

SCANNED ON 7/17/2010

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

PRESENT: LANCELOT B. HEWITT
SPECIAL REFEREE
Justice

PART 81K

*In the Matter of the Application of Joseph
Bennish*

INDEX NO. 123089/01

MOTION DATE _____

MOTION SEQ. NO. 39, 40, 41

MOTION CAL. NO. _____

- v -

*For the Dissolution of Haslerka, Inc.
Serivan Homes, Inc., and Primary Residence, Inc.*

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**THIS REFERENCE IS DISPOSED OF IN ACCORDANCE
WITH ACCOMPANYING REPORT / DETERMINATION**

FILED

JUL 06 2010

NEW YORK
COUNTY CLERK'S OFFICE

LANCELOT B. HEWITT
SPECIAL REFEREE

Dated: JUN 15 2010

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

7/6
39, 40

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

-----X
In the Matter of the Application of SOHEIL DARVISH,
holder fo one-half of all the outstanding shares entitled
to vote in an election of Directors of HASLACHA, INC.,
URBAN HOMES, INC., and PRIMARY RESIDENCE,
INC.,

Index No. 123089/01

Decision and Order

Petitioner,

-against-

For the Dissolution of HASLACHA, INC., URBAN
HOMES, INC., and PRIMARY RESIDENCES, INC.,
Domestic Corporations Pursuant to §1104 of the BCL,
Respondents.

-----X
ORDER OF THE SUPREME COURT, NEW YORK COUNTY: PART 81R

By decision and order of the Honorable Melvin L. Schweitzer dated March 30,
2010, the issue of Motion Sequence Nos. 39, 40 and 41, was referred to the undersigned Special
Referee to hear and report with recommendations.¹

This matter was assigned to the undersigned Special Referee on April 6, 2010, at
which time counsel for the respective parties appeared. Appearances were as follows:

For Petitioner,
Perry Dean Freedman, Esq.
Law Offices
Ten Bank Street-Suite 650
White Plains, New York 10606

For the Receiver,
Lawrence A. Mandelker, Esq.
and Daniel S. Kokhba, Esq.
Kantor, Davidoff, Wolfe,
Mandelker, Twomey & Gallanty, P.C.
51 East 42nd Street
New York, N.Y. 10017

The matter was conferenced on April 6, 2010, and motion papers were taken on

¹The Order of Reference was issued by Justice Schweitzer in order to “clarify” previous
Orders issued by the court dated April 29, 2009 and May 12, 2009 (Motion Sequence No. 39);
Orders dated April 29, 2009 and May 12, 2009 (Motion Sequence No. 40); and Order dated
November 4, 2009 (Motion Sequence No. 41).

submission.

Motion Sequence No. 39

Permanent Receiver Marc A. Landis, Esq. (“Landis”) moves for an order, directing: (1) the approval of an “amended, restated and extended agreement of the lease” between Haslacha, Inc. (“Haslacha”) and Jubilee, Inc. (“Jubilee”); (2) approving the withdrawal of appeal on behalf of Haslacha pending in the New York Supreme Court, Appellate Term, First Department in the action Haslacha, Inc. v. Jubilee, Inc. (Index No. L&T 59587 NLT 2008); (3) approving payment of the invoice submitted to Landis by the court-ordered counsel, Lawrence Mandelker, Esq.,² and (4) authorizing Landis to use monies held by Landis as Permanent Receiver of Haslacha,, Primary Residence, Inc., (“Primary”), and Urban Homes, Inc. (“Urban”), to make payments demanded by the invoice, should the funds in the Haslacha receiving estate to be insufficient.³

Petitioner supports the motion made by Landis and cross-moves for an order, pursuant to BCL§1008 [5], directing that upon the Receiver’s’ final distribution of Haslacha’s assets, the sums sought by the Receiver in his motion for attorney’s fees be charged and attributable solely to any distributive share of Shahram David Lavian (“Lavian”), a former principal in Haslacha, upon the grounds that such fees and expenses were incurred solely as a result of Lavian’s acts, misconduct, and interference with the Receivership.

²A hearing on the issue of the amount of attorney’s fees to be awarded counsel for the Receiver for services rendered during the period December 31, 2008 through January 31, 2009, and for the months February, March, April, May, and June, 2009, was held on April 6, 2010. This branch of the Motion Sequence No. 39, as well as Motion Sequence No. 41, will be determined in a separate Special Referee’s report.

³This branch of the motion will be also determined in the Special Referee’s report.

Lavian opposes the motion made the Permanent Receiver and the cross-motion made by the petitioner.

