

**Sakow v Waldman**

2009 NY Slip Op 30988(U)

April 24, 2009

Supreme Court, Nassau County

Docket Number: 015752/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

\_\_\_\_\_  
WALTER SAKOW, Individually and on behalf  
of MAWASH REALTY CORP.,

Plaintiff,

INDEX No. 015752/08

MOTION DATE: Feb. 19, 2009  
Motion Sequence # 001, 002

-against-

MICHAEL WALDMAN, Individually and as  
Executor of the Estate of SHERWOOD  
WALDMAN, and MAWASH REALTY CORP.,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affirmation in Opposition.....	X
Reply Affirmation/Affidavit.....	XXX
Memorandum of Law.....	X

This motion, by defendants Michael Waldman, Mawash Realty Corp. and by aggrieved party 2279-2283 Third Avenue Associates, LLC, for an order pursuant to CPLR §§ 6501 and 6514, and Rule 6511 cancelling Notices of Pendency filed by the plaintiff against two properties located in the County of New York on the following grounds, (1) that the action does not affect title to or possession, use or enjoyment of the real property described in the Notices of Pendency, (2) that plaintiff has not complied

with Rule 6511(b) with respect to 2279 Third Avenue, also known as Block 1788, Lot 47, as a Declaration of Condominium was recorded against this property breaking up the lots in this particular block into separate and distinct lots, (3) that plaintiff has not complied with CPLR 6511(a) by filing a copy of the complaint with the Notices of Pendency in New York County, and (4) that plaintiff has not commenced this action in good faith. The motion is **denied**. Plaintiffs Walter Sakow and Mawash Realty Corp. cross-move for an order pursuant to CPLR 6401(a) appointing a temporary receiver for the properties known as 264-266 West 25<sup>th</sup> Street, New York, New York, and 237 East 10<sup>th</sup> Street, New York, New York on the grounds that said properties are at issue in the above captioned action, plaintiff has an interest in said properties, and defendant Michael Waldman, who controls the day to day operations of said properties, has been diverting the income and value of those properties to himself and to his other business ventures, and absent the appointment of a temporary receiver will continue to do so, thereby "materially injuring" those properties within the meaning of CPLR 6401(a), and for an order enjoining defendants during the pendency of this action from transferring, disposing of or further encumbering either of the two aforesaid properties on the grounds that defendants have taken and/or are threatening to take actions in violation of plaintiff's rights with respect to the subject of the action and which, unless enjoined, will tend to render any judgment herein ineffectual. The cross-motion is **granted** with respect to the appointment of a receiver and denied with respect to an injunction, as the appointment of a receiver, who will see to the collection of rents and profits, as well as the proceeds of any corporate loans, provides sufficient protection to plaintiff's interests.

In this action plaintiff Walter Sakow, on his own behalf and in a derivative action on behalf of Mawash Realty Corp., seeks an accounting, a constructive trust and a declaration of ownership with regard to certain property.

The complaint alleges that plaintiff Walter Sakow and defendant Michael Waldman's father, Sherwood, were business associates who formed defendant Mawash Realty Corp. for the purpose of acquiring and holding title to real property in the City and County of New York. Initially, Walter and Sherwood each owned a 50% interest in Mawash Realty. In July of 1971 Mawash took legal title to a property on West 25<sup>th</sup> Street and a second property on East 10<sup>th</sup> Street.

In 1975 Sherwood and Walter reached an agreement for Sherwood to purchase one half of Walter's beneficial interest in the West 25<sup>th</sup> Street Property. Their 50% beneficial

interest in the 10<sup>th</sup> Street property would remain unchanged.

In order to effectuate the above the parties entered into an agreement dated February 13, 1975. Walter resigned as an officer of Mawash and the parties caused Mawash to transfer the deed to the 10<sup>th</sup> Street property to Walter and Sherwood as tenants in common. Walter and Sherwood agreed not to record the 10<sup>th</sup> Street property deed, with Mawash continuing to hold record title. The parties also agreed that if the income derived from the West 25<sup>th</sup> Street property was insufficient to pay expenses, Walter would contribute 25% of any deficiency and Sherwood would contribute 75%. Sherwood thereafter was in exclusive control of Mawash and its properties until he died in 1992. Michael acquired his interests in Mawash and took over as the operating shareholder.

Walter alleges that prior to his death Sherwood retained and converted all of the net operating revenue derived from the operation of the West 25<sup>th</sup> Street property and the East 10<sup>th</sup> Street property, and that he encumbered those properties using the proceeds to purchase real property for his own account and for the account of entities of which he was a principal. Specifically Sherwood borrowed, using the properties owned by Mawash the following: in April of 1977 \$175,000 from American Savings and Loan; in 1977 an additional \$50,000 from American Savings and Loan; in 1977 \$43,000 from the City of New York; and in 1988 \$1,246,901 from Columbia Savings Bank.

Walter alleges that Michael extensively engaged in borrowing and encumbering the properties legally titled in Mawash. He alleged the following loans, in 1996 \$174,620 from Apple Bank; in 1999 \$300,000 from Baron Associates and David Gold; in June 2000 \$175,000 from Levitas Family L.P.; in April 2001 as co-borrower with 54 Barrow Assoc. \$300,000 from Baron Associates; in 2001 as co-borrower with Arizona Associates and Idaho Associates \$200,000 from David Gold; in 2003 \$125,000 from the Levitas Organization; in 2003 \$1,306,808 from Dime Savings Bank of Williamsburg; in 2003 \$3,495,000 from Dime Savings Bank of Williamsburg, plus \$4,000,000 in 2004, \$1,100,000, \$500,000, and \$1,700,000 in 2005 from various lenders, 2006, \$3,700,000; and in 2007 \$2,500,000. Plaintiff alleges that Michael used the proceeds of the loans secured by the West 25<sup>th</sup> and East 10<sup>th</sup> Street properties to purchase properties for his own account and for the account of entities in which he was a principal. Those properties include 2279 Third Avenue, 2283 Third Avenue, 203 East 124<sup>th</sup> Street, as well as a property in Bronx County known as 3217 Irwin Avenue.

Plaintiff seeks an accounting, a constructive trust upon properties purchased with

the proceeds of loans encumbering the West 25<sup>th</sup> and East 10<sup>th</sup> Street properties or which were paid with the revenues generated by them to pay the debt service on such loans, and a judgment declaring that plaintiff Walter Sakow is the owner, as tenant in common with defendant Michael Waldman, of the East 10<sup>th</sup> Street property, granting plaintiff the right to possession of such property, and awarding damages in an amount sufficient to compensate him for the withholding of such possession.

With respect to the merits of plaintiff's claims, defendants suggest that Michael Waldman is the sole owner of the 10<sup>th</sup> and 25<sup>th</sup> Street Properties by virtue of adverse possession. This contention is rejected.

Five elements must be established in order to gain title by adverse possession. "The possession must be hostile and under a claim of right, it must be actual, it must be open and notorious, it must be exclusive, and it must be continuous for the statutory period of 10 years" (*Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, 192 AD2d 501, 503, 2<sup>nd</sup> Dept., 1993). The entry onto the property must be strictly adverse to the title of the rightful owner. "[I]f the first possession is by permission it is presumed to so continue until the contrary appears" (*Shandaken Reformed Church of Mount Tremper v. Leone*, 87 AD2d 950, 951, *app denied* 57 NY2d 602, 1982). When possession is permissive in its inception, adverse possession will not arise until "a distinct assertion of a right hostile to the owner" (*Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, *supra*).

The February 1975 agreement rendered defendant's possession permissive and there was no hostile act until Michael attempted to take a loan alleging that he was the sole shareholder of Mawash after commencement of this action. Without hostile possession, no cause of action is stated (*Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, *supra*). Moreover, legal title is held by Mawash Realty Corp. Clearly Mawash is not capable of taking adverse possession from itself, and Mawash is a plaintiff here as well as a defendant. Accordingly, the assertion of adverse possession as a defense to plaintiffs' claims, as an indication that they cannot succeed on the merits, is rejected.

Plaintiff's application for the appointment of a temporary receiver is **granted**. Sakow has not received any distributions from the profits of Mawash, and extensive borrowing using the East 10<sup>th</sup> Street and West 25<sup>th</sup> Street properties as collateral has enabled Michael to acquire additional properties. There is an unrefuted allegation that Mawash paid the debt service on the loans, that the Mawash properties at East 10<sup>th</sup> Street

and West 25<sup>th</sup> Street were repeatedly used as collateral for extensive borrowing, but that title to the newly acquired properties, including those upon which Sakow has filed a notice of pendency, is held by Michael or business entities in which he is a principal.

CPLR § 6001 states that the provisional remedies are “attachment, injunction, receivership and notice of pendency”. Plaintiff must state whether any provisional remedy has been secured and the court “may” require the plaintiff to “elect between those remedies to which he would otherwise be entitled” (CPLR 6001). Contrary to defendants’ contentions, the court may grant more than one provisional remedy when called for, and has *discretion* “to require” or not “a plaintiff to elect between any provisional remedy(ies) previously obtained and that or those now sought” (*Metropolitan Funeral Directors Ass'n v. City of New York*, 182 Misc2d 977, 990, Supreme Court New York County 1999).

CPLR § 6401 permits the appointment of a temporary receiver upon motion of a person having an “apparent interest in property which is the subject of an action” where there is “danger that the property will be removed from the state, or lost, materially injured or destroyed” (CPLR § 6401[a]).

Where a managing partner causes “unlawful disposition” of corporate property and “manifests a predisposition to take unilateral action” in disregard of shareholder’s rights, it is sufficient to demonstrate the requisite “danger of material injury to the property” within the meaning of CPLR 6401(a) (*Chaline Estates v. Furcraft Assocs.* 278 AD2d 141, 1<sup>st</sup> Dept., 2000). Accordingly, as sufficient specific and uncontroverted allegations that Michael Waldman has acted to his own benefit to the detriment of minority shareholder Walter Sakow and Mawash Realty Corp., and demonstrated the danger of material injury to the subject property, a temporary receiver shall be appointed. The appointment of a receiver and the collection of corporate income is sufficient protection against dissipation of corporate funds, including any that may arise from the encumbrance of corporate real property pending resolution of this action. Accordingly, a temporary injunction is **denied**.

Turning to defendants’ motion to cancel the Notice of Pendency filed against property owned by 2279-2283 Third Avenue Associates, LLC, (hereafter referred to as Associates), Associates asserts that this action does not affect the title to, or the possession, use or enjoyment of the real property described in the Notices of Pendency, that plaintiff has not complied with CPLR Rule 6511(b) with respect to premises known

as 2279 Third Avenue, New York, New York, also known as Block 1788, Lot 47, as such lot does not exist, as a Declaration of Condominium was recorded against this property breaking up this particular block and lot into separate and distinct lots rendering the Notice of Pendency on this property a nullity, and plaintiff has not complied with CPLR 6511(a) as the complaint was not filed with Notices of Pendency in New York County and on the grounds that plaintiff has not commenced this action in good faith.

Rule 6511 of the CPLR regarding filing, content and indexing of notices of pendency states:

(b) Content; designation of index. A notice of pendency shall state the names of the parties to the action, the object of the action and a description of the property affected. A notice of pendency filed with a clerk who maintains a block index shall contain a designation of the number of each block on the land map of the county which is affected by the notice. . .

As CPLR 6511(b) requires only a designation of the correct block number to be identified for the land map of the county, the Notice containing block number 1788 is in compliance with the statute regardless of an increase in lot numbers (*Mechanics Exchange Sav. Bank v. Chesterfield*, 34 AD2d 111, 114, 3<sup>rd</sup> Dept., 1970) [“absolute conformity with the statutory provisions is not necessary, it being sufficient if the notice substantially follows the requirements of those provisions so that a purchaser or encumbrancer will be informed of the statutory items, or given such information as to be put on inquiry as to them, and will not be misled by the record”].

Insofar as the defendants assert that this is not an action which affects title to, or the possession, use or enjoyment of real property, the complaint indicates otherwise. The Second Cause of Action seeks imposition of constructive trusts on realty allegedly acquired with proceeds of funds borrowed upon the West 25<sup>th</sup> and East 10<sup>th</sup> Street properties. “Such an action seeks a judgment affecting title to, or the possession, use or enjoyment of real property within the purview of CPLR 6501, thus permitting the filing of notices of pendency” (*Laucella v. Grant*, 126 AD2d 705, 2<sup>nd</sup> Dept., 1987).

Concerning the defendants’ allegation that the plaintiffs did not file the complaint in New York County, such a failure would be fatal. The filing of a copy of the Nassau

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County complaint with the notices of pendency in New York County is mandated by CPLR 6511(a). However, a County Clerk may not require the purchase of an index number for the filing of a Notice of Pendency with a complaint. As an opinion of the Attorney General states:

You have also asked whether the clerk can require the purchase of an index number when a party tenders for filing papers in an action pending in another court. An action can only have one index number; if the venue of the case is changed, the CPLR provides that the new index number is to be assigned without charge (CPLR § 8018[b]; 1977 OpAttyGen [Inf] 107).

We conclude that a county clerk may not require the purchase of an index number as a prerequisite to the filing of a notice of pendency.

(1989 N.Y. Op. Atty. Gen. (Inf.) 100, Informal Opinion No. 89-28 [1989]).

As the complaint filed with a Notice of Pendency in a county other than the one in which it is pending does not have an index number in the county where the Notice must be filed, a record search for such a document may present problems. In any event the title search submitted by defendants is insufficient. The search is for the wrong index number, searching Index No. 15782/08. The Index No. of the within action is 15752/08. Accordingly, defendants have failed to establish that a copy of the complaint with the correct index number was not filed.

Moreover, Elliot Schnapp, Esq., counsel for plaintiffs, offers an affirmation under penalty of perjury that:

I caused copies of the complaint in this action to be filed with each Notice of Pendency that I caused to be filed in connection with this action, with the County Clerk of each County (New York and Bronx) where I caused such Notices to be filed. Indeed, because the New York County Clerk sought guidance from his counsel in connection with the Notices I caused to be filed there, I caused an additional copy of the complaint to be hand delivered to Phyllis Mingione, Esq., counsel to the New York County Clerk, under cover of my letter to her dated October 28, 2008.

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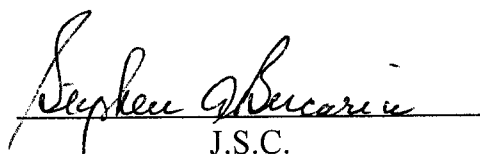
Counsel's "caused to be filed" language is not evidence that the complaint was filed in New York County, as he did not personally file the document nor describe regular office procedure. However, defendants' report containing a wrong index number is no more persuasive, and it is defendants' burden on their motion. Accordingly, the motion to cancel the Notices of Pendency is **denied**.

Finally, there is no evidence whatsoever indicating a lack of good faith in commencing this action.

A Preliminary Conference has been scheduled for May 12, 2009 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Submit order on notice.

Dated APR 24 2009

  
J.S.C.

**ENTERED**

APR 28 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE