

Purchase Partners II, LLC v Westreich

2006 NY Slip Op 30077(U)

April 19, 2006

Supreme Court, New York County

Docket Number: 0604219/2004

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED
Justice

FBEM PART 60

PURCHASE PARTNERS II, LLC, ARTHUR
H. LERNER, PETER A. HOCHFELDER, and
BRAHMAN REAL ESTATE INVESTORS LLC,

INDEX NO. 604219/04

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 003

ANTHONY E. WESTREICH,
Defendant.

MOTION CAL. NO. _____

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 _____
NYS SUPREME COURT
REVIEWED
APR 24 2006
E-FILING DEPT.

Cross-Motion: Yes No

FILED

APR 20 2006

COUNTY CLERK'S
NEW YORK OFFICE

PLAINTIFFS MOTION FOR A PRELIMINARY INJUNCTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING DECISION, AND DEFENDANT'S CROSS-MOTION TO AMEND IS DECIDED IN ACCORDANCE WITH THE PROCEEDINGS IN OPEN COURT ON APRIL 6, 2006.

Dated: 4/19/06

B. J. Fried
J.S. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FBEM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 60

-----X
PURCHASE PARTNERS II, LLC, ARTHUR
H. LERNER, PETER A.L HOCHFELDER, and
BRAHMAN REAL ESTATE INVESTORS LLC,

Plaintiffs,

INDEX NO.: 604219/04

-against-

ANTHONY E. WESTREICH,

Defendant.

-----X

FRIED, J.:

Plaintiffs have moved for a preliminary injunction enjoining Defendant, as the manager of a corporation, from distributing proceeds from the sale of certain property to himself or to the majority investor in that corporation which is a company in which his family is involved. Because Plaintiffs have failed to show that Defendant "threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual," (C.P.L.R. § 6301), their motion is denied.

FILED
APR 20 2006
COUNTY CLERK'S OFFICE
NEW YORK

I will not describe the somewhat complicated facts in detail for purposes of this motion, since I have done so in an earlier decision. Briefly, however, the facts are these: Plaintiffs Purchase Partners II, LLC, Arthur H. Lerner, Peter A. L. Hochfelder, and Brahman Real Estate Investors LLC are investors in a company called MNY 260 Park Avenue South, LLC ("MNY"). MNY owns an interest in a company called Max 260 Park Avenue South LLC ("Max 260"). Max 260 owns an interest in a property at 260 Park Avenue ("the

property”). Besides MNY, other owners of Max 260 include DTT Park Avenue South (“DTT”), a company in which members of Defendant Anthony E. Westreich’s family allegedly have interests. Westreich is the manager of a company called Max 260 PAS, LLC, which is in turn the manager of Max 260.¹

The property is being converted (or has been converted) into condominiums. The anticipated sales of the condominium units is expected to generate income for the owners of the property, including Max 260, after the construction and development costs are paid. Through their investment interests in Max 260, MNY and DTT expect to receive income indirectly from these sales.

During 2004, Westreich and his then business partner, Adam Hochfelder, were negotiating a “business divorce”— i.e. a separation of their interests in a variety of business entities including Max Capital Management Corporation,² a company whose share in the property was then held by Max 260. To that end, Adam Hochfelder and Westreich executed two agreements, one dated August 11, 2004 and the other, called the “Separation Agreement,” dated November 12, 2004.³ The parties agree that the negotiations leading up

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The record is ambiguous as to the precise corporate form by which Defendant manages an interest in the property. This memorandum adopts the form used in Plaintiffs’ Order to Show Cause petition, which states that Westreich is the manager of “Max 260 PAS, LLC, which is the manager of Max 260 Park Avenue South, LLC.”

2

Max Capital Management Corporation was jointly owned by Westreich and Adam Hochfelder until November 2004, and was thereafter owned by Westreich alone.

