

SUPREME COURT OF THE STATE OF NEW YORK

JUSTICE SHIRLEY WERNER KORNREICH

Index Number : 651834/2010
KADOSH, MICHEL
vs.
KADOSH, DAVID
SEQUENCE NUMBER : 001
STAY PROCEEDINGS

PART 54

INDEX NO.

MOTION DATE 12/2/11

MOTION SEQ. NO.

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

e-Filed

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

No(s) 13-35

Answering Affidavits — Exhibits

No(s)

Replying Affidavits

No(s)

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: July 13, 2012

SHIRLEY WERNER KORNREICH, S.C. J.S.C. (with signature)

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
MICHAEL KADOSH, on behalf of himself and as a
member and in the right of
213 WEST 85th STREET LLC,

DECISION & ORDER

Index No.: 651834/2010

Plaintiffs,

-against-

DAVID KADOSH, 114 WEST 71st STREET, LLC,
30 LEXINGTON AVENUE, LLC and 3D IMAGING
CENTER CORP.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001 and 002 are consolidated for disposition.

Plaintiffs move for the following relief: 1) reassigning this case to me; 2) staying David Kadosh (David), his agents and employees from engaging in management and construction activities at the building located at 213 West 85th Street, New York, NY (Building), except as necessary to collect rent from the tenants; 3) ordering David to remove a structure from the roof of the Building; 4) declaring that David violated the operating agreement of the plaintiff 213 West 85th Street LLC (LLC) and removing him as its managing member; 5) holding David in contempt for violation of an order of this court, dated May 24, 2011, that was issued in a related action, *David Kadosh v Michel Kadoe*, Index No. 652228/2010 (Related Action), and ordering David to pay the attorneys' fees and expenses incurred by Michel Kadosh (Michel); 6) ordering David to pay half the operating expenses of the Building; and 7) ordering David to pay half of the expenses incurred by Michel and David for the construction, maintenance and operation of the

Building.

Defendants move for the following relief: 1) to stay Michel from renting units in the Building for less than thirty days; 2) directing that David shall have full management of the Building and shall collect all the rent; 3) staying Michel from harassing and interfering with David's tenants in the Building; 4) staying Michel from interfering with David's repair and improvement work on the Building; 5) staying Michel from interfering with the tenants in units 1F, 2 and 5; and 6) directing Michel to remove all of his belongings from the Building's basement. Defendants also request the appointment of a temporary receiver, although not in their order to show cause. The court will construe the request as a motion. CPLR 104.

This is an action between brothers who jointly own a six-unit Building through the plaintiff LLC. The Building was substantially renovated by Michel, who is in the construction business, including the installation of an elevator. David disputes the quality and cost of the construction. Each brother owns fifty percent membership interest and is a manager pursuant to the LLC operating agreement. The operating agreement requires unanimity for decision-making. The parties are at loggerheads. The complaint contains three causes of action that relate to the Building: accounting (1st), breach of contract (2nd) and breach of fiduciary duty (3rd).¹

Since these motions were argued, other motions have been decided and there have been numerous other proceedings. At present, much of the relief sought by the motions is moot. The case has been reassigned to me. The roof structure created by David's tenant, about which Michel complained, has been removed and David was directed to pay the fines, if any. Tr.

¹The remaining causes of action are for an accounting relating to two other real properties and a corporate investment. There also are counterclaims.

11/23/11. The parties were ordered to continue, pending determination of these motions, their practice of separately renting three units each and jointly paying the on-going Building expenses. *Id.* David is not managing the Building. Each brother is renting and managing three units. The mortgage expenses are being shared equally. Michel claims he is paying the rest of the Building expenses, such as the super, elevator maintenance, cleaning, water, electricity. At the last conference, it was unclear whether David concedes that Michel is paying the expenses other than the mortgage. The tenants are being left alone.

However, Michel is renting his units in his name individually and putting the rent in his own bank account; David is renting his units in the name of the LLC and depositing the rent in a bank account to which only he has access. Although I ordered the parties to pay the rent they collect to a neutral accountant with a single bank account, that has not occurred.

Plaintiff's Motion (Seq 001)

The motion for a declaration that David violated the LLC agreement is denied. It is not a proper motion. A motion is an application for an order. CPLR 2211. A declaratory judgment is ultimate relief. CPLR 3001. Further, the plaintiff has no cause of action for a declaratory judgment. In addition, this branch of the motion seeks the ultimate relief sought by the breach of contract action.

The motion to hold David in contempt for violating an order in the Related Action is denied. I dismissed the Related Action before the motion was made. A motion must be made in a pending action. *Herald Square Foot Care Assocs. v Indemnity Ins. Co. of N. Am.*, 257 AD2d 551 (1st Dept 1999).

