

Otto v Otto

2023 NY Slip Op 33535(U)

October 11, 2023

Supreme Court, New York County

Docket Number: Index No. 108886/2010

Judge: Andrea Masley

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

PRESENT: HON. ANDREA MASLEY PART 48
Justice
 -----X
 MARIA OTTO, INDEX NO. 108886/2010

Plaintiff,

- v -

JONATHAN OTTO, METROCENTERS LLC, METRO CAPITAL HOLDINGS LLC, METROCAPITAL, LLC., METRO ASSETS TRUST, BAYBOARD INC., RIDGEBAY INC., BELLMORE SUNRISE REALTY CORP., COURTESY BRENTWOOD INC., ELMONT REALTY INC., HICKSVILLE ASSOCIATES INC., HOMEPORT ASSOCIATES INC., LEVITOWN EAST MEADOW CORP., MASPETH GRAND REALTY CORP., MASSAPEQUA MALL ASSOCIATES, INC., MERRICK MASS REALTY CORP., and PARKCHESTER RB CORP.,

Defendants.

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Plaintiff Maria Otto initiated this 2010 case against defendant Jonathan Otto, the son of her deceased husband Richard Otto (date of death August 18, 1999), arising from her ownership of 10% of 13 real estate properties and 16.417% ownership of a rental real estate operating entity. The background of this 2010 case is set forth in this court’s April 7, 2020 decision on motion sequence 008 granting plaintiff’s request for reverse summary judgment. (NYSCEF 262, Decision and Order.)

The remaining issue is plaintiff’s accounting claim: “[a]n accounting of the profits, losses, expenses, and revenues of Defendants’ management of all real estate entities in which Maria and the Estate own (or owned) an interest, for the period 1997 to the present.” (NYSCEF 210, May 20, 2011 Second Amended Complaint ¶ 109.) As to plaintiff’s remaining unjust enrichment claim, the order provides: “[s]pecifically, should Jonathan’s overpayment of distributions to himself or management fees to Metro have resulted in under distributions to not only the Estate but to Maria as well,

OTHER ORDER – NON-MOTION

those sums must be paid to Maria under her individual theory of unjust enrichment.”¹ (NYSCEF 262, Decision and Order at 23.)

Although an accounting was prepared for the surrogate’s court matter, plaintiff was also entitled to an accounting under applicable limited partnership and limited liability company laws. (*Id.* at 23-24.) Accordingly, the court appointed Sareena Sawhney to perform the forensic accounting. (NYSCEF 302, June 24, 2021 Decision and Order.) In her report (NYSCEF 320, Report) which she supplemented (NYSCEF 321, Supplemental Letter), Sawhney recommends that Jonathan Otto pay Maria Otto \$9,742.60 composed of (1) **\$6,579.60** (10% of \$65,796) for overpayment of management fees from 1999 to 2004 (NYSCEF 343, Hearing Transcript [Tr.] at 63:12-18; NYSCEF 321, Supplemental Letter) and (2) underpaid rents of **\$3,163** (10% of \$31,630). (NYSCEF 320, Report 10-11; NYSCEF 343, Tr. at 45:6-50:19.) The court held a hearing on the accounting and the parties submitted posttrial memoranda.

Sawhney reviewed the following financial records for the fourteen real estate entities for the years 1997 through 2008: (1) federal income tax returns; (2) financial statements; (3) general ledgers and accountants work papers; (4) lease agreements; (5) bank statements and cancelled checks; (6) sale agreements and closing statements for property sales for each of the real estate entities; (7) various invoices provided for professional fees, repairs and maintenance, and miscellaneous expense categories; (8) Letter Agreement dated January 5, 1999; (9) Managing and Leasing Agreement dated January 1, 2002 and related exhibits; (10) a forensic report prepared by Gettry Marcus Stern & Lehrer, CPA, P.C. dated October 21, 2005; (11) trust account statements held at JP Morgan for years 2007 through 2016; (12) various letters and reconciliations prepared by Empire Valuation; (13) RSM letter dated April 11, 2016; (14) Satisfaction of Judgment dated November 5, 2021. (NYSCEF 320, Report, Appendix B). She did not review (1) documents sufficient to calculate percentage rent which is based on the tenant’s revenues or (2) documents sufficient to distinguish rent from non-rent items such as security deposits. (*Id.* at 10-11.). While the parties agree that the report is thorough, defendants challenge its conclusion and insist defendants owe nothing to plaintiff. (NYSCEF 343, Tr. at 16-18 [Pileggi].)

¹ The order defines Metro as “the management entities owned or controlled by Jonathan.” (NYSCEF 262, Decision and Order at 2.)

Defendants challenge the underpaid rent calculation of \$31,630. Defendants object to the calculation of gross rent because Sawhney did not include security deposits and tax refunds in her gross rent computation. In addition, defendants want a credit for the 12 entities for which Sawhney calculated an overpayment.

The court credits Sawhney's calculation and reasoning for omitting security deposits from gross rent. First, she relied on the leases which do not include security deposits as rental income. (*Id.* at 45:6-47:16.) Second, she was not able to verify that defendants received security deposits. (*Id.* at 49:9-50:24.) Likewise, the court accepts Sawhney's reasoning for excluding the tax refunds from the definition of rent for determining the basis to calculate management fees. (*Id.* at 57:16-24, 96:5-11.)

There will be no credit for an overpayment because the alleged "overpayment" may not be an overpayment at all. Instead, it may be from percentage rent, which is a "variable amount based on a percentage of the tenant's gross sales" (NYSCEF 320, Report at 10), another component of rent which Sawhney was not able to calculate with the documents she was given. Overpayments may also arise from timing issues. (NYSCEF 343, Tr. at 48:19-49:2.) However, as to Elmont Realty Associates and Parkchester RB Associates, LLC, Sawhney could not reconcile the difference between the projected rent and bank deposits. (NYSCEF 320, Report at 11.)

Defendants challenge the management fee calculation of \$65,796 because it includes 1999 payments of \$34,551 to the general partners of the Real Estate Entities, which were not paid to Metro Centers. (NYSCEF 322, Objection Letter.) The court rejects defendants' argument based on the clear transfer agreement between Richard and Jonathan which provides:

"In order to fund the costs of providing management services, each of the Real Estate Companies shall be authorized to pay an amount equal to Three (3%) Percent of gross rents to MetroCenters, Inc. or any other affiliate of mine which renders services to the Controlling Persons and the Real Estate Companies, in lieu of any other

amounts payable to the Controlling Person.” (NYSCEF 334, Transfer Agreement ¶ 5.)

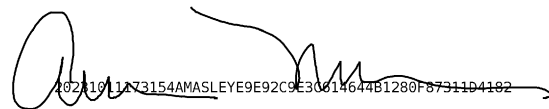
Payments over 3% violate the transfer agreement. As to the 5% instead of 3%, reliance on the January 1, 2002 Managing and Leasing Agreement between MetroCenters, LLC and various real estate entities is misplaced since the document is unsigned (NYSCEF 327, Managing and Leasing Agreement) and it was rejected by the parties. In 2006, the limited partners of MetroCenters, LLC, not plaintiff or her daughter, agreed to settle with the real estate entities to reimburse any excess management fees charged above the 3%. (NYSCEF 228, Settlement Agreement.) The settlement is based on the forensic report prepared for the surrogate’s court proceeding by Gettry Marcus Stern & Lehrer, CPA, P.C. dated October 21, 2005, which rejected the 5%. (NYSCEF 320, Report at 14.)

In addition, plaintiff seeks \$3,455.10 (10% of \$34,551) paid to the general partners of the 13 real estate entities in 1999. Likewise, plaintiff seeks \$2,615.19, the amount that should have gone to the estate of which plaintiff was entitled to 33.3% of \$5,231.39 for estate and 16.66% of \$5,231.39 for the testamentary trust. Defendants fail to address either of plaintiff’s requests. Therefore, it is granted in the absence of opposition.

Accordingly, it is

ORDERED, plaintiff shall have judgment for \$15,812.79; and it is further

ORDERED, plaintiff shall submit a proposed judgment to the court within 30 days of the date of this order and defendants shall have 10 days following service of the proposed judgment to object. This submission shall include an Excel chart demonstrating the calculation of interest.



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DATE: 10/11/2023

ANDREA MASLEY, JSC

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)