

89/5 Greene St., LLC v Moore

2010 NY Slip Op 32336(U)

August 23, 2010

Supreme Court, New York County

Docket Number: 111791/2007

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

89/5 Greene St.
Peter Moore, E.G Realty LLC,
Greene St. Partners LLC,

INDEX NO. 111791/07
MOTION DATE _____
MOTION SEQ. NO. 002
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

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

FILED
AUG 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/23/10

Luy
LOUIS B. YORK 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

89/5 GREENE STREET LLC,

Plaintiff,

Index No. 111791/2007

-against-

PETER MOORE, E&G REALTY LLC,
and GREENE STREET PARTNERS LLC,

Defendants.

FILED
AUG 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

In this motion, Plaintiff 89/5 Greene Street LLC ("89/5") requests that Scott Rubman, Esq. and the law office of Scott Rubman be disqualified from representing Defendant Peter Moore in this action. Defendant Moore cross-moves for summary judgment. For the reasons below, the Court grants Plaintiff's motion and denies Defendant's cross-motion.

Defendant Greene Street Partners, LLC (the "Company") is a limited liability company formed to acquire, renovate and convert an apartment building at 89 Greene Street, New York, New York into a condominium (the "Property"). George Hargreaves and Defendant E&G Realty LLC ("E&G") and Defendant Peter Moore ("Moore") all had membership interests in the Property. Members of the Company entered into an operating agreement on March 26, 2003; the agreement set forth the manner in which the Company was to be managed and operated. Under the agreement, Moore was authorized to conduct the day-to-day affairs of the Company for two years. However, the Company must approve a member's transfer of ownership interests; additionally, certain matters related to the operation of the company required the written approval of 85% in interest of the Members: amending the operating agreement, mortgaging a material part of the Company's assets and paying compensation or fees to a Company member.

On May 22, 2003, George Hargreaves transferred his 20% interest in the Company to Plaintiff 89/5 Greene Street, LLC ("89/5"), a company which he owns and of which he is a Managing Member. Defendant Moore argues that the transfer was not properly approved per the agreement and that 89/5 therefore has no ownership in the property and no standing to sue.

Moore, with Rubman's assistance, executed a First Modification to the operating agreement on December 28, 2004. The First Modification provided that "if the Property is not converted to a condominium on or before February 1, 2006, [E&G] will have the right to buy out [the other members of the Company] and take ownership of their units..." Plaintiff's complaint alleges that 89/5 and other members of the Company did not sign the First Modification. According to Defendant Moore's Affirmation in Opposition to Motion to Disqualify, however, George Hargreaves, representing 89/5, orally consented to the First Modification. On June 1, 2005, Moore, again with Rubman's assistance, executed a Second Modification to the operating agreement. The Second Modification provides that E&G, "agrees that in the event the Property is not converted to a condominium as of February 1, 2006, it shall grant [the other Company members] an extension until March 15, 2006." Hargreaves affirms that he signed the Second Modification on behalf of Plaintiff 89/5 and crossed out the part which said that the Second Modification is deemed a ratification of the First Modification. The Property was not converted into a condominium until July 2006, several months after the February 1, 2006 deadline. Defendant E&G demanded that Plaintiff and other members of the Company pay E&G a monthly penalty of \$5,000 from February 2006 through the conversion date, alleging that the penalty was pursuant to the First Modification; E&G further stated that would take over the ownership interests of the other Company members if the penalty was not paid.

On December 29, 2004, Moore, represented by Scott A. Rubman, Esq. ("Rubman"), mortgaged the Company's assets in connection with a mortgage refinance to pay off the Company's previous mortgage, refinance costs and related expenses. Plaintiff claims that Moore did not get the 85% approval of Company members as required by the agreement before entering into the deal. Additionally, Plaintiff claims that the Company had extra funds from the mortgage refinance, which Moore transferred to his

own company to build out and develop his unit in the 89 Greene Street condominium; according to Plaintiff, the transfer was never authorized. Defendant Moore claims that Rubman was out of the country during the closing.

