

Katan Group, LLC v CPC Resources, Inc.
2012 NY Slip Op 33990(U)
September 20, 2012
Supreme Court, New York County
Docket Number: Index No. 650664/12
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 651450/2012
KATAN GROUP, LLC
vs.
CPC RESOURCES, INC.
SEQUENCE NUMBER : 002
CONSOLIDATE / JOINT TRIAL

INDEX NO. 651450/12
MOTION DATE 8/29/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to , were read on this motion tofor consolidate and dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9-20-12

Eileen Bransten, J.S.C.
HON. EILEEN BRANSTEN

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked) DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE (checked)

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

-----X
KATAN GROUP, LLC,
individually and derivatively as a member
of Refinery Management LLC,

Plaintiff,

-against-

CPC RESOURCES, INC., CPCR OPPORTUNITY
FUND II, LLC, and JOHN DOES 1-20 inclusive,

Defendants.
-----X

Index No. 650664/12
Motion Date: 8/20/12
Motion Seq. No.: 009

KATAN GROUP, LLC,

Plaintiff,

-against-

CPC RESOURCES, INC., THE REFINERY LLC,
DOMINO MEZZ HOLDINGS LLC and PCCP, LLC,

Defendants.
-----X

Index No. 651450/12
Motion Date: 8/20/12
Motion Seq. No.: 002

BRANSTEN, J.

Defendants CPC Resources, Inc. (“CPCR”), CPCR Opportunity Fund II, LLC (“Fund II”) and The Refinery LLC (“Refinery” or “Fee Owner”) (CPCR, collectively with Fund II and Refinery, the “Moving Defendants”) move in *Katan Group, LLC v. CPC Resources, Inc., et al.*, Index No. 650664/2012 and in *Katan Group, LLC v. CPC Resources, Inc., et al.*, Index No. 651450/2012 (both *Katan Group* actions collectively the “Prior Actions”) to consolidate *Katan Group, LLC v. CPC Resources, Inc., et al.*, Index No. 13071/2012 (the “New Action” or the “Third Action”) with either or both of the Prior Actions. If consolidation is ordered,

Moving Defendants also move, pursuant to CPLR 3211(a)(1) and (5), to dismiss the New Action on the ground that each of the three causes of action asserted therein is barred by documentary evidence and principles of collateral estoppel and *res judicata*.

If the New Action is dismissed, Moving Defendants move, pursuant to CPLR §§ 6501 and 6514, for the court to direct the Clerk of Kings County to cancel the notice of pendency filed by plaintiff Katan Group, LLC (“Plaintiff”) in connection with the New Action. Moving Defendants further request attorneys’ fees and costs.

1. Background

I. Related Katan Group Actions

The facts of the Prior Actions have been previously discussed at length by this court. Accordingly, familiarity with the facts is assumed and only facts necessary to the instant motion will be discussed herein.

Each of the actions filed by Plaintiff concern Plaintiff’s fifty percent ownership interest in Refinery Management LLC (“Management”) and Management’s indirect ownership interest in real property commonly known as the Domino Sugar Refinery in Brooklyn, New York (Block 2413 Lot 1 and Block 2428 Lot 1, Kings County) (the “Property”).

*a. The First Action*¹

Plaintiff filed its first action in New York County on March 16, 2012 (the “First Action”). Plaintiff sought, *inter alia*, to enjoin CPR from transferring an approximate 84% interest in the Property to the lender in exchange for forgiveness of the mortgage loan on the Property (the “Lender Transaction”).

On April 30, 2012, this court denied Plaintiff’s motion for injunctive relief to halt the transaction. The court held that, pursuant to the Second Amended and Restated Operating Agreement of Refinery Management LLC between Plaintiff, CPR and Fund II (the “Second Operating Agreement”), CPR was entitled to effect the proposed transaction. *See* Decision and Order on Motion Sequence Number 2, dated April 30, 2012 (Index No. 650664/2012) (the “April 30th Decision”).

*b. The Second Action*²

On May 1, 2012, Plaintiff filed its second action in New York County (the “Second Action”). Plaintiff again sought to stop the Lender Transaction from closing.

Plaintiff argued that the Second Operating Agreement between Plaintiff and CPR provided Plaintiff with a right of first refusal to purchase the Property if CPR were to sell

¹ Unless otherwise provided, the facts in this subsection are taken from this court’s April 30th Decision.

² Unless otherwise provided, the facts in this subsection are taken from this court’s Decision and Order on Motion Sequence Number 1, dated July 26, 2012 (Index No. 12-651540) (“July 26th Decision”).

the Property to a third party. Plaintiff contended that it had duly exercised its right of first refusal to purchase the Property and that CPCR had failed to honor it.

In its July 26th Decision on Moving Defendants' motion to dismiss, the court held that Plaintiff does not have such a right of first refusal on the Property. Rather, Plaintiff has a right of first refusal to purchase another Management member's interest in Management, not the Property, should a member wish to sell such interest to a non-member.

Accordingly, the court dismissed each of Plaintiff's causes of action in the Second Action. The court did so because Plaintiff's three asserted claims, breach of contract, breach of the implied covenant of good faith and fair dealing and constructive trust, were each based on Plaintiff's non-existent right of first refusal to purchase the Property. The Second Action remains pending for both for the purpose of determining the amount of attorneys' fees and costs to which CPCR is entitled and because Plaintiff has appealed this court's July 26th Decision.

c. The Third Action

Plaintiff filed its Third Action in Kings County, simultaneously filing a second notice of pendency on the Property ("Second Notice of Pendency"), on June 25, 2012. Plaintiff sought to voluntarily discontinue both of the Prior Actions before this court without prejudice. This court would not permit Plaintiff to withdraw the Prior Actions without prejudice in light of the potential prejudice to defendants. Accordingly, Moving Defendants

brought the instant motion to consolidate the Third Action with either or both of the Prior Actions.

In Plaintiff's Third Action, Plaintiff again seeks to exercise a purported right of first refusal on the Property. *See* Milito Affirm³, Ex. C ("Third Action Complaint"). In the Third Action, Plaintiff seeks to exercise its right of first refusal by purchasing the Property on the same terms offered for the Property by new defendant New DS Acquisitions LLC ("New DS") in a new transaction with CPCR (the "New DS Transaction"). Third Action Complaint, ¶¶ 1-6. The Lender Transaction, the basis of the Prior Actions, contemplated the sale of an 84% interest in the Property to the Fee Owner's mortgage lender. The New DS Transaction contemplates a 100% sale of the Property.

Plaintiff brought the Third Action in Kings County, despite having brought the first two very related actions in New York County. Plaintiff claims that, unlike in the Prior Actions, Kings County is the mandatory venue for the Third Action. Plaintiff bases its argument first on the fact that CPLR § 507 provides that "the place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." Plaintiff also contends venue is proper in Kings County because Defendants New DS and Two Trees Management Corp. ("Two Trees") have their principal places of business in Kings County. Third Action Complaint, ¶¶ 13-14.

³ Affirmation of Christopher Milito in Opposition to Defendants' Motion to Consolidate, to Dismiss and to cancel the Notice of Pendency ("Milito Affirm.").

II. The Instant Motions

The Moving Defendants filed the identical instant motions, one in each of the Prior Actions, to consolidate the Third Action with either or both of the Prior Actions before this court. Moving Defendants contend that the actions should be consolidated because each of the Prior Actions in New York County was commenced before the Third Action, and Moving Defendants argue that each of the Prior Actions share at least one question of law or fact in common with the Third Action. Moving Defendants also contend that the consolidated action should be venued in New York County because the Prior Actions were both venued here and the Second Operating Agreement between Plaintiff, CPCR and Fund provides for venue in New York County. Moving Defendants' Memo⁴, p. 4-5.

Upon consolidation, Moving Defendants argue that the court should dismiss the entirety of Plaintiff's Third Action. They argue that each claim in the Third Action is premised on Plaintiff's contention that the Second Operating Agreement gives Plaintiff a right of first refusal to purchase the Property on terms being offered by a third party. This court held in its July 26th Decision, that Plaintiff does not have such a right of first refusal. Moving Defendants thus argue that the Third Action should be dismissed based on collateral estoppel. *Id.*, p. 5.

⁴ Moving Defendants' Memorandum of Law in Support of Motion to Consolidate, to Dismiss, and to Cancel the Notice of Pendency ("Moving Defendants' Memo").

Upon dismissal of the Third Action, Moving Defendants argue that the court should award Moving Defendants attorneys' fees and costs and should direct the Clerk of the County of Kings to cancel the notice of pendency on the Property. *Id.*, p. 5-6.

Plaintiff opposes the motion.

2. Analysis

I. Motion to Consolidate

a. *Standard of Law*

CPLR 602 (a), governing the consolidation of actions generally, provides that: 'When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[']

When two actions are pending in the Supreme Court in different counties, the motion to consolidate may be made in either county, and in the order consolidating the two actions, the court must necessarily fix the venue of the consolidated action. In deciding the venue issue, the court, in its sound discretion, must consider a number of factors, including the county where the cause of action arose and where the parties and witnesses are located.

Woods v. County of Westchester, 112 A.D.2d 1037, 1038 (2d Dep't 1985) (internal citations omitted). "In the absence of special circumstances, where the actions have been commenced in different counties venue should be placed in the county having jurisdiction over the action

first commenced.” *TT Enterprises v. Gralnick*, 127 A.D.2d 651, 652 (2d Dep’t 1987); *see also Velasquez v. C.F.T., Inc.*, 240 A.D.2d 178 (1st Dep’t 1997) (travel by witnesses from the Bronx to Kings County is not so arduous as to be a special circumstance justifying departure from the general rule favoring venue in the county where the first action was commenced).

b. Consolidation

The complaints in the Second Action and the Third Action center around Plaintiff’s purported Second Operating Agreement-granted right of first refusal to purchase the Property on terms offered by a third party.

Plaintiff’s argument that the court may not consolidate the Third Action with the Second Action because this court dismissed the Second Action in its July 26th Decision is without merit. The Second Action continues to pend for the purposes of a determination of attorneys’ fees to be awarded to defendants and in the First Department Appellate Division for Plaintiff’s appeal. Because the Second Action continues to pend and shares a common question of law with the Third Action, the interpretation of the Second Operating Agreement’s right of first refusal language, the court grants Moving Defendants’ motions to consolidate the Second and Third Actions.

c. Setting Venue

The court sets the venue of the consolidated action in New York County. Plaintiff's arguments that venue in New York County is improper fail.

Plaintiff argues that CPLR § 507 requires the action be brought in Kings County. Plaintiff's Memo⁵, p. 12. CPLR § 507 provides that "[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property shall be in the county in which any part of the subject of the action is situated." However, Plaintiff fails to mention that the Second Operating Agreement, to which Plaintiff is a signatory and from which Plaintiff contends its right of first refusal stems, provides that "any legal or equitable action or proceeding arising under or in connection with this [Second Operating] Agreement may be brought in Federal or state court in the County of New York, State of New York" and that "by execution and delivery of this [Second Operating] Agreement [CPCR, Fund II and Plaintiff] irrevocably and unconditionally submit[] to the jurisdiction and venue of such courts[.]" Affirmation of Mark Walfish, Ex. B.6 ("Second Operating Agreement") at 18.

Parties to a contract may freely select a forum which will resolve any disputes arising under the contract. *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 (1996). "Such clauses are prima facie valid and enforceable unless shown by the resisting party to be

⁵ Katan Group's Memorandum of Law in Opposition to Consolidate, to Dismiss and to Cancel the Notice of Pendency ("Plaintiff's Memo").

unreasonable. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes[.]” *Id.* (internal citations omitted).

Though Plaintiff does not address the forum selection clause in its opposition brief, it states merely at oral argument that the clause is here without effect because the language is permissive rather than mandatory, and thus cannot trump CPLR § 507. *See* Transcript of August 2, 2012 (Angela Tolas, O.C.R.), pp. 16-17. This contention is without merit.

In the absence of a showing of unreasonableness of the clause, courts routinely uphold forum selection clauses even where the clauses do not expressly provide that the selected forum shall have “exclusive” jurisdiction or that all suits “must” be filed in the selected forum. *See Micro Balanced Products Corp. v. Hlavin Indus. Ltd.*, 238 A.D.2d 284, 284-85 (1st Dep’t 1997) (language that a court “shall have jurisdiction” is mandatory and that courts should not adopt interpretations of forum selection clauses that would render the clause meaningless); *see also The Levin Group L.P. v. Bowater*, 2008 NY Slip Op 30201U, 2008 *4, 2008, N.Y. Misc. LEXIS 7585 *3-4, 2008 WL 279223 (Sup. Ct. N.Y. Co. Jan. 23, 2008)(Cahn, J.) (rejecting the argument that the word “may” within a forum selection clause makes it permissive rather than mandatory).

Plaintiff brought the first two actions in New York County. Plaintiff may not now claim that venue is improper in New York County on the basis that a judgment in the Third

Action would affect title to and use of real property located in Kings County, thereby raising CPLR § 507. Were the court to issue a judgment in one of the Prior Actions, it would have also affected title to and use of real property located in Kings County. Even though the Lender Transaction at issue in the Prior Actions did not contemplate an outright sale of the Property, it did contemplate transferring fee ownership of the Property to a new entity. *See* Walfish Affirm., Ex. 2 (“Second Action Complaint”), ¶ 3 (stating that “the sale of the Property proposed by CPCRC will transfer fee ownership of the Property from an entity owned in part by Plaintiff to a new entity which will be controlled by outside parties”). Plaintiff’s argument is at best disingenuous and such attempts at forum shopping will not be tolerated by the courts.

Plaintiff’s argument that the court may not reach the issue of venue on this motion because defendants have not served the required demand for a change of venue pursuant to CPLR § 511 also fails. “In ordering consolidation, the designated venue for one cause of action must be ignored.” *Siegel v. Greenberg*, 85 A.D.2d 516, 517 (1st Dep’t 1981). In the face of a consolidation, where a party fails to comply with the CPLR § 511 requirement that the party make a formal demand for change of venue, the motion to change venue is left to the discretion of the court. *Id.*

The court sees no reason to stray from the general rule that actions should be consolidated in the county of the first filed action, particularly where, as here, the parties

contracted to submit to venue in New York County. Furthermore, New DS and Two Trees Management Corp., new Third Action defendants with principal places of business in Kings County, do not oppose the consolidation in New York County. *See* Transcript of August 2, 2012 (Angela Tolas, O.C.R.), p. 36.

Accordingly, the Second and Third Actions are consolidated in New York County.

II. Motion To Dismiss

Moving Defendants move to dismiss the Third Action pursuant to CPLR 3211(a)(5). Moving Defendants contend that each of the causes of action therein was fully disposed of by the June 26th Decision, which held that Plaintiff does not have a right of first refusal on a sale of the Property.

CPLR 3211(a)(5) provides that a party may move to dismiss the causes of action asserted against it on the ground that “the cause of action may not be maintained because of . . . collateral estoppel.”

Alternatively, Moving Defendants argue that the court should dismiss each of Plaintiff’s claims pursuant to CPLR 3211(a)(1) on the basis of documentary evidence. Moving Defendants’ Memo, pp. 16-19. The court finds that the Third Actions is barred by collateral estoppel and therefore does not reach Moving Defendants’ alternative argument.

Plaintiff contends that collateral estoppel does not bar its Third Action claims. Plaintiff asserts that the Third Action is based on the New DS Transaction, and that this new

transaction differs from the Prior Actions' Lender Transaction. Plaintiff's Memo, p. 17. Plaintiff contends that the court's June 26th Decision in the Second Action decided a different issue—whether CPC Resources was entitled to effect a transaction that would transfer an 84% interest in the Property to its existing mortgage lender. *Id.*, pp. 17-18. Plaintiff also contends that collateral estoppel is of no effect because there is an appeal pending on this court's June 26th Decision.

Though the court agrees with Plaintiff that the Lender Transaction and the New DS Transaction differ slightly, the court finds that the issue of whether or not Plaintiff has a right of first refusal, pursuant to the Second Operating Agreement, to purchase the Property on terms offered by a third party remains the same and was decided in the court's June 26th Decision.

“The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules.” *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001).

Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party[.]. . . The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.

Ventur Group, LLC v. Finnerty, 80 A.D.3d 474 (1st Dep't 2011) (internal citations and quotations omitted).

In the court's June 26th Decision this court held that "[t]he clear language of the [] Second Operating Agreement does not provide Plaintiff a right of first refusal with regard to sale of the Property." June 26th Decision, p. 10.

The court then dismissed Plaintiff's claims for breach of contract, breach of the implied covenant of good faith and fair dealing and for a constructive trust on the Property. The court did so based on the fact that each of those causes of action was based on CPC's refusal to honor Plaintiff's purported right of first refusal on the Property, a contract provision that was not a part of the Second Operating Agreement. *Id.*, p. 10-14.

This court's June 26th Decision was material to the Second Action. The court decided based on the Second Operating Agreement, that Plaintiff had no right of first refusal on a purchase of the Property. The court then dismissed the entirety of Plaintiff's case. The motion to dismiss was fully briefed and argued to the court prior to its decision on the motion. Accordingly, Plaintiff had a full and fair opportunity to be heard on the right of first refusal issue.

Each of the three causes of action in the Third Action are again premised on Plaintiff's attempt to enforce its purported right of first refusal on a sale of the Property. *See* Third Action Complaint, ¶¶ 65-76 (premising Plaintiff's breach of contract cause of action on CPC's alleged failure to honor the Second Operating Agreement's right of first refusal); ¶¶ 77-83 (premising Plaintiff's breach of the implied covenant of good faith and fair dealing

cause of action on the Second Operating Agreement's right of first refusal); ¶¶ 84-92 (premising Plaintiff's cause of action for a constructive trust on the Property on the Second Operating Agreement's right of first refusal).

Although Plaintiff seeks nominal relief against Rafael Cestero in his capacity as president of CPCR, the Third Action does not otherwise seek any relief against any defendant other than CPCR and the Fee Owner, each of which was a party to the Second Action. No relief is sought against defendants New DS and Two Trees.

Further, the pending appeal on this court's June 26th Decision does not alter the applicability of the doctrine of collateral estoppel at this time. *See Plaza PH2001 LLC v. Plaza Residential Owner LP*, 947 N.Y.S.2d 498 (1st Dep't 2012) (a pending appeal does not alter the applicability of the doctrine of *res judicata*); *see also Petrella v. Siegel*, 843 F.2d 87, 90 (2d Cir. 1988) (a New York state court's determination of a certain issue in the case should be given preclusive effect despite a pending appeal of the state court's judgement on that issue).

Accordingly, Plaintiff's complaint in the Third Action is dismissed in the entirety.

III. Motion to Cancel Notice of Pendency on the Property

Moving Defendants argue that, upon dismissal of the Complaint, the court should direct the immediate cancellation of the Second Notice of Pendency on the Property.

A notice of pendency cannot be maintained in the absence of a valid claim. *Guberman v. Rudder*, 85 A.D.3d 683, 684 (1st Dep't 2011). Once a court dismisses an

action on the merits, a notice of pendency premised on the property involved in that action is properly canceled. *Yenom Corp. v. 155 Wooster St., Inc.*, 33 A.D.3d 67, 73-74 (1st Dep't 2006).

Accordingly, because the court herein dismissed the entirety of Plaintiff's Complaint as collaterally estopped by the court's June 26th Decision, the court also grants Moving Defendants' motion to direct the Clerk to cancel the Second Notice of Pendency on the Property.

IV. Attorneys' Fees and Expenses Resulting from Notice of Pendency

Moving Defendants argue that, upon dismissal of Plaintiff's Complaint as against CPR, the court must, pursuant to the Second Operating Agreement, direct Plaintiff to pay all of CPR's attorneys' fees in this action.

The Second Operating Agreement provides:

[i]n the event of any litigation brought by Katan or any [a]ffiliates against [Refinery Management] and/or CPR, or in the event of any litigation brought by [Refinery Management] and/or CPR or any [a]ffiliates against Katan, the prevailing party shall be entitled to recover the reasonable attorneys' fees incurred by it in prosecuting or defending against the action.

Second Operating Agreement, § 13(k).

Because the court has dismissed Plaintiff's Third Action Complaint in its entirety, CPR is the prevailing party in this action. Accordingly, the court grants CPR's motion for attorneys' fees incurred by CPR or its affiliates in the defense of this action.

In addition, the court awards Moving Defendants any costs and expenses incurred as a result of the filing and cancellation of the second notice of pendency. “The court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.” CPLR § 6514(c). New York courts award costs and expenses upon an order cancelling a notice of pendency when it finds that the plaintiff did not commence the action or file the notice of pendency in good faith. *See, e.g., Josefsson v. Keller*, 141 A.D.2d 700 (2d Dep’t 1988) (trial court properly exercised its discretion in awarding defendants costs and expenses occasioned by filing of notice of pendency in light of its determination that plaintiff did not commence the action and file the notice of pendency in good faith).

The court finds that the Plaintiff did not file the Third Action and the corresponding Second Notice of Pendency in good faith. The court has held several times, as early as its April 30th Decision in the First Action, that the Second Operating Agreement permits CPCOR, as managing member of Management, to sell all or any portion of the Property. The court explicitly held in its June 26th Decision in the Second Action that Plaintiff does not have a right of first refusal on the Property.

Plaintiff filed the second Notice of Pendency on June 25, 2012. Plaintiff should have been aware as of this court’s April 30th Decision that the Third Action does not support a notice of pendency. Even if Plaintiff was unaware as of June 25, 2012, the date it filed the

second notice of pendency, it was certainly aware as of June 28, 2012, the date this court handed down its June 26th decision canceling Plaintiff's first notice of pendency. Plaintiff did not take any steps thereafter to cancel the notice of pendency and maintained its similar claims in another court. Accordingly, this court finds that Plaintiff acted in bad faith in filing and continuing the notice of pendency and that Katan must pay the costs and expenses incurred by the Moving Defendants resulting from the second notice of pendency and the cancellation thereof.

The court has considered the parties' remaining arguments and finds them unavailing.

Order

Accordingly it is hereby

ORDERED that defendants CPC Resources, Inc. and CPC Resource Opportunity Fund II's (in Index No. 650664/12) and CPC Resources, Inc. and The Refinery LLC's (in Index No. 651450/12) motions to consolidate (motion sequence no. 9 in Index No. 650664/12 and motion sequence no. 2 in Index No. 651450/12) are GRANTED and *Katan Group, LLC v. CPC Resources Inc., et al.*, Index No. 651450/12 (New York County) is consolidated with *Katan Group, LLC v. CPC Resources, Inc., et al.*, Index No. 13071/12 (Kings County) in this

court under New York County Index No. 651450/12 and the consolidated action shall bear the following caption:

-----X
KATAN GROUP, LLC, Index No. 651450/12
Plaintiff,
-against-
CPC RESOURCES, INC., THE REFINERY LLC,
DOMINO MEZZ HOLDINGS LLC and PCCP, LLC,
Defendants.
-----X

And it is further

ORDERED that the Clerk of the Supreme Court, Kings County, shall transfer the papers on file under Index No. 13071/12 to the Clerk of this Court upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-file Support

Office (Room 119), who are hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that defendants CPC Resources, Inc. and CPCO Opportunity Fund II's (in Index No. 650664/12) and CPC Resources, Inc. and The Refinery LLC's (in index No. 651450/12) motions to dismiss each of the three causes of action contained in the complaint as against all defendants (motion sequence no. 9 in Index No. 650664/12 and motion sequence no. 2 in Index No. 651450/12) is GRANTED and the complaint is hereby dismissed in its entirety; and it is further

ORDERED that defendants CPC Resources, Inc. and CPCO Opportunity Fund II's (in Index No. 650664/12) and CPC Resources, Inc. and The Refinery LLC's (in index No. 651450/12) motions to vacate the notice of pendency in the instant action, filed with the Kings County Clerk on June 25, 2012, by plaintiff, Katan Group, LLC (motion sequence no. 9 in Index No. 650664/12 and motion sequence no. 2 in Index No. 651450/12) is GRANTED and the Kings County Clerk is directed upon service of a copy of this order with notice of entry, to vacate that notice of pendency; and it is further

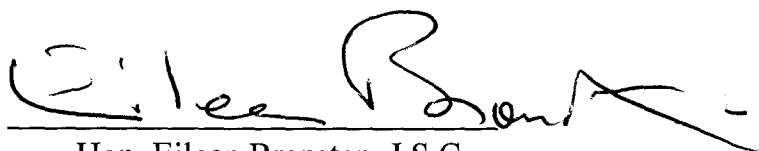
ORDERED that the issue of the total amount of reasonable attorneys' fees incurred by CPC Resources, Inc. and its affiliates in defending against *Katan Group LLC v. CPC Resources, Inc., et al.*, Index No. 13071/12 (Kings County) (the "Third Action") and the costs and expenses incurred by CPC Resources, Inc., CPCO Opportunity Fund II and The

Refinery LLC occasioned by the filing and cancellation of the Third Action and the corresponding notice of pendency is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures") shall assign this matter to an available JHO/Special Referee to hear and report as specified above. It is recommended that the Special Referee Clerk place this on the calendar to be heard with the hearing on the issue of reasonable attorneys' fees in *Katan Group LLC v. CPC Resources, Inc., et al.*, Index No. 651450/2012.

This constitutes the decision and order of the court.

Dated: New York, New York
September 20 2012

ENTER:


Hon. Eileen Bransten, J.S.C.