

Loewentheil v O'Hara
2008 NY Slip Op 32930(U)
May 28, 2008
Supreme Court, New York County
Docket Number: 601761-05
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Freedman
Justice

PART 39m

Stephan Loewentheil et al

INDEX NO. 601761/05

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

- v -

White Knight, LTD, et al

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 *is decided in accordance with the accompanying memoranda of law*

FILED

JUN 02 2008

COUNTY CLERK
NEW YORK

Dated: 5/28/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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 39

-----X
Stephan Loewentheil and Beth Farber Locwentheil,

Plaintiffs,

-against-

Index No.

EDITH O'HARA, individually and as a director and
shareholder of White Knight, Ltd.,

Defendants.

-----X
Edith O'Hara, Individually and as a Director and

Shareholder of White Knight, Ltd,

Third Party Plaintiffs,

-against-

Gordon Milde and 13 Street Repertory Company, Inc.,

Third Party Defendants.

-----X

HELEN E. FREEDMAN, J:

This motion is part of a long running dispute between Edith O'Hara and her 13th Street Repertory Company, Inc. ("13th St. Rep" or "the Repertory Company"), both of whom are housed at 50 West 13th Street ("the building"), and Stephan and Beth Loewentheil ("Locwentheils") the purchasers of either 50 % or 62.5% of the shares of White Knight, Ltd. ("White Knight"), the

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JUN 02 2008
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NEW YORK

corporation that owns the building. In the underlying dispute, the Loewentheils seek to recover the sum of \$ 751,758.57 based on three notes allegedly issued at a Board of Directors meeting held on December 2, 2004 at the offices of McCarter & English, LLP (“McCarter & English”), allegedly replacing notes previously issued by White Knight to third party defendant Gordon Milde (“Milde”), the former owner of either 50% or 62.5 % of White Knight. In related Civil Court proceedings, White Knight or the Loewentheils, asserting their majority ownership rights, have brought eviction proceedings against O’Hara and 13th St. Rep. With this Court’s permission, White Knight sold air rights to its property for which it has realized a net sum of \$1,974,975.

In this motion Edith O’Hara in behalf of herself and White Knight Ltd. seek the following:

1) the enjoining of the Loewentheils from utilizing the \$1,974,975 proceeds of the sale of the air rights for cantilever use in a 1031 Exchange transaction and directing that the funds be deposited into a bank or brokerage account in the name of White Knight pending determination of this proceeding;

2) a declaration that third-party defendant, 13th St. Rep. be the owner of the disputed 12.5 shares of White Knight because the transfer of shares by 13th St. Rep to Milde was unlawful;

3) dismissal of the complaint upon the grounds that the notes sued upon were fraudulently created, never existed, and any debt owed has either been paid or is barred by the statute of limitations;

4) a stay of attempts by the Loewentheils or White Knight to evict 13th St. Rep. until the rights of parties have been adjudicated;

5) disqualification of McCarter & English as counsel because the latter are both suing White Knight in this actions and representing White Knight in a landlord-tenant proceeding seeking to evict the Repertory Company, L&T Index Number 91401/07 ;

6) a direction that Stephan Loewentheil answer deposition questions that his counsel objected to; and

7) a direction that Steven Eckhaus, counsel, appear for a deposition in both the direct and third party actions.

Plaintiffs cross-move for summary judgment pursuant to CPLR 3212 on certain of the promissory notes, dismissal of third party plaintiff's claim regarding the 12.5 percent of the shares of White Knight, and a declaration that plaintiffs are the owners of 62.5 % of the shares of White Knight and that the cross-purchase agreement that O'Hara avers is controlling is without force and effect.

A brief review of the history of the premises is in order. Edith O'Hara operated a theater company since 1972 at 50 West 13th Street which became the Repertory Company in 1979. She occupied an apartment above the Repertory Company premises. In or about 1982, the building was up for sale, but neither she nor the Repertory Company had the means to purchase it. Looking for a "White Knight", hence the name, they found Gordon Milde of Shaker Heights, Ohio who agreed to put up funds for the purchase of the property. The original agreement involved the formation of White Knight to purchase the building, Milde putting up \$100,000 to become a 50% shareholder in White Knight, O'Hara putting up \$50,000 to become a 25% shareholder, and the Repertory Company to put up \$50,000 to become a 25% shareholder. The Repertory Company was only able to put up \$26,000 so 12.5% shares remained with White

Knight. O'Hara asserted her rights to the shares that were originally designated for the Repertory Company as compensation for services that she rendered to the Company. Her right to those shares does not appear to be in dispute. However, on February 1, 1983, Milde purchased the shares that the Repertory Company owned for \$25,000 plus \$3,000 interest. O'Hara contends that this purchase was unlawful because the sale took without court approval, thus violating §§ 510-511 of the Not-for Profit Corporation Law. That law requires court approval where substantially all of the assets of a not-for-profit entity are transferred. The Repertory Company used the money it received from the sale of shares plus an additional \$10,000 to pay down the \$44,000 due on January 1, 1984 on the purchase money mortgage on the building. O'Hara now avers that because the Repertory Company used the money that it received from Milde together with its own money to pay White Knight's mortgage, it has neither stock nor money, and that is unfair. She claims that Milde's purchase of its shares should not have been approved because the purchase of shares divested the Repertory Company of substantially all of its assets.

At or about the time the Corporation was created, the parties signed a Cross-Purchase Agreement, dated January 4, 1983, in which the Stockholders agreed not to sell, assign transfer, pledge or dispose of respective stock in the Corporation except as hereinafter provided,. The Agreement gave the Repertory Company the first option to purchase Milde's and O'Hara's shares for a period of three years and gave Milde the first option to buy the stock of the Repertory Company and the second to buy the stock of O'Hara for a period of three years. It also provided that the Stockholders agreed to vote Edith O'Hara as president, Gordon Milde as Vice-President and Secretary and Robert Flicker as Treasurer. O'Hara contends that those provisions are still in effect.

Milde sold his shares in White Knight to the Loewentheils in 2004. At or about the same time, on December 2, 2004, various notes were created or recreated by attorneys from McCarter & English, at a White Knight board meeting held in the law firm's offices and in the absence of Edith O'Hara. These notes, which were assigned to the Loewentheils, form the basis of the underlying action here. In addition, White Knight brought an eviction proceeding against the Repertory Company under L&T Index Number 91401/07. This Court stayed that action, pending the determination of these motions.

With respect to the notes, O'Hara contends that three of the five alleged loans never existed. As to the two remaining notes, she appends copies of the originals to her papers; one that is dated December 8, 1983 for \$15,000 for repair and renovation of the corporate owned structure at 50 West 13th Street that was to be repaid by December 1, 1986, and one is a promissory note for \$180,000 due on January 3, 1989. O'Hara claims that the debts represented by these notes have either been repaid or are time barred. O'Hara avers that Milde did not seek to collect the money until way after the alleged notes were due or last payments were made, and that a letter that she sent to him on November 11, 1997, which he did not object to, indicates that the notes had been paid.

Some of the issues set forth in these motions cannot be determined on the papers and must await trial. However, certain issues are ripe for determination.. It would appear that the notes that were recreated in the offices of McCarter & English, based on previously held notes, copies of two of which O'Hara appends to her papers, are time barred. The \$15,000 note was due on December 1, 1986 and the \$180,000 note was due on January 3, 1989. A meeting of a Board of Directors cannot reaffirm time barred notes where there is neither evidence of an underlying

obligation nor current consideration. BCL § 713(b) specifically requires that a contract between a corporation and one or more of its directors...is voidable if the party or parties thereto cannot establish affirmatively that the transaction was fair and reasonable. Mere assertion of the existence of disputed old and probably time barred notes is insufficient evidence of a fair and reasonable transaction. Moreover, Milde's claim that interest was paid on the notes up through the 1990's makes no sense since O'Hara was the treasurer of the corporation and must have had evidence of such payments. Milde does attach a check for \$1000 paid on August 29, 1989 indicating that it was interest on the loan and then himself writes that it was interest paid on the 1986 note and that such interest was paid up until 1996. O'Hara's letter of November 1997 indicates that there had been interest payments up through 1996, but at that point she considered the notes paid in full. Milde's creation of a bank account in which he deposited his own money and then paid himself periodic sums does not constitute a reaffirmation of the notes to defeat a time limitation. Even if payments were made until 1996, a law suit commenced in 2005 on such notes would be time barred. Thus, it appears that defendants are entitled to summary judgment dismissing the claims based on the promissory notes.

With respect to plaintiffs' claim that they are the owners of 62.5 % of the shares of White Knight because they purchased Gordon Milde's shares, that claim is reasonable. Although O'Hara now contends that Milde's purchase of 12.5 % of the shares from the Repertory Company violated sections 510 and 511 of the Not-for-Profit Law, and should, therefore, be set aside, that claim is without merit. First, those provisions require judicial approval of the sale, lease, or disposal of "all or substantially all of its assets." The claim is that the only assets that the Repertory Company had at the time were its 12.5% interest in White Knight. However, at the

time of the sale to Milde, there is no evidence that the transfer of 12.5% of the shares constituted a sale or disposal of substantially all of its assets. At the time, Milde was already a 50% shareholder in White Knight, having financed 50% of the original purchase, and the Cross Purchase Agreement specifically provided for asset purchase within three years by any of the principles. Second, O'Hara appears to have ratified the sale of the Repertory Company's shares to Milde in or about 1983 when she allocated the remaining 12.5% shares of White Knight to herself for services rendered. Most of the documents subsequent to 1986 indicate that Milde was 62.5% shareholder and O'Hara was a 37.5% shareholder in White Knight. At no time did anyone in behalf of the Repertory Company object to the share purchase. Therefore, the Repertory Company does not own the 12.5% shares purchased by Gordon Milde, and third party plaintiff's claim must be dismissed.

With respect to defendants' claim that Stephan Loewentheil failed to answer deposition questions concerning the creation of the notes or the basis for the notes, those questions are rendered moot by dismissal of the claims on the notes. As to the claims that he failed to answer questions concerning Milde's sale of shares to him, this Court has found that Milde owned 62.5% of the shares of White Knight. Thus, some of those questions may also be moot. However specific questions concerning the purchase transaction are relevant and are not protected by the attorney-client privilege because they do not involve legal advice. Questions relating to the business aspect of the share purchase must be answered. Calling Steven Eckhaus, the McCarter & English attorney involved in the creation of the notes would no longer serve any purpose because those claims are rendered moot by dismissal of the claims on the notes.

The next issue involves the requested disqualification of McCarter & English because it is

suing White Knight for the Loewentheils while at the same time representing White Knight in a summary proceeding against Repertory Company. If the Loewentheils claims against White Knight in this proceeding are based solely upon the notes and upon a declaration that they purchased 62.5% of the shares of White Knight from Milde, those claims have been decided, and disqualification would not be warranted. However, if the claims against White Knight, the Repertory Company, and O'Hara include failure to maintain the premises or anything beyond a mere claim for rent, McCarter & English should be disqualified. At this time, decision is reserved on that application.

Defendants have also asked that plaintiffs be enjoined from using the \$1,974,975 realized from the sale of air rights (for the potential use by adjoining property of cantilever space) in a 1031 real estate Exchange. In view of my earlier decision to allow the sale to go forward, there is no point to enjoining or restricting the parties from entering into a 1031 Exchange.

At this time, the eviction proceedings commenced in the name of White Knight against the Repertory Company are closely bound up with the remaining issues in this case. They include, among others, whether the Loewentheils purchased Milde's interest in White Knight pursuant to a valid corporate decision, whether the Repertory Company and O'Hara have continuing rights under the Cross-Purchase Agreement, and whether, in view of the fact that the Repertory Company and O'Hara have maintained the premises, paid for insurance et al. For those reasons White Knight shall be stayed from bring eviction proceedings against either O'Hara or the Repertory Company at this time. Based on the above, it is hereby

ORDERED that the motion for summary judgment dismissing the claims on the

promissory notes is granted and the cross motion based on the promissory notes is denied; and it is further

ORDERED that the motion to set aside the purchase by Gordon Milde of the Repertory Company's 12.5% interest is denied, and the cross-motion declaring Milde to have been in possession of a 62.5% interest in White Knight is granted; and it is further

ORDERED that the request that Stephan Loewentheil furnish answers to questions concerning the purchase of shares and business deal is granted; and it is further

ORDERED that the request for a deposition of Steven Eckhaus concerning the creation of the notes denied at this time; and it is further

ORDERED that the motion to disqualify McCarter & English is denied at this time; and it is further

ORDERED that the 1031 Exchange is not stayed; and it is further

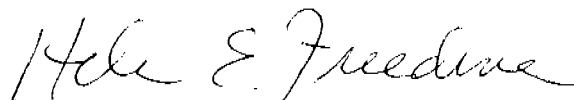
ORDERED that the Landlord Tenant proceedings in Civil Court of New York County under the Index Number 91401/07 is stayed pending resolution of the remaining issues in this case; and it is further

ORDERED that the parties appear as previously scheduled for a pre-trial conference.

Dated: May 7, 2008

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Helen E. Freedman, J.S.C.