

**Hess 938 St. Nicholas Judgment, LLC v 936-938
Cliffcrest Hous. Dev. Fund Corp.**

2022 NY Slip Op 32232(U)

July 11, 2022

Supreme Court, New York County

Docket Number: Index No. 153822/2015

Judge: Francis A. Kahn III

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

PRESENT: HON. FRANCIS KAHN, III PART 32

Acting Justice

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INDEX NO. 153822/2015

HESS 938 ST. NICHOLAS JUDGMENT, LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005

- v -

936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION,

DECISION + ORDER ON MOTION

Defendant.

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936-938 CLIFFCREST HOUSING DEVELOPMENT FUND CORPORATION

Third-Party
Index No. 595841/2019

Third-Party Plaintiff,

-v-

MAVERICK REAL ESTATE PARTNERS LLC

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 136-153, 155-171 were read on the motion/cross-motion to/for LIMIT/ PRECLUDE/ COMPEL DISCOVERY

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This is a dispute over the alleged delivery and non-payment for home heating oil worth a grand total of \$48,276.86. Had this action been commenced this year, it could have been brought in New York City Civil Court which now has a monetary jurisdiction up to \$50,000.00.¹ Rather than reach a sensible outcome to a seemingly mundane retail commodity transaction, the parties have engaged in over seven years of verily contested litigation for which both parties have surely incurred legal fees well more than the amount sought in the complaint. The litigation includes multiple claims of champerty of all things and discovery regarding same which has spiraled out of control. Hundreds of pages of depositions have been generated, interrogatories containing dozens upon dozens of inquiries as well as copious documents demands. In response, the parties have posited objection after objection.

Defendant 936-938 Cliffcrest Housing Development Fund Corporation ("Cliffcrest") served demands for interrogatories and documents dated July 22, 2020. Plaintiff Hess 938 St. Nicholas Judgment LLC ("Hess 938") and Third-Party Defendant Maverick Real Estate Partners, LLC., ("Maverick"), the apparent owner of Hess 938, served responses dated August 11, 2020. Cliffcrest then served notices for the depositions of Edward Martell and David Aviram, employees of either Hess 938 or Maverick. Cliffcrest deposed Edward Martell of

¹ The parties may find themselves relegated to that Court if this litigation continues much further (CPLR 325[d]).

Maverick on two separate dates. Thereafter, Cliffcrest served supplemental document demands dated July 19, 2021, and July 20, 2021, to which Hess 938 and Maverick served an undated response. Finally, Cliffcrest served notices, all dated August 25, 2021, for the depositions of David Aviram, Jason Leibowitz, employees of either Hess 938 or Maverick, and Brock Kenyon, a former employee of Maverick.

Hess 938 and Maverick move pursuant CPLR §3103[a] for a protective order limiting and precluding Cliffcrest's discovery demands. Cliffcrest cross-moves to compel this discovery and for this Court to impose sanctions against Hess 938 and Maverick for their perceived dilatory tactics. The absurd excess of the memorandums of law in support and in opposition to the motions, totaling 76 pages, confirms the parties, and their attorneys, have lost all of perspective in this matter. Now, this Court is relegated to clearing up this nonsensical thicket of discovery.

Hess 938 seeks to prevent Cliffcrest from ascertaining "(1) the ownership structure and/or the finances of non-parties Maverick Lien Fund IV LP, Maverick Lien Fund V LP and/or Maverick Lien Fund V Co-Investor LP; and/or (2) unrelated loans, debts, properties and/or affiliates that are/were acquired, owned, and/or controlled by Maverick." Hess 938 and Maverick identify the alleged offending demands on these issues as Cliffcrest's Interrogatory Nos. 1, 3-11, 13-26, 29-31, 33 and 35-47, Cliffcrest's Supplemental Demand Nos. 1-10 and Cliffcrest's Second Supplemental Document Demand Nos. 1-8. In the alternative, Hess 938 and Maverick seek this Court to conduct an *in camera* review of the documents sought. Hess 938 and Maverick also move to strike the notices served for depositions of David Aviram, Jason Leibowitz and Brock Kenyon.

In civil litigation in New York, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (see CPLR §3101[a]; *Forman v Henkin*, 30 NY3d 656 [2018]). In other words, discovery in New York is liberal and broad (see *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). This does not mean disclosure is limitless and courts are empowered to oversee discovery and set reasonable terms for its exchange (see generally *Diako v Yunga*, 148 AD3d 438 [1st Dept 2017]; *Elmore v 2720 Concourse Associates, L.P.*, 50 AD3d 493 [1st Dept 2008]). A court's discretion to regulate disclosure is wide (see CPLR §3126; *Forman v Henkin*, supra) and includes the power to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR §3103).

At the outset, although Hess 938 and Maverick made timely objections to Cliffcrest's interrogatories, they concede in their memorandum of law (p. 16) they "failed to serve written objections to the disputed demands and second notices of deposition." Hess 938 and Maverick this Court to excuse this delay pursuant to CPLR §2001. CPLR §3122[a][1] provides that a party serve an objection to a discovery demand within 20 days of the date of its service that sets forth the basis for the party's objections. Failure to serve such a response constitutes a waiver of any objection except those that are palpably improper or violate a recognized privilege (see CPLR §3101; *Kiernan v Booth Memorial Medical Center*, 175 AD3d 1396, 1397 [2d Dept 2019]; *Wilner v Allstate Ins. Co.*, 71 AD3d 155, 168 [2d Dept 2010]; *DG & A Mgt. Servs., LLC v Securities Indus. Assn. Compliance & Legal Div.*, 78 AD3d 1316 [3d Dept 2010]).

As to the branch of the Hess 938 and Maverick's motion to preclude Cliffcrest from seeking discovery as to the ownership structure and/or the finances of non-parties Maverick Lien Fund IV LP, Maverick Lien Fund V LP and/or Maverick Lien Fund V Co-Investor LP, the movants' memorandum of law states that Martell testified at his deposition that Hess 938 is entirely owned by Maverick Lien Fund IV LP and that Maverick acts on behalf of Lien Fund IV. It further states that Maverick directly manages Hess 938 and that Edward Martell and David Aviram manage Maverick. As such, the demand for this discovery is relevant, narrow in scope and

not unduly burdensome. The motion papers are silent as to any supposed irrelevance of this discovery as to Maverick Lien Fund V LP and Maverick Lien Fund V Co-Investor LP. Contrary to the contention of Hess 938 and Maverick, they have failed to demonstrate how demands for this information was palpably improper so to warrant a protective order (*see Ural v Encompass Ins. Co. of Am.*, 158 AD3d at 847; *Woo v Shimunov*, 273 AD2d 303 [2d Dept 2010]).

Maverick and Hess 938 have also failed to demonstrate how the objected to interrogatories of Cliffcrest are improper except for Interrogatory Nos. 4 and 37. No. 4 asks “Who manages, owns, or has any controlling interest in Hess?” As identified in the Interrogatory Definitions, “Hess” means Hess Corporation, no longer a party to this action. Likewise, No. 37 overbroadly asks for identity of any other litigations in which Hess 938 or Maverick are named parties.

In the August 11, 2020, response Hess 938 and Maverick set forth sixteen boiler plate objections to Cliffcrest’s first set of interrogatories. As for the specific objections raised for the disputed interrogatories, essentially Hess 938 and Maverick asserted that they were “overly broad and/or lacking specificity.” Otherwise, they claimed the interrogatories sought information which was not relevant. In their motion, Hess 938 and Maverick additionally claim in conclusory fashion, that the demands are done to harass Hess 938 and Maverick. These objections raised by Hess 938 and Maverick are unfounded and movants have failed to shoulder their burden to demonstrate that the demanded materials “are immune from discovery” (*see Arch Ins. Co., Delric Constr. Co., Inc.*, 174 AD3d at 562 citing *Ren Zheng Zheng v Bermeo*, 114 AD3d 743, 744 [2d Dept 2014]; *Melworm v Encompass Indem. Co.*, 112 AD3d 794, 795 [2d Dep 2013]; *Schreiner v Long Is. Light. Co.*, 124 AD2d 578, 579 [2d Dept 1986]; *Zimmerman v Nassau Hosp.*, 76 AD2d 921, 921–922 [2d Dept 1980]).

Interrogatory Nos. 1, 3, 5-11 seek witness information, specifically identifying people with knowledge of the claims alleged in the complaint, a timeline of when and whom the judgment was assigned and to identifying those involved with the assignment as well ownership and controlling interests of Hess 938, Maverick, Maverick Lien Fund V LP and Maverick Lien Fund V Co-Investor LP. These interrogatories seek relevant information that are not overbroad or burdensome (*see generally, Albert v Time Warner Cable*, 255 AD2d 248 [1st Dept 1998]). Cliffcrest is entitled to know who or what owns Hess 938 as well as Maverick since this information necessarily informs the decision-making process germane to this case. The need for confidentiality does not override an obligation to disclose material information. Any perceived sensitive information can be protected by a confidentiality agreement between the parties (*see Lauro v Top of the Class Caterers*, 169 AD2d 708, 709 [2d Dept 1991]; *Wilensky v JRB Marketing & Opinion Research*, 137 AD2d 520 [2d Dept 1988]; *compare Alpha Funding Group v Continental Funding, LLC*, 17 Misc3d 959 [Sup Ct. Kings County, 2007]).

Interrogatory Nos. 13-18 seek all communications regarding the home heating fuel transactions at issue, the job title, job responsibilities, and financial interest in Maverick of Edward Martell, David Aviram, Jason Leibowitz, James Yetter and David Pan. Clearly, these requests are relevant and are made with sufficient particularity (*see Gottwald v Geragos*, 61 Misc3d 1214 [Sup Ct. New York County, 2018]).

Interrogatory Nos. 19-23 inquire about the business practices of Hess 938 and Maverick, specifically asking how many distressed mortgages purchased since 2015 and in 2019, how much did Hess 938/Maverick purchase the judgment in the instant matter, whether Hess 938/Maverick ever executed a note and mortgage on behalf of another party and to identify the addresses of other commercial or residential real estate where Hess 938/Maverick has sold or purchased judgments. These interrogatories are pertinent to the champerty counterclaim as this Court has already stated is “a factual determination largely pertaining to purpose, motive and credibility.”

Interrogatory Nos. 24-26 ask for Maverick's corporate structure, the relationship between Maverick and Maverick Lien Fund V LP and Maverick's relationship with Maverick Lien Fund V Co Investors' LP. For the reasons stated supra, these demands are proper.

Interrogatory Nos. 29-31 seek information about the assignment of Hess Corp's interest to Hess 938, including the identity of all individuals responsible for contemplating, negotiating, drafting, and executing the assignment, the identity of each document received by Maverick relating to the assignment and identity of each employee, agent, servant, or independent contractor with knowledge of the assignment. Contrary to Hess 938 and Maverick's position, how Hess 938 took ownership of the debt at issue and its terms pertain to standing and is relevant as to the breach of contract cause of action (*see generally Park Avenue Associates in Radiology, P.C. v Nicholson*, 200 AD3d 1436 [3d Dept 2021]). Moreover, the movants have not established that they are subject to any unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, by Cliffcrest's pursuit of this discovery.

Interrogatory Nos. 33, 35, 36, 38, 39 seek information about the identity of individual(s) who informed Hess 938 and/or Maverick about the subject buildings' alleged debt, identification of individual(s) who decided to purchase the judgment against Cliffcrest, the terms of the purchase agreement between the Hess Corp. and Hess 938 and/or Maverick, and to identify those responsible for the compliance and oversight of Hess 938 and Maverick (*see generally In re Estate of Max*, 43 Misc3d 1217[A] [Surr Ct. Nassau County, 2014] [use of interrogatories to identify witnesses is proper]; *Site Safety, LLC v Gunnala*, 68 Misc 3d 1213[A] [Sup Ct. New York County, 2020])["to identify witnesses who possess relevant information about the allegations in the complaint, the proper means to do so is an appropriately targeted set of interrogatories"].

Interrogatory Nos. 40-45 pertain to the parties' interaction with New York City Department of Housing Preservation and Development ("HPD"). The HPD is the New York City department responsible for developing and maintaining affordable housing for which Cliffcrest provides. These interrogatories seek information concerning the relationship between Hess 938 and Maverick with HPD as to the Cliffcrest property, communications Hess 938 and/or Maverick had with HPD regarding the financial status, sale or foreclosure of the Cliffcrest property and whether Hess 938 and/or Maverick received compensation from HPD regarding the Cliffcrest property. These demands are relevant and proper.

Interrogatory Nos. 46 and 47 seek information as to what steps were taken by Hess 938 and/or Maverick to collect monies due and the identity of each person on whose testimony Hess 938 and Maverick plan to rely. These requests touch upon both causes of action in the complaint but especially for the account stated cause of action.

Turning next to the branch of Hess 938 and Maverick's motion seeking to preclude Cliffcrest's Supplemental Demand Nos. 1-10 and Cliffcrest's Second Supplemental Document Demand Nos. 1-8, the Supplemental Demands No. 1-10 are as follows:

1. Documents requested on page 38 of the deposition of Edward Martell: names of persons or entities that own Maverick Lien Fund, IV LP and their percentage of ownership.
2. Documents requested on Page 49 of the deposition of Edward Martell: title reports that identified the Hess judgment and any documents related to this that would refresh deponent's recollection as to details of discovering the judgment.

3. Information requested on Page 54 of the deposition of Edward Martell: information regarding any settlement efforts regarding the monetary claims in this matter, including but not limited to the date place and individuals in any verbal discussions and sum and substance of those communications and any documents related to any settlement efforts made by Plaintiff and/or Third-Party Defendant.
4. Information requested from Page 58 of the deposition of Edward Martell: the total amount of out-of-pocket expenses related to this matter that will not be recovered in the action such as legal fees and the administrative fees Mr. Martell referenced.
5. Documents requested from Page 61 of the deposition of Edward Martell: a copy of the retainer agreement and legal bills in this matter.
6. Information and Documents requested from Pages 64 to 66 of the deposition of Edward Martell: any records or information regarding any demands for payment or settlement efforts made by Plaintiff and/or Third-Party Defendant prior to bringing the Sheriff's Sale of the property.
7. Information and Documents requested from Page 85 of the deposition of Edward Martell: any and all records of information regarding the purchase price of loans and subsequent sale of the mortgaged properties of the loans purchased by Plaintiff and/or Third-Party Defendant which led to acquiring the property. This includes but is not limited to documents regarding the acquisition of the loan and the acquiring of the property and ultimate amount recovered from sale of the property.
8. Information and Documents requested from Page 99 of the deposition of Edward Martell: The names of the properties which Plaintiff and/or Third-Party Defendant brought a foreclosure action or sheriff's sale to force a sale of the property.
9. Information and Documents requested from Pages 112 and 113 of the deposition of Edward Martell: a list of all loans purchased by or on behalf of Plaintiff and/or Third-Party Defendant or entities which Third-Party Defendant has a controlling interest, since the formation of Maverick, with a designation as to which loans after being acquired litigation was initiated whether foreclosure or otherwise.
10. Information and Documents requested from Pages 149 and 150 of the deposition of Edward Martell: A list of all entities that the Plaintiff and/or Third-Party Defendant has an ownership and/or controlling interest or otherwise manages or controls.

These discovery demands seek material and necessary information and are not vague, overbroad or burdensome. As discussed above, Cliffcrest is entitled to know the structure of Plaintiff and Third-Party Defendant and that includes the names of persons or entities that own them. Contrary to Hess 938 and Maverick's argument, the settlement efforts are relevant as to demonstrating steps taken to collect on the debt without resorting to litigation. Likewise, out-of-pocket expenses, retainer agreement and legal bills reflect the intent of Hess 938 and Maverick as to collecting on the debt. Hess 938's and Maverick's actions in procuring other mortgaged-distressed properties goes to the champerty counterclaim and third-party action.

Cliffcrest's Second Supplemental Document Demand Nos. 1-8 are as follows:

1. Documents and information requested on pages 220 and 221 as well as pages 224 and 225 of the deposition of Edward Martell: any documents including emails or any other communications or documents exchanged from Maverick with Mark Slama or anyone else regarding acquiring the note and mortgage in the related foreclosure action Index No. 850233/2018, with regards to Coogans Bluff, the originating foreclosing entity or any other entity, as well as the name of the individual employed by Maverick who first reached out to prior lender to inquire about acquiring the loan.
2. Documents and information requested on pages 254 and 255 of the deposition of Edward Martell: the amount the loan in the foreclosure action Index No. 850233/2018 was purchased for as well as all of the closing documents related to the closing of the loan including but not limited to the purchase agreement and term sheet for closing between Maverick and any other entities including but not limited to Coogans Bluff.
3. Documents and information requested on page 285 of the deposition of Edward Martell: The name of the person who first located the Hess judgement which Maverick ultimately acquired.
4. Documents and information requested on page 315 of the deposition of Edward Martell: any documents that would clarify why funds were not released until September 20, 2018 as well as the person with information regarding the release and funding of this assignment of the Hess judgment.
5. Documents and information requested on page 343 of the deposition of Edward Martell: any all documents related to Hess judgment from September 20, 2018 through October 10, 2018 which seem to be missing from the production to Cliffcrest.
6. Documents and information requested on page 353 of the deposition of Edward Martell: The attached document from Carlton Brown.
7. Documents and information requested on page 354 of the deposition of Edward Martell: The missing document regarding extension request for the sheriff's sale.
8. Documents and information requested on page 370 of the deposition of Edward Martell: the missing affidavit regarding publication.

Assignment of the judgment regarding the purported unpaid home heating fuel deliveries is intertwined with Maverick's purchase of the mortgage for the Cliffcrest property. The parties activities leading upon to the cancelled sheriff's sale of the Cliffcrest property is relevant to the champerty cause of action. Therefore, the Second Supplemental Demands properly seek relevant materials all borne from the deposition testimony of Edward Martell (*see Ural v Encompass Ins. Co. of Am.*, supra at 846).

