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

PRESENT: GISCHE Justice PART 10

RUSHMORE REALTY CORP

-v-

DRUIN COHEN

INDEX NO. 103198/09

MOTION DATE

MOTION SEQ. NO. 001

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

FILED

APR 21 2009

COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Cont 5/14/09 @ 9:30 AM

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

Dated: 4/17/09

HON. JUDITH J. GISCHE 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: Part 10

Rivercity Realty Corp.

Plaintiff,

Decision/Order

-against-

Index# 103198/09
Mot. Seq. # 001

Irwin B. Cohen, Gerald S. Kaufman, Stuart E. Seigel and 31-02 74th Avenue Associates, L.P.

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
OSC, Oleske affirm., exhibits	1
Emergency JO affirm	2
PAM affirm in opp. dated 3.9.09, to interim injunction, exhibit	3
PAM affirm in opp. dated 3.11.09,exhibit	4
Steno Decision and order on TRO dated 3/11/09	5

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff, Rivercity Realty Corp. ("Rivercity") seeks an preliminary injunction against defendants transferring any funds between them which relate to 31-02 47th Avenue Associates, L.P. ("31-02 Associates") or any of its successors to defendants Gerald S. Kaufman ("Kaufman") and/or Stuart E. Seigel ("Seigel")[1]. The relief sought is supported only by an attorney's affirmation and an unverified complaint.

The event precipitating the relief sought in this newly commenced action was a

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[1]As Rivercity's arguments evolved in this motion, it also claimed that it was entitled to pre judgment attachment against the settlement funds. Since Rivercity's original motion only sought a preliminary injunction, the court will not consider or address the arguments on issues of attachment, which is an entirely different remedy from a preliminary injunction.

recent settlement in a previously commenced action of long standing (NY Co. Index No. 601320/01) brought by Kaufman and Seigel individually and on behalf of SIG Partners ("SIG"), SIG-L,I. City Inc. ("SIGLIC") and 31-02 Associates against Irwin Cohen ("Cohen"). In the earlier action, Kaufman and Seigel sought money damages based on claims that Cohen, who was their partner (individually and through the various entities), breached his fiduciary duty to them in connection with a business opportunity related to commercial real estate in Long Island City known as the Falchi Building ("Falchi litigation"). After many years, the Falchi litigation was settled on February 9, 2009 in the middle of trial. Cohen agreed to pay Seigel, Kaufman and "any of the other plaintiffs that may remain" in that litigation the total sum of $3,500,000 in exchange for having the litigation discontinued. The monies were payable in two installments within 60 days of the date of settlement.

Rivercity then simultaneously commenced this action and brought the instant Order to Show Cause seeking a preliminary injunction. Although the motion generally seeks to prohibit the transfer of funds, in particular, Rivercity seeks to prohibit the transfer of the settlement funds in the Falchi litigation to Seigel and Kaufman. By order made in open court, the Falchi settlement funds have been transferred to Seigel and Kaurman's attorney and are being held in escrow, pending further order of the court.[2]

The underlying complaint alleges one cause of action for specific performance of a December 31, 1992 agreement (1992 agreement"). SIG Partners was a partnership

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[2]Collaterally, after the Falchi settlement was made JP Morgan Chase Bank, which holds a money judgment against Seigel served a retraining notice on Cohen and others with respect to the Falchi settlement proceeds. The funds in escrow are also subject to whatever rights JP Morgan Chase Bank may have under the restraining notices it served.

consisting of Kaufman, Seigel and Cohen that held various interests through various entities in 31-02 Associates during the late 80s and early 90s. During that time, 31-02 Associates was the beneficial owner of the Falchi building. By 1990, there was a mortgage held by the East River Savings Bank ("ERSB") on the Falchi building in excess of $30,000,000.[3] There also was an additional ERSB mortgage of $2,500,000 which was personally guaranteed by Kaufman Seigel and Cohen. The Falchi building had serious financial problems at the time and related thereto the 1992 agreement was negotiated and executed in connection with the Falchi building and other SIG holdings.

Rivercity claims that under the 1992 agreement, the promissory note previously signed by SIG partners and personally guaranteed Kaufman, Cohen and Seigel was renegotiated. A new note, in the amount of $1,758,157, was signed with a maturity date of December 31, 1994 ("new note"). The new note was "guaranteed" by Seigel and Kaufman, but was "non-recourse" except to the extent that Seigel and/or Kaufman receive any funds from 31-02 Associates. The new note was secured, in part, by a "direct assignment of the proceeds distributable to Seigel and/or Kaufman from 31-02 Associates."

No one disputes that no part of the note was ever paid. Rivercity claims in this case that the Falchi litigation settlement proceeds are really funds that Seigel and Kaufman are receiving from 31-02 Associates. It seeks specific performance of the "security interest" it holds in such funds under the 1992 agreement. In support of the motion for a preliminary injunction, Rivercity claims that it has a direct and specific security interest in these funds and that if the funds are transferred to Seigel and

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[3]Prior to 19992 Rivercity had a nominal ownership in the Falchi building through SIGLIC and SIG-47th Avenue Partners. ERSB may have had some relationship with Rivercity, but that is not clear from the papers presently before the court.

Kaufman they will be dissipated and Rivercity will be irreparably harmed.

As further set forth below, the court denies the preliminary injunction because: [1] the application is not supported by a sworn statement by someone with personal knowledge; [2] the movant has not shown that the funds sought to be enjoined constitute a *res* under the agreement that is the subject matter of this action, and [3] the movant has not otherwise shown a likelihood of success on the merits.

Under CPLR § 6301, a preliminary injunction may be granted in any action where it appears that the defendants are doing something in violation of plaintiffs' rights respecting the subject of the action and tending to render the judgment ineffectual. In order to be entitled to a preliminary injunction, a movant must clearly demonstrate: (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. Paine v. Chriscott v. Blair House Associates, 70 A.D.2d 571 (1st Dept. 1979); Aetna Insur. Co. v. Capasso, 75 N.Y.2d 860 (1990). CPLR §6312 requires that the movant show, by affidavit and such other evidence as may be submitted, that there is a cause of action.

At bar the application for preliminary injunction is only supported by any attorney's affirmation, an unverified complaint and a copy of the 1992 agreement. This support for the application, not based on a statement by anyone with personal knowledge, is insufficient to obtain a preliminary injunction. Glazer v. Brown, 55 AD3d 1385 (4th dept. 2008).

Moreover, Riversity has not shown that the monies it seeks to restrain are the subject matter of the underlying action. In the seminal case of Credit Agricole Indosuez v. Rossiyskiy Kredit Bank (94 NY2d 541 [2000]) the Court of Appeals held that no

preliminary injunction should issue against the defendant's use of money, unless it otherwise constitutes a specific *res* that is the subject matter of the underlying action. See also: Ficus Investments, Inc. v. Private Capital Managment, LLC, __ AD3d __ ;872 NYS2d 93 (1st dept. 2009). Injunctive relief is inappropriate in an action for the recovery of money only and the courts have been very strict in interpreting whether money due under a contract can constitute a *res* that would otherwise support a preliminary injunction. In making the requisite analysis the courts have looked at the substance of the remedy sought and not necessarily at the cause of action plead. Thus, the court in Winter v. Brown, (49 AD3d 526 [2nd dept. 20008]) disallowed a preliminary injunction over funds that plaintiff claimed represented his vested interest in 20% of the net fees generated in an accounting firm. In Dinner Club Corp. v. Hamlet on Olde Oyster Bay Homeowners Association, Inc.,(21 AD3d 777 [1st dept. 2005]) the first department found that a right under a contract to receive a monthly minimum food and beverage charge did not constitute a res to support a preliminary injunction. In Purchase Partners II, LLC v. Westreich (2006 WL 4682161 [NY Co. Sup.]) the court found that notwithstanding that plaintiff had brought an action for declaratory judgment, the action was really for breach of contract and no preliminary injunction would issue to prevent the distribution of the proceeds from the sale of a certain piece of property. In this regard the fact that Rivercity couched its claim as one for specific performance does not necessarily control the outcome of the motion. The court must examine whether the action is for a specific collateral or only for money.

Rivercity argues that the funds that it seeks to enjoin constitute a "*res*" because under the 1992 agreement it has a security interest in any funds that 31-02 Associates

may distribute to Seigel and Kaufman. Assuming, without deciding, that the 1992 agreement creates an interest in collateral that may be the subject of a preliminary injunction, the application in this case must be denied, because the funds sought to be enjoined in this case cannot be specifically identified as collateral under the 1992 agreement.

The Falchi litigation was brought by Seigel and Kaufman individually and also on behalf of SIG Partners, SIGLIC and 31-02 Associates. By the time the matter was tried, only the first, second and fourth causes of action remained. Contrary to Seigel and Kaufman's contentions, those remaining causes of action were, in part, asserted on behalf of 31-02 Associates. There are decisions and/or orders of the court in the Falchi litigation, dismissing 31-02 as a party plaintiff in this action. The settlement agreement, however, did not apportion any of the monied between any of the named plaintiffs. It is unclear what if any part of the settlement funds 31-02 Associates is entitled to.

Even assuming that 31-02 Associates was entitled to some or even all of the proceeds, you still would not be able to conclude that those proceeds would thereafter have to or couold be distributed by 31-02 Associates to Seigel and Kaufman. Distributions would entail that 31-02 Associates have some measure of profits resulting from the settlement. In this regard, 1992 agreement was, in part, due to the fact that the Falchi building venture and consequently 31-02 Assocaites was failing financially. By 1993 a default judgment of foreclosure on the $30,000,000 ERSB mortgage was entered and after sale, there was a deficiency. Thus, Riversicity's arguments that these settlement proceeds would wind up in the hands of Seigel and Kaufman as 31-02 distributions is so completely speculative that it cannot support the serious relief

demanded.

There are also serious issues about the statute of limitations that raise questions about Rivercity's likelihood of success on the merits. The new note which secured the collateral Rivercity now claims matured on December 31, 1994, which is almost 15 years ago. If this action is based upon Seigel and Kaufman's guarantee of that note, it is barred by a six year statue of limitations. Haber v. Nassar, 289 AD2d 199 (2nd dept. 2001). Rivercity claims that its action is really one to recover collateral and not on the guarantee *per se*. While the law allows for a security interest in after-acquired collateral (see: UCC 9-204) the court cannot find any support for Rivercity's contention that the cause of action on such collateral does not accrue until the collateral actually comes into being, even if that happens to be nine years after the statute of limitations on the underlying debt has expired.

Accordingly the motion for a preliminary injunction is denied. The stay previously granted by the court on May 11, 2009 is vacated forthwith, except to the extent that it preserved the interest of JP Morgan Chase pursuant to its retaining notices. The court otherwise sets a preliminary conference for May 14, 2009 at 9:30 a.m. This constitutes the decision and order of the court.

Dated: New York, NY
April 17, 2009

SO ORDERED:

J.G. J.S.C.