Siras Partners LLC v Activity Kuafu Hudson Yards LLC
2017 NY Slip Op 30601(U)
March 29, 2017
Supreme Court, New York County
Docket Number: 650868/2015
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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SIRAS PARTNERS LLC, SAIF SUMAIDA, and ASHWIN VERMA,

Plaintiffs,

-against-

ACTIVITY KUAFU HUDSON YARDS LLC, 462-470 11th AVENUE LLC, SHANG DAI, ZENGLIANG "DENIS" SHAN, QILING YUAN, DANIEL DWYER, AND DAI & ASSOCIATES, P.C.,

Defendants,

-and-

REEDROCK KUAFU DEVELOPMENT COMPANY LLC, SIRAS KUAFU LP, ATHENA KUAFU LP, SIRAS KUAFU LAND HOLDINGS LLC, and BIFROST LAND LLC,

Nominal Defendants.

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Index No.: 650868/2015

Mtn Seq. No. 007

DECISION AND ORDER

462-470 11th AVENUE LLC,

Plaintiff,

-against-

BIFROST LAND LLC, AJ LABELLE & PARTNERS, LLC, MUTUAL, LLC, 554 WEST 38TH STREET, LLC, JACOB I. SOPHER A/K/A HANK SOPHER, NEW YORK STATE WORKERS' COMPENSATION BOARD, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, GZA GEOENVIRONMENTAL, INC., and JOHN DOES #1 through #20, said John Doe defendants being fictitious and unknown to plaintiff, it being intended to name all other parties who may have some interest in or

Index No.: 850216/2015

Mtn Seq. Nos. 001 & 002

DECISION AND ORDER

lien upon the premises sought to be foreclosed,

Defendants.

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JEFFREY K. OING, J.:

Relief Sought

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Mtn Seq. No. 007

Plaintiffs, Siras Partners LLC, Saif Sumaida, and Ashwin Verma (collectively, "Siras"), move for an order: (i) staying the related foreclosure action under Index No.: 850216/2016 (the "foreclosure action") pending resolution of this action, and (ii) granting plaintiffs leave to file a second amended verified complaint.

Defendants Activity Kuafu Hudson Yards LLC ("Kuafu"), 462-470 11th Avenue LLC ("462-470"), Shang Dai ("Dai"), Zengliang "Denis" Shan ("Shan"), and Qiling Yuan ("Yuan"), cross-move, pursuant to CPLR 3211(a)[7], to dismiss the amended verified complaint as to defendant 462-470.

Defendants Shang Dai ("Dai") (on the fourth, fifth, and sixth causes of action), Daniel Dwyer ("Dwyer"), and Dai & Associates, P.C. ("Dai & Associates") (Dai, Dwyer, and Dai &

Associates, collectively referred to as "D&A") do not take a position regarding that branch of Siras' motion seeking a stay of the foreclosure action (see Bruno Affim., 8/12/16, ¶ 2, fn 1).

Index No.: 850216/2015

Mtn Seq. No. 001

462-470 moves for an order: (i) pursuant to RPAPL § 1321 referring this matter to a Referee to compute the amounts due to it for principal and interest on the Consolidation, Modification and Restatement Agreement (the "mortgage"), and to examine and report whether the mortgaged property may be sold in one parcel; and (ii) pursuant to CPLR 1003 dismissing from this action and striking from the caption the fictitious defendants "John Does" #1 through #20 inclusive, and amending the caption accordingly.

Mtn Seq. No. 002

This motion and cross motion are identical to the reliefs sought in mtn seq. no. 007 under Index No. 650868/2015.

These actions and motions are consolidated for disposition.

Factual Background

Siras, Kuafu, and their respective