

Ruandro, LLC v Born
2016 NY Slip Op 31008(U)
May 19, 2016
Supreme Court, New York County
Docket Number: 651148/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 651148/2014
RUANDRO, LLC
vs.
BORN, RICHARD
SEQUENCE NUMBER : 001
OTHER

INDEX NO. _____

MOTION DATE 5/10/16

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 52-58

Answering Affidavits — Exhibits _____ | No(s) 62-65

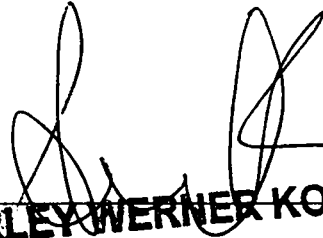
Replying Affidavits _____ | No(s) 67-75, 80-98

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/19/16


SHIRLEY WERNER KORNREICH
J.S.

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

RUANDRO, LLC,

Index No.: 651148/2014

Plaintiff,

DECISION & ORDER

-against-

RICHARD BORN, SEAN MACPHERSON,
ERIC GOODE, IRA DRUKIER, and SIRE
HOTEL COMPANY, LLC,

Defendants.

-----X

SHIRLEY WERNER KORNREICH, J.:

Non-party John Ruha moves (1) pursuant to CPLR 1012 and 1013, for leave to intervene in this action; and (2) pursuant to CPLR 3211(a) and 3217(b), for dismissal of the complaint. Plaintiff Ruandro, LLC (Ruandro) opposes the motion. Defendants take no position on the motion. The motion is denied for the reasons that follow.

I. Background

This action, along with two other actions consolidated for discovery,¹ concerns disputes over the alleged right of Ruandro and one of its principals, Gerald Rosengarten (a non-party in this action and the plaintiff in the related actions), to convert the upper three floors and the roof of the Bowery Hotel, located at 335-343 Bowery in Manhattan (the Building), to condominium units. Without delving into the merits of these bitterly litigated cases, in short, Rosengarten alleges that he has the contractual right to conduct this condominium conversion if the fee title to the property is acquired by non-party Three on Third, LLC (TOT), Ruandro's landlord, or its

¹ Those actions are each styled *Rosengarten v Born*, Index Nos. 651147/2014 and 651149/2014.

affiliates.²

Ruandro is a New York LLC. Its only members are Rosengarten and Ruha, and they each own 50% of the membership interests. Ruandro's sole asset is a sublease for the upper three floors and the roof of the Building. Ruandro's Articles of Organization indicate that it was formed on August 6, 2005 [*see* Dkt. 82]³ and it entered into the sublease with TOT on August 6, 2005. *See* Dkt. 83.

Originally, Rosengarten and Ruha did not execute a formal operating agreement for Ruandro. However, they did execute a letter agreement, dated November 7, 2006 (the Letter Agreement), which addresses their rights as members in Ruandro with respect to the sublease and their dealings with TOT. *See* Dkt. 84. The Letter Agreement states that its sole purpose "is to allow separate development and benefit for both [Rosengarten and Ruha]" of two of the subleased floors (the 15th and 16th), and that they "will still act jointly in regard to Ruandro's dealings with" their landlord. *See id.* at 2.

In 2013, Rosengarten loaned \$2 million to Ruha (the Loan). The Loan, explicitly made for commercial purposes, is memorialized and governed by a Promissory Note dated January 30, 2013 (the Note). *See* Dkt. 85. The Note requires monthly interest payments beginning on March 1, 2013 until its maturity date on January 31, 2016. *See id.* at 2. The Note is secured by a Pledge of Membership Interest Agreement dated January 30, 2013 (the Pledge), pursuant to which Ruha granted Rosengarten a security interest in his Ruandro membership interest and voting rights in

² TOT is the tenant under a ground lease of the real property and the Building. Rosengarten and Ruha are also members of TOT.

³ References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

the event Ruha defaulted on the Loan. *See id.* at 10-11. Under the Pledge, Ruha, until the liabilities under the Loan were satisfied, agreed to deliver to Rosengarten “all certificates, instruments or other documents evidencing any of the Pledged Collateral” and to appoint Rosengarten as his “attorney-in-fact, coupled with an interest.” *See id.* at 15-16.

Later that year, during a period of time when Rosengarten claims the Loan was in default, Rosengarten executed, on behalf of himself and as Ruha’s “attorney in fact”, an Operating Agreement for Ruandro dated October 22, 2013 (the Operating Agreement). *See* Dkt. 86. The Operating Agreement provides that Rosengarten and Ruha are the only members, but that Ruha’s interest is subject to the Pledge. *See id.* at 3. The Operating Agreement names Rosengarten as the sole Manager of Ruandro, which, he contends, affords him the authority to prosecute this action on Ruandro’s behalf. *See id.* at 7.

On April 14, 2014, Ruandro commenced this action by filing a summons with notice. Ruandro filed a complaint on May 23, 2014. *See* Dkt. 7. The specific allegations in the complaint are not pertinent to this motion. A preliminary conference was held on June 26, 2014, and discovery is ongoing.⁴ Ruha, who was aware of this action, did not file the instant motion for leave to intervene until September 4, 2015, nearly 17 months after its commencement. Moreover, Ruha has not submitted a proposed pleading. Nonetheless, Ruha contends that the court must dismiss this action because Rosengarten, a 50% member of Ruandro, lacks the authority to maintain this action without his consent. Rosengarten opposes the motion on the grounds of timeliness and failure to provide a proposed pleading. Rosengarten also avers that

⁴ Discovery would likely have been completed by now but for the protected ESI process, the specifics of which are beyond the scope of this motion. *See, e.g.*, Dkt. 43.

Ruha failed to seek intervention until now because, until recently, he was in default on the Loan and, thus, the threat of forfeiture of his rights in Ruandro under the Pledge would have precluded him from intervening. The court reserved on the motion after oral argument pending submission and consideration of the complete set of governing contracts and the recent decisions in other related actions. *See* Dkt. 96 (3/24/16 Tr.).

II. Discussion

CPLR 1012(a)(2), which governs intervention as of right, provides:

Upon **timely** motion, any person shall be permitted to intervene in any action ... **when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment.**

(emphasis added).

Permissive intervention is governed by CPLR 1013 and provides, as relevant here:

Upon **timely** motion, any person may be permitted to intervene in any action when ... the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

(emphasis added).

That said, “[d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied.” *In re HSBC Bank U.S.A.*, 135 AD3d 534 (1st Dept 2016), quoting *Yuppie Puppy Pet Prods., Inc., v Street Smart Realty, LLC*, 77 AD3d 197, 201 (1st Dept 2010). However, as the statutes provide, intervention is only permitted when the proposed intervenor timely moves to intervene. *See id.*; *T & V Const. Corp. v Pratti*, 72 AD3d 1065, 1066 (2d Dept 2010) (“Intervention under CPLR 1012 and CPLR 1013 requires a timely motion”). Where, as here, “it is uncontested that the proposed intervenors knew about the pending action

for over a year, [this] court [may] properly den[y] the motion to intervene as untimely.” See *HSBC*, 135 AD3d at 534, citing *RKH Holding Corp. v 207 Second Ave. Realty Corp.*, 236 AD2d 254, 255 (1st Dept 1997) (“Leave to intervene was also properly denied in view of the proposed intervenor’s year-long delay in seeking such relief, despite her undisputed knowledge that the foreclosure action had been commenced.”). Ruha’s waited nearly 17 months before seeking to intervene. He provides no excuse for his delay. He alleges that litigation between him and Rosengarten as to his default on the Loan was the reason for the delay. However, if he and Rosengarten were at odds and he objected to this suit, the opposite would be true – he would have sought intervention at the start of this action.⁵

In any event, even if Ruha’s motion was timely, it would be still be denied. CPLR 1014 provides that “[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought.” See *Zehnder v State*, 266 AD2d 224, 224-25 (2d Dept 1999) (“The Supreme Court was correct in denying the motion ... for leave to intervene in the absence of a proposed pleading”); see also *Farfan v Rivera*, 33 AD3d 755 (2d Dept 2006) (same). Ruha did not submit a proposed pleading, setting forth what (if any) claims he has.

Additionally, Ruha will not be bound by any judgment in this case. This action was brought by Ruandro, which seeks to enforce its claimed rights to compel a condominium conversion. If Ruandro were to prevail in *this* action (leaving aside the relief sought in the other two Related Actions, in which Ruha does not seek to intervene), all that would mean is Ruandro

⁵ Rosengarten alleges that Ruha originally was in favor of this action but has received consideration from defendants, which has caused him to change his mind. See Dkt. 63 at 4.

has the contractual rights alleged by Rosengarten. The determination of whether Ruandro *actually* will conduct a condominium conversion is a matter concerning the internal affairs of Ruandro, and, therefore, is a dispute between its members, i.e., Rosengarten and Ruha. The governance of Ruandro is not at issue in this action. In contrast, the issue of Ruha's membership status, his default on the Loan, and the proposed dissolution of Ruandro are all being addressed in separate actions before this court.⁶ Ruha can adequately protect his interests in those actions, including litigating his right to object to Ruandro conducting a condominium conversion. A judicial declaration that Ruandro has conversion rights, the issue in this action, cannot prejudice Ruha since Ruha's concern is merely whether such rights are exercised.

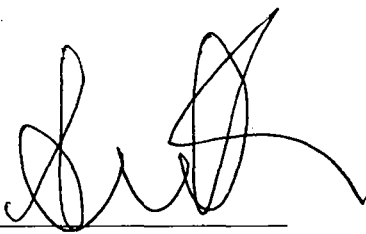
Indeed, Justice Lebovits, who presided over two lawsuits between Rosengarten and Ruha, by order dated March 14, 2016, denied Ruha's summary judgment motion seeking dissolution of Ruandro. *See Rosengarten v Ruha*, Index No. 151159/2014, Dkt. 45. That action will determine Rosengarten's and Ruha's rights in Ruandro, such as the validity of the Operating Agreement. Justice Lebovits found there to be material questions of fact requiring a trial. *See id.* at 3. Also, by orders dated April 11, 2016, Justice Lebovits dismissed an action brought by Rosengarten for summary judgment in lieu of complaint against Ruha seeking enforcement of the Loan because Ruha paid the amount sought by Rosengarten. *See Rosengarten v Ruha*, Index No. 153992/2014, Dkt. 60 & 61.

Finally, Ruha's motion to dismiss this action is denied. Ruha has no standing to bring the motion in an action in which he is not a party. Accordingly, it is

⁶ Further, there is a Yellowstone action, which was recently transferred to this part, styled *Ruandro, LLC v Three on Third LLC*, Index No. 155505/2014. The parties filed a joint letter in which they list all of the related actions. *See* Dkt. 80.

ORDERED that the motion by non-party John Ruha for leave to intervene and for dismissal of the complaint is denied.

Dated: May 19, 2016

ENTER: 

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.