

ABRA Constr. Corp. v 112 Duane Assoc., LLC
2005 NY Slip Op 30453(U)
April 6, 2005
Supreme Court, New York County
Docket Number: 603260/02
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos
Justice

PART 53m

Abra Construction Corp

INDEX NO. 603260/02

- v -

MOTION DATE _____

MOTION SEQ. NO. 011

112 Duane Associates, LLC

MOTION CAL. NO. _____

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

is decided in accordance with
 accompanying memorandum decision and order.

FILED
 APR 14 2005
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 4/6/05

CHARLES E. RAMOS
 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:COMMERCIAL DIVISION

-----X

ABRA CONSTRUCTION CORP., on its own
behalf and on behalf of all others
similarly situated, who are beneficiaries
of trust funds received by Defendants
under Article 3A of the Lien Law of
the State of New York or otherwise,

Index No. 603260/02

Plaintiffs,

- against -

112 DUANE ASSOCIATES, LLC, LOUIS GRECO,
LEWIS HOROWITZ and THE MERCHANTS
BANK OF NEW YORK,

Defendants.

-----X

GUY ROBERTS,

Plaintiff,

- against -

Index No. 604522/01

112 DUANE ASSOCIATES, LLC, 72 READE LOWER
CONDO LLC, 72 READE ASSOCIATES, LINDA E.
GRECO, LOUIS V. GRECO, 295 DEVELOPMENT CORP.,
LEWIS HOROWITZ, THE MACKENZIE GROUP,
GEORGE MACKENZIE, WARREN L. FORMAN, ESQ,
FORMAN & ASSOCIATES, P.C., E & L'S PLACE., LLC,
THE MERCHANTS BANK OF NEW YORK, FERNANDEZ
CONSTRUCTION CORP., and JOHN DOES,

Defendants-Third Party Plaintiffs,

- against -

ABRA CONSTRUCTION CORP., BERNARD
DILLENBERGER, ERIC DILLENBERGER and
CASSANDRA DILLENBERGER, individually and in their
respective capacities as directors and/or officers of
ABRA CONSTRUCTION CORP.,

Third-Party Defendants.

-----X

Charles Edward Ramos, J.S.C.:

Defendant Lewis Horowitz died in May 2004 in an accident.
His will named his co-defendant Louis Greco as executor.
According to his attorney, the Surrogate's Court has granted

Greco permanent letters testamentary. On the ground that a conflict of interest renders Greco ineligible to represent Horowitz's estate, plaintiff Abra Construction Corp. (Abra) moves, by order to show cause, for a court-appointed fiduciary to represent Horowitz's estate in the above captioned actions and in a federal action. Greco cross-moves to be substituted in place of Horowitz.

Greco and Horowitz were principals of defendant 112 Duane Associates (Duane Associates). In 1997, Duane Associates hired Abra to provide labor and materials for a condominium construction project. Abra commenced this action in 2002, because of Duane Associates' alleged failure to make payment and its alleged wrongful termination of the parties' contract. Abra alleges that the total amount of its damages is \$916,811, out of which \$281,811 is for labor and materials.

According to Abra, the individual defendants stole much of the funding that Duane Associates received for the project. The plaintiff in the second action, Guy Roberts, is seeking to recover about \$600,000, that he allegedly invested in the project. Plaintiffs in both actions allege that Horowitz and Greco diverted funds to themselves by various wrongful means, including forging checks and fabricating expenses. Abra further asserts that the money invested for the project constitutes a trust fund for the benefit of those who performed labor or provided materials, pursuant to Article 3A of the Lien Law. The federal court action, commenced by Abra against these same and

other defendants, alleges violations of the Racketeer Influenced and Corrupt Organizations Act (18 USC §1962 [c] *et seq.*).

Abra asserts that Greco is unfit to represent Horowitz's estate in the litigations, because he is engaged in a plan to insulate himself from liability by blaming Horowitz for Greco's defalcations. Allegedly, one scheme used by Horowitz and Greco to divert funds involved causing checks to be made out to a fictitious person. Horowitz and Linda Greco, Greco's wife, then cashed these checks. Linda Greco testified at a deposition that Greco ran the business. Abra claims that these actions evidence Greco's attempt "to insulate himself from liability by creating layers of liability" among Horowitz, Greco's wife, and others (Miletsky Affirmation, ¶ 15). Abra further alleges that Greco is both creditor and debtor of Horowitz's estate, that Greco cannot be trusted to properly marshal the Horowitz assets, and that allowing Greco to represent the estate will prejudice Abra in successfully prosecuting its claims. For these reasons, Abra requests that the court: 1) replace Horowitz with Horowitz's estate; 2) appoint an independent fiduciary for the estate; and 3) substitute that fiduciary.

This court has concurrent jurisdiction with the Surrogate's Court to appoint a fiduciary for a deceased's estate (*Harding v Noble Taxi Corp.*, 155 AD2d 265, 266 [1st Dept 1989]; *Jones v Vetter*, 188 Misc 2d 475, 476 [Sup Ct, Nassau County 2001]). However, under Surrogate's Court Procedure Act (SCPA) § 701 (3), letters testamentary, which must be issued before one can act as

fiduciary (SCPA § 103 [21]), may be suspended, modified, or revoked only by the court that issued them. Therefore, this court has no authority to revoke Greco's letters or limit the authority granted him by the Surrogates' Court.

SCPA § 702 permits the Surrogate's Court to issue limited letters testamentary, "restraining the holder from doing any such acts or exercising any such powers as may be specified therein" (SCPA § 702 [10]). Greco's attorney states that he informed Abra of the Surrogate's Court proceedings in time for Abra to interpose objections to Greco's appointment. Abra does not deny that it failed to petition the Surrogate's Court to limit Greco's letters.

The next issue is whether the substitution of Greco for Horowitz is mandated. Substitution is governed by CPLR 1015 which provides that "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the proper parties." Neither CPLR 1015, nor CPLR 1021, which concerns the procedure for substitution, mandate the substitution of the fiduciary appointed by the Surrogate's Court (*see Aptacy v H.J. Giorgi, Inc.*, 124 Misc 2d 175, 177 [Sup Ct, Kings County 1984]). Moreover, the choice of substitute is a discretionary matter for the court (*Rocha Toussier y Asociados, S.C. v Rivero*, 184 AD2d 398, 399 [1st Dept 1992]; *Harding*, 155 AD2d at 266). Nonetheless, the person who has been granted letters testamentary is generally found to be the proper substitute for the deceased party (*see Nunez v Goodman*, 264 AD2d

651, 651-652 [1st Dept 1999]; *Macomber on Behalf of Agne v Cipollina*, 226 AD2d 435, 437 [2d Dept 1996]; *Grillo v Tese*, 113 AD2d 871, 873 [2d Dept 1985]; *Mas v Ellis*, 184 Misc 2d 870, 872 [Sup Ct, Kings County 2000]; *Berger v Ickovicz*, 175 Misc 2d 677, 681 [Sup Ct, Kings County 1998]; see also Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C1015:1 [Westlaw ed] [stating that CPLR 1015 mandates the substitution of the decedent's personal representative]). CPLR 1015 "contemplates that a fiduciary has been appointed" by the Surrogate's Court (*Jones*, 188 Misc 2d at 476). The preference is for substituting the fiduciary is reasonable, given that the Surrogate's Court found that person fit to administer the estate.

Although these motions concern substitution, some examination of the rules that the Surrogate's Court follows in choosing fiduciaries is instructive for this court, both courts being concerned with the proper representation of the deceased. Horowitz chose Greco to act as his fiduciary. A testator's selection of a fiduciary is entitled to great deference, unless there is ground for disqualification (*Matter of Duke*, 87 NY2d 465, 473 [1996]; *Matter of Leland*, 219 NY 387, 393 [1916]; *Matter of Shaw*, 186 AD2d 809, 810 [2d Dept 1992]; *Matter of Fodera*, 96 AD2d 559, 560 [2d Dept 1983]). Apparently, the Surrogate's Court found no reason to disqualify Greco. It is also worth noting that Horowitz's will, which is attached to the motion papers, was executed in September 2003, after these actions began. When making his will, Horowitz was not worried that Greco would misuse

his estate.

A conflict of interest, including the fiduciary's status as a debtor of the estate does not automatically necessitate disqualification (*Matter of Shephard*, 249 AD2d 748, 749 [3d Dept 1998]; *Matter of Rosenfeld*, 157 Misc 686, 687 [Sur Ct, NY County 1935]; see also *Matter of Marsh*, 179 AD2d 578, 580 [1st Dept 1992] [actual wrongdoing, rather than potential conflict between fiduciary and person interested in the estate, justifies denial of letters]). Similarly, Greco is not disqualified as a substitute, because he may owe Horowitz's estate or it may owe him.

Greco has not asserted any claims against Horowitz. Nor does Abra offer any evidence showing that Greco is putting the blame on Horowitz for his own alleged misdeeds. If such evidence is discovered in the future, it may be brought to the attention of the court or the factfinder to be properly sifted. At this point, the court sees no reason that Greco should not be substituted for Horowitz.

Accordingly, Abra's motion is denied. Greco's cross motion to be substituted for Horowitz is granted.

In conclusion, it is

ORDERED that the motion of Abra Construction Corp. is denied; and it is further

ORDERED that the cross motion of defendant Louis Greco is granted, and that Louis Greco, as executor of the estate of Lewis Horowitz, deceased, be substituted as defendant in the above-

entitled actions in the place and stead of defendant Lewis Horowitz, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled actions be amended by substituting the name of Louis Greco, as executor of the estate of Lewis Horowitz, deceased, as defendant in the place and stead of said decedent, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that counsel for Louis Greco shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office, who are directed to amend their records to reflect such change in the caption herein.

Dated: April 6, 2005



J.S.C.
CHARLES E. FAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

FILED
APR 14 2005
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