

**125 Urban Joint Venture Partners LLC v Hope  
Community, Inc.**

2008 NY Slip Op 33177(U)

November 3, 2008

Supreme Court, New York County

Docket Number: 602295/08

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
Charles Edward Ramos 53

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

125 Urban Sv Partners LLC  
Et al

INDEX NO. 60229S/08

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

Hope Community, Inc. 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 \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

Motion is decided in accordance with accompanying Memorandum Decision

**FILED**  
NOV 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 11/3/08

HON. CHARLES E. RAMOS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
125 URBAN JOINT VENTURE PARTNERS LLC; and  
THOR ACQUISITION, LLC suing  
Derivatively on behalf of 125 URBAN JOINT  
VENTURE PARTNERS, LLC and in its own right,

Plaintiffs,

-against-

Index No.  
602295/08

HOPE COMMUNITY, INC.; EL BARRIO'S  
OPERATION FIGHTBACK INC.; HOPE  
FIGHTBACK ALLIANCE; and HFB JOINT  
VENTURE,

Defendants.

**FILED**  
NOV 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**Charles Edward Ramos, J.S.C.:**

Plaintiffs 125 Urban Joint Venture Partners LLC ("125 Urban") and Thor Acquisition, LLC (collectively, "plaintiffs"), move for a preliminary injunction to enjoin defendants Hope Community, Inc. ("Hope"), El Barrio's Operation Fightback, Inc. ("El Barrio"), Hope Fightback Alliance ("Hope Fightback"), and HFB Joint Venture (collectively, "defendants") from competing with them in combination with a rival (Richman Group and General Growth Group) in the effort to acquire the development rights with regard to the East 125<sup>th</sup> Street Development (the "Development")<sup>1</sup>.

**Background**

The City's Request for Proposals ("RFP") required that the respondents form a "joint venture development team" with at least

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<sup>1</sup> In October 2006, the City of New York, through its Economic Development Corporation, issued a Request for Proposals for the development of six acres in East Harlem. This development project is known as the "East 125<sup>th</sup> Street Development."

one member or entity being a well capitalized and experienced developer, and "one or more Local Development Partner(s)." (Jennings Aff. ¶ 11).

The parties to this action, or their affiliates, embarked upon a haphazard and incomplete process of responding to the RFP with imperfectly created entities (or non-entities).

The plaintiffs are Thor Acquisition, LLC ("Thor"), an apparently properly organized LLC and 125 Urban, which was organized by Thor in November of 2006 without articles of organization or any definitive agreement as to who its members would be and what terms would define their relationship.

Thor and 125 Urban seek to hold HFB Joint Venture ("HFB JV") liable as if it had executed the non-existent articles of organization of 125 Urban. HFB JV, for its part, was itself never formally organized as a joint venture, whose members are alleged to be Hope Fightback and Bluestone Organization (a fourth party non-defendant involved in this RFP), ("Bluestone"). Its proposed members could never come to a mutual understanding. Hope Fightback is a partnership formed in October of 2006 between Hope and El Barrio. Hope and El Barrio are properly organized.

125 Urban relies on an exclusivity agreement, signed by Operation Fightback (presumably on behalf of El Barrio), Hope and Bluestone, which agreement expired by its terms on January 12<sup>th</sup>, 2007. Although the agreement identifies Thor Acquisition as a 50% partner, with Bluestone, Hope, and El Barrio collectively as a 50% partner, little is said about the intended partnership.

The agreement states that during the exclusivity period, the parties "will negotiate exclusively with each other (and such other parties as all of the Parties shall mutually agree upon) the terms of a joint venture in connection with a possible acquisition..." Although this agreement has many of the characteristics of an agreement to agree, this Court will consider other defenses.

Months after the exclusivity period had expired, and after the defendants had expressed their desire not to be bound by any additional exclusivity agreement, the City of New York informed 125 Urban that they were among the finalists in the bidding project. Thereafter, Daniel Jennings, a Director of Thor, received a phone call from Robin LeBaron and Gustavo Rosado, senior officials of Hope and El Barrio, respectively, informing him that they had joined a competing submitter, and signed a Letter of Interest with such submitter, to wit, the Richman Group and General Growth Group.

Plaintiffs have brought this action on theories of breach of contract and breach of fiduciary duty.

#### **Discussion**

The parties fail to agree on choice of law. "[T]he first step in any choice-of-law analysis is to determine if there's actually a conflict between the laws of the competing jurisdictions. If there is none, then the law of the forum state where the action is being tried should apply."

*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, (1<sup>st</sup> Dept 2004).

Where the claim specifically involves a breach of fiduciary duty, it is clear that the state of formation governs. *Diamond v Oreamuno*, 24 NY2d 494, 503-504 (1969) ("Securities regulation...effect on the duties and obligations of directors and officers and their relation to the corporation and its shareholders is only occasional and peripheral. The primary source of the law in this area ever remains that of the State which created the corporation"); *BHC Interim Funding, L.P. v Finantra Capital, Inc.*, 283 FSupp2d 968 (SDNY 2003) ("Under New York's choice of law principles, a claim involving breach of a fiduciary duty owed by a corporate officer is governed by the law of his company's state of incorporation"). 125 Urban was formed in Delaware, however, because the defendants are not signatories to the articles of organization but may be held to some duty, either Delaware or New York law may apply.

#### Breach of Fiduciary Duty

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate: (1) a reasonable probability of success on the merits; (2) irreparable injury if the preliminary injunction is not granted; and (3) a balancing of the equities in favor of the movant. *SI Management L.P. v Wininger*, 707 A2d 37 (Del 1998).

#### *Reasonable Probability of Success on the Merits*

Plaintiffs contend that they have established a reasonable probability of success on the merits for their claim of breach of fiduciary duty because they contend that Hope Fightback and HFB

JV are fiduciaries to 125 Urban. Plaintiffs base this argument on both the submission to the RFP and defendant's conduct.

Conversely, defendant's argue that neither Hope, El Barrio, nor Hope Fightback, are alleged to be members of 125 Urban, and thus owe no fiduciary duty to 125 Urban. Defendants also claim that HFB JV, although alleged to be a member of 125 Urban, did not breach any fiduciary duty to 125 Urban.

"A preliminary injunction will not [be] issue[d], unless [the] complainant satisfies [the] court that there is at least reasonable probability of his ultimate success on final hearing." *Consolidated Film Industries v Johnson*, 192 A 603, 608 (Del Ch 1937).

125 Urban was formed on November 30<sup>th</sup>, 2006 in the State of Delaware. Although a certificate of formation was filed, no operating agreement was executed or even drawn up listing the proposed members or managers of 125 Urban. Defendants argue, "the LLC was supposed to be composed of Thor (50%) and [HFB JV, which was to be] composed of Hope, [El Barrio] and Bluestone (50%). However, Hope and [El Barrio] were never able to come to terms with Bluestone regarding their proposed partnership. No agreement between Hope Fightback and Bluestone was ever executed [to form HFB Joint Venture]." (defendants Memorandum of Law, Pg. 4).

The fact that Thor, on the one hand, and Hope Fightback and Bluestone, on the other, made equal contributions to 125 Urban for payments as reflected in the RFP is inadequate to form HFB JV

as an entity or to make it a member of 125 Urban. That fact that in the event the effort was successful, the profits were to be distributed on a 50-50 basis, does not create partnerships or joint ventures, though it might create rights in the event the condition was satisfied.

However, the plaintiffs' reliance on the RFP submission is misplaced. It has not been established on this record that the RFP was executed by the defendants. It is not apparent, as it must be, that the signature for 125 Urban by the "Managing Member" was for both the plaintiffs and defendants as members of 125 Urban, and that the RFP submission was on behalf of and binding upon, both plaintiffs and defendants.

In addition, it does not appear that the defendants engaged in a prohibited conflict of interest when they joined with Richman Group and General Growth Group. The exclusivity period had long expired prior to the new submission. The parties' agreement on the extent of their obligations to each other superseded the common law duties the plaintiffs rely upon. The termination of the period set forth in the agreement permitted the defendants the freedom to seek out other potential partners. The defendants' expressed desire not to be bound by yet another exclusivity period makes it clear that they were free to contract with others thereby giving the defendants, as the community component of a development team, the opportunity to partner up with an outside developer acceptable to the City. The plaintiffs impermissibly seek to extend the term of the exclusivity period

well beyond that which the defendants agreed to.

In light of the foregoing, it cannot be said that the plaintiffs possess a probability of success on the merits. Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied.

Dated: November 3, 2008



J.S.C.

**HON. CHARLES E. RAMOS**

**FILED**  
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