

**Matter of Guarino v Ross**

2007 NY Slip Op 31166(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0603841/2006

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 3

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In the Matter of

The Application of JAMES V. GUARINO, JAMES N. GUARINO and RICHARD GUARINO, members of 163 CHRISTIE, LLC.

Index No. 603841/2006

Petitioners,

For the dissolution of 163 CHRISTIE, LLC pursuant to Article 7 of the Limited Liability Company Law

DECISION and ORDER

-against-

**FILED**

MAY 10 2007

NEW YORK  
COUNTY CLERK'S OFFICE

DEAN ROSS, TODD ROSS and 163 CHRISTIE, LLC

Respondents.

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**KARLA MOSKOWITZ, J:**

The court consolidates motion sequence numbers 003 and 004 for disposition.<sup>1</sup>

In a proceeding seeking dissolution of 163 Christie, LLC, ("Company"), a limited liability company whose only asset is a residential apartment building located at 163 Christie Street in New York City ("building"), respondents Dean Ross, Todd Ross and 163 Christie, LLC ("respondents") move by order to show cause for an order: 1) granting them physical access to inspect the 163 Christie Street premises; 2) declaring that superintendent Al Ramos is a resident of Apartment 0 at 139 Eldridge Street and that he is not a resident of 163 Christie Street; 3) restraining petitioners from interfering with Al Ramos's tenancy at Eldridge Street; 4) directing petitioners to pay \$158,872 into an operations account for 163 Christie Street; 5) directing petitioners to turn over all 163 Christie Street books and records to respondents; and 6) staying

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<sup>1</sup>Motion sequence number 004, that contains a request for all of the relief that respondents requested in motion 003, is the basis of this decision. This decision, however, fully incorporates motion sequence number 003 as well.

the sale of 163 Christie Street Respondents also seek to reargue and/or renew this court's December 15, 2006 decision that dissolved 163 Christie, LLC and, upon renewal or reargument, seek an order relieving them from the judgment dissolving the Company.

In addition, respondents move pursuant to CPLR 3212 for summary judgment dismissing the second and third count in the petition and for summary judgment in their favor on their fourth and fifth counterclaims.

### **BACKGROUND**

In July 2002, the company purchased a 22-unit residential apartment building located at 163 Christie Street in New York City with the plan to buy out the existing tenants, renovate the apartments and then lease the renovated apartments to new tenants at higher rents. Petitioners allege that, in the ordinary course of business and pursuant to the operating agreement, the members of the company made capital calls in order to buy out tenants and pay contractors for the renovations. Petitioners further allege that, at the end of 2005, all members of 163 Christie, LLC agreed that, in order to increase the Company's profitability, the members needed to ramp up their efforts to buy out existing tenants. However, petitioners claim that despite this agreement, in May 2006, respondents defaulted in making their share of the payment under a \$50,000 capital call. In June 2006, respondents defaulted in making a \$12,500 payment in response to a capital call, and the petition lists several other instances where respondents defaulted in their responsibilities under the operating agreement. Petitioners contend that respondents acted in bad faith to create financial hardship and induce petitioners to sell their interest in the building for less than market value. Petitioners also contend that the animosity that has developed between the LLC members, coupled with respondents' failure to honor their

financial obligations, “has made it virtually impossible to conduct the business of the Company in a reasonable and efficient manner. The Company is effectively deadlocked and cannot function properly.” (Petition, ¶ 43). The petition seeks dissolution of the Company, a reduction in respondents’ interests in the Company pursuant to the operating agreement and damages based on respondents’ alleged breach of fiduciary duty.

Respondents answered and allege that petitioners have engaged in financial self-dealing. In their first and second counterclaims, they seek declaratory judgments that, pursuant to the operating agreement, respondents were entitled to a right of first refusal before petitioners transferred and/or reconfigured their ownership interests. Respondents have also counterclaimed for breach of contract, breach of fiduciary duty and conversion (the third, fourth and fifth counterclaims).

On December 5, 2006, the court issued a judgment dissolving 163 Christie LLC, and, by order dated February 17, 2007, the court appointed a receiver to oversee the winding down and sale of the building.

### **RULINGS ON ORAL ARGUMENT**

On March 9, 2007, at oral argument, the court resolved several portions of the motions on the record. The court ruled that it would keep the receiver in place (Trans. pp. 64-65) and deal with the issues regarding Al Ramos’s residency, the destruction of the building’s value and questions regarding financial transactions after the sale of the building when the court conducts a hearing on the distribution of the proceeds. The court further ruled that respondents would have full discovery after the sale and prior to the hearing. (*Id.* at 62-64). The court prohibited all parties from interfering with the receiver’s operation of the building and forbade them from

entering the building without the receiver's permission. It also directed petitioners to produce all books and records to the receiver. (*Id.* at 66-67). The court denied respondents' application to renew and reargue the court's December 15, 2006 judgment dissolving the company because respondents had failed to demonstrate that the court misapprehended the law or the facts and failed to produce new evidence sufficient to require renewal. (*Id.* at 70-71).

The only branches of the motion that remained unresolved after oral argument are respondents' request for summary judgment dismissing the "reduction of respondents' interest" claim and the breach of fiduciary duty claim in the petition and respondents' demand for summary judgment on their counterclaims for breach of fiduciary duty and conversion.

Respondents' requests for summary judgment dismissing the second count in the petition for reduction of respondents' interests pursuant to the operating agreement and for summary judgment in their favor on the conversion counterclaim are premature. The court will consider these requests at the hearing to determine disbursements after the receiver sells 163 Christie Street and an accountant has inspected the books and records. (*See* Trans. pp. 62-63, 71).

### **BREACH OF FIDUCIARY DUTY**

**The requests for summary judgment on the breach of fiduciary duty claims are premature.**

A member of a limited liability company owes a fiduciary duty to the other members. (*Salm v Feldstein*, 20 A.D.2d 469 [2d Dept 2005]). To prevail on a cause of action for breach of fiduciary duty, the minority member must prove that the managing member misused or misappropriated funds of the limited liability company and/or engaged in self-dealing. (*See e.g.* *Tzolis v Wolff*, 829 NYS 2d 488 [1st Dept 2007]; *Finkelman v Greenbaum*, 2007 WL 102464

[Sup. Ct., Nassau County 2007]). At this juncture, however, the motion for summary judgment in respondents' favor on the breach of fiduciary duty counterclaim is premature because, at the March 9, 2007 hearing, the court directed the parties to hold discovery in abeyance until the receiver completed the sale of 163 Christie Street. Accordingly, the court denies the motion with leave to renew after the sale of the building when all discovery and review of the financial records is complete. (See CPLR 3212[f]; *Espindola v Jorawar*, 228 AD 2d 243 [1st Dept. 1996]; *Ramos v DGI Deutsche Gesellschaft Feur Immobilienfonds, MBH*, 37 AD3d 802 [2d Dept 2007] [summary judgment premature because substantial discovery remained outstanding]).


For the reasons stated above, the court also denies the branch of the motion for summary judgment for dismissal of the third count in the petition for breach of fiduciary duty with leave to renew after the receiver sells the building and discovery and review of the financial records is complete.

Accordingly, it is ORDERED that the branch of the motion that requests the court to keep the receiver in place is granted and the motions are otherwise denied.

The parties are directed to appear in Part 3, 60 Centre Street., Room 248 on the 7<sup>th</sup> day of May at 3:30 ~~am~~ pm for a compliance conference.

This decision constitutes the order of the court.

Dated: May 7, 2007

**FILED**   
J.S.C.  
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