

Matter of Schneiderman
2014 NY Slip Op 31118(U)
April 25, 2014
Supreme Court, New York County
Docket Number: 450454/2014
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

In the Matter of an Inquiry by
ERIC T. SCHNEIDERMAN, Attorney General of
the State of New York,
Petitioner,

Index No.: 450454/2014
Motion Date: 04/15/2014
Motion Seq. No.: 001
Motion Cal. No.: OSC

Pursuant to Article 23-A of the New York
General Business Law in regard to the acts
and practices of

15 BROAD STREET, LLC, 15 BROAD STREET
MANAGERS, LLC, AFRICA ISRAEL INVESTMENTS
LTD, A1 PROPERTIES AND DEVELOPMENTS (USA)
LTD., A1 PROPERTIES AND DEVELOPMENTS (USA)
CORP., A1 HOLDINGS (USA) CORP., BOYMELGREEN
FAMILY LLC, PINCHAS COHEN, and JESHAYAHU
BOYMELGREEN,

Respondents,

The following papers, numbered 1 to 3 were read on this motion to vacate ex parte Order dated
February 27, 2014.

Order to Show Cause -Affidavits -Exhibits
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

Table with 2 columns: PAPERS NUMBERED, 1, 2, 3

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this
motion to vacate the ex parte order of February 27, 2014 (Braun,
J.) shall be denied and the temporary restraining order enjoining
the enforcement of the part of such order that directs

Check One: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [] DO NOT POST [] REFERENCE
[] SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING

respondents to call a meeting of the board of managers of the Downtown Condominium to occur within 7 days of the service of such order and, at such meeting, to instruct their designees to introduce and vote for a certain resolution shall be vacated.

In State of New York v Fine, 72 NY2d 967 (1988), the Court of Appeals reversed the order of the Appellate Division, First Department, that affirmed the grant by the trial court to the Attorney General of a preliminary injunction under the Martin Act (General Business Law art 23-A). It ruled that the trial and appellate courts improperly "gave no consideration to the necessary discretionary elements for preliminary injunctions", i.e., a showing by the Attorney General of "a likelihood of success on the merits, irreparable injury if the relief is not granted, and a balancing of the equities". The Court reasoned that "[t]he Legislature made plain in the Martin Act that '[t]he provisions of the civil practice law and rules shall apply to all actions brought under this article except wherein otherwise provided' (General Business Law § 357) and it specifies no other standard for preliminary motions (cf., General Business Law § 354)". Fine, supra, at 968

Here, petitioner commenced a proceeding pursuant to General Business Law § 354, which states

Whenever the attorney-general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and

answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged fraudulent practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice law and rules, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.

Such provisions, which authorize the Attorney General to obtain pre action discovery under the Martin Act, contrasts with that of General Business Law § 357, which, as cited in Fine, states,

The provisions of the civil practice law and rules shall apply to all actions brought under this article except as herein otherwise provided.

General Business Law § 353 sets forth the basis for the attorney general to bring an action to prosecute practices or transactions that it determines to be fraudulent under the Martin

Act. Petitioner is correct that General Business Law § 357, by its terms, applies to such actions, but does not apply to the instant proceeding, which is not an action but an application pursuant to General Business Law § 354 for discovery relative to an action under the Martin Act that the Attorney General has determined to commence but which it has not yet commenced. In General Business Law § 354, the Legislature explicitly provided that the civil practice laws and rules are inapplicable to an application for an order for the examination of witnesses. That section states further that "[t]he order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient" (underlining supplied). Had the Legislature intended to apply the civil practice laws and rules with respect to a preliminary injunction to proceedings brought under General Business Law § 354, it would not have limited the provisions of General Business Law § 357 to actions only. To hold otherwise would fail to give meaning to the phrase "proper and expedient" under General Business Law § 354. (See, Matter of Stevens v Wing, 293 AD2d 49, 54 (1st Dept 2002) [contrary to principles of statutory construction, the Supreme

Court ignored that its interpretation would render some of the statutory language meaningless]). In fact, General Business Law § 354 mandates that the justice of the supreme court to whom the application is made grant "such preliminary injunction... as may appear to such justice to be proper and expedient", in contrast to the standards to which a judge must adhere to grant a preliminary injunction pursuant to article 63 of the civil practice law and rules. Indeed, the Court of Appeals in Fine, supra, contrasted the provisions of General Business Law § 357, which was the subject of its holding, to those of General Business Law § 354.

It cannot be gainsaid that the preliminary injunction made pursuant to General Business Law § 354 appeared "proper and expedient" to the justice to whom the application was made. The court cannot find that such provisional relief did not so appear to such justice and declines to disturb his order. Moreover, upon commencement of the action pursuant to General Business Law § 354, respondents may move to vacate the preliminary injunction. See In the Matter of the Attorney General of the State of New York v Katz, 55 NY2d 1015 (1982).

Accordingly, it is hereby

ORDERED that the motion of the respondents to vacate the

order dated February 27, 2014 (Braun, J.) be and the same is hereby in all respects denied, and it is further

ORDERED that the temporary restraining order enjoining the enforcement of the part of such order that directs respondents to call a meeting of the board of managers of the Downtown Condominium to occur within 7 days of the service of such order and, at such meeting, to instruct their designees to introduce and vote for a certain resolution is vacated, except that such call of a meeting of the board of managers shall occur within 7 days of the service of the herein order with notice of entry.

This is the decision and order of the court.

Dated: April 25, 2014 ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.