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

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Index Number : 600217/2008

POST BROADWAY ASSOCIATES

VS

MINSKOFF GRANT

Sequence Number : 002

DISMISS

INDEX NO.

MOTION DATE 7/18/08

MOTION SEQ. NO.

MOTION CAL. NO.

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

FILED

OCT 21 2008

COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10/16/08

HON. RICHARD B. LOWE, III

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 56

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POST BROADWAY ASSOCIATES a/k/a 59 SOUTH BROADWAY VENTURE, 77TH QUEENS ASSOCIATES, 82nd-83rd STREET VENTURE, HALSTEAD HARRISON AVENUE VENTURES,

Plaintiffs,

Index No.: 600217/08

-against-

MINSKOFF GRANT REALTY & MANAGEMENT CORP.,

Defendant.

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**Hon. Richard B. Lowe, III:**

In motion sequence 002 Defendant Minskoff Grant Realty & Management Corp. Moves to dismiss pursuant to CPLR 3211(a)(4). In motion sequence 003, plaintiff moves for summary judgment pursuant to CPLR 3212. The motions are consolidated for disposition.

**BACKGROUND**

In motion sequence number 002, defendant moves to dismiss alleging that an action currently in the federal court to dissolve several of the plaintiff partnerships involves the same or similar parties, and seeks substantially the same relief, as in the instant action. The plaintiffs, four partnerships, move for summary judgment, pursuant to CPLR 3212, to declare that any agency relationship between plaintiffs and defendant has ended, and to enjoin defendant from taking any further action on behalf of any plaintiff, or from holding itself out as the managing or leasing agent for any plaintiff.

Previously, this court granted plaintiffs a preliminary injunction, which decision was affirmed on appeal on April 15, 2008. ___ AD3d ____ (1st Dept 2008).

This litigation arises out of internecine disputes in which family member partners of the plaintiff partnerships voted to terminate the management agent contract with defendant corporation, whose principals are also family member partners in the partnerships. The factual background has already been detailed in this court's earlier decision granting the preliminary injunction on March 18, 2008, and need not be repeated here.

The first issue to be resolved by the court is whether this action must be dismissed or stayed because of the pending federal litigation to dissolve the partnerships. If the action in this court is not dismissed or stayed because of the federal action, the court must then resolve the issue of whether plaintiffs validly terminated the management agent contract with defendant.

**DISCUSSION**

*Defendants' Motion to Dismiss*

CPLR 3211 (a) (4) allows an action to be dismissed if "there is another action pending between the same parties for the same cause of action in a court of any state or the United States ... ." A complete identity of parties is not necessary, if there is a *substantial* identity of parties (*Proietto v Donohue*, 189 AD2d 807 [2d Dept 1993]), but there must be a complete identity of issues to avoid dismissal. *Reliance Insurance Co. v American Electric Power Company, Inc.*, 224 AD2d 235 (1st Dept 1996).

The pending federal action was instituted by the principals of the corporate defendant in the instant action to dissolve some of the partnerships in which they are partners. The case at bar was commenced by four partnerships for injunctive and declaratory relief to have the corporate defendant herein declared as no longer being the managing agent for the plaintiff partnerships. The dissolution of a partnership does not involve the same issue as the restraint of an alleged

former agent from acting on behalf of the alleged former principal.

In arguing against the earlier motion to grant a preliminary injunction, defendant contended that this action should be dismissed or stayed because of the pending federal litigation to dissolve the partnerships. Both this court and the appellate court declined to so dismiss or stay.

As stated in the federal complaints, defendant at bar is a non-party to the federal actions. Furthermore, the primary thrust of the federal claims is to dissolve some of the partnerships involved in the instant action. As a secondary, and temporary, prayer, the federal action plaintiffs have asked that the management contract with the corporate defendant in this action be continued until a final determination in the federal suit.

When the federal court was asked to reverse this court's determination not to dismiss or stay the state proceedings and to grant a preliminary injunction, the federal court stated that it was not "going to adjudicate whether the State Court was wrong." Tr. 16, May 16, 2008.

Since the defendant and some of the plaintiffs in the present action are not parties to the federal litigation, and the issue in the federal suit regarding the grounds to dissolve partnerships is dissimilar to the to the issue in this action regarding a principal's ability to terminate an agent's authority, defendant's motion to dismiss or stay this proceeding pending the outcome of the federal litigation is denied.

*Plaintiffs' Motion for Summary Judgment*

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to

"present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs maintain that the decision to terminate the managing agent contract with defendant corporation was a valid exercise of partnership rights, and, therefore, defendant can no longer hold itself out as acting on behalf of plaintiffs. Defendant's argument, in opposition to plaintiffs' motion, rests on the assertion that the majority partners in the plaintiff partnerships acted in contravention of New York Partnership Law (Partnership Law) by deciding to terminate defendant's contract with less than an unanimous vote.

First, it must be stated that defendant is not a partner in any of the plaintiff partnerships, and therefore has no standing to challenge the partnerships' decision-making process. Defendant is a corporation, a legal entity separate and distinct from its shareholders. *Total Health Care Industries, Inc. v Department of Social Services*, 144 AD2d 678 (2d Dept 1988). Second, although defendant's principals, who are partners, are opposed to the termination, they are still in the minority. Although they may wish to assert claims against the majority partners for violation of alleged breaches of fiduciary obligations, those claims are not appropriate to this action, since defendant's principals are not parties to this lawsuit between the partnerships and the corporation.

However, since all parties to this action have argued the application of Partnership Law to the termination decision, the court shall address that issue.

Partnership Law 40 (8) states that "any difference arising as to ordinary matters connected

with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."

It is well settled that "a principal has the power to revoke at any time his agent's authority to represent him." *Wilson Sullivan Co., Inc. v International Paper Makers Realty Corp.*, 307 NY 20, 24 (1954). The question, therefore, is whether a partnership, as the principal, may only revoke the authority of its managing agent by unanimous consent.

In *Bishop v Rubin* (228 AD2d 222 [1st Dept 1996]), the court held that a partnership, by majority vote, had the right to remove its managing agent for cause. Defendant has argued that *Bishop v Rubin* is distinguishable, because in that case the managing agent was removed for cause, whereas, in the instant action, the managing agent was removed without cause. In making this argument, defendant is incorrectly placing the emphasis on the reason for the termination as the determining factor, rather than the act of termination itself.

As part of its argument, defendant states that, "while the relationship that any particular partnership has with a managing agent may be of an 'ordinary' nature (Memorandum in Opp at 10)," it disputes that the relationship between plaintiffs and defendant was ordinary because defendant's principals are partners in the plaintiff partnerships, and defendant has been the managing agent for over one hundred years. In making this argument, defendant misses the thrust of this litigation, which is the ability of a principal to terminate its agent's authority.

The issue, as argued by the parties, is whether a partnership may terminate a contract with a managing agent with less than an unanimous vote. The court notes that the fact that the agency was created by contract is not relevant to the principal's ability to terminate the relationship. The

termination may be effective even if the partnership may be in breach of contract, for which the terminated agent may have a contractual claim. *See, e.g., Smith v Conway*, 198 Misc 886 (Sup Ct, NY County 1950), *affd* 278 AD 566 (1st Dept 1951).

The alleged "special relationship" posited by defendant, because of the long-standing nature of the contact between the parties, may only give rise to a requirement that the partnerships adhere to an appropriate methodology before terminating the contract, but is not a preclusion of their ability to so terminate. *See generally Wein & Malkin LLP v Helmsley-Spear, Inc.*, 300 AD2d 32 (1st Dept 2002).

The court could find no legal support for defendant's proposition that the hiring or firing of a managing agent is not ordinary business for a commercial venture. In *Wein & Malkin, LLP v Helmsley-Spear, Inc.* (302 AD2d 253 [1st Dept 2003]), a case involving another contentious partnership dispute, the court was called upon to determine whether a managing agent for a partnership had been validly terminated without cause. In that instance, the court upheld the termination, even though the vote was apparently not unanimous. Extrapolating from that decision, this court concludes that the retention and dismissal of a managing agent for a commercial enterprise falls within the concept of ordinary business under Partnership Law § 40 (8).

Defendant also contends that the vote to terminate the contract was itself suspect because the partners who are the principals of defendant were not provided with the necessary documentation to make a knowing decision, thereby freezing them out of their right of management in the partnership, pursuant to Partnership Law § 40 (5). As stated previously, this argument, which is an allegation of breach of fiduciary obligations by majority partners to

minority partners, is inappropriate with respect to the instant action.

Therefore, based on the foregoing, plaintiffs' motion for summary judgment declaring defendant permanently enjoined from taking any action concerning plaintiffs' properties, and compelling defendant to turn over to plaintiffs, to the extent it has not already done so, any keys, books, accounts, records or other property it may have concerning plaintiffs' properties, is granted.

**CONCLUSION**

It is hereby

ORDERED that defendant's motion to dismiss or stay these proceedings is denied; and it is further

ADJUDGED that the agency relationship between each plaintiff and defendant has terminated and that defendant may no longer act of hold itself out as the managing or leasing agent of the property owned by a plaintiff; and it is further

ORDERED that defendant Minskoff Grant Realty & Management Corp., its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are permanently enjoined and restrained from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant, any of the following acts: (A) from taking any action on behalf of any plaintiff (Post Broadway Associates a/k/a 59 South Broadway Venture, 77th Queens Associates, 82nd-83rd Street Venture, and Halstead Harrison Avenue Ventures) or holding itself out as the leasing or managing agent with respect to any of these properties; (B) from taking any action to destroy or otherwise transfer any of the books, records, documentation, keys and other

property concerning plaintiffs' properties as set forth on Exhibit D attached to the Verified Complaint that is in the possession, custody or control of defendant, its officers, agents or employees; and (c) to turn over said items to plaintiffs so that each plaintiff can effectively manage the property it owns or leases; and it is further

ORDERED that the undertaking fixed in the sum of $20,000.00 is to be returned to plaintiffs; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiffs, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: October 16, 2008

ENTER:

HON. RICHARD B. LOWE, III

FILED

OCT 21 2008

COUNTY CLERK'S OFFICE
NEW YORK