M&B Joint Venture, Inc. v P.H. Realty Associates LLC
2007 NY Slip Op 34407(U)
January 10, 2007
Supreme Court, New York County
Docket Number: 115741/06
Judge: Rolando T. Acosta

[* 1]

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

PRESENT: HON. ROLANDO T. ACOSTA
Justice

PART 61

M&B Joint Venture, Inc.

INDEX NO. 115741/06

MOTION DATE

- v -

MOTION SEQ. NO. 1

P.H. Realty Associates LLC, et al.

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	See attached
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

SO ORDERED

Dated: 1/10/07

Rolando Acosta
ROLANDO T. ACOSTA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

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 67th 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 67th Street, New York, New York,

Defendants.

DECISION/ORDER

Index No. 115741/06

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

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The following documents were considered in reviewing Defendants Laurus's and 14-16 East 67th Street Holding Corp.'s motion for an order cancelling plaintiff's notice of pendency, filed on October 20, 2006:

Papers	**Numbered**
Order to Show Cause, Affirmation, Affidavit & Memorandum of Law	**1-2 (Exhibits A-D)**
Affirmation in Support by Defendant Newman & Newman	**3**
Affirmation & Affidavits in Opposition	**4 (Exhibits A-F)**
Reply Memorandum of Law	**5**

Defendants Laurus's and 14-16 East 67th Street Holding Corp.'s motion is denied inasmuch as plaintiff has properly plead the existence of an equitable lien on the subject property. Pursuant to CPLR § 6501, a party may file a notice of pendency (or lis pendens) in an action that can "affect the title to, or the possession, use or enjoyment of, real property." "[A] showing that the plaintiff's action doesn't qualify for a notice of pendency under CPLR 6501 in the first place," although not listed in CPLR 6514(a), is a basis for mandatory cancellation. Siegel, New York Practice, 4th Ed. at p.537. The likelihood of success on the merits, however, is irrelevant to determining the validity of the notice of pendency. In re Sakow, 97 N.Y.2d 436, 441 (2002); 5303 Realty Corp. v. O&Y Equity Corp., 64 N.Y.2d 313, 320 (1984). Indeed, in entertaining a motion to cancel, this Court "essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501." 5303 Realty Corp. v. O&Y Equity Corp., 64 N.Y.2d at 320.

"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, the pleadings satisfy the requirements for the filing of a notice of pendency pursuant to CPLR 6501inasmuch as plaintiff properly pled, inter alia, 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. And, although this Court is limited to the pleadings in entertaining this motion, which clearly support plaintiff's right to a notice of pendency, it 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 "(21st Century Technologies, Inc.)." Id. By letter dated February 24, 2004, Arland Dunn, M&B's and 21st Century Technologies's then president, transmitted a letter to Newman & Newman (on 21st 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 21st Century and others. . . Please note that not all deposits listed on the[] attached schedule are 2st Century funds. Particularly, on February 17, I received a wire from M&B Joint Adventure in the amount $490,000 which I designated as 21st Century on the schedule; however, nothing from the wire confirmation indicates that it is from 21st 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 67th 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 67th 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.

Accordingly, it is hereby

ORDERED that Defendants Laurus's and 14-16 East 67th Street Holding Corp.'s motion for an order cancelling plaintiff's notice of pendency, filed on October 20, 2006, is DENIED

This constitutes the Decision and Order of the Court.

FILED
JAN 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 10, 2007

ENTER

SO ORDERED

ROLANDO T. ACOSTA
J.S.C.