3

The August agreement was executed by Adam Hochfelder and Westreich alone.

to the execution of these agreements at one time contemplated selling Max 260's interest in the property to the developer, Yitzchak Tessler, but the sale to Tessler never took place.

The August 11, 2004 agreement states, in pertinent part, that "upon the sale of 260 Park Avenue South or the Max interests therein," the proceeds to which Westreich or DTT would be entitled "shall be paid to your creditors (as you direct)," provided that a Separation Agreement is executed. The November 12, 2004 Separation Agreement states, *inter alia*, that it "contain[s] the entire agreement between the parties respecting all matters contemplated by this Separation Agreement, and any other agreements respecting the rights and duties of the parties in relation thereto not expressly set forth in this Separation Agreement." As part of the Separation Agreement, Westreich paid about \$3.8 million to certain creditors of Adam Hochfelder; these creditors did not include Plaintiffs.

By letter dated November 22, 2004, Adam Hochfelder informed Westreich that he was directing Westreich to distribute certain proceeds received by DTT or Westreich from the "sale of 260 Park Avenue South or the Max Interests therein" to Adam Hochfelder's "creditors" pursuant to the August 11, 2004 agreement. Adam Hochfelder identified these "creditors" as Max Harlem, LLC, MNY, Purchase Partners II, and Peter Hochfelder. Westreich rejected Adam Hochfelder's request in a November 24, 2004 reply letter.

Plaintiffs subsequently asserted a claim that the August 11 agreement entitles them, as "creditors" of Adam Hochfelder, to any proceeds from the sale of condominium units in

The Separation Agreement, however, was also executed by Adam Hochfelder's wife and Max Capital Management Corporation.

the property. In their Complaint⁴ dated December 15, 2004, Plaintiffs sought a declaratory judgment of “their rights, as third-party beneficiaries, to enforce Westreich’s obligations under the August 11 letter agreement to pay to plaintiffs the net proceeds to which Westreich and DTT otherwise would have been entitled upon the sale of 260 Park Avenue South or the Max Capital [] interests therein.” (Compl. ¶ 59.)

Plaintiff Peter Hochfelder has averred that he asked Westreich to hold in escrow all sale proceeds to which Westreich or DTT would be entitled pending the resolution of this lawsuit, but Westreich refused. (P. Hochfelder Decl. ¶ 13.) Peter Hochfelder has also averred that Westreich told him that the closings for the condominium units would begin in March 2006 and that the excess funds after payment of construction and development costs would subsequently be distributed to the investors of Max 260. (*Id.* ¶¶ 10, 12.) Plaintiffs’ counsel has averred that Westreich’s counsel informed him that Westreich has no intention of awaiting resolution of this case before “dissipating the funds” from the sale of the condominiums. (Leichtman Emerg. Decl. ¶ 3.)

I heard oral argument on this motion on April 6, 2006.⁵

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Westreich is also being sued in two related lawsuits before me: *Purchase Partners II, LLC v. Max Capital Management Corp.*, Index No. 604218/2004, and *Lerner v. Westreich*, Index No. 603184/2005.

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I have not considered the correspondence dated April 17, 2006 submitted by Defendant. Commercial Division Rule 18 does not permit parties to submit sur-reply papers, including correspondence, addressing the merits of a motion, except to inform the Court of “any post-submission court decision that is relevant to the pending issues,” absent “express permission in advance”—which was not granted here.

This Court's July 29, 2005 Decision

On July 29, 2005, I issued a decision denying Defendant's Motion to Dismiss the complaint. In this motion, Defendant had contended that documentary evidence provided it with a complete defense to the complaint, pursuant to C.P.L.R. § 3211(a)(1). In its support, Defendant submitted the August 11 and November 12, 2004 agreements, Adam Hochfelder's November 22, 2004 letter, and Westreich's November 24, 2004 reply letter.

As is required under C.P.L.R. § 3211, for the purpose of Defendant's motion to dismiss, I accepted as true Plaintiffs' factual allegations in the Complaint. Based on the documents submitted, I stated that nothing in the Separation Agreement "appear[ed] to pertain to the sale" of the property, and I deduced that "it cannot be said that the sale of the property was 'part of the negotiations directly leading to the written [August 11] settlement agreement,'" as required in order to circumvent the merger clause in the Separation Agreement. (Slip op. at 8-9.) I also reasoned that "the presence of the merger clause in the Separation Agreement does not bar plaintiffs' reliance on the terms of the [August 11] Letter Agreement." (*Id.* at 9.)

These statements about the binding nature of the August 11, 2004 agreement were not findings of fact, but preliminary conclusions reached in the process of denying Defendant's § 3211(a)(1) motion to dismiss based on limited documentary submissions. Therefore, these statements and any similar characterizations of fact in the July 29, 2005 decision carry no weight in resolving the present motion.

Plaintiffs' Motion for a Preliminary Injunction

On April 3, 2006, Plaintiffs filed this petition for an order to show cause, seeking a

temporary restraining order (“TRO”) and preliminary injunction enjoining Westreich, as manager of Max 260 PAS, LLC, which is manager of Max 260, from distributing the proceeds from the sale of the condominium units at 260 Park Avenue South to himself and to DTT and to hold such proceeds in an escrow account until this litigation is resolved. On April 6, 2006, I denied Plaintiff’s request for a TRO. At that time Defendant represented that it would give Plaintiffs ten days notice before distributing any proceeds from the condominium sales. Now at issue is Plaintiffs’ motion for a preliminary injunction, pursuant to C.P.L.R. § 6301.

This motion is governed by C.P.L.R. § 6301, as interpreted by *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 [2000]. Section 6301 provides that a preliminary injunction “may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the *plaintiff’s rights respecting the subject of the action*, and tending to render the judgment ineffectual....” *Id.* (emphasis added).

In order to satisfy § 6301, the petitioner must seek relief with respect to “a specific fund” that is “the subject of the action.” *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 548 [2000]. Injunctive relief is inappropriate “in an action on contract for the recovery of money only. The plaintiff in such an action *has no rights as against the property of the defendant until he obtains a judgment, and until then he has no legal right to interfere with the defendant in the use and sale of the same.*” *Credit Agricole*, 94 N.Y.2d at 545-46 (quotations omitted) (emphasis in original). The “mere danger of asset-stripping is not a sufficient basis” for injunctive relief. *Id.* at 548.

In *Credit Agricole*, the plaintiffs sued to recover \$30 million in principal and interest due under debentures that were sold to them by one of the defendants. The Court reversed the trial court's grant of an injunction ordering the attachment of \$30 million to cover the unsecured debts and a TRO restraining defendants' transfer of assets, finding that the injunctive relief was "incidental to and purely for the purposes of enforcement of the primary relief sought [], a money judgment." *Id.* at 548.

Citing and following *Credit Agricole*, the First Department reached a similar result in *Dinner Club Corp. v. Hamlet on Olde Oyster Bay Homeowners Association, Inc.*, 21 A.D.3d 777 [1st Dept. 2005]. There the plaintiff operated a restaurant in a gated community. It sought injunctive relief directing the defendant homeowners association to deliver all the dining charges the association had collected from homeowners, alleging that it was entitled to these charges pursuant to a lease contract. Although the plaintiff alleged an interest in a specific income stream- the dining charges to which it was entitled under the lease contract, the First Department found that the nub of the lawsuit was the plaintiff's pursuit of money damages pursuant to a breach of contract claim. Accordingly, the Court denied injunctive relief, finding that this income stream was not the "subject of the action," i.e. a "specific res in which the plaintiff has a preexisting interest." *Dinner Club*, 21 A.D.3d at 778.

