

Moyal v Tripost Capital Partners, LLC
2018 NY Slip Op 30046(U)
January 10, 2018
Supreme Court, New York County
Docket Number: 650824/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

-----X
DAVID MOYAL 1 800 POSTCARDS, INC., ONE 2 ONE ON
VARICK, LLC, EXT PRINTING & DESIGN, INC.,

Plaintiffs,

INDEX NO. 650824/2017

MOTION DATE 10/18/2017

MOTION SEQ. NO. 003

- v -

TRIPOST CAPITAL PARTNERS, LLC, 121 PROP OWNER LLC,
121 PROP LEASE OWNER LLC, 121 RETAIL OWNER LLC,
121 RETAIL LEASE OWNER LLC, 121 VARICK STREET
GROUP, LLC, TP VARICK LLC, BRADLEY CARROLL, TODD
SILVERMAN, BCDC HOLDINGS, LLC, TSBC LLC, DWKI
ASSET I, LLC, TS VARICK, LLC, BC VARICK, LLC, CKR
HOLDINGS, LLC, LONDON VARICK LLC, SOUTH OCEAN, OF
AN UNKNOWN ENTITY TYPE, TRIPOST INVESTMENTS LLC,
TP VARICK MM LLC, TP-F VARICK LLC, 121 VARICK
STREET CORP., JONATHAN NOTARO, JOHN DOE 1, JOHN
DOE 2

Defendants.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number 36, 37, 38, 39, 40, 41, 42, 43,
44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 76, 77, 78, 80, 81, 99, 102, 108, 111,
115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134,
135, 136, 137, 138, 139, 140, 152, 154

were read on this application to/for Injunction/Restraining Order

HON. SALIANN SCARPULLA:

Plaintiffs David Moyal ("Moyal"), 1 800 Postcards, Inc., One 2 One on Varick
LLC, and Next Printing and Design, Inc. (collectively "plaintiffs"), moved, by order to
show cause submitted on October 18, 2017, for a preliminary injunction: 1) enjoining
defendant 121 Retail Lease Owner LLC from selling the leases and sublease at the
building at 121 Varick Street consisting of "retail spaces" encompassing the first floor
and mezzanine level; 2) staying an action brought in the commercial landlord tenant part

of the Civil Court of the State of New York under index no. 61914/2017 (the “Civil Court Action”); and 3) ordering that if defendant 121 Prop Lease Owner LLC proceeds with the sale of any of its interest in the shares appurtenant to the third and sixth floors of the building at 121 Varick Street, the net proceeds from the sale, after payment of closing fees and note and mortgage of Alma Bank, be paid into court pending the resolution of this action.

By amended decision and order dated October 27, 2017, I denied plaintiffs’ request for a temporary restraining order for the above-demanded relief. In my October 27, 2017 decision and order I noted that a final judgment had already been entered in the Civil Court Action, thus plaintiffs’ request for a stay of the Civil Court Action was moot.

At oral argument on this preliminary injunction application on November 28, 2017, plaintiffs informed me that they were seeking a stay of execution of the judgment in the Civil Court Action and vacatur of the warrant of eviction. By letter dated December 15, 2017, plaintiffs informed me that Judge Jose A. Padilla of the Civil Court of the City of New York had denied plaintiff 1 800 Postcards, Inc.’s order to show cause to stay execution of the judgment and warrant of eviction issued in the Civil Court Action. Accordingly, I deny as moot that part of plaintiffs’ preliminary injunction application in which they seek a stay of the Civil Court Action, as a judgment and warrant of eviction have already been entered in the Civil Court action, and the Civil Court has denied a stay of the judgment and warrant. Plaintiffs’ remedy now lies in the appellate process.

Further, prior to my October 27, 2017 amended decision and order, the parties had stipulated to the sale of the sixth-floor lease. After the expenses of sale were paid, part of the proceeds of sale were used to pay down a loan secured by the third-floor and sixth-floor leases ("the Alma Loan"), and the remainder of the sale proceeds were distributed to defendants. Plaintiffs now seek an order requiring defendants to disgorge the proceeds they retained from the sale of sixth floor lease and further pay down the Alma Loan.

At oral argument on November 28, 2017 defendants confirmed that there is not now a prospective purchaser for the third-floor lease and they averred that they have been and will continue to pay the interest on the remaining portion of the Alma Loan. Defendants also confirmed that they would use the proceeds of any eventual sale of the third-floor lease to pay off fully the Alma Loan and secure the cancellation of the Alma Loan guarantees. Plaintiffs do not dispute that, even if I had ordered defendants to use the entire proceeds of the sale of the sixth-floor lease to pay off the Alma Loan, it would not be fully repaid.

Under these circumstances, I find that plaintiffs' have failed to show a threat of imminent, irreparable harm sufficient to warrant the issuance of a preliminary injunction requiring defendants to disgorge their share of the proceeds of the sale of the sixth-floor lease to further pay down the Alma Loan. If defendants wrongfully paid themselves part of the proceeds from the sale of the sixth-floor lease, plaintiffs may be made whole by money damages.

Further, as there is no prospective purchaser for the third-floor lease, and defendants have averred on the record that they will continue to pay the interest on the

remaining portion of the Alma Loan and will fully pay off the Alma loan in the event of a sale of the third-floor lease, plaintiffs have not yet demonstrated a present, immediate threat of irreparable harm sufficient to warrant the issuance of a preliminary injunction as to the third-floor lease. I deny plaintiffs' request for a preliminary injunction as to the third-floor lease without prejudice to renewal in the event the above-discussed circumstances change.

The last issue on this preliminary injunction motion is plaintiffs' application to enjoin defendant 121 Retail Lease Owner LLC ("RLO") from selling the leases and sublease at the building at 121 Varick Street consisting of "retail spaces" encompassing the first floor and mezzanine level (the "Leases"). Plaintiffs argue that RLO has failed to market the Leases in a commercially reasonable manner and is proposing to sell the leases for below their market value. If plaintiffs prevail on these claims, they may be made whole by money damages, and injunctive relief is therefore improper. *See WHG CS, LLC v. LSREF Summer REO Trust 2009*, 79 A.D.3d 629 (1st Dept. 2010); *Credit Index, L.L.C. v. RiskWise Int'l, L.L.C.*, 282 A.D.2d 246 (1st Dept. 2001); *Mr. Dees Stores, Inc. v. A.J. Parker, Inc.*, 159 A.D.2d 389 (1st Dept. 1990); *Multi Media Entertainment, Inc. v. National Telefilm Associates, Inc.* 58 AD 2d 785 (1st Dep't 1977).

Plaintiffs also argue that the Leases are unique and that defendants' proposed sale of the Leases would cause them, individually, irreparable harm. However, as defendants rightfully point out in opposition, none of the individual plaintiffs have standing to seek injunctive relief with respect to the Leases. By assignment dated August 15, 2015 1 800 Postcards, Inc. assigned its interests in the Leases to TP Varick LLC and then, on

November 15, 2015, TP Varick LLC assigned the Leases to RLO. Thus, since November 2015, none of the individual plaintiffs have had any property interest in the Leases.

Plaintiffs argue that 1 800 Postcards, Inc.'s assignment of the Leases in 2015 was only intended to create a security interest in the leases, and that 1 800 Postcards, Inc. now has "ownership of these leases as mortgagee." In support of this argument, plaintiffs point to **§5.11** of the Joint Venture Agreement, which states that the Leases are assigned to TP Varick LLC as "security for Moyal Member's obligations in respect of the Alma Bank Consent."

Review of the assignments themselves (see Glanzberg Aff. Exh. A) show that they are absolute and unconditional. Plaintiffs have produced no documents, other than the vague statement in the Joint Venture Agreement, showing that the parties intended to treat the assignment of Leases from 1 800 Postcard, Inc. to TP Varick LLC as a mortgage. And while **§5.11** of the Joint Venture Agreement discusses the first assignment of Leases, from 1 800 Postcard, Inc. to TP Varick LLC, there is nothing in the Joint Venture Agreement to indicate that TP Varick LLC's assignment of the Leases to RLO several months later intended to reserve for 1800 Postcards, Inc. a reversionary interest in the Leases. Instead, that second assignment is also absolute and unconditional.

In opposition, defendants explain that the language in the joint venture agreement indicating that the first assignment of Leases from 1 800 Postcard, Inc. to TP Varick LLC was "security for Moyal Member's obligations in respect of the Alma Bank Consent," refers to the fact that effectuation of the joint venture was conditioned on Alma Bank's consent to the transaction. Moyal was required to secure that consent, and, if he did not

secure consent, the transactions taking place in anticipation of the joint venture (such as the first assignment of Leases) would have to be unwound. Once Moyal secured Alma Bank's consent, the Leases would then be unconditionally assigned to a subsidiary of the 121 Varick Street Group LLC, as contemplated in the Joint Venture Agreement.

Defendants note that Moyal eventually obtained Alma Bank's consent, and the Leases were then unconditionally assigned from TP Varick LLC to RLO, as contemplated by the joint venture agreement and reflected in the documentation.

Because the unambiguous and unconditional assignments submitted on this motion show that none of the plaintiffs currently have any interest in the Leases, and plaintiffs have not provided meaningful proof in opposition, I find that plaintiffs' argument that they have a reversionary interest in the Leases does not have a likelihood of success on the merits.

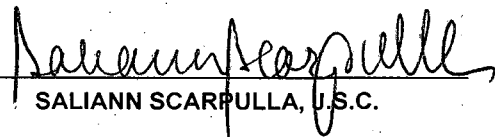
In addition, in balancing the equities I note that none of the plaintiffs have paid any rent on the Leases for many months, although they claim that they have been using part of the space. Plaintiffs do not dispute that defendants have been paying the rent under the Leases and, if I issue the preliminary injunction, defendants would be forced to continue to do so. Given that I find that plaintiffs' do not have a likelihood of success in showing that they have a reversionary interest in the Leases and that the issuance of a preliminary injunction would require defendants to pay rent that they do not want to continue to pay, the equities favor defendants. To the extent that plaintiffs have made additional arguments on this motion in favor of a preliminary injunction, I have considered these arguments but they do not persuade me to issue the injunction.

In accordance with the foregoing, plaintiffs' motion for a preliminary injunction is denied.

This constitutes the decision and order of the Court.

1/10/2018

DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐
☐
☐
☐

CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

☒

DENIED

☒
☐
☐
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE