

**Merriview Hill, LLC v Prebenda**

2023 NY Slip Op 30822(U)

March 15, 2023

Supreme Court, New York County

Docket Number: Index No. 657021/2019

Judge: Joel M. Cohen

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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 03M

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MERRIVIEW HILL, LLC,

Plaintiff,

- v -

MICHAEL F. PREBENDA,

Defendant.

INDEX NO. 657021/2019

MOTION DATE 12/23/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

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MICHAEL PREBENDA, MICHAEL F. PREBENDA EX REL.  
MERRIVIEW HILL, LLC

Third-Party Plaintiffs,

-against-

EDWARD LOGAN

Third-Party Defendant.

Third-Party  
Index No. 595258/2020

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to AMEND THIRD-PARTY COMPLAINT and VACATE PRELIMINARY INJUNCTION.

Defendant–Third-Party Plaintiff Michael F. Prebenda’s (“Prebenda”) motion to amend and supplement the Third-Party Complaint is GRANTED. Prebenda’s motion to vacate, in part, the Court’s January 10, 2020, preliminary injunction is DENIED without prejudice as it appears to be moot.

This is a dispute between the co-founders of Merriview Hill, LLC (“Merriview”). Merriview asserts claims against its co-founder, Prebenda, for conversion and breach of fiduciary duty. Prebenda asserts counterclaims against Merriview, as well as individual and derivative

claims (on Merriview's behalf) against Third-Party Defendant Edward Logan ("Logan"), Merriview's second co-founder.

On January 10, 2020, the Court issued an order (NYSCEF 43 ["Preliminary Injunction"]) temporarily restraining Prebenda from acting on behalf of Merriview or holding himself out as a representative of Merriview and requiring the return of certain information and assets to Merriview. On March 6, 2020, Merriview moved for contempt against Prebenda for allegedly violating the Preliminary Injunction (NYSCEF 52). On March 10, 2020, the Court referred this case to the Commercial Division ADR Program (NYSCEF 65).

No filings were made in this case for more than two years. On November 30, 2022, the Court directed the parties to provide an update (NYSCEF 71). On December 3, 2022, Prebenda submitted a letter indicating that he wants to pursue his counterclaims and third-party claims (NYSCEF 73). On December 9, 2022, Merriview and Logan submitted a letter indicating they intended to prosecute Merriview's claims and defend against Prebenda's claims (NYSCEF 74). Merriview and Logan also request that the Court issue an updated order of reference to the Commercial Division ADR program and schedule a preliminary conference (*Id.*).

On December 11, 2022, Merriview filed an Answer to Counterclaims and Logan filed an Answer to the Third-Party Complaint (NYSCEF 75-76). On December 23, 2022, Prebenda moved to supplement and amend the Third-Party Complaint pursuant to CPLR 3025(b). Specifically, Prebenda alleges that Logan has failed to cause Merriview to file tax returns since 2018 and that Logan has diverted payments owed to Merriview to himself (NYSCEF 83 [Redline of Proposed Amendment]). Prebenda seeks to add third-party claims for money had and received, fraudulent conveyance, and declaratory judgment (*Id.*). He also moves to partially vacate the Preliminary Injunction pursuant to CPLR 6314 to name Logan (rather than Prebenda)

as the party responsible for filing Merriview’s taxes. In response, Merriview and Logan assert that Prebenda did not raise this issue before making his motion and that they are “more than willing to remove [Prebenda] as the tax matters designee. . .” (Opp. Memo at 2 [NYSCEF 87]).

Prebenda’s motion to amend and supplement his Third Party Complaint is granted. CPLR 3025(b) provides that “leave shall be freely given” and Prebenda has provided the requisite “proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” Relevant here, CPLR 3025(a) provides that “[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” Here, the proposed amendment is well after the date on which Logan’s answer was due, but within 20 days after the answer was actually filed. In these circumstances, since both Logan and Prebenda were dilatory, leave to amend is granted.

Prebenda’s motion to vacate, in part, the Preliminary Injunction pursuant to CPLR 6314 is denied without prejudice. Merriview and Logan have agreed to work with Prebenda to remove him as Merriview’s tax matters designee which would render the motion to vacate moot.

\* \* \* \*

Accordingly, it is

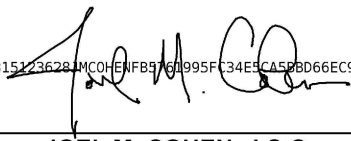
**ORDERED** that Defendant Prebenda’s motion to amend his Third-Party Complaint is **GRANTED** and the proposed amended pleading shall be filed and served via NYSCEF promptly after the filing of this order and Logan shall answer or otherwise respond within twenty-one (21) days of service; it is further

**ORDERED** that Prebenda’s motion to modify the Preliminary Injunction is **DENIED** without prejudice; it is further

**ORDERED** that the parties are referred to the Commercial Division ADR Program and the parties shall re-submit a proposed order of reference to the Court on NYSCEF with a courtesy copy to [sfc-part3@nycourts.gov](mailto:sfc-part3@nycourts.gov) within ten (10) days of the filing of this order; it is further

**ORDERED** that the parties appear for a telephonic preliminary conference on April 4, 2023 at 11:30 am (parties to circulate dial-in information to [sfc-part3@nycourts.gov](mailto:sfc-part3@nycourts.gov) prior to the conference).<sup>1</sup>

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

<u>3/15/2023</u> DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE

<sup>1</sup> If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/PC-Order-Part-3.pdf>), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.