The Second Department in *Leo v. Levi*, 304 A.D.2d 621 [2d Dept. 2003], applying *Credit Agricole*, also reached a similar conclusion on facts that are similar to the present case. In *Leo*, the plaintiffs and one of the defendants, as law partners, became jointly and severally liable to repay a loan. The partners pledged their interest in certain personal injury cases as collateral, and these cases were referred to another law firm, also a defendant. The

individual defendant left the law partnership, with the understanding that he was entitled to receive a percentage of the legal fees from the referred cases. Meanwhile, the plaintiffs paid down the loan and sued their former partner for contribution. The plaintiffs moved for injunctive relief restraining the defendant law firm from paying the individual defendant his share of the legal fees from the referred cases. Although the relief sought concerned payment of a particular income stream—i.e. a set percentage of legal fees from certain referred cases, the Second Department denied their motion. The Court found that the assets that the plaintiffs sought to restrain were not “specific funds which can be rightly regarded as ‘the subject of the action.’” *Leo*, 304 A.D.2d at 623. The Court further found that the plaintiffs had not shown irreparable injury, because without injunctive relief “the plaintiffs could be adequately compensated by damages or could pursue relief under C.P.L.R. § 6201(3) for a provisional order of attachment.” *Id.*

As in *Credit Agricole*, *Dinner Club* and *Leo*, the heart of the present declaratory judgment action is breach of contract. Plaintiffs allege that Defendant has breached the terms of the August 11, 2004 agreement, which allegedly requires him to pay them “the net proceeds to which Westreich and DTT [] otherwise would have been entitled upon the sale of 260 Park Avenue South or the Max [] interests therein.” (Compl. ¶ 59.) Plaintiffs’ alleged right to the stream of income flowing from the sale of condominium units would arise (if at all) only by virtue of the August 11, 2004 agreement. Therefore, the “subject of the action” is the August 11, 2004 agreement. Consequently, Plaintiffs are not entitled to interfere with Defendant’s use and sale of the proceeds of the condominium sales. If Plaintiffs fear that Defendant will secrete property and thus make a money judgment

uncollectable, their ordinary remedy is to seek an order of attachment under C.P.L.R. § 6201(3).

Plaintiffs argue, however, that this case is governed by *Ma v. Lien*, 198 A.D.2d 186 [1st Dept. 1993], *lv. app. den.*, 83 N.Y.2d 847 [1994], in which the Court upheld a grant of injunctive relief putting into escrow the payments from the defendant's winning \$8 million lottery ticket. There the Court exercised its equitable authority to find that "a substantial amount of money may be dissipated or otherwise unavailable for recovery" if injunctive relief was not granted, relying on the fact that the defendant had "indicated his intention to share his winnings with his family." *Ma*, 198 A.D.2d at 186.

Ma does not control the result in this case for at least two reasons. First, *Ma* was decided prior to the Court of Appeals' restrictive interpretation of § 6301 in *Credit Agricole*.⁶ Second, even if *Ma* remains good law after *Credit Agricole*, it is factually distinguishable. In *Credit Agricole*, the Court of Appeals held that a preliminary injunction is available only if "the subject of the action" under C.P.L.R. § 6301 is a "specific fund." Whereas in *Ma*, the subject of the action was a discrete sum of money, i.e. a winning lottery ticket, here the subject of the action is a contract – the August 11, 2004 agreement. Consequently, Plaintiffs here cannot satisfy the requirement that the "subject of the action" is a "specific fund."

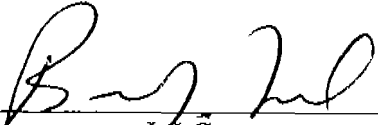
I find it unnecessary to evaluate the merit of Plaintiffs' claims of irreparable injury or likelihood of success on the merits, because my decision in this case is controlled by C.P.L.R. § 6301 and *Credit Agricole*.

⁶

The *Ma* Court did not expressly address C.P.L.R. § 6301.

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction is denied.

DATED:



J.S.C.

BERNARD J. FRIED
J.S.C.

4/19/06

FILED

APR 20 2006

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NEW YORK**