

Weber v Barnett

2023 NY Slip Op 30650(U)

March 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 508333/2022

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM PART 8

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YOEL WEBER and YOEL LEONOROVITZ, Individually
and derivatively on behalf of HORSEPOWER
ELECTRIC AND MAINTENANCE CORP.,

Plaintiff,

Decision and order

- against -

Index No. 508333/2022

GARY BARNETT, HP STOCK LLC and EXTELL
DEVELOPMENT COMPANY,

Defendants,

March 1, 2023

Motion Sequence No. 3

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GARY BARNETT,

Third-Party Plaintiff,

- against -

PASCACK GROUP LLC and PASCACK WL HOLDINGS
LLC,

Third-Party Defendants,

-----x
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking an injunction preventing the plaintiffs from disbursing or otherwise transferring any of the proceeds from the sale of six parcels of property known as the Pascack properties and to enjoin the further sale of any remaining Pascack properties. Further, the defendant seeks to impose a constructive trust on the proceeds from the sale that has already taken place. The plaintiffs oppose the motion. Papers have been submitted by the parties and arguments held. After reviewing the arguments of the parties this court now makes the following determination.

As recorded in prior orders, Horsepower Electric and Maintenance Corp., is equally owned by plaintiffs Yoel Weber, Yoel

Leonorovitz and an entity called HP Stock LLC pursuant to an operating agreement dated October 28, 2014. Gary Barnett is the managing member of HP Stock LLC. The defendant has filed counterclaims and asserted that the parties created an entity called Horsepower Joint Venture which among other purposes purchased investment real estate properties. Specifically, the defendant asserts that entities he owns were given shares of entities created by the joint venture. Concerning construction endeavors these entities include LV Member, LLC, an entity which became a member of Filo-LV Technologies, MFSE Member LLC, an entity which became the sole member of Manhattan Fire & Security Electrical Co. LLC, and Volta Electric & Lighting Supply, LLC. Concerning real estate endeavors the defendant asserts entities he owns were given shares in five entities as well as shares in Pascack Group LLC and Pascack WL Holdings LLC [hereinafter the 'Pascack entities'] (see, Affirmation of Gary Barnett, ¶¶6,7 [NYSCEF Doc. No. 66]). The plaintiffs argue the defendant is not a member of the Pascack entities and consequently has no ownership rights in them. The defendant has moved seeking to enjoin the distribution of profits from the sale of a number of Pascack parcels on the grounds they seek to exclude the defendant from such a distribution. The defendant further seeks to enjoin the future sale of any such parcels without a prior determination he is an owner of those properties. The plaintiffs oppose the request on

the simple ground that the defendant is not an owner of any of the Pascack entities and has no standing to challenge any actions taken on behalf of those entities.

Conclusions of Law

It is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]).

In order to establish a likelihood of success on the merits the defendant must establish ownership interests in the Pascack entities. First, an oral agreement may be sufficient to create a joint venture (see, Unicorn Enterprises Ltd. v. Stonewall Contracting Corp., 232 AD2d 404, 648 NYS2d 153 [2d Dept., 1996]). Indeed, the defendant asserts an oral joint venture has been created. The plaintiffs assert no such joint venture exists, essentially disputing the factual basis for the injunction.

However, even if issues of fact exist, the court can still conclude the moving party has demonstrated a likelihood of success on the merits (see, Ruiz v. Meloney, 26 AD3d 485, 810 NYS2d 216 [2d Dept., 2006]). Indeed, "the mere existence of an issue of fact will not itself be grounds for the denial of the motion" (Arcamone-

Makinano v. Britton Property Inc., 83 AD3d 623, 920 NYS2d 362 [2d Dept., 2011]). This is especially true where the denial of an injunction would disturb the status quo and render the continuation of the lawsuit ineffectual (Masjid Usman, Inc., v. Beech 140, LLC, 68 AD3d 942, 892 NYS2d 430 [2d Dept., 2009]). Thus, the moving party is not required to present "conclusive proof" of its entitlement to an injunction and "the mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (Ying Fung Moy v. Hoho Umeki, 10 AD3d 604, 781 NYS2d 684 [2d Dept., 2004]). Of course, issues of fact will necessarily prevent the issuance of any injunction only where the factual issues "subvert[s] the plaintiff's likelihood of success on the merits in this case to such a degree that it cannot be said that the plaintiff established a clear right to relief" (County of Westchester v. United Water New Rochelle, 32 AD3d 979, 822 NYS2d 287 [2d Dept., 2006]). Therefore, and examination of the evidence presented is necessary.

Further, the elements of a joint venture are "an agreement of the parties manifesting their intent to associate as joint venturers, mutual contributions to the joint undertaking, some degree of joint control over the enterprise, and a mechanism for the sharing of profits and losses" (see, Clarke v. Sky Express Incorporated, 118 AD3d 935, 989 NYS2d 87 [2d Dept., 2014]).

The plaintiffs argue that no joint venture was ever created

because the parties had always executed written operating agreements in the past and the absence of such an agreement regarding the Pascack entities demonstrates "there was simply no meeting of the minds with respect to Barnett's potential membership in the Pascack Entities" (see, Memorandum of Law in Opposition, page 13 [NYSCEF Doc. No. 89]).

In this case on September 13, 2018 plaintiff's counsel sent an email to defendant's counsel with an attached operating agreement. The email stated that "attached is a proposed Revised and Restated Operating Agreement for Pascack Group, LLC. This entity owns three properties: 240, 267 and 79 Red Schoolhouse Road. The agreement follows the operating agreement of 5113 Second Owner LLC. It is dated "as off [sic] March 12, 2018". I don't know if the LLC issued K-1's yet (it was organized in March, 2016 and the original Operating Agreement was dated as of March 22, 2016). So please check the date of the agreement as well as Par. 3 which described initial capital contributions. Let me know if you need any changes. After this agreement is in final form, I will draft two others for the other properties" (see, E-mail dated September 13, 2018 sent 1:54 PM [NYSCEF Doc. No. 68]). The following day the defendant's counsel sent back an email which stated "attached are my comments - please let me know if you have questions. What's the allocation of the \$1.55 million capital contribution between the 3 agreements. Why are we picking March 12, 2018 as the date? I would think we

date it as of today but make it effective as of the date the property was acquired" (see, E-mail dated September 14, 2018 sent 5:52 PM [NYSCEF Doc. No. 68]). Four days later the plaintiff's counsel responded that "the marked-up operating agreement which you sent to me on Friday evening was not the agreement I sent to you on Thursday, 9/13. I had used the template we had agreed upon for the Brooklyn property. There is no particular reason for the date and it could be dated currently and effective as of the date of the acquisition of the property. I do not know how HP Member's funds are to be allocated. Let me know what your understanding it [sic] and I'll find out from my side" (see, E-mail dated September 18, 2018 sent 12:43 PM [NYSCEF Doc. No. 97]). Three days later counsel for the defendant responded "the markup I sent to you was my comments to the agreement you sent on 9/13 - the printout on which I made the comments was a blackline of the Pascack Group LLC operating agreement versus the last one we did for Amity Holding LLC. Please look at the handmarked comments I made and incorporate into Pascack Group LLC's operating agreement or let me know if you have questions. Re the allocation, Joel, of the \$1.55MM, how is that being divided between the LLCs which own this property?" (see, E-mail dated September 21, 2018 sent 10:51 AM [NYSCEF Doc. No. 98]). While these emails demonstrate negotiations concerning an executed operating agreement, the defendant invested one and a half million dollars which was readily accepted by the plaintiffs and

retained that money until August 3, 2022, when in the midst of litigation, sought to return those funds. Indeed, on November 13, 2020 the defendant sent an email requesting information "about the overall financial standing of the company, including various real estate" (see, E-mail dated November 13, 2020 sent 3:52 PM [NYSCEF Doc. No. 71]). The information submitted contained a statement of commercial rent rolls and included Pascack Group and Pascack WL Holdings LLC. Further, there is a table listing various loans including loans owed by Pascack Group LLC. Although Mr. Barnett is not listed as a personal guarantor the entity Pascack Group LLC is listed as a corporate guarantor. Lastly, a rental income statement includes information for Pascack as well.

The plaintiffs acknowledge the defendant sent one and a half million dollars to the plaintiffs, and they insist it was merely held pending the execution of the operating agreement (see, Affidavit of Joel Weber, ¶34 [NYSCEF Doc. No. 106]). However, by the time the money was forwarded in March 2019 the operating agreement had still not been executed and yet the money was not returned for another three years. It is difficult to accept that no joint venture was reached when significant sums were advanced and not returned for such a prolonged period of time. Moreover, Mr. Weber states that, referencing the main lawsuit, "as of the date Barnett sent us \$1.5 million, he owed much more than that amount to HPE. Barnett owed HPE approximately \$7,824,907.61 as of

that date, which was calculated based on the percentage of hours on the Extell jobs by March 12, 2019 and the total owed for each job multiplied by the percentage complete on the jobs, plus the cost of unionization of HPE personnel for Extell projects" (id at ¶61). To the extent the plaintiffs seek to argue the capital contribution was really intended to pay off prior debt such argument is undermined by the fact the capital contribution was returned after this lawsuit commenced.

Further, concerning the financial statements sent, the plaintiffs argue that in any event the defendant was never given any schedule K-1's concerning those entities. While that does raise questions, however, the plaintiff has failed to adequately explain why they would include the Pascack entities in financial statements sent to Barnett if Barnett had no interest in them. The accountant submitted an affidavit and explained that since the other plaintiffs owned a majority share of combined entities all such entities were included, even those not owned by Barnett (see, Affidavit of Barry Sunshine, ¶¶18,19 [NYSCEF Doc. No. 90]). However, that does not really explain why Barnett would be sent financial information about entities he does not own at all. The more reasonable explanation, of course, supports the assertion that Barnett in fact owned the Pascack entities.

Thus, it cannot be said that there is no basis to conclude Barnett is an owner of the Pascack entities. Thus, there are

significant factual questions whether the defendant is an owner of the entities. Those factual questions do not preclude the imposition of an injunction pending the resolution of the lawsuit. Further, there are no other reasons to deny such injunction. Therefore, considering the litigation history of this case the motion seeking an injunction freezing the defendant's share of the proceeds from properties already sold is granted. One third of all proceeds from the sale that already took place may not be transferred in any way without the consent of all parties for the remainder of the lawsuit. Even if the defendant is deemed an owner of the entities he does not have the right to any say in whether any further properties are sold. Therefore, the motion seeking an injunction preventing the sale of any further Pascack properties is denied. In the event such a sale takes place one third of the proceeds of such sale must be reserved for the defendant and is subject to the same injunction as the proceeds from the properties already sold.

So ordered.

ENTER:



DATED: March 1, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC