

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - CIVIL TERM - PART: 53

-----X  
546-552 WEST 146TH STREET LLC,  
522-536WE ST 147TH STREET LLC,  
WEST 162ND STREET AND ACADEMY STREET LLC,  
100-102 EAST 124TH STREET PACKAGE LLC,  
HARLEM I LLC and HARLEM II LLC,

Plaintiffs,  
-against-

RACHEL L. ARFA, ALEXANDER SHPIGEL, GADI ZAMIR,  
HARLEM HOLDINGS LLC, by and through its Court-  
Appointed Receiver LAWRENCE A. MANDELKER, in  
his official capacity, AMERICAN ELITE PROPERTIES  
LLC, MINTZ LEVIN COHEN FERRIS GLOVSKY & POPEO, P.C.,  
EDWARD LUKASHOK, AUBREY REALTY CO., and 42ND STREET  
REALTY LLC,

Defendants.

-----X  
Index No. 603041/06                      60 Centre Street  
New York, New York  
November 24, 2008

B E F O R E:

HONORABLE CHARLES E. RAMOS, J.S.C.

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

BALBER PICKARD MALDONADO & VAN DER TUIN  
Attorneys for the Plaintiffs  
1370 Avenue of the Americas  
New York, New York 10019-4602  
BY: JOHN VAN DER TUIN, ESQ.  
TODD S. PICKARD, ESQ.

SCHLAM STONE & DOLAN, L.L.P.  
Attorneys for Defendants  
Rachel L. Arfa, Alexander Shpigel and  
American Elite Properties, Inc.  
26 Broadway  
New York, New York 10004  
BY: DAVID J. KATZ, ESQ.

VICKI K. GLOVER, OFFICIAL COURT REPORTER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

A P P E A R A N C E S: (Continuing)

SIMPSON THACHER & BARTLETT, L.L.P.  
Attorneys for Defendants  
Mintz Levin Cohn Ferris Glovsky & Popeo, P.C.  
425 Lexington Avenue  
New York, New York 10017  
BY: SCOTT A. SUKENICK, ESQ.

VICKI K. GLOVER, CSR, RMR, CRR  
Official Court Reporter

## Proceedings

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

THE COURT: Good afternoon.

Mr. Van Der Tuin, why is it 546-522 instead of  
522-546?

MR. VAN DER TUIN: It should be 546-552.

THE COURT: Oh, 552. Okay.

MR. VAN DER TUIN: West 146.

THE COURT: Yeah, it says 522. Okay.

MR. VAN DER TUIN: It's a typo.

THE COURT: So it's 552, okay. That's better.

Okay. This is Mr. Katz's motion --

MR. KATZ: Yes.

THE COURT: -- for a change.

MR. KATZ: Yes. Yeah, right.

It's basically more of a renewed motion. I  
mean, what we're looking for here, this is the first  
commission case. This was the case that was brought --

THE COURT: That was dismissed.

MR. KATZ: Correct. And after it was  
dismissed, which was in February, I believe, of 2007, we  
came back and we made a motion which you heard argument  
on in April of '07. And basically we were asking to  
have our legal fees indemnified because under the  
language in the operating agreements, if in a case like  
this where the former managers are sued for what they  
did in their capacity as being involved with the LLCs,

## Proceedings

1  
2 they have to have their fees indemnified unless there's  
3 a finding at the end of the case that they engaged in  
4 willful misconduct.

5 THE COURT: Let me make it easy for you. If  
6 this was the only case that you had with the LLCs I  
7 would agree with you. But it isn't.

8 MR. KATZ: Well, it is the only case we do  
9 have with the LLCs as plaintiffs.

10 THE COURT: No, number one -- wait a minute --  
11 number one, and number two, it's really, I almost look  
12 at this case or this claim involving the commissions as  
13 being part of an overall series of transactions that are  
14 all in litigation now. I don't know how many different  
15 captions we have.

16 MR. VAN DER TUIN: Three that we're  
17 litigating. There are a couple of others.

18 THE COURT: There are captions within  
19 captions. We have multiple -- we have third-party  
20 practice.

21 MR. VAN DER TUIN: Third-party claims.

22 THE COURT: Because I'm thinking particularly  
23 of the statute. The statute doesn't speak in terms of  
24 case by case. And, quite frankly, neither does the  
25 operating agreement.

26 But I agree with you. Once there's an

## Proceedings

1  
2 adjudication in favor of Arfa and Zamir, that triggers  
3 their rights to be indemnified or at least to consider  
4 indemnification. But keep in mind, Mr. Katz, that our  
5 dismissal of the action that was brought, which, by the  
6 way, could result in indemnification ultimately, was a  
7 dismissal not on the merits. It was on standing.

8 MR. KATZ: Yes.

9 THE COURT: The new action has been brought.  
10 The claim and the statute, and I think even the LLC  
11 agreement talks about claim. The claim has not been  
12 adjudicated one way or the other.

13 MR. KATZ: Well, it has been adjudicated on  
14 behalf of these plaintiffs. And I guess the way I would  
15 say it differently is, if --

16 THE COURT: It doesn't matter because your  
17 clients are entitled to be indemnified whether they are  
18 sued by the LLCs or sued by some third party. The  
19 indemnification right that you have is a very broad  
20 one --

21 MR. KATZ: Yes.

22 THE COURT: -- as I understand it.

23 MR. KATZ: Yes.

24 THE COURT: There are a couple of problems I  
25 have with considering it now. There's the argument that  
26 it's premature.

## Proceedings

1  
2 For example, the claim with regard to the  
3 commissions has not been adjudicated in favor of your  
4 client. It is possible -- I'm not going to say likely,  
5 but it's possible that you would lose that claim.

6 MR. KATZ: Yes.

7 THE COURT: And it's also possible that there  
8 might be a finding that your client did something wrong  
9 in the context of the LLC.

10 MR. KATZ: In our --

11 THE COURT: Let me finish.

12 Under the statute as I understand it, any  
13 finding of wrongdoing by your client, whether it  
14 involves the LLC commission claim or the manner in which  
15 the LLCs were managed, any adjudication that your  
16 clients wrongfully profited or were guilty of some sort  
17 of bad faith, would result in a denial of any right to  
18 indemnification because the whole right of  
19 indemnification is subject to good behavior.

20 MR. KATZ: Well, I would say it's subject to  
21 good behavior in the context of the claim. To me, a  
22 claim -- you're right; the claims involve the same  
23 transactions, but a claim belongs to a plaintiff, okay.  
24 Without the plaintiff there is no claim.

25 So my -- the way, I guess, I would address  
26 your concern, I think it's a valid concern, is that if

## Proceedings

1  
2 in the Roni action there is ultimately a finding that we  
3 did something wrong, we would not be entitled to  
4 indemnification in the Roni action.

5 THE COURT: All right. But what you're saying  
6 is we could somehow bifurcate these various cases and  
7 say you're indemnified in one and two, you don't get  
8 indemnified in three, four and five.

9 MR. KATZ: Well, and by the way --

10 THE COURT: I don't know that I can agree with  
11 that.

12 MR. KATZ: Well, the other point is, this is a  
13 bed of their own making. In other words, they could  
14 have brought a claim. They could have brought claims on  
15 behalf of the LLCs and the plaintiffs all at the same  
16 time.

17 THE COURT: But we're not talking here about a  
18 counterclaim. We're not talking here about a sanction  
19 against the plaintiffs. We're talking here about your  
20 contract right to indemnification --

21 MR. KATZ: Right.

22 THE COURT: -- under the operating agreement.  
23 And that contract right is subject to its terms and the  
24 statute, and I think both contemplate a final  
25 adjudication of no wrongdoing by your client. That is,  
26 I'm sorry. There doesn't have to be an affirmative

## Proceedings

1  
2 finding of no wrongdoing, so long as there's no  
3 affirmative finding of wrongdoing.

4 MR. KATZ: Correct.

5 THE COURT: That's the key. So long as there  
6 is no judicial determination that Arfa, Shpigel or Zamir  
7 did anything wrong, then you're entitled to your  
8 contract indemnification. And I think, I think that the  
9 way the statute reads, it applies to the right, not to  
10 making claim in a particular action.

11 MR. KATZ: Well, to me the only public policy,  
12 I guess, problem with that argument is that what that  
13 would mean is that if any defendant gets a claim against  
14 them dismissed, and let's say there are other claims  
15 that could be brought against them by other plaintiffs,  
16 and the statute of limitations has a run of those, then  
17 that person would have to wait until the statute of  
18 limitations on all of those claims ran before they could  
19 ask for indemnification.

20 THE COURT: I don't agree. That would be  
21 unreasonable.

22 We don't have to eliminate the possibility of  
23 any finding of wrongdoing. What we have to do in the  
24 actions that are now pending, which I think or I hope  
25 cover all of the relationships between the parties that  
26 there is no finding of wrongdoing. We haven't gotten to



## Proceedings

1  
2 the end of the road yet. Indeed, the very claim which  
3 is the subject of the dismissed action, this action, the  
4 commission claim, is still being litigated.

5 MR. KATZ: It's still being litigated by the  
6 investors against us.

7 THE COURT: All you have to do is end all of  
8 this litigation --

9 MR. KATZ: I understand that.

10 THE COURT: -- with no finding in any of those  
11 cases that your clients have engaged in wrongdoing and  
12 that would work not to defeat your right to contract  
13 indemnification.

14 MR. KATZ: Here's the only other issue then  
15 that I would have with respect to that. Right now --  
16 Zamir settled. Right now there's about a million  
17 dollars that you ordered to sit in escrow to deal with  
18 attorneys' fees, claims to indemnification of attorneys'  
19 fees. If we wait for this case to be litigated all the  
20 way to the end, and any other cases that can be brought  
21 between now and then, it's possible that that escrow  
22 will not be enough to pay for the attorneys' fees that  
23 we incur in litigating all these cases. I mean, these  
24 are, as you discussed before, single purpose LLCs.

25 THE COURT: But we have jurisdiction over the  
26 investors.

## Proceedings

1  
2 MR. KATZ: Yes, but you can't force them to  
3 make capital calls.

4 THE COURT: Indemnification would not -- well,  
5 let's see. Indemnification would be from the members or  
6 from the LLCs?

7 MR. KATZ: From the LLCs.

8 THE COURT: How much of the money that  
9 Mr. Mandelker's got now is going to be released to the  
10 LLCs as part of the settlement with Zamir?

11 MR. KATZ: Well, that's an interesting  
12 question.

13 MR. VAN DER TUIN: We'll be making an  
14 application with respect to that, and I'll probably try  
15 to do it by order to show cause perhaps tomorrow. I  
16 won't be seeking any sort of TRO order. I'll just set a  
17 convenient return date. But we recognize that there  
18 will be an obligation to leave some funds in escrow with  
19 respect to the remaining claims. We can have an  
20 argument at that time as to how much that should be.

21 THE COURT: I think that's where we can deal  
22 with it and you're right, because you don't want to have  
23 to go chasing people in Israel, number one, and number  
24 two, the LLCs -- well, they still own property, don't  
25 they?

26 MR. KATZ: No. Well, one does but I would

## Proceedings

1  
2 find it highly unlikely that they still own that  
3 property at the end of this case, but I could be wrong.

4 THE COURT: I understand you're concerned and  
5 I think what Mr. Van Der Tuin has said will cover it.  
6 We have to find an appropriate amount that will protect  
7 your clients.

8 MR. VAN DER TUIN: At present, approximately  
9 \$650,000 I think of the funds have been, if you will,  
10 earmarked for indemnification purposes. But the record  
11 is a little fuzzy with respect to that.

12 THE COURT: We'll clarify that when you make  
13 the motion.

14 So I think what I'm going to do -- I'm telling  
15 you what I'm going to do.

16 Nice argument, Mr. Van Der Tuin.

17 MR. VAN DER TUIN: Thank you, your Honor.

18 THE COURT: I'm going to deny the motion as  
19 premature. Clearly, all these issues are going to be  
20 before us once there's something like a final  
21 determination. Perhaps that will motivate your clients  
22 to move forward more quickly.

23 MR. KATZ: Judge --

24 THE COURT: I think they are confident of  
25 success.

26 MR. KATZ: I would say this. We are the ones

## Proceedings

1  
2 you said we should move forward more quickly. I stood  
3 up here two weeks after the first action was brought and  
4 said the wrong plaintiffs are here. Then we had the  
5 issue with the signer and the joinder, okay. We're not  
6 the one responsible for the case not moving quickly  
7 enough.

8 MR. VAN DER TUIN: Wait a minute here. If  
9 we're going to get into who said what when --

10 THE COURT: Yeah, the Court made a big  
11 mistake. Shame on me. I'll withdraw the remark, okay?

12 MR. VAN DER TUIN: I do anticipate that if  
13 this is being denied as premature we'll have to deal  
14 with all these indemnification issues at some point down  
15 the road. If, you know, Mr. Katz's clients are  
16 successful, you know, we'll deal with it then.

17 MR. KATZ: And look, in the meantime we'll  
18 probably take an appeal. And at least the good thing  
19 about that is we'll probably get a decision before this  
20 case is over and, you know, if we need to revisit this  
21 in light of that, we'll have more than enough time to do  
22 it.

23 THE COURT: Off the record.

24 (Discussion off the record.)

25 THE COURT: Okay, guys, good to see you.

26 MR. VAN DER TUIN: Thank you.

Proceedings

\* \* \*

It is hereby certified that  
the foregoing is a true and accurate  
transcript of the proceedings.



VICKI K. GLOVER, CSR, RMR, CRR  
OFFICIAL COURT REPORTER  
SUPREME COURT-NEW YORK COUNTY

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26