

Primestone, LLC v Lichtenstein
2011 NY Slip Op 30743(U)
March 29, 2011
Supreme Court, New York County
Docket Number: 602715/06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
HON. JUDITH J. GISCHE *Justice*

PART 10

PRIMESTONE LLC
- v -
DAVID LICHTENSTEIN

INDEX NO. 602745/06
MOTION DATE _____
MOTION SEQ. NO. 5
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
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

MAR 29 2011

Dated: _____

[Signature]
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: IAS PART 10**

-----X

Primestone, LLC,

Plaintiff (s),

-against-

David Lichtenstein and Lightstone Prime, LLC.,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 602715-06

Seq. No.: 005

PRESENT:

Hon. Judith J. Gische

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

Papers

Numbered

Motion Seq. 005	
Pltf's OSC (PSJ) w/SRP affid, exhs	1
Def's opp w/MDB affirm	2
Pltf's reply w/SRP affirm, JDG affid (sep back) w/exhs	3, 4
Def's sur-reply MDB affirm, JC affid	5
Motion Seq. 006 (already decided)	
Pltf's OSC (supplement record) w/SRP affirm, KB affid, exhs	6
Def's response w/MDB affirm	7
Transcript OA 12/3/10	8
Order, Gische J., 3/3/11	9

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MAR 30 2011

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

GISCHE J.:

Plaintiff seeks partial summary judgment, ordering defendants to pay plaintiff's distributive share of capital proceeds. The motion opposed by defendants. Although this motion is brought pre-note of issue, defendants have answered the complaint. The issue of whether summary judgment relief is available is addressed at greater length

later in this decision.

Arguments Presented

Non-party Jonathan Gould is the principal of plaintiff Primestone, LLC ("Primestone"). Defendant David Lichtenstein ("Lichtenstein") is the managing member of defendant Lightstone Prime, LLC ("Lightstone Prime"). Primestone and Lichtenstein entered into the Lightstone Prime Limited Liability Company Agreement ("LP agreement"), pursuant to which Lichtenstein owns 99.15 % of the membership interests in Lightstone Prime and Primestone owns the remaining .85% of Lightstone Prime's membership interests. Lightstone Prime is in the business of owning and operating outlet centers and malls through another entity called Prime Outlets Acquisition Corp. ("POAC").

In its complaint, Primestone alleges that defendants have failed to distribute "Capital Proceeds" to plaintiff, although Lightstone Prime engaged in certain transactions which constituted "Capital Events," within the meaning of the LP agreement. The transactions identified in the complaint each took place in 2005 and 2006.

More recently, on August 30, 2010, (after this litigation had already begun) defendants closed a transaction which is the subject of the within motion by Primestone for partial summary judgment. As a result of that transaction, the Simon Property Group acquired most of Lightstone Prime's interest in POAC for approximately \$2.3 billion ("Simon transaction") paid partly in cash and partly in the distribution of stock. The parties to the Simon transaction include various Lightstone Prime subsidiaries/holdings and Lightstone Prime itself. The participating companies

contributed their outstanding membership interests in POAC and in exchange for their contribution, received "Unit Consideration" which they immediately contributed to the "new company." One of the contributing members (a Lightstone subsidiary) contributed real property in St. Augustine.

Primestone alleges that Lichtenstein received his distributive share of the Simon transaction, but has refused to distribute plaintiff's share to Primestone. Primestone argues that this is a violation of defendants' fiduciary duties, a breach of section 5.2 of the LP agreement which provides as follows:

"5.2 Distributions of Capital Proceeds. Subject to Section 5.3 below, Capital Proceeds shall be distributed within thirty (30) days of the closing which generates such Capital Proceeds in the following order of priority:

(a) First, to the Members in proportion and to the extent of their respective adjusted Capital Balances and

(b) Then, the balance shall be distributed to the Members in proportion to their respective Percentage of Membership Interests."

Primestone seeks an order directing defendants to immediately pay to it the sum of \$1,848,000, since Lichtenstein has already paid himself his share of the "Capital Proceeds."

Defendants oppose summary judgment and present the following reasons why Primestone's motion should be denied:

The first reason is that Primestone is seeking relief on an unpleaded cause of action and, since plaintiff did not amend its complaint, Primestone is seeking summary judgment before issue has been joined. Defendants also contend that by failing to provide the sworn affidavit by a person with knowledge or other proof in admissible

form, Primestone has not established its entitlement to summary judgment.

Next, defendants argue that Primestone is not seeking summary judgment at all, but a mandatory or permanent injunction, because it seeks specific performance of an alleged contract provision.

According to defendants, Primestone's motion also fails because its interpretation is contrary to the plain language of the LP agreement which provides for two kinds of distributions: 1) net cash receipts, not less frequently than annually (LP agreement section 5.1) and 2) capital proceeds within thirty (30) days of being generated under section 5.2. Defendants deny that Lightstone Prime has ever owned any real property, but instead only held a 60% equity interest in POAC. Taking this a step further, they contend the Simon transaction was not a "capital event," as defined under the LP agreement, but simply a cash receipt by LP, not subject to the thirty (30) day disbursement requirement in the LP agreement.

Among the events defined as a "Capital Event" in the LP agreement is the following: "(i) a sale of all or any part of or interest in the Company's assets, exclusive of sales or other dispositions of tangible personal property in the order course of business..." "Capital Proceeds" are defined as "the net cash receipts of the Company [Lightstone Prime, LLC] from a Capital Event as reduced by . . ." certain amounts (LP agreement § 1.1 [i]).

Primestone decries all of this as being a sudden about-face from earlier correspondence by Lichtenstein who, in 2005, in connection with a prior matter concerning the proceeds of a loan made to subsidiaries of POAC, wrote Primestone a letter stating that it was paying Primestone its share of the loan proceeds as "a

distribution of Capital Proceeds (as defined in the LLC agreement) pursuant to Section 5.2 (b) of the LLC agreement . . .” Thus, according to Primestone, defendants not only agree, they have always understood, that “Capital Proceeds” as defined in the LP agreement includes transactions related to real property owned by POAC subsidiaries.

Alternatively, Primestone argues that even if the court is persuaded by defendants’ literal interpretation of a “Capital Event,” defendants have taken their distribution and are required to pay Primestone its proportionate share, not only because that is required under section 5.1 of the LP agreement, but also because Gould suspects defendants are trying to wield economic leverage over Gould, if not actually deprive him of his money altogether.

Primestone was allowed to supplement its motion with the added information contained in its order to show cause of October 12, 2010 (Order, Gische J., 3/3/11). Primestone adds that defendants have not denied receiving their disbursement and that if the court grants the plaintiff summary judgment, the payment of cash should not come from the money held in escrow pursuant to an agreement of the parties.

Discussion

While the general rule is that a party cannot obtain summary judgment on an unpleaded cause of action (Cohen v. City Co. of New York, 283 NY 112 [1940]), summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and the opposing party has not been misled, to its prejudice (Weinstock v. Handler, 254 AD2d 165 [1st Dept 1999]). Thus, as with a trial, the pleadings may be deemed amended to comply with the proof (Weinstock v. Handler, 254 AD2d at 166).

It is undisputed that this particular claim is not contained in the complaint. Rather than bringing a motion to amend the complaint when this was raised in opposition and at oral argument, Primestone moved to amplify the record on its motion for summary judgment. According to Primestone, the Simon transaction is but another example of defendants' refusal to distribute "Capital Proceeds," as alleged in the original complaint.

Examining the summons and complaint, Primestone makes factual allegations that defendants entered into various refinancing transactions in 2005 and 2006 which they have refused to divulge any information about. According to Primestone, although those were "Capital Events," defendants did not distribute Primestone's share of the "Capital Proceeds." Two transactions are identified: each of which were in 2006. One transaction as for \$800 million; the other for \$388 Million.

The Simon transaction was not, however, a refinancing transaction, but a conveyance of assets. The transaction did not take place in either of those years (2005 or 2006) but more recently in 2010, only after this case was commenced. The claim that Primestone is seeking summary judgment on is new and, until Primestone brought this motion, never an issue in this case. Since summary judgment is not available on an unpleaded cause of action or before issue has been joined, this dispositive motion must be denied for that reason alone.

Even were the court persuaded that this motion should be treated as one for a preliminary injunction, bringing with it a more relaxed burden of proof, it would still be denied. A party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a

balance of equities in its favor (see CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to such relief, and a preliminary injunction can, in the court's discretion, even be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept 2001]), In this context, "irreparable injury" means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue *pendente lite*, and if granted, tailored to fit the circumstances so as to preserve the *status quo* to the extent possible (generally, Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66 AD3d 255 [1st Dept 2009]).

In bringing this motion, Primestone is seeking the ultimate relief of having money that it claims are "Capital Proceeds" from a "Capital Event" distributed to the plaintiff. Primestone has not shown that the present circumstances are "imperative, urgent, or [of] grave necessity" to warrant such relief (Sithe Energies, Inc. v. 335 Madison Ave., LLC, 45 AD3d 469, 470 [1st Dept 2007]), or that the *status quo* would be disturbed if the money is not distributed. The vague accusations, that defendants are scheming to deprive plaintiff of its rightful due are insufficient. Thus, Primestone is not entitled to receive *pendente lite* the ultimate relief sought (St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc., 308 AD2d 347 [1st Dept 2007]).

Other arguments about whether the Simon transaction is a "Capital Event" or a "Cash Receipt) highlight the interlocking and complex relationship of these companies that cannot be easily teased apart. The Simon transaction did not simply involve a sale

by defendants of the company's assets (LP Agreement section 1.1[h]). But even if Primestone is right, and this was a "Capital Event" and defendants wrongfully distributed the "Capital Proceeds" to themselves without then distributing Primestone's share, this is compensable through money damages.

Conclusion

Primestone's motion is denied for each of the reasons stated. Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
March 29, 2011

So Ordered:



Hon. Judith J. Gische, JSC

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MAR 30 2011

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