

927 Atl. Invs. LLC v Brookland Capital, LLC
2019 NY Slip Op 33632(U)
December 2, 2019
Supreme Court, Kings County
Docket Number: 507226/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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927 ATLANTIC INVESTORS LLC, individually as
well as derivatively on behalf of ATLANTIC
UPREAL LLC,

Plaintiffs, Decision and order

- against -

Index No. 507226/2019

BROOKLAND CAPITAL LLC, BROOKLAND UPREAL
LIMITED, UPREAL BROOKLYN LLC, NEW UPREAL LLC,
UPREAL BROOKLYN 2 LLC, BROOKLAND UPREAL A1 LLC,
ELEVATION HOLDINGS LLC, VISTA NYC MANAGEMENT
LLC, BG VENTURES LLC, BST REAL ESTATE VENTURES
LLC, NEW BROOKLAND LLC, BROOKLAND UPREAL A2
LLC, UPREAL GASTON LLC, DAVID GOLDBERGER,
EYAL YAGEV, ASSAF FITOUSSI, NOA MATITTAHU PORAN,
ALON RASKY, MILENA SHNITSER RATPAN, RUFFEL AVIV
AVRAHAM. MOSHE COHEN, MARK LICHTIN, MOSHE
GIDANSKY, HANNAH PRI-ZAN, ZACH FISHMAN & BOAZ
GILAD, Individually,

ms # 1

Defendants,

December 2, 2019

- against -

ATLANTIC UPREAL LLC,

Nominal Defendant,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §6301 seeking a preliminary injunction staying the defendant from further depleting the plaintiff's investment. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

During 2015 the plaintiff invested over four million dollars in a real estate development project on property located at 925-927 Atlantic Avenue in Kings County. Thus, the plaintiff entered into

an agreement with defendant New Upreal LLC and formed a new company called Atlantic Upreal LLC. The plaintiff has sued the defendants alleging the defendants engaged in various improprieties including mismanagement, self dealing and negligence. The complaint alleges various causes of action including breach of contract, breach of fiduciary duty, corporate waste, mismanagement and negligence, unjust enrichment conversion and an accounting. The plaintiff has now moved seeking a preliminary injunction enjoining the defendants from removing, transferring or disposing of any assets, accounts or property pending the outcome of the litigation. The defendants oppose the motion.

Conclusions of Law

CPLR §6301, as it pertains to this case, permits the court to issue a preliminary injunction "in any action... where the plaintiff has demanded and would be entitled to a judgement restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id). A party seeking a preliminary injunction "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Hosing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 Ad3d 690, 890 NY2d 593 [2d Dept., 2009])). Further, each of the above elements must be

proven by the moving party with "clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

Considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction is grounded in the fact it is alleged the defendants have breached the agreement in many significant ways. Of course, the defendants deny these underlying facts supporting the injunctive relief and indeed the allegations are heavily and fundamentally disputed. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the basis for the injunction rests upon "speculation and conjecture" the injunction must be denied (Faberge International Inc., v. Di Pino, 109 AD2d 235, 491 NYS2d 345 [1st Dept., 1985]). Thus, the Amended Complaint states that while the project is 70% complete the budget "has almost been used in its entirety" (see, Amended Complaint, ¶ 43) and that in fact the project debt on the project has increased to almost three million dollars. Further, the Amended Complaint accuses the

defendants of entering into unnecessary loans and unauthorized transfers to other entities. The defendants note these allegations are unfounded and there is scant evidence supporting them. This is especially true since the company is engaged in many other projects and the company engages in inter-company payables and receivables which are meticulously recorded. Thus, while the allegations may prove true, at this juncture there are factual disputes undermining the availability of any injunction.

In order to satisfy the second prong of irreparable harm it must be demonstrated that monetary damages are insufficient (Autoone Insurance Company v. Manhattan Heights Medical P.C., 24 Misc3d 1229(A), 899 NYS2d 57 [Supreme Court Queens County, 2009]). The plaintiff does not even allege anything other than money damages. The plaintiff cites to Monteleone v. Leverage Group, 2008 WL 4541124 [E.D.N.Y. 2008] for the proposition that the dissipation of one's investment is a valid basis upon which to grant an injunction. However, that case did not concern an injunction, rather it concerned attachment and is therefore inapplicable to the facts of this case. Thus, any alleged loss which can be compensated by money damages is not irreparable harm (Family Friendly Media Inc., v. Recorder Television Network, 74 AD3d 738, 903 NYS2d 80 [2d Dept., 2010]). As noted, since the plaintiff has not alleged anything other than monetary damages the plaintiff has failed to allege any irreparable harm.

Therefore, based on the foregoing, the motion seeking a preliminary injunction enjoining the defendants is denied.

So ordered.

ENTER:

DATED: December 2, 2019
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC

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FILED
MISSOURI CLERK