

**Orchard Hotel, LLC v D.A.B. Group, LLC**

2016 NY Slip Op 32558(U)

December 16, 2016

Supreme Court, New York County

Docket Number: 850044/11

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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ORCHARD HOTEL, LLC,

Plaintiff,

- against -

D.A.B. GROUP, LLC, ORCHARD CONSTRUCTION,  
LLC, FLINTLOCK CONSTRUCTION SERVICE LLC,  
JJ K MECHANICAL INC., EDWARD MILLS &  
ASSOCIATES, ARCHITECTS PC, CASINO  
DEVELOPMENT GROUP, INC., CITYWIDE  
CONSTRUCTION WORKS INC., EMPIRE TRANSIT  
MIX INC., MARJAM SUPPLY CO., INC.,  
ROTAVELE ELEVATOR INC., SMK ASSOCIATES INC.,  
FJF ELECTRICAL CO. INC., CITY OF NEW YORK,  
NEW YORK STATE DEPARTMENT OF TAXATION &  
FINANCE, LEONARD B. JOHNSON, CITY OF NEW  
YORK ENVIRONMENTAL CONTROL BOARD, BROOKLYN  
FEDERAL SAVINGS BANK, STATE BANK OF TEXAS,  
and JOHN DOE #1 through JOHN DOE #100, the  
last 100 names being fictitious, their  
true identities unknown to plaintiff, and  
intended to be the tenants, occupants,  
persons or corporations, if any, having or  
claiming an interest in or lien upon the  
premises described in the complaint,

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Defendants.

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**Hon. C. E. Ramos, J.S.C.:**

Defendant Flintlock Construction Services, LLC (Flintlock) moves to lift the order of this Court which stayed the action to the extent of allowing the prosecution of Flintlock's cross-claims against plaintiff Orchard Hotel LLC (Orchard Hotel); and for attachment, pursuant to CPLR 6201 in the sum of \$2,804,724.82 out of approximately \$27 million that Orchard Hotel will realize from the sale of real property located at 139-141 Orchard Street

[\* 2]  
in New York City.

### **Background**

This action arises out of the foreclosure of two mortgage loans that secured commercial property located in Manhattan, owned by defendant D.A.B. Group, LLC (DAB). The purpose of the loans was to finance the development and construction of a boutique hotel on Orchard Street, in the Lower East Side. Orchard Hotel obtained ownership of the loans by assignment from defendant Brooklyn Federal Savings Bank (BFSB), the original lender, and is the successor-in-interest to BFSB. Flintlock was the general contractor involved in constructing the hotel, and holds a mechanic's lien against the property in the amount of \$2.7 million for unpaid services. In the midst of litigation pertaining to Orchard Hotel's attempts to foreclose on the mortgages, DAB filed for Chapter 11 bankruptcy protection and this Court stayed the action in the interim.

### **Procedural History**

This Court previously granted (by written order entered August 28, 2013), DAB's motion to renew motions of Orchard Hotel and BFSB which had resulted in the dismissal of DAB's counterclaims, and on this basis, granted DAB leave to replead its counterclaims, granted Flintlock leave to serve an amended answer, and held in abeyance Orchard Hotel's motion for summary judgment seeking to foreclose on the mortgage loans (NYSCEF Doc No

643). Flintlock filed an amended answer on August 8, 2013, which included cross-claims against Orchard, as successor-in-interest to BFSB, for fraud, constructive fraud, negligent misrepresentation and conversion (NYSCEF Doc No 618).

On February 18, 2014, the First Department reversed this Court's August 28, 2013 order which granted DAB's motion for leave to renew (NYSCEF Doc No 803). Thereafter, on March 21, 2014, this Court, inter alia, denied Orchard Hotel's motion for summary judgment which sought to foreclose on the notes, and granted dismissal of Flintlock's first through eighth affirmative defenses, severed and dismissed Flintlock's cross claims and counterclaims against DAB Group, and otherwise denied dismissal of Flintlock's remaining affirmative defenses, cross-claims and counterclaims pertaining to its mechanic's lien (NYSCEF Doc No 809). Once Flintlock amended its answer, BFSB and Orchard Hotel separately moved to dismiss it (NYSCEF Doc No 696), which this Court denied as moot on May 6 and 16, 2014 (Dismissal Orders) (NYSCEF Docs No 824, 925). It appears that the Dismissal Orders were in error, because although the Court, in its March 21, 2014 decision (NYSCEF Doc No 803), addressed Orchard Hotel's and BFSB's arguments in support of dismissal of Flintlock's answer (which was already a nullity due to Flintlock's previous filing of an amended answer), this Court failed to consider the sufficiency of the amended answer. Flintlock did not move to

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reargue the Dismissal Orders, and instead, appealed them. Its appeals have not yet been perfected (Exhibits C-D, annexed to the DeCapua Aff.).

In December 2014, Flintlock also filed a proof of claim before the Bankruptcy Court (DeCapua Aff., ¶ 22). The Bankruptcy trustee authorized the sale of DAB's sole asset, the real property, to a purchaser for \$30,750,000. Under the approved plan of reorganization, Orchard Hotel will receive the vast majority of the proceeds of the sale in satisfaction of its mortgage claims. Flintlock objected to the plan of reorganization, but the Bankruptcy Court rejected those objections. Flintlock did not seek a stay of the confirmation order from the bankruptcy judge or file an appeal of the confirmation order (Exhibit 10, annexed to the Dockwell Aff.), and is now taking steps to perfect its appeal of the Dismissal Orders before the First Department.

#### **Discussion**

Flintlock moves to lift the stay of this action to permit it to prosecute its cross-claims against Orchard Hotel, and for an attachment with pre-judgment interest out of the sales proceeds that Orchard Hotel will realize from the sale of the property. In support of its motion, Flintlock asserts that sufficient basis exists for believing that Orchard Hotel is about to dispose of funds that it will be receiving following the sale of the

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property. Flintlock maintains that Orchard Hotel is a single purpose entity, formed solely to repurchase BFSB's notes, and following disbursement of the sales proceeds, the funds will likely be removed from the state because the two entities who claim an interest in Orchard Hotel are foreign limited liability companies located in Connecticut.

In opposition, Orchard Hotel maintains that Flintlock fails to satisfy any of the four elements required to obtain an order of attachment, and Flintlock has no viable claims against Orchard unless its prevails on its appeal.

In order to obtain an order of attachment, the plaintiff bears the burden of establishing (1) that one or more grounds for attachment exist under CPLR 6201; (2) the existence of a cause of action; (3) that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff; and (4) the probability of success on the merits (CPLR 6212 [a]; *Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111, 111 [1<sup>st</sup> Dept 1997]). Moreover, even if the statutory requisites for attachment are satisfied, this provisional remedy is a discretionary one (*Capital Ventures Intl. v Republic of Argentina*, 443 F 3d 214, 222 [2d Cir 2006]).

Pursuant to CPLR 6201 (1), a court may order an attachment when "the defendant is a non-domiciliary residing without the state." This provision serves two independent purposes: (1) to

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obtain jurisdiction over a nonresident; or (2) to provide adequate security for a potential judgment against a nonresident where there is an identifiable risk that the defendant will not be able to satisfy any such judgment (*Elton Leather Corp. v First Gen. Resources Co.*, 138 AD2d 132, 134-35 [1<sup>st</sup> Dept 1988]). Where the defendant is a non-domiciliary that is subject to in personam jurisdiction, an order of attachment may issue to insure that there will be property in New York upon which the plaintiff may execute in the event that a judgment is obtained (*Elton Leather Corp.*, 138 AD2d at 134-35).

Another ground for attachment exists where the defendant, "with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered, or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201 [3]).

Flintlock does not possess a valid cause of action against Orchard Hotel following this Court's entry of the Dismissal Orders, which are the subject of a pending appeal. Although the court retains jurisdiction relating to the action generally (to the extent not subject to the Bankruptcy stay), this Court has no jurisdiction to entertain matters pertinent to the pending appeal (*Kleinman v Metropolitan Life Ins. Co.*, 298 NY 217 [1948]). Thus, even where it appears that this Court's orders dismissing

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Flintlock's amended answer without considering the sufficiency and substance of those pleadings was in error, this Court cannot now interfere with the appellate review of those orders, two and a half years after entry. Flintlock's sole remedy may lie in an application for relief before the Appellate Division, First Department.

Otherwise, Flintlock has not demonstrated that any ground for attachment exists, under CPLR 6201. Flintlock alleges in conclusory fashion that there is a risk that Orchard Hotel will not be able to satisfy any judgment because it is a single asset LLC formed solely to purchase the DAB mortgage from BFSB, and the proceeds of the sale proceeds are expected to be disbursed outside of the state of New York (DeCapua Aff., ¶¶ 35-37).

Where the plaintiff seeks to levy upon defendant's property to conserve it for eventual execution, the plaintiff must demonstrate that the defendant's past or present conduct demonstrates a real, identifiable risk that the defendant would be unable to satisfy a future judgment (*Elton Leather Corp.*, 138 AD2d at 134-35), and "with intent to defraud [its] creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered, or secreted property, or removed it from the state or is about to do any of these acts" (CPLR 6201 [3]). In the absence of allegations that Orchard Hotel lacks sufficient assets or will



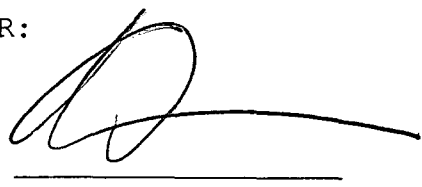
choose to hide or dispose of assets, Flintlock's conclusory allegations are insufficient to warrant the drastic relief of pre-judgment attachment (see *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 59-62 [1<sup>st</sup> Dept 2013]).

Accordingly, it is

ORDERED, that the motion to lift the stay and for an order of attachment is denied.

Dated: December 16, 2016

ENTER:



J.S.C.

**CHARLES E. RAMOS**