SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12EFM

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CSC 4540, LLC, 45-50 VERNON LP, JSMB 4540 LLC, JSMB 4540 MM LLC

Petitioners,

- v -

VERNON 4540 REALTY, LLC, 4528 VERNON REALTY LLC, BRENT CARRIER,

Respondents.

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INDEX NO. 652680/2017

MOTION DATE

MOTION SEQ. NOS. 1, 3

DECISION AND ORDER

HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60

were read on this motion for prelim. injunction/temporary restraining order

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion/for injunction/restraining order

Motion sequence numbers 001 and 003 are consolidated for disposition.

This petition arises from a dispute among the members of CSC 4540, LLC (the LLC), which had been formed for the purpose of developing certain property in Long Island City. Respondents negotiated the purchase of a neighboring property, which was to be added to the development of the initial property. The LLC made a downpayment of $250,000 toward the purchase, but the necessary zoning approvals could not be timely obtained. Thus, the contract was sale was cancelled, thereby entitling the LLC to a return of its deposit. The LLC alleges that respondents stole the $250,000 down payment in breach of the LLC agreement and a related

settlement agreement. The LLC agreement contains an arbitration clause for disputes arising out of it.

Petitioners move: 1) pursuant to CPLR 7502(c) for an attachment in aid of arbitration, directing the Sheriff of New York County, or in any other county in the state, to levy upon such property in which respondents have an interest, or debts owed to respondents, as will satisfy the amount of $250,000, which represents the amount petitioners demand against respondents; 2) pursuant to CPLR 6201 and 6212 for an attachment directing the Sheriff to levy on respondents' property or debts owed, in order to satisfy the amount of $250,000 demanded by petitioners; and 3) pursuant to CPLR articles 62 and 63 for an injunction directing that respondents be restrained and enjoined from withdrawing, transferring, pledging, encumbering, concealing, or otherwise dissipating or diminishing in value any assets, funds, or property held by them, or by anyone else for respondents' benefit, to the extent of $250,000 (motion seq. no. 001).

Petitioners also seek, pursuant to CPLR articles 75 and 63, a mandatory injunction in aid of arbitration: 1) directing respondents Carrier and Vernon 4540 Realty, LLC (Vernon 4540), and 4528 Vernon Realty LLC (Vernon 4528) (respondents) to transfer and assign to petitioner LLC a partial interest in the certificate of completion (COC) issued by the New York Department of Environmental Conservation (DEC) under the Brownfield cleanup program (BCP) in connection with the LLC's remediation of property in Long Island City; and 2) a temporary restraining order prohibiting respondents from interfering in the LLC's procurement of Brownfield tax credits.

I. BACKGROUND

On November 15, 2015, petitioners JSMB 4540 LLC, JSMB 4540 MM LLC, 45-50 Vernon LP, and respondent Vernon 4540 entered into a limited liability company agreement (LLC agreement), forming petitioner LLC for the purpose of developing property at 45-40 Vernon Boulevard, Long Island City, New York. Respondent Carrier owns and controls Vernon 4540 and Vernon 4528. He signed the LLC agreement on behalf of Vernon 4540, and is named in that agreement as an observer to the Board of Directors (Verified Petition, dated May 18, 2017 [Pet.], ¶¶ 18-19).

Pursuant to the LLC agreement, members are obligated to act in good faith toward each other, and to promote the best interests of the LLC (id., ¶¶ 20-22). It also provides that "any disputes which may arise out of or in connection with this Agreement shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association," and that a demand for arbitration be filed in writing with the American Arbitration Association in New York, New York after a 30-day period in which the members attempt to resolve their dispute through the use of commercially reasonable efforts (Pet., Exh. A, LLC agreement § 7.2).

Simultaneously with the execution of the LLC agreement, the LLC entered into a consulting agreement (entitlements agreement) with CRE Vernon Consulting, LLC (CRE Consulting), an affiliate of Vernon 4540 in which Carrier is also a principal (Pet., ¶ 24). Pursuant to that agreement, CRE Consulting was to provide services in connection with obtaining certain permits, variances, approvals, and tax credits in exchange for $50,000 (entitlements agreement, Exh. B, § 6.1). Upon CRE Consulting's performance, it would be entitled to an additional $450,000 (Pet., ¶ 26).

In late 2016, Carrier began requesting that the LLC pay him the contingent payment under the entitlements agreement, even though the entitlements had not yet been procured (*id.*, ¶ 27). When the LLC refused, Carrier allegedly threatened to sabotage the entire development project. To avoid this, on November 18, 2016, the LLC entered into a settlement agreement with CRE Consulting, Vernon 4540, and Carrier (settlement agreement) (*id.*, ¶¶ 28-29; Pet., Exh, C). In that agreement, in exchange for Carrier and his companies to refrain from interfering in any manner with the LLC's "lawful and fiduciary management and operation" of the project, LLC agreed to pay the $450,000 immediately and before the procurement of the entitlements (settlement agreement, Exh. C, ¶ 9).

A. Brownfield tax credits

On November 22, 2016, a copy of the final engineering report (FER) for the project was prepared for respondents (Affidavit of Michael Baron, dated Dec. 19, 2017 [Baron affid.], Exh. A to order to show cause [motion seq. no. 003], ¶ 16). The FER contains a certification of the completion of the remediation of the site (*id.*). Respondents then submitted the FER to the DEC, and indicated that the COC should issue (*id.*, ¶ 17). The LLC asserts that it had not authorized submission of the FER, absent completion of the necessary paperwork to claim the Brownfield tax credits. The Brownfield cleanup agreement (BCA), which was initially executed by Vernon 4528, had not yet been amended to reflect the LLC's involvement in the project (*id.*, ¶ 18). Thus, LLC, the property owner, is not named in the COC as a "certificate holder," the entity which incurred cleanup costs and is thereby entitled to file tax returns claiming Brownfield site preparation tax credits (*id.*, ¶19).

In December 2017, petitioners sought help from DEC's environmental counsel to address this problem. First, the DEC suggested that the COC be retroactively amended by adding the

LLC as the certificate holder, provided that the current certificate holders, including Vernon 4528, consent to the amendment (*id.*, ¶ 21). Respondents refused to consent (*id.*, ¶¶ 22-23).

B. Adjoining property

Before the deterioration of the relationship among the parties, Carrier worked for the LLC in connection with the attempt to purchase the property adjoining 45-40 Vernon Boulevard, given his many connections in the Long Island City area and with the adjoining property owner. (Pet., ¶ 30). Carrier negotiated for that property on the LLC's behalf.

On June 15, 2015, a contract of sale was executed in which respondent Vernon 4528 was listed as purchaser, which is required therein to pay a $250,000 deposit to be held in escrow pending the closing or cancellation of the contract (*id.*, ¶¶ 33-36). The contract also provides for a return of that deposit, less the seller's reimbursable expenses, in the event certain zoning approvals were not obtained within 18 months (*id.*, ¶ 37). It identified Vernon 4528 as an affiliate of the LLC, and contains a clause providing for the assignment of the adjoining property to the LLC (*see* Affidavit of Michael Baron, dated May 17, 2017 [Baron May 2017 affid.], ¶ 15; Exh. E to Affirmation of Y. David Scharf, Esq., dated May 18, 2017 [Scharf aff.], contract of sale). The LLC paid the deposit to the seller on June 19, 2015, but was unable to obtain the required zoning approvals within the required time. Notice was provided to the seller, and the contract was cancelled (*id.*, ¶ 38).