Defendants E&G and Moore exchanged correspondence in February 2006. In a letter dated February 27, 2006, Rubman, on behalf of Moore, wrote to E&G's counsel that the First Modification "is not fully executed" and "any action on your client's part to enforce this incompletely executed document...where no authority exists for this type of communication in the Operating Agreement will be responded to swiftly with the commencement of a legal action..." According to Plaintiff, who challenges the validity of the First Modification, Rubman's letter directly undermines Moore's position regarding the validity and enforceability of the First Modification and is prejudicial to Moore.

Plaintiff filed a verified complaint against Defendants on August 14, 2007, claiming several causes of action including breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and breach of fiduciary duty. Defendant Moore, represented by Mr. Rubman, filed an answer on October 26, 2007. On August 26, 2009, Plaintiff filed a motion to disqualify Mr. Rubman. Defendant Moore then filed a cross-motion for summary judgment.

ANALYSIS

Motion to Disqualify

The "advocate-witness" rule requires an attorney to withdraw from a case where it is likely he will be called as a witness. N.Y. Code of Prof. Responsibility DR 5-102, N.Y. Comp. R. & Regs. tit. 22, § 1200.21. Disqualification is only required when the attorney's testimony is necessary. (*Broadwhite Associate v. Mac Truong et al.*, 237 AD2d 162, 162-163, 654 NYS2d 144, 145 [1st Dept 1997]). In determining necessity, a court should consider factors such as significance of the matters, weight of the testimony, availability of other evidence and prejudice to the client. (*see S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 446, 515 NYS2d 735, 739 [Ct. App. 1987]; *Metropolitan Transp. Auth. v. 2 Broadway LLC*, 279 AD2d 352, 316, 720 NYS2d 12, 13 [1st Dept 2001]). The challenging party has the burden of (1) identifying the possible disqualifying testimony and (2)

demonstrating how it would be “so adverse to the factual assertions” to warrant the attorney’s withdrawal. (see *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 446, 515 NYS2d 735, 739 [Ct. App. 1987]; *Martinez v. Suozzi*, 186 AD2d 378, 379, 588 N.Y.S.2d 175, 176 [1st Dept 1992]).

Here, Plaintiff meets its burden by presenting evidence that Attorney Rubman contradicted his client Defendant Moore’s position that the First Modification was valid and enforceable. Plaintiff’s case rests upon the alleged validity of the First Modification. Mr. Rubman represented Moore throughout every critical juncture of Moore’s involvement with the Company. He was closely involved in drafting both modifications to the operating agreement; and his contradictory stance in his correspondence to E&G, which is prejudicial to his client—in fact, directly undermining his client’s position regarding the validity of the First Modification—would make his testimony necessary. Additionally, as Mr. Rubman wrote the February 27, 2006 letter to E&G, he is the only person who can testify as to the letter and its contents.

Defendant Moore’s arguments against disqualifications have no merit. Moore’s first argument, that attorney Rubman was not present when the First Modification was signed on December 29, 2004, is insufficient to defeat Plaintiff’s motion. While Plaintiff claims that Rubman was not involved in the transaction because he was out of the country, his absence at the meeting does not mean that he has no knowledge of the steps leading up to the meeting, including steps critical to the dispute. (see *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 445, 515 NYS2d 735, 739 [Ct. App. 1987] (holding that “whether [counsel] ought to testify does not depend solely on the fact that counsel has knowledge or was involved in the transaction... but whether the testimony is necessary”)). Furthermore, as Plaintiff points out, the testimony would be based on Mr. Rubman’s correspondence with Defendant E&G, not the 2004 closing. Additionally, Mr. Rubman’s affirmation that “the letter was carefully crafted so as not to state that the First Modification is invalid” (Aff. in Opp. to Motion to Disqualify ¶ 8) also has no merit. As Plaintiff argues, the letter plainly states that the purported modification is not subject to enforcement. Moreover, Moore claims that Mr. Rubman should not be disqualified because the testimony of others who were present at the closing would be essential to Plaintiff’s case. However, as Plaintiff

points out, the testimony is based on Mr. Rubman's 2006 correspondence with E&G's counsel and he is the only person who can testify to the letter's contents.

The Court has considered Defendant's remaining arguments on this issue and they are unavailing. Therefore, the Court grants Plaintiff's motion to disqualify.

Motion for Summary Judgment

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues. (*see Birnbaum v. Hyman*, 2007 NY Slip Op 6527 *2, 841 NYS2d 274, 275 [1st Dept 2007]). As with any motion to obtain summary judgment, the burden rests with the moving party to establish its claim sufficiently to enable a court to conclude that it is entitled to judgment as a matter of law (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 852 NYS2d 736, 739 [Sup. Ct. N.Y. Cty. 2008]). If the moving party has made a prima facie showing of entitlement to such judgment, the burden shifts to the opposing party to provide evidence of material issues of fact. (*see Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y. 3d 316, 320, 880 NYS2d 869, 871 [2009]).

Defendant Moore's sole argument in support of summary judgment is that Plaintiff 89/5 has no standing to sue because it is not a member of the Company. Moore alleges that Hargreaves, who had an individual interest in the Company, did not validly transfer his interest to 89/5 per the terms of the operating agreement by entering a new Note and Security Agreement for 89/5 and did not get the Company's consent to do so. However, Defendant Moore admitted in his verified answer that "plaintiff owns a 20% membership interest in the Company..." (Verified Complaint ¶ 6). At the very least, this creates issues of fact as to 89/5's ownership and its standing. Additionally, as Hargreaves points out in his affirmation in opposition to the summary judgment motion, a failure to provide a substitute Note and Security Agreement does not mean that a transfer of interest is invalid; it merely means ■ that Hargreaves would retain and not be relieved of personal liability to the Company. Furthermore, Hargreaves notes that the Company raised no objection to the transfer, waived any objection to and ratified the transfer by conducting business with 89/5 for three years. Therefore, Defendant's arguments have not met the high

standard for summary judgment. (*see Finding Group, Inc., v. Water Chef, Inc.*, 19 Misc 3d 483, 486, 852 NYS2d 736, 739 [Sup. Ct. New York Cty. 2008]).

Defendant Moore also argues that George Hargreaves' affidavit in opposition to the motion for summary judgment should be disregarded by the Court because the affidavit was signed and notarized in Britain and did not include a certificate of conformity as required by CPLR 2309(c). Under CPLR 2309(c), an affirmation taken outside the state must be accompanied by a certificate of conformity. If an out of state notarization is not accompanied by such a certificate, the defect can be cured nunc pro tunc, which Plaintiff has done. (*see Elizabeth R.E. v. Doundley A.E.*, 44 AD3d 332, 332, 841 NYS2d 871, 871-872 [1st Dept 2007]). Therefore, the Court rejects this argument as well.

Based on the above, therefore it is

ORDERED that the motion to disqualify counsel for Defendant Moore is granted; and Scott A. Rubman, Esq. is hereby disqualified from representing Defendant Moore in this matter, and it is further

ORDERED that the action is stayed for 30 days from service of a copy of this order with notice of entry upon the parties and upon Defendant Moore, who shall, within said period, retain another attorney in place of the attorney named above; and it is further

ORDERED that the new attorney retained by Defendant Moore shall serve upon all parties a notice of appearance and file same with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part within said 30-day period; and it is

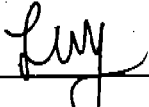
ORDERED that in the event that Defendant Moore intends to proceed pro se pursuant to CPLR 321, he is directed to notify the Clerk of the Part in writing within said 30-day period; and it is

ORDERED that the motion for summary judgment by Defendant Moore is denied.

Dated: 8/23/10

ENTER:

8/23/10



LOUIS B. YORK, J.S.C.

**LOUIS B. YORK
J.S.C.**

FILED
AUG 30 2010
NEW YORK
COUNTY CLERK'S OFFICE