

Matter of Marfam Realty Co., LLC v Libby

2007 NY Slip Op 30630(U)

January 17, 2007

Supreme Court, New York County

Docket Number: 0114499/2006

Judge: Lewis Bart Stone

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

PRESENT: ~~HON. LEWIS BART STONE~~
Justice

PART 505

In re: Martin Realty Co.
Daniel Libby - v -

INDEX NO. 114499/06
MOTION DATE _____
MOTION SEQ. NO. 01
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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in part
and granted in part in accordance with the
attached Decision and Order

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

FILED

FEB - 6 2007

Dated: 19 Jan 07

Lewis Bart Stone
LEWIS BART STONE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

-----X
In the Matter of the Application of :
MARFAM REALTY CO., LLC. JAMES MARSHALL, :
and LEON KACHURIN, :

Petitioner, : DECISION AND
ORDER

For a Judgment Pursuant to Article 75 of the :
Civil Practice Law and Rules, :

: Ind. No. 114499/06

-against-

:
DANIEL LIBBY, NANCY KEMENY LIBBY, :
MARY MARGARET KEMENY and LILLY :
BEACHER BAILEY, :

Respondents.

-----X

STONE, J:

This proceeding was commenced by petitioners James Marshall (“James”), Leon Kachurin (“Leon”) and Marfam Realty Company, LLC (“Marfam”), against respondents Daniel Libby (“Daniel”), Nancy Kemeny Libby (“Nancy”), Mary Margaret Kemeny (“Mary”) and Lilly Beacher Bailey (“Lilly”), pursuant to Article 75 of the Civil Practice Law and Rules (“CPLR”) to vacate a demand for arbitration filed against petitioners by respondents on September 29, 2006 (the “Demand”).

Marfam is a New York Limited Liability Company of which James is the managing member. Marfam is engaged in the business of managing real estate. West

56th Associates (“Associates”), is a New York Limited Partnership. According to Associates’ Certificate and Agreement of Limited Partnership (the “Partnership Agreement”), Associates was formed in 1979 by Leon, Richard Marshall (“Richard”), and Mitchell Bailey (“Mitchell”) as general partners and eleven limited partners of which Richard, Leon and Mitchell were also limited partners.¹ Petitioners Nancy and Daniel were two of the original limited partners of Associates. The parties agree that Petitioners Mary and Lilly are also currently limited partners of Associates, although the record does not indicate when they became limited partners or from whom they acquired their interest. Associates was formed to acquire and operate an office building (the “Building”) located at 16 West 56th Street in Manhattan. On or about August 6, 2000, Associates retained Marfam Realty Company, effective August 1, 2000, as the managing agent for the Building pursuant to a written management agreement (the “Management Agreement”). The Management Agreement was executed by James as a partner of Marfam Realty Company and by Richard as General Partner of Associates. Neither the Amended Petition nor the Answer nor any other document submitted by the parties indicates how Marfam and Marfam Realty

¹ Although the parties do not dispute in their pleading that James is a limited partner and Leon is a General Partner of Associates, they do not address whether either is both a general and limited partner, as originally contemplated. Their status as both does not, however, impact on the issues raised or the decision and order of the Court herein.

Company relate to each other. The Management Agreement merely recites that Marfam Realty Company is “a New York Company.” Presumably, as a “partner” signed on its behalf, it was a partnership as limited partnerships and limited liability companies must, under New York Law, identify themselves as such. Interestingly, and further confusing the identity issue is the fact that the Demand was made against “Marfam Realty Co.” and the petition to set aside the Demand was brought by Marfam Realty Co. LLC. The Respondents admit that Marfam manages the Building pursuant to “a management agreement.”

The gravamen of Respondents’ claims to which this Court must direct its attention is the assertion that certain partners of Associates violated their fiduciary obligations by entering into the Management Agreement which provided for excessive compensation to Marfam, the managing agent, and that certain partners also entered into a sweetheart lease with Marfam for the sixth floor of the Building. Self dealing in such two transactions are alleged.

After initial discussions with the Court, the parties agreed in a stipulation dated January 4, 2007 so ordered by the Court (the “Stipulation”), that Marfam had no obligation to arbitrate and that Marfam’s prayer for a stay of arbitration by respondents as against Marfam, should be granted.

The parties further agreed in the Stipulation that this Court should determine the prayer of James and Leon for a Stay of Arbitration and a dismissal of the Demand as against them, as set forth in the Amended Petition as far as it relates to the Management Agreement and that arbitration as set forth in the Demand may proceed against James and Leon with respect to all other issues set forth in the Demand.

The Partnership Agreement clearly requires arbitration of disputes. What is in dispute is whether the applicable statute of limitations precludes arbitration of the propriety of the partnerships' entry into the Management Agreement. Although the Respondents concede that the longest applicable statute of limitations is six years, that the Management Agreement was entered into on August 6, 2000, and that the Demand was filed on September 29, 2006, more than six years after the date of the Management Agreement, Respondents argue that the statute was inapplicable as the Management Agreement was "on going" and that a "breach of fiduciary duties" occurs every time that Marfam receives a payment from "Associates. Petitioners disagree.

Petitioners do not challenge this Court's jurisdiction to rule on the statute of limitations issues under CPLR §7803(b) in this Motion to Stay Arbitration.

Although the "continuing wrong" theory may extend the statute of limitations, it requires the wrong itself to continue. Where a cause of action is based on an earlier

wrong which has a continuing later effect, the doctrine is inapplicable. See: Selkirk v. New York, 249 AD2d 818 (3rd Dept. 1998). Thus, the six-year statute precludes Respondents from asserting any claim in arbitration against Petitioners by reason of the entry by Associates into the Management Agreement with Marfam on August 6, 2000 or the performance of Associates' obligations pursuant to such Management Agreement. Accordingly, this Court must grant Petitioners prayer for relief to enjoin petitioners from an arbitration claims against them arising out of assertions that they wrongfully entered into the Management Agreement in 2000. However, as Paragraph 9 of the Management Agreement provides that the Management Agreement may be terminated "at any time, with or without cause, on not less than 120 days prior written notice to the other party," this Court's stay of arbitration does not apply to any assertion that the alleged failure to exercise such rescission right, within the appropriate limitation period, constitutes a failure of fiduciary responsibility.

In this Decision and Order, this Court expresses no opinion as to the validity of any claim of the respondents as to breach of fiduciary obligation, the propriety of Marfam's compensation under the Management Agreement, the responsibilities and duties of specific partners, both general and limited, under the Agreement or any other matter which the remaining parties have, by agreeing to Arbitrate left for the determination of the arbitrators.

Accordingly, it is the Order and Decision of this Court, that:

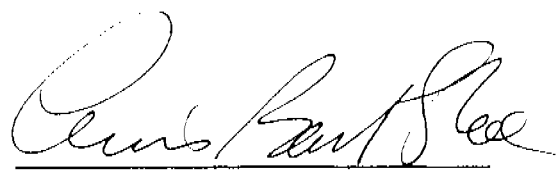
The petition of Marfam is granted and all arbitration proceedings initiated by the Demand as against Marfam are hereby permanently stayed.

The petition of Leon and James is granted to the extent that all arbitration proceedings initiated by the Demand that seeks to arbitrate claims against them by reason of the initial entry of Associates into the Management Agreement and the performance of obligations thereunder which could not be avoided under the terms of the Management Agreement itself, are hereby permanently stayed.

All other prayers for relief set forth in the petition are hereby denied.

This is the Decision and Order of the Court.

DATED: JANUARY 17, 2007
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

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