

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

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RUBEN ELBERG, individually and derivatively on behalf of :
ROYAL CP HOTEL HOLDINGS LP and ROYAL HI : Index No.
HOTEL HOLDINGS LP, :
 : (Hon. Andrew Borrok)
 :
Plaintiff, :

v. :

TAMARA PEWZNER, individually, as co-executor and co- : **AFFIRMATION IN**
trustee of the Estate of Jacob Elberg, and as Co-Manager of : **SUPPORT OF NOTICE**
ROYAL ONE REAL ESTATE, LLC, ROYAL REAL : **OF MOTION FOR**
ESTATE MANAGEMENT LLC, ROYAL LIC REAL : **SUMMARY**
ESTATE MANAGEMENT, LLC, : **JUDGMENT IN LIEU**
 : **OF COMPLAINT**
 :
Defendants, :

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BRIAN MCCARTHY, an attorney admitted to practice law in the State of New York,
affirms the following to be true under the penalties of perjury pursuant to NY CPLR § 2106:

1. I am a Partner with Abrams, Fensterman, LLP, counsel for Plaintiff, Ruben Elberg
(hereinafter referred to as “Ruben”), individually and derivatively on behalf of Royal CP Hotel
Holdings LP (“Royal CP”) and Royal HI Hotel Holdings LP (“Royal HI”), (collectively referred
to as the LPs) and, as such, I am fully familiar with the facts and circumstances set forth herein.

2. I submit this affirmation in support of the Plaintiff’s Notice of Motion in Lieu of
Complaint, dated June 29, 2022.

Procedural History

3. This Court is well aware of the procedural history of a related action, Elberg v.
Crabapple et al, Supreme Court New York County Index No. 653373/2016 (“prior Elberg action”).

4. By this Court's Decision and Order, dated January 20, 2021, the Plaintiff's Motion for Summary Judgment was granted and the Defendant's Motion for Summary Judgment and for Sanctions was denied, which frames the instant request for relief.

5. In this Court's decision, it was, "ADJUDGED and DECLARED that the Limited Partnership Agreements, dated November 30, 2012 are valid and govern the affairs of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP; and it is further ADJUDGED and DECLARED that under the Limited Partnership Agreements, dated November 30, 2012, Ruben Elberg is a Class D Limited Partner of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP and as such is entitled to receive 40% of the Net Proceeds from a Capital Event or dissolution from Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP consistent with Article 3.4 of the November LP Agreements." See **Exhibit "1"**, Decision, Order and Judgment, dated January 20, 2021 (NYSCEF Doc. # 340).

6. By letter, dated March 3, 2021, counsel for Plaintiff demanded that Defendant Pewzner make distributions in accordance with section 3.4.2 of the November LP Agreements in accordance with the judgment delivered by this Court in its Decision and Order, dated January 20, 2021.

7. Defendant Pewzner failed to respond to this demand.

8. On March 16, 2021, the Plaintiff filed an Order to Show Cause in the prior Elberg action, which included a request for a temporary restraining order to require that all funds received following the August 25, 2016 merger/sale transactions for Royal CP and Royal HI be paid into an account designated by this Court.

9. Defendant Pewzner opposed the request for a temporary restraining order.

10. On March 22, 2021, the Court held a hearing on the Plaintiff's request for the issuance of an Order to Show Cause.

11. As set forth in the transcript of this hearing, counsel for the Defendant repeatedly asserted that no court had determined that the Plaintiff was a 40% member of Royal One Real Estate, LLC ("RORE"), or a 40% member of Royal Real Estate Management, LLC ("RREM"). A true and complete copy of the transcript of the March 22, 2021 hearing is annexed hereto as **Exhibit "2"**.

12. Specifically, counsel for the Defendant stated:

However, the main issue that is before this court is Ruben's claims to being an owner of the LLCs. The court believed it was decided -- please. The court believed it was decided by the Appellate Division, First Department. We know it was not decided by the Appellate Division, First Department because as plaintiffs' own appellate counsel advised the Appellate Division, that issue was never before the motion court as to the ownership of the LLCs. As plaintiffs' appellate counsel represented to the Appellate Division only last week, the issue of LLC ownership is solely before the Surrogate's court.
See Exhibit "2" at p. 11, lines 4-15.

13. However, the Court swiftly rejected this argument, stating, "That is not what Mr. Huebner's affidavit says. That is not right." See id. at p. 11, lines 16-17.

14. The Court went on to reference Justice Charles Ramos' earlier decision, and the Court stated, "...The Appellate Division determined that Elberg was a minority member, not a managing member with the power to act unilaterally on the LLCs' behalf.' So saying that the LLC has not -- the interest in the LLC is not yet determined, he may not be a member of the LLC by the Appellate Division, it is not right. That is not right. They ruled on the issue." See id. at p. 13, lines 13-19 (emphasis added).

15. The Court then read into the Record the decision of the First Department, which included the following holding, "Contrary to his contention, Elberg was not removed as the sole

"managing member" of the LLCs. The record demonstrates that he was a 40 percent minority member, not a managing member with the power to act unilaterally on the LLCs' behalf. See id. at p. 16, lines 18-22.

16. The following exchanged cleared any doubt as to the Plaintiff's ownership interest:

THE COURT: The First Department made a finding, a finding, sir. A finding. It is in the decision. 40 percent. That is what he owns.

MR. LIEBMAN: Your Honor --

THE COURT: That is what the First Department said.

MR. LIEBMAN: Please, your Honor. If I may address that. The issue -- the statement of the Appellate Division is that according to the record he's a 40 percent owner. We did not brief the court on that issue because --

THE COURT: Mr. Liebman, enough. Enough. No. Mr. Liebman, enough. Enough. Mr. Liebman, I'm very close right now, I'm very close right now to exercising my authority as it relates to sanctions. This is ridiculous. Sir, sir, I've had enough. Really, I've had enough. I allowed this to go on for a very long time during the first argument. The facts are very clear in this case. Mr. Elberg, Mr. Ruben Elberg was, in fact, a partner. The 2012 agreement, the November agreement as I found is the controlling agreement. Ms. Pewzner's continual attempt to frustrate his rights is inappropriate. I'm prepared to accept a supplemental order as it relates to a declaration that based on this order from the First Department, that the First Department held that the record demonstrated he was a 40 percent minority owner. See id. at p. 18, line 1 - p. 19, line 4 (emphasis added).

17. On March 23, 2021, the Court issued its Order, stating, "For the avoidance of doubt, to the extent the defendants argue that because the plaintiff opposes their motion to expand the record in front of the First Department as to the LLCs' ownership in this action, the First Department never looked at the issue, the argument fails. As discussed above, the First Department did look at this issue (i.e., 650492/2015, NYSCEF Doc. No. 357) and found that on the record before the court in that action, Mr. Elberg is a 40% minority member of the subject LLCs." See Exhibit "3", Decision and Order, dated March 23, 2021 (NYSCEF Doc. # 370).

18. Defendant appealed both of this Court's Decisions and Orders and they were unanimously affirmed by the Supreme Court, Appellate Division, First Department. See Elberg v. Crabapple, 203 A.D.3d 425 (1st Dep't March 3, 2022).

19. The First Department held:

The record establishes that the parties treated the November agreements as the operative agreements and performed under their terms. Contrary to defendants' contention, there is nothing in the November agreements to indicate that they were intended to be amendments of the August agreements, and this Court will not read into the November agreements something that is not there (see Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 [2004]).

The court also properly found that plaintiff was a 40% minority member in two of the defendant LLCs, as this Court has already made that determination (Crabapple Corp. v. Elberg, 153 A.D.3d 434, 60 N.Y.S.3d 124 [1st Dept. 2017]).
See id.

20. The Defendant moved to reargue this Decision and Order, or in the alternative, for leave to appeal the Decision to the Court of Appeals, and said motion was denied. See Exhibit "4", First Department Order, dated June 23, 2022.

21. Accordingly, the Judgment issued by this Court in the earlier Elberg action is final and can no longer be appealed as a matter of right and the Plaintiff's interests in the LLCs and as a Class D partner of the LPs can no longer be disputed.

Proceeds of the Hotel Merger/Sale Transaction

22. As the Court will recall from the prior submissions in the prior Elberg action, Royal CP and Royal HI are the Limited Partnerships that were formed to construct two hotels in Long Island City, New York.

23. In the summer of 2016, the Defendant entered into an agreement for the merger/sale for Royal CP and Royal HI.

24. By Notice of Special Meeting and Proxy Statement, dated July 15, 2016, counsel for the Defendant stated that the total consideration to be realized from the August 25, 2016 merger/sale transaction for Royal CP and Royal HI was \$35,777,210.00. A true and complaint

copy of the Notice of Special Meeting and Proxy Statement, dated July 15, 2016, is annexed hereto as **Exhibit “5”**.

25. In the Plaintiff’s Notices of Settlement for the Judgment and Amended Judgment in the prior Elberg action, the Defendant did not dispute that its Special Meeting and Proxy Statement, dated July 15, 2016, stated that the total consideration for the Hotel Merger/Sale transaction was \$35,777,210.00.

26. In accordance with section 3.4.2 of the November LP Agreements for Royal CP and Royal HI, the distribution of this \$35,777,210.00 total consideration is: (1) \$11,800,000 to the Class C Partners for their Capital Contributions to Royal HI and Royal CP; and, (2) the remaining net proceeds of \$23,977,210.00 is to be distributed 59% to the Class C partners (i.e., \$14,146,553.90 to RORE and RREM), 40% to the Class D partner (i.e., \$9,590,884.00 to Plaintiff) and 1% to the General Partner (i.e., \$239,772.10). True and complete copies of the Limited Partnership Agreements for Royal CP and Royal HI are annexed hereto as **Exhibit “6”** and **“7”**.

27. Furthermore, section 3.4.2 of the November LP Agreements for Royal CP and Royal HI and the Operating Agreements for RORE and RREM provided that the Defendant was obligated to pay Plaintiff 40% of the \$11,800,000 (to wit: \$4,720,000.00), plus 40% of \$14,146,553.90 (to wit: \$5,658,621.56), in addition to his Class D interest of \$9,590,884.00, for a total payment to Plaintiff of \$19,969,505.56. See id.

28. These amounts were required to have been distributed at the time of the Capital Event on August 25, 2016, but the defendant has never paid these amounts to the Plaintiff.

29. Additionally, pursuant to section 12.15 of the November LP Agreements, Plaintiff, as the prevailing party, is entitled to recover all attorneys' fees and expenses incurred. Plaintiff’s attorneys’ fees total \$4,208,728.28.

30. Defendant has not disputed the attorneys' fees incurred by the Plaintiff.

Standard For Granting Of Motion

31. A plaintiff is entitled to move for summary judgment in lieu of complaint pursuant to CPLR § 3213 if the Plaintiff's his claim is based upon "an instrument for the payment of money only or upon any other judgment." CPLR § 321.

32. Any judgment qualifies for the accelerated treatment afforded by CPLR 3213. See Steinard v. Steinard, 221 A.D.2d 835, 836 (3d Dep't 1995).

Relief Sought

33. In the Decision and Order, dated January 20, 2021, the following Judgment was issued:

ADJUDGED and DECLARED that the Limited Partnership Agreements, dated November 30,

2012 are valid and govern the affairs of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP; and it is further

ADJUDGED and DECLARED that under the Limited Partnership Agreements, dated November 30, 2012, that Ruben Elberg is a Class D Limited Partner of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP and as such is entitled to receive 40% of the Net Proceeds from a Capital Event or dissolution from Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP consistent with Article 3.4 of the November LP Agreements.

Exhibit "1" at p. 16.

34. In the Decision and Order, dated March 23, 2021, it was recognized that the First Department found that Plaintiff is a 40% member of the LLC, Royal One Real Estate, LLC and Royal Real Estate Management, LLC. See Exhibit "3" at p. 2.

35. Plaintiff brings this plenary action to obtain a money judgment to enforce what was decided and adjudged by this Court and affirmed on appeal, as the Defendants have refused to distribute any proceeds of the merger/sales transaction to the Plaintiff.

36. The Defendant, having exhausted their appeals as a matter of right, are intent to frustrate any form of judicial relief by simply refusing to abide by the Court's decision and judgment.

37. As such, the Plaintiff is moving for a judgment that will distribute the proceedings of the Merger/Sales transaction in accordance with his ownership interest in the LPs and LLCs.

38. Plaintiff seeks a judgment as follows:

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against the ROYAL CP HOTEL HOLDINGS LP and all its successors upholding that the Limited Partnership Agreement for ROYAL CP HOTEL HOLDINGS LP, dated November 30, 2012 (NYSCEF Doc. No. 235), is valid and binding on ROYAL CP HOTEL HOLDINGS LP and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against ROYAL HI HOTEL HOLDINGS LP and all its successors upholding that the Limited Partnership Agreement for ROYAL HI HOTEL HOLDINGS LP, dated November 30, 2012 (NYSCEF Doc. No. 236), is valid and binding on ROYAL HI HOTEL HOLDINGS LP and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against ROYAL ONE REAL ESTATE, LLC and all its successors upholding that the operating agreement, dated March 2, 2005 (NYSCEF Doc. No. 232), is valid and binding on ROYAL ONE REAL ESTATE, LLC and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against ROYAL REAL ESTATE MANAGEMENT, LLC and all its successors upholding that the operating agreement, dated June 13, 2001 (NYSCEF Doc. No. 233), is valid and binding on ROYAL REAL ESTATE MANAGEMENT, LLC and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against the Defendant, TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC, in the amount of \$19,969,505.56, with interest thereon at 9% per annum from the 25th day of August, 2016, along with motion costs of \$45.00, and disbursements as to be taxed by the Clerk of this Court upon the presentation of the proper papers; and that the Plaintiff have execution therefor, and,

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against the Defendant, TAMARA PEWZNER, individually, as co- executor and co-trustee of the Estate of Jacob Elberg, and as co- Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC, in the amount of \$4,208,728.28 with interest thereon at 9% per annum from the 20th day of January, 2021, and disbursements as to be taxed by the Clerk of this Court upon the presentation of the proper papers; and that the Plaintiff have execution therefor.

39. As stated above, the Defendant has never denied that its counsel valued the gross consideration for the merger/sale transaction at \$35,777,210.00.

40. There can be no dispute that pursuant to the express terms of the November Limited Partnership Agreements for Royal CP and Royal HI, the merger/sale would be a capital event, requiring the distribution of proceeds of that event in accordance with the terms of the Limited Partnership Agreements.

41. As set forth above, the individual Limited Partnership Agreements specify the exact manner in which the proceeds of a Capital Event must be distributed.

42. Numerous demands have been made by counsel for the Plaintiff for the Defendant to distribute the proceeds of this Capital Event in accordance with the provisions of the Limited Partnership Agreements.

43. These demands have been ignored and no distribution has been made by the Defendant to the Plaintiff.

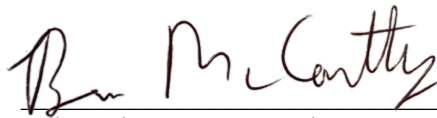
44. It cannot be disputed that the Defendant has repeatedly demonstrated her refusal to abide by these provisions, as well as her refusal to recognize that the Plaintiff is a Class D partner in Royal CP and Royal HI, as well as a 40% member of RORE and RREM.

45. The Defendant has not distributed a single penny to the Plaintiff despite his partnership and membership statuses in the LPs and LLCs.

46. It is this pattern and practice of the Defendant, which has gone on for almost six years, that required this action to be filed and demand that the Court reject any attempt by the Defendant to further diminish the funds that are owed to Ruben, with interest, which the Plaintiff has refused to distribute.

47. As such, the Plaintiff respectfully requests the Court grant this motion and enter judgment as specified above.

Dated: June 29, 2022



Brian Thomas McCarthy