

**Lincoln Associates v Jeffries**

2004 NY Slip Op 30238(U)

June 7, 2004

Supreme Court, New York County

Docket Number: 0604849/2001

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III  
Low  
Justice

PART 56m

Lincoln Assoc

INDEX NO.

604849/01

MOTION DATE

2/11/04

MOTION SEQ. NO.

002

MOTION CAL. NO.

Christopher JEFFERS

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

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 IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

JUN 16 2004

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/7/04

HON. RICHARD B. LOWE, III

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
LINCOLN ASSOCIATES,

Plaintiff,

Index No.: 604849/01  
DECISION/ORDER

-against-

CHRISTOPHER JEFFRIES, LINCOLN TRIANGLE  
PARTNERS, L.P., and 148-154 COLUMBUS  
AVENUE PARTNERS, L.P.,

Defendants.

-----X  
**HON. RICHARD B. LOWE, JSC:**

In this commercial contract action, plaintiff has submitted separate orders to show cause which seek: 1) a temporary restraining order and a preliminary injunction; and 2) an order to strike defendants' answer or, in the alternative, to compel discovery (motion sequence numbers 002 and 003, respectively).

**BACKGROUND**

The Parties

In 1993, plaintiff **Lincoln** Associates (LA) sold a block of land in New York County, located at **148-154** Columbus Avenue, a/k/a 100 West 67<sup>th</sup> Street (the Block), to an entity known as Lincoln Triangle Corp. (LTC). See Aarons Affidavit in Opposition, ¶ 5. LTC was an affiliate of a real estate development company called Millennium Partners, Inc. (Millennium), whose principals are co-defendant Christopher Jeffries (Jeffries) and non-parties Philip Aarons and Philip Lovett. Id., ¶ 2. Millennium had formed LTC in order to purchase the Block, and planned to renovate the commercial and residential space thereon and to resell the units as condominiums. Id., ¶ 4.

LA and LTC executed a contract of sale for the Block on May 18, 1993, and amended it to a final form on November 19, 1993 (the First Amendment). See Notice of Motion (motion sequence number 002), Exhibit H. The transaction was complex, and the Block's purchase price was comprised of: 1) a lump-sum cash payment of \$22,000,000.00; 2) a mortgage for \$3,000,000.00; and 3) a deferred payment arrangement which was to endure for ten-years after the closing. Id. The deferred payments were limited to no more than \$8,000,000.00, and were to be calculated pursuant to formula under which LA would receive half of all profits realized from the sales of units between January 25, 1994 and January 25, 2004, provided that it had first been determined that said profits were sufficient to provide LTC's investors a twenty-five percent return on their initial investments, See Aarons Affidavit in Opposition, ¶ 6.

At the closing on January 25, 1994, LTC bifurcated its ownership interest in the Block, and conveyed part of that interest to co-defendant Lincoln Triangle Partners, L.P. (LTP), and the other part to co-defendant 148-154 Columbus Avenue Partners, L.P. (CAP). Id., ¶ 8. LTP and CAP simultaneously assigned to LA their respective rights to any deferred payments which might come due over the following ten years, in accordance with the formula contained in the Block's contract of sale (the Assignment). See Notice of Motion (motion sequence number 002), Exhibit M. LA now claims that defendants have not made any of the deferred payments *required* by the First Amendment and the Assignment, although substantial amounts of such payments are due. Defendants dispute this claim.

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<sup>1</sup> Jeffries and the other two principals of Millennium, Philip Aarons and Philip Lovett, now control both the LTP and CAP partnerships. LA has named only Jeffries as a defendant in this action, however, because he executed a personal guaranty for LTP's assignment. See Notice of Motion (motion sequence number 002), Menton Affidavit, ¶ 34.

### Prior Proceedings

LA commenced this action on October 11,2001. See Notice of Motion (motion sequence number 002), Exhibit A.<sup>2</sup> Defendants answered on November 26,2001. Id., Exhibit B. LA then served a document discovery demand on January 25,2002. Id., Exhibit K. Defendants partially responded to this on April 26,2002. Id., Exhibit L. After LA's counsel objected to the inadequacy of the response, defendants provided some more material on June 17,2002. Id., Exhibit J, ¶¶ 31-36. LA's counsel again wrote to object that the response was incomplete, and thereafter stipulated to several more extensions in an attempt to secure the remaining discovery material. Id., ¶¶ 37-40. Defendants failed to comply, however. Id., ¶ 41. Accordingly, on March 6,2003, LA moved for relief pursuant to CPLR 3126. Id., Exhibit J. In response, defendants cross-moved, on April 11,2003, to disqualify LA's counsel (motion sequence number 001). The court entered a preliminary conference order on July 16,2003, which it hoped would resolve the concerns raised in LA's motion. See Notice of motion (motion sequence number 002), Exhibit P. The court entered a separate decision denying defendants' cross motion.

On November 24, 2003, after again having attempted in vain to obtain discovery from defendants, LA's counsel wrote to inform the court of defendants' failure to comply with the preliminary conference order, and to request a compliance conference. Id., Exhibit Q. The court then ordered both parties to appear before a special master on December 11,2003, on which date the special master drafted a new, and final, discovery order which the court signed. Id., Exhibit R. By January 16,2004, however, defendants had again made only a partial response to the final

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<sup>2</sup> LA's complaint asserts causes of action for breach of contract against LTP and CAP, and for breach of guaranty against Jeffries; it does not request a permanent injunction. See Notice of Motion (motion sequence number 002), Exhibit A.

order. See Notice of Motion (motion sequence number 002), Robbins Affidavit, ¶¶ 40-48. LA's counsel thereupon served the two instant orders to show cause. In their opposition papers, defendants claim that they have annexed material which constitutes a complete response to LA's discovery demands. See Tucker Affirmation in Opposition, ¶¶ 48-49. LA's counsel took the submitted reply papers in which they vigorously deny defendants' assertion.

The court signed the first order to show cause with a temporary restraining order which was to remain in effect pending the hearing date of the motion. On that date, February 11, 2004, the court ruled to continue the temporary restraining order until the final resolution of both motions. .

#### DISCUSSION

The Court of Appeals has unequivocally stated that CPLR 6301, which governs temporary restraining orders and preliminary injunctions, may not be used by general unsecured creditors in actions for money damages to protect against the dissipation of assets prior to the entry of a judgment. See Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 (2000). Plaintiffs counsel argues that this rule should not apply because LA had a "participation in defendants' property," and was "defendants' partner as to the net proceeds from capital transactions." See Robbins Reply Affirmation, ¶¶ 26-28. The court disagrees. The only "property" at issue in this action is clearly a portion of the proceeds of certain condominium sales - i.e. money. There is no question here of enjoining any of the sales themselves; indeed, plaintiffs counsel admits that any sale which took place after January 25, 2004 would not be subject to the First Amendment's deferred payment provision. See Notice of Motion (motion sequence number 002), Menton Affidavit, ¶ 61. That provision itself appears in the portion of

the First Amendment which defines the Block's "Purchase Price and Deposit," and uses the terms "deferred payments" and "obligation to pay." Nothing in either the First Amendment or the Assignment can be interpreted as creating a "participatory interest" or a "partnership" in the renovated condominium units. Apart from this semantic argument, plaintiffs counsel offers no basis for the court to find that LA is anything other than an unsecured, general creditor seeking monetary damages for breach of contract. Accordingly, the court must deny plaintiff's first motion for a temporary restraining order and/or a preliminary injunction as legally unjustifiable.

***Motion to Strike the Answer***

On December 11, 2003, a stipulation was so ordered by this court which specifically provides that:

By December 31, 2003, [defendants] will supplement answers to interrogatories # 1, 2, 3 [and] 7(vii) without prejudice to [plaintiff]'s raising further objections to any other interrogatory answers; [plaintiff] will reframe interrogatory # 8, [and defendants] will respond to interrogatory #8 within 20 days after getting the reframed interrogatory.

After [plaintiff] has received the supplemental interrogatory answers, [defendants] will make available to [plaintiff] all books and records of [defendants] (or under their custody and control) relevant to the answers to [the] interrogatories, as supplemented, and relevant to paragraph 2(D) of the First Amendment \* \* \*.

See Notice of Motion (motion sequence number 003), Exhibit A. This order was preceded by a number of other demands for the same material, including: 1) plaintiff's first set of interrogatories;<sup>3</sup> 2) plaintiffs supplement to its first set of interrogatories;<sup>4</sup> 3) plaintiffs first

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<sup>3</sup> See Notice of Motion (motion sequence number 002), Exhibit D.

<sup>4</sup> See Notice of Motion (motion sequence number 002), Exhibit F.

notice of discovery and inspection;<sup>5</sup> 4) a large volume of correspondence from plaintiff's counsel seeking the production of the material requested in the foregoing notices;<sup>6</sup> 5) plaintiffs earlier motion pursuant to CPLR 3126;<sup>7</sup> and 6) the court's preliminary conference order of July 16, 2003.<sup>8</sup> The material being sought consists of information and documents regarding the sales of condominiums on the Block between **January 25, 1994** and **January 25, 2004**, and the calculation and distribution of any profits made thereon. Defendants' counsel asserts that it has now answered all of the outstanding interrogatories, and has offered to allow plaintiffs counsel to inspect the "books and records" referred to in the December **11, 2003** discovery order. See Tucker Affirmation in Opposition, ¶ **46**, Exhibit J. Plaintiffs counsel responds that, upon review, this Court has already determined that the answers to said interrogatories are inadequate, and also denies that defendants' counsel have made the aforementioned "books and records" available. See Robbins Reply Affirmation, ¶¶ 56-65. The court first finds that the record clearly bears out plaintiffs claim that defendants' responses to the above interrogatories are grossly inadequate and do not comply with the Court's instructions. The court **has** also already expressed disbelief at defendants' counsel's assertions that the instant "books and records" do not contain the information which plaintiff's counsel is seeking. See Transcript of hearing held on February **11, 2004**, pp **14-15**. Paragraph **2 D** of the First Amendment is quite specific about

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<sup>5</sup> See Notice of Motion (motion sequence number **002**), Exhibit K.

<sup>6</sup> See Notice of Motion (motion sequence number 003), Exhibit M, ¶¶ 30-64; Tucker Affirmation in Opposition, Exhibits C, E, G; Robbins Reply Affirmation, Exhibits A, B, C.

<sup>7</sup> See Notice of Motion (motion sequence number 002), Exhibit J.

<sup>8</sup> See Notice of Motion (motion sequence number 002), Exhibit P.

[\* 8 ]

the information and records that defendants were obligated to record and keep with respect to the sales of condominiums on the Block between **January 25, 1994** and **January 25, 2004**. See Notice of Motion (motion sequence number 003), Exhibit B. The court, therefore, also ~~finds~~ that defendants have violated this portion of the December **11, 2003** discovery order. CPLR 3126 authorizes the court to strike the answer of a party who “refuses to obey an order for disclosure or wilfully fails to disclose information.” CPLR 3126. The court finds that defendants have acted in this manner with respect to the two portions of the December **11, 2003** discovery order mentioned above. Accordingly, the court also finds that plaintiffs second motion should be granted to the extent of striking defendants’ answer unless defendants comply fully with those portions of that order within twenty days of service of a copy of this order..

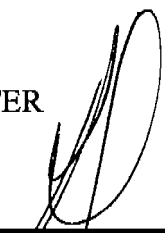
### CONCLUSION

Accordingly, for the foregoing reasons, the court determines that the first motion of plaintiff Lincoln Associates, which seeks a preliminary injunction (motion sequence number 002) should be, and hereby is, denied; and that the temporary restraining order which the court granted upon the signing of said motion hereby is vacated. The court also determines that the second motion of plaintiff Lincoln Associates, which seeks an order to strike the answer of defendants Christopher Jeffries, Lincoln Triangle Partners, L.P., and **148-154** Columbus Avenue Partners, L.P., or, in the alternative, an order to compel said defendants to provide discovery (motion sequence number 003), hereby is granted to the extent that said defendants’ answer shall be stricken within **20** days after service of a copy of this order with notice of entry, unless said defendants respond fully to all of the interrogatories which are enumerated in the court’s December 11, 2003 discovery order, and also make available all of the books **and** records

referred to therein. Settle order on notice.

Dated: New York, New York  
June 7, 2004

ENTER



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Hon. Richard B. Lowe, JSC

HON. RICHARD B. LOWE, III

**FILED**  
JUN 16 2004  
COUNTY CLERK'S OFFICE  
NEW YORK