

Gladstein v Martorella
2009 NY Slip Op 31861(U)
August 17, 2009
Supreme Court, New York County
Docket Number: 602276/2007
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____ J.S.C. Justice

PART 2

Jane Gladstein

INDEX NO. 602276/07

MOTION DATE _____

- v -

Christopher Mantorelle

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

AUG 19 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/17/09

Luy

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: IAS PART 2

----- X

JANE GLADSTEIN,

Plaintiff,

Index No. 602276/2007

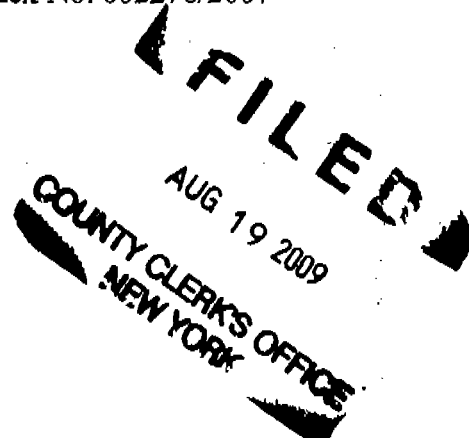
-- against --

CHRISTOPHER H. MARTORELLA,

Defendant.

----- X

LOUIS B. YORK, J.:



Gladstein v. Martorella

Plaintiff, Jane Gladstein originally brought this action against Defendant, Christopher Martorella for breach of a real estate contract. Plaintiff and Defendant were partners in Metropolitan Housing Partners, LLC, a real estate investment partnership that Defendant formed in 1999 and which owned several condominium projects in New York City. Following various disputes, the parties ultimately ended their business relationship. In their December 15, 2005 settlement agreement ("the Agreement"), Defendant agreed to buy Plaintiff's share in Metro's holdings for \$8,000,000 payable in three separate payments.

It is the timing of the third payment, in the amount of \$2,000,000, which is in dispute in this lawsuit. Plaintiff argues that under the Agreement, payment is currently due. Defendant counters that 75% of the units must be sold before the third payment is due, and that this condition has not been satisfied. Gladstein v. Martorella, Index No. 602276/2007 (Sup. Ct. N.Y. County April 16, 2008)(motion sequence 1). Plaintiff moved and Defendant cross-moved for summary judgment. On April 16, 2008 this Court

issued an order granting summary judgment to Plaintiff and denying Defendant's cross motion for that relief. The Court awarded judgment on the \$2,000,000 plus interest and costs.

By Order to Show Cause dated May 5, 2008, Defendant sought an order granting reargument of the Court's April 16, 2008 decision and, upon reargument, denying summary judgment to Plaintiff and vacating the judgment. Defendant also sought to restrain Plaintiff from enforcing the judgment. The Court granted the restraining order only if Defendant obtained a bond to secure the judgment, and only on the amount secured by the bond. Defendant stated that it was easier to deposit the money with the Court instead. Accordingly, on May 23, 2008 Defendant deposited \$2,000,000 with the Court in order to secure the judgment for Plaintiff.

iStar v. Tower

Movant, iStar FM Loans LLC is a limited liability company organized under the laws of Delaware. Movant is the assignee of a \$49,100,000 loan (the "Loan") to 1419 Tower, L.P. ("Tower"), an entity controlled by Defendant.¹ The purpose of the Loan was to finance the construction of improvements for Tower's condominium units and common areas and facilities in Philadelphia. The premises together with all other property pledged by Tower to Movant are collateral for the Loan. The Loan is currently in default and the unpaid balance is due. Movant has since commenced an action in the Philadelphia Court of Common pleas against Tower to collect the amount due under the Loan. Defendant is not a party to the Pennsylvania action.

¹ iStar's predecessor-in-interest, Fremont Investment & Loan ("Fremont") originally extended the Loan to 1419 Tower, L.P. Pursuant to an Assignment and Assumption of Notes, Mortgages and Other Loan Documents on June 29, 2007, Fremont assigned all of its interests and rights related to the Loan Documents to iStar.

In consideration of the Loan and pursuant to the Mortgage and other Loan documents, Tower agreed to immediately pay all insurance proceeds it received with respect to the condominiums to Movant. The property securing the repayment of the Loan includes all:

(c) [I]nsurance proceeds . . . derived from any . . . agreement now existing or hereafter created affecting all or any portion of the Project

(g) All proceeds from and rights to (including, without limitation, payments, judgments, awards, settlements, contractual rights, profits, general intangibles, rebates, benefits and rights at law and in equity) any insurance policies now or hereafter in effect with respect to the Project, including, without limitation, casualty insurance, rental loss or business interruption insurance, and all Insurance/Condemnation Proceeds.

Mortgage, dated August 26, 2004 at p. 2. The Mortgage further provides:

Borrower hereby assigns to Lender all Insurance/Condemnation Proceeds Lender is entitled to collect and receive all Insurance/Condemnation Proceeds, and all Insurance/Condemnation Proceeds shall be paid to Lender by the payor thereof or, if the same are nonetheless paid to Borrower, by Borrower immediately upon Borrower's receipt thereof.

Mortgage, § 1.6(A).

When a portion of the façade at Tower's condominium building separated from the building, causing operations at the building to be suspended and forcing tenants to vacate, Tower commenced an insurance coverage action against its insurer. This action resulted in a settlement. Tower's books and records, including its General Ledger show that on May 12, 2008 an insurance claim check for \$5,500,000 was deposited into Tower's account. On May 23, 2008, Tower transferred \$2,000,000 out of this account and into its checking account. Also on May 23, 2008, Tower paid \$2,000,000 from its checking account to Defendant's personal counsel for bond payment in the Gladstein/

Martorella action. In addition, on May 30, 2008 Tower's Balance sheet includes as an asset an escrow account with a balance of \$2,000,000, this account having had a balance of \$0 on April 30, 2008.

During May 2008, Movant allegedly asked Defendant about the status of settlement negotiations regarding the insurance claim. On July 1, 2008, Movant's Senior Vice President received a copy of Defendant's purported accounting. This accounting, which Movant annexes to its papers, does not reference the \$2,000,000 check that was written to Defendant's counsel for bond payment. Movant claims that it did not learn that Defendant might have diverted a portion of the insurance proceeds until September 19, 2008, when Movant received the check register and balance sheet of the annexed General Ledger from another lender to Tower. At this time, Movant believed that the \$2,000,000 had been transferred to a bonding company rather than deposited with the Court. Movant alleges that it did not find out that \$2,000,000 of the insurance proceeds was deposited with the Clerk of the Court until the weekend of January 10-11, 2009.

Movant brought this motion around January 20, 2009 to intervene and for a preliminary injunction prohibiting the release of the money deposited by Defendant. Movant maintains that Tower has withheld from it approximately \$5,500,000 of insurance proceeds arising from a casualty loss and that Defendant wrongfully diverted \$2,000,000 of that security by using it to stay execution of judgment against him. Movant seeks to intervene in this action on the grounds that the action involves the disposition or distribution of \$2,000,000 of Movant's money and that Movant will be adversely affected by the judgment if it is not permitted to intervene. Movant also seeks

a preliminary injunction to stay distribution of the \$2,000,000 deposited with the County Clerk.

Analysis

Plaintiff and Defendant have raised some threshold challenges to the motion, none of which are persuasive. First, Plaintiff argues that the doctrine of laches prevents Movant from bringing its claim. Under the doctrine of laches, the Court can bar an action based on a lengthy delay of asserting a right and the ensuing prejudice to an opposing party. See Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 816, 766 N.Y.S.2d 654, 662 (2003). Plaintiff claims that Movant unreasonably delayed its lawsuit against Defendant for approximately seven months, arguing Movant learned about the potential conversion of the insurance proceeds in May 2008. Movant counters that it did not delay asserting its rights. It claims it did not learn of the \$2,000,000 transfer until September 2008, and did not learn that the funds were deposited with the Clerk until approximately ten days before it filed this motion.

Although the facts are in dispute as to when Movant truly learned of the alleged wrongful conversion of the insurance proceeds, it does not appear that there was delay sufficient to invoke the doctrine of laches. See infra, p. 9. However, the Court does not have to determine when Movant knew of the alleged wrongful conversion. Prejudice is an essential element of the defense of laches. Schulz v. State, 81 N.Y.2d 336, 348, 599 N.Y.S.2d 469, 473 (1993). As Plaintiff has not shown prejudice, there is no merit to this defense. See Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d at 817, 766 N.Y.S.2d at 663 (six year delay did not prejudice adverse party); see also Poblocki v.

Todoro, 55 A.D.3d 1346, 1346 865 N.Y.S.2d 448, 449 (4d Dept. 2008) (intervention permitted after four year delay, where defendants would not suffer prejudice from delay).

Plaintiff, who was not involved in the Tower loan, argues that she is prejudiced by Movant's delay, as she assumed the funds held by the Clerk of the Court stood as security for its judgment and as a result did not seek modification of the Court's temporary restraining order or of the security deposited with the Court. Movant asserts that the timing of the motion does not substantially prejudice Plaintiff, as Plaintiff was restrained from executing the judgment against Defendant, and the judgment against Defendant was subsequently vacated. As Plaintiff asserts, she may be in a worse position with respect to the funds at issue if Movant is permitted to intervene. However, as Plaintiff's judgment against Defendant was vacated and Plaintiff was restrained from executing on the judgment, the timing of the motion itself does not prejudice Plaintiff. See Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d at 817, 766 N.Y.S.2d at 663. Therefore, the Court rejects the defense of laches on this basis as well.

Second, Defendant suggests that Movant's proposed complaint is subject to dismissal under the doctrine of forum non conveniens. Pursuant to CPLR 327(a), when the court finds that "in the interest of substantial justice the action should be heard in another forum," the court may dismiss the action. Defendant asserts that Pennsylvania is the proper forum for Movant's cause of action because Tower is a Pennsylvania partnership, the insurance proceeds resulted because of an occurrence in Pennsylvania, and witnesses and records are located in Pennsylvania. Movant argues that New York is the proper forum because the Clerk of this Court holds the property that is the subject of its complaint.

It is a matter of discretion whether the Court retains jurisdiction or not. Intertec Contr. A/S v. Turner Steiner, 6 A.D.3d 1, 5, 774 N.Y.S.2d 14, 17 (1st Dept. 2004). The party asserting forum non conveniens bears a heavy burden of demonstrating that the forum is inappropriate. See Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, 62 N.Y.2d 65, 73, 476 N.Y.S.2d 64, 68 (1984). Defendant does not identify the witnesses or documents that exist in Pennsylvania that cannot easily be made available in New York. Defendant is already a party to a case in New York and Defendant himself brought this particular issue to New York when he took money that should be in the Pennsylvania court.

The Court is reluctant to decide Movant's rights with respect to this money, as a Pennsylvania court is overseeing the receivership of the building. Thus, that court will and should consider Movant's dispute with Tower regarding its right to the insurance proceeds compared with that of defendant here and with other parties. However, the Court is also reluctant to deny Movant relief. If Movant is found to have superior rights to the \$2,000,000, but the funds are distributed elsewhere, Movant may not be able to obtain adequate relief. Movant seeks to intervene to recover only the \$2,000,000 to which it claims it has rights. It seems, as discussed in more detail below, see infra, pp. 12-14, that allowing the intervention is the best way to maintain the status quo and protect the relative interests of the parties to this litigation and to the Pennsylvania litigation. The Court will retain jurisdiction to the extent that it will refrain to the amount possible from deciding the Pennsylvania issues and give deference to that court with any issue.

Third, Defendant argues that Movant is barred from intervening under LLCL § 808, as Movant does not have a certificate of authority to do business in New York. Movant counters that it does not “do business” in New York, a necessary requirement to trigger the statutory bar, as it does not have offices, employees, or real property in New York, and does not maintain bank accounts, solicit business or administer any loans in New York.

LLCL § 808 provides that a foreign limited liability company doing business in New York without a certificate of authority may not maintain any action in any court of New York. A party relying upon the statute must prove that the corporation’s business activities in the state are systematic and regular. Airtran N.Y. v. Midwest Air Group, 46 A.D.3d 208, 214, 844 N.Y.S.2d 233, 238 (1st Dept. 2007)(decided under BCL § 1312, which contains language nearly identical to LLCL § 808). “[W]here a foreign corporation’s activities within New York are merely incidental to its business in interstate and international commerce, [this provision] is not applicable.” Maro Leather v. Aerolineas Argentinas, 161 Misc. 2d 920, 920, 617 N.Y.S.2d 617, 617 (1st Dept. 1994)(decided under BCL § 1312). Furthermore, “a foreign corporation bringing suit in New York is presumed to be doing business in its State of incorporation.” Id.

Movant is a Delaware corporation, and alleges it was formed for the sole purpose of taking title to and holding a portfolio of loans purchased from Fremont. Movant concedes that it does not have a certificate of authority to do business in New York. However, as set forth in the Affidavit of Geoffrey M. Dugan, Movant purportedly never originated any loans for its own account. Under an annexed management and servicing agreement between Movant and iStar Financial, Inc. dated July 15, 2007, iStar Financial

provides all management and administrative services required on loans held by Movant. The annexed Certificate of Authority shows that iStar Financial is validly authorized to do business in the State of New York. Movant's contacts with New York are limited to the loans purchased from Fremont. Therefore, Movant may properly intervene in this action.

I. *Intervention*

Now that the Court has addressed these preliminary issues, the Court turns to the parties' arguments relating to intervention itself. Movant alleges that it should be permitted to intervene as a matter of right under CPLR § 1012 (a)(3) because the action involves the distribution of money to which it is entitled and Movant might be affected adversely by the judgment.

Plaintiff and Defendant first argue that the motion should be denied because it was untimely submitted and therefore, does not satisfy "timeliness" requirement of CPLR § 1012 (a). In response to this, Movant cites to 82 N.Y. Jur. Parties § 217, which defines the words "timely motion" in CPLR 1012 to mean only a reasonable time, reasonableness depending on the circumstances of the particular case.

It is true that courts have denied intervention on the ground that the proposed intervenor waved its right to intervene by failing to move for intervention in a timely manner. See Fotiades v. Moskoff, 21 A.D.3d 898, 898, 800 N.Y.S.2d 748, 749 (2d Dept. 2005) (right waived when intervenor had three months notice but failed to move prior to hearing); see also Hospital Ass'n v. Axelrod, 164 A.D.2d 518, 527, 565 N.Y.S.2d 243, 249 (3d Dept. 1990) (intervention denied when all pleadings had been served, oral argument had been held and judgment had been rendered). Plaintiff claims that its

pending case with Defendant is virtually over, and allowing Movant to intervene would delay the action thereby prejudicing Plaintiff. However, Movant allegedly did not learn that \$2,000,000 of the insurance proceeds was deposited with the Clerk of the Court until ten days before filing this motion. Movant acted accordingly with the statute, as Movant did not delay its claim.

Plaintiff and Defendant also argue that intervention should be denied because the fungible nature of money prevents Movant from demonstrating an interest in the specific funds deposited with the Court. Plaintiff and Defendant claim that because the money was intermingled with money in Tower's accounts, Defendant's lawyer's escrow account, and other money in the possession of the County Clerk's office, there is no specific property that would support Movant's claim to these exact funds.

"C.P.L.R. § 1012(a)(3) . . . permits intervention when an action involves the disposition or distribution of, or the title, or a claim for damages for injury to property, and the person may be affected adversely by the judgment." Matter of Glass v. Glass, 29 A.D.3d 347, 348, 815 N.Y.S.2d 36, 38 (1st Dept. 2006). There are two types of situations where a party might seek to intervene. In the first situation, when the proposed intervenor demonstrates a clear relation to the property, intervention should be permitted. See Property Clerk v. Duck Jae Lee, 183 Misc. 2d 360, 362 702 N.Y.S.2d 792, 794 (Sup. Ct. N.Y. County 2000) (granting motion where judgment in forfeiture action would cut off movant's right to possession of vehicle); see also Wells Fargo Bank Minn v. Ray, 23 Misc. 3d 931, 934, 880 N.Y.S.2d 454, 457 (Sup. Ct. N.Y. County 2000) (successful bidder in foreclosure auction sale permitted to intervene where mortgager sought to cancel sale). In the second situation, when a creditor seeks to intervene because it is

owed money, intervention generally is not permitted. See Taw International Leasing v. Overseas Private Inv., , 799-800, 394 N.Y.S.2d 672, 673 (1st Dept. 1977) (holding impairment of insurers' right to debtors' money does not warrant intervention). Plaintiff and Defendant argue that Movant's situation falls in the second category, where Defendant owes Movant money. However, Movant can trace the specific insurance funds from Tower's accounts in Philadelphia to the Clerk of the Court here. Therefore, Movant has demonstrated a clear relation to Defendant's bank account and directly to the property at issue, placing it in the first category instead.

As the Loan and Mortgage documents, the UCC-1 filing statement and the assignment all show, the property securing the repayment of the Loan includes all insurance proceeds related to the property. The diversion of the converted insurance proceeds is verified by the transactions set forth in Tower's General Ledger. Less than two weeks after Tower received \$5,500,000 of insurance proceeds, Defendant caused \$2,000,000 of the insurance proceeds to be used to stay execution of judgment in this matter. Although according to the annexed documents the insurance proceeds were deposited and commingled with other funds in Tower's accounts, the documents also establish that Tower did not have the funds to make the \$2,000,000 transfer to Defendant absent the insurance proceeds. By depositing the \$2,000,000 with the Clerk of the Court, Defendant has placed into issue the disposition of property that might rightfully belong to Movant. Movant has demonstrated a clear relation to the \$2,000,000, satisfying the clear language of CPLR § 1012 (a)(3). Therefore, Movant is entitled to intervene as a matter of right.

Movant also has demonstrated a real and substantial interest in the outcome of the action, further justifying intervention. See Agostino v. Soufer, 284 A.D.2d 147, 148, 726 N.Y.S. 2d 635, 636 (1st Dept. 2001). Plaintiff and Defendant contend that Movant can properly vindicate its claim in the Pennsylvania court. They are correct that Movant's claim to the insurance proceeds can be determined in the Pennsylvania court. However, unless Movant has the opportunity to intervene, Movant will likely be unable to recover funds through other means even if it obtains a favorable determination in Pennsylvania. See Property Clerk v. Duck Jae Lee, 183 Misc. 2d at 362, 702 N.Y.S.2d at 794. A judgment against Tower in the Pennsylvania procedure would be meaningless because Defendant brought the \$2,000,000 here. Thus, Movant should be permitted to protect its alleged interest in the funds that were deposited with this Court.

Although Defendant argues that he invested his personal money in Tower and therefore is entitled to the \$2,000,000 as reimbursement, the Court does not have sufficient information to determine whether Defendant or Movant has the superior right to the property. This issue, as Defendant himself points out, should be resolved in Pennsylvania. In the meantime, an order allowing intervention best protects the respective interests of all three parties, including Movant.

Because this Court permits intervention as a matter of right, it need not consider the arguments the parties raise concerning intervention by permission. See Norstar Apartments v. Clay, 112 A.D.2d 750, 750, 492 N.Y.S.2d 248, 248 (4d Dept. 1985)(noting that "[i]t is of little consequence whether intervention is warranted as of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013.").

II. Preliminary Injunction

Movant also seeks a preliminary injunction preventing the release of the \$2,000,000 Defendant deposited with the Court. The factors to be considered by the Court in deciding whether to award injunctive relief are: "(1) the likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." Doe v. Axelrod, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45 (1988). Movant alleges that it has met the requirements for a preliminary injunction as it can demonstrate it has rights to the funds, it is unlikely that sufficient assets of Tower will remain to satisfy judgment for Movant in a separate proceeding, and neither Plaintiff nor Defendant will be prejudiced because the money already was deposited with the Court. Plaintiff counters that the balancing of equities is in her favor, as she will be prejudiced if a preliminary injunction is granted. Defendant also argues that the balance of equities is in his favor, where Movant unreasonably delayed asserting its rights, but does not offer any showing that he will be prejudiced by the injunction.

The decision to grant or deny a preliminary injunction is within the discretion of the trial court. Jiggets v. Perales, 202 A.D.2d 341, 342, 609 N.Y.S.2d 222 (1st Dept. 1994). Plaintiff claims that had she known that Movant would seek intervention, she would have sought to enforce her judgment sooner.

Plaintiff suffers a risk of harm, comparable to what Movant would suffer if not permitted to intervene. If the \$2,000,000 is distributed to Movant, Defendant may not have sufficient funds to pay the \$2,000,000 Plaintiff claims it is owed. However, harm to Plaintiff is not dispositive to this Court's decision, as the Court must take into account the circumstances of all parties. See Doe v. Axelrod, 73 N.Y.2d at 750, 536 N.Y.S.2d at

45. Furthermore, had the court affirmed judgment in favor of Plaintiff, Defendant would have had to pay the judgment. Therefore, Defendant cannot demonstrate that the balance of equities is in his favor. Based on the fact that Defendant arguably took money improperly from Tower, the Court finds that the balancing of equities tips slightly in favor of Movant. The only way that Movant will be deemed to be entitled to the money deposited with the Court is if the Pennsylvania Court finds that the money belongs to Tower and not to Defendant. In that circumstance, Plaintiff -- even if she has the right to money from Defendant -- would not be entitled to the money.

Movant simply seeks to have its money remain where it is pending a final adjudication of the parties' rights. The \$2,000,000 was deposited in May of 2008 and the order would essentially continue the status quo, as the funds will remain where it is absent an Order by this Court distributing them to another party. In order ensure that the proceeds will be available to iStar if it prevails in the Pennsylvania action, the Court grants Movant's request for a preliminary injunction.

Accordingly, it is

ORDERED that the motion to intervene is granted, and that iStar be permitted to intervene in the above-entitled action as a party plaintiff; and it is further

ORDERED that the summons and complaint in the above-entitled action be amended by adding iStar thereto as a party; and it is further

ORDERED that the new caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JANE GLADSTEIN,

Plaintiff,

Index No. 602276/2007

-- against --

CHRISTOPHER H. MARTORELLA,

Defendant.

ISTAR FM LOANS LLC,

Plaintiff-Intervenor,

----- X

and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to conform their records to reflect the change in the caption; and it is further

ORDERED that iStar's intervenor complaint, annexed to the Affidavit in support of its Order to Show Cause as Exhibit 1, shall be deemed served upon the attorneys for the plaintiff and the defendant, within 20 days from service of a copy of this order with notice of entry; and it is further

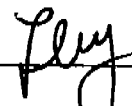
ORDERED that plaintiff and defendant are permitted to serve their responsive pleadings upon the attorneys for the other parties, or otherwise move with respect to the complaint in the above permitted action, within 20 days from the service of a copy of this order with notice of entry; and it is further

ORDERED that, due deliberation having been had, and it appearing to this Court that a cause of action exists in favor of the movant and against the defendant and that the movant is entitled to a preliminary injunction on the ground that the movant may have a superior right to the property in question, and a judgment in this action might adversely impact this right and render a judgment by the Pennsylvania Court as to movant's right to the property to be ineffectual, as set forth in this decision, it is

ORDERED that the parties to this action are enjoined from removing any of the \$2,000,000 that defendant Martorella deposited with the Court on May 23, pending further order of this Court.

Dated: August 17, 2009

ENTER:



LOUIS B. YORK, J.S.C.

FILED
AUG 19 2009
COUNTY CLERK'S OFFICE
NEW YORK