

Parker Hart L.P. v Fasciglione

2023 NY Slip Op 30529(U)

February 21, 2023

Supreme Court, New York County

Docket Number: Index No. 655186/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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PARKER HART LIMITED PARTNERSHIP,	INDEX NO. <u>655186/2020</u>
Plaintiff,	MOTION DATE <u>12/28/2022</u>
- v -	MOTION SEQ. NO. <u>004</u>
JOY DACOSTA FASCIGLIONE, KIMBERLY FASCIGLIONE	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108 were read on this motion to/for SEVER ACTION.

Upon the foregoing documents, Parker Hart Limited Partnership's (the **Plaintiff** or the **Lender**) motion (Mtn. Seq. No. 4) to sever actions pursuant to CPLR 603 must be granted without opposition. By way of background, the Plaintiff asserts thirteen causes of action in its complaint: (i) counts one through nine against defendant Joy Dacosta Fasciglione only, (ii) count ten against Kimberly Fasciglione only, and (iii) counts eleven through thirteen against both Joy Dacosta Fasciglione and Kimberly Fasciglione. Because defendant Joy Dacosta Fasciglione filed for bankruptcy on October 19, 2022 (NYSCEF Doc. No. 93), this case is automatically stayed pending the bankruptcy proceeding. The Plaintiff now moves to sever counts one through nine and eleven through thirteen from the remaining count ten, intending to proceed with count ten against the non-bankrupt defendant Kimberly Fasciglione. To wit, the Plaintiff seeks a declaratory judgment in count ten against Kimberly Fasciglione with respect to her obligation under the Stock Pledge Agreement, which can be factually separated from the Plaintiff's other claims based on allegations that (i) the defendants diverted assets and revenues from Vito

Fasciglione Holdings 24, Inc. (the **Borrower**), and that (ii) the defendants diminished the value of the Lender's collateral underpinning the Loans. For convenience, and to avoid prejudice caused by delay, a severance of claims is warranted pursuant to CPLR 603.

The branch of this motion for default judgment against Kimberly Fasciglione pursuant to CPLR 3215 must also be granted without opposition. Simply put, Kimberly Fasciglione was found in default as the guarantor of the Loan in the related action *Parker-Hart Limited Partnership v Kimberly Fasciglione*, Supreme Court of New York, New York County, Index Number 656328/2017. The Plaintiff now seeks to enforce her obligations under the Stock Pledge Agreement, which provides that in the event of a default on the Loans, (i) the plaintiff is entitled to vote Kimberly's shares of the Borrower, (ii) Kimberly's right to vote the shares is extinguished, and (iii) Kimberly is also required to deliver to the Plaintiff all proxies and other documents necessary to exercise its rights under the Stock Pledge Agreement. As relates to this instant motion, there is an alleged default, an affidavit of merit, proper service, and the defendant has received at least 5 days' notice of the time and place of the motion for default judgment. Therefore, the motion for a default judgment must be granted.

Accordingly, it is

ORDERED that the action is severed as to the Plaintiff's counts one through nine and eleven through thirteen, and is continued as to the remaining count ten against defendant Kimberly Fasciglione; and it is further

ORDERED that further proceedings in this severed action are stayed as to the defendants, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of, or vacatur of the stay issued by the Bankruptcy Court; and it is further

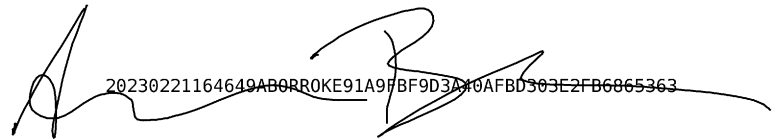
ORDERED that the Plaintiff is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office within ten days from entry and the Clerk shall mark the action severed as to the Plaintiff's counts one through nine and eleven through thirteen and stayed as provided herein; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the Plaintiff's motion for default judgment (Mtn. Seq. No. 4) as to Kimberly Fasciglione pursuant to CPLR 3215 is granted: (i) Kimberly Fasciglione's voting rights in the Stock as a result of continuing defaults under the Loans and Guarantees, and that Plaintiff is the sole rightful and lawful attorney-in-fact with full authority in her place and stead to take any action and to execute any instrument which the Plaintiff may deem necessary or advisable to accomplish the purposes of the Stock Pledge, and (ii) a writ of mandamus is granted to require

Kimberly Fasciglione to immediately issue the necessary proxy to the Plaintiff to vote the Stock, constituting 100% of the shares in Vito Fasciglione Holdings 24, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



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2/21/2023
DATE

ANDREW BORROK, J.S.C.

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