Turning to the branch of Hess 938 and Maverick's motion seeking to preclude the depositions of David Aviram, Jason Leibowitz and Brock Canyon, generally, a corporation or municipality has the right in the first instance to determine which of its employees with knowledge of the facts may appear for a deposition (*see Colicchio by Colicchio v City of New York*, 181 AD2d 528 [1st Dept 1992]). Hess 938 and Maverick's assert that Edward Martell was fully versed in the facts of this case.

To be entitled to a further deposition of a corporate defendant a movant must “show that the representatives already deposed had insufficient knowledge or were otherwise inadequate, or that further discovery was warranted by reason of a substantial likelihood that additional persons sought for deposition possessed information material and necessary to oppose the motion” (*Hayden v. City of New York*, 26 AD3d 262 [1st Dept 2006]).

Cliffcrest demonstrated that Martell was a poor historian as to facts central to this case. Martell was unable to provide any information regarding the acquisition of the judgment and claimed ignorance as to the facts alleged in the complaint. Further, Cliffcrest demonstrated with Martell’s testimony that deposition witnesses Leibowitz, Aviram and Kenyon all played key roles in the events surrounding the purchasing of the judgment against Cliffcrest. Leibowitz managed all ongoing asset management and litigation for Maverick and compiled the discovery in this matter. Aviram managed Maverick, released the funds to purchase judgment against Cliffcrest and was identified in the discovery responses as a person with relevant knowledge. Kenyon is a former employee of Maverick who was part of its acquisitions team in that he identified distressed mortgages in New York City. Thus, their testimony is “material and necessary” and the witnesses should be deposed (*see* CPLR §3101[a]; *see Gendell v 42 W 17th St. Housing Corp.*, 201 AD3d 520 [1st Dept 2022] *citing Anonymous v High School for Env’tl. Studies*, 32 AD3d 353, 358 [1st Dept 2006]; *Roman Catholic Church of the Good Shepherd v Tempo Sys.*, 202 AD2d 257, 257–258 [1st Dept 1994]).

To the extent Kenyon is no longer employed by Maverick and is a non-party, the objections of Hess 938 and Maverick are unavailing as has agreed to be deposed. As such, Hess 938 and Maverick have demonstrated they incurred any prejudice by any procedural error seeking this discovery (*see Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; *Gendell v 42 W. 17th St. Housing Corp.*, 201 AD3d at 521; *Harris v Erie County Medical Center Corporation*, 175 AD3d 1104, 1105-1106 [4th Dept 2019]).

Finally, the branch of Cliffcrest’s cross-motion for sanctions against Hess 938 and Maverick is denied. Cliffcrest failed to demonstrate that Hess 938 and Maverick engaged in frivolous conduct within the meaning of 22 NYCRR §130–1.1[c] (*see Keyspan Generation, LLC v Nassau County*, 118 AD3d 949, 954 [2d Dept 2014]; *Muro–Light v Farley*, 95 AD3d 846, 848 [2d Dept 2012]; *Finkelman v SBRE, LLC*, 71 AD3d 1081, 1081–1082 [2d Dept 2010]).

Accordingly, it is

ORDERED that the motion by Hess 938 St. Nicholas Judgment, LLC, and Maverick Real Estate Partners LLC, is granted to the extent that 936-938 Cliffcrest Housing Development Fund Corporation Interrogatory Nos. 4 and 37 are deemed improper and are stricken and the motion is otherwise denied; it is further

ORDERED that the cross-motion by 936-938 Cliffcrest Housing Development Fund Corporation is granted to the extent that Hess 938 St. Nicholas Judgment, LLC, and Maverick Real Estate Partners LLC, shall respond to Interrogatory Nos. 1, 3-11, 13-26, 29-31, 33 and 35-47, Supplemental Demand Nos. 1-10 and Second Supplemental Document Demand Nos. 1-8 within 30 days of the filing of this Decision and Order; it is further

ORDERED that the depositions of David Aviram, Jason Leibowitz and Brock Kenyon are to be held within 90 days of Hess 938 St. Nicholas Judgment, LLC, and Maverick Real Estate Partners LLC, providing the written discovery enumerated above, and the cross-motion is otherwise denied; it is further

ORDERED that a status conference in this matter is set for **September 20, 2022 at 10:00am** via Microsoft Teams.

7/11/2022

DATE

Francis A. Kahn III

FRANCIS KAHN, III
HON. FRANCIS A. KAHN III
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