

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

NAOMI FEIN, a shareholder, suing on behalf of herself
and in the right of 35 PERRY STREET TENANTS
CORP.,

Plaintiff,

- v -

ROBERT E. SIGNOM II, ROBERT E. SIGNOM III, LOLA
SIGNOM, and PERRY STREET TENANTS CORP.,

Defendants.

Index No.: 603085/07

Motion Date: 12/11/12

Motion Seq. No.: 101

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion to appoint temporary receiver

	FILED DEC 18 2012 NEW YORK COUNTY CLERK'S OFFICE	<u>PAPERS NUMBERED</u>
Order to Show Cause -Affidavits -Exhibits		1
Answering Affidavits - Exhibits		2
Replying Affidavits - Exhibits		3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the show cause order of
plaintiff for the appointment of a temporary receiver is denied.

CPLR 6401 states in pertinent part,

Upon a motion of a person having an apparent interest in property which is the
subject of an action in the supreme court, a temporary receiver of property may
be appointed, before or after service of a summons any time prior to
judgment,..., where there is danger that the property will be removed from the
state, or lost, materially injured or destroyed.

Plaintiff claiming breach of fiduciary duty in a derivative action on behalf of 35
Tenants Corporation ("Tenants Corporation"), now moves for the appointment of a
temporary receiver pursuant to CPLR 6401. Her "apparent interest in the property" are

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):

shares in Tenants Corporation and a proprietary lease of an apartment in 35 Perry Street, New York, New York ("35 Perry Street"), the building owned by the Tenants Corporation. She has no direct interest in the revenues of Tenant Corporation and therefore is not entitled to relief under CPLR 6401. Though the claims against the Signom defendants sound in Business Corporation Law § 1104-a (Article 11, "Judicial Dissolution"), plaintiff does not seek dissolution of Tenants Corporation, but limits her demands to the appointment of a receiver, a declaratory judgment of the parties' rights, and injunctive relief compelling the Tenants Corporation, inter alia, to account, provide access to records, and refrain from wasting its assets.

BCL § 1113 states in pertinent part:

At any stage of an action or special proceeding under this article, the court, may, in its discretion, make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment and removal of a receiver under article 12 (Receiver), who may be a director, officer or shareholder of the corporation.

Even assuming arguendo that plaintiff sought dissolution pursuant to BCL 1104-a, as well as a *pendente lite* temporary receiver pursuant to CPLR 6401, "courts of equity exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and withholding of possession of property from the party without an adjudication on the merits." Hahn v Garay, 54 AD2d 629, 629 (1st Dept). Plaintiff fails to meet the high standard of showing by clear and convincing evidence a substantial likelihood that the assets of Tenants Corporation will be subject to waste or mismanagement unless a temporary receiver is appointed. The utility arrears notices she submits are several years old and she fails to rebut defendants'

contention that at no time has the building service ever been interrupted or at risk of interruption. Nor does she refute public records that show that all real property tax payments are current. The e-mail exchanges between defendant Signom and the managing agent Andrews Building Corporation, all sent between 2004 and 2009, do not refute defendants' contention that the Signom defendants are current in all maintenance payments and that it is plaintiff who is approximately \$15,000 behind in her maintenance. Plaintiff fails to counter defendants' assertion that the ECB violation assessments are in the process of being promptly paid or otherwise resolved, or the clear evidence that the requisite insurance for the underlying mortgage on 35 Perry Street has always been in place. Plaintiff submits no evidence that defendants have commingled funds, much less any clear and convincing evidence" of same [See In Re Marmienti, 309 AD2d 659 (1st Dept 2003)], and the evidence that she does submit is consistent with defendants' assertion that he personally made direct online payments of Tenant Corporation's 2011 real property taxes, including interest, and that his maintenance arrears were credited for no more than such payments. In short, plaintiff has failed to provide even minimal evidence that Tenant Corporation is insolvent or that there is any danger that the Signom defendants are dissipating any of Tenant Corporation's assets, and therefore the appointment of a receiver is unwarranted. See

Martin v Donghia Associates, 73 AD2d 898 (1st Dept 1980).

Accordingly, it is hereby

ORDERED that plaintiff's motion is DENIED.

Dated: December 14, 2012

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[Signature]
DEBRA A. JAMES J.S.C.