

**Siras Partners LLC v Activity Kuafu Hudson Yards
LLC**

2019 NY Slip Op 31812(U)

June 21, 2019

Supreme Court, New York County

Docket Number: 650868/2015

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ANDREA MASLEY</u>	PART	IAS MOTION 48EFM
	<i>Justice</i>		
	-----X	INDEX NO.	<u>650868/2015</u>
SIRAS PARTNERS LLC,		MOTION DATE	_____
Plaintiff,		MOTION SEQ. NO.	<u>013</u>
- v -			

ACTIVITY KUAFU HUDSON YARDS LLC, 462-470 11TH AVENUE LLC, SHANG DAI, ZENGLIANG SHAN, QILING YUAN, DANIEL DWYER, DAI & ASSOCIATES, P.C., REEDROCK KUAFU DEVELOPMENT COMPANY LLC, BIFROST LAND LLC, SIRAS PARTNERS LLC, SAIF SUMAIDA, ASHWIN VERMA, REEDROCK KUAFU DEVELOPMENT COMPANY LLC,

Defendants.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 013) 677, 678, 679, 689, 691, 692, 693, 694, 696, 698, 699

were read on this motion to/for RENEWAL

Upon the foregoing documents, it is ordered that Motion Sequence Number (Motion) 013 is denied in its entirety.

In Motion 013, defendants Activity Kuafu Hudson Yards LLC, 462-470 11th Avenue LLC, Shang Dai, Zengliang "Denis" Shan, and Qiling Yuan (collectively, Kuafu) move, pursuant to CPLR 2221 (e), for leave to renew the portion of plaintiffs' Motion 010 which sought a preliminary injunction and, upon renewal, entry of an order denying the preliminary injunction, previously granted by this court, which stayed the related action, *462-470 11th Ave. LLC v. Bifrost Land LLC*, Index No. 850216/2015 (Foreclosure Action) (NYSCEF Doc No [NYSCEF Doc] 604 [3/14/18 decision and order]). Alternatively, Kuafu seeks an order vacating that preliminary injunction pursuant to CPLR 6314 (*see* NYSCEF Doc 677).

A motion for leave to renew must “be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination” (CPLR 2221 [e]). According to Kuafu, the “new fact” warranting leave to renew is found in the Referee Report and Recommendation (Report), dated October 2, 2018, which resulted from the Special Referee’s assignment, by June 2017 order of reference of this court, to hear and report on certain issues. Among other things, the Special Referee conducted an in camera review of certain documents withheld by Kuafu as protected by the attorney-client privilege to hear and report as to whether an exception to that protection—specifically, as relevant here, the crime-fraud exception—should apply to certain documents and, thus, that those documents should be disclosed (*see* NYSCEF Doc 694 [Report]).

Kuafu asserts that the new fact warranting renewal is the Special Referee’s recommendation that the court find plaintiffs did not satisfy their burden of establishing that crime-fraud exception applies to certain withheld documents; therefore, as Kuafu argues, the documents were appropriately withheld. Kuafu further asserts that renewal is appropriate under CPLR 2221 (e) on the basis that the Report states that there was “insufficient evidence before [the Special Referee] to demonstrate even probable cause for the type of fraudulent scheme that has been asserted” (*see* NYSCEF Doc 694). Accordingly, Kuafu argues that, had the court been in possession of the Report when the motion for a preliminary injunction to stay the foreclosure action was made, it would have reached a different decision: it would have denied the motion for a preliminary injunction on the basis that plaintiffs had not demonstrated likelihood of success on the merits for their claims in this action.

The motion for leave to renew is denied. Under these circumstances, neither the Report nor any discreet statements or recommendations contained in it constitute new facts within the ambit of CPLR 2221 (e). The Report was not confirmed and, thus, nothing in the Report—including the Special Referee's recommendations as to the limited issues expressly referred to him to hear and report—is not a binding ruling, decision, or order of this or any other court of competent jurisdiction, regardless what, if any, legal or factual recommendations or conclusions the Special Referee may have made.

The Report was submitted on October 2, 2018 and none of the parties timely moved to confirm, reject, or modify the Report; in fact, no motions concerning the Report or its recommendations have been filed at any time by any of the parties. Moreover, following a conference on December 4, 2018, the parties were directed by the court to submit a stipulation or motion(s) as to the Report by January 8, 2019 (NYSCEF Doc 676) and, again, the parties declined to agree or move to confirm, reject, or modify the Report. By letter filed on that January 8, 2019 deadline, counsel for Kuafu indicated that no stipulation was forthcoming "and neither party intends to make a motion to vacate or modify the Report"; instead, Kuafu's counsel informally "urge[d]" the court to "*sua sponte* confirm the findings" set forth in the Report (NYSCEF Doc 688). The court did not enter any order confirming, rejecting, or modifying the Report, *sua sponte* or otherwise. As such, the Report is and remains only the record of the Special Referee's assignment to hear and report on the discreet issues referred to him and his unconfirmed recommendations as to those issues.

