

Delgrange v Madison Immobilier, LLC

2013 NY Slip Op 31296(U)

June 11, 2013

Sup Ct, NY County

Docket Number: 151651/13

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN Justice
J.S.C.

PART 11

DEGRANGE, PHILIPPE

INDEX NO. 151651/13

MOTION DATE 5-30-13

MADISON IMMOBILIER, LLC,
ETAL.

MOTION SEQ. NO. 04

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 is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: June 11, 2013

HON. JOAN A. MADDEN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
PHILIPPE DELGRANGE,

Plaintiff,

INDEX NO. 151651/13

-against-

MADISON IMMOBILIER, LLC, ROBERT CAVALLI,
INC., ROBERT CAVALLI, USA, INC., JEAN-PIERRE
LEHMAN, ART FASHION CORP., JOHN DOES 1-25,

Defendants.

-----X
JOAN A. MADDEN, J.:

Plaintiff Philippe Delgrange (“Delgrange”) moves, by order to show cause, for an order requiring defendant Madison Immobilier, LLC (“Madison”) to produce a copy of a Stock Purchase Agreement (“SPA”). Defendants Madison and Jean-Pierre Lehman (“Lehman”) oppose the motion and cross move for an order pursuant to CPLR 3126 compelling Delgrange to permit the inspection and asbestos testing in Apartment No. 4 (“the Apartment”) within 15 days or that his complaint be stricken.¹ Defendant Art Fashion Corp. also opposes the motion.

This action arises out of certain construction work performed at 25 East 63rd Street, New York, NY, known as 711 Madison Avenue (“the Building”) beginning on or about December 2012, which resulted in the release of asbestos in the air and caused the New York City Department of Environmental Protection (“DEP”) to shut down the project by order dated February 7, 2013, but work was subsequently permitted to proceed when asbestos abatement was

¹By interim order dated May 30, 2013, the court resolved the cross motion by ordering that “the inspection, testing and photographing with respect to the premises and plaintiff’s apartment shall be conducted on June 12 and June 13, 2013.”

completed on February 19, 2013. Delgrange is a residential tenant in the Building and asserts that he was exposed to asbestos as the result of defendants' allegedly negligent, reckless and dangerous conduct.

Madison, which is a New York limited liability company, owns the Building, and Lehman is Madison's Chief Executive and the sole owner of the two members that own Madison. Art Fashion has leased space in the Building since 1999, and in December 2010, it entered into a new lease agreement with Madison to expand the size of its retail store to include space formerly leased by Delgrange.²

Delgrange previously moved for an order (i) attaching the funds from an upcoming sale of the Building pursuant to CPLR 6201(1) and 6212(a), (ii) granting expedited discovery within seven days, and (iii) granting immediate access to the Building to permit plaintiff to inspect, take measurements, sample and otherwise record the air and other conditions in the Building to determine whether, and how much, airborne asbestos is present. Degrange's request for an order of attachment was based on an assertion, upon information and belief, that the Building is the sole asset of Madison and that the funds will be disbursed outside of New York to Lehmann who is a resident of Switzerland. Defendants Madison and Lehmann opposed the motion and cross moved to dismiss the complaint based on documentary evidence.³

By interim order dated April 13, 2013, Delgrange was permitted to withdraw his motion for an attachment conditioned on Madison providing to him "written notice of the following

²By stipulation dated April 30, 2013, the action against defendants Robert Cavalli USA, Inc. and Robert Cavalli, Inc. was discontinued.

³Argument on the cross motion was adjourned to June 27, 2013.

evidence whichever is earliest to occur; (1) the date of execution of a contract for sale of the subject building, or (2) three months notice of the closing date of such sale.” The order also provided, *inter alia*, that Delgrange be permitted to test and inspect those parts of the Building under construction, and, that on the date Delgrange conducts testing Madison be permitted to inspect and test the Apartment. The balance of Delgrange’s motion was denied without prejudice, and the order permitted the motion to be renewed and restored to the calendar upon stipulation.

By letter dated April 29, 2013, John Simoni, Jr., Esq., counsel for Madison and Lehmann, wrote to Richard Wasserman, Esq., counsel for Delgrange, that the SPA was executed and effective on April 26, 2013; that it is not a contract of sale of the Building but instead the sale of stock of the two corporations (Madison Immobilier Corp. and Nosidan Realty Corp) which own 100% of the membership interest in Madison; that following the closing of the transaction, Madison will remain the 100% fee owner of the Building. The letter also stated that a portion of the SPA closed in an “Initial Closing” on April 26, 2013 “with 19% of the shares of Madison Immobilier Corp. and Nosidan Realty Corp sold for a fixed sum of money, [and that] at the Final Closing Date⁴ ...the balance of the two corporations would be sold or by which the 19% stock interests would be returned as part of the cancellation of the entire transaction.” The letter also advised Mr. Wasserman that the SPA was subject to the Confidentiality Order and should be kept confidential.

On April 30, Mr. Wasserman wrote a letter in response requesting information as to how

⁴The letter indicated that no Final Closing date had been set but that the buyer had a right to terminate the SPA if there was no closing on or before June 26, 2013.

the deal underlying the SPA was structured and seeking a copy of the SPA. Mr. Wasserman also denied that any confidentiality agreement applied so the SPA, which is public information.

When Madison refused Delgrange's request to provide it with a copy of the SPA, Delgrange made this motion, by order to show cause, requiring Madison to provide it with a copy of the SPA, arguing that the structure of the sale is crucial to determining whether there will be assets to satisfy a potential judgment in favor of Delgrange. Delgrange also argues that the SPA and expedited discovery is needed to that it can renew its motion for an order of attachment.

In opposition to the motion, Madison and Lehmann have provided a copy of the first page of the SPA and the signature page. The Seller is identified as Lehmann and the SPA states that Lehmann owns 100% of the capital stock of Madison Immobilier Corp. and Nosidan Realty Corp. The Buyer is identified as 711 Madison Owners Corp, a Delaware limited liability corporation. As argued by Madison and Lehmann, Delgrange is not entitled to discovery of the SPA as the transaction at issue does not involve the sale of the Building but, rather, the sale of the stock of two corporations that hold membership interests in Madison. There is no dispute that assuming the transaction closes, the Building will still be owned by Madison, nor does Madison deny ownership. Thus, Delgrange is not entitled to discovery regarding the details of Madison's ownership of the Building. See Back v. Nuro Trans. Corp., 62 AD2d 942 (1st Dept 1978)(non-party discovery as to "true ownership" denied when ownership of the property admitted).

In this connection, Delgrange's arguments that he needs discovery of the SPA so he can learn how the liabilities of Madison have been treated, whether there is an indemnification provision in the SPA, and if there are plans to liquidate any of the corporate entities or Madison,

are without merit. As Madison was the owner of the Building at the time of the underlying events, and will still be the owner if the transaction anticipated by the SPA closes, it remains potentially liable for any damages to Delgrange.

Next, insofar as Delgrange seeks information regarding the SPA to determine if Madison will be able to pay any judgment that Delgrange may recover, he is only entitled to such discovery if he demonstrates a basis for an attachment. To obtain an order of attachment, “a plaintiff must show probability of success on the merits, the existence of one or more grounds for attachment provided in CPLR 6201,⁵ and that the amount demanded exceeds all counterclaims known to plaintiff.” Computer Strategies, Inc. v Commodore Business Machines, Inc., 105 A.D.2d 167, 172-173 (2d Dept 1984), appeal and reargument denied, 110 A.D.2d 743 (2d Dept 1985); see, also, Arzu v Arzu, 190 A.D. 2d 87 (1st Dept 1993).

As a preliminary matter, it is, at best, unclear as to whether Delgrange has established

⁵CPLR 6201 provides, in part, that:

An order of attachment may be granted in any action ... where plaintiff has demanded and would be entitled in whole or in part, or in the alternative, to a money judgment against one or more defendants: (1) the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state (2) the defendant resides or is domiciled in the state and cannot be served despite diligent efforts to do so... (3) the defendant, *with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor*, has assigned, disposed of, or encumbered or secreted property, or removed it from the state or is about to do any of these acts.....

likelihood of success on the merits, in absence of evidence that he was exposed to asbestos and based on the evidence submitted by Madison that asbestos containing material consisted of pipe insulation was lawfully abated within weeks of the issuance of the no work order. In any event, the asserted grounds for attachment under CPLR 6201(1) are that defendant Lehmann is “a nondomiciliary residing without the state” for the purposes of CPLR 6201(1) and that once the Building is sold, Madison will have no assets. However, as indicated above, grounds for attachment do not exist since Madison remains the owner of the Building. Under these circumstances, the request for expedited discovery should also be denied.

In view of the above, it is

ORDERED that the motion is denied.

DATED: June 11, 2013


A handwritten signature in black ink, appearing to read 'Joan A. Madden', is written over a horizontal line.

J.S.C.

HON. JOAN A. MADDEN
J.S.C.