The motion to compel David to pay half of the construction, maintenance and operation

expenses of the Building is denied. Insofar as it seeks payment for past expenses, it is a request for ultimate relief on the accounting claim, not a proper request for incidental relief in the action. CPLR 2211.

The balance of the relief sought is resolved by the appointment of a temporary receiver to manage the Building, as requested by David's motion papers. *See, below.*

Defendant's Motion (Seq 002)

The motion to stay Michel from renting units for less than thirty days is denied. A motion for a preliminary injunction requires the movant to demonstrate the following factors: likelihood of ultimate success on the merits; that irreparable injury will result in the absence of preliminary injunctive relief; and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of extraordinary relief. *Pilgreen v 91 Fifth Ave. Corp.*, 91 AD2d 565, 567 (1st Dept.1982), app. dismissed, 58 NY2d 1113 (1983). A preliminary injunction should not be granted where there are sharply contested factual issues. *Newmann v Mapama Corp.*, 96 AD2d 793 (First Dept. 1983).

David claims that Michel violated the Multiple Dwelling Law, §4, by renting units for less than a month. However, it is not clear from the record that Michel rented them prior to the effective date of the statute, May 1, 2011. Nor is it clear that the units advertised were in the Building, rather than another building owned by Michel. The Building is on 85th Street, near Broadway. It does not have balconies. The ads are for rentals with balconies, just off Central Park West. The facts are sharply disputed, barring preliminary injunctive relief.

The motion for an injunction directing that Michel remove his belongings from the Building's basement is denied. There is no showing that David will be injured irreparably by the

Michel's use of the basement for storage. This can be remedied by money damages. David is free to prove, as part of the accounting, the value of the alleged potential rental. Moreover, there are sharply disputed factual issues. The parties dispute whether the space could be rented for purposes other than storage. Further, the court is aware from numerous conferences and other proceedings that both parties have property stored in the basement. At the present time, David wants to offer his tenants basement storage so that he can charge them more rent. The inability to offer storage spaces to tenants is not a reason to grant the extraordinary remedy of a preliminary injunction. Nor is it more than a claim for monetary damages, which is not a proper subject for injunctive relief.

The motion to grant David full management of the Building is denied. The record clearly reflects that neither brother should have full control, in light of the mistrust and clear evidence of misappropriation of LLC monies by both parties. However, David's alternate request to appoint a temporary receiver is granted.

CPLR 6401 provides that a person with an interest in property which is the subject of an action in the supreme may move make a motion for the appointment of a temporary receiver "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." *Accord, Vardaris Tech, Inc. v Paleros, Inc.*, 49 App Div 3d 631 (2d Dept 2008); *Dolgoff v Projectavision, Inc.*, 235 App Div 2d 311 (1st Dept 1997) (must show danger of irreparable loss and damage to property). A receivership pending trial is a conservation and preservation remedy resting in sound discretion of court. *Hahn v Wylie*, 54 App Div 2d 622 (1st Dept 1976). A receiver is proper where the applicant makes a clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant.

Schachner v Sikowitz, 94 App Div 2d 709 (2d Dept 1983).

Here, Michel admits that he is renting property in his individual name. Leases made by Michel individually do not convey a leasehold. *Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229 (4th Dept 1982)(party cannot convey an interest it does not own). The parties admit that the LLC is not receiving all of the tenants' rent. This materially injures the Building, as rent is needed to pay ongoing expenses. David rightly claims that the LLC's income must be properly reported in tax filings. It is admitted that David improperly filed a *lis pendens* against the Building when he filed the Related Action, let the insurance lapse and allowed his tenant to build an illegal roof deck. Moreover, there are questions whether Michel alone is bearing most of the building expenses, and it appears that David alone has access to the LLC bank account. The receiver will insure that the LLC receives the rent, that ongoing expenses are paid by the LLC and that the Building is properly maintained.

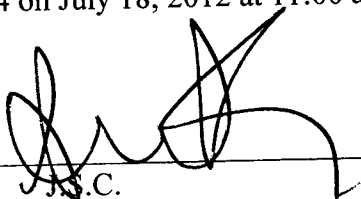
The balance of the relief sought by the motions is denied as moot. Accordingly, it is ORDERED that the motion by defendants to appoint a temporary receiver is granted and Motion Sequences 001 and 002 are otherwise denied; and it is further

ORDERED that the parties are to settle an order for the appointment of the receiver within one week of entry of this order in the New York State Courts Electronic Filing System; and it is further

ORDERED that the parties shall appear in Part 54 on July 18, 2012 at 11:00 a.m.

Dated: July 13, 2012

ENTER:



J.S.C.