Even if the court has the discretion to construe the Report or any statements contained in it as new facts warranting renewal under CPLR 2221 (e), it declines to exercise such discretion here, where the parties have done nothing to confirm the Report for months.

Accordingly, there is no new fact warranting renewal and the motion for leave to renew is denied.

The court also denies the alternative prong of Kuafu's motion to vacate, pursuant to CPLR 6314, the order granting the preliminary injunction. "A motion to vacate a preliminary injunction is addressed to the sound discretion of the court and may be granted either upon compelling or changed circumstances that render continuation of the injunction inequitable or upon failure to proceed expeditiously (*Wellbilt Equip. Corp. v Red Eye Grill, L.P.*, 308 AD2d 411, 411-412 [1st Dept 2003] [internal citations omitted]). The court rejects Kuafu's argument that the unconfirmed recommendations as to the crime-fraud exception constitute compelling or changed circumstances which render continuation of the injunction inequitable.

Briefly, the court granted the motion for a preliminary injunction, pursuant to CPLR 6301, in the decision and order resolving Motion 10, dated March 14, 2018 (NYSCEF Doc 604). The court's earlier determination that plaintiffs satisfied the requisite elements of likelihood of success, irreparable harm, and that the balance of equities is in plaintiffs' favor are not altered by the wholly unconfirmed Report that has not been examined, let alone endorsed, by the court given the parties' neglect to take any steps to confirm, reject, or modify the Report in whole or in part. In any event, the likelihood of success element was satisfied, as stated in the March 14, 2018 decision and order, not—as Kuafu now argues—on the basis that the court needed only to determine whether the crime-fraud exception applies to certain undisclosed document.

Rather, the court found, as did the First Department in *Siras Partners LLC v Activity Kuafu Hudson Yards LLC* (157 AD3d 445 [1st Dept 2018]), that "[t]he complaint alleges sufficient wrongful conduct on the part of defendant 462-470 11th Avenue LLC, an affiliate of

the other defendants, to support the claims for injunctive and declaratory relief as against that defendant" (*id.*; NYSCEF Doc 604). In fact, the court, having granted plaintiffs' spoliation motion, found that the adverse inference that would be applied "increases plaintiffs' likelihood of success," particularly given the Third Department's decision in an action with similar factual circumstances to those supporting plaintiffs' viable claims here (NYSCEF Doc 604, citing *192 Sheridan Corp. v O'Brien*, 252 AD2d 934, 935 [3d Dept 1998] [finding that the foreclosing partners-defendants in that action "intentionally caus[ed] the mortgage to be in default, and were attempting to wrongfully oust [plaintiffs] from the partnership and their equity interest in the real property"])).

Further, the preliminary injunction was not dependent upon, or to remain in place only until, completion of the Special Referee's Report on the issue of the crime-fraud exception. While the court noted that "plaintiffs are entitled to a ruling on the alleged crime fraud exception before the foreclosure proceeds," and that "[i]t would be unfair to plaintiffs to allow the foreclosure to proceed before the referee concludes his examination which goes to the heart of plaintiffs' claims: defendants' improper acts to oust plaintiffs from the Project," those statements did not form the basis of the court's ruling that plaintiffs satisfied the necessary elements of CPLR 6301. The court determined that the irreparable harm element was satisfied on the basis that plaintiffs adequately alleged that they would lose a substantial interest in the property if the foreclosure were to be consummated "before the court has an opportunity to evaluate the merits of the action" (NYSCEF Doc 604). While plaintiffs' likelihood of success and irreparable harm may potentially be impacted by a ruling of this court as to whether the crime-fraud exception applies to the limited documents referred to the Special Referee, those particular issues are not now and were not previously decided by the court, and nothing in the

unconfirmed Report obviates the court's prior rulings with respect to the elements of irreparable harm or likelihood of success; indeed, the preliminary injunction was granted to permit the court to decide plaintiffs' viable claims on the merits. The court has not yet addressed those claims on the merits and, contrary to Kuafu's contentions, the merits are not decided by "rulings" in the unconfirmed Report of the Special Referee.

The court has considered Kuafu's remaining arguments and, to the extent they are procedurally appropriate and properly before the court on this motion, they do not compel an alternative result.

Accordingly, it is

ORDERED that Motion Sequence Number 013 is denied.

6/21/19
DATE

Andrea Masley
ANDREA MASLEY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED GRANTED IN PART SUBMIT ORDER

CHECK IF APPROPRIATE: SETTLE ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN