

**Weber v Barnett**

2023 NY Slip Op 34273(U)

December 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 508333/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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

-----x  
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, December 7, 2023

-----x  
GARY BARNETT,

Third-Party Plaintiff,

- against -

PASCACK GROUP LLC and PASCACK WL HOLDINGS  
LLC,

Third-Party Defendants,

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

Motion Seq. #4

The defendant has moved seeking sanctions against the plaintiffs. The plaintiffs have opposed the motion. Papers were submitted by all parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in prior orders the defendant has asserted that entities he owns were given shares in Pascack Group LLC and Pascack WL Holdings LLC [hereinafter the 'Pascack properties'] and is a one third owner of the Pascack properties. The plaintiffs have argued the defendant is not an owner of those entities. On October 19, 2022 the defendant filed an order to show cause seeking to enjoin the transfer of any of the proceeds from the sale of the Pascack properties. The defendant asserted that he learned the sale had

taken place on or about July 26, 2022 for a price of twenty one million dollars. The parties entered into a stipulation that was signed by the court on December 19, 2022. The stipulation stated that "until the motion for a preliminary injunction is heard and determined, Counterclaim Defendants agree to maintain the status quo that existed as of November 30, 2022 and will not disburse 1/3 of the proceeds from the sale of the Pascack properties that took place on or about July 26, 2002 that are currently held by the Counterclaim Defendants as of November 30, 2022. This agreement expires, as of February 1, 2023, unless extended by the Court" (see, So ordered Stipulation, ¶5 [NYSCEF Doc. No. 88]). Of course, implicit within this agreement was the understanding that one third of the proceeds was in the plaintiff's possession and would not be disbursed without further court intervention. The order to show cause was opposed on January 13, 2023. The opposition was primarily focused upon the fact that defendant was not an owner of the Pascack properties. The plaintiff Yoel Weber submitted an affidavit in opposition and stated that "I have been advised that Defendants are seeking to enjoin Plaintiffs and the Pascack Entities from selling or transferring any of the remaining Pascack Properties and to place the proceeds from previously sold parcels in a constructive trust. The requested injunctive relief is completely unwarranted and would cause an undue burden on Plaintiffs, which are already being penalized due to the

Defendants' ongoing breaches of the Shareholder Agreement and refusal to pay over \$14 million for services rendered as alleged in Plaintiffs' Complaint" (see, Affidavit of Yoel Weber, ¶62 [NYSCEF Doc. No. 106]). Again, that affidavit clearly acknowledges that the proceeds had not been disbursed and that an injunction preventing the distribution of such proceeds would be a hardship. On March 1, 2023 the court rendered a decision and held that one third of the proceeds could not be disbursed and could not be transferred in any way.

On September 29, 2023 the plaintiffs forwarded the defendant the closing statement of the sale related to the Pascack properties. That statement demonstrated that in fact all of the proceeds had been disbursed at the closing or shortly thereafter. Thus, there did not exist any distribution of proceeds that could possibly be enjoined. The defendant has now moved seeking to sanction the plaintiff for the misrepresentations wherein they led the defendant to believe the proceeds had not yet been disbursed. The plaintiff opposes the motion arguing there can be no violation of a court order regarding conduct that occurred before the order was even issued.

#### Conclusions of Law

It is well settled that where a court has jurisdiction an order of the court must be obeyed (Woistencraft v. Sassower, 212 AD2d 598, 623 NYS2d 7 [2d Dept., 1995]). Thus, "a party is

obligated to comply with a court order, however, incorrect the party may consider that order to be, until that order is set aside, either by appeal or otherwise, so long as the court issuing the order had jurisdiction to do so" (Gloveman Realty Corp., v. Jeffreys, 29 AD3d 858, 815 NYS2d 687 [2d Dept., 2006]).

As noted, the plaintiffs argue sanctions are improper because no court order was violated. Thus, Shimshon Friedman, an officer of the plaintiff Horsepower Electric & Maintenance Corp., submitted an affidavit and asserted that "the distribution of proceeds from the sale of certain Pascack properties took place in July 2022, months before the underlying motion for injunctive relief was filed and the Court issued the March 1, 2023 Order. Thus, I do not see how Plaintiffs could have violated a Court order when the actions took place months before it was entered" (see, Affidavit in Opposition, ¶9 [NYSCEF Doc. No. 162]). While that may be technically true there can really be no question that the representations the proceeds were not disbursed, upon which the defendant relied in agreeing to a stipulation and upon which the court relied in its determination, were disingenuous. The plaintiff's material omissions in this regard, while not a violation of any court order, were surely improper. The plaintiff's elide the seriousness of the omissions by asserting that no omissions were recorded in the stipulation. Plaintiff's argue that "the stipulation specifically states that 'Defendants

agree to maintain the status quo that existed as of November 30, 2022' regarding the proceeds of the prior sale of the property, and agreed not to sell or convey any other properties owned by Pascack as of November 30, 2022. Plaintiffs did not violate either portion of that stipulation" (see, Affirmation in Opposition, ¶20 [NYSCEF Doc. No. 165]). By its very definition an omission cannot be violated because the contents of the omission are never recorded. Consequently, arguing the terms of the stipulation were not violated is a mere truism that does not absolve improper conduct when, due to material omissions, the stipulation was rendered entirely hollow.

Therefore, while the plaintiffs cannot be subject to sanction in the conventional sense, the plaintiffs should be required to secure one third of the proceeds from the sale of the Pascack properties should the defendant prevail that he is indeed a one third owner. Concerning the proper amount that the plaintiffs shall be required to secure, the closing statement reveals that the amount paid at closing was \$19,479,752.19. Of that amount \$3,595,063.76 was paid to Lakeland Bank and \$84,000.00 was paid to Chicago Title Insurance Co. Thus, \$15,800,688.43 remains. The plaintiffs argue that further amounts were paid to pay off loans to entities owned by the defendant. Thus, the closing statement demonstrates that amounts of \$563,460.69 and \$2,382,145.04 were paid to 4101 Owners LLC and \$1,124,247.15 was paid to Horsepower


Electric and Maintenance Corp. However, the defendant is a minority owner of those entities and there is no evidence those entities still maintain a third of those funds on behalf of the defendant. Therefore those amounts cannot be reduced.

Consequently, pursuant to the prior court order, one third of \$15,800,688.43 must be secured on behalf of the defendant. Therefore, \$5,266,896.14 must be set aside and cannot be disbursed until the defendant's ownership interest in the Pascack properties is decided. Pursuant to the closing statement \$7,230,835.55 was paid to SS Sontag QI LLC, to fund the purchase of a 1031 Exchange for the subsequent purchase of property. The court hereby orders that \$5,266,896.14 of that amount cannot be disbursed or released by the 1031 Exchange agent in any manner and for any purpose. The 1031 Exchange agent is hereby ordered to maintain \$5,266,896.14 until further order of this court. This order enjoining the 1031 Exchange agent from disbursing \$5,266,896.14 will be released upon evidence the plaintiff's have deposited \$5,266,896.14 into the defendant's attorney's escrow account.

So ordered.

ENTER:

DATED: December 7, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC