

**A&F Hamilton Hgts. Cluster, Inc. v Urban Green
Mgt., Inc.**

2016 NY Slip Op 30646(U)

April 11, 2016

Supreme Court, New York County

Docket Number: 653038/2014

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X
A&F HAMILTON HEIGHTS CLUSTER, INC.,
derivatively on behalf of HAMILTON HEIGHTS
CLUSTER ASSOCIATES, L.P., and JAMES FENDT,
derivatively on behalf of A&F HAMILTON HEIGHTS
CLUSTER, INC., PLEASANT AVENUE ASSOCIATES,
L.P., FAM PLEASANT AVENUE LLC, AFF-PSA
BRONX 9-D, INC. and TAF ALEXANDER AVE., INC.,

Plaintiffs,

-against-

Index No.: 653038/2014

URBAN GREEN MANAGEMENT, INC. and
ERIC ANDERSON,

DECISION & ORDER

Defendants,

and

HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P.,
A&F HAMILTON HEIGHTS CLUSTER, INC.,
PLEASANT AVENUE ASSOCIATES, L.P., FAM
PLEASANT AVENUE LLC, AFF-PSA BRONX 9-D,
INC., and TAF ALEXANDER AVE., INC.,

Nominal Defendants.

-----X
WHGA HAMILTON HEIGHTS CLUSTER, INC., and
WEST HARLEM HEIGHTS CLUSTER, INC.,

Intervenor-Plaintiffs,

-against-

HAMILTON HEIGHTS CLUSTER ASSOCIATES, L.P.,
A&F HAMILTON HEIGHTS CLUSTER, INC., A&F
EQUITIES, LLC; and A&F HHC EQUITIES, LLC,

Intervenor-Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Defendants Eric Anderson and Urban Green Management, Inc. (Urban Green, with Anderson, Defendants), move (Motion Sequence 013): 1) to preclude derivative plaintiff James Fendt from contending that the ownership of nominal defendant Hamilton Heights Cluster Associates, L.P. (Partnership), is different than is set forth in the 1999 Partnership Agreement [Dkt 71];¹ 2) to disqualify the Tendy Law Firm, who represents derivative plaintiff James Fendt; and 3) and for an award of Defendants' costs and fees incurred in making this motion. The Intervenor-Plaintiffs, WHGA Hamilton Heights Cluster, Inc., and West Harlem Heights Cluster, Inc. (collectively, Intervenors), join in the motion. Fendt cross-moves for an order barring Defendants from making further motions without leave of court.

The ground for the motion is that Fendt's attorney, Sheila Tendy, withheld signed copies of the Partnership Agreement that were in the possession of the managing agent, Safeguard, who was managing the Partnership until this court's order, dated July 8, 2015, appointing a receiver. Dkt 228. Safeguard was hired by Fendt. Defendants' attorney, Andrew Hayes, alleges that he discovered two signed copies of the Partnership Agreement on November 18, 2015, when he went to the office of the managing agent employed by the receiver. Hayes was there because Safeguard had delivered 25 boxes of documents to the new managing agent, pursuant to this court's order of October 30, 2015. Dkt 419.² Hayes contends that Fendt should be precluded at trial from attempting to prove that the Partnership Agreement was amended because he withheld the originals found by Hayes.

¹ Unless otherwise defined, terms defined in this court's July 8, 2015, decision and order (2015 Decision, Dkt 230) have the same meaning in this opinion. References to "Dkt" filed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

² The October 30, 2015, order was entered because the order appointing the receiver limited the documents to be turned over to him. Compare Dkt 228 & 419.

Hayes and Anderson first brought the existence of the signed Partnership Agreement to the court's attention in March 2015, when they filed a copy of it. Dkt 70-71. Prior to that, in October 2014, Fendt had moved for a preliminary injunction and to appoint Safeguard as the Partnership's managing agent, based on, *inter alia*, an Unsigned Amendment to the Partnership Agreement. Dkt 2, 38 & 47. Fendt's motion was granted *on default*. Dkt 38 & 47. At oral argument of the motion, the court raised the fact that Fendt was relying on the Unsigned Amendment. Katherine Daniels, Esq., of Bahn Multer, LP, co-counsel with Tendy for Fendt, stated that she was reasonably confident that the Unsigned Amendment was in effect; that she had asked Defendants for a signed copy, but they did not have one; and that plaintiffs did the best they could in providing the court with the Unsigned Amendment. Dkt 47, pp 6-7. In Hayes' March 2015 letter, he provided the court with a copy of the signed Partnership Agreement, which he claimed was proof that the Unsigned Amendment did not give Fendt authority to replace Urban Green with Safeguard as managing agent of the Partnership.

Subsequently, Defendants moved to appoint a receiver to manage the Partnership and to compel Tendy to disgorge fees paid to her firm by the plaintiff entities, on the ground that Fendt did not have authority under the terms of the Partnership Agreement to bring the action. The Intervenor moved to dismiss the complaint on the same ground. Both motions referred to the signed Partnership Agreement, the existence of which was known to all. Dkt 85, ¶6, & 111.

In this court's 2015 Decision, the motions for a receiver and to dismiss were granted, with leave granted to Fendt to replead a derivative action. Dkt 230. The 2015 Decision noted that documents in the record contained different names for entities comprising the Partnership, which were consistent with the Unsigned Amendment. *Id.* The documents were signed by Anderson in connection with a 2004 refinancing of the Partnership's mortgage. *Id.* In addition,

the 2015 Decision discussed K-1s that were issued for 9 years after the refinancing, when Defendants were managing the Partnership, to a non-existent entity with the name “WHGA Hamilton Heights Cluster Assoc.” The K-1s reflected the same percentage ownership as Intervenor West Harlem Heights Cluster, Inc., purportedly had in the Unsigned Amendment.

Thus, there is nothing new here, except that Defendants’ attorney claims that he found 2 signed originals of the Partnership Agreement. Furthermore, in support of the motion, Defendants submitted excerpts of photocopies of the originals, with signatures that are illegible, although Hayes alleges that the signatories are different than on the copy Defendants previously submitted to the court. Moreover, since the inception of the action, Fendt claimed that the parties acted in accordance with the Unsigned Amendment, while the Intervenor disputed its validity and the ownership percentages reflected in it, although they claimed that there had been a substitution of one entity comprising the general partner with the Intervenor West Harlem Heights Cluster, Inc., and the entity named as the limited partner. Dkt 180. The substitutions the Intervenor supported were consistent with the Unsigned Amendment and the 2004 mortgage refinancing documents. The 2015 Decision determined only that Fendt did not have authority to bring the action based on the documents submitted at the time, including the signed Partnership Agreement. However, the 2015 Decision clearly pointed to issues of fact surrounding the Unsigned Amendment that would benefit from discovery, which is ongoing.

Since this action was filed, Defendants have made incessant accusations that Fendt has not turned over records that were in Urban Green’s office in September 2014, when Safeguard took over, and various orders were entered requiring Fendt, Safeguard and/or Safeguard’s employees, Abreu and Rosado, to prepare an inventory and turn over documents. Dkt 52, 419, 425 & 543. In the last order, Defendants’ motion for spoliation sanctions was denied because it

rested on hearsay. Dkt 543. In addition, due to Fendt's failure to establish that the Partnership authorized the action, Fendt was ordered to repay fees that were paid to the Tendency Law Firm by the original plaintiff entities. Dkt 428, 453 & 476.

It has become obvious to the court, which has presided over numerous motions and other proceedings in this action, that the relationship between Hayes and Tendency is acrimonious. A new attorney, James Catterson of Kaye Scholer, appeared as co-counsel to Tendency, when Hayes first began accusing her of misconduct.³ Tendency, without Catterson, has appeared for the last few applications.

Discussion

Under 22 NYCRR §130-1.1(a), "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" Conduct is frivolous under 22 NYCRR §130-1.1(c)(1) if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." In awarding costs, the court has discretion to impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct, which shall be to the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law. 22 NYCRR §§ 130-1.1 & 130-1.3. In determining whether to award costs, the court must consider the circumstances surrounding the conduct,

³ In their reply papers, Defendants allege that during a court-ordered deposition on November 2, 2015, Yasmin Rosado, testified that Tendency came to Safeguard's office and took invoices rendered by the Tendency firm to Fendt and Tendency's associate instructed Rosado not to answer questions about conversations with Tendency based on the attorney/client privilege. The court will not reach the issue because Tendency and Fendt had no opportunity to respond. In addition, Hayes mischaracterizes Rosado's testimony. She said that she did not know whether Tendency took the invoices.

including time available to properly investigate the legal or factual basis for the conduct. 22 NYCRR §130-1.1(c).

Sanctions are appropriately awarded where there is no bona fide basis for a claim; where a party ignores court orders for disclosure; where a party makes false sworn statements, or for fraud that causes delay or substantial expense. *644 BRDY Realty v 684 Owners Corp.*, 216 AD2d 43 (1st Dept. 1995) (no bona fide basis for claim); *Kihl v Pfeffer*, 94 NY2d 118, 123 (1999) (ignoring court orders for disclosure); *Birch v Carroll*, 210 AD2d 119, 120 (1st Dept 1994) (substantial expense and delay due to fraudulent scheme); *Sanders v Copley*, 194 AD2d 85, 88 (1st Dept 1993) (false sworn testimony and affidavit on material issue). On the other hand, sanctions are inappropriate where a party asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure. *Gordon Group Invs., LLC v Kugler*, 127 AD3d 592, 594-595 (1st Dept 2015), citing *Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 70 (1st Dept 2006).

Defendants' motion is denied. Sanctions are inappropriate because Fendt's claim based on the Unsigned Amendment was colorable and there was no prejudice to Defendants. Defendants had, and successfully used, a copy of the original Partnership Agreement. Although Fendt's preliminary injunction motion was granted, Defendants defaulted on the motion. Without a showing of prejudice, there is no basis to disqualify Tendency or to impose the costs of making this motion on plaintiffs.⁴

⁴ Defendants have cited no authority, and the court has found none, for disqualifying a lawyer for withholding an original of a document of which the moving party already had a copy. Furthermore, a civil litigant has a fundamental right to counsel of its choice and the court must be mindful of the possibility that disqualification is sought for improper reasons, to delay, or to gain a strategic advantage. *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 (1987); *Strongback Corp. v N.E.D. Cambridge Ave. Dev Corp.*, 32 AD3d 793 (1st Dept 2006).

A party may be enjoined from making motions without prior leave of court where he engages in a pattern of frivolous motion practice that constitutes an abuse of the judicial system. *Sibersky v Winters*, 42 AD3d 402, 404 (1st Dept 2007). The cross-motion is granted to the extent of barring defendants from making any further motions without a prior court order concerning: 1) documents taken from Urban Green's Office in September 2014; and 2) Tendy's legal fees paid by the nominal plaintiff entities before the receiver was appointed. Defendants have exhibited a pattern of making unfounded motions about the documents allegedly taken in 2014 and have repeatedly made motions about fees paid to Tendy by the plaintiff entities, an issue that was resolved by ordering Fendt to repay the money.⁵ The motions are burdensome on the other parties and the court. Leave of the court to make further motions on the above-mentioned subjects may be obtained by making a conference call to chambers with an attorney for each party on the line.⁶

The court finds that Defendants' motion was frivolous and orders Defendants to pay \$1,000.00 to the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law. There was no merit to the motion, or even a colorable basis. The withholding of original copies of the Partnership Agreement did not bear remotely on the dispute over the Unsigned Amendment, or any other material issue in the case. There was no showing of prejudice to Hayes' clients. The disqualification prong of the motion was not supported by any citation to authority or grounds for disqualifying an attorney. The issue of the Tendy invoices was improperly raised for the first time in reply, and, in addition, Fendt had been ordered to

⁵ Defendants made this motion a week after Fendt was ordered to repay the entities for Tendy's fees. Compare Dkt 428 & 445.

⁶ The court's rules require a pre-discovery motion conference call. *See, Individual Practices in Part 54.*

return the fees a week before Defendants filed this motion. The court finds that the motion was made for the purpose of harassment and wasted judicial resources. Accordingly, it is

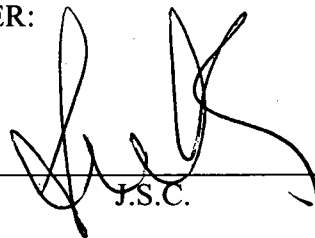
ORDERED that the motion (Motion Sequence 013) by Defendants Eric Anderson and Urban Green Management, Inc., to preclude, to disqualify the Tandy Law Office, and for sanctions is denied; and it is further

ORDERED that the cross-motion by plaintiffs to enjoin said Defendants from making further motions in this action without leave of court is granted to the extent indicated in this decision and is otherwise denied; and it is further

ORDERED that within one week of service upon them of a copy of this order with notice of entry, Defendants Eric Anderson and Urban Green Management, Inc., shall pay \$1,000.00, as a sanction, to the Lawyers' Fund for Client Protection established pursuant to section 97-t of the State Finance Law, and the upon service upon him of a copy of this order with notice of entry at cc-nyef@nycourts.gov, the Clerk shall enter judgment for said sanction against said Defendants, jointly and severally.

Dated: April 11, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C