

Trustees of Masonic Hall & Asylum Fund v Bay Ridge Lodge 758 Bldg. Corp.
2018 NY Slip Op 31688(U)
March 21, 2018
Supreme Court, Kings County
Docket Number: 500308/17
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of March, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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TRUSTEES OF MASONIC HALL &
ASYLUM FUND,

Plaintiffs,

- against -

Index No. 500308/17

BAY RIDGE LODGE 758 BUILDING
CORP., BAY RIDGE MINERVA LODGE
#758, JERRY FISHMAN, PETER
GRAZIOLI, AND ANTHONY BARRIS,

Defendants.

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The following e-filed papers read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

_____ Affidavit (Affirmation) _____

Memoranda of Law _____

Papers Numbered

22, 23-30, 33 36, 38-39

40-56, 58-64 71

66-70

31, 65 37, 75

Upon the foregoing papers, in this action by plaintiffs Trustees of Masonic Hall & Asylum Fund (the Trustees) against defendants Bay Ridge Lodge 758 Building Corp. (Building Corp.), Bay Ridge Minerva Lodge #758 (Bay Ridge Lodge), Jerry Fishman

alleging claims of conversion, replevin, breach of fiduciary duty, and unjust enrichment, the Trustees move, by order to show cause, under motion sequence number one, for an order:

(1) appointing a temporary receiver during the pendency of this action for their benefit to:

(i) marshal, take, and maintain possession of the real property located at 9104 4th Avenue, Brooklyn, New York (the building) and all other assets (collectively, the property) of Bay Ridge Lodge and Building Corp., including, but not limited to, all of Bay Ridge Lodge's documents, books, records, papers, funds, and bank accounts; (ii) demand, collect, and receive from the tenants in possession of any portion of the building, or any other persons liable therefor, all rents, license fees, and revenues generated by or from the building; (iii) maintain and operate the building in a good state of repair and in accordance with the Trustees' requirements, all applicable laws, ordinances, regulations, rules, and orders of governmental authorities; (iv) rent or lease any part of the building for terms not exceeding one year; (v) keep the building in a proper state of repair, in compliance with law and insured against loss or damage by fire, and to make the expenditures necessary for these purposes and for the purpose of paying the necessary running and operational expenses of the building; (vi) pay any taxes, water rates, or assessments now due upon the building or hereafter and during the pendency of this action to become due; (vii) pay the principal and interest charges in connection with any prior encumbrances of the building; (viii) institute and carry on such legal proceedings as may be necessary for the protection of the building, for the collection of rents and profits thereof, or for the removal of any tenant, licensee, or other person from

the building, subject, however, to the qualification that the temporary receiver shall not retain outside counsel other than the Trustees' counsel in this action, namely, Hodgson Russ LLP, without further application to this court; (ix) obtain advances from the Trustees of such funds as may be required by the temporary receiver to cover operating expenses of the building, the temporary receiver's fees and costs, and costs needed for the temporary receiver to perform all of the tasks and duties set forth in this order; (x) negotiate, extend, terminate, modify, renegotiate, ratify, or enter into interim leases under such terms and conditions as the temporary receiver may, in the exercise of its business judgment, deem appropriate or desirable; (xi) negotiate, extend, terminate, modify, renegotiate, ratify, or enter into interim contracts under such terms and conditions that the temporary receiver may, in the exercise of its business judgment, deem appropriate or desirable; and (xii) provide routine accounting and purchasing services as required in the ordinary course of business of the building; and (2) compelling all defendants and their employees, agents, officers, directors, subsidiaries, affiliates, parents, and all other persons or entities within their control or supervision or acting in concert with them, to turn over the property to the temporary receiver.

Defendants cross-move, under motion sequence number two, for an order: (1) denying the Trustees' motion for the appointment of a temporary receiver; (2) pursuant to CPLR 3212, granting them partial summary judgment on the issue of the Trustees' liability on their counterclaims; and (3) setting this action down for an immediate trial on the issue of their damages on their counterclaims, pursuant to CPLR 3212 (c); or, alternatively, (4)

pursuant to CPLR 3212 (g), determining what facts are not in dispute or are incontrovertible and specifying such facts and deeming them established for all purposes of this action.

FACTS AND PROCEDURAL BACKGROUND

The Trustees were formed under an Act of Incorporation adopted by the New York State Legislature in 1864 (*see* Chapter 272 of the Laws of 1864, as amended), and are subject to the Not-For-Profit Corporation Law. The Trustees are entrusted with the maintenance and protection of all assets of the New York State Masonic Fraternity. Bay Ridge Lodge was a not-for-profit corporation organized as a subordinate lodge of the Grand Lodge of the State of New York (the Grand Lodge), and formed pursuant to the Benevolent Orders Law. Bay Ridge Lodge was issued a warrant or Charter from the Grand Lodge. Fishman was a member of Bay Ridge Lodge, and beginning in May 2013, he held the office of Master of Bay Ridge Lodge. Fishman was a fifth generation Mason, with his family's Mason membership tracking back to 1857, and Fishman's late father was a Mason for 70 years. Grazioli and Barris were members and Trustees of Bay Ridge Lodge. Through a recruiting effort by Fishman, Bay Ridge Lodge's membership rose to over 100 active members. Bay Ridge Lodge collected dues from its members, which were used to support charitable causes.

Bay Ridge Lodge was the fee owner of the building, and was collecting rental income from the building. According to defendants, the rent collected by Bay Ridge Lodge was in the amount of \$70,000 annually. This income was planned to be used to fund charitable causes. Bay Ridge Lodge was responsible for maintaining and protecting the building.

Defendants claim that from January to April 2016, there were eight meetings held by Bay Ridge Lodge, and it was determined by Bay Ridge Lodge that it would form a separate corporation, namely, Building Corp., to operate the building.

Defendants caused Building Corp. to be formed on or around March 7, 2016, at which time Building Corp.'s certificate of incorporation was filed with the New York State Department of State. Building Corp. does not hold a warrant or Charter from the Grand Lodge, and it is not a corporation formed pursuant to the Benevolent Orders Law. Building Corp.'s certificate of incorporation reflects that Building Corp. was formed under Business Corporation Law § 402 as a for-profit New York corporation. Building Corp.'s certificate of incorporation was signed by Fishman, and Fishman is Building Corp.'s authorized representative.

On July 11, 2016, defendants caused Bay Ridge Lodge, as the seller, to transfer the building to Building Corp., as the buyer, for allegedly no or inadequate consideration. Fishman, Grazioli, and Barris are identified as the authorized signatories for Bay Ridge Lodge, and Fishman is identified as Building Corp.'s authorized representative on the transfer documents. As reflected by bank statements, in September 2016, defendants also transferred in excess of \$100,000 from Bay Ridge Lodge's bank account to Building Corp.'s bank account, and used \$10,000 of Bay Ridge Lodge's funds to pay attorney's fees in connection with these transfers.

Defendants claim that Joseph J. Burke (Burke), who was the Assistant Grand Lecturer and was elevated to the District Deputy Grand Master of the Third Kings Masonic District in May 2016, favored spending Lodge money on parties and other outings for Lodge members. Defendants allege that at the May 21, 2016 fraternal night dinner where the winner of each Lodge's Brother of the Year award was announced, and at which time Fishman presented the award to Joseph Staiano (Staiano), who held the offices of Junior Warden and Acting Secretary of Bay Ridge Lodge, Burke stated that his choice for Bay Ridge Lodge's Brother of the Year award would have been Milton Henry (Henry). Defendants further allege that at the May 26, 2016 annual election of officers, Burke stated that he would have preferred Henry as the Master of Bay Ridge Lodge over Fishman, who was reelected as the Master of Bay Ridge Lodge. Defendants assert that this was because Henry and Burke preferred funding parties and outings, rather than spending Bay Ridge Lodge's money on charitable purposes.

A September 28, 2016 meeting, which Fishman could not attend because he had recently undergone heart surgery, was audiotaped by Staiano. Thomas P. Wilkinson (Wilkinson) filled in for Fishman as the Master of Bay Ridge Lodge at this meeting. Burke attended this meeting, and Ralph K. Archangel (Archangel), who is the North Star Program Chairperson for the Third Kings Masonic District, and Gill R. Calderon (Calderon), who is the Assistant Grand Lecturer for the Third Kings Masonic District, also attended. At this meeting, Staiano read emails from Henry, and stated that Henry had engaged in un-Masonic

conduct, and that Henry was invited to a meeting and refused to attend. Henry was restricted from Bay Ridge Lodge until further notice. Burke expressed his dissatisfaction with this, and there was a heated verbal dispute. Following this meeting, Burke issued a report to Williamson and the Grand Lodge. Based on this report, Williamson summoned Fishman; David McDowell (McDowell), who was the Senior Warden of Bay Ridge Lodge; Eric D. Rukhman (Rukhman), who was the Treasurer of Bay Ridge Lodge; Wilkinson; Staiano; and Abner Rivera (Rivera), who was the Acting Junior Warden of Bay Ridge Lodge, to a hearing at the Grand Lodge headquarters on October 31, 2016. Williamson revoked Bay Ridge Lodge's Charter and the dues cards before the hearing.

On the same day of the October 31, 2016 hearing, the Grand Lodge wrote to Burke and stated that "Williamson . . . in response to the meeting held this morning with the principal officers of [Bay Ridge Lodge], orders and directs you as the personal representative of the Grand Master to immediately collect and take possession of all of the Financial Records, Instruments and Bank Books belonging to [Bay Ridge Lodge]." A November 10, 2016 "Official Directive and Lawful Masonic Order" directed Fishman and others to "cause all of the financial records, bank books, ledgers, financial reports, financial statements, and documentation pertaining to the funds, foundations and property held in any and all financial and/or brokered accounts belonging to or held in trust for [Bay Ridge Lodge to] be entrusted and delivered to . . . Burke on or before November 18, 2016." Fishman responded by his counsel, Dennis Houdek, Esq., to the "Official Directive and Lawful Masonic Order" on

November 18, 2016, and advised Williamson that any and all books and records requested in his “Official Directive and Lawful Masonic Order” had been previously transferred to counsel by him, and were, therefore, only discoverable by litigation.

Williamson, in response, issued a “Grand Master’s Directive,” dated December 2, 2016, addressed to, among others, Fishman, which, among other things: (1) ordered the immediate suspension from office of Fishman, as the Master of Bay Ridge Lodge; (2) directed that Mr. Fishman shall stand suspended from office until a Masonic Trial was convened to hear and try him, (3) appointed the Senior Warden of Bay Ridge, McDowell, as the Master of Bay Ridge Lodge; and (4) ordered McDowell to deliver or cause to be delivered to the District Deputy Grand Master all of the permanent records belonging to Bay Ridge Lodge from the past five years on or before Wednesday, December 7, 2016. The Grand Master’s Directive warned that if all of the permanent records belonging to Bay Ridge Lodge from the past five years were not turned over to the District Deputy Grand Master by McDowell on or before Wednesday, December 7, 2016, then “[i]n addition to contumacy to an order of the Grand Master,” the “failure to comply with this . . . order [would] subject the Senior Warden acting as Master and other elected officers of the [Bay Ridge] Lodge to being singularly and severally liable for violating their fiduciary duties under the Benevolent Orders Law of the State of New York,” and “subject him or them to civil charges and penalties.” The “Grand Master’s Directive” further warned that “[t]he Grand Lodge also reserves the right to present the matter of the violation of fiduciary obligations under the

Benevolent Orders Law of the State of New York by the Lodge Officers to the New York Attorney General's office for [its] review and possible action."

By a letter dated December 7, 2016, Mr. Houdek, Esq., on behalf of Fishman, McDowell, Rukhman, Staiano, and Rivera, responded that each and every one of these directives was blatantly wrongful and rejected by them, and that each and every one of the threats based on those directives was completely without basis. Mr. Houdek, Esq., reiterated the statements in his prior November 18, 2016 letter that any and all books and records requested in the "Official Directive and Lawful Masonic Order" had been previously transferred to him by Fishman and were thus only discoverable in the litigation that he was authorized by his clients to commence.

On December 12, 2016, the Grand Lodge, in a letter signed by Paul M. Rosen, General Secretary, addressed to Burke, stated that Williamson, as the Grand Master, in response to the deliberate failure of the officers of Bay Ridge Lodge to deliver or cause to be delivered the permanent records and financial records of Bay Ridge Lodge to the District Deputy Grand Master, as ordered, declares the Charter of Bay Ridge Lodge "suspended until further notice." This letter further stated that the suspension of Bay Ridge Lodge's Charter had the same effect upon all of the members of Bay Ridge Lodge, and, as such, each member could not affiliate with another Lodge unless they were expressly exempted from the order of suspension. The Grand Lodge also brought charges against Fishman, Rukhman, Staiano, McDowell, Rivera, Andrew F. Bruskin (Bruskin), Regina, and Michael Bistreich. The

charges against Fishman accused him of “contumacy” in failing to turn over the books and records of Bay Ridge Lodge and Building Corp. to the Grand Lodge. In May 2017, following a Masonic trial, a Masonic judgment was issued, finding Fishman guilty of all charges. A Masonic Trial was held with respect to the charges against Bay Ridge Lodge and the individual defendants on August 9, 2017. It appears that the individual defendants were suspended from being Masons for one year. By a Masonic decision dated August 9, 2017, the Trial Commission imposed on Bay Ridge Lodge the following discipline: “Recommend Forfeiture of Lodge Charter.”

On January 6, 2017, the Trustees, which is the Masonic arm above the Grand Lodge in the hierarchy of New York Masonry, filed this action against defendants, alleging a first cause of action for conversion, a second cause of action for replevin, a third cause of action for breach of fiduciary duty, and a fourth cause of action for unjust enrichment. The Trustees’ first cause of action for conversion seeks an order directing defendants to provide a full and complete accounting of all transactions involving the building from January 1, 2016 to the date of the accounting, and awarding them damages in an amount exceeding \$1 million. The Trustees’ second cause of action for replevin requests an order directing that title to the property be transferred to the Trustees, or, in the alternative, an order appointing a receiver pursuant to CPLR 6401 to hold, maintain, and protect the property during the pendency of this action. The Trustees’ third cause of action for breach of fiduciary duty demands an award of damages in an amount exceeding \$1 million. The Trustees’ fourth

cause of action for unjust enrichment demands an order directing that title to the building be transferred to the Trustees, and that defendants pay over to them the total sum of all rental income received on account of the building. On February 26, 2017, defendants filed an amended answer and 30 counterclaims. On March 20, 2017, the Trustees filed a reply to the counterclaims, denying all of the allegations contained therein.

On February 6, 2017, defendants (as plaintiffs), along with Rukhman, Rivera, Bruskin, and Anthony J. Regina (who was a member and Trustee of Bay Ridge Lodge), filed a related action against Grand Lodge, Williamson, Burke, Archangel, and Calderon, as defendants (the Bay Ridge Lodge action). On April 27, 2017, the plaintiffs in the Bay Ridge Lodge action filed an amended complaint. The allegations and claims in the amended complaint in the Bay Ridge Lodge action are virtually identical to those asserted in the counterclaims in the instant action.

On August 23, 2017, the Trustees' order to show cause was signed, and the temporary restraining order requested therein to temporarily enjoin defendants from transferring, pledging, conveying, assigning, selling, altering, destroying, using in any way, withdrawing, and/or otherwise disposing of the property except in the ordinary and necessary course of the business of Building Corp., and using the property to pay legal fees in any proceeding, suit, and/or action, was granted. On October 3, 2017, defendants filed their instant cross motion. By an order dated November 17, 2017, the court extended the temporary restraining order issued on August 23, 2017, pending the determination of the Trustees' motion.

DISCUSSION

CPLR 6401 (a) provides that upon a motion by a person “having an apparent interest in property which is the subject of an action” pending in the supreme court, a temporary receiver of the property may be appointed, at any time prior to judgment, “where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.” The Trustees have an apparent interest in the property that is the subject of this action pursuant to Benevolent Orders Law § 5, which provides, in pertinent part, as follows:

“If a lodge of Free and Accepted Masons . . . surrender[s] its warrant to the grand body to which it is subordinate or is expelled or becomes extinct, according to the general rules or regulations of such body, the trustees then in office shall, out of the property belonging to such lodge or chapter, satisfy all just debts due from it and transfer the residue of its property to the ‘trustees of the masonic hall and asylum fund,’ a corporation created by chapter two hundred seventy-two of the laws of eighteen hundred sixty-four, entitled ‘An act to incorporate the trustees of the masonic hall and asylum fund’ . . . in accordance with the constitution and general regulations of such grand body, the same, with the avails or increase thereof, shall be applied by the “trustees of the masonic hall and asylum fund” to the benevolent purposes for which such trustees were created in and by such act.”

The Grand Master has the power to suspend the warrant or Charter of any Lodge until “the next Annual Communication of the Grand Lodge” (The Constitutions of the Grand Lodge of Free and Accepted Masons of the State of New York § 113 [7]). The Grand Master has exercised this power and suspended Bay Ridge Lodge’s Charter on December 12, 2016, and Bay Ridge Lodge’s Charter presently remains suspended. The Grand Lodge has the

power to declare the Charter of a Lodge forfeited at an Annual Communication following the trial of the lodge upon charges that were duly presented to the Grand Master, at which trial the lodge was afforded an opportunity of being heard in its defense, and after the findings of the Trial Commission have been submitted to the Grand Lodge (*see Handbook of Masonic Law of New York* [1952] § 102 [V]).

Here, as discussed above, there was a trial of the charges against Bay Ridge Lodge, after it was afforded an opportunity to be heard in its defense, and the Trial Commission's August 9, 2017 decision has recommended the forfeiture of Bay Ridge Lodge's Charter. Bay Ridge Lodge has not filed a notice of appeal from this Trial Commission decision, which it could have done within 60 days of being served with the notice of the decision, pursuant to Code of Procedure of the Grand Lodge of Free and Accepted Masons of the State of New York § 407. According to defendants, the Annual Communication does not take place until May 2018. However, it appears that the Grand Lodge will follow the recommendation of the Trial Commission and declare the forfeiture of Bay Ridge Lodge's Charter at that time. Thus, pursuant to Benevolent Orders Law § 5, the Trustees will have an immediate possessory right or interest in the property and/or the rental income generated by the building upon Bay Ridge Lodge's Charter being forfeited.

As to the danger that the property will be lost, materially injured, or destroyed, it is undisputed that the individual defendants transferred title to the building and over \$100,000 from Bay Ridge Lodge to Building Corp., a for-profit corporation, and used \$10,000 of Bay

Ridge Lodge's funds to pay attorney's fees in connection with these transfers. Although defendants claim that the transfer of the building was done for tax purposes in connection with income from the building and to protect the members of Bay Ridge Lodge from exposure to liability generated in connection with owning the building, this does not explain why the \$100,000 in funds was also transferred out of Bay Ridge Lodge's account.

Furthermore, substantially all of the assets of Bay Ridge Lodge were transferred to Building Corp. Defendants assert that Not-for-Profit Corporation Law § 510, which applies when substantially all of the assets of a corporation are transferred, is inapplicable to Bay Ridge Lodge. Defendants contend that this is because Bay Ridge Lodge was formed as a Type A corporation since it was formed for fraternal purposes. A Type A not-for-profit corporation formed prior to July 2014 is deemed a non-charitable corporation under chapter 35 of the Not-for-Profit Corporation Law (Not-for-Profit Corporation Law § 201). Therefore, Not-for-Profit Corporation Law § 510 (3), which requires the approval of the attorney general or the supreme court for such transfer, is inapplicable to Bay Ridge Lodge. Not-for-Profit Corporation Law § 510 (1), however, is applicable to Bay Ridge Lodge, which requires the board to adopt a resolution recommending such transfer, which specifies the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual disposition to be made of such consideration, and the resolution must be submitted to a vote at a meeting of members entitled to vote thereon, and at such meeting the proposed transaction must be approved by a two-thirds vote of the

members according to the terms of the resolution of the board, or the members may authorize the board to modify the terms and conditions of the resolution of the board. Defendants refer to an April 2016 vote, but have not annexed the minutes of that meeting.

Moreover, the minutes of Bay Ridge Lodge's July 11, 2016 meeting stated that Building Corp was to fund a Foundation, namely, the Bay Ridge Lodge #258 Foundation, (the Foundation), which was to be created once the building is transferred from Bay Ridge Lodge to Building Corp. for charitable donations, as approved unanimously by the Brothers at the April 2016 meeting. According to these amended bylaws, the Foundation was to be owned by Bay Ridge Lodge, and Building Corp. was required to make contributions to the Foundation. However, the transfer of the building to Building Corp. was effectuated on July 11, 2016, but the Foundation was not and has never been formed. Defendants claim that they did not form the Foundation because the September 28, 2016 meeting and the October 31, 2016 meeting "eclipsed events." Defendants do not explain why they did not create the Foundation in July or August 2016 or how these two meetings prevented them from forming the Foundation. Notably, the transfer of Bay Ridge Lodge's funds to Building Corp. took place in September 2016. Defendants also claim that this action by the Trustees is "eclipsing" the Foundation from being formed. However, this action was filed on January 6, 2017, which was 10 months after the formation of Building Corp. on March 7, 2016, six months after the transfer of the building from Bay Ridge Lodge to Building Corp. on July 11,

2016, and four months after the transfer of Bay Ridge Lodge's funds to Building Corp. in September 2016.

Defendants further assert that Bay Ridge Lodge's bylaws, as amended and approved on April 27, 2016, in section 6, provided that Building Corp. shall be owned by Bay Ridge Lodge, and the minutes of the July 11, 2016 meeting state that the 200 shares of Building Corp. are owned by the Brothers of Bay Ridge Lodge. However, if Building Corp. is owned by Bay Ridge Lodge pursuant to this section and Bay Ridge Lodge is no longer functioning under a Charter, its property requires protection since there would be no more valid trustees, officers, or members of Bay Ridge Lodge. Defendants assert that they are continuing to manage and take care of the building subsequent to the suspension of Bay Ridge Lodge's Charter on a pro bono basis. There is no basis for the individual defendants to continue to manage the building since Bay Ridge Lodge's Charter has been suspended and its forfeiture appears to be imminent. A temporary receiver is needed to avoid any dissipation and/or diversion of Bay Ridge Lodge's assets and to manage and maintain the building. While defendants, as plaintiffs in the Bay Ridge Lodge action, have raised arguments which challenge whether Bay Ridge Lodge's Charter was properly suspended, the purpose of the appointment of a temporary receiver is to provide interim relief and prevent any dissipation or loss of property, pending the resolution of such issues.

The Trustees additionally state that according to the Treasurer's Report, on December 31, 2016, Building Corp had \$100,173.58 in a money market account and \$32,971.43 in a

checking account, but according to the Treasurer's Report, by March 31, 2017, there was only \$1,008.20 in the checking account. The Trustees assert that the Treasurer's Report does not account for: (1) rental income for January, February, and March 2017 (at \$6,500 per month) plus (2) the \$32,971.43 that was in the checking account at the end of 2016. In response, defendants state that the Treasurer's Report cited to by the Trustees "only gives the highlights, not the monthly breakdown," but defendants do not set forth the monthly breakdown. Defendants further state that the Trustees are in possession of the monthly Profit and Loss reports of the building's accounting firm, KR Staples, which account for all monies, but defendants do not annex these reports or show how these reports account for these missing monies.

In view of the transfers of Bay Ridge Lodge's property, the court finds that there is a danger that Bay Ridge Lodge's property will be lost or materially injured (*see Singh v Brunswick Hosp. Ctr.*, 2 AD3d 433, 434-435 [2d Dept 2003]; *Chaline Estates v Furcraft Assoc.*, 278 AD2d 141, 142 [1st Dept 2000]; *Butler v Gibbons*, 225 AD2d 335, 335 [1st Dept 1996]). The Trustees have made a clear evidentiary showing of the necessity of such appointment for the conservation of the property and the protection of their interests (*see* CPLR 6401 [a]; *Suissa v Baron*, 107 AD3d 689, 689 [2d Dept 2013]; *St. Julien v LaGuerre*, 39 AD3d 532, 533 [2d Dept 2007]). Thus, while the granting of a temporary receiver is an extreme remedy, it is warranted under the circumstances (*see* CPLR 6401).

