

**Marx v Island Hills Golf Club, Inc.**

2017 NY Slip Op 30573(U)

March 24, 2017

Supreme Court, Suffolk County

Docket Number: 010930-2011

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 01/18/2017  
ADJ. DATE: 02/22/2017  
Mot. Seq. 006-MD

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ROBERT MARX; ANTHONY PUGLISI; LARRY GRAYSON; JOHN ERRA;  
STEPHEN R. CANTOR; CRAIG HINCK; WAYNE HALL; JOSEPH  
PARADISE; KEITH BELCHER; PETER FIORILLO; GLENN ZACHARY;  
SEAN HARTMAN, as Executor of the Estate of WILLIAM HARTMAN; C.  
DONALD SCHLIMBAUM; PAUL SOUTHARD; HOWARD SAMUELS;  
MARC HOWARD; CHARLES G. FIRMBACH; ALEXANDER BUCHANAN;  
THOMAS J. LYNCH; DIPAK PATEL; CRAIG BREWER; WAYNE  
BREWER; CARMINE AVELLINO, SR.; PETER ROSENTHAL; PETE  
SCHAAF; WAYNE LICKER; DAVID DITKOWICH; STEVEN MEMOLI;  
JEROME STEVENS PHARMACEUTICAL; GERALD SULLIVAN;  
MICHAEL A. ROMEO; JOHN HEINTZ; FRANK GIORGIO; NORMAN  
RUSS; JOE STUDLEY; DENNIS KANFER; FRED WERFEL; JOE  
BONJIORNO; DREW J. SAPEDE, as Executor of the Estate of DONALD A.  
SAPEDE; ROBERT TRINCHETTO; BERNARD FRANKEL, MICHELLE  
BODNER and WILLIAM B. SIEGEL, as sole heirs of ADOLPH SIEGEL,  
CASSATA ORGANIZATION, DENNIS O'HARA; KEVIN BALKAM and  
DOUG VALERO,

Plaintiffs

-against-

ISLAND HILLS GOLF CLUB, INC., ATTORNEY GENERAL OF THE  
STATE OF NEW YORK and JOHN DOES I-X, inclusive,

Defendants

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ACTION I  
Index No. 010930-2011

**DECISION & ORDER**

Before the HON. WILLIAM G. ASHER

SUPREME COURT, SUFFOLK COUNTY  
IN AND FOR THE STATE OF NEW YORK

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CARL R. PIVARSKY, JR., as Co-Trustee under the Last Will and Testament of  
Carl R. Pivarsky, Sr., deceased,

Plaintiff

-against-

385 IH LLC, CLAIRE PIVARSKY a/k/a CLAIRE M. PIVARSKY a/k/a  
CLAIRE G.M. PIVARSKY, Individually; CLAIRE PIVARSKY a/k/a  
CLAIREM. PIVARSKY a/k/a CLAIRE G.M. PIVARSKY, as Trustee of the  
Trust benefitting ROSELLEN MCCANN pursuant to the Last Will & Testament  
of CLAIRE G. MCCANN, deceased; CLAIRE PIVARSKY a/k/a CLAIRE M.  
PIVARSKY a/k/a CLAIRE G.M. PIVARSKY as remaining Co-Trustee under  
the Last Will and Testament of CARL R. PIVARSKY, SR., deceased; and 458  
LAKELAND AVENUE LLC,

Defendants

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ACTION II

Index No.  
603543/2016

Before the HON. ELIZABETH EMERSON

SUPREME COURT, SUFFOLK COUNTY  
IN AND FOR THE STATE OF NEW YORK

ROBERT MARX, ANTHONY PUGLISI, LARRY GRAYSON, JOHN ERRA,  
STEPHEN R. CANTOR, CRAIG HINCK, WAYNE HALL, JOSEPH  
PARADISE, KEITH BELCFIER, PETER FIORILLO, GLENN ZACHARY,  
SEAN HARTMAN as Executor Of the Estate of WILLIAM HARTMAN,  
C. DONALD SCFILIMBAUM, PAUL SOUTHARD, HOWARD SAMUELS,  
MARC HOWARD, CHARLES G. FIRMBACH, ALEXANDER BUCHANAN,  
THOMAS J. LYNCH, DIPAK PATEL, CRAIG BREWER, WAYNE  
BREWER, CARMINE AVELLINO, SR., PETER L. ROSENTHAL, PETE  
SCHAAF, WAYNE LICKER, DAVID DITKOWICH, STEVEN MEMOLI,  
JEROME STEVENS PHARMACEUTICAL, GERALD SULLIVAN,  
MICHAEL A. ROMEO, JOHN HEINTZ, FRANK GIORGIO, NORMAN  
RUSS, JOE STUDLEY, DENNIS KANFER, FRED WERFEL, JOE  
BONJIORNO, DREW J. SAPEDE as Executor Of the Estate of DONALD A.  
SAPEDE, ROBERT TRINCHETTO, BERNARD FRANKEL, MICHELLE  
BODNER and WILLIAM B. SIEGEL as sole heirs of ADOLPH SIEGEL,  
CASSATA ORGANIZATION, DENNIS O'HARA, KEVIN BALKAM and  
DOUG VALERIO,

Plaintiffs

-against-

ISLAND HILLS GOLF CLUB, INC., CARL R. PIVARSKY, JR., as Co-Trustee  
under the Last Will and Testament of Carl R. Pivarsky, Sr., deceased, R  
SQUARED IH, LLC, 385 IH LLC. CLAIRE PIVARSKY a/k/a CLAIRE M.  
PIVARSKY a/k/a CLAIRE G.M. PIVARSKY, Individually; CLAIRE  
PIVARSKY a/k/a CLAIRE M. PIVARSKY a/k/a CLAIRE G.M. PIVARSKY,  
as Trustee of the Trust benefitting ROSELLEN MCCANN pursuant to the Last  
Will & Testament of CLAIRE G. MCCANN, deceased; CLAIRE PIVARSKY  
a/li/a CLAIRE M. PIVARSKY a/k/a CLAIRE G.M. PIVARSKY as remaining  
Co-Trustee under the Last Will and Testament of CARL R. PIVARSKY, SR.,  
deceased, 458 LAKELAND AVENUE LLC, WILLIAM GRADANTE,  
ANTHONY CASSINO, ROBERT DIBASIE, KERRY EVANS, JOSEPH  
VITARELLI, JAMES PLATE, JAY GORMAN and DOES I-X, inclusive,

Defendants

ACTION III  
Index No. 613247/2016

**TO:**

WALSH & ROTH  
360 ROUTE 109  
WEST BABYLON, NY 11704  
631-321-7000

HAMBURGER, MAXSON, YAFFE & MCNALLY, LLP  
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632 MERRICK RD  
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BRODY, O'CONNOR & O'CONNOR, ESQS.  
810 SEVENTH AVENUE, STE 2700  
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212-233-2505

HERRICK FEINSTEIN  
2 PARK AVENUE  
NEW YORK, NY 10016  
212-592-1400

VICTOR A. CARR & ASSOCIATES  
88 SECOND STREET  
MINEOLA, NY 11501  
516-747-2478

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiffs in Action I dated December 16, 2016 for consolidation of three related actions pursuant to CPLR § 602, the Affirmation of David I. Roth, Esq. with Exhibits A-N attached thereto; (2) Affirmation in Opposition for Defendants in Action II: R Squared IH, LLC; 385 IH, LLC; and 458 Lakeland Avenue, and 385 IH, LLC Defendant in Action III, by Lane T. Maxson, Esq. affirmed on February 8, 2017 with Exhibits A and B attached thereto; (3) Affirmation in Opposition for Defendant Island Hills Golf Club, Inc. by Donald R. Hamill affirmed on February 8, 2017 with Exhibit A attached thereto; (4) Affirmation in Opposition for Defendants Island Hills Golf Club, Inc., William Gradante and Robert Dibiase, by Scott A. Brody, Esq. affirmed on February 8, 2017; and (5) Reply to Opposition to Motion for Consolidation for Plaintiffs in Action I by David I. Roth, Esq. affirmed on February 21, 2017; it is:

**ORDERED** that the motion (Seq. #006) by Plaintiffs in Action I for consolidation with Actions II and III is denied.

#### DECISION

Plaintiffs in Action I move to consolidate Actions I, II, and III. All three actions pertain to or arise out of ownership, leasehold, or security interests in a 116.25 acre parcel of property located in Sayville, New York upon which a golf course has been in operation since 1927 and until recently was operated by Island Hills Golf Club, Inc.

#### Action I

Action I was commenced on April 1, 2011 and assigned to the Hon. Peter F. Cohalan, thereafter it was assigned to the Hon. Jerry Garguilo in or about December of 2012, and then re-assigned to this Court in January of 2015. Action I, in the Amended Petition / Complaint, seeks:

1. The repayment of bonds issued to the Plaintiffs in the amount \$1,5000.00 with interest; and

2. A declaration of the membership rights of Plaintiff Robert Marx in Defendant Island Hills Golf Club, Inc.; and
3. The redemption of Escrow Bonds and the issuance of a Replacement Certificate in accordance with the "92 Plan"; and
4. An injunction prohibiting the Defendant Island Hills Golf Club, Inc. from "continuing with ultra vires" activity; and
5. Dissolution of Defendant Island Hills Golf Club, Inc.

By Decision and Order of this court dated August 31, 2015 this Court granted Plaintiffs' motion (Seq. 005) for partial summary judgment on the first cause of action and each of the Plaintiffs that had capacity to bring the action were granted a partial judgment in the amount of \$1,500.00 together with interest. The movant informs the court this partial judgment has been satisfied as to all named Plaintiffs in Action I. *Affirmation of David I. Roth, Esq. at par. 30.*

#### Discontinued Petition for Dissolution

On February 1, 2016, a Petition was filed by William Gradante, Kerry Evans, Anthony Cassino, Robert DiBiase, and John V. Rafter, collectively alleged to be "*a majority of the active directors of the Board of Directors of Island Hills Golf Club, Inc.*" for the judicial dissolution of Island Hills Golf Club, Inc. *See e-filed Petition Suffolk County Index Number 610473/2016.* This Petition for Dissolution was assigned to the Hon. Elizabeth Emerson. However, on July 7, 2016, Petitioner executed a stipulation that vacated the stay that had previously been by the court and discontinued this petition for dissolution. This stipulation was so ordered by that court.

#### Action II

On March 4, 2016 Action II was commenced by the filing of summons and complaint. Plaintiff seeks:

1. The partition and sale of the 116.25 acre parcel of property with payment to Plaintiff for its equitable interest in the fee title; and
2. A constructive trust upon the 75% ownership interest purportedly obtained by Defendant 385 IH, LLC, as has been alleged it obtained that interest from Island Hills Golf Club, Inc. (a non-party to this action); and
3. An award of \$1,500,000.00 in damages from Defendant 385 IH, LLC for its conversion of a sprinkler / irrigation system that runs throughout the 116.25 acre parcel.

### Action III

On August 23, 2016 Action III was commenced by the same Plaintiffs in Action I in addition to the Defendant Island Hills Golf Club, Inc. in Action I, Plaintiff added as Defendants in Action III both the Plaintiff and Defendants in Action II.

Also named as a Defendant in Action III is R SQUARED IH, LLC which Plaintiffs allege secured an option to purchase an 18.75% interest in the fee estate of the subject premises, and that through this option interest successfully prevented Island Hills Golf Club, Inc. from securing either a new lease or a lease extension. Plaintiffs allege R SQUARED IH, LLC was in league with officers of Island Hills Golf, Inc. to obtain an appraisal that undervalued Island Hills Golf, Inc. interest in the property inducing the members to settle a foreclosure action on less favorable terms. Plaintiffs add an additional group of Defendants to Action III that they contend are members and officers of Island Hills Golf, Inc. that have controlled this corporation and have engaged in improper self-dealing these Defendants being: William Gradante, Kerry Evans, Anthony Cassino, Robert DiBiase, Joseph Vitarelli, James Plate, Jay Gorman, and "John Does I-X.

The foregoing description of the three actions is a limited synopsis of the material events that relate to the purchase by Island Hills Golf, Inc. of a 50% interest in the fee title, followed by the purchase of another 25% interest in the fee title, loans made to and a mortgages executed by Island Hills Golf, Inc., the foreclosure action on the mortgage, an ensuing settlement with the sale of the 75% interest Island Hills Golf, Inc. had in the property, and the expiration of its lease to the premises.

### Current Status of Actions II and III

In both Actions II and III there are dispositive motions pending. In Action II there is a motion to dismiss pursuant to CPLR 3211 (a)(3) and EPTL 10-10.7. In Action III there is a motion to dismiss pursuant to CPLR § 3211 (a) (1) (5) and (7) by 458 Lakeland Avenue, LLC; 385 IH, LLC and R SQUARED IH, LLC (collectively the "Rechlers") and Cross Motion to Amend Complaint. Action III is pending in the Commercial Division which is a Part dedicated to the resolution of commercial cases such as these related actions. *22 NYCRR § 202.70 (b)*. Under these circumstances this Court will not consolidate the actions which might be resolved upon the motions pending therein, or otherwise may be more properly be addressed in the Commercial Division of the Supreme Court. Accordingly, the motion to consolidate is denied with leave to renew in the Commercial Division should that Part so permit.

The foregoing shall constitute the decision and order of the court.

Dated: March 24, 2017

  
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 JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION