

People v Merkin
2013 NY Slip Op 33255(U)
December 19, 2013
Supreme Court, New York County
Docket Number: 450879/09
Judge: Richard B. Lowe III
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

THE PEOPLE OF THE STATE OF NEW YORK

Index No.
450879/09

Plaintiff,

Motion Sequence No.
015

- against -

J. EZRA MERKIN and GABRIEL CAPITAL
CORPORATION,

Defendants,

and

ARIEL FUND LIMITED, ASCOT FUND LIMITED,
ASCOT PARTNERS, L.P., GABRIEL ALTERNATIVE
ASSETS, LLC, GABRIEL ASSETS, LLC and
GABRIEL CAPITAL, L.P.,

Relief Defendants.

RICHARD B. LOWE, III, J.:

In this motion, the relief defendants Ariel Fund Limited (Ariel) and Gabriel Capital, L.P. (Gabriel) move, by Order to Show Cause, for an order approving a sixth interim distribution to investors of Ariel and Gabriel. Bart M. Schwartz, Esq. (Schwartz), appointed by this court as Receiver of Ariel and Gabriel pursuant to a Stipulation and Order dated June 10, 2009, seeks to make a distribute \$55 million to investors in Ariel and \$85 million to investors in Gabriel.

The instant motion is unopposed, and, for the reasons stated below, is granted.

By motion, the Receiver has sought, and this court has

approved, five previous interim distributions to Ariel investors. In his affirmation supporting the instant motion, Schwartz avers that, as of September 30, 2013, the unaudited estimated asset value of Ariel was \$440,058,497 and the unaudited estimated asset value of Gabriel was \$400,270,469.

Further, Schwartz has notified the court that, as of September 30, 2013, net of all reserves established and maintained in accordance with prior Orders of this court, the Receiver was holding \$58,866,966 in cash or cash equivalents in Ariel, and \$80,794,745 in cash or cash equivalents in Gabriel.

As part of the requested sixth distribution, the Receiver seeks to include funds currently held in two reserves that he now seeks to terminate. In the first, a \$7,962,036 reserve was set up based upon a claim asserted against Gabriel in the United Stated District Court for the Southern District of New York Civil Action No. 09-6483 (DAB), entitled *Morris Fuchs Holdings, LLC v Gabriel Capital L.P.* (The Fuchs Action). In the second, a \$1,800,000 reserve was set up based upon a claim asserted against Gabriel in the United Stated District Court for the Southern District of New York Civil Action No.09-6031 (DAB), entitled *Croscill, Inc. V Gabriel Capital, L.P.*, (The Croscill Action).

Schwartz avers that, the plaintiffs in both the Fuchs Action and the Croscill Action have "executed full, binding releases of all claims that were, or could have been asserted against" Gabriel (see Schwartz Affirmation in Support of Motion), and

proffered copies of such releases.

Given the lack of opposition to the instant motion, Schwartz's assurances that the value of Ariel and Gabriel's remaining assets are more than sufficient to satisfy any foreseeable creditor claims, and that unaudited, estimated values of the assets of Ariel and Gabriel on September 30, 2013 were approximately \$440,058,497 and \$400,270,469, respectively, the instant motion is granted.

Order

Accordingly, it is hereby

ORDERED that the motion is granted, and Bart M. Schwartz, Esq., as Receiver for Gabriel Capital, L.P., is authorized to eliminate the cash reserve of \$7,962,036 held as security for claims of plaintiffs in the *Morris Fuchs Holdings, LLC v. Gabriel Capital, L.P.*, US District Court for the Southern District of New York action no. 09-6483 (DAB); and it is further

ORDERED that Bart M. Schwartz, Esq., as Receiver for Gabriel Capital, L.P., is authorized to eliminate the cash reserve of \$7,962,036 held as security for claims of plaintiffs in the *Morris Fuchs Holdings, LLC v. Gabriel Capital, L.P.* plaintiffs; and it is further

ORDERED that Bart M. Schwartz, Esq., as Receiver for Gabriel Capital, LP, is authorized to make a Sixth Interim Distribution of \$85,000,000 to the investors of Gabriel Capital, L.P.; and it is further

ORDERED that Bart M. Schwartz, Esq., as Receiver for Ariel Fund Limited, is authorized to make a Fifth Interim Distribution of \$55,000,000 to the investors of Ariel Fund Limited; and it is further

ORDERED that no interim distributions authorized by this court today shall be made to either J. Ezra Merkin or Gabriel Capital Corp., nor to any person or entity known to be employed by or affiliated with them.

Dated: 12/19/12

ENTER:



HON. RICHARD B. LOWE III