

Poole v West 111th St. Rehab Assoc.

2015 NY Slip Op 32630(U)

March 19, 2015

Supreme Court, New York County

Docket Number: 101096/09

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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JONATHAN POOLE,

Plaintiff,

Index No. 101096/09

-against-

WEST 111TH STREET REHAB ASSOCIATES, MARILYN
C. REZNICK, PAMELA L REZNICK, NANCY ROBINSON,
SUSAN SELTZER, LAYNE C. REZNICK, JAMES ROBINSON,
LAWRENCE PESCE, RICHARD PESCE, CHRISTOPHER PESCE,
CHRISTINE LATOUR, RICHARD PESCE, CHRISTOPHER
PESCE AND LAWRENCE PESCE, as Co-Executors of the
ESTATE OF LAWRENCE PESCE, MARILYN C. REZNICK,
as Executrix of the ESTATE OF JEROME REZNICK and
THE SEYMOUR ROBINSON TRUST,

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

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RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the
review of this Motion/Order for an Order to Show Cause.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____
Order to Show Cause and Affidavits Annexed	<u> 1 </u>
Answering Affidavits.....	<u> 2 </u>
Replying Affidavits.....	<u> 3 </u>
Exhibits.....	_____
Memoranda.....	_____
Cross-Motion	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff, Jonathan Poole moves by order to show cause, for an order pursuant to CPLR §
5104 and Judiciary Law §§ 753 and 756, to: (1) hold defendants West 111th Street Rehab
Associates, Marilyn C. Reznick, Pamela L. Reznick, James Robinson, Lawrence Pesce, Richard
Pesce, Christopher Pesce, Christine Latour, Richard Pesce, Christopher Pesce and Lawrence

Pesce, as Co-Executors of the Estate of Lawrence Pesce, Marilyn C. Reznick as Executrix of the Estate of Jerome Reznick and The Seymour Robinson Trust, in contempt for their failure to provide an accounting, as ordered by this court on April 19, 2013, and (2) impose a fine, in addition to damages, attorney's fees and costs. Plaintiff also moves for an order, under CPLR § 6401, for an appointment of a temporary receiver to oversee the partnership's assets pending a final determination of this matter. Plaintiff is also seeking an order, pursuant to CPLR § 6301, enjoining defendants and their employees, agents, or representatives from transferring any sums of money from the partnership accounts, which are not a part of the ordinary course of business.

West 111th Street Rehab Associates is a partnership that is in the business of managing residential properties located on West 111th Street in Manhattan. The partnership was formed on June 16, 1989 by four general partners: Seymour B. Robinson, Jerome S. Reznick, Lawrence Pesce and plaintiff, and eight limited partners: Seymour B. Robinson, Jerome S. Reznick, Lawrence Pesce, James Robinson, Pamela Reznick, Susan Seltzer, Layne Lederer (now Layne Reznick) and plaintiff. Seymour Robinson died in 1996 and Lawrence Pesce died in 1997. Plaintiff resigned as general partner in 2003. On November 24, 2008, Jerome S. Reznick, the last remaining general partner died. On December 23, 2008, plaintiff's counsel sent a letter to the remaining limited partners expressing plaintiff's desire to dissolve the partnership following Reznick's death. By letter dated January 7, 2009, several limited partners responded to plaintiff's correspondence stating that the partnership agreement provided for a 90-day period to elect to continue the business and, in their estimation, liquidation was improper and premature at that point in time. On January 20, 2009, Layne Reznick and James Robinson sent a letter to plaintiff and all of the individual defendants to schedule a meeting for the purpose of: holding an

election, continuing the business of the partnership, and appointing a corporation as successor and general partner of the partnership.

On January 27, 2009, plaintiff commenced an action, seeking a temporary restraining order to stay the election of a successor general partner. In an order dated February 4, 2009, this court (Lehner, J.) denied said request. The vote proceeded as scheduled on February 17, 2009. Plaintiff subsequently filed a motion seeking: (1) a declaration as to his rights and obligations in the partnership, (2) a finding as to whether the vote in the February 2009 meeting was proper, and (3) whether Rehab Corporation was properly designated as the successor general partner to West 111th Rehab Associates. Plaintiff also sought an injunction directing the partnership to conduct an accounting as of the date of death of each deceased partner, an accounting, and a declaratory judgment determining the identity of the remaining partners. In a written order dated June 2, 2009, this Court (Lehner, J.) denied Poole's motion. By notice of motion, dated August 13, 2012, plaintiff subsequently moved for summary judgment on the first, second, third, sixth, seventh, eighth, and ninth causes of action of the amended complaint. In a written order, dated April 9, 2013, this court granted plaintiff's motion, as to the sixth cause of action only, for an accounting of the partnership.

Plaintiff argues that, despite repeated demands, defendants have failed to provide an accounting, and thus they must be held in contempt for failure to comply with this Court's order.

For the reasons that follow, the motion for contempt is denied. "In order to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged violated a clear and unequivocal court order, thereby prejudicing a right of another party to the litigation" (*Moore v Davidson*, 57 AD3d 862, 863 [2d Dept 2008] [internal quotation marks and

citation omitted]). Moreover, Judiciary Law § 753 (A) authorizes the Court to punish a party by fine and imprisonment for civil contempt when there is:

“‘A neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: . . .

“‘3. A party to the action. . . or other person, . . . for any . . . disobedience to a lawful mandate of the court . . .’”

(*Matter of Comas*, 40 AD3d 168, 173 [1st Dept 2007] [quoting Judiciary Law ¶ 753]).

Plaintiff was awarded summary judgment on his sixth cause of action for an accounting on April 9, 2013. In October of 2013, defendants provided plaintiff with tax returns and financial statements for 2011, 2012, and 2013 (*see* exhibits D, E and F to affidavit of Jonathan Poole, dated November 4, 2013) (Poole Aff.). Copies of the financial statements for the time period beginning January 1, 2008 through December 12, 2012 were forwarded to plaintiff in November of 2013 (*see* exhibits I and J to Poole Aff.). Defendants retained the certified public accounting firm of Shanholt Glassman Klein Kramer & Co. to prepare the aforementioned accounting. Said documents were delivered to plaintiff on May 8, 2014 (*see* exhibit B to affirmation of Peter Sullivan, dated May 28, 2014) (Sullivan Affir.). Defendants also forwarded the partnership’s tax records for the years 2009 and 2010 along with financial statements for the years 2008-2013 (exhibit C to Sullivan affir.). It appears that plaintiff also desires a review of the accounts payable and tenant security accounts managed by the independent, third-party real property manager. Sandy Klein, defendants’ certified public accountant and shareholder of

Shanholt Glassman Klein Kramer & Co, avers that an accounting would not typically include such information (affidavit of Sandy Klein, ¶ 6, dated May 28, 2014) (Klein Aff.).

Plaintiff argues that the defendants have engaged in a scheme to hide the partnership's records and divert its funds, thereby thwarting this court's order. Under Partnership Law § 44, any partner has the right to a formal account of partnership affairs if the right exists under the terms of the partnership agreement. In the case at bar, Article IX of the partnership agreement provides:

"9.1 Books of Accounts, Records. At all times during the continuance of the Partnership, the General Partners shall keep or cause to be kept in accordance with generally accepted accounting principles . . . full and true books of account in which shall be entered fully and accurately all transactions of the Partnership . . .

"9.3 Financial Reports

"(a) The General Partners shall take all steps reasonably necessary to cause to be delivered to each Partner within ninety (90) days after the expiration of each fiscal year of the Partnership, beginning with the first full fiscal year ending December 31, 1989 annual reports of the Partnership, (a) including a balance sheet and profit and loss statement, (b) a statement showing the distributions to the Partners and the allocation among the Capital Accounts of the Partners of taxable income, gains, losses, deductions, credits and other relevant items of the Partnership for such fiscal year, and (c) a statement of cash flow of the Partnership. All such reports and statements shall be prepared by the Partnership's Accountants in such manner as they determine.

"(b) Quarterly Statement. The General Partners or the Managing Agent shall deliver to each General Partner within thirty (30) days following

the end of each quarter, a statement of rents billed and received and expenses paid and accrued and an annual statement to each Limited Partner within each fiscal or calendar year. Such statements shall include an itemization of the names of the tenants, the rents paid, the spaces occupied and the lease expiration dates.

“9.4 Tax Returns. The General Partners shall cause all income tax and other applicable information returns for the Partnership to be prepared by the Partnership’s Accountants and shall cause such tax and information returns to be timely filed with the appropriate authorities. Copies of such tax and information returns shall be sent to each Partner and shall also be kept at the principal office of the Partnership where they shall be available for inspection by the Partners and their representatives during normal business hours.”

(exhibit C to Poole Aff.). In addition to the aforementioned tax returns and financial statements, the record reveals that defendants provided annual statements for the partnership’s bank accounts ending in 2935, 4540, and 5560 at Bank of America for years 2006-2013 (exhibit D to Sullivan Affir.). Moreover, defendants provided plaintiff with monthly and annual reports from the parties’ property manager, ABC Realty, which included detailed information regarding opening cash balances, cash receipts, disbursements, adjustments, net cash flow and closing cash balances for the years 2010-2013 for the partnership properties located at 204, 208 and 240 West 111th Street (exhibit E to Sullivan Affir.). Plaintiff alleges that said documents do not satisfy his demand for an accounting. However, Klein avers that the combination of all of the foregoing documents “is far more comprehensive and detailed” concerning the partnership’s finances than is generally “contained within an accounting” (Klein Aff., ¶ 5). Accordingly, this court finds that there is insufficient support in the record to hold defendants in contempt. Defendants had

knowledge of the order, they provided the documents requested, and said actions have not intentionally impaired plaintiff's rights and remedies (*Moore v Davidson*, 57 AD3d at 863). Although the record reveals that plaintiff is not completely satisfied with the documentary evidence provided, he has neglected to specify what, if any, documents he still desires (exhibits F, G and H to Sullivan Affir.). Thus, the court must deny plaintiff's motion to hold defendants in contempt. Additionally, since a finding of civil contempt is not appropriate here, plaintiff is not entitled to attorney's fees or costs (*Moore v Davidson*, 57 AD3d at 863).

Plaintiff's motion for a temporary receiver to manage the partnership during the pendency of the rest of this action is denied. CPLR 6401 (a) provides that a receiver may be appointed "[u]pon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." In circumstances similar to these, courts have "consistently refrained from appointing pendente lite receivers, because such action amounts to a taking without adjudication on the merits" (*Matter of Alpine Motor Cars*, 280 AD2d 412, 413-14 [1st Dept 2001]). Accordingly, a motion for a temporary receiver may be invoked "only in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting that party's interests" (*Matter of Kristensen v Charleston Sq.*, 273 AD2d 312, 312 [2d Dept 2000]). Furthermore, such appointments "should never be made until a proper case has been clearly established'" (*Matter of Armienti & Brooks*, 309 AD2d 659, 661 [1st Dept 2003] [citation omitted]). Here, plaintiff has not made the requisite detailed evidentiary showing demonstrating that the property in question will be removed from the state, or lost, materially injured or destroyed. The record does not clearly establish the

necessity to conserve the partnership's assets, or the need to protect any of the partners' interest in that property (*Quick v Quick*, 69 AD3d 828, 829 [2d Dept 2010]). Plaintiff's allegations lack sufficient supporting documentary evidence to substantiate his claims. Furthermore, there is an absence of expert testimony or reports to establish the necessity to conserve the partnership's assets in this manner. The extent of both parties' alleged ownership interest in the partnership, as well as the obligations of the parties is sharply contested in this matter, thereby precluding the appointment of a receiver at this stage of the litigation.

Plaintiff's motion for an order pursuant to CPLR § 6301 enjoining defendants and their employees, agents, or representatives from transferring any sums of money from the partnership accounts, which are not a part of the ordinary course of business is also denied for the reasons stated above. Plaintiff has not shown a likelihood that the property in question will be removed from the state, or lost, materially injured or destroyed.

Plaintiff's remaining contentions are without merit.

Accordingly, it is

ORDERED that plaintiff's order to show cause and request for relief is denied. This constitutes the decision and order of the court.


GEOFFREY D. WRIGHT
AJSC

Dated: March 19, 2015

JUDGE GEOFFREY D. WRIGHT
 Acting Justice of the Supreme Court

FILED

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