Rose v Stamoulis
2008 NY Slip Op 30182(U)
January 18, 2008
Supreme Court, Queens County
Docket Number: 0006885/2003
Judge: Peter Joseph Kelly
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

HELEN ROSE and ARIS TAFLAMBAS, individually and as shareholders of BROADSIDE REALTY CORP. and in the right of BROADSIDE REALTY CORP. Plaintiffs, - against - GEORGIA STAMOULIS, individually and in her capacity as Officer and Director of BROADSIDE REALTY CORP., MICHAEL ROSE, individually and as shareholder and/or officer of BROADSIDE REALTY CORP. and BROADSIDE REALTY CORP., Defendants.	INDEX NO. 6885/2003 MOTION DATE August 21, 2007 MOTION CAL. NO. 32 MOT. SEQ. NUMBER

The following papers numbered 1 to 13 read on this motion by the plaintiffs Helen Rose and Aris Taflambas for, inter alia, an order holding the defendant Michael Rose in contempt and appointing a receiver for Broadside Realty Corp pursuant to CPLR §6401[a].

	PAPERS NUMBERED
Order To Show Cause-Affid(s)-Exhibits-Service......	1 - 5
Affid(s) in Opp.-Exhibits-Memo of Law..............	6 - 8
Replying Affirmation-Exhibits......................	9 - 10
Affidavit-Exhibits.................................	11 - 12
Further Affidavit in Support of Motion.............	13 - 14

Upon the foregoing papers the motion is determined as follows:

In this corporate derivative action Helen Rose ("Helen") and Aris Taflambas ("Taflambas"), as shareholders of Broadside Realty Corp., seek to compel the defendants Georgia Stamoulis ("Stamoulis") and Michael Rose ("Rose") to, as stated in the wherefore clause of the complaint, account for "the business, affairs, assets liabilities and accounts of Broadside and M&G Realty". Helen and Taflambas also seek a judgment compelling Stamoulis and Rose to pay Broadside monetary damages for alleged breach of their fiduciary duty to Broadside.

Prior to the commencement of this action, Rose had commenced a derivative action, (Index Number 5686/2002), seeking identical relief against Stamoulis and Broadside. By order of this court dated May 8, 2003, which was based upon a written stipulation of all parties, these

[* 2]

two actions were joined for trial, but remained "separate and distinct for all other purposes". Moreover, the stipulation and order provided that motions were not to be made under a joint caption, but "under the caption of the action to which the motion pertains". In both of these actions, Helen and Taflambas have taken the position that Stamoulis and Rose mismanaged Broadside, and/or improperly diverted funds from or owing to Broadside for their own personal uses.

Broadside is a family owned corporation with offices located at 24-21 21st Street, Astoria, New York. The corporation exists primarily to own and manage significant real estate interests in Manhattan and Queens. Michael Rose, Helen Rose and Georgia Stamoulis are half-siblings linked by their now deceased father Stanley M. Rose. Taflambas is Helen's son. Although all the individual parties are shareholders in Broadside, the parties dispute the actual percentage of ownership each retained or acquired upon the death of Stanley Rose.

The assets owned by Broadside include real property located in Manhattan at 2740-2748 Broadway, 2742 Broadway, 2750-2756 Broadway, 250 West 106th Street, 244 West 106th Street, 246 West 106th Street, 248 West 106th Street, and 24-12 21st Street, in Astoria, New York. Broadside Corp. is also apparently partners with an individual, Nick C. Melissimos, in an entity named M&G Realty Co. ("M&G"). M&G owns a residential apartment building with some 54 rental units located at 34-57 73rd Street, Jackson Heights, New York.

The premises owned by Broadside at 24-12 21st Street, Astoria, is a three-story two family premises which, in addition to being the corporation's offices, is used by Rose as his primary residence. Stamoulis apparently has a 50% interest in a business, Silver Moon Bakery, that operates out of a Broadside property located at 2740 Broadway, New York, New York.

In response to a prior motion for a preliminary injunction, the court issued the above referenced short form order dated May 8, 2003, which provided, inter alia, that Just Management Corporation ("JMC") would be retained to manage Broadside's Manhattan properties and the Astoria premises occupied by Rose. Other pertinent provisions of the stipulation and order provide as follows:

"Except for medical benefits . . . no other amounts shall be requested or received by any party from Broadside and the parties are enjoined from accepting or requesting the distribution of any funds from M&G Realty, Inc. which belong to Broadside."

"JMC shall not make any determination or commence any work that would result in a major change to the properties and may not make any single expenditure in excess of $5,000 without the prior written consent of the parties; provided however that this prohibition shall not apply to the payment of any bills in connection with the Premises."

"The parties are hereby enjoined from all access to the Premises, as well as to the buildings in Queens County owned by M&G Realty, without the prior written consent of all the parties . . . The parties are further enjoined and restrained from receiving, collecting or disbursing any funds, rents, assets or property of any kind belonging

or owed to Broadside. Further, all parties to this litigation shall be removed as signatories and/or authorized parties listed on any Broadside bank accounts and shall be enjoined and restrained from accessing any of the records, assets, property, documents or accounts of Broadside."

As to the branch of the motion for an order holding Rose in contempt, Helen and Taflambas assert in support of the motion that Michael Rose committed four discrete acts violating the May 8, 2003 stipulation and order. First, it is alleged that Rose attempted to negotiate a check for $100,000.00 made payable to himself that he drew on an account in the name of M&G Realty. Second, that Rose admitted at his deposition that he received a $50,000.00 "loan" from M&G that has never been repaid. Third, that Rose has accessed a Broadside property in Manhattan. And finally, that masonry work, paid for by M&G Realty, was performed at the Astoria premises where Rose resides.

Pursuant to Judiciary Law §753, a court is authorized "to hold a party in civil contempt for failing to obey a lawful mandate of the court" (Tihanyi v Grimando, 36 AD3d 893, 894). To justify a finding of contempt, either civil or criminal, "'it must appear with reasonable certainty that the party charged has violated a clear and unequivocal mandate'" (Tihanyi v Grimando, supra, citing Bay Parkway Super Clean Car Wash v Accurate Auto Repair, 220 AD2d 549, 550; see also, Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Protection of State of N.Y., 70 NY2d 233, 240), "thereby prejudicing a right of another party to the litigation" (Riverside Capital Advisors, Inc. v. First Secured Capital Corp., 28 AD3d 455, 456). "An application to adjudicate a party in contempt is treated in the same fashion as a motion, and a hearing need not be held if an issue of fact is not raised" (Riverside Capital Advisors, Inc. v First Secured Capital Corp., 28 AD3d 455). The burden of proof is on the movant to demonstrate the contempt by clear and convincing evidence (See, Rienzi v Rienzi, 23 AD3d 447).

Initially, the court notes that the motion for contempt suffers from a technical defect. The stipulation and order of the court the movants claim was violated was issued in the Michael Rose, et al. v Georgia Stamoulis action under Index No. 5686/2002. However, the instant motion was made in the Helen Rose, et al. v Georgia Stamoulis action under Index No. 6885/2003. Contrary to the movants' assertion, these actions were not consolidated, but rather joined for trial. Also, the parties' joint trial stipulation provided that motions were to be made "under the caption of the action to which the motion pertains". However, inasmuch as all the parties ignored or overlooked this defect and addressed the facts of the motion, the court will proceed to address the merits of the arguments.

With respect to Rose's attempted negotiation of a $100,000.00 check, and receipt of a $50,000.00 "loan", it is clear these funds came from the coffers of M&G, not Broadside. The stipulation and order claimed to be violated prohibited the parties from "receiving", "accepting", "requesting" or "collecting" any funds "belonging" or "owed" to Broadside. Therefore, to find Rose in contempt, the movants are required to establish, by clear and convincing evidence, that the

funds in question "belonged" or were "owed" to Broadside. In this regard, the movants make a blanket assertion that since Broadside was a 50% owner of M&G, a portion of the funds Rose received, or that he attempted to acquire, must have belonged to Broadside. However, all the court can legally discern with any certainty from the moving papers is that M&G was, and remains, an equal partnership between Broadside and Nick C. Melissimos as well as that the funds at issue came from M&G. Other than a document dated October 17, 1983 which appears to establish the partnership, there is no proof what the partnership agreement between Broadside and Melissimos was concerning the distribution of assets of M&G. It has also not even been demonstrated, clearly and convincingly, that M&G was even profitable.

The fact that the proof offered on this point is speculative is confirmed by the movants' request for an accounting of M&G which is not a party in this action. Had the stipulation prevented the parties merely from accepting or receiving any funds from M&G, the result would probably be different. Unfortunately it was incumbent on the movants to establish that these funds actually "belonged" or were "owed" to Broadside and/or that these finds did not belong to Melissimos. This can not be done based on the evidence presented. Perhaps this information could be ferreted out during discovery in a proceeding involving M&G but the court is loathe to further delay these proceedings while the parties undertake another tangential line of litigation at this procedural point in this matter.

