

Moskovits v Maria Plaza LLC
2015 NY Slip Op 32900(U)
June 12, 2015
Supreme Court, Kings County
Docket Number: 501231/2015
Judge: Martin M. Solomon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
Commercial Part 10**

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**TOBY MOSKOVITS, individually, and derivatively on
behalf of TLG NORTH LLC, derivatively on behalf of
NORTH FLATS,**

Plaintiff(s)

Index no. 501231/2015

-against-

DECISION/ORDER

**MARIA PLAZA LLC, JOEL GLUCK, YOEL GOLDMAN
and MERIDIAN CAPITAL GROUP, LLC,**

Defendant(s)
-----X

Recitation, as required by CPLR 2219(a), of the papers considered on the review of these motions

PAPERS	NUMBERED
Motion Sequence No. 1 (Moskovitz motion to enjoin negotiating the loan) Order to Show Cause and Affidavits and Exhibits Annexed Answering Affidavits and Exhibits Annexed	1 2, 3, 4 & 5
Motion Sequence No. 2 (Gluck cross motion for sanctions) Notice of Cross Motion and Affidavits and Exhibits Annexed Answering Affidavits and Exhibits Annexed	1 2
Motion Sequence No. 3 (Meridian motion to dismiss) Notice of Motion and Affidavits Annexed Answering Affidavits and Exhibits Annexed Replying Affidavits and Exhibits Annexed	1 2 3
Note: Motion Sequence No. 4 was an Order to Show Cause by Meridian to Post an Undertaking that was not signed.	
Motion Sequence No. 5 (Motion by Goldman to Quash subpoena on Bank United) Notice of Motion and Affidavits Annexed	1

Answering Affidavits and Exhibits Annexed	2
Replying Affidavits and Exhibits Annexed	3
Motion Sequence No. 6	
(Motion by Gluck to Quash subpoena on Meridian)	
Notice of Motion and Affidavits Annexed	1
Answering Affidavits and Exhibits Annexed	2
Motion Sequence No. 7	
(Motion for a Temporary Receiver and injunctive relief)	
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits and Exhibits Annexed	2

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

The essence of plaintiffs claims is that defendants Goldman and Gluck have breached their fiduciary duties to North Flats LLC (North Flats) by pledging interests in the project in connection with a bond issuance in Israel and thereby impaired North Flats ability to arrange the “take out” financing for the project. Plaintiffs also allege that Goldman and Gluck made unauthorized withdrawals of North Flats funds. The essence of defendants counterclaims are that Moskowitz has mismanaged the project and that Moskowitz has made unauthorized withdrawals of North Flats funds.

This action involves a construction project on two properties in Brooklyn. The one on North 6th Street is a former church, and the other, somewhat contiguous plot, on North 7th Street is a former school. The real property is owned by North Flats.

Maria Plaza LLC (Maria Plaza) owns 51.875% of North Flats. Defendant Gluck owns 100% of Maria Plaza.

TLG North LLC (TLG) owns the remaining 48.125% of North Flats. Defendant Goldman owns 56.25% of TLG. The remaining 43.75% of TLG is owned by plaintiff Moskowitz (although an amendment to TLG’s operating agreement shows an authorization to divide this interest into 21.88% owned by Moskowitz and 21.88% owned by Northside Partners LLC).

The North Flats operating agreement requires approval of 60% of its members to authorize actions. The operating agreement of TLG requires 100% approval to authorize actions. Effectively, North Flats requires unanimous approval of Moskowitz, Goldman and Gluck to authorize actions.

The project at issue is a substantial project involving construction of some 85 units. It is more than half completed and one part of the structure is already in operation as a rental building, containing somewhat less than half the rental units in the project. At the time this action was commenced a construction loan of nearly 42 million dollars was becoming due on May 1, 2015.

On April 29, 2015 the parties agreed to an extension of the existing financing on this loan.

Defendant Meridian Capital Group, LLC (Meridian) is a loan broker who was acting as an intermediary between North Flats and Bank United, the lender that held the existing loan. At the time of the commencement of the action, Meridian had been actively engaged in discussions with Bank United in regard to the "take out" financing. Plaintiff alleges that Meridian conspired Gluck and Goldman to exclude Moskovits from its negotiations to obtain takeout financing.

At the outset, it must be noted that events have largely outpaced the motions. To the extent the motions seek to effect the financing required on May 1; the parties agreement to an extension of the existing financing with Bank United rendered the motions less relevant if not entirely moot.

The initial motion is plaintiffs' Order to Show Cause date February 4, 2015 which seeks to enjoin defendant Meridian from further action concerning the loan and to provide full access to Meridian's file concerning the property and the loan. The stay in this order was modified by the order dated April 17, 2015 which permitted Meridian to engage in discussions with Bank United for the purpose of obtaining a proposal in connection with the settlement discussions which ultimately resulted in the extension of the loan. It is worth noting that the relief sought in this order to show cause is against Meridian only.

Gluck cross moved for sanctions against Moskovitz for failing to give notice of the application for a temporary stay contained in the Order to Show Cause. Meridian then moved to dismiss the action as against it pursuant to CPLR 3211. The two motions to quash followed and were decided by orders dated April 2, 2015.

Finally, Gluck moves for appointment of a temporary receiver, for injunctive relief against plaintiffs and to obtain access to the books and records of North Flats. To the extent this motion seeks access to the books and records, it was decided by order dated April 29, 2015.

Starting with the initial motion by Moskovitz to enjoin Meridian, CPLR 6301 provides, in relevant part:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

It is well settled that a party seeking injunctive relief must satisfy a three prong test. "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor

(see CPLR 6301; see generally *Doe*, 73 N.Y.2d at 750, 536 N.Y.S.2d 44, 532 N.E.2d 1272).” (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 833 N.E.2d 191, 800 N.Y.S.2d 48, 2005 N.Y. Slip Op. 02575 [2005]).

Under this analysis the motion by Moskowitz to enjoin Meridian is less than compelling, particularly in light of the change of circumstances since that application was made. It is less than clear that Meridian could or would bind North Flats to take out financing without the consent of Moskowitz. It is essentially conceded, however, that Moskowitz’s approval is necessary to authorize North Flats actions. Excluding her from discussions regarding a matter as important as the “take out” financing is not conducive to obtaining her approval.

It would be prudent to include Moskowitz in the negotiations and discussions between Meridian and Goldman and Gluck. It does not follow from this, however, that they are required to do so. Meridian, Goldman and Gluck may engage in discussions and submit their proposals to Moskowitz for her approval or disapproval. Meridian is and should be on notice that the approval of the three principals, Goldman, Gluck and Moskowitz, is required to authorize the actions of North Flats.

For the foregoing reasons, plaintiffs’ order to show cause is granted only to the extent that Meridian is enjoined from executing any document that would bind North Flats to any commitment unless Meridian obtains the unanimous consent of Moskowitz, Goldman and Gluck to such a commitment or upon further order from this court. To the extent the order to show cause seeks information contained in Meridian’s files, plaintiff may seek that through the discovery process.

The motion by Gluck for sanctions against Moskowitz is denied on the law and in the court’s discretion. The failure to give notice to Gluck’s counsel of the application for a T.R.O. against Meridian does not constitute frivolous conduct pursuant to N. Y. Ct. Rules, § 130-1.1(c).

Turning to the motion by Meridian to dismiss the action, the first amended complaint alleges four causes of action against Meridian. The first seeks a declaratory judgment declaring that defendants are barred from marketing or negotiating the loan and excluding Moskowitz from the files and details of the negotiations and that members of North Flats are barred from a variety of conduct. The second cause of action seeks a preliminary injunction, essentially for the same relief as that sought in plaintiffs’ order to show cause. The eleventh cause of action is for aiding and abetting the alleged breach of fiduciary duty by the other defendants. The twelfth cause of action is for breach of contract.

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff’s allegations are accepted as true and accorded the benefit of every possible favorable inference" (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996, 913 N.Y.S.2d 668; see *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should...determine only whether the facts as alleged fit within any cognizable legal theory" (*Simos v. Vic-Armen Realty, LLC*, 92 A.D.3d 760, 761, 938 N.Y.S.2d 609, quoting *Leon v.*

Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see *Sinensky v. Rokowsky*, 22 A.D.3d 563, 564, 802 N.Y.S.2d 491). (*Black v. New York City Housing Authority*, 120 A.D.3d 731, 991 N.Y.S.2d 337, 2014 N.Y. Slip Op. 05936 [2d Dept. 2014]).

With this in mind, the court turns to the causes of action as alleged against Meridian. On the first cause of action plaintiffs seeks a three pronged declaration, only the first two of which apply directly to Meridian, i.e. a declaration that Meridian is barred from marketing and negotiation the loan and that Meridian is barred from excluding Moskovitz from the files and details of the negotiations. Setting aside the view that such a declaration in a final judgment would undoubtedly be mooted by ensuing events, and affording plaintiff every reasonable inference, the first cause of action states a cause of action against Meridian.

The second cause of action seeks a preliminary injunction against Meridian continuing to market and negotiate the loan. It is worth noting that the relief may be mislabeled. Generally injunctive relief as a cause of action seeks a permanent injunction. As previously noted herein, the court is granting plaintiffs limited preliminary injunctive relief against Meridian. To the extent this cause of action seeks to enjoin Meridian from taking actions that may bind, or arguably bind, North Flats without proper authorization of the members and interfere with North Flats ability to obtain financing, the second cause of action states a cause of action against Meridian.

The eleventh cause is for aiding and abetting the breach of fiduciary duty by Goldman and Gluck. This cause of action alleges that Meridian “was aware of the fiduciary duties and their breach, and substantially assisted in the breach...” Reading the complaint in its entirety, plaintiffs allege that they had an ongoing business relationship with Meridian and Meridian allegedly assisted the other defendants in breaching their fiduciary duty to the plaintiffs and thereby allegedly frustrated obtaining the “take out” financing that Meridian was retained to arrange. The eleventh cause of action states a cause of action against Meridian.

The twelfth cause of action for breach of contract. Plaintiffs allege there was a contract with Meridian and that Meridian breached the contract. This is sufficient to withstand a motion to dismiss.

For the foregoing reasons, Meridian’s motion to dismiss the complaint is denied in its entirety.

As previously noted, the motions by Goldman and Gluck to quash non-party subpoena were decided by orders dated April 2, 2015. To the extent plaintiffs seek materials that were not disclosed pursuant to those orders, plaintiffs may seek it through the discovery process.

Turning to Gluck’s motion for appointment of a temporary receiver to arrange the “take out” financing for the project, for injunctive relief against plaintiffs and to obtain access to the books and records of North Flats, as previously noted, to the extent this motion seeks access to the books and records, it was decided by order dated April 29, 2015.

The motion for appointment of a temporary receiver is pursuant to CPLR 6401, which provides, "Upon motion of a person having an apparent interest in property which is the subject of an action ... a temporary receiver of the property may be appointed...where there is danger that the property will be removed from the state, or lost, materially injured or destroyed."

Not every showing under CPLR 6401 compels the appointment of a temporary receiver. "[T]he appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (Vardaris Tech, Inc. v. Paleros Inc., 49 A.D.3d 631, 632, 853 N.Y.S.2d 601 [internal quotation marks omitted]; see Schachner v. Sikowitz, 94 A.D.2d 709, 462 N.Y.S.2d 49). Accordingly, a temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property (citations omitted). " (Quick v. Quick, 69 A.D.3d 828, 893 N.Y.S.2d 583, 2010 N.Y. Slip Op. 00495 [2d Dept., 2010]; Lee v. 183 Port Richmond Ave. Realty, Inc., 303 A.D.2d 379, 755 N.Y.S.2d 664, 2003 N.Y. Slip Op. 11658 [2d Dept., 2003]).

The agreement to extend the existing financing removed the immediate danger to the project that might have warranted the appointment of a temporary receiver. Moreover, during the conferences and discussions which resulted in the May 1st extension of the existing financing and the submission of financing proposals by all parties, it became apparent that the selection of the "best" proposal was very complex and involved issues of concern to each party that went beyond the immediate project. Given the fact that the parties were ultimately able to agree to the May 1st extension of the loan and that they are in a far better position to evaluate the needs of the project as well as their own needs, in the court's discretion, the motion to appoint a temporary receiver to arrange the "take out" financing for the project is denied at this time.

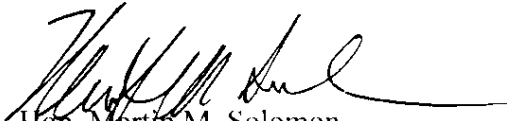
Gluck's motion for a preliminary injunction is granted to the extent that the temporary restraining order is continued and plaintiffs Toby Moskovits and TLG North be and are enjoined and restrained, without first obtaining the written approval from Moving Defendants, from (i) selling, transferring or refinancing North Flats' property, and (ii) writing checks, wiring or otherwise withdrawing or transferring funds from any bank accounts maintained by or on behalf of North Flats to themselves, any affiliated persons or entities, except any contractor or material supplier, other than payments to third parties made in the ordinary course of business and for amounts of less than \$25,000.

For the foregoing reasons, plaintiffs' motion for injunctive relief against Meridian is granted only to the extent that Meridian is enjoined from executing any document that would bind North Flats to any commitment unless Meridian obtains the unanimous consent of Moskovitz, Goldman and Gluck to such a commitment or upon further order from this court, Meridian's motion for sanctions is denied, Meridian's motion to dismiss pursuant to CPLR 3211 is denied, the motions to quash non-party subpoenas were determined by orders dated April 2, 2015, and Gluck's motion for receiver is denied at this time and Gluck's motion for injunctive relief is granted to the extent that Toby Moskovits and TLG North be and are enjoined and restrained, without first obtaining the written approval from Moving Defendants, from (i) selling, transferring or refinancing North Flats' property, and (ii) writing checks, wiring or

otherwise withdrawing or transferring funds from any bank accounts maintained by or on behalf of North Flats to themselves, any affiliated persons or entities, except any contractor or material supplier, other than payments to third parties made in the ordinary course of business and for amounts of less than \$25,000.

Motion sequence 1, 2, 3, 5, 6, and 7 decided as indicated.

Dated: June 12, 2015


Hon. Martin M. Solomon
J.S.C.