

**Ebersman v Malcolm X II Phase B Assoc., L.P.**

2019 NY Slip Op 32020(U)

July 5, 2019

Supreme Court, New York County

Docket Number: 652312/2018

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: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 652312/2018

JUSTIN EBERSMAN,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 003

- v -

MALCOLM X II PHASE B ASSOCIATES, L.P., CDC  
MANAGEMENT CORPORATION F/K/A CENTER FOR  
HOUSING PARTNERSHIPS

DECISION + ORDER ON  
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 75, 76, 77, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Petitioner, a limited partner, questions note 8 of the 2016 Audited Financial Statement, referencing a note with a principal amount of \$262,555 with an outstanding balance of \$1,734,977, and inquires whether a change from cumulative interest to compounding interest would explain the balance. In his May 10, 2018 petition, he seeks to review the note, any amendments, documents concerning the note and payments and an accounting for the note.

In motion sequence number 03, petitioner Justin Ebersman moves for summary judgment: (1) directing respondents Malcolm X II Phase B Associates LP (the Partnership) and CDC Management Corporation f/k/a Center for Housing Partnerships to produce and make available for inspection a full and complete copy of the note described in note 8 of the 2016 Audited Financial Statement with a principal amount of \$262,555.00 (the Note) and any and all amendments or restatements of the Note (collectively the "Note"); (2) directing respondents to furnish and make available for

inspection to petitioner any and all documents relating to the Note; (3) directing respondents to furnish and make available for inspection to petitioner a full and complete accounting of any and all payments made with respect to the Note; (4) directing respondents to pay all costs and fees incurred in connection with this proceeding, including but not limited to, attorney's fees. (NYSCEF Doc. No. [NYSCEF 75]. Respondent cross-moves pursuant to CPLR 3211 to dismiss the action. (NYSCEF 79).

To succeed on a motion for summary judgment, the movant must show that there are no material issues of fact in dispute and that he is entitled to judgment as a matter of law. (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Once that showing has been made, the burden shifts to the party opposing to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The authority for petitioner's request is found in the Revised Limited Partnership Act § 121-106 which provides:

(a) Each domestic limited partnership shall maintain the following records, which may, but need not, be maintained in this state:

- (1) a current list of the full name and last known mailing address of each partner set forth in alphabetical order together with the contribution and the share in profits and losses of each partner or information from which such share can be readily derived;
- (2) a copy of the certificate of limited partnership and all amendments thereto, together with executed copies of any powers of attorney pursuant to which any certificate or amendment has been executed;
- (3) a copy of the partnership agreement, any amendments thereto and any amended and restated partnership agreements; and

(4) a copy of the limited partnership's federal, state, and local income tax or information returns and reports, if any, for the three most recent fiscal years.

(b) Any partner may, subject to reasonable standards as may be set forth in the partnership agreement or otherwise established by the general partners, inspect and copy at his own expense for any purpose reasonably related to the partner's interest as a partner the records referred to in subdivision (a) of this section, any financial statements maintained by the limited partnership for the three most recent fiscal years and other information regarding the affairs of the limited partnership as is just and reasonable.

Article 10(a) of the March 14, 2006 Second Amended and Restated Agreement of Limited Partnership of Malcolm X II Phase B Associates, LP. (the Agreement) provides that the managing general partner shall maintain the book and records and make them available to partners for "reasonable inspection and examination."

Petitioner identifies a variety of contradictory statements concerning the Note which constitute good cause to question the Note and the financial statements which he is entitled to review as a limited partner. For example, the financial statement states the note matured in August 2005, \$77,162 in interest was paid in 2016, the interest balance is \$1,746,415.18 for a loan of \$262,555 for 34 years at 6% compound interest, all of which cannot be true as mathematically impossible. Therefore, petitioner has established a legitimate reason to review the requested relevant documents.

The court rejects all of respondent's objections and arguments in support of dismissal pursuant to CPLR 3211(a)(1) and (7) and in opposition to petitioner's motion for summary judgment.

That respondent reports the note and its terms to HUD is irrelevant to a petitioner's right to inspect a partnership's books and records. Respondent's objection to petitioner's counsel's authority while initially a valid concern in its June 6, 2018 letter

(NYSCEF 85) has become frivolous in light of petitioner's affidavit swearing that he engaged counsel on December 12, 2017 (NYSCEF 91)<sup>1</sup> and counsel's appearance in this court. Likewise, respondent's failure to challenge petitioner's standing in its answer (NYSCEF 42) waives it as a defense. The court notes that petitioner provided a copy of his 2017 K-1 (NYSCEF 95) and that this motion was filed long before a 2018 K-1 would be available. (*Charles Offset Co. v Hobart-McIntosh Paper Co.*, 192 AD2d 419 [1st Dept 1993]). Providing petitioner with financial statements and tax returns on July 13, 2018, as directed by the court, is insufficient to resolve the issues with the Note as reported by respondent in the financial statements.

Further, that Article 2(e) of the Agreement of Limited Partnership allows for a developer's note at 10% due upon sale or seven years from execution is irrelevant to petitioner's inquiry about the Note and its treatment. Even if the Note is a "developer's fee note" pursuant to which "the developer of the project makes its fee when the property owned by the partnership is ultimately sold", as respondent identifies it as (NYSCEF 88, William N. Hubbard, III, Esq., general partner of the Partnership, Affidavit November 15, 2018, ¶19), again it is irrelevant to petitioner's inquiry. Therefore, petitioner's motion for summary judgment is granted and respondent's cross motion to dismiss is denied.

Petitioner seeks all costs and fees incurred in connection with this proceeding, including attorney's fees. However, without any legal authority cited, petitioner's request for attorney's fees must be denied.

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<sup>1</sup> Petitioner executed the affidavit in Litchfield, Connecticut which is endorsed by the Commissioner of the Superior Court, but it is not accompanied by a certification.

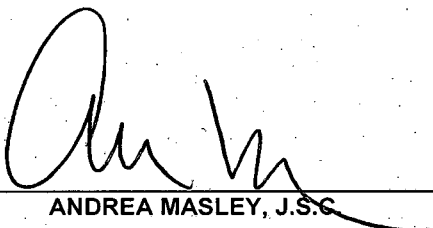
Accordingly, it is

ORDERED that petitioner's motion for summary judgment is granted; and it is further

AJUDGED that, within 30 days of this decision, respondents Malcolm X II Phase B Associates LP and CDC Management Corporation f/k/a Center for Housing Partnerships shall produce and make available for inspection a full and complete copy of the note described in note 8 of the 2016 Audited Financial Statement with a principal amount of \$262,555.00 and any and all amendments or restatements of the Note; (2) respondents shall furnish and make available for inspection to petitioner any and all documents relating to the Note; and (3) respondents shall furnish and make available for inspection to petitioner a full and complete accounting of any and all payments made with respect to the Note; and it is further

ORDERED, that respondent's motion to dismiss is denied.

7/5/19  
DATE

  
ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE