

**Maheras v Awan**

2013 NY Slip Op 31927(U)

August 16, 2013

Sup Ct, New York County

Docket Number: 114296/11

Judge: Donna M. Mills

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

MARK MATHERAS, et al.,

INDEX No. 114296/11

Plaintiffs,

**FILED**

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 005

AYAZ AWAN, et al.,

**AUG 16 2013**

MOTION CAL NO. \_\_\_\_\_

Defendants.

COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for summary judgment.

PAPERS NUMBERED

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

1, 2, 4

Answering Affidavits- Exhibits \_\_\_\_\_

3

Replying Affidavits \_\_\_\_\_

6, 7, 5

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8-16-13

*Donna M. Mills*

J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 58

-----  
 MARK MAHERAS, DANA WHITTLE,  
 CHRISTINA KELSEY, and ADRIAN  
 SOLOMON,

Plaintiff,

- against -

AYAZ AWAN, NEW YORK BEST  
 DEVELOPMENT, INC., HIGH RISE  
 DEVELOPMENT ENTERPRISES, SUMMIT  
 BUILDERS INC., MALIK ALI, SABBA  
 SALEEMI, K.T. SEUNG, OSCAR JACKSON,  
 CLEMENT CHAMBERS, and KNC ELECTRIC,  
 Defendants.

INDEX NO.  
 114296/11

DECISION/ORDER

**FILED**

AUG 16 2013

COUNTY CLERK'S OFFICE  
 NEW YORK

-----  
 DONNA M. MILLS, J.:

Plaintiffs move pursuant to CPLR §§ 6301, 6311 and 6313 for a preliminary injunction to enjoin and restrain the defendants from selling, transferring or otherwise conveying certain real property located at 245 Lenox Avenue, New York, New York (the "Property"). Plaintiffs also move pursuant to CPLR §§ 6201 (3), 6210 and 6212 for an order of attachment on the aforementioned property.

BACKGROUND

Plaintiffs are owners of a certain property known as 261 West 137<sup>th</sup> Street, New York, New York. The basis of their underlying action is the alleged faulty construction and renovation work done by the various contractor defendants.

In a Decision and Order by this Court filed on May 14, 2013, this Court denied defendant Ayaz Awan's ("Awan") motion for summary judgment to dismiss the complaint against him, and this Court granted plaintiffs' cross-motion to amend the complaint to (i) add a cause of action to pierce the corporate veil of Awan's alleged alter ego entities, and to (ii) add codefendants.

Plaintiffs contend that Awan is transferring assets out of fear of this litigation. The

Property that is sought by plaintiffs to be attached is not part of this lawsuit, however, plaintiffs are requesting the attachment of the Property in light of the fact that Awan is in contract to sell the Property, and if he is allowed to do so, he may not be able to satisfy any judgment entered against him in the underlying action.

Awan opposes the relief sought on the grounds that (1) plaintiffs lack standing to maintain the action; (2) plaintiffs have not established a right to the attachment; and (3) plaintiffs have failed to establish the need for a preliminary injunction.

It is undisputed that the plaintiffs have all filed for bankruptcy and it is undisputed that they failed to list this potential claim against the defendants. However, plaintiff Adrian Solomon's chapter 13 bankruptcy proceeding was dismissed by the the Bankruptcy Court as evidenced by the Order Dismissing Pettiioer annexed to plaintiffs' supplemental reply affirmation. Therefore Mr. Solomon has standing to pursue the relief requested in this motion. As to the other plaintiffs, it is the rule that: "A debtor's failure to list a legal claim as an asset on his or her bankruptcy petition causes the claim to remain the property of the bankruptcy estate and precludes a debtor from pursuing the claim on his or her own behalf" (Coogan v Ed's Bargain Buggy Corp., 279 AD2d 445; see, also, Mehlenbacher v Swartout, 289 AD2d 651-652). The remaining plaintiffs knew or should have known of the facts allegedly giving rise to this fraud cause of action against Awan and the other contractors at the time they filed their bankruptcy petition (see Dynamics Corp. of Am. v Marine Midland Bank-N.Y., 69 NY2d 191 [1987]).

Defendant Awan has submitted certified copies of each plaintiffs' bankruptcy proceeding, which shows that this fraud cause of action against the defendants was not listed as an asset of the bankruptcys' estate (Exhibits A and B to Opposition Affirmation). These Bankruptcy Court records establishes that the plaintiffs, Mark Meheras, Dana Shittle and Christina Kelsey lack standing to maintain this action.

This Court also finds that plaintiffs are not entitled to the attachment of the Property.

“Attachment is considered a harsh remedy and the statute is strictly construed in favor of those against whom it may be employed” (Glazer & Gottlieb v Nachman, 234 AD2d 105, 105 [1<sup>st</sup> Dept 1996]). This is so because, while attachment secures property that can be used to pay a judgment, it also “keeps the debtor away from his property or, at least, the free use [of it]” (Koehler v Bank of Bermuda Ltd., 12 NY3d 533, 538 [2009]). Allegations merely “raising a suspicion of an intent to defraud” are insufficient to sustain an attachment (Mitchell v Fidelity Borrowing LLC, 34 AD3d 366, 366 [1<sup>st</sup> Dept 2006]). Rather, plaintiff must present “evidentiary facts, as opposed to conclusions” (Benedict v Browne, 289 AD2d 433, 433 [2d Dept 2001]).

Plaintiffs offer no credible evidence to show that Awan has the requisite intent to defraud them by selling an unrelated property. For this very same reason, plaintiffs are not entitled to a preliminary injunction because they have failed to show a probability of success on the merits. Even if plaintiffs could show that it was likely to succeed on the merits of its claim for declaratory relief, they failed to demonstrate that their potential damages are not compensable in money and capable of calculation, and thus that it will suffer irreparable harm in the absence of the requested injunction (see Credit Index v RiskWise Int., 282 AD2d 246, 247 [1<sup>st</sup> Dept 2001]). Finally, plaintiffs have not shown that the equities tip in its favor since the record affords no reason to believe that any injury plaintiffs are likely to sustain will be more burdensome to it than the harm likely to be caused defendant Awan through the imposition of an injunction ( *id.*, quoting Klein, Wagner & Morris v Lawrence A. Klein, P.C., 186 AD2d 631, 633).

Accordingly, it is

ORDERED that the plaintiffs' motion for attachment and a preliminary injunction is denied in its entirety.

Dated: 8-16-13

ENTER:

Donna M. Miller

J.S.C.

**FILED**

AUG 16 2013

COUNTY CLERK'S OFFICE  
NEW YORK