

Obeid v Bridgeton Holdings, LLC

2015 NY Slip Op 31085(U)

June 24, 2015

Supreme Court, New York County

Docket Number: 152596/2015

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA Justice

PART 39

WILLIAM T. OBEID, directly and derivatively on behalf of GEMINI REAL ESTATE ADVISORS LLC, et al.

INDEX NO. 152596/2015

- v -

MOTION DATE

BRIDGETON HOLDINGS, LLC, ATIT JARIWALA, THE CONGRESS GROUP, and JOHN DOE DEFENDANTS NOS. 1-10,

MOTION SEQ. NO. 002

Table with 2 columns: Description of papers and No(s). Rows include 'cancel notices', 'Notice of Motion/Order to Show Cause - Affidavits - Exhibits' (1), 'Answering Affidavits - Exhibits' (2), 'Replying Affidavits', and 'Cross Motion' (No).

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

In this derivative action, nominal defendants Gemini Real Estate Advisors LLC and Gemini Equity Partners, LLC (collectively, "Gemini") move for an order cancelling plaintiff William Obeid's ("Plaintiff") four notices of pendency upon filing of a respective bond pursuant to CPLR § 6515.

On March 18, 2015, Plaintiff filed notices of pendency against four properties at issue in this action – the Best Western Seaport Hotel, the Bryant Park Hotel Development Site, the Jade Greenwich Village Hotel, and the Wyndham Flatiron Hotel.1 Shortly thereafter, Gemini moved to cancel the notices of pendency pursuant to CPLR § 6514, on the grounds that this action does not affect the title to real property and was not commenced in good faith. On May 12, 2015, I issued an order on the record denying Gemini's motion to cancel the notices of pendency under CPLR § 6514. However, I directed the parties to submit supplemental briefing

on whether they should be permitted to “double bond” the notices of pendency pursuant to CPLR § 6515.

CPLR § 6515 sets forth a “double bonding” procedure under which the court may cancel a notice of pendency upon the defendant’s posting of a bond to secure adequate relief to the plaintiff, unless plaintiff posts a bond to “indemnify the defendant for any damages flowing from the notice of pendency.” *Purchase Real Estate Group, Inc. v. Jones*, 489 F.Supp.2d 345, 348 (S.D.N.Y. 2007).

In determining whether to permit cancellation of a notice of pendency and set respective bond amounts, the court may consider “the circumstances revealed in the pleadings, the acts of the parties . . . the circumstances set forth in their affidavits . . . [and plaintiff’s] good faith and probability of success as revealed in the papers submitted.” *Ronga v. Alpern*, 45 Misc. 2d 1029, 1031 (Sup. Ct. Bronx County 1964). Any bond amounts set by the court “should be proportionate to the damages the parties may suffer as a result of the continuance or cancellation of the notice of pendency.” *Mattone Group LLC v. Telesector Resources Group, Inc.*, 2008 WL 412612, 2008 N.Y. Slip. Op. 30374(U) (Sup. Ct. Queens County January 30, 2008).

1. Best Western Seaport Hotel

Gemini first moves to cancel the notice of pendency against the Best Western Seaport Hotel (“the Seaport Hotel”) upon posting a nominal bond. Gemini argues that they should be permitted to cancel the notice of pendency because Plaintiff’s allegation that the hotel is being sold to defendants Bridgeton Holdings, LLC (“Bridgeton”), Atit Jariwala, and The Congress Group at a below-market price is meritless.

In support of their motion, Gemini submits a copy of a purchase and sale agreement dated May 11, 2015, under which Gemini’s subsidiary agreed to sell the Seaport Hotel to a third-party bidder, Atlantic Pearl for \$38 million.² Gemini also submits evidence that the market value of the Seaport Hotel is \$34.25 million, and that Atlantic Pearl’s offer was the

highest of five offers which ranged from \$33.25 to \$38 million dollars, including a \$36 million bid from Plaintiff.

In opposition, Plaintiff argues that Gemini should not be permitted to cancel the notice of pendency because Atlantic Pearl could rescind the sale agreement, or ask for a 10% reduction in the purchase price after completing its due diligence on the property. In the alternative, Plaintiff asserts that Gemini should be required to post a \$3.8 million dollar bond – i.e., 10% of the purchase price – to cover its potential damages if the notice of pendency is cancelled.

I grant Gemini's motion to cancel the notice of pendency against the Seaport Hotel on the condition that Gemini posts a \$25,000 bond. Gemini submits evidence that the property is to be sold to a third-party buyer, Atlantic Pearl, for a price that is more than \$3 million above market value. In determining the relatively low amount of the bond, I have evaluated Plaintiff's claim – that the defendants are offering kickbacks to Gemini's controlling members to induce them to sell the Seaport Hotel at a below market price– in light of the existing third-party sale contract. In addition, Plaintiff's assertion that the \$38 million purchase price could drop to \$34.2 million after due diligence is purely speculative and unsupported by the record. As Plaintiff has not submitted any evidence to show that he or the Gemini subsidiary that owns the property will suffer damages resulting from a sale to Atlantic Pearl, the notice of pendency against the Seaport Hotel may be cancelled upon Gemini's posting of a \$25,000 bond.

If Gemini posts a \$25,000 bond, Plaintiff seeks permission to post a \$25,000 bond to maintain the notice of pendency. Given the circumstances surrounding the pending sale, I will not permit Plaintiff to maintain the notice of pendency by posting a bond. *Sparks Assoc., LLC v. North Hills Holding Co. II, LLC*, 74 A.D.3d 1183, 1185 (2d Dep't 2010) (finding that the court may decline to allow plaintiff from maintaining a notice of pendency).

2. Bryant Park Hotel Development Site

Gemini also moves to cancel the notice of pendency against the Bryant Park Hotel Development Site (“Bryant Park Hotel”) upon posting a nominal bond. In support of their motion, Gemini submits a copy of a letter of intent dated April 2, 2015, under which Gemini’s subsidiary agreed to sell the Bryant Park Hotel to a third-party, Hansji Corporation, for \$25.5 million.³ Gemini argues that Plaintiff’s allegations have no merit because the Bryant Park Hotel will be sold above its \$19.5 million market value, and Hansji’s offer was the highest of seven offers made, ranging from \$18.5 million to \$25.5 million dollars (including Plaintiff’s bid of \$24.9 million).

In opposition, Plaintiff argues that the notice of pendency should not be cancelled because Hansji’s offer is non-binding, did not require any deposit, and would not be sufficient to pay off the hotel’s investors. Plaintiff further argues that the bidding process was corrupted because he was the highest bidder in the first round of bids, and that his bid was in fact higher than Hansji’s bid. Plaintiff also contends that the market value of the property is actually \$31 million, and that Gemini’s bond should be set at \$5 million dollars to cover Plaintiff’s potential loss if the property is sold to Hansji for \$25.5 million dollars.

Here, I set the amount of Gemini’s bond at \$25,000. Gemini’s subsidiary has entered into a letter of intent to sell the Bryant Park Hotel to a third-party for \$25.5 million, an amount that would satisfy the UBS loan on the property.⁴ Although Plaintiff argues that the market value of the Bryant Park Hotel is \$31 million, Plaintiff does not offer any credible evidence to support this valuation beyond an email from a potential purchaser who seeks to flip the property for \$31 million. Based on the parties’ submissions, I find that a \$25,000 bond will adequately protect the Plaintiff.

If Gemini posts a \$25,000 bond, Plaintiff seeks permission to post a \$25,000 bond to maintain the notice. To set the amount of Plaintiff’s bond, I must assess Gemini’s potential damages if the notice continues. Gemini argues that they will potentially suffer \$12.75 million

in damages, which includes the loss of the sale to Hansji, and continued expenses for maintaining the property, including loan interest and real estate taxes. I find that Gemini has substantiated \$1.8 million dollars in potential damages, which includes \$600,000 for the loss of Hansji's sale (the difference between Hansji's bid and the next highest bid of \$24.9 million) and \$1,200,000 for loan interest (a year of interest based on a rate of \$120,000 per month). I therefore set Plaintiff's bond to continue the notice of pendency at \$1.8 million dollars.

For the reasons stated above, the notice of pendency against the Bryant Park Hotel Development Site may be cancelled upon Gemini's payment of a \$25,000 bond, unless Plaintiff posts a \$1,800,000 bond to maintain the notice of pendency.

3. Jade Greenwich Village Hotel

Gemini next moves to cancel the notice of pendency against the Jade Greenwich Village Hotel ("Greenwich Village Hotel") upon posting a nominal bond. In support of their motion, Gemini submits a copy of a purchase and sale agreement dated April 2, 2015, under which Gemini's subsidiary 52 West 13th P, LLC agreed to sell the Greenwich Village Hotel to Bridgeton for \$78 million. Gemini also submits evidence that the current market value of the Greenwich Village Hotel is \$77 million dollars (based on a May 24, 2013 appraisal by Cornerstone Real Estate Advisors LLC), and that Bridgeton's offer was the highest of five offers made ranging from \$62.7 million to \$78 million dollars.

In opposition, Plaintiff argues that the notice of pendency should not be cancelled because Gemini seeks to sell the Greenwich Village Hotel at a below market price. Plaintiff argues that the actual market value of the property is between \$88 and 92 million, based on a November 2014 draft appraisal by Robert Douglas.

Gemini has entered into a purchase and sale agreement with defendant Bridgeton for a purchase price of \$78 million dollars. If Plaintiff's evidence is credited and the market value of the property is in fact \$88 million or more, a sale of the property for \$78 million would result in at least a \$10 million loss to the Gemini subsidiary that owns the property. Based upon the

evidence submitted, I find that Gemini's bond amount should be set at \$10 million to guarantee adequate relief to Plaintiff.

Plaintiff seeks to post a \$5,000 bond to maintain the notice. To set the amount of Plaintiff's bond, I must assess Gemini's potential damages if the notice continues. Gemini argues that their potential damages are \$39 million, which includes the loss of the \$78 million sale price, \$2 million in fees, and ongoing expenses for maintaining the property, including loan interest and real estate taxes. I find that Gemini substantiates \$5 million in potential damages, which includes \$3 million for the loss of Bridgeton's sale (the difference between Bridgeton's bid and the next highest bid of \$75 million) and \$2 million in fees. As Gemini did not present any admissible evidence or information about the cost of maintaining the property, I do not include those costs in setting the bond amount, which I set at \$5 million dollars.

For the reasons stated above, the notice of pendency against the Jade Greenwich Village Hotel shall be cancelled upon Gemini's posting of a \$10 million bond, unless Plaintiff posts a \$5 million bond to maintain the notice of pendency.

4. Wyndham Flatiron Hotel

Lastly, Gemini seeks to cancel the notice of pendency against the Wyndham Flatiron Hotel ("the Wyndham") upon posting a nominal bond. Gemini asserts that the Wyndham has not been actively marketed due to the notice of pendency, and that the hotel has a market value of \$57 million dollars.

Plaintiff argues that the notice of pendency against the Wyndham should not be cancelled because Gemini is contemplating a sale to Bridgeton at a below market price. Plaintiff presents a copy of Bridgeton's marketing materials, in which Bridgeton states that it has "an unparalleled opportunity" to acquire the Wyndham for \$60 million. Plaintiff also submits a copy of a third-party bid to purchase the Wyndham for \$65 million, which was made in January 2015.

To cancel the notice of pendency against the Wyndham, I require Gemini to post a \$5 million bond. Plaintiff presents some evidence to support its allegation that Bridgeton may have an arrangement with Gemini's controlling members to purchase the Wyndham for \$60 million, an amount that may be lower than the market value of the property. If the Wyndham's market value is \$65 million, as Plaintiff claims, then the Gemini subsidiary which owns the property would suffer a \$5 million loss if the property is sold to Bridgeton for \$60 million.

Plaintiff also seeks to post a \$5,000 bond to maintain the notice of pendency. However, based on Plaintiff's agreement that the Wyndham should be marketed and sold, I deny Plaintiff's request to maintain the notices of pendency upon posting a bond.

In accordance with the foregoing, it is

ORDERED that, if the nominal defendants Gemini Real Estate Advisors LLC and Gemini Equity Partners, LLC post an undertaking of \$25,000 within 10 days of service of this order with notice of entry, the notice of pendency for the Best Western Seaport Hotel shall be cancelled pursuant to CPLR § 6515(2); and it is further

ORDERED that, if the nominal defendants Gemini Real Estate Advisors LLC and Gemini Equity Partners, LLC post an undertaking of \$25,000 within 10 days of service of this order with notice of entry, the notice of pendency for the Bryant Park Hotel Development Site shall be cancelled pursuant to CPLR § 6515(2), unless within 20 days of service of this order with notice of entry, the plaintiff William Obeid posts an undertaking in the amount of \$1,800,000; and it is further

ORDERED that, if the nominal defendants Gemini Real Estate Advisors LLC and Gemini Equity Partners, LLC post an undertaking of \$10,000,000 within 10 days of service of this order with notice of entry, the notice of pendency for the Jade Greenwich Village Hotel shall be cancelled pursuant to CPLR § 6515(2), unless within 20 days of service of this order with notice of entry, the plaintiff William Obeid posts an undertaking in the amount of \$5,000,000; and it is further

ORDERED that, if the nominal defendants Gemini Real Estate Advisors LLC and Gemini Equity Partners, LLC post an undertaking of \$5,000,000 within 10 days of service of this order with notice of entry, the notice of pendency for the Wyndham Flatiron Hotel shall be cancelled pursuant to CPLR § 6515(2); and it is further

ORDERED that the remainder of nominal defendants Gemini Real Estate Advisors LLC and Gemini Equity Partners, LLC's motions are denied (motion seq. nos. 001 and 002).

This constitutes the decision and order of the Court.

1. According to the complaint, the Best Western Seaport Hotel is owned by Gemini subsidiary, 33 Peck Slip Holding LLC; the Bryant Park Hotel Development Site is owned by Gemini subsidiary, 36 West 38th Street Holding LLC; the Jade Greenwich Village Hotel is owned by Gemini affiliate, 52 West 13th P, LLC; and the Wyndham Flatiron Hotel is owned by Gemini affiliate 37 West 24th Street MT, LLC. These subsidiaries are also derivative plaintiffs.

2. The parties to the purchase and sale agreement are Gemini subsidiary, 33 Peck Slip Acquisition LLC, and Morning View Hotels – New York Seaport, LLC.

3. The parties to the letter of intent are Gemini subsidiary 36 West 38th Street, LLC and Hansji Corporation for \$25.5 million.

4. Plaintiff asserts that the notice of pendency against the Seaport Hotel and the Bryant Park Hotel Development Site should not be cancelled because the lender UBS will not permit the loans on the properties to be prepaid without payment of a premium. I do not address this issue at this time as the parties can directly negotiate with UBS regarding how to prepay the loans.

DATED:

6/24/15



SALIANN SCARPULLA, J.S.C.

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