

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK : CIVIL TERM : PT. 53

3 -----x  
4 RUBEN ELBERG, individually and derivatively on  
5 behalf of ROYAL CP HOTEL HOLDINGS LP and  
6 ROYAL HI HOTEL HOLDINGS LP,

Index: 653373/2016

7 Plaintiffs.

8 -against-

9 CRABAPPLE CORP. and TAMARA PEWZNER individually,  
10 as co-executor and co-trustee of the Estate of  
11 Jacob Elberg, and as court-designated Manager of  
12 ROYAL ONE REAL ESTATE LLC, ROYAL REAL ESTATE  
13 MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT LLC,  
14

15 Defendants.

16 -and-

17 ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE  
18 MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT  
19 LLC, ROYAL HOTEL & RESORTS LLC, ROYAL CP HOTEL  
20 HOLDINGS LP, ROYAL HI HOTEL HOLDINGS LP, ZHU QING,  
21 FENG LI MENGSHA CHEN, RUIZHEN WANG, HONG GE, QIN SI,  
22 YANG ZHANG, ZHE FANG, and XU NING,

23 Nominal Defendants.

24 -----x  
25 TEAMS PROCEEDING  
March 22, 2021  
60 Centre Street  
New York, New York 10007

B E F O R E:

HONORABLE ANDREW BORROK  
Justice of the Supreme Court

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Monica A. Martinez  
Senior Court Reporter

## Proceedings

1 THE COURT: Ruben Elberg v. Crabapple Corp.,  
2 et al. 653337 of 2016.

3 Your appearances, please.

4 MR. MCCARTHY: Good morning, your Honor. Brian  
5 McCarthy, of Abrams Fensterman Fensterman Eisman Formato  
6 Ferrara Wolf & Carone for the plaintiff Ruben Elberg.

7 MR. FENSTERMAN: Howard Fensterman, your Honor,  
8 with the same firm.

9 MR. ABRAMS: Robert Abrams, also with Abrams  
10 Fensterman.

11 MR. LIEBMAN: Charles Liebman, for the  
12 defendants, Johnson Liebman.

13 THE COURT: Good morning to all of you.

14 So I'm delighted to see all of you back on this  
15 case.

16 I'll hear you Mr. McCarthy.

17 MR. MCCARTHY: Thank you, your Honor.

18 Your Honor, we're before you on an order to  
19 show cause to restore this action for the enforcement of  
20 the judgment you entered in your decision and order  
21 dated January 20, 2021.

22 We have previously requested from the  
23 defendants that they voluntarily distribute the proceeds  
24 of the capital events that occurred in accordance with  
25 the November LP agreements by letter dated March 3,

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1           2021. We've received no response to that letter, so we  
2           are seeking in addition to restoring the action, a  
3           temporary restraining order to have the funds realized  
4           from that transaction. All total compensation  
5           transferred to an account designated by the court to  
6           insure the status quo on this action as we adjudicate  
7           our underlying request which is for a full and complete  
8           distribution of those funds in accordance with the  
9           November partnership agreement.

10                   As set forth in our payments, what has occurred  
11           previously was the funds were diverted into estate  
12           accounts and were never distributed in accordance with  
13           the November partnership agreements.

14                   As your Honor identified in the decision and  
15           order, Section 3.4.2 of the November limited partnership  
16           agreement identifies exactly how those funds are to be  
17           distributed with \$11.8 million in capital contributions  
18           going to the Class C partners, and the remaining funds  
19           being split 59 percent to the Class C partners, 40  
20           percent to the Class D partner who is Ruben Elberg  
21           individually, and one percent to the general partner.

22                   So, your Honor, we're requesting the court  
23           safeguard these funds to insure that Ruben Elberg can  
24           receive his distribution in accordance with your Honor's  
25           previous order.

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1 THE COURT: Let me ask some questions.

2 Why is this different than any other  
3 postjudgment enforcement?

4 MR. MCCARTHY: Well, your Honor, the remedy we  
5 are seeking does sit at the foot of your judgment which  
6 is to compel the distribution in accordance with the  
7 partnership agreements.

8 We have two options to either start plenary  
9 action to seek this relief or there is support from the  
10 Court of Appeals that we can bring a post-decision  
11 request to your Honor.

12 THE COURT: Right. I'm saying, why do I need  
13 to restore the case to the calendar? Why can't I deal  
14 with the postjudgment request like any other  
15 postjudgment -- is it necessary I guess is what I'm  
16 asking you to restore the case to the calendar as it  
17 relates to your postjudgment request?

18 MR. MCCARTHY: Well, with regards to the  
19 distribution it may not be necessary to restore it.

20 With regards to the payment of legal fees, we  
21 were not the prevailing party at the time until your  
22 decision and order was entered, and we are making a  
23 request for the payment of our legal fees pursuant to  
24 the partnership agreement that allows that. So that  
25 would not envision. We were not the prevailing party

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1 at the time the decision and order was entered.

2 THE COURT: Okay. I mean, I understand what  
3 you are saying. I will say to you quickly when I get  
4 the kind of motion that you made I'm often asked for  
5 attorneys fees as part of that motion, respectfully.

6 All right, Mr. Liebman. What is wrong with  
7 this? Why aren't you abiding by my order and making  
8 sure the proceeds are distributed in accordance with  
9 the partnership agreement?

10 MR. LIEBMAN: Well, the proceeds are subject to  
11 a bankruptcy court proceeding which we submitted to the  
12 court as NYSCEF No. 366.

13 THE COURT: I read the bankruptcy order. You  
14 are talking about the taxi medallion bankruptcy.

15 MR. LIEBMAN: Royal One was a party in that  
16 action, and in fact Ruben Elberg appeared and made  
17 objections in that action regarding --

18 THE COURT: This settlement agreement that was  
19 in the bankruptcy court, as well as, the Surrogate  
20 action surrounds taxi medallions. I don't understand  
21 what that has to do with anything that we're talking  
22 about at this point.

23 MR. LIEBMAN: The Surrogates Court action that  
24 we referred to in our Exhibit A, the recovery action  
25 NYSCEF 364 deals specifically with Royal One Real Estate

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1 and Royal Real Estate Management which were the LLCs  
2 which plaintiff is seeking to have ownership declared on  
3 his behalf.

4 THE COURT: Strikes me as that has already  
5 been done, and we can talk about that. That issue has  
6 been decided. It has, yeah. The First Department spoke  
7 to the issue earlier in this case.

8 MR. LIEBMAN: So if I could address that,  
9 please.

10 THE COURT: Let me proceed with the point  
11 first.

12 This was an action of in re Bracha Cab Corp.,  
13 et al. That is the bankruptcy caption.

14 MR. LIEBMAN: That is the caption, correct.

15 THE COURT: When you say that is the caption,  
16 is there something that I'm missing about the case? I  
17 mean, so, yes, LLCs were in the case, but this dealt  
18 with certain taxi medallions. So there is no staying in  
19 place as it relates to the partnership distributions  
20 that are the estate of the debtor, in that case.

21 MR. LIEBMAN: The taxi medallion companies  
22 loaned money to the real estate companies.

23 THE COURT: Yeah.

24 MR. LIEBMAN: And they did that through their  
25 principal, Jacob Elberg. They also did that through

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1 lending companies like SHEFA Funding, which had a  
2 mortgage against, from the real estate entities. All  
3 of these things were provided as loans to the real  
4 estate entities, and these loans were repaid at the  
5 merger.

6 THE COURT: So what. These companies that are  
7 the debtor in the bankruptcy action are not the  
8 partnership. I don't understand what the, what the  
9 bankruptcy action has anything to do with this, at this  
10 point.

11 MR. LIEBMAN: Because the funds that were  
12 realized from the merger which were paid back to the  
13 estate are the very funds that counsel now asked this  
14 court to remove from the estate and move to the  
15 commercial division under this court's purview.

16 There were loans that were made which counsel  
17 does not discuss except to say that they were not valid.  
18 There were loans that were made which were repaid.  
19 Counsel uses the gross figure in his calculation of what  
20 is profit. He doesn't include the fact that the  
21 entities paid transfer taxes, real estate taxes, income,  
22 what you call it --

23 THE COURT: You are arguing about a number.  
24 That has nothing to do with it.

25 Look, respectfully, the bankruptcy court has



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1 nothing to do with it, and as you well pointed out to  
2 me in the merger agreement, you left open the issue, the  
3 parties were not resolved as to what Mr. Elberg's  
4 ownership was. The parties specifically left that issue  
5 open and I've adjudicated that issue.

6 MR. LIEBMAN: That is correct. The issue that  
7 was open was whether or not Ruben Elberg was a Class D  
8 limited partner of the partnerships.

9 THE COURT: And I've answered that question.

10 MR. LIEBMAN: The issue as to whether or not  
11 Ruben is a 40 percent owner of the LLCs was never  
12 adjudicated by the First Department.

13 THE COURT: Wait. You are getting -- you are  
14 conflating different things.

15 What does the bankruptcy proceeding have to do  
16 with anything is what I'm asking you? Because the  
17 bankrupt -- the debtor and bankruptcy estate were these  
18 taxi companies.

19 MR. LIEBMAN: The debtor and the bankruptcy  
20 estate was an additional. So the cab companies brought  
21 in the real estate companies, because the real estate  
22 companies owed money to the cab companies.

23 So the real estate companies were added in as  
24 parties to the bankruptcy by the cab companies because  
25 of loans and money that was outstanding to them. So --

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1           THE COURT: Again, you are just talking about  
2 a number because if what you are saying is that  
3 Mr. Elberg's number should be different because the  
4 amount that the Class D partner should get as a result  
5 of the capital event should take into account these loan  
6 transactions, that is irrelevant for purposes of whether  
7 or not -- it is irrelevant for the purposes of whether  
8 or not the bankruptcy proceeding is a bar to his  
9 recovery in the action. Maybe -- I don't -- that issue  
10 isn't briefed. The number -- the amount of money that  
11 he is entitled, that he maybe entitled to is, that maybe  
12 affected by other obligations as it relates to the  
13 partnerships in the LLCs, but that is neither here nor  
14 there. The bankruptcy itself is not a bar as it relates  
15 to his recovery in respect of the capital event. The  
16 number maybe zero, the number maybe one, but it is not  
17 an absolute bar.

18           MR. LIEBMAN: I'm not saying it is absolute  
19 bar. I'm saying the numbers he is putting forward were,  
20 are more than the entire amount of the bankruptcy  
21 settlement and would void, functionally void the  
22 bankruptcy settlement by his claims.

23           THE COURT: Well, look, I don't know who  
24 entered into this bankruptcy settlement, but that is not  
25 an issue in front of me either, whether or not they

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1 violated any fiduciary duties, they may have, by  
2 entering into the settlement. That is not something in  
3 front of the court.

4 MR. LIEBMAN: However, the main issue that is  
5 before this court is Ruben's claims to being an owner of  
6 the LLCs. The court believed it was decided -- please.

7 The court believed it was decided by the  
8 Appellate Division, First Department. We know it was  
9 not decided by the Appellate Division, First Department  
10 because as plaintiffs' own appellate counsel advised the  
11 Appellate Division, that issue was never before the  
12 motion court as to the ownership of the LLCs.

13 As plaintiffs' appellate counsel represented  
14 to the Appellate Division only last week, the issue of  
15 LLC ownership is solely before the Surrogate's court.

16 THE COURT: That is not what Mr. Huebner's  
17 affidavit says. That is not right. I mean, you  
18 don't --

19 MR. LIEBMAN: He says, "there is no need for  
20 this court to exercise original jurisdiction to  
21 determine the ownership of the LLCs." He goes on and  
22 says, "this action only sought to resolve the  
23 partnerships while the ownerships of the LLCs is sub  
24 judice before the Surrogate's court, and the parties did  
25 not move the motion court to resolve the ownership of

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1 the LLCs." He goes on and states, "nonetheless, the  
2 ownership of the LLCs is before the Surrogate's court,  
3 not in this court," and enlarge --

4 THE COURT: "As relates to the distribution of  
5 the estate." You know what, I'm going to let Abrams  
6 Fensterman address what it is that you are saying. That  
7 is not -- that is not exactly right.

8 MR. MCCARTHY: Judge, in that submission by  
9 Mr. Huebner, the defendants have deceptively omitted the  
10 following sentence where he states, "meanwhile, the  
11 motion court's decision prepared and submitted ex parte  
12 by -- held that the Appellate Division determined that  
13 Elberg was a minority member, not a managing member with  
14 the power to act unilaterally on the LLCs behalf." It  
15 is stated in that submission.

16 More importantly, he is accurately describing,  
17 there is a turnover proceeding that is pending in the  
18 Surrogate's court. However, after the order to show  
19 cause in 2014 was issued, that same Surrogate in 2015  
20 recognized that Mr. Elberg had made out a prima facie  
21 case that it was, in fact, a 40 percent owner of the  
22 LLC's.