Defendants, in their cross motion, seek partial summary judgment on the issue of the Trustees' liability on their counterclaims, an immediate trial on the issue of damages, or a determination of what facts are not in dispute or are incontrovertible. In opposition, the Trustees point out that defendants have ignored their discovery demands and deposition notices regarding the counterclaims since March 20, 2017, the day on which they were served upon defendants' attorney.

In support of their cross motion, defendants contend that Grand Lodge's revocation of Bay Ridge Lodge's Charter was improper because Bay Ridge Lodge produced all of its books and records as requested by Grand Lodge. However, as discussed above, in a letter dated December 7, 2016, Bay Ridge Lodge's attorney, Mr. Houdek, Esq., rejected Grand Lodge's request for Bay Ridge Lodge's records. The Constitutions of the Grand Lodge of Free and Accepted Masons of the State of New York (September 1991), in § 121 (2), provides that each District Deputy Grand Master "shall have power and it shall be his duty . . . to examine the books and records [of each Lodge] and see if they are properly kept." Supplement to the Handbook of Masonic Law of New York (1977) § 322 requires the Treasurer of a Lodge "to exhibit all records of the Lodge with regard to disbursements in his custody, upon request, to the District Deputy Grand Master." Supplement to the Handbook of Masonic Law of New York (1977) § 599 states that the "[f]ailure of a Treasurer to produce Lodge records on request of the District Deputy constitutes disobedience of lawful Masonic authority and is a Masonic offense." Handbook of Masonic Law of New York (1952) § 236 provides that the Grand Master is "specifically authorized, for just cause, to

suspend any elected officer of a Lodge from the functions of his office, as . . . where the Secretary has refused to deliver the books and papers of the Lodge to the Master or to allow him to have access to them.”

Defendants, in their amended answer, interpose 30 counterclaims. The first, seventh, thirteenth, nineteenth, and twenty-fifth counterclaims by Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, respectively, are for breach of contract; the second, eighth, fourteenth, twentieth, and twenty-sixth counterclaims by Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, respectively, are for breach of fiduciary duty; the third, ninth, fifteenth, twenty-first, and twenty-seventh counterclaims by Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, respectively, are for fraud; the fourth, tenth, sixteenth, twenty-second, and twenty-eighth counterclaims by Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, respectively, are for unjust enrichment; the fifth, eleventh, seventeenth, twenty-third counterclaims by Bay Ridge Lodge, Building Corp., Fishman, Grazioli, respectively, are for civil conspiracy; the sixth, twelfth, eighteenth, twenty-fourth, and thirtieth counterclaims by Bay Ridge Lodge, Building Corp., Fishman, Grazioli, and Barris, respectively, are for defamation. As noted above, these counterclaims are asserted by these same defendants as claims by them, as plaintiffs, in the Bay Ridge Lodge action.

Since defendants have cross-moved for summary judgment, the court, pursuant to CPLR 3212 (b), may search the record and if it shall appear that the Trustees are entitled to a summary judgment dismissing any of defendants’ counterclaims, the court may grant such summary judgment without the necessity of a motion by the Trustees for such relief.

Inasmuch as the court, in the Bay Ridge Lodge action, has found that dismissal of all of Building Corp.'s claims and Bay Ridge Lodge, Fishman, Grazioli, and Barris' claims for unjust enrichment, fraud, civil conspiracy, and defamation must be granted, their counterclaims for this same relief as against the Trustees must likewise be dismissed (*see* CPLR 3212 [b]). With respect to defendants' counterclaims for breach of contract and breach of fiduciary duty against the Trustees, material and triable issues of fact exist as to these counterclaims. Thus, defendants are not entitled to summary judgment with respect to these counterclaims.

CONCLUSION

Accordingly, the Trustees' motion for an order appointing a temporary receiver during the pendency of this action, and compelling all defendants and their agents to turn over the property to the temporary receiver, is granted. The temporary receiver shall have the powers requested by the Trustees, as set forth above. Defendants' cross motion is denied in its entirety. Upon a search of the record, pursuant to CPLR 3212 (b), summary judgment dismissing all of Building Corp.'s counterclaims and the Bay Ridge Lodge, Fishman, Grazioli, and Barris' counterclaims for unjust enrichment, fraud, civil conspiracy, and defamation is granted.

Settle order appointing temporary receiver.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL