

Melrose Assoc. LP v Floral Assoc. LP

2023 NY Slip Op 32359(U)

July 13, 2023

Supreme Court, New York County

Docket Number: Index No. 651323/2020

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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MELROSE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiff,

INDEX NO. 651323/2020

MOTION DATE 05/07/2023,
05/17/2023

- v -

FLORAL ASSOCIATES LIMITED PARTNERSHIP,
JOSEPH T CEFALO, FREDERICK W CEFALO, STEPHEN
R CEFALO, ESMC, LLC,

MOTION SEQ. NO. 009 010

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 192, 193, 194, 195, 196, 197, 198, 199, 206, 209, 210

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 200, 201, 202, 203, 204, 207, 208, 214, 215, 216, 217, 218, 219, 220, 221

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, (i) the Plaintiff’s motion (Mtn. Seq. No. 009) seeking to hold Hallkeen Management, Inc. (**Hallkeen**) in contempt and (ii) the Defendants’ motion (Mtn. Seq. No. 010) to strike the Amended Verified Complaint (NYSCEF Doc. No. 9) and the Verified Reply to the Counterclaims (NYSCEF Doc. No. 55) are both denied.

On the record before the Court, the Plaintiff is not entitled to have this Court hold Hallkeen in contempt based on their failure to respond to a subpoena. Hallkeen had an incorrect address on its New York State registration (NYSCEF Doc. No. 218 ¶ 14) and therefore did not initially respond to the subpoena that they did not receive. However, since receiving a copy of the subpoena, Hallkeen has responded (*id.* at ¶ 15). Thus, the Plaintiff’s motion seeking to hold Hallkeen in contempt based on their failure to respond to a subpoena is denied.

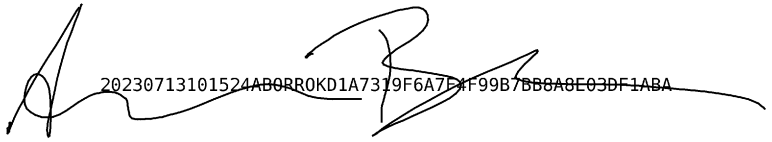
However, the Court notes that this dispute arises out of the sale of a real estate project in Massachusetts for \$32.24 million of which the Plaintiff was the 96% beneficial owner (NYSCEF Doc. No. 193). In connection with the sale, the defendants produced a Projected Sale Statement (in June 2019) which included \$550,000 of expenses of which 96% were charged to the Plaintiff. A mere two months earlier, in April 2019, the expenses were projected to be only \$31,000 – i.e., over \$500,000 less than the \$550,000 set forth on the Projected Sale Statement delivered just two months later. This lawsuit concerns these expenses and whether the defendants improperly deducted expenses from the Plaintiff's allocation of the proceeds. In this lawsuit, the defendants indicated that they did not know where the \$550,000 had come from and that the information needed to be sought from the manager. To wit, Edward McNeil, a partner of CohnReznick, asserts that the figures came from Hallkeen, the manager. The manager has now indicated that these expense figures came from CohnReznick. Thus, it appears that the defendants in this case do not have any basis upon which to claim that the expense of \$550,000 is in fact proper. Stated differently, the fact that the amount of projected expense changed from \$31,000 to \$550,000 in a two month period suggests that it is presumptively invalid. It has been incumbent on the defendants, as the party producing the Projected Sale Statement, to explain why the amount increased so dramatically and to otherwise justify the amount of the expense charged against the Plaintiff's share of the distribution. Inasmuch as they do not appear to have a factual basis for the deduction as the manager has now testified that the number came from the defendants, it would seem that this issue is ripe for briefing on a motion for summary judgment. Therefore, leave is granted to the Plaintiff to bring a motion seeking summary judgment by order to show cause.

The defendants' motion to strike is denied. Deborah Oliver, Ephraim Fruchtdandler's assistant, who performed the search, appears to have merely innocently and incorrectly assumed that all of the emails in her inbox mirrored those on Mr. Fruchtdandler's computer (NYSCEF Doc. No. 215 ¶ 8). Although the subsequent forensic search conducted by KLDISCOVERY reveals that at least 104 emails and attachments were responsive to the original discovery requests which the Plaintiff did not but should have produced (NYSCEF Doc. No. 203), these documents have now been produced (*id.* at ¶ 9). Thus, under the circumstances, it can not be said that the conduct was willful, contumacious or otherwise done in bad faith, the Plaintiff has a credible explanation as to why the documents were not initially produced and the Defendants do not appear to have been prejudiced in any cognizable manner (*Scholem v Acadia Realty L.P.*, 144 AD3d 1012, 1013 [2nd Dept 2016]; *Palmenta v Columbia Univ.*, 266 AD3d 90, 91 [1st Dept 1999]). Thus, the motion is denied.

Accordingly, it is hereby ORDERED that the motion to hold Hallkeen in civil contempt is denied; and it is further

ORDERED that the Plaintiff is granted leave to bring an order to show cause seeking summary judgment; and it is further

ORDERED that the motion to strike the Amended Verified Complaint and the Verified Reply to Counterclaims is denied.



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7/13/2023

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