

**M&B Joint Venture v P.H. Realty Associates LLC**

2007 NY Slip Op 34406(U)

February 13, 2007

Supreme Court, New York County

Docket Number: 115741/06

Judge: Rolando T. Acosta

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**HON. ROLANDO T. ACOSTA**

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

Index Number : 115741/2006

PART 61

M&B JOINT VENTURE

vs

P.H. REALTY ASSOCIATES LLC

INDEX NO. \_\_\_\_\_

Sequence Number : 002

MOTION DATE \_\_\_\_\_

DISMISS

MOTION SEQ. NO. \_\_\_\_\_

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

*See attached*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
FEB 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.**

**SO ORDERED**

Dated: 2/23/07

*[Signature]*

ROLANDO T. ACOSTA <sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION <sup>J.S.C.</sup>

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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M&B Joint Venture, Inc.,

Plaintiff,

– against –

P.H. Realty Associates LLC, Penthouse International, Inc., Laurus Master Fund, Ltd., Laurus Master Fund, Ltd., as agent, 14-16 East 67<sup>th</sup> Street Holding Corp., Newman & Newman, P.C., New York State Department of Taxation and Finance, New York City Department of Finance, and John Does 1 through 10 (John Does 1 through 10 being fictitious names or persons who may have an interest in the real property known as and located at 14-16 East 67<sup>th</sup> Street, New York, New York,

Defendants.

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**DECISION/ORDER**

Index No. 115741/06

Seq. No. 2

Present:

**Rolando T. Acosta**  
Supreme Court Justice

The following documents were considered in reviewing Defendants Laurus's and 14-16 East 67<sup>th</sup> Street Holding Corp.'s ("Laurus Defendants") motion for an order dismissing the complaint against them pursuant to CPLR 3211:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation, Affidavit &amp; Memorandum of Law</b>	<b>1-2 (Exhibits A-C)</b>
<b>Affirmation &amp; Affidavits in Opposition &amp; Memorandum of Law</b>	<b>3-4 (Exhibits A-E)</b>
<b>Reply Memorandum of Law</b>	<b>5</b>

The Laurus Defendants move to dismiss the complaint on the grounds that plaintiff has failed to an equitable lien and unjust enrichment claims causes of action against them. The motion is denied.

\* 3 ]

In deciding a motion pursuant CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1<sup>st</sup> Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if “from [the] four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law”); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1<sup>st</sup> Dept 1998 (“so liberal is th[is] . . . standard that the test is simply ‘whether the pleading has a cause of action,’ not even ‘whether he has stated one’”). “Affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims.” R.H. Sandbar projects, Inc. v. Gruzen Partnership, 148 A.D.2d 316 (1<sup>st</sup> Dept. 1989).

Here plaintiff has satisfied this standard. Indeed, with respect to plaintiff’s equitable lien claim, this Court recently held in its decision regarding the Laurus Defendant’s motion to cancel plaintiff’s notice of pendency that plaintiff had properly pled its claim:

“Under New York Law, an equitable lien may arise by implication from circumstances or an implied agreement in which the party claiming the lien stood in a confidential relationship with the legal owner and made payments for the purchase, preservation or enhancement of the property.” Testmetges v. Testmetges, 47 B.R. 385, 390 (E.D.N.Y. 1984)(court found equitable lien based upon implied agreements between the parties). “The agreement ‘must deal with some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation.’” Teichman v. Community Hospital of Western Suffolk, 87 N.Y.2d 514, 520 (1996)(citing James v Alderton Dock Yards, 256 NY 298, 303 (1931)).

Here . . . plaintiff properly pled . . . the existence of an equitable lien. Whether plaintiff ultimately prevails on its claim, is of no moment. 5303 Realty Corp. v. O&Y Equity Corp., supra, 64 N.Y.2d at 320. . . [I]t should be noted that contrary to defendant’s assertions, several writings seem to establish that plaintiff made a purchase money loan to P.H. Realty to enable P.H. Realty to purchase the subject property. Specifically, in February 2004, plaintiff wired \$490,000 to Newman & Newman, the escrow agent for the transaction. Indeed, Newman & Newman’s IOLA Trust Account Balance Sheet dated February 24, 2004, shows that it received \$490,000 from plaintiff. See Plaintiff’s Exhibit B. There is a notation in the balance sheet under M&B stating “(21<sup>st</sup> Century Technologies, Inc.)” Id. By letter dated February 24, 2004, Arland Dunn, M&B’s and 21<sup>st</sup> Century Technologies’s then president, transmitted a letter to Newman & Newman (on 21<sup>st</sup> Century Technologies

letter head) authorizing the escrow agent to release the funds (including M&B's \$490,000) to be utilized by P.H. realty to acquire the property. See Plaintiff's Exhibit C. In addition, Newman & Newman drafted a Purchase Money Note to be executed by Penthouse International in favor of Century 21 Technologies and a Mortgage, Security Agreement and Assignment of Lease and Rents dated February 23, 2004 with respect to the loan. See Plaintiff's Exhibit D. Last, in a letter dated March 10, 2006, Newman & Newman, which stated, inter alia, "I was introduced to Mr. Dunn by Charles Samel, who was arranging for the financing of certain property which required a short term bridge loan from 21<sup>st</sup> Century and others. . . Please note that not all deposits listed on the[] attached schedule are 21<sup>st</sup> Century funds. Particularly, on February 17, I received a wire from M&B Joint Adventure in the amount \$490,000 which I designated as 21<sup>st</sup> Century on the schedule; however, nothing from the wire confirmation indicates that it is from 21<sup>st</sup> Century." See Plaintiff's Exhibit E.

Given the tight control over which Laurus maintained over the various transactions in this matter to protect its \$24,000,000 investment, this Court finds it hard to believe that Laurus did not have knowledge of M&B's purchase money loan to P.H. Realty, which was created at Laurus's insistence. Moreover, 14-16 East 67<sup>th</sup> Street Holding Corp was expressly created by Laurus for the sole purpose of taking title to the subject property. Under these circumstance, Laurus's knowledge of M&B's loan could be imputed to 14-16 East 67<sup>th</sup> Street Holding Corp. See also Kevin Romney's Affidavit, where Romney affirms that he discussed the terms of M&B's loan with a Laurus official in February 2004.

Plaintiff also properly plead an unjust enrichment claim. As the Appellate Division, First Department, noted in Wiener v Lazard Freres & Co., 241 A.D.2d 114, 119 (1<sup>st</sup> Dept. 1998), "[a] cause of action for unjust enrichment is stated where "plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (Tarrytown House Condominiums v Hainje, 161 AD2d 310, 313 [1<sup>st</sup> Dept. 1990]). Where defendants have reaped such benefit, equity and good conscience require that they make restitution." "Unjust enrichment . . . does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched. What is required, generally, is that a party holds property under such circumstances that in equity and good conscience he ought not to retain it." Ptachewich v. Ptachewich, 96 A.D.2d 582 (2<sup>nd</sup> Dept. 1983). Here, plaintiff alleged that it loaned money to P.H. Realty and that there was an amount outstanding on the loan, that the loan enabled P.H. Realty to acquire, subsequently refinance and then transfer the property to 14-16 Corp., thereby enriching all defendants at plaintiff's expense. These allegations are sufficient to survive a motion to dismiss pursuant to CPLR 3211(a)(7).

Accordingly, based on the foregoing, it is

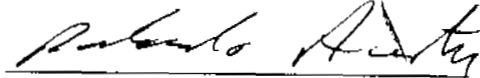
ORDERED that Defendants Laurus's and 14-16 East 67<sup>th</sup> Street Holding Corp.'s motion to dismiss is DENIED.

This constitutes the Decision and Order of the Court.

Dated: February 13, 2007

ENTER

**SO ORDERED**



**ROLANDO ACOSTA**  
J.S.C.

**FILED**  
FEB 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE