

<b>Kleinman v Cohen</b>
2017 NY Slip Op 32969(U)
April 3, 2017
Supreme Court, Rockland County
Docket Number: 033699/2015
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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ABRAHAM KLEINMAN and COHEN BRAFFITS  
ESTATES DEVELOPMENT LLC,

Plaintiff,

**DECISION & ORDER**

-against-

Index No.033699/2015

ZOHAR COHEN, A/K/A ZOHAR ABIKZER AND  
THOMAS WILLIAMS,

Defendant(s).

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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ERIC TAUBMAN, WILLIAM MAYER AND FIRST  
NATIONAL LAND DEVELOPMENT OF  
NEW YORK, LLC

Plaintiff,

Index No. 031417/2016<sup>1</sup>

-against-

ZOHAR COHEN A/K/A ZOHAR ABIKZER, A/K/A  
ZOHAR ABIKZER COHEN, COHEN BRAFFITS  
ESTATES DEVELOPMENT LLC, THOMAS WILLIAMS  
AND BRAFFITS MOUNTAIN LIQUIDATION UNIT,

Defendant(s).

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The following papers numbered 1- 3 read on this Order to Show Cause by proposed Third Party Plaintiffs, ERIC TAUBMAN, WILLIAM MAYER and FIRST NATIONAL LAND DEVELOPMENT OF NY LLC, for an Order (1) consolidating the two matters herein pursuant to

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<sup>1</sup> Plaintiff's motion contains the incorrect Index Number and also fails to delineate that Cohen Braffits Estates Development, LLC is a Plaintiff in the first action. Further, Plaintiff improperly uses the terminology "Third Party Plaintiff" and "Third Party Defendant" as to the second action. The parties in the second action are not intervenors and therefore should be denominated Plaintiff and Defendant. Additionally, Plaintiff has annexed the incorrect Complaint as Exhibit 1 to their moving papers.

Civil Practice Law and Rules § 602, (2) amending the caption to reflect the consolidation and (3) allowing the Third Party Plaintiffs an Equal Say in the marketing of the Property owned by COHEN BRAFFITS ESTATES DEVELOPMENT, LLC:

<u>PAPERS</u>	<u>NUMBERED</u>
Order to Show Cause/Affirmation of Michael L. Previto, Esq./Affidavit of Eric Taubman/Exhibits (1-9)	1
Affirmation of Reginald H. Rutishauser, Esq./Exhibits (A-H)	2
Reply Affirmation of Michael L. Previto, Esq./Reply Affidavit of Eric Taubman <sup>2</sup> /Declaration of Kinan Nimeh/Exhibit 10 (contains three parts)	3

On August 5, 2015 Plaintiffs KLEINMAN AND COHEN BRAFFITS ESTATES DEVELOPMENT, LLC (hereinafter CBED) commenced Action #1 by filing a Complaint which alleges fraud in a real estate investment by Defendants ZOHAR COHEN A/K/A ZOHAR ABIKZER (hereinafter ZOHAR) and attorney THOMAS WILLIAMS (hereinafter WILLIAMS). Subsequently, on August 15, 2015 Plaintiffs TAUBMAN, WILLIAM MAYER and FIRST NATIONAL LAND DEVELOPMENT OF NEW YORK, LLC (hereinafter TAUBMAN) commenced the second action by filing a Complaint in Nassau County Supreme Court. The second action was later transferred to Rockland Supreme Court. Upon transfer, Plaintiff TAUBMAN filed a Request for Judicial Intervention (hereinafter RJJ) stating that the two actions are related.

Plaintiff is seeking consolidation of the aforementioned two actions because Plaintiff TAUBMAN has an interest in the subject matter of the first action “which is not adequately represented by the parties” and that the cases have common questions of both law and facts. The argument presented by Plaintiff TAUBMAN that the two cases contain common questions of fact and law appears to rest upon the fact that the Plaintiffs in both actions were victimized by the Defendant ZOHAR, that the facts of the fraud is intertwined and that the parties have competing interests for ownership over the same land. In support of their application TAUBMAN Plaintiffs state that they have been “frozen” out of all management decisions and seek the instant

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<sup>2</sup> The Court notes that the Reply Affidavit of Eric Taubman is undated and not notarized.

consolidation so that they can be “dealt in” so that they can “have a fair chance of protecting our interests.” [Previto Aff. ¶ 25].

In opposition Plaintiffs KLEINMAN and CBED argue that consolidation would be improper in the instant matter as CBED is a Plaintiff in Action #1 and a Defendant in Action #2. As a result, Plaintiffs KLEINMAN and CBED aver that in a consolidation the parties would have to be totally “realigned” and a consolidation would be confusing to a jury. Additionally, Plaintiff KLEINMAN and CBED oppose the consolidation as the two actions involve different transactions, different written agreements and different oral representations.

Where common questions of law or fact exist, consolidation is warranted unless the opposing party demonstrates prejudice of substantial rights. [*Civil Practice Law and Rules* § 602; *American Home Mtge. Servicing, Inc. v. Sharrocks*, 92 AD3d 620, 622; *Chiacchia v. National Westminster Bank*, 124 AD 626, 628 (2d Dept 1986)]. A determination to consolidate actions rests within the sound discretion of the trial court. [*American Home Mtge. Servicing, Inc. v. Sharrocks*, 92 AD3d at 622]. In a situation where after a consolidation the role of an individual as a plaintiff and defendant could be the source of confusion at a jury trial of the consolidated action, consolidation is inappropriate. [*Padilla v. Greyhound Lines*, 29 AD2d 495, 497 (1st Dept 1968); *M & K Computer Corp. v. MBS Industries, Inc.*, 271 AD2d 660 (2d Dept 2000)]. Further, where there is insufficient identity of factual or legal issues in an action, then consolidation is not warranted. [*J.T. Mauro Co. v. Genesee Val Group Health Assn*, 184 AD2d 998 (4th Dept 1992); *Dunkin Donuts v. Reyes Corp.*, 166 AD2d 908 (4th Dept 1998)].

In the instant action any consolidation would place Plaintiff/Defendant CBED on both sides of the equation. The fact that CBED would be both a Plaintiff and Defendant in one consolidated action would lead to confusion for a jury. Further, consolidation is inappropriate because even though the actions arise out of the same fraudulent real estate scheme, they present claims on different written and oral agreements that involve different transactions and different parties.

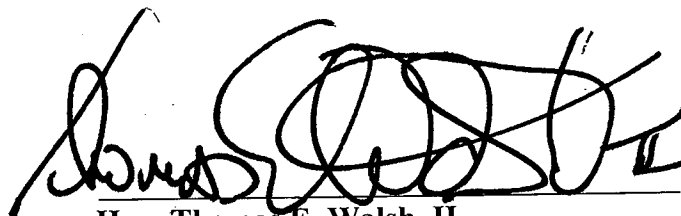
As to Plaintiff TAUBMAN’s application for “Equal Say” in the marketing of the Property owned by CBED, the Court finds that the application is insufficient pursuant to *Civil Practice Law and Rules* § 6301. Specifically, TAUBMAN seeks the “Equal Say” as part of his Order to Show Cause for consolidation as if it is part and parcel of the consolidation application. The

relief sought is not part of the consolidation, but rather is seeking a preliminary injunction to protective the fifty percent (50%) ownership Plaintiff alleges they have in CBED. The purpose of a preliminary injunction is to safeguard rights of a Plaintiff in a pending action or special proceeding, i.e preserve the status quo until the case can be fully adjudicated on the merits. [*Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 NY2d 236, 239 (1992); *Walker Memorial Baptist Church v. Saunders*, 285 NY 462, 474 (1941); *Bachman v. Harrington*, 184 NY 458, 464 (1906)]. Additionally, a preliminary injunction can also be used to restore the status quo as it existed prior to the commencement of the wrongdoing by the defendant. The factors to be considered by the court are (1) the likelihood of success on the merits, (2) irreparable injury and (3) a balancing of the equities in their favor. [*Neumann v. Metropolitan Medical Group*, 153 AD2d 888 (2d Dept 1989)].

The Plaintiff has failed to argue any of the three requirements for a preliminary injunction. Rather, Plaintiff TAUBMAN includes a narrative recitation of the facts as he believes they are with multiple documents annexed, but the Plaintiff's failure to demonstrate how those documents support any of the three requirements for a preliminary injunction.

Based upon the foregoing the motion is granted to the extent that the two matters are joined, but not consolidated, for trial.

Dated: New City, New York  
April 3, 2017



Hon. Thomas E. Walsh, II  
Justice of Supreme Court

TO:

MICHAEL PREVITO, ESQ.  
Attorney for Plaintiff TAUBMANN, WILLIAM MEYER and  
FIRST NATIONAL LAND DEVELOPMENT OF NEW YORK  
(via e-file)

REGINALD H. RUTISHAUSER, ESQ.  
KANTROWITZ, GOLDHAMMER & GRAIFMAN, P.C.  
Attorney for Plaintiff ABRAHAM KLEINMAN and COHEN BRAFFITS ESTATES  
DEVELOPMENT, LLC