

**Dormitory Authority of the State of N.Y. v M.T.P. 59
St., LLC**

2001 NY Slip Op 30070(U)

October 3, 2001

Supreme Court, New York County

Docket Number: 103416/11

Judge: Judith J. Gische

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

PRESENT: Gische
HON. JUDITH J. GISCHE ^{J.S.C.} ~~Justice~~

PART 10

Darmstrong Aull Carter

INDEX NO. 103416/4

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -
M.T.P. 59th St

The following papers, numbered 1 to _____ were read on this motion to/for Vacato o/a.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/3/11

[Signature]
HON. JUDITH J. GISCHE ^{J.S.C.} ~~Justice~~

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Dormitory Authority of the State of
New York,

Plaintiff (s),

-against-

M.T.P. 59 St., LLC, MTP 3330 Broadway
Corp., MTP 57, LLC, MTP Operating Corp.,
29 Operating Corp., MTP Global Group, LLC.,
Chelsea MTP Operating, LLC, David Vital,
Pernilla Andren-Avital, and "John Doe
Entities" 1 through 20,

Defendant (s).

DECISION/ORDER

Index No.: 103416-11
Seq. No.: 002

PRESENT:

Hon. Judith J. Gische JSC

FILED

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-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the foregoing (these) motion(s):

Papers	Numbered
MTP OSC w/DA affid, RS affirm (sep back), DL affid (sep back), exhs	1, 2, 3
Good Faith Affirm (JCR)	4
Dormitory opp w/KJA affirm, exhs	5
MTP reply w/JCR affirm	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action to set aside fraudulent conveyances by M.T.P. 59 St., LLC ("MTP 59") and to hold the other named defendants liable for a money judgment previously obtained against MTP 59. Plaintiff ("DASNY") brought a prior motion seeking an order of attachment against defendants David Avital ("Avital") and Pernilla Andren-Avital ("Andren"). Avital and Andren are members of MTP 59, limited liability company.

Pursuant to this court's order dated March 29, 2011, the court granted DASNY a temporary restraining order, restraining Avital and Andren from transferring or paying

any of their assets (Order, March 29, 2011, Gische J.) ("TRO"). Thereafter, the court granted DASNY's motion for an order of attachment. In the court's prior order dated May 17, 2001 ("prior order"), Avital and Andren were "restrained and prohibited from transferring, encumbering, or paying any assets of defendants, or any personal property in which said defendants have an interest, or any debt owed to said defendants to the extent of \$387,143.36," pending further order or Judgment of the court. The court's decision was rendered on default as there was due proof of service.

Avital and Andren now move to vacate the court's prior order based upon CPLR §§5015 and 6223 [a]. To prevail on a motion to vacate an order entered on default, the party seeking that relief must set forth excusable default and a meritorious defense (CPLR § 5015 [a]; Gray v. B.R. Trucking Co., 59 N.Y.2d 649 [1983]). Avital and Andren contend they satisfy both requirements.

Their excuse, as set forth in the sworn affidavit of Avital, is that the plaintiff served its prior motion (an order to show cause) along with several copies of the summons and complaint for the other named defendants. Believing the extra papers were just copies pleadings, Avital states he threw out all but one copy of the summons and complaint. According to Avital, upon being served, he contacted his attorney who obtained additional time to respond to the complaint.

Avital and Andren's lawyer ("Attorney Shanks") states that he contacted the attorney for DASNY and obtained an extension of time to answer the complaint. According to Attorney Shanks, his clients did not know about the order to show cause because they threw it out and DASNY's attorney did not mention the motion to him so he never learned about it until after receiving this court's order. The court does not find

this excuse acceptable. While the attorneys did not know about the order the show cause, because their clients never presented it to them, it is incomprehensible that the clients, who are business people, would throw legal papers out without looking at them and simply assume they were all the same. The court also rejects any arguments by Avital and Andren that DASNY engaged in sanctionable activity or unethical conduct. DASNY's attorney was under no obligation to keep Attorney Shanks apprised about the status of the case. Such information is available to the public through SCROLL, the court's online library. Even if the defendants had provided an excusable default, for the reasons set forth below, they have not established a meritorious defense tot he granting of an order of attachment.

Avital, the manager of MTP 59, the entity against which there is a money judgment, states in his sworn affidavit that he and Andren have not, as DASNY claims, been transferring MTP 59's assets to defraud the plaintiff. He explains that certain cash distributions to him are merely accounting entries and adjustments to accounts for either earlier transactions remaining on MTP 59's books or non-income transactions. Thus, Avital claims the entries do not represent tangible monies at all, but "paper" transactions.

Avital also explains that certain transactions "net out" one another, such as the withdrawal of money from a line of credit and the record of a loan payable to Chase Manhattan is an equivalent amount.

Avital explains further that a certain savings account in the name of MTP 59 did not, in fact, actually contain money belonging to that entity but were the property of

another entity by the name of "MTP Eastside, LLC" and that whomever opened the account in the name of MTP 59 "made an error."

On a motion for an order of attachment, the plaintiff must show, by affidavit and other evidence that: 1) there is a cause of action, 2) it is probable that the plaintiff will succeed on the merits, 3) one or more grounds for attachment provided in section 6201 exist, and 4) the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. Pursuant to CPLR § 6201 an order of attachment may be granted when: "1) the defendant is a non-domiciliary residing without the state, OR is a foreign corporation not qualified to do business in the state; OR ... 3) the defendant, with the intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed or, or encumbered or secreted property, or removed it from the state or is about to do any of these acts; ..."

On the underlying motion, DASNY met its burden of proof by identifying various transactions which could be seen as evasive measures by Avital and Andren. While on this motion to vacate their default Avital has tried to explain the transactions and show they were nothing more than accounting entries, not physical manifestations of "real money" transfers, the explanation does not justify vacature of the attachment order that was previously granted.

The complaint asserts two different theories of recovery, one being that Avital dominates MTP 59 and, therefore, the corporate veil should be pierced (4th cause of action) and the other that payments and transfers are being made in violation of the debtor and creditor law (1st, 2nd, and 3rd causes of action). The activities that plaintiff

has identified and confirmed by Avital, justify the order of attachment remaining in place at this time to protect the plaintiff's interests.

Other arguments by Avital, that there is little likelihood they can secret away assets because their business, income and bank accounts are all in New York, are unhelpful. Plaintiff does not have to take their word that they will not transfer assets to defeat plaintiff's right to satisfy the judgment.

Therefore, the motion by the defendants to vacate the order of attachment entered against them on default is denied as they have failed to show they have a meritorious defense. The prior order remains unmodified and fully enforceable.

Any relief otherwise requested but not expressly addressed is hereby denied

This constitutes the decision and order of the court.

Dated: New York, New York
October _3, 2011

So Ordered:

FILED



Hon. Judith J. Gische, JSC

OCT 04 2011

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