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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: 60

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Application of Joseph Yahudaii,
: Index No.:
Petitioner, : 654014/2012

In the Matter of the Application for :
Dissolution of True Gate Holding, Ltd., :
a New York Domestic Corporation, :

-v- :
Mehry Noghrei, :
Respondent. : **Motion**

Calendar

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60 Centre Street
New York, New York
April 4th, 2013,

B E F O R E:

HONORABLE MARCY S. FRIEDMAN,
Justice,

A P P E A R A N C E S:

TOBACK BERNSTEIN & REISS, LLP
Attorneys for Petitioner
15 West 44th Street - 12th Floor
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80 Cuttermill Road
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BY: ROBERT P. JOHNSON, ESQ.

William D. Leone
Senior Court Reporter

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THE COURT: On the record.

Good morning. May I have counsels' appearances, please.

MR. BERNSTEIN: Good morning.

Brian Bernstein, of Toback, Bernstein & Reiss, LLP, for Petitioner Yahudaii.

MR. JOHNSON: Robert Johnson, 80 Cuttermill Road, Great Neck, appearing for the Respondent Mehry Noghrei.

THE COURT: Who else is present?

MR. GENTILE: Anthony Gentile, of counsel, to, Bailey & Sherman of Douglaston, I'm here for Mr. Baroukhian. I have an application for an adjournment, if your Honor would consider that. Mr. Baroukhian.

THE COURT: Excuse me. Have you filed a notice of appearance? You didn't give your appearance to the court reporter, did you?

MR. GENTILE: I'm trying to explain.

THE COURT: Excuse me. I don't even know who you are. Your name is not even written down.

MR. GENTILE: I have not been retained yet.

THE COURT: Please, do not speak over me under any circumstance.

Now, would you give your card to the court reporter, please.

MR. GENTILE: I haven't been retained in this case.

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2 THE COURT: Then I am not going to hear from you.
3 Please, have a seat in the spectator section. You have not
4 been retained. I want to make sure that I heard that.

5 MR. GENTILE: I have not been retained.

6 THE COURT: Now, let me just say for the record --
7 Have a seat in the spectator section.

8 I have been dealing with Mr. Yahudaii and Mr.
9 Baroukhian for many years. I had their case when I was
10 sitting in IAS Part 57. I note that Mr. Yahudaii and Mr.
11 Baroukhian are both in the courtroom today. Mr. Baroukhian
12 had numerous lawyers in the prior proceeding and had a
13 lawyer and then went pro se and then had a lawyer and then
14 went pro se and had a lawyer and went pro se and then had a
15 lawyer and went pro se. I hope I've made my point. So, I
16 am certainly not going to hear today from a lawyer who has
17 not even been retained yet.

18 Now, let me say also, I have a proceeding by Mr.
19 Yahudaii for dissolution of True Gate Holding, Limited,
20 against Mehry Noghrei, who is Mr. Baroukhian's
21 mother-in-law. She is the party of record in this case.
22 This case has been going on for a few months, since the end
23 of last year. And Mr. Baroukhian has been here, but he has
24 not yet moved to intervene. He is not a party in this
25 proceeding.

26 I note that he has served a motion, which is still

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2 in Part 130, and this is a pro se motion for change of venue
3 and for a stay of this proceeding.

4 The clerks have been instructed, I believe, to
5 accept papers so they are not making judgments about who may
6 seek relief from the court. These papers in fact were not
7 properly filed however, because Mr. Baroukhian is not a
8 party to this proceeding.

9 Mr. Bernstein, have you responded to these papers
10 yet?

11 MR. BERNSTEIN: No, your Honor. And if I may --

12 THE COURT: I don't wish to hear anything now.

13 MR. BERNSTEIN: It's just --

14 THE COURT: Just a moment, please. I just want to
15 hear an answer to my question.

16 Have you responded to this yet?

17 MR. BERNSTEIN: No, but those papers were not filed
18 in this court.

19 THE COURT: I am informed by my court attorney --
20 would you have a seat, please -- that they are in Part 130.

21 Mr. Johnson, have you responded to this?

22 MR. JOHNSON: No, your Honor.

23 THE COURT: All right. Both parties to this case
24 are directed not to respond to this motion. When it is
25 transferred to this part from Part 130, assuming it has in
26 fact been filed, it will be denied on the grounds that Mr.

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2 Baroukhian is not a party to this case.

3 Mr. Baroukhian is directed not to file any further
4 papers with the Court, with the exception that if he has a
5 good faith basis to do so he may file an order to show cause
6 which shall state on its face in bold type that it is to be
7 presented to me for consideration for signing.

8 The Court will direct the clerk of the court not to
9 accept any papers from Mr. Baroukhian unless they are
10 presented by order to show cause with the boldface type
11 notation that I have indicated.

12 In addition, this is a Part 60's case and both
13 parties to the case are directed that there is to be
14 compliance with the Part 60 rules and the rules of the
15 Commercial Division. The parties have not been complying
16 with those rules and I have a motion for a -- I have
17 presented an order to show cause for a motion to stay this
18 proceeding pending hearing of a motion in Nassau County to
19 change venue to Nassau County.

20 There should have had been a request for a
21 pre-motion conference before that order to show cause was
22 presented. The order to show cause may not be used as a
23 means of avoiding the pre-motion conference rules set forth
24 in the rules of the Commercial Division.

25 That said, since the parties are here today, in any
26 event, I will hear both in relation to any issues on the

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2 petition for dissolution and the request to sign the order
3 to show cause together.

4 Now, I will begin with Mr. Bernstein.

5 MR. BERNSTEIN: Thank you, your Honor.

6 Good morning. When we were here before your Honor
7 last, I believe that was February 7thg, 2013, counsel and I
8 had already presented argument with respect to petition for
9 dissolution, as well as the order to show cause seeking the
10 Court's authorization to serve the mortgage foreclosure
11 papers that have already been filed by other counsel with
12 respect to the action regarding the property subject of the
13 mortgage.

14 The Court asked us to file the order to show cause
15 and to serve on parties that were necessary under the
16 statute, which we have done. We have complied with the
17 publication requirements. We have handed up amended copies
18 to our motion. I have asked my secretary to upload to the
19 Court, by ECF, copies of the publications independent as
20 being an exhibit to our response to the motion for a stay.

21 As it relates to the initial question of this
22 Court, there was a question as to whether the statute of
23 limitations would have run in January. I don't know if the
24 Court wants me to go through that again, but I believe we
25 have satisfied through the case law and the facts of this
26 case the issue that the statute of limitations, in fact,

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would have run in January.

The Court, in December, had given True Gate a provision to file its foreclosure action, but in that decision stated its ability to serve those papers.

We have advised the Court through papers that the 120 day rule would elapse in April, and a lot has happened since in court last for different applications for a stay both here and the Appellate Division, in my view, in an effort to stop this Court from rendering a decision to allow us to serve those foreclosure mortgage papers.

The difficulty is we also have the need to and filed a motion to extend the time under 306-b since the Court's December order asked us to file those papers pursuant to 306-b and been unable to serve them because the order staying us was in place before we actually even filed those papers.

THE COURT: Mr. Bernstein, was there an Appellate Division order addressing or modifying my order permitting you to file the foreclosure action but not to serve it?

MR. BERNSTEIN: No, your honor, Mr. Baroukhian had filed pro se the application to stay. I appeared with him. I was given notice on Friday at six o'clock to be in court on Monday.

THE COURT: When was this?

MR. BERNSTEIN: This past Friday, Good Friday, your

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2 honor is when I got notice and the notice wasn't to me. The
3 notice was to other counsel. They were good enough to
4 forward a copy of the letter saying that there would be an
5 application made before the Appellate Division First
6 Department seeking a stay of this action. I then went down
7 to the Appellate Division Monday morning. I met with Mr.
8 Baroukhian, I met with the clerk, the court attorney. And
9 we went up and saw Justice Tom who heard argument for
10 application of a interim stay. Justice Tom, after oral
11 argument, denied the stay. A briefing schedule was setup
12 with respect to the motion for a stay that was filed by Mr.
13 Baroukhian. My papers are not due until Monday the age. I
14 believe Mr. Baroukhian reply papers he asked for sometime
15 the third week of April. But the basis is again in my
16 opinion to stop you from rendering a decision to allow me to
17 serve the foreclosure action so that we couldn't complete
18 the foreclosure or at least perfect service of the
19 foreclosure under 306.

20 As it relates --

21 THE COURT: So you are.

22 MR. BERNSTEIN: I am everywhere.

23 THE COURT: You are telling telling me that this
24 motion to change venue and stay the case, which is, on its
25 face, made returnable in room 130 and which I am advised by
26 my court attorney was in fact filed in this court, was filed

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2 instead with the Appellate Division.

3 MR. BERNSTEIN: I'm not sure what paper you're
4 looking at, your Honor.

5 THE COURT: I'm going to hand it it up so can you
6 see it and of course Mr. Johnson can look at it as well.

7 MR. JOHNSON: Thank you.

8 Pause in proceedings.

9 Handing to counsel.

10 MR. BERNSTEIN: Your Honor I can tell you I that I
11 haven't seen this. What I have is I have a notice of motion
12 to change venue that was filed presumably in the county of
13 Nassau with a new index number from the county of Nassau
14 seeking the very relief that you just recited.

15 THE COURT: A motion that was filed by Mr.
16 Baroukhian?

17 MR. BERNSTEIN: Yes, your Honor.

18 THE COURT: All right. Well.

19 MR. JOHNSON: Can I see it.

20 THE COURT: Excuse me. Mr. Baroukhian is about to
21 stand. I am not hearing from Mr. Baroukhian today, but
22 since he is hear, listening, I am going to tell him that he
23 is skating on very thin ice and he is going to be facing
24 potential sanctions if he continues to file papers that
25 there is no basis for him to file.

26 In any event, the motion that I said at the outset

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2 counsel need not respond to is submitted by Mr. Baroukhian
3 in his own name. It purports to be made returnable on April
4 22, 2013 in Part 130 of this courthouse. And counsel need
5 not respond. This will be denied because he has no standing
6 to file that motion.

7 Now, what relief are you seeking here today Mr.
8 Bernstein.

9 MR. BERNSTEIN: Well the two forms of relief that
10 we sought in essence from the beginning one is court
11 permission to serve the mortgage foreclosure papers that
12 were filed about accordance with this courts December
13 decision, recognizing that my time runs out this month under
14 306.

15 The second would be for dissolution of True Gate
16 and that all funds that are collected in terms of the
17 foreclosure can be held pending further court order so that
18 the court retains jurisdiction over those funds, but there's
19 been no opposition of merit filed with respect to
20 dissolution. There's been no opposition asserted that the
21 corporation can function. There's been no opposition
22 asserted that there's been a meeting or consensus among the
23 directors or shareholders. There's just been a litany of
24 allegations relating to the trial that this court sat and
25 presided over and issues relating to prior to that date.

26 THE COURT: But there is a motion to change venue

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2 that was filed by the respondent Mary know graze counsel in
3 Nassau County; correct?

4 MR. BERNSTEIN: If you give me one moment, Judge.
5 Pause.

6 MR. BERNSTEIN: Yes, your Honor. That's filed by
7 Mr. Johnson. And our time to file a response to that will
8 be this week. I asked my secretary to confirm with the
9 court. I believe it's relevant to address in this
10 proceeding and I think that's what the court had asked us to
11 do when we came in with respect to Mr. Johnson's order to
12 show cause.

13 THE COURT: So I think we'll turn to Mr. Johnson
14 and hear his presentation on why the respondent takes the
15 position that this venue motion can be brought in Nassau
16 County and whether I should sign this order to show cause
17 for a stay of this dissolution proceeding pending hearing of
18 the motion and then I will hear petitioner Yahudaii's
19 response and we'll go from there.

20 MR. JOHNSON: Thank you, your Honor.

21 If your Honor pleases, as you may recall this case
22 -- It's a corporate dissolution proceeding brought under BCL
23 1104.

24 THE COURT: Believe me, I recall. I have been
25 living with an incarnation of this case for years.

26 MR. JOHNSON: I'm sorry, Judge, I share your pain,

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2 I really do but if I may.

3 The case started, I believe, November 20th with
4 petition and notice of petition counsel also brought a
5 separate order to hoe cause seeking courts permission to
6 start the foreclosure action which this court had actually
7 dismissed back in May of 200012 using True Gate as the
8 plaintiff instead of Mr. Yahudaii personally.

9 I believe there was a court appearance about
10 December fourteenth. My client did not appear. There was a
11 transcript. I was not in the case at that point and the
12 entire proceeding apparently was put over to oral argument
13 or further court appearance on February seven, 2013.

14 Upon coming into case we file a verified answer to
15 the petition dated January 22, 2013.

16 Believing that venue was improper because the
17 corporations office has always been in Great Neck New York
18 as reflected in the certificate of incorporation, which is
19 the prime factor under CPLR Section 503, we. We also sent
20 in and filed with and served with counsel a demand for
21 change of venue pursuant to CPLR Section 511-b. As I'm sure
22 the Court knows, that's an intricate statute that if a
23 defendant believes venue has been improperly placed in the
24 wrong county, we have the right to serve with our answer a
25 demand upon plaintiff's counsel, telling counsel you have
26 knife days to which to provide us with an affidavit stating

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2 some facts supporting your contention that venue had been
3 properly placed in the summons.

4 We never received any response to that.

5 I had thought about frankly moving at that time for
6 change of venue but the court appearance was basically
7 February seventh, which was the same date that I had to make
8 my -- I'm sorry the statute also -- once I serve demand and
9 there's no response, I have 15 days in which to make the
10 motion to change venue as a right. And it's an unusual
11 statute because it gives the moving party the option to
12 change venue, make the motion in the county where the action
13 was commenced or in what we believe would have been proper
14 count see which here is Nassau County.

15 However, we came in February 7th, 2013, court
16 directed counsel to -- I won't say jurisdiction -- but, in
17 effect, start the case over because he had to file an order
18 to show cause, join the state tax commission, do the
19 publications in the newspapers, which none of which had been
20 done at that point, and to file an amended petition. And he
21 did that. I'm not contesting that he -- withdraw.

22 Therefore, on March 13th or 14th, 2013, on a timely
23 basis we interposed as a matter of right, an answer to the
24 amended petition. Although, technically, order to show
25 cause is to amend this petition but we already answered it
26 and on the same date with the answer to amended petition we

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2 filed an amended demand for change of venue specifying in
3 considerable detail why we believe Nassau County was the
4 proper venue.

5 Now, actually, if I may, this is interesting
6 because on the afternoon of February 7th, 2013, Mr.
7 Yahudaii's went to Gerald Weinberg, P.C., which is a
8 corporate service in Albany who I use and he filed a
9 document called a Certificate of Change under 805-A of the
10 Business Corporation Law, to change the office the address
11 for service of process of the corporation.

12 So he tried to change the venue after the case had
13 started. However, what my research revealed is that BCL
14 eight oh five-capital A does not change a certificate does
15 not change certificate of incorporation and the office of
16 the corporation and there for it's of no moment for venue
17 purposes.

18 THE COURT: Mr. Johnson, your position is that you
19 filed a timely demand to change venue in response to the
20 amended petition.

21 MR. JOHNSON: Correct, Judge.

22 THE COURT: That the petitioner did not then file
23 the 511-b affidavit showing that the county specified by the
24 defendant is not proper or that the county designated by him
25 is proper and that you then within 15 days of service of the
26 demand served your motion.

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MR. JOHNSON: Correct.

THE COURT: Served your motion to change venue.
That motion being the motion before the Nassau County court.

MR. JOHNSON: Correct, your Honor and that was
March 22nd, 2013, we made the motions and filed in Nassau
Supreme Court where it's now returnable April 8th following
the service of our amended demand which was March fourteenth
so we were well within the 15 days. Actually interesting
area of the law, you know, because the statute really isn't
used that much.

THE COURT: Now I think I'm going to hear from Mr.
Bernstein in response.

MR. BERNSTEIN: Thank you, your Honor.

THE COURT: Are you disputing any of Mr. Johnson's
representations that the affidavit that venue here is proper
was not served in response to the demand or that the motion
was timely brought in Nassau County?

MR. BERNSTEIN: Yes, I am opposing that.

The motion under 511-b was not timely served. The
demand to change venue was served in January. It's dated
January 18, 2013, but the affidavit of service, I believe,
was January 22, 2013. The basis set forth in that demand is
under the CPLR 511-b and specifically states that the venue
designated is an improper venue.

THE COURT: I'm sorry?

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2 MR. BERNSTEIN: That the venue designated is an
3 improper venue.

4 Under 511-b counsel then has 15 days like a statute
5 of limitations, has 15 days to file his motion to change
6 venue. I have cited cases in my affidavit that the court
7 had asked for on April 1st that he fail to timely file that
8 motion to change venue. Your right to change venue is lost.

9 THE COURT: But you're going back to the first
10 petition that was never properly served. Are you not?

11 MR. BERNSTEIN: I'm sorry?

12 THE COURT: You're saying there wasn't a timely
13 motion to change venue in response to the first petition in
14 this case, the original petition, that was never properly
15 served.

16 MR. BERNSTEIN: He served the demand. The demand
17 can be served with the answer. It could also be served
18 after the answer. He served his demand in January. He
19 never moved to change venue.

20 THE COURT: But that was with respect to the
21 original petition that I found had not been properly served.

22 MR. BERNSTEIN: But the action was still pending
23 here. The action remained here. There was no motion to
24 dismiss this action. And under the cases that both counsel
25 had cited I could correct those defects which were not
26 considered jurisdictional so I can serve 9 taxation

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2 department which we did and it do the publications. The
3 action remained here. You can't ignore 511-b because of
4 that service issue.

5 THE COURT: Are you taking the position that when
6 you served an amended position the respondent did not have
7 the right to serve a demand to change venue with respect to
8 that petition.

9 MR. BERNSTEIN: Mr. Johnson misspoke when he said I
10 served an amended petition. If the court will look at my
11 motion papers.

12 THE COURT: I am looking at the petition. It says
13 amended petition.

14 MR. BERNSTEIN: If the court will look at my motion
15 papers would be one of the forms of relief that I had
16 requested in one of my motions is leave to file an amended
17 petition. That has not yet been address by the court and
18 that would have been addressed today along with the relief
19 of the various motion that's have been brought up to today.
20 So I never served him and counsel will tell you that I never
21 served him with an amended petition.

22 THE COURT: What did you serve by publication?

23 MR. BERNSTEIN: We served the I think the order to
24 show cause with all of the exhibits with the order to show
25 cause. I think it was the order with the Court's
26 nomenclature on that order together with all of the exhibits

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2 to that which included our application to file an amended
3 petition. But I haven't served an amended petition in this
4 case. And if counsel's position is take egg en what would
5 happen is that 15 day rule would be eviscerated. Because
6 the basis set forth in what he denominates as an amend
7 demand to change venue is no different than the original
8 demand to change venue. Once he served that demand he had
9 15 days to move the case. And that was never moved. Now he
10 does have the right to file his application in Nassau
11 County.

12 THE COURT: All right. I will give Mr. Johnson a
13 brief reply on this. And you should address whether if I
14 stay these proceedings to permit you to bring that motion,
15 whether the petitioner should be permitted to serve the
16 foreclosure proceeding in order to preserve the status quo.

17 MR. JOHNSON: Thank you, your Honor.

18 If your Honor pleases, I believe the petitioner
19 served us with an order to show cause with an amended
20 petition and in the amended petition, it says, the petition
21 is being amended in part to reflect that they've now changed
22 the corporate office from Nassau County to New York County.

23 So, with all due respect, and I do respect my
24 adversary, for him to contend that my answer and my demand
25 to change venue is untimely seems to be somewhat
26 disingenuous.

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2 The petition, with the order to show cause under
3 the BCL, and I believe it's 1106, he's supposed to file the
4 petition. So he filed an order to show cause and published
5 it with an amended petition reflecting these changes and I
6 put an answer to the amended petition and with respect there
7 are three cases in the Appellate Division, one of them
8 counsel cites Valley Psychological, P.C. -v- Government
9 Employees Insurance Company, 944, New York Supplement 2d,
10 785, Third Department.

11 THE COURT: Are these cited in your papers?

12 MR. JOHNSON: They are in my exhibit, Judge.

13 THE COURT: Okay. I need to stop you.

14 MR. JOHNSON: Judge --

15 THE COURT: I'm sorry, I need to stop you. Would
16 you have a seat, please.

17 MR. JOHNSON: I'm sorry.

18 THE COURT: I am persuaded that this order to show
19 cause to stay the proceeding is not, on its face, without
20 merit. I was concerned about the issue of moving in Nassau
21 County. There are some factual issues that will need to be
22 resolved to determine the ultimate propriety of that motion
23 having been made there or the timeliness on the motion but I
24 am going to sign the order to show cause and I am also going
25 to stay this proceeding pending hearing, stay this
26 proceeding meaning the dissolution proceeding pending

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hearing for the motion for a stay.

However, I am going to condition the stay on leave to petitioner to serve the foreclosure proceeding in order to maintain the status quo and avoid any passage of the statute of limitations. The service will be permitted but pending the determination of the motion for say stay any steps to prosecute the foreclosure proceeding other than the service will not be permitted.

My court attorney will confer with you with a view to giving you a convenient day for the order to show cause for the stay and the adjourn date for the dissolution proceeding.

The parties are directed to promptly obtain a copy of the transcript of today's proceedings and to E-file it and file a hard copy with the clerk of Part 60.

The parties are advised that I may correct errors in the transcript, therefore, if it is needed for any further purpose they should be sure they have copy as so ordered by me and not merely a signed by the court reporter.

The record is closed for today's proceedings.

MR. JOHNSON: Thank you, Judge.

MR. BERNSTEIN: Thank you, Judge.

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

WILLIAM D. LEONE, SENIOR COURT REPORTER

Proceedings


William D. Leone
Senior Court Reporter

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