

Born to Build LLC v 1141 Realty LLC

2012 NY Slip Op 30324(U)

January 3, 2012

Supreme Court, New York County

Docket Number: 108128/2011

Judge: Lucy Billings

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

PRESENT: LUY JILLINGS
J.S.C. Justice

PART 44

BORN TO BUILD LLC,

INDEX NO. 108128/2011

- v -

1141 REALTY LLC, KUANG CHIH LI a/k/a
KENNY LI, and JOHN DOES 1 through 10

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion *to/for a preliminary injunction*

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that ~~this motion~~ :

The court vacates the temporary injunction in the order to show cause dated July 18, 2011, denies petitioner's motion for a preliminary injunction, and denies respondent 1141 Realty LLC's cross-motion to dismiss the petition and to impose sanctions, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(1) and (7), 6301, 6312(a).

FILED

FEB 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/12

Luy Jillings

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):

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

FEB 09 2012

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BORN TO BUILD LLC,

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner

Index No. 108128/2011

- against -

1141 REALTY LLC, KUANG CHIH LI a/k/a
KENNY LI, and JOHN DOES 1 through 10
(the persons intended being other
individuals or entities claiming
ownership interests in 1141 Realty LLC),

DECISION AND ORDER

Respondents

-----x

LUCY BILLINGS, J.:

In this proceeding to dissolve respondent 1141 Realty LLC, petitioner moves preliminarily to enjoin respondents from disposing of respondent LLC's assets, claiming it purchased nonparty Ibrahim Saleh's membership interest in respondent LLC June 23, 2011, but the LLC's other member, respondent Li, will not cooperate with petitioner in the LLC's management. C.P.L.R. §§ 6301, 6311(a), 6312(a). Respondent 1141 Realty LLC cross-moves to dismiss the petition, claiming documentary evidence establishes that Saleh was never a member of respondent LLC, C.P.L.R. § 3211(a)(1) and (7), and for sanctions based on the absence of merit to the petition. 22 N.Y.C.R.R. § 130-1.1(c).

Even if respondent 1141 Realty LLC's witness John Mei is competent to authenticate respondent LLC's operating agreement, which, according to respondent LLC, reflects that Saleh was not a member of the LLC, petitioner has raised controverting facts in

its petition and supporting affidavits. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595-96 (2008); Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 151-52 (2002). Petitioner's affidavits that Saleh held himself out as respondent LLC's owner are not hearsay, as they are based on the witnesses' observations of and personal experiences with Saleh, not simply his statements, even though the affidavits may contain hearsay insofar as they attest that he claimed to be an owner. The affidavit that Saleh negotiated the sale of respondent LLC's property through April 2011 and his recorded guarantee of the mortgage debt for the property further evidence his control of respondent LLC.

Finally, the operating agreement, on which respondent 1141 Realty LLC relies to establish that Main Team Hotel, LLC, not Saleh, owned a controlling interest in respondent LLC, does not show that Main Team Hotel in fact owned a 50% or greater interest as of June 23, 2011. For all these reasons, the court denies respondent 1141 Realty LLC's cross-motion to dismiss the petition, C.P.L.R. § 3211(a)(1) and (7); Lawrence v. Graubard Miller, 11 N.Y.3d at 596-97; Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326-27; 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d at 153-54; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010), and its motion for sanctions, which was premised on a meritless petition. 22

N.Y.C.R.R. § 130-1.1(c).

The court also vacates the temporary injunction and denies petitioner's motion for a preliminary injunction, however, because petitioner has not shown any immediate threat that respondents will dispose of the assets in which petitioner claims an interest. C.P.L.R. §§ 6301, 6312(a). E.g., Moore v. Ruback's Grove Campers' Assn., Inc., 85 A.D.3d 1220, 1221 (3d Dep't 2011); Di Fabio v. Omnipoint Communications, Inc., 66 A.D.3d 635, 637 (2d Dep't 2009); Schmitt v. City of New York, 50 A.D.3d 1010, 1011 (2d Dep't 2008). See Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 272 (1st Dep't 2009); OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 40 A.D.3d 413, 414 (1st Dep't 2007); FTI Consulting, Inc. v. PricewaterhouseCoopers LLP, 8 A.D.3d 145, 146 (1st Dep't 2004). Saleh, whom petitioner claims was negotiating the sale of respondent LLC's property, is no longer associated with the LLC. Moreover, should respondents divest themselves of assets to which petitioner ultimately is entitled, petitioner may preserve its right to collect a judgment via a fraudulent conveyance claim against any transferee. N.Y. Debt. & Cred. Law §§ 273-76.

In sum, the court vacates the temporary injunction in the order to show cause dated July 18, 2011, which in any event expired October 21, 2011; denies petitioner's motion for a preliminary injunction; and denies respondent 1141 Realty LLC's

cross-motion to dismiss the petition and to impose sanctions.
This decision constitutes the court's order.

DATED: January 3, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

FEB 09 2012

**NEW YORK
COUNTY CLERK'S OFFICE**