Contentions

In support of the motion, Landis asserts that by order dated November 24, 2008, he was appointed as the Temporary Receiver of the rents and profits of the improved real property located at 347 East 54th Street, New York (the “subject premises), a property owned by Haslacha, and that such order directs him, among other things, to manage the subject premises and to collect rents and profits from it. Landis also asserts that by order dated December 31, 2008, he was appointed Permanent Receiver of Haslacha.

Landis contends that in December 1993, Jubilee, as tenant, initially entered into a lease with the predecessor owner of the subject premises and has operated a restaurant on the ground floor and basement commercial space at the subject premises. Landis asserts that the term of such lease terminated January 31, 2009. Landis contends that Lavian, a 50% shareholder in Haslacha, formerly managed the subject premises on behalf of Haslacha, after Haslacha purchased the subject premises.

According to Landis, Lavian and Jubilee have had numerous disputes over the years, resulting in protected litigation and that an action is currently pending in the Appellate Term, First Department.⁴ Landis contends that as part of the negotiations relating to the “amended, restated and extended agreement of the lease,” Jubilee has agreed to pay, and has in fact paid him, as the receiver of Haslacha, the sum of \$59,533.51, in settlement of Haslacha’s claims against it for past due rent and tax payments that are the subject of the pending appeal.

⁴Haslacha, Inc. v. Jubilee, Inc.-Index No. L&T 59587 NLT 2008.

Landis contends that prior to his appointment, Lavian, purportedly on behalf of Haslacha, entered into the following leases, all dated September 29, 2008: (1) Apartment#3B, leased to David Elazari for a lease term of two years; (2) Apartment#4A, leased to Ben Makabi for a lease term of two years; (3) Apartment#3A, leased to Harden Hayempour for a lease term of two years; (4) Lavian leased the entire second floor to himself for a period of five years; and (5) the restaurant space occupied by Jubilee on the ground floor and basement was leased to French Bistro, Inc. ("French Bistro") for a lease term of two years.

Landis contends that these leases recite that rent obligations for various months have been prepaid, in some instances in full, and that such leases constitute sham transactions, given that since his appointment as Receiver, and despite repeated demands, Lavian has failed to turnover any of the alleged prepaid rents, or provide any evidence that such rents were indeed paid. Additionally, Landis contends that there is no evidence that the proper permits or licenses have been issued to French Bistro from the New York City Department of Consumer Affairs Licensing Division and the New York State Alcoholic Beverage Control Commission to conduct business on the subject premises at the time the lease was entered into. According to Landis, he subsequently negotiated an agreement for an "amended, restated and extended agreement of the lease" between Haslacha and Jubilee, which feature terms which are fair and reasonable.

Petitioner maintains that it supports Landis' motion. In support of the cross motion, petitioner contends that pursuant to BCL§1008(5), the attorney's fees sought by Landis should be charged solely to Lavian's distributive share of Haslacha's assets since all of the legal services rendered by counsel to Landis, as Receiver, were the result of Lavian's misconduct.

In opposition to the motion and cross motion, Lavian contends that as officer, director, and shareholder of Haslacha, as well as the managing agent of the subject premises, he had the full right and authority to entered into the leases dated September 29, 2008, and that such leases are lawful. Lavian also contends that no court order was ever issued directing that he produce any documentation with respect to the executed leases and the prepayment of rent. Lavian contends that he properly commenced a non-payment action against Jubilee, seeking the sum of approximately \$120,000 in rent arrears, in an effort to protect the assets of Haslacha. Lavian also maintains that the matter is properly on appeal.

Analysis

Here, the documentary evidence demonstrates that by order dated November 24, 2008, Landis was appointed the Temporary Receiver of the subject premises and was authorized to manage the rent and profits of the subject premises, as well as to retain counsel and a managing agent to properly manage the subject premises. The documentary evidence also demonstrates that by order dated December 22, 2008, Haslacha was dissolved and that Landis was appointed Permanent Receiver to “receiver the assets and property of Haslacha.” Landis was also granted “all powers of a Permanent Receiver, including, but not limited to, the sale” of the subject premises.

In addition, by order dated December 30, 2008, Landis was authorized to retain Lawrence A. Mandelker, Esq. (“Mandelker”), as his legal counsel, and to compensate counsel for the “fair and reasonable value of the legal counsel’s services solely out the receivership assets. . .” Landis was also authorized to retain Green Real Estate as the managing agent of subject premises and to compensate the managing agent “the fair and reasonable value of the managing

agent's services solely out of the receivership's estate. . .”

By “Order and Judgment” dated December 10, 2009, the court determined that the leases “purportedly entered into by Haslacha, Inc. in September 2008 for space in 347 East 54th Street, New York⁵ are declared unlawful, unenforceable, void and having no force and effect.” The court directed French Bistro, David Elazari, Harden Hayempour, Shahram Lavian, and Ben Makabi to “surrender possession of the premises to the receiver and to turn over all rent paid or received, or due and owing,” under the “Lavian leases” to the Receiver.

In light of the court's previously issued orders, the persuasive contentions made by Landis, and an examination of the various documents taken on submission, it is clear that the leases executed by Lavian and the purported tenants on September 29, 2008 are without legal significance, and that the “amended, restated and extended agreement of lease,” as of “February 1, 2009,” subsequently executed between Haslacha and Jubilee, was a negotiated lease agreement between Landis, as Receiver, and by Eric Macaire, President of Jubilee, and that such document appears to be reasonable on its face. Additionally, the settlement of the action involving Haslacha and Jubilee, as negotiated by Landis, as Receiver, clearly renders the pending appeal moot.

Consequently, it is the court's determination that the “amended, restated and extended agreement of the lease,” as of February 1, 2009, as executed between Haslacha and Jubilee, is hereby approved and that the withdrawal of the appeal currently pending involving Haslacha and Jubilee is also approved.

⁵(i.e., subject premises).

Accordingly, that branch of the motion made by Landis for an order directing the approval of an “amended, restated and extended agreement of the lease” between Haslacha and Jubilee is granted. Additionally, that branch of the motion made by Landis for an order approving the withdrawal of the appeal on behalf of Haslacha currently pending in New York State Supreme Court, Appellate Term, First Department, in the action Haslacha, Inc. v. Jubilee, Inc. (Index No. L&T 59587 NLT 2008) is also granted.

Moreover, petitioner’s cross motion must be denied. BCL§1008[5] authorizes the court to determine and enforce the liability of any “director, officer, shareholder, or sub-scriber for shares, to the corporation of for liabilities of the corporation,” but does not authorize the court to charge an award of attorney’s fees to any distributive share of a “director, officer, shareholder, or subscriber” of a corporation, upon the grounds of misconduct.

Motion Sequence No. 40

Landis, as Receiver, moves for an order, approving the “Stipulation Settling Action To Foreclose” dated February 5, 2009 (the “Stipulation”), and authorizing him to use monies held by him to make payments required under the terms of the Stipulation.

Petitioner supports the motion made by Landis and cross-moves for an order, pursuant to BCL§1008 [5], directing that upon the Receiver’s final distribution of the Haslacha’s assets, any sums sought by the Receiver to pay default interest and expenses to settle the Foreclosure Action, be charged solely to any distribution share of Lavian, upon the grounds that such interest and expenses were incurred and are attributable solely to Lavian, as a result of his acts of misconduct in the instant matter.

Lavian opposes the motion made by Landis and the cross motion made by petitioner.

Contentions

In support of the motion, Landis contends that Lavian, the former manager of the subject premises on behalf of Haslacha, a corporation in which he was a 50% shareholder, failed for years to make payments due on the existing mortgage on the subject premises, and that due to this failure, the mortgagee commenced a foreclosure action against Haslacha in New York State Supreme Court, New York County, entitled Sheila Haskell v. Haslacha, Inc., et. al.-Index No. 100762/08 (the "Foreclosure Action"). According to Landis, Haslacha failed to timely answer the complaint in the Foreclosure Action, and the mortgagee moved for an order referring the matter to a referee to compute. Landis maintains that the mortgagee, however, subsequently agreed to accept the service of a late answer.

Landis contends that Lavian has claimed that Haslacha has no defenses to the claims of the mortgagee, but that his review of the matter reveals that there are no such viable defenses. Landis asserts that under the terms of the mortgage, interest continues to accrue on Haslacha's debt at a default interest rate that is higher than the mortgage rate, and that it is therefore in the best interest of Haslacha to conclude the Foreclosure Action. Landis asserts that in an effort to resolve the matter, the Stipulation was executed by counsel for the Receiver and counsel for the mortgagee.

Landis contends that approval of the Stipulation would best allow him to carry out his duties as Receiver and requests that he be authorized to use monies held by him as Receiver for respondents Primary Residence, Inc. ("Primary Residence") and Urban Homes, Inc. ("Urban

Homes”), corporations equally owned by Lavian and petitioner, to make the payments required under the terms of the Stipulation, due to the insufficiency of funds in Haslacha.

Petitioner asserts that the default rate of interest on the mortgage has been costing Haslacha \$6,000 per month, and that the failure to resolve the Foreclosure Action constitutes a waste of corporate assets. Petitioner contends that the interest that has accrued as a result of the default, as well as all the costs and expenses incurred to settle the Foreclosure Action, should be borne solely out of the distributive share of Lavian, upon final distribution of Haslacha’s assets. Petitioner asserts that court approval of the proposed Stipulation is in the best interest of Haslacha and its shareholders.