Concerning the third claim, Taflambas states in his affidavit dated April 24, 2007 that Rose "has eaten dinner with his family frequently at the Meridiana restaurant on Broadside Broadway property when he's been enjoined from going into the property by this court". Although the court's order expressly provides that the parties are "enjoined from all access to the Premises", Taflambas' conclusory statement is insufficient to establish willful contemptuous conduct on the part of Rose. Even if true, and not just hearsay information being passed on to the court, there is no proof demonstrating how any other party to this action was prejudiced by Rose and his family eating dinner at a restaurant contained within a Broadside property.

The clear thrust of the stipulation and order was to enjoin the parties from entering into the subject premises and taking an active role in managing or directing Broadside's business interests, and movants have not shown how the above purported conduct involves such actions.

With respect to the masonry work performed at the Astoria premises, while such work could constitute a proscribed major change to the property in excess of $5,000.00, the express terms of the order constrains JMC from making such significant changes to the Broadside properties. Thus, the party potentially in contempt would be JMC, not Rose. If the parties feel JMC is not properly performing its obligations the solution does not lie in holding Rose in contempt.

Turning to the branch of the motion seeking the appointment of a receiver for Broadside, Section 6401 of the Civil Practice Law and Rules authorizes the Supreme Court to appoint a temporary receiver "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed" (CPLR §6401[a]; Rotary

Watches (USA), Inc. v Greene, 266 AD2d 527, 528). The invocation of this equitable power is a "drastic remedy" (Natoli v Milazzo, 35 AD3d 823) and the court must "exercise extreme caution in the appointment of receivers, which should never be made until a proper case has been clearly established" (Laber v Laber, 181 AD 733, 735; see also, Armienti v Brooks, 309 AD2d 659; Di Bona v General Rayfin, Ltd., 45 AD2d 696).

While there is ample evidence to substantiate the movants' concerns that Rose is and has been controverting the spirit, if not the letter of the May 8, 2003 stipulation and order, and that certain of his actions, including Rose's admission at a deposition to receiving an undocumented no-interest "loan" that he has yet to repay, may be placing his self interest ahead of that of his co-shareholders, the court is not persuaded that the appointment of a temporary receiver to manage the affairs of Broadside during the pendency of these joined actions is justified.

The real value in Broadside does not lay in the rent earnings from a single residential apartment building in Queens of which it is effectively only a one-half owner, but rather in its multi-million dollar real estate holdings in Manhattan which are in no danger of being transferred or diminished in value. Indeed, if the offers purportedly received by the movants for the sale of the Manhattan properties are viable, then these holdings owned by Broadside are worth in excess of forty million dollars and Rose's share thereof would provide more than adequate security to protect any diminution in value of the minority stakes in Broadside held by Helen and Taflambas (See, Kristensen v Charleston Square, Inc., 273 AD2d 312; B.D. & F. Realty Corp. v Lerner, 232 AD2d 346).

The court is absolutely convinced that the appropriate recourse under these circumstances is to secure an early trial (See, Shapiro v Ostrow, 46 AD2d 859). The parties have clearly manifested to the court that at this juncture, they are unwilling or unable to voluntarily resolve the underlying disputes despite the inordinate amount of effort and time expended to accomplish such a result over these last six years.

The court sees no benefit in further delaying these proceedings as it appears all parties are entitled to an accounting of the actions of Michael Rose and Georgia Stamoulis for their actions in the operation of Broadside. Indeed an accountant was supposed to have been retained, by stipulation and order of May 8, 2003, to prepare an accounting for the parties from 1988-2002. If the assets of Broadside are being manipulated to enrich an individual shareholder it is time such acts are set forth and recompense had. If not, it is time to end the depletion of the parties' assets on a fruitless endeavor.

Therefore, unless the court is in receipt of a stipulation setting forth the parameters of such accounting, and consenting to the entry of an interlocutory judgment thereon within 30 days from the date of this order, the plaintiffs shall move for the issuance of such judgment within 20 days thereafter (See, Nishman v DeMarco, 76 AD2d 360, 367; Kaminsky v Kahn, 23 AD2d 231, 241). These dates shall be strictly adhered to and not extended by stipulation.

The remaining branches of the motion are denied as these concern the movants' cause of action for damages based upon alleged breaches of fiduciary duties by Rose and Stamoulis which are more properly attended to after completion of the accounting.

Dated: January 18, 2008

Peter J. Kelly, J.S.C.