

320 West 13th St. LLC v Wolf Shevack, Inc.

2008 NY Slip Op 33422(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 603730/2007

Judge: Marilyn Shafer

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

PRESENT: **HON. MARILYN SHAFER, JSC**

PART 8

Index Number : 603730/2007

320 WEST 13TH STREET, LLC

vs

WOLF SHEVACK, INC.

Sequence Number : ~~999~~

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

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

considered

with notes

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

IRA GAMMERMAN

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/16/08

HON. MARILYN SHAFER, JSC

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: IAS PART 8

-----X
320 WEST 13TH STREET LLC,

Plaintiff,

- against -

WOLF SHEVACK, INC., et al,

Defendants.
-----X

Index No. 6037

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER, J.:

This is an action to enforce a stipulation of settlement which was entered into on January 7, 2003, in connection with a claim for \$2.842 million in rent owed to plaintiff under a commercial lease. The complaint in this action alleges that defendants made several payments pursuant to the stipulation of settlement, but that no payment on the remaining principle debt of \$696,428.59, plus interest, has been made to plaintiff since June 30, 2004. Defendants move to dismiss the complaint for failure to state a cause of action, and a lack of in personam jurisdiction over some of the defendants. Plaintiff has cross-moved to disqualify defendants' attorney. Motion sequences #001 and #002 are consolidated for disposition.

The complaint alleges five causes of action, all of which seek to void defendants' alleged transfer of assets under the Debtor Creditor Law or the CPLR.

Plaintiff alleges that defendant Wolf Shevack, Inc. (the Tenant) defaulted on rent owed for a commercial lease for the 5th and 6th floors of a building located at 320 West

13th Street, New York, New York. Plaintiff obtained a judgment for \$2.842 million against the Tenant and the rent guarantor, defendant Wolf Group Integrated Communications, Ltd. (the Guarantor), in an action captioned *Wolf Shevack, Inc. et al. v Sage Realty Corp., et al*, Index No. 600280/02. Thereafter, the parties entered into a stipulation of settlement which obligated the Tenant to pay the judgment in installments according to an agreed schedule.

The Guarantor, of Toronto, Canada, is allegedly the headquarters for a network of companies founded by defendant Larry Wolf. The Guarantor allegedly has branch offices in more than a half dozen cities, and several of those branch entities are named as defendants in this litigation. Plaintiff claims that the branch entities consistently transferred cash to the Guarantor without any consideration. Plaintiff further claims that Larry Wolf, the founder of the Guarantor, controlled all of the material operations and financial affairs of the Tenant in New York. Further, Larry Wolf is alleged to have forced the Tenant to pay sham salaries to members of the Wolf family, to make gratuitous transfers of cash to Larry Wolf in Toronto, and to pay family members' expenses in derogation of plaintiff's judgment. Plaintiff claims that the Tenant could have paid the outstanding balance due under the judgment except for Larry Wolf's mismanagement.

Specifically, plaintiff claims that Larry Wolf directed that \$4 million be transferred from the Tenant to a Cleveland branch of the company two weeks before ordering that the Tenant, in New York be permanently closed, on January 31, 2004.

In the first cause of action, plaintiff alleges that Larry Wolf directed a series of payments and asset transfers which had the end result of siphoning off assets from the Tenant, making it incapable of paying the balance due under the stipulation of settlement. Plaintiff seeks to set aside these payments and asset transfers, pursuant to Debtor Creditor Law §§ 273 and 278.

In the second cause of action, plaintiff alleges that the Tenant became insolvent as a result of Larry Wolf's dominion and control over the company, that the branch entities commingled assets with the Guarantor as a result of which several of the branch entities may be found to have acted in concert with the Guarantor in improperly diverting company assets, and that Larry Wolf is personally responsible for the alleged diversion of assets pursuant to Debtor Creditor Law §§ 273 and 278.

In the third cause of action, plaintiff alleges that individual members of the extended Wolf family participated in the diversion of company assets, and seeks recovery against them, as well.

In the fourth cause of action, plaintiff seeks to recover attorney's fees from the defendants, pursuant to Debtor Creditor Law § 276-a.

In the fifth cause of action, plaintiff seeks to enforce the underlying judgment against all defendants and defendants' personal property, pursuant to CPLR 5225 (b).

Plaintiff's cross motion to disqualify defendants' attorney raises a threshold issue.

Plaintiff claims that the same attorney represents all of the individual and corporate

defendants, but that these defendants have potentially conflicting interests. Disciplinary Rule 5-105, Conflicts of Interest; Simultaneous Representation, forbids a lawyer from representing multiple parties “if it would be likely to involve the lawyer in representing differing interests.” 22 NYCRR 1200.24 Plaintiff argues that the Court of Appeals has admonished attorneys against engaging in dual representations even after full disclosure has been made and the consent of the clients has been obtained, citing *Greene v Greene* (47 NY2d 447 [1979]).

Plaintiff does not have standing to seek the disqualification of defendants’ attorney. *Develop Don’t Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144 (1st Dept 2006). The basis of the disqualification motion under the present circumstances is the potential for a breach of defense counsel’s fiduciary duty, owed to its present clients. *Rowley v Waterfront Airways, Inc.*, 113 AD2d 926 (2^d Dept 1985).

When the firm sought to be disqualified had never represented the moving party, that firm owed no duty to that party. And it follows that if there is no duty owed there can be no duty breached.

Id. at 927.

While DR 5-105 (A) and (B) prohibit an attorney from representing adverse, differing, or multiple clients if such representation would adversely impact any of them, DR 5-105 (C) specifically permits such multi-party representations, where the parties waive their objections:

a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Defendants have offered evidence of their express waiver of any objection to counsels' representation of each and all of them by way of affidavit, thus satisfying the requirements of DR 5-105 (C). Of course, should circumstances develop that the parties could not have anticipated when they signed that waiver, any party represented by counsel for the defense may make an application under this disciplinary rule.

The admonition against dual representation in *Greene v Greene* (47 NY2d 447 [1979]), cited by plaintiff, arose in the context of a party who was adverse to a lawyer's former client. There, where it was the former client who moved for the attorney's disqualification, standing was not an issue.

The cross motion to disqualify defendants' attorney is denied.

The motion to dismiss the complaint by certain of the individual and corporate defendants, based on a lack of in personam jurisdiction, is referred to a Special Referee to hear and report. The corporate defendants Optio Software, Inc. and Shells Seafood Restaurants, Inc. submitted affidavits stating that they were never served with process in New York. Further, these defendants, along with the individual defendants Mary Wolf and David Wolf, claim that there is no basis on which to exercise long-arm jurisdiction

over them. In counsel's memorandum of law, defendants Mary Wolf and David Wolf claim that they, too, were never served with process; however, no affidavit to that effect appears in the record. Nor has plaintiff filed any proofs of service with the court.

The balance of the motion, to dismiss the complaint for failure to state a cause of action, is held in abeyance pending receipt of the referee's report on the issue of personal jurisdiction.

Accordingly, it is

ORDERED that the issue of in personam jurisdiction over defendants Optio Software, Inc., Shells Seafood Restaurants, Inc., Mary Wolf, and David Wolf is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the cross motion to disqualify defendants' attorney is denied; and it is further

ORDERED that the motion to dismiss the complaint is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this

order, serve a copy of this order with notice of entry, together with a completed Information Sheet, ¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: 12/16/08

ENTER:

Marilyn Shafer
J.S.C.

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.