In opposition, Lavian contends that Haslacha has valid defenses to the Foreclosure Action. Lavian also contends that certain properties located at 542a Willoughby Avenue, Brooklyn, New York, and 2010 Strauss Avenue, Brooklyn, New York, were owned by Urban Homes, as well as a property owned by Primary Residence, which is located at 453 Greene Avenue, Brooklyn, New York, were all sold over three years ago and that the proceeds from these sales have been held by Landis, as Receiver of Urban Homes and Primary Residence, in violation of the final accounting provisions of BCL§1216. Lavian maintains that such monies should be dispersed to him and not used by Landis, as Receiver, for any purpose.

Analysis

Here, it is clear from the documentary evidence submitted that the Foreclosure Action was commenced against Haslacha, as well as other interested parties, due to Lavian’s default in making payments on the mortgage. Further, the court is persuaded by Landis’ contention that Haslacha has no valid defense to the Foreclosure Action and that under the terms of

the mortgage, interest continues to accrue at a default rate of interest. The court is also persuaded that approval of the Stipulation would protect the assets of Haslacha. Additionally, the court is persuaded that the monies required to comply with the payment terms of the Stipulation should come from monies held by Landis as Receiver for Primary Residence and Urban Homes, due to the insufficiency of funds in Haslacha.

Accordingly, that branch of the motion made by Landis for an order, approving the Stipulation and authorizing him to use monies held by him as the Receiver of Urban Homes and Primary Residence, respectively, in order to make payments pursuant to the terms of the Stipulation, is granted. Again, petitioner's cross motion must be denied upon the grounds that BCL§ 1008 [5] does not authorized the court to grant him the relief sought.

Motion Sequence No. 41⁶

Landis moves for an order, approving payment of an invoice submitted to him as Receiver as Haslacha by Mandelker, and authorizing him to use monies held by him in his capacity as Receiver of Haslacha, Primary Residence, and Urban Homes, to make the payment sought by the invoice, should the funds in Haslacha receivership estate be insufficient.

Petitioner moves for an order, pursuant to BCL§1008 [5], directing that upon the Receiver's final distribution of Haslacha's assets, the sums sought by the Receiver for attorneys' fees, be charged solely to the any distributive share of Lavian, upon the grounds that such fees and expenses were incurred and are attributable solely as a result of Lavian's acts, misconduct, and interference with the Receivership.

⁶As previously indicated, the issue of attorney's fees as sought by Landis for the months of February, March, April, May, and June, 2009, will be resolved in a separate Special Referee's report.

Lavian opposes the motion made by Landis and the cross motion made by petitioner.

Contentions

In support of the motion, Landis contends that Mandelker and members of his law firm began providing legal services to him as Receiver of Haslacha since his court-ordered appointment as counsel on December 31, 2008. Landis maintains that such legal services were provided by Mandelker and his firm during the period December 31, 2008 through January 31, 2009, and that by his request, Mandelker has continued to provide legal services for the months February, March, April, and June 2009.

According to Landis, the invoice submitted by Mandelker for February, March, April, and June 2009, reflects that 302.6 hours were charged for work performed in the case and that he was billed the sum of \$133,920.00 for such worked performed, plus costs and disbursements in the amount of \$3,371.49, for a total sum of \$137,291.49. Landis contends that the amounts charged are reasonable and necessary, and that payment of the invoice should be made from funds he holds as Receiver of Haslacha, Primary Residence, and Urban Homes, due to the insufficiency of funds in Haslacha.

Petitioner contends that the vast majority of the services rendered by Mandelker to the Landis, as Receiver, include making motions to hold Lavian in contempt; to dismiss improper appeals brought by Lavian and his counsel; investigating and contending with sham lease agreements created by Lavian; settling the Foreclosure Action, which was caused by Lavian's misconduct and improper defense; as well as Lavian's interference with the Receivership. Petitioner maintains that due to Lavian's misconduct, any award of attorneys' fees should be attributive

solely to Lavian's distributive share of Haslacha's assets.

In opposition, Lavian contends that the motion and cross motion have no basis in law or fact.

Analysis

Here, the issue of attorney's fees for services rendered in cases in which a Receiver has retained outside counsel, can only be determined following a hearing, rather than by submission of papers (*see, Chang v. Zapson, 67 AD3d 435, 465 [1st Dept. 2009]*). Such hearing was held on April 6, 2010, as previously indicated, and the report to be issued by undersigned Special Referee will determine this issue. Petitioner's cross motion, however, is denied for reasons already stated in the instant decision and order.

The foregoing constitutes the decision and order of the court.

Date: June 15, 2010.



**Lancelot B. Hewitt,
Special Referee**

Entry:

FILED

Clerk of the Court

JUL 06 2010

NEW YORK
COUNTY CLERK'S OFFICE