further provides that the receiver 'shall have the power to bring suit to collect rents or

remove tenants "and employ counsel for that purpose."

The receiver met and corresponded with Portes several times beginning in January 2000. However, after an initial payment of **\$6000**, the mortgagor has never paid any rent for use and occupancy of the building.

The receiver moved this court for an order setting the fair market use and occupancy of the premises. The court referred this motion to a referee to hear and report and by order dated August 11, 2000 confirmed the referee's findings that fair rent for the building was **\$16,666.66** per month, and that the fair rent for the parking places situated on the property was \$1680 per month. Both of these rental figures were made retroactive to January 1, **2000**.

Based on this order, the receiver retained counsel experienced in landlord/tenant matters to serve demands on Portes and his various companies. Counsel subsequently initiated nonpayment proceedings in Civil Court on September 29, 2000.

These proceedings were delayed by Damon's bankruptcy filing on October 5, 2000. The receiver moved the Bankruptcy Court for an order lifting the automatic stay, which motion was granted on November **16**, 2000.

The nonpayment proceeding subsequently resumed and ended in a judgment of approximately \$214,000 against Damon, Portes, C.P Portes Associates, and Maria Portes. The court also issued a warrant of possession in favor of the receiver. Portes and his various business entities were evicted from the premises in late

January of this year.

In the course of appearing in the bankruptcy proceeding the receiver discovered that Damon had claimed that it had received and retained rent from various tenants in the building. Damon's bankruptcy filings reflect that it received a total of \$15,000 in rent from ten tenants for the month of October 2000. The filings reflect that all of these tenants took occupancy as of "10/2000."

The receiver has submitted unrebutted evidence that Damon opened an account at North Fork Bank on October 5, 2000 -- the same day as its bankruptcy filing -- in which it deposited these alleged rent monies (the "North Fork Account"). Slightly less than \$15,000 total was deposited in the North Fork account in the months of October and November 2000. Defendants offer no explanation as to whether further rent was paid or what happened to the alleged tenants. All but approximately \$550 of the rents were spent by defendants. Payments totaling \$4000 were made to Abrahams from the account.

The receiver moved for an order holding Portes and Damon in civil contempt for their failure to attorn this alleged rent. This motion was granted by this court's March 5<sup>th</sup> decision.

In their current motion Damon and Portes make no attempt to establish the bona fides of the ten alleged month to month tenants who suddenly appeared and started paying rent in October 2000, in conjunction with Damon's bankruptcy filing. Portes and Abrahams represented to this court in April 2000 that all the companies occupying the building were alter ego corporations of

Portes, and that the building was difficult to rent to unrelated individual tenants because of its configuration. Abrahams and Portes made these sworn statements when the court was considering the receiver's application to set fair use and occupancy for the premises.

Damon and Portes do not describe the identities of the alleged tenants, the circumstances under which they began their occupancy, whether the tenants signed leases or paid any security, or how they paid their rent. Defendants do not even allege whether the alleged tenants made their rental payments prior to Damon's bankruptcy filing on October 5, 2000.

It appears likely that the rent-paying "tenants" who suddenly appeared in October 2000 in time for Damon's bankruptcy filing, and then mysteriously disappeared upon the lifting of the bankruptcy stay -- were in fact simply entities controlled by Portes. Accordingly, it is probable that the money deposited in to the North Fork bank account was Portes' money that he wished to shelter from the receiver.

The Bankruptcy Court dismissed Damon's bankruptcy proceeding on May 31, 2001.

#### DISCUSSION

CPLR 2221 provides in relevant part that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court." (See William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27, lv denied 80 NY2d 1005.)

Defendants merely repeat the argument they made in opposition to the motion for contempt without offering anything further as to why the court's first take on this argument was incorrect. Defendants argue that upon the filing of Damon's Chapter 11 petition, Damon automatically became a debtor in possession authorized "to collect the rents and out of such funds pay the operating expenses of the property." It is remarkable that defendants cite no authority in support of this proposition.

Once Premier successfully sought appointment of a receiver, its rights to the rents of the property vested. In such circumstances, the receiver -- not the debtor in bankruptcy -- continues to collect and act as custodian of rents. (See Flower City Nursing Home Inc. v Park Hope Nursing Home, Inc. 38 BR 642.) Even courts that have held that a debtor retains some right to rents have nonetheless held that it remains the receiver's right to collect and possess the rents. (See In re Koula Enterprises Ltd., 197 BR 753, 758 ["the effect of the appointment of the receiver was to terminate the Debtor's right to possession of rents, not to terminate its ownership prior to a judgment of foreclosure and subsequent sale"].)

In their opposition to the contempt motion, defendants utterly failed to establish their right to collect and possess rents for the building. Their motion to reargue adds nothing to their previous failure to justify their contemptuous actions and is a complete waste of this court's time.

The court finds that the motion is but the latest of a

series of maneuvers by defendants and their counsel to avoid their obligations under this court's prior orders. These orders, the November 19, 1999 order appointing the receiver, the August 11, 2000 order confirming the referee's findings that fair rent for the building was \$16,666.66 per month, and the March 5, 2001 decision holding Portes and Damon in contempt, all direct defendants to attorn rents to the receiver.

Defendants' behavior in consistently failing to do so has been frivolous as defined by § 130-1.1(c) of the Rules of the Chief Administrator of the Courts. It satisfies each of the grounds set forth therein -- any one of which would justify the impositions of sanctions. Defendants' actions have been "completely without merit in law," they have been undertaken "primarily to delay or prolong the resolution of the litigation" and their arguments include assertions of "material factual statements that are false." (22 NYCRR § 130-1.1[c][1]-[3]; see Bell v State, 96 NY2d 811; Julian v Security Mut. Ins. Co., 281 AD2d 954.)

The court finds that Abrahams, defendants' counsel, should be sanctioned because he participated in defendants' frivolous tactics -- and benefitted from **them** as well, as he was paid \$4000 from the "rent" monies deposited in the North Fork account. He accepted these funds despite the explicit language of this court's November 1999 Order that barred any occupants "**or** other person(s) liable for the rents" from paying the rents to defendants or their attorneys.

Accordingly, Portes and Abrahams shall each pay plaintiff

\$5000 in sanctions (for a total of \$10,000) in partial payment of plaintiff's costs and attorney fees incurred in enforcing this court's Orders of November 19, 1999, August 11, 2000 and March 5, 2001.

Premier also moves for further contempt sanctions, in particular for a warrant authorizing the arrest of Portes. The court declines to award this relief at this time. However, plaintiff may move for further contempt sanctions, including arrest, if Portes does not, by December 31, 2001, take the following actions: 1) pay the sanctions awarded herein, and 2) purge his contempt as specified in this court's decision of March 5, 2001, by accounting to the receiver for all rents defendants collected at the building after January 1, 2000 and by attorning a sum equal to these rents to the receiver.

#### CONCLUSION

Defendants' motion to reargue is denied. Plaintiff's motion for sanctions is granted against defendant Carlos Portes and his counsel Solomon Abrahams to the following extent: Portes and Abrahams shall each pay plaintiff \$5000 in sanctions (for a total of \$10,000). In all other respects the motion is denied without prejudice to resubmission upon the conditions set forth above. This constitutes the decision and order of the court.

DATE:

**NOV 28 2001**

\_\_\_\_\_  
J.S.C.