

**Matter of Classic N.Y. Realty 2009 LLC v
Commissioner of Taxation & Fin. of State of N.Y.**

2010 NY Slip Op 31900(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 600075/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Classic NY Realty

INDEX NO. 600075/10

- v -

Commissioner of Taxation + Finance

MOTION DATE _____

MOTION SEQ. NO. 001

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

FILED

JUL 09 2010

motion (s) and cross-motion(s) decided in accordance with COUNTY CLERK'S OFFICE NEW YORK the annexed decision/order of even date.

conference set 9/2/10 @ 9:30 am.

Dated: 7/7/10

J. GISCHE
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 10

In the Matter of the Application of Classic
New York Realty 2009 LLC,

Petitioner,

Decision/Order

-against-

Index# 600075/10
Mot. Seq. #001

Commissioner of Taxation and Finance
of the State of New York

Respondents.

FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

PAPERS	NUMBERED
Notice of Petition, Petition, OH affd., exhibits.....	1
Verified Answer.....	2
EP-M affd., exhibits.....	3

Hon. Gische, J.:

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

Petitioner, Classic New York Realty 2009 LLC ("Classic"), brought this special proceeding to determine adverse claims pursuant to CPLR § 5239 in connection with a restraining notice issued by respondent. Essentially, Classic claims that although respondent obtained a money judgment against a company known as Global Hotels, Inc. ("Global"), it is improperly restraining property belonging to Classic.

A prior motion to dismiss was denied by the Court in a decision and order made on the record, on March 11, 2010. Respondent, the Commissioner of Taxation and Finance of the State of New York ("CTF"), has now answered the petition. Prior to its answer, the CTF was permitted to obtain some discovery from non-party Travelscape,

LLC ("Expedia").

Sometime before December 2009 CTF obtained a judgment in the amount of \$1,873,735.76 against Global for unpaid taxes and penalties. On December 14, 2009 CTF served a levy against any assets belonging to Global that were in the possession of Expedia. Classic claims that in response to the CTF levy, Expedia has improperly restrained Classic's accounts. Classic claims that it manages several properties in Manhattan, in which it leases rooms to the public for transient lodging. When Expedia book rooms for Classic, it collects the rental monies due, holds them in a separate account, deducts its booking fees and ultimately disburses out the monies due Classic. It claims that the monies restrained by CTF through Expedia belong to Classic and not Global. In support of its claim, Classic has produced various property participation agreements that it has with Expedia, which are dated between January and October 2009.

In response CTF claims that Classic: [1] has not plead facts sufficient to state a claim; [2] has failed to join a necessary party and [3] there are disputed issues of fact that require a trial.

CPLR §5239 is a means to determine who is rightfully entitled to property that is being levied upon. Roberson v. Roberson, 45 AD3d 494 (4th dept. 2007). Classic has stated facts that it is entitled to the property which is being held pursuant to a levy. These facts are sufficient to state a claim.

The court has already determined that Expedia is not a necessary party to this action for the reasons stated in the March 11, 2010 decision and order. That determination is law of the case. People v. Evans, 94 NY2d 499 (2000). CTF now

claims that Global should also be joined as a necessary party. Global may or may not have an interest in the property restrained which may or may not be validly applied to reduce the amounts due CTF under the judgment. The court, therefore, agrees with CTF that Global may be inequitably affected by the application of the monies in a manner other than toward its debt to CTF. CPLR§ 1001(a). The remedy for failure to join a necessary party, however, is not an outright dismissal of the petition, but an opportunity to summon such party before the court. CPLR §1001(b). The court, therefore, orders Classic to serve an Amended Notice of Petition and Petition upon Global, adding it as a necessary party, within the next 30 days.

Lastly, CTF claims that there are disputed factual issues requiring a trial. It has obtained documents from Expedia showing that for the same period of time that Classic had property participation agreements with Expedia for certain properties, Global also had property participation agreements with Expedia for those same properties. This, alone raises factual disputes about whether Global or Classic are entitled to the monies held by Expedia for booking rentals at these properties. CPLR §5239 provides that a trial shall be ordered where there are factual disputes and that the court shall designate who shall have property pending a trial decision and the undertaking, if any, to be posted. Clearly, there are disputed factual issues about who is the rightful owner of the levied monies requiring a trial. A trial date will be set once petitioner has joined Global as a party to the proceeding and Global has answered or been given an appropriate opportunity to answer the petition. CPLR §403.

Presently, Expedia is just a stakeholder and there is no reason to let it continue to hold the monies while the parties dispute its rightful owner. The Court, however,

does not believe that either party to this matter should hold the property pending a decision, but instead requires that the monies be deposited with the Court. Since the monies are to be deposited with the court, no undertaking is necessary.

In accordance herewith, it is hereby:

ORDERED that within 30 days of the date of this decision, the petitioner is directed to serve an amended Notice of Petition and Petition and copy of this decision and order upon Global Hotels, Inc, and it is further

ORDERED that Travelscape, LLC is directed to deposit the monies being held pursuant to the levy of the respondent with the Court , and it is further

ORDERED that the matter is set for a trial certification conference on **September 2, 2010 at 9:30 a.m;** no further notices will be sent, and it is further

ORDERED that any requested relief not otherwise set forth herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
July 7, 2010

SO ORDERED:

J.G. J.S.C.
FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK