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

PRESENT: HON. RICHARD B. LOWE, III — PART 56

Justice

Ciao - Bi Restaurant Corp.

- v -

Paxton 350 LLC

INDEX NO. 602863/07

MOTION DATE 9/10/07

MOTION SEQ. NO. 001

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	
Replying Affidavits	

Cross-Motion: ☑ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2/25/08

HON. RICHARD B. LOWE, III

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 : IAS PART 56
----------X

CIAO-DI RESTAURANT CORPORATION,

Plaintiff,

INDEX NO.
602863/07

-against-

PAXTON 350, LLC and ALAN FRIEDBERG,

Defendants.

----------X

RICHARD B. LOWE, III, J.:

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

In motion sequence 001 plaintiff moves by order to show cause for an order preliminarily enjoining defendants from: (i) holding themselves out or conducting themselves as the manager of plaintiff's condominium project; (ii) depositing, withdrawing, disbursing or transferring from, or in any way exercising control over or acting with respect to any bank account in the name of plaintiff Ciao-Di Restaurant Corporation or any other bank account into which defendants have deposited any loan proceeds or monies derived from the project; (iii) transferring, disposing or expending any portion of the $1,925,000 which defendant Alan Friedberg ("Friedberg") wired out to defendant Paxton 350, LLC ("Paxton") from HSBC account no. 61089557 on August 22, 2007; and, (iv) deleting, destroying, altering or copying any hard drives, disks, CDs, computer-related information, files, records, bank statements or documents of any kind relating to the project.

Defendants cross-move for an order enjoining plaintiff and its agents, including Yvonne Wagner ("Wagner") and William Wagner, her son, from interfering with defendants' activities as

manager of the project, including, without limitation, interfering with the staff of the office space located at 88 Washington Place in Manhattan, locking that space and using it themselves, and removing and destroying or altering the documents and other records in that office and informing contractors and vendors and other staff members that they are not to take instructions from defendants.

In motion sequence 002 Alfred Noe ("Noe"), a member of Paxton, moves by order to show cause for an order (i) disqualifying Jeffrey D. Taub, Esq. ("Taub") and his firm from representing defendants and (ii) permitting Noe to intervene pursuant to CPLR § 1012(a)(2) and (3) and CPLR §1013.

Background

Plaintiff is the owner of a building located at 88 Washington Place a/k/a 350 Sixth Avenue in Manhattan (the "building"). On December 3, 2003 plaintiff, as owner, entered into a Development Agreement with Paxton, as manager, pursuant to which Paxton agreed to renovate and develop the building by adding residential floors above the then existing two stories and converting the building to condominium ownership (the "project"). Plaintiff's principal is Wagner. Paxton's members are Friedberg, David Gruber ("Gruber") and Noe. Friedberg is the managing member.

On June 4, 2007 plaintiff and Paxton entered into a Memorandum of Understanding (the "Memorandum") which amended the Development Agreement and provided *inter alia* that any disbursements in excess of $10,000 must be jointly approved by the parties. By letter dated August 16, 2007, Wagner, on behalf of plaintiff, terminated Paxton's services as manager pursuant to section 11 of the Development Agreement, as amended, on the stated ground that

Paxton issued checks in excess of $10,000 without obtaining plaintiff's approval. The letter also requested Paxton to transfer all books and records pertaining to the project to plaintiff. That same day Wagner, her son William, plaintiff's attorney Richard Feldman ("Feldman") and Friedberg's son Bruce appeared at Paxton's office on the site of the project and it was agreed *inter alia* that Feldman would hold the keys to the office and Bruce Friedberg, an attorney, would hold the project files in escrow. On August 24, 2007 plaintiff brought the instant application for temporary and preliminary injunctive relief. The court granted plaintiff's request for a temporary restraining order enjoining defendants from participating in any of the activities set forth in plaintiff's application (*supra*) pending a hearing.

Plaintiff's application is based on a litany of charges aimed at Paxton and Friedberg who are accused of *inter alia* unduly extending the length and costs of the project, mishandling the setting up and processing of various bank accounts, awarding Bruce Friedberg a brokerage commission, ignoring and circumventing the dual signature requirement, soliciting kickbacks from contractors, and stealing money from plaintiff.

Defendants, who seek to enjoin plaintiff from terminating their services, counter that they adhered to the letter of the Development Agreement and that it was Wagner, on plaintiff's behalf, who breached that Agreement by terminating Paxton's services without notice so as to deprive Paxton of part of its construction developer's fee.

Each side argues that the other has failed to demonstrate that they meet the criteria for injunctive relief.

Discussion

The purpose of a preliminary injunction is to maintain the *status quo* until a decision is

reached on the merits (*see Tucker v Toia*, 54 AD2d 322, 325 [4th Dept 1976]). To be entitled to such relief, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent such relief, an inadequate remedy at law, and a balancing of the equities in its favor (*see Gulf & Western Corp. v New York Times Company*, 81 AD2d 772, 773 [1st Dept 1981]; *W.T. Grant Co. v Srogi*, 52 NY2d 496,517 [1981]).

As to likelihood of success on the merits, Plaintiff is likely to prevail. Paragraph 3.11.4 of the Development Agreement (*Order to Show Cause, Exhibit A*) provides that Paxton has a fiduciary responsibility with respect to project funds and paragraph 3.17 contains an acknowledgment by Paxton that it is acting as a fiduciary in the course of its duties. Paragraph 11.1, when read in conjunction with paragraph 11.3.1 and section 10, as intended, provides in essence that plaintiff can terminate Paxton's services for breach of its obligations under the Development Agreement, fraud and willful misconduct. Given Paxton's status as a fiduciary, if any of plaintiff's claims prove to be true it will prevail herein. "[T]he showing of a likelihood of success ... must not be equated with the certainty of success on the merits" (*Bingham v Struve*, 184 AD2d 85, 88 [1st Dept 1992] quoting Tucker v Toia, *supra*, 54 AD2d at 326).

Plaintiff may suffer irreparable injury without injunctive relief. Both sides agree that the project is virtually complete. Defendants' services may no longer be required and clearly are no longer desired. The contention between the parties has the potential to substantially interfere with plaintiff's relationship with the unit owners and unpaid contractors, if any. As a result, plaintiff risks the possibility of further litigation. It is also likely that plaintiff may lose its good will, which is not compensable with money damages.

Furthermore, Plaintiff is favored by a balancing of the equities for the reasons stated

above and because the owner of a building is entitled to the right, in equity, to terminate the services of an unsatisfactory manager. On the other hand, any injury that defendants may suffer because of their allegedly improper termination can be compensated with money damages.

In motion sequence 002, Noe seeks leave to intervene in this action and to disqualify Taub and his law firm from representing defendants. Noe, a member of Paxton, supports plaintiff's position contending that the project is virtually complete and there is no reason to reinstate Paxton. According to Noe, the motion to intervene is based on his desire to protect Paxton from Friedberg's illegal conduct. Noe also seeks to bar Friedberg's access to the project's books and records to prevent Friedberg from tampering with them to cover up this alleged conduct.

Noe accuses Friedberg and Gruber of excluding him from all aspects of the project in February 2005 because he refused to participate in diversions of funds from the project to Paxton, shakedowns of vendors and subcontractors, and the receipt of kickbacks. Noe is supported by Wayne Schumer ("Schumer"), a former vice president of Ameribuild Construction Management Inc. ("Ameribuild"), the project's construction manager, who has submitted a declaration pursuant to 28 USC § 1746 (rather than an affidavit) in which he states that in 2005 Friedberg demanded a kickback of $50,000 from Ameribuild. Robert Lopez, an employee of Ameribuild, states that either Ameribuild or Friedberg failed to require a water leak test and that the project is virtually complete.

Schumer is contradicted by Brandon Roth, Ameribuild's president and principal stockholder, who states, *inter alia*, that Friedberg never demanded a kickback and never attempted to extort money from Ameribuild. In any event, the declaration by Schumer pursuant

to 28 USC § 1746 must be disregarded as this matter is brought in state rather than a federal court (*see Colbert v Rank America, Inc.*, n.o.r., index no. 11140/98, mot. seq. no. 18 [Sup Ct, Queens Co, Elliot, J, Nov. 14, 2007] [no CPLR provision allowing use of federal declaration in state court]).

Defendants deny Noe's allegations of conflict and illegality and argue that Noe, who currently has only a 10.38% interest in Paxton, has that interest adequately represented by Taub in this litigation, and oppose Noe's motion in all respects on various grounds.

Noe's motion to intervene cannot be granted because it is not supported by a proposed pleading containing the claims or defenses Noe intends to assert in the action. CPLR § 1014 provides that "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought." The court has no power to grant Noe leave to intervene inasmuch as he did not include in his application a proposed pleading pursuant to CPLR § 1014 (*see Matter of Colonial Sand and Stone Co., Inc.*, [Flacke], 75 AD2d 894, 895 [2d Dept 1980]). Furthermore, Noe's presence as a party within an already complex matter would cause needless delay and be otherwise inappropriate since he is a member of defendant Paxton but has aligned himself with plaintiff. In addition, there is no need to add Noe as a party since he has the ability to state any claim he – or Paxton – may have against Friedberg and Gruber in a separate action, which would be a more suitable vehicle.

Neither has Noe demonstrated the need for Taub's disqualification as defendants' counsel herein. Noe seeks the disqualification of Taub on the stated ground that the interests of Friedberg and Paxton inherently conflict because Paxton and its members have potential claims against Friedberg. As noted above, these conflicts are best explored in a separate action. Defendants

correctly argue that a party's entitlement to be represented by counsel of his own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted *(see Olmoz v Town of Fishkill*, 258 AD2d 447 [2d Dept 1999]; *Petrossian v Grossman*, 219 AD2d 587, 588 [2d Dept 1995]). No such showing has been made herein.

Accordingly, plaintiff's application for an order granting a preliminary injunction (mot. seq. no. 001) is granted to the extent that it is hereby

ORDERED that defendants and all persons acting at their direction or on their behalf, including Gruber and Bruce D. Friedberg, are preliminarily enjoined during the pendency of this action from:

1. Holding themselves out or conducting themselves as the manager of the project;

2. Depositing, withdrawing, disbursing or transferring from, or in any way exercising control over or acting with respect to any bank account in the name of plaintiff, including but not limited to HSBC account no. 610895257, or any other bank account into which defendants have deposited any loan proceeds or monies derived from the project;

3. Transferring, disposing or expending any portion of the $1,925,000 which Friedberg wired out to Paxton from HSBC account no. 610895257 on August 22, 2007 except for the funds provided for at the September 10, 2007 hearing and the parties' September 26, 2007 stipulation which was "so ordered" on October 11, 2007;

4. Deleting, destroying, altering or copying any hard drives, disks, CDs, computer-related information, files, records, bank statements or documents of any kind relating to the project; and it is further

ORDERED that defendants' cross-motion for an order granting a preliminary injunction is denied; and it is further

ORDERED that Noe's application for an order disqualifying Taub and his law firm from representing defendants and granting Noe leave to intervene (mot. seq. no. 002) is denied.

This constitutes the decision and order of the court.

DATED: February 25, 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE, III