On April 20, 2017, the LLC contacted the seller about the return of the deposit, and was informed that the deposit had been released to counsel for the purchaser, Vernon 4528, and that Carrier had directed payment of seller's expenses, legal fees to his counsel, and the balance of the deposit to himself (*id.*, ¶ 41). The LLC sent a notice to Carrier and Vernon 4540 of a breach of the LLC agreement, and a demand for the deposit (*id.*, ¶ 43). Carrier did not deny taking the

deposit, but refused to turn it over to the LLC. The LLC asserts that because Carrier refuses to engage in any discussions with it, it has no choice but to commence arbitration (*id.*, ¶ 44).

On June 5, 2017, petitioners commenced an arbitration in accordance with the LLC agreement § 7.2 (Exh. B to order to show cause [motion seq. no. 003], arbitration demand) as to the LLC's claims concerning the parties' rights under the LLC agreement, such as the distribution of the LLC assets, including the highly valuable Brownfield tax credits.

In seeking an attachment pending the arbitration of this matter, petitioners assert that they have not received any response from Carrier or Vernon 4540, and that the deposit has not been turned over to them (Baron May 2017 affid., ¶ 23). To avoid dissipation of the deposit pending the arbitration proceedings against respondents Carrier and Vernon 4540, they also seek disclosure of respondents' assets pursuant to CPLR 7502(c), and contend that absent immediate relief, any award they may obtain in arbitration would be rendered ineffectual. According to petitioners, respondents have misappropriated approximately $250,000, representing the deposit for the adjoining property, which belongs to the LLC, and they appear to be on the verge of insolvency (Scharf aff, ¶ 5). Thus, they also contend that the only likely source of payment of any arbitration award against respondents is the deposit. They submit proof that Carrier and his entities are not financially able to pay an arbitration award, and that Carrier committed a fraud to avoid paying them the deposit.

Petitioners also seek a mandatory injunction and TRO in aid of arbitration, directing Carrier, on behalf of Vernon 4540, to sign an assignment and transfer of the COC approved by the DEC for the project site to the LLC, which assignment and transfer would constitute a partial transfer of Vernon 4540's interest, in that it would retain an interest in the COC for the project site.

II. DISCUSSION

A. Motion sequence one

Pursuant to CPLR 7502 (c), in pertinent part, a court:

> may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 [attachment] and 63 [injunction] of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above.

(*See Matter of Kadish v First Midwest Sec., Inc.*, 115 AD3d 445, 445 [1st Dept 2014]).

Articles 62 and 63 of the CPLR set forth the rules governing, respectively, prejudgment attachments and preliminary injunctions. An order of attachment directs the sheriff to take possession of a defendant's property in order to apply it to the plaintiff's judgment in the action, should the plaintiff prevail. (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59 [1st Dept 2013]; see CPLR article 62). In support of the motion, the petitioner must demonstrate:

> by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.

(CPLR 6212 [a]; *VisionChina Media*, 109 AD3d at 59; *Matter of Mermaid Mar., Ltd. v Maritime Capital Mgt. Partners, Ltd.*, 147 AD3d 498, 499 [1st Dept 2017]).

Attachment is a "harsh" remedy, consistently construed narrowly in favor of the party against whom it is sought. (*VisionChina Media*, 109 AD3d at 59; *Glazer & Gottlieb v Nachman*, 234 AD2d 105, 105 [1st Dept 1996] [attachment denied but court directed that escrowed funds remain in escrow]). The determination of a motion for an attachment rests in the court's discretion. (*VisionChina Media*, 109 AD3d at 59; *J.V.W. Inv. Ltd. v. Kelleher*, 41 AD3d 233, 234

[1st Dept 2007]; *see also Moquinon, Ltd. v Gliklad*, 55 Misc 3d 1212[A], 2017 NY Slip Op 50548 [U], *3 [Sup Ct, NY County 2017]).

In deciding whether to grant an attachment in aid of arbitration, the court applies the "rendered ineffectual" standard for an attachment pursuant to CPLR 7502(c) (*Matter of Kadish*, 115 AD3d at 446; *Matter of Sojitz Corp. v Prithvi Info. Solutions Ltd.*, 82 AD3d 89, 96 [1st Dept 2011], citing *Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270, 271 [1st Dept 1996]; *Sullivan & Worcester LLP v Takieddine*, 73 AD3d 442, 442 [1st Dept 2010]), and determines whether the movant has shown a probability of success on the merits (*see Matter of Kadish*, 115 AD3d at 446; *Founders Ins. Co. Ltd. v Everest Natl. Ins. Co.*, 41 AD3d 350, 351 [1st Dept 2007]).

The court must also consider whether the movant has demonstrated

> an identifiable risk that the defendant will not be able to satisfy the judgment. The risk should be real, whether it is a defendant's financial position or past and present conduct. The court may consider the defendant's history of paying creditors, or a defendant's stated or indicated intent to dispose of assets

(*VisionChina Media*, 109 AD3d at 60 [internal quotation marks and citations omitted]), and whether the movant offered admissible evidence that the respondent would not be financially able to pay the potential arbitration award, or that it "would undertake deceptive actions to avoid paying it, if one were rendered" (*Matter of Mermaid Mar.*, 147 AD3d at 499). In addition, if discovery into the respondent's assets is sought, the movant must show that discovery is necessary. (*id.*; *JPMorgan Chase Bank v Reibestein*, 34 AD3d 308, 309 [1st Dept 2006]; *International Components Corp. v Klaiber*, 54 AD2d 550, 551 [1st Dept 1976]).

The elements of a cause of action for conversion are the unauthorized exercise of the right of ownership over property, belonging to another person, to the exclusion of the owner's rights. (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]; *Lemle v Lemle*, 92

AD3d 494, 497 [1st Dept 2012]). Money is converted "when funds designated for a particular purpose are used for an unauthorized purpose." (*World Ambulette Transp., Inc. v Lee*, 161 AD3d 1028, 1031 [2d Dept 2018] [internal quotation marks and citations omitted]).

Here, the LLC paid the refundable deposit under the contract of sale for the adjoining property, which was to be used for the designated purpose of purchasing the adjoining property, or be returned to the LLC, minus the seller's expenses. The contract of sale was appropriately terminated under the terms, with the seller agreeing to return the deposit. Carrier does not dispute that the deposit was returned to him by the seller, and that after paying appropriate expenses, he retained the balance rather than pay it to the LLC. Carrier's failure to turn over the deposit to the LLC also violates respondents' obligations as members of the LLC. Thus, there is a likelihood that petitioners will succeed at the arbitration on their claim that the deposit was converted, giving rise to compensatory damages in the amount of $250,000, plus interest.

Petitioners' proof that Vernon 4540 and Vernon 4528 are nondomiciliaries (*see* CPLR 6201[1] [grounds for attachment when defendant is nondomiciliary or is foreign corporation not qualified to do business in this state]), provides an additional basis for finding that there is a significant risk that Carrier, their principal, will cause them to transfer what assets he or they may have, outside of the state (*see Morgan v Worldview Entertainment Holdings, Inc.*, 141 AD3d 461, 462 [1st Dept 2016]). They also offer the affidavit of a director of the LLC, who states that Carrier admitted to the LLC that he had taken the deposit, refused to return it, and was desperate for cash, seeking loans and early payments for his services (Baron May 17, 2017 affid., ¶¶ 8, 21, Exhs. A, B). They offer evidentiary proof that Carrier's home is subject to active tax warrants (Scharf May 2017 aff.]), and that he was evicted from other premises in which he resided as a tenant (exhibit H to Scharf May 2017 aff.).

Carrier admits that he is the subject of the tax warrants, but states that he is contesting them. He explains the eviction as necessitated by the refusal of the sole tenant, the woman with whom he had lived there, to vacate the premises. (Affidavit in Opposition of Brent Carrier, dated June 23, 2017 [Carrier Opp. Affid.], ¶¶ 14-15). He also maintains that petitioners have more than adequate protection for recovery in the arbitration based on Vernon 4540's interest in their joint venture. However, he offers no proof of his financial ability to pay the $250,000, and no explanation of why he took the deposit (*id.*, ¶ 16), and there is no dispute that the joint venture to develop the property is years from realizing a financial return, particularly to Carrier's capital account which is subordinate to other members of the LLC. (Scharf Reply Aff., ¶ 9). Thus, Carrier's reliance on a future financial return does not account for the more imminent potential of petitioners prevailing in the arbitration.

Petitioners contend that Carrier may undertake deceptive action to avoid paying if an arbitration award were rendered. They offer a letter dated June 4, 2015, from CRE Development that is signed by Carrier, addressed to the principals of a non-party beneficial owner of petitioners JSMB 4540 LLC and its managing member JSMB MM LLC, and submitted by Carrier in his opposition, in which he states that he had entered into an agreement with petitioners providing that "[i]n the event that CSC [4540, LLC] fails to consummate the acquisition of Lot 10 for any reason other than a default by the seller, CRE shall be entitled to retain the $250,000 contract deposit as a fee for services rendered." (Respondents' opp., Exh. J). Absent any proof that the letter was signed by the principals or even mailed to them, and given the their denial of having seen the letter or agreed to its content, they maintain that the letter proves nothing and, in any event, makes no sense. Rather, one of the principals attests that the principals had met several months before the date of Carrier's letter and, as evidenced by

contemporaneous emails, discussed paying Carrier the far lesser fee of $50,000 for completing his work on the deal. (Affidavit of Matthew Baron, dated June 27, 2017 [Baron Reply Affid.], ¶ 4-5, Exhs. A, B). According to Carrier, however, he would earn $250,000 if he did not complete the deal, and if he completed it, he would earn $50,000 (*id.*, ¶¶ 5-7). Carrier's reliance on a letter authored by him, absent any evidence of having sent it, is misplaced.

Evidence that Vernon 4540 and Vernon 4528 are nondomiciliaries, that Carrier was desperate for cash, seeking loans, and not likely to realize significant financial return from this joint venture in the immediate future, and that he might undertake deceptive action to avoid paying, supports petitioners' claim that there is an identifiable risk that respondents would not be financially able to pay the potential award in arbitration, or that they may take deceptive action to avoid paying it.

Petitioners also show that the amount they demand exceeds all known counterclaims, and respondents fail to show that they advance a counterclaim exceeding that amount. Their counterclaims having to do with the tax treatment of their capital accounts with the LLC do not demonstrate otherwise. In any event, petitioners show that the capital accounts are reported on a tax-adjusted basis, which indicates that Vernon 4530's capital account is $0 as reported on Vernon 4540's Form K-1 and that, in September 2016, they offered to amend the K-1 to reflect Vernon 4540's book-adjusted basis. In response, Carrier, directed that the tax treatment remain the same (*see* Baron Reply Affid., ¶¶ 9-12, Exh. C). Absent any request by Carrier to change the tax treatment, there is no basis for finding that respondents' counterclaims will exceed the amount petitioners demand.

Thus, in the exercise of my discretion, an order of attachment of the property of Carrier, Vernon 4540, and Vernon 4528 is appropriate in the amount of $250,000, and the temporary

restraining order prohibiting respondents from transferring any interest respondents may have in any property or funds in this state, and from removing or transporting said property or funds from the state of New York, or from secreting said property or funds to the extent of $250,000, is continued.

To the extent that petitioners seek disclosure pursuant to CPLR 6220, they do so prematurely.

B. Motion sequence three

Petitioners seek an injunction directing Carrier and Vernon 4540 to transfer and assign to the LLC a partial interest in the COC as issued by the DEC under the BCP in connection with the LLC's remediation of the property. Pursuant to the LLC agreement, the LLC "shall become a party to the [BCA] with respect to the Site in order to be admitted into the [BCP]," and it shall apply or cause CRE Consulting to apply for Brownfield tax credits (LLC agreement, § 6.10). Section 8.2 of the LLC agreement provides the mechanism for allocating the tax credits among the LLC members (*id.*, § 8.2), and section 16.14 prohibits members from unreasonably withholding consent to disclosures required to obtain Brownfield tax credits (*id.* § 16.14). Petitioners offer the affidavit of their environmental counsel who attests that he reached out to the DEC which indicated that the LLC could be added as a certificate holder to the COC by retroactive amendment after obtaining the consent of all current certificate holders (affidavit of Lawrence Schnapf, dated Aug. 2, 2018 [Schnapf affid.], ¶¶ 7-8). Carrier refused to consent unless he received unrelated concessions from the LLC. (Affirmation of Latisha V. Thompson, Esq., dated Aug. 2, 2018 [Thompson Aff.], ¶ 9).

On December 20, 2017, pending the determination of petitioner's motion for an injunction in aid of arbitration (motion seq. No. 002), respondents were restrained and prohibited

from interfering in the LLC's procurement of the Brownfield tax credits and in the management of the LLC (Thompson Aff., Exh. C). Carrier then executed the consent, but senior officials at the DEC determined that the consents by the certificate holders were not sufficient to amend the COC (Thompson Aff., ¶ 11; Schnapf Aff., ¶ 10).

On May 9, 2018, the parties, Carrier and his counsel, and the LLC and its counsel, met with the DEC wherein the DEC stated that a partial transfer of Vernon 4540's interest in the COC to the LLC would enable the LLC to procure its share of the Brownfield tax credits (Schnapf Aff., ¶¶ 13-20). An "Assignment and Notice of Transfer of [COC]" was thereupon drafted by Mr. Schnapf with additional language by which Vernon 4540's rights are retained, and noting that it was a partial transfer, per Carrier's request. (Schnapf Aff., ¶¶ 17, 20, Exh. B). On June 19, 2018, the DEC sent an email message stating that it approved the assignment and notice (Schnapf Aff., Exh. D). Carrier, however, refused to execute the consent.

Thus, petitioners ask that Carrier be directed to sign the partial Assignment and Notice of Transfer of COC, contending that as Vernon 4540, the party listed on the COC, did not incur the cleanup costs associated with the Brownfield tax credits, it cannot claim them. Rather, the tax credits are due petitioners, and they maintain that unless and until the LLC, which incurred the cleanup costs, becomes a certificate holder on the COC, the tax credits will not be redeemable by the parties, and any arbitration award as to those credits will be ineffectual.

As the LLC agreement provides that the LLC is to become the party to the BCP, and apply for the tax credits, and that members, such as Vernon 4540 are obligated not to unreasonably withhold their consent to disclosures required for those tax credits, petitioners show that Vernon 4540 appears to be unreasonably withholding its consent in violation of that

agreement. Petitioners do not, however, demonstrate irreparable harm or that the balance of equities tip in its favor.

A preliminary injunction is a provisional remedy, designed to maintain the *status quo* pending a full hearing on the merits, and not to determine the ultimate rights of the parties (*see Spectrum Stamford, LLC v 400 Atlantic Title, LLC*, 162 AD3d 615, 616 [1st Dept 2018]; *Moltisanti v East Riv. Hous. Corp.*, 149 AD3d 530, 531 [1st Dept 2017]; *Residential Bd. of Mgrs. of the Columbia Condominium v Alden*, 178 AD2d 121, 122 [1st Dept 1991]). "However, if relief is required because of imperative, urgent, or grave necessity, then a court, acting with great caution and upon clearest evidence, i.e., where the undisputed facts are such that without an injunction order a trial will be futile, may grant a preliminary injunction" (*Spectrum Stamford v 400 Atlantic Title, LLC*, 162 AD3d at 616 [internal quotation marks and citations omitted]).

Here, instead of maintaining the *status quo* pending the arbitration, the mandatory injunctive relief sought would grant the ultimate relief sought (*see Moltisanti*, 149 AD3d at 531; *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264-265 [1st Dept 2009]; *see also LGC USA Holdings, Inc. v Taly Diamonds*, LLC, 121 AD3d 529, 530 [1st Dept 2014]). It would also mandate action by respondents in the absence of proof that such an extraordinary remedy is essential to maintain the *status quo* pending a full determination of the merits in the arbitration (*see Spectrum Stamford*, 162 AD3d at 617; *Fieldstone Capital, Inc. v Loeb Partners Realty*, 105 AD3d 559, 560 [1st Dept 2013]; *Residential Bd. of Mgrs. of the Columbia Condominium*, 178 AD2d at 122).

Petitioners fail to explain how respondents' failure to sign the transfer immediately "endanger[s] the viability of the Brownfield Tax Credits" (Petitioners' Memorandum of Law in

Support, at 13), or show how this transfer is urgent and must be completed before they arbitrate. Thus, they fail to meet their burden for this extraordinary relief.

The cases on which petitioners rely upon are distinguishable. In *Invar Intl., Inc. v Zorlu Enerji Elektrik Uretim Anonim* Sirketi, relief was granted on the petitioners' claim to an ownership interest in two power plants in Russia which was about to be foreclosed upon. (86 AD3d 404, 405 [1st Dept 2011]). Similarly, in *Matter of Witham v Finance Invs., Inc.*, the petitioner, who was CEO and company board chair, claimed a right to retain ownership of shares in the company. Without an injunction, he claimed, the shares were going to be sold. (52 AD3d 403, 403 [1st Dept 2008]; *see also Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 220 [4th Dept 2009] [court makes exception to rule given advances due under construction mortgage, and as project unique and with no market value, and there was serious harm to petitioners' reputation]).

Here, by contrast, petitioners are pursuing this in the arbitration, and are not losing the right to these credits. Respondents should be permitted the opportunity to challenge the Assignment and Notice of Transfer of the COC. There is no "imperative, urgent or grave necessity" that respondents immediately sign the assignment and notice of COC transfer. (*See Spectrum Stamford*, 162 AD3d at 616). This case does not present the unusual circumstance that requires a mandatory injunction, one which would essentially grant petitioners the ultimate relief they seek. (*id.* at 616-617).

III. CONCLUSION

Accordingly, it is

ORDERED, that the petitioners' motion for an order of attachment in aid or arbitration (motion seq. no. 001) is granted; it is further

ORDERED, that the amount to be secured by this order of attachment, inclusive of probable interest, costs and Sheriff's fees and expenses shall be $250,000; it is further

ORDERED, that petitioners' undertaking is fixed in the sum of $2,500 conditioned on the requirement that petitioners pay to respondents all costs and damages, including reasonable attorney fees which may be sustained by reason of the attachment, and must pay to the Sheriff all of his or her allowable fees, if respondents recover judgment/ arbitration award or if it is decided that petitioners were not entitled to an attachment of the property of respondents; it is further

ORDERED, that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, shall levy within his or her jurisdiction, at any time before final arbitration award, upon such real and personal property in which respondents have an interest and upon such debts owing to such respondents as will satisfy $250,000, the amount of petitioners' demand, together with probable interest, costs, and the Sheriff's fees and expenses, and that the Sheriff proceed herein in the manner and make his return within the time prescribed by law; it is further

ORDERED, that the temporary restraining order prohibiting respondents from transferring any interest respondents may have in any property or funds in this state, and from removing or transporting said property or funds from the State of New York, or from secreting said property or funds to the extent of $250,000, is continued; and it is further

ORDERED, that the petitioners' motion for a mandatory injunction (motion seq. no. 003), directing respondents Vernon 4540 Realty, LLC and Brent Carrier to transfer and assign a partial interest in the Certificate of Completion to petitioner CSC 4540, LLC, is denied.

11/13/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE