Acker v Appell
2016 NY Slip Op 30623(U)
April 8, 2016
Supreme Court, New York County
Docket Number: 652530/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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KERRY ACKER and DANIEL FEDER, as limited partners in East 86th Street Partners, a limited partnership, on behalf of themselves and derivatively in the right of East 86th Street Partners,

Plaintiffs,

-against-

MICHAEL N. APPELL and DAVID A. APPELL,

Defendants,

EAST 86TH STREET PARTNERS, a limited partnership,

Nominal Defendant.

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DECISION/ORDER
Index No. 652530/2015

HON. SALIANN SCARPULLA, J.:

In this direct and derivative action, plaintiffs move, by order to show cause, for the appointment of a temporary receiver for the benefit of East 86th Street Partners that has the authority to make all decisions for East 86th Street Partners and that may take all necessary actions to avoid waste of East 86th Street Partners' assets.

In support of their motion, plaintiff Kerry Acker ("Acker") submits an affidavit, in which he alleges that East 86th Street Partners is a limited partnership, which is governed by the Amended Agreement of Limited Partnership of East 86th Street Partners, executed in 1984, and amended in March 2004 ("Agreement"). Defendant Michael Appell has been a general partner of East 86th Street Partners from its inception, the sole general

partner for a number of years, and owns approximately 10% of East 86th Street Partners.[1] Acker and Daniel Feder ("Feder") are limited partners of East 86th Street Partners, and Acker alleges that "Feder and [Acker], and persons associated with [them], currently hold approximately 27% of the interests in East 86th Street Partners." It is further alleged that "defendant David Appell, the son of general partner Michael Appell, does not own any interest in East 86th Street Partners."

East 86th Street Partners has a fee interest in a retail space at 225 East 86th Street ("Property"), which is currently occupied by Bank Santander. Plaintiffs allege that, pursuant to the Agreement, "East 86th Street Partners was established for the specific and limited purpose of acquiring, owning, and operating the Property, and holding the Property as an investment for the general partner and the Limited Partners."

Acker avers that, on occasion, Michael Appell, acting as the general partner, refinanced the Property with the most recent refinancing occurring in June 2014. Allegedly, "[t]he refinancings resulted in additional approximately $4,000,000 in equity for East 86th Street Partners." Acker maintains that Section 8.1 of the Agreement dictates that refinancing proceeds should be distributed through distributions to partners, and although Michael Appell distributed a portion of the refinancing proceeds to the limited partners, Acker alleges that "he diverted no less than $2,750,000 of the proceeds from the refinancings, to the benefit of two companies that he and his son, David Appell control." Acker states that in a letter to limited partners in March 2015, Appell claimed that he

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[1] In his affidavit, Michael Appell states that he "own[s] approximately 6.6% of [East 86th Street Partners'] limited partner interests."

used the money "to invest in a company called 'Contour Design', which allegedly specializes in the manufacture of fashion cases and accessories for mobile phones and related products." Acker alleges that this investment "violated the purposes of East 86th Street Partners, which are to own and operate the Property, not to make speculative investments in outside companies controlled by the Appell family."

Further, Acker maintains that the March 2015 letter's characterization of the transaction with Contour Design is false. Acker alleges that David and Michael Appell created Associated Innovation Partners, LLC ("Associated"), a shell company, and that "Michael Appell then caused East 86th Street Partners to lend $2,750,000 to Associated, with no security for repayment. Acker claims that "again through an unsecured transaction, Associated lent those funds to, and took an equity interest in, another company controlled by the Appells, known as Contour Acquisition Group, LLC ('Contour Acquisition')," which is not affiliated with Contour Design. Acker alleges that "East 86th Street Partners is not even to be repaid any of the money that Michael Appell caused it to 'loan' unless and until Contour Acquisition pays Associated back the monies that Associated in turn provided to Contour Acquisition."

Acker also alleges that Michael Appell was untruthful in his letter to the limited partners when he stated "that the mortgage proceeds from the June 2014 refinancing 'will provide reserves for any unforeseen situation upon the expiration of the Bank Santander lease in February of 2019." Instead, Acker alleges that as a result of Michael Appell's actions, East 86th Street Partners was left with little surplus cash. Acker also avers that matters are made worse because "David Appell is a convicted felon and disbarred

attorney who has pled guilty to [several] charges." Acker claims that these charges arose in the context of "David Appell's misleading investors while attempting to raise capital to finance several different schemes, paying secret bribes, and artificially manipulating corporate stock."

Finally, Acker sets forth other alleged improprieties perpetrated by Michael Appell. It is alleged that Michael Appell transferred East 86th Street Partners' assets to East 86th Street, LLC, which is an entity that Michael Appell controls; and that "Michael Appell additionally appears to have taken at least $97,500 in improper fees for himself in connection with the refinancings that are not permitted under the Agreement." Acker avers that Michael Appell's actions were undertaken without approval or knowledge of any of the limited partners.

In their memorandum of law, plaintiffs argue that "there is a substantial danger that East 86th Street Partners and its assets will be 'materially injured or destroyed', and that, to avoid irreparable loss, someone is needed to take, hold, and preserve the partnership and its assets while this action is pending." (citation omitted) They further argue that the issue is not whether a receiver is needed, "but who is to perform those duties," and they suggest "that it must be a disinterested non-party, so that self-interest and inter-party disagreements and positioning do not play any role in the objective and neutral decisions which must protect all parties."

In opposition to the motion, Michael Appell argues that plaintiffs have not met the high burden in appointing a temporary receiver because they have not shown "that there

is a danger of 'irreparable loss or damage.'" (citation omitted)[2] He also claims that Michael Appell has no interest in Contour Acquisition or Associated beyond the *pro rata* interest that all East 86th Street Partners share and that David Appell has never been a Contour managing member, nor is he a managing member of Associated.[3]

Michael Appell disputes plaintiffs' implication that the loan to Contour Acquisition constitutes a "pattern of waste and diversion of Partnership assets," because, as general partner, Michael Appell was authorized to invest partnership funds, one loan is not a pattern, and the investment did not constitute "a change in the general character or nature of the Partnership's business" pursuant to the Agreement. Michael Appell additionally disputes allegations regarding a transfer of assets to East 86th Street, LLC and his receipt of fees for refinancing, because he argues that these assertions are deceptive.

Michael Appell additionally argues that plaintiffs have not shown that a receiver is needed to protect them. He argues that plaintiffs' interests are sufficiently secured by

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[2] David Appell submits an affidavit, stating that he has no interest and does have management responsibilities in East 86th Street Partners. He further states that he submits no substantive reply to the motion because the motion does not seek relief as against him, and "respectfully note[s] that [his] silence in respect of this motion may not be construed to constitute agreement with any of the allegations made in plaintiffs' papers."

[3] In his affidavit, David Appell states, "[a]t the time of [Associated]'s formation, my son and I both were managing members of [Associated]. David Appell subsequently resigned as managing member and has no management role in [Associated]. I am the sole managing member of [Associated]." He also states that he is the sole managing member of Contour, and that as a finder fee for the investment opportunity, David Appell received a 10% interest in Associated and a 5% interest in Contour, but has received no cash. David Appell will not receive any funds from his interest in Associated or Contour until East 86th Street Partners and other investors are repaid in full with interest.

East 86th Street Partners' solvency, Michael Appell's limited partner shares in the partnership as well as his interest as general partner, and the fact that the commercial unit continues to generate substantial rental income. Finally, Michael Appell notes that appointing a temporary receiver would injure East 86th Street Partners because the appointment would be considered "an 'Event of Default' under the terms of the Partnership's existing mortgage on the commercial unit, and would trigger lender's right to commence foreclosure and or pursue certain other remedies that would be detrimental to East 86th [Street Partners]."[4]

Discussion

CPLR § 6401(a) states,

> [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, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

Plaintiffs seeking the appointment of a receiver must show "clear proof of the danger of irreparable loss or damage." *Groh v. Halloran*, 86 A.D.2d 30, 33 (1st Dep't 1982). "The appointment of a receiver of a going concern is a drastic remedy, and can properly be invoked only where there is a clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant." *Glassner v. Kaufman*, 19 A.D.2d 885, 885 (1st Dep't 1963).

[4] In reply, plaintiffs dispute that the appointment of a receiver would necessarily constitute "an event of default," but nonetheless state "plaintiffs are willing to stipulate that the appointment of a receiver here be subject to the bank's approval."

Plaintiffs claim that a receiver is needed because Michael Appell has used a large portion of refinancing proceeds to invest in a company associated with him and his son, David Appell. Plaintiffs note that East 86th Street Partners is unlikely to be repaid the loan Michael Appell extended because Contour is in poor financial health. Additionally, in an affidavit in further support of plaintiffs' motion, Acker states that Contour's profit and loss statement ("P&L") that Michael Appell previously sent in May 2015 "appears grossly to misrepresent the true financial condition of Contour Acquisition."

Here, plaintiffs' allegations fail to clearly show that "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." CPLR § 6401(a). Plaintiffs' assertions of mismanagement and waste do not carry specific evidentiary support and are therefore insufficient to support the appointment of a temporary receiver. *See Modern Collection Assocs. v. Capital Grp., Inc.*, 140 A.D.2d 594, 594 (2d Dep't 1988); *Shapiro v. Ostrow*, 46 A.D.2d 859, 859 (1st Dep't 1974). Moreover, plaintiffs have failed to show that East 86th Street partners is currently at risk of insolvency, further militating against the appointment of a temporary receiver. *See Martin v. Donghia Assocs.*, Inc., 73 A.D.2d 898, 898 (1st Dep't 1980) ("Finally, it is unnecessary at this time to appoint a Receiver for this profitable, on-going business and the request for an accounting is denied until plaintiffs establish the underlying claims asserted in the complaint."). *Cf. Somerville House Mgmt., Ltd. v. Am. Television Syndication Co.*, 100 A.D.2d 821, 822 (1st Dep't 1984) (finding that plaintiff made a sufficient showing for a temporary receiver when it showed, *inter alia*, "that defendants are on the verge of insolvency or may dissipate the assets.").

Finally, I note that the appointment of a receiver may be considered an event of default under the Property's mortgage. A mortgage default would be an undesirable consequence of appointing a receiver at this time. For all of the foregoing reasons, I deny motion to appoint a temporary receiver is denied.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion for the appointment of a temporary receiver for the benefit of East 86th Street Partners that has the authority to make all decisions for East 86th Street Partners and that may take all necessary actions to avoid waste of East 86th Street Partners' assets is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on April 27, 2016, at 2:15 PM.

This constitutes the decision and order of this Court.

DATE : 4/8/16

SALIANN SCARPULLA, JSC