23 THE COURT: Okay. Not only that, Judge Ramos,  
24 in this case, in NYSCEF 352, after he got reversed on  
25 Ms. Pewzner's motion, "this court has conducted a

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1 hearing at the request of Tamara Pewzner to determine  
2 if Ruben Elberg should be removed as co-manager of the  
3 LLC Nominal Defendants and as co-manager of the Managing  
4 Member of the Limited Partnership Nominal Defendants.  
5 This Court concludes that he shall be removed.

6 Pewzner asserts that her father, Jacob Elberg,  
7 deceased, was the sole owner of the LLCs and that she is  
8 the LLCs' co-manager by virtue of her status as the  
9 co-executor, along with Elberg, of Jacob's estate. By  
10 virtue of that authority, Pewzner moved in the name of  
11 the LLCs to remove, Elberg asserting that he had  
12 breached his fiduciary duties.

13 The Appellate Division determined that Elberg  
14 was a minority member, not a managing member with the  
15 power to act unilaterally on the LLCs' behalf."

16 So saying that the LLC has not -- the interest  
17 in the LLC is not yet determined, he may not be a member  
18 of the LLC by the Appellate Division, it is not right.  
19 That is not right. They ruled on the issue.

20 MR. LIEBMAN: Your Honor, they did not rule on  
21 the issue because it was never before them.

22 The complaint for the declaratory judgment  
23 sought only to resolve the issue of whether or not the,  
24 which limited partnership contract was in effect.  
25 There was never an issue of LLC ownership in the

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1 complaint. We didn't brief the court on the issue of  
2 LLC ownership, on the issue to remove Ruben because it  
3 was irrelevant and before another court. It is dicta  
4 from the Appellate Division which has been repeated over  
5 and over again. When we went to the Appellate Division  
6 this past week and said we want to enlarge the record  
7 on this case to show the Appellate Division documents  
8 that show that Ruben Elberg never owned the any part of  
9 the LLCs, plaintiffs' appellate counsel went to the  
10 Appellate Division and said, no, you can't enlarge the  
11 record to show that he's not an owner because these  
12 issues were never before this court. These issues are  
13 above the Surrogate's court. So he is saying don't let  
14 them enlarge the record to show that Ruben is not an  
15 owner, because these are outside the jurisdiction of  
16 this court.

17 THE COURT: Please show me the NYSCEF document  
18 where the Appellate Division issued it's decision that  
19 Judge Ramos is citing.

20 MR. LIEBMAN: Sorry?

21 THE COURT: Would you -- when you say it is  
22 dicta from the Appellate Division decision.

23 MR. LIEBMAN: It is the Appellate Division  
24 decision which counsel cites in their petition.

25 THE COURT: I'm talking about Judge Ramos'

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1 decision.

2 MR. LIEBMAN: He is citing the prior Appellate  
3 decision from the Crabapple case.

4 THE COURT: Give me a NYSCEF number, because  
5 Judge Ramos in his decision cites the Appellate Division  
6 decision.

7 MR. MCCARTHY: I will look for the NYSCEF  
8 number. I have the reporter cite for that decision.

9 THE COURT: I rather, if it is okay,  
10 respectfully, if it is okay with you I rather just look  
11 it up.

12 MR. LIEBMAN: It is from the prior Crabapple  
13 action.

14 THE COURT: Do you have an Index number? I  
15 will look it up.

16 MR. MCCARTHY: Yes. The Crabapple action is  
17 650492 of 2015.

18 THE COURT: Okay. Do we have -- I'm in that  
19 docket now. I might have it. I have it. I think I  
20 have it. Is it 357, sorry? I'm sorry. Mr. Liebman,  
21 I'm sorry.

22 The issue of the ownership of the LLC has been  
23 decided by the First Department, sir. I'm going to read  
24 the decision into the record. It is NYSCEF 357.

25 "Order, Supreme Court, New York County, Charles

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1 E. Ramos, entered January 21, 2016, which, to the extent  
2 appealed from as limited by the briefs, granted  
3 defendants-respondents' the LLCs motion to remove  
4 defendant Ruben Elberg as their co-manager and fiduciary  
5 unanimously, unanimously reversed, without costs, motion  
6 denied, and the matter remanded to Supreme Court for  
7 further proceedings in accordance with this decision.

8 Elberg asserts that he is the sole managing  
9 member of the LLCs. His sister, non-party Tamara  
10 Pewzner, asserts that their father, Jacob Elberg,  
11 deceased, was the sole owner of the LLCs and that she is  
12 the LLCs co-manager by virtue of her status as the  
13 co-executor, along with Elberg, of Jacob's estate. By  
14 virtue of that authority, Pewzner moved in the name of  
15 the LLCs to remove Ruben as a co-manager of the  
16 defendant entities, asserting inter alia, that he had  
17 breached his fiduciary duties.

18 Contrary to his contention, Elberg was not  
19 removed as the sole "managing member" of the LLCs. The  
20 record demonstrates that he was a 40 percent minority  
21 member, not a managing member with the power to act  
22 unilaterally on the LLCs' behalf. The relevant  
23 agreements contained no provision regarding the  
24 succession of management of the LLCs in the event of the  
25 death of Jacob, the majority member. Thus, Jacob's



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1 controlling interest in the LLCs passed to his estate  
2 upon his death, and Elberg and Pewzner, the co-executors  
3 of the estate, had the authority to act as co-managers  
4 of the LLCs, citing (Limited Liability Company Law [LLC]  
5 Section 608; see also *Yew Prospect v. Szulman*, 305  
6 A.D.2d 588, 589, [2d Dept. 2003]). LLC Section 608  
7 provides that the executor of a deceased member "may  
8 exercise all of the member's rights for the purpose of  
9 settling his or her estate.

10 In view of the foregoing, Elberg's reliance on  
11 the business judgment rule is misplaced, citing (*Matter*  
12 *of Levandusky*). As he was never the sole managing  
13 member of the LLCs, the business judgment of the LLCs  
14 was never his to exercise unilaterally. However, given  
15 the conflicting submissions as to the rights of the  
16 parties vis-a-vi the LLCs and LPs, as well as whether  
17 completing the project or accepting the buyout was the  
18 best course of action, the motion court acted  
19 prematurely when it granted the motion to remove Elberg  
20 as co-manager without holding evidentiary hearing,  
21 citing the *Alpert* decision. Questions of fact exist as  
22 to whether movants are entitled to relief they seek,  
23 citing the *Colucci* decision."

24 So respectfully, Mr. Liebman.

25 MR. LIEBMAN: Yes.

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

4 MR. LIEBMAN: Your Honor --

5 THE COURT: That is what the First Department  
6 said.

7 MR. LIEBMAN: Please, your Honor. If I may  
8 address that.

9 The issue -- the statement of the Appellate  
10 Division is that according to the record he's a 40  
11 percent owner. We did not brief the court on that issue  
12 because --

13 THE COURT: Mr. Liebman, enough. Enough. No.  
14 Mr. Liebman, enough. Enough. Mr. Liebman, I'm very  
15 close right now, I'm very close right now to exercising  
16 my authority as it relates to sanctions. This is  
17 ridiculous. Sir, sir, I've had enough. Really, I've  
18 had enough. I allowed this to go on for a very long  
19 time during the first argument.

20 The facts are very clear in this case.

21 Mr. Elberg, Mr. Ruben Elberg was, in fact, a  
22 partner. The 2012 agreement, the November agreement as  
23 I found is the controlling agreement. Ms. Pewzner's  
24 continual attempt to frustrate his rights is  
25 inappropriate. I'm prepared to accept a supplemental

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1 order as it relates to a declaration that based on this  
2 order from the First Department, that the First  
3 Department held that the record demonstrated he was a  
4 40 percent minority owner.

5 MR. LIEBMAN: May address that?

6 THE COURT: I'll sign the order.

7 You can go back to the First Department.

8 No, sir. I've had enough.

9 Plaintiffs, you can submit an order. I'll sign  
10 it. Mr. Liebman, you can go back to the First  
11 Department. You can tell the First Department that they  
12 didn't mean it or they got it wrong when they found he  
13 was a 40 percent owner. You can do that, sir.

14 Thank you, very much.

15 You can submit an order. There is no need to  
16 have this case restored.

17 In fact, you can move for postjudgment  
18 remedies.

19 MR. MCCARTHY: Thank you, your Honor.

20 I, Monica A. Martinez, do hereby certify the  
21 foregoing to be a true and accurate verbatim  
22 transcription of the original stenographic record.

23

24

Monica A. Martinez

25

Senior Court Reporter

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