

**Bank of Am., N.A. v 57-63 Wadsworth Terrace
Holding LLC**

2010 NY Slip Op 31214(U)

May 11, 2010

Supreme Court, New York County

Docket Number: 601439/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 15

BANK OF AMERICA
- v -

INDEX NO. 601439/09

MOTION DATE _____

MOTION SEQ. NO. 15005

57-63 WADSWORTH TERRACE
142D, 142

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
<u>1, 2, 3</u>
<u>4</u>
<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 19 2010
NEW YORK
COUNTY CLERKS OFFICE

Dated: 5/11/10

[Signature]
HON. EILEEN A. RAKOWER J.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: PART 15

-----X
BANK OF AMERICA, NATIONAL ASSOCIATION
SUCCESSOR IN INTEREST TO LASALLE BANK,
NATIONAL ASSOCIATION, AS TRUSTEE FOR THE
REGISTERED HOLDERS OF J.P. MORGAN CHASE
COMMERCIAL MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-LDP 11,

Plaintiff,

- against -

57-63 WADSWORTH TERRACE HOLDING LLC, 261
WADSWORTH AVENUE HOLDING LLC, LELAND L. GREENE,
BARBANEL and THE CITY OF NEW YORK,

Defendants.
-----X

Index No.
601439/09

**DECISION/
ORDER**

Mot. Seq. No.
005

FILED
MAY 19 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER, J.S.C.

Leland L. Greene, Temporary Receiver of the property located at 57-63 Wadsworth Terrace ("Terrace") and 261 Wadsworth Avenue ("Wadsworth Avenue"), both located in the County and State of New York, brings this Order to Show Cause seeking approval for a contract entered into between Mr. Greene and Eastmond & Sons Boiler Repair & Welding Service, Inc. ("the Eastmond Contract"), for the Wadsworth Avenue building. Bank of America, plaintiff in the action, submits an affirmation in support of the application. The owners of the buildings located at Terrace and Wadsworth Avenue ("defendants") oppose the application.

Mr. Greene was appointed Temporary Receiver by Order of the Honorable Justice Walter B. Tolub on May 26, 2009. On June 25, 2009, Justice Tolub appointed a managing agent and counsel to the Receiver. That Order also stated, relevant to the instant application:

ORDERED, that unless faced with emergency conditions, the Receiver shall get the approval of this Court before undertaking any repairs or renovations that exceed \$50,000 . . .

According to Mr. Greene, shortly before he was appointed Receiver, a heating oil spill occurred in the boiler room of Wadsworth Avenue. Mr. Green claims that a forensic expert retained by the former receiver determined that the problem was “severe enough to require the immediate notification to the state Department of Environmental Conservation.” Mr. Greene discovered that the leak had been ongoing “for some time,” and an engineer recommended that the oil tank should be replaced. Additionally, the engineer recommended that the boiler would have to be moved in order to clean and that moving the boiler would likely “cause its demise.”¹ Thereafter, Mr. Greene obtained a “temporary boiler,” which is being rented on a month to month basis, pending the installation of a permanent boiler.

Mr. Greene affirms that he obtained two bids for the cleanup of the oil spill. Mr. Greene claims that “after speaking with persons knowledgeable in the field . . . I hired . . . Eastmond . . . on an emergency basis to begin removal of contaminated soil, clean up of the oil spill and related restoration activities.” Upon inspection by Greene, it was discovered that there were several water leaks in the basement, which necessitated that Eastmond pump substantial amounts of water out of boiler room.² Although Mr. Greene claims that Eastmond’s initial estimate for the job was less than \$50,000, due to the complications associated with the water leaks, the cost of the clean up, through the end of 2009, is \$131,294.43. Of this sum Mr. Greene has paid \$45,139.33. Eastmond estimates that, barring the discovery of any further leaks, the job will cost approximately \$35,000 more. To date, Eastmond has suspended the clean-up until it is paid \$75,000 of the money it is owed.

Mr. Greene states that it is his opinion, as well as that of an unspecified engineer, that the work is necessary to maintain the building and for the health and safety of the residents of the building. Further, Mr. Green asserts that Eastman is qualified to do the clean up, the contract price is reasonable, and that there are sufficient funds in the receivership to pay the amount requested by Eastman.

Defendants, in opposition, argue that the Eastman contract is deficient on a

¹Under separate contracts that have been paid in full, Eastmond removed the oil tank and the boiler, for which Eastmond was paid \$5,000 each.

²As of the time of the making of the instant Order to Show Cause, Mr. Greene states that the oil spill clean up had to be suspended in order to repair the water leaks as to not allow the oil to leach into the groundwater.

number of grounds. Defendants assert that: (1) the right to payment should be conditioned on obtaining the necessary permits and approvals; (2) Eastman should be required to provide the Receiver with proof of compliance with all applicable laws; and (3) specific insurance requirements should be inserted. Currently, the agreement states, with regard to insurance: "Contractor shall be deemed to be in default of this Agreement if: . . . (F) Contractor fails to obtain and maintain all insurance required by this Agreement. Defendants point out that the contract does not contain specifications as to the amounts of insurance required, or a clause directing that defendants be named as additional insureds.

By way of reply, Mr. Greene argues that the work is substantially complete and has been inspected by the "appropriate environmental agency officials." As the clean up is almost finished, Mr. Greene argues that the need for insurance is minimized. In any event, Mr. Greene points out that plaintiff maintains insurance on the property with defendants, as borrowers, named as additional insureds. Mr. Greene submits the "Certificate of Liability Insurance," which names defendants as additional insureds "as respects receivership activities at above described location . . ." ³

CPLR §6401(b) states, in relevant part:

Powers of Temporary Receiver. The court appointing a receiver may authorize him to take and hold real and personal property . . . upon such conditions and for such purposes as the court shall direct . . . Upon motion of the receiver . . . powers granted to a Temporary receiver may be extended . . .

"A Receiver is an officer of the court and not an agent of the mortgagee or the owner . . . His duty is to preserve and operate the property, within the confines of the order of appointment and any subsequent authorization granted to him by the court." (*Jacynicz v. Seaman Associates*, 270 AD2d 83,85[1st Dept. 2000])(internal citations omitted).

³Defendants and counsel for the Receiver appeared on the return date of the Order to Show Cause. At that time it was proposed by the Court that an amended contract addressing defendants' concerns be presented for approval. Counsel to the Receiver pointed out that the clean up work was nearly finished and that modifying the contract would have no practical effect. However, counsel to the Receiver did not rule out addressing defendants' concerns in any new contracts drafted which involved the defendants' buildings.

Wherefore it is hereby

ORDERED that the application is granted; and it is further

ORDERED that the contract between Leland Greene, as Receiver, and Eastmond & Sons Boiler Repair & Welding Service, Inc., entered into September 21, 2009, for "...environmental clean up and restoration services . . . in connection with the removal of contaminated soil and other oil spill clean up activities and site restoration . . . at the building located at 615 West 185th Street," is approved, and all past payments made under said contract are hereby ratified.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 11, 2010



EILEEN A. RAKOWER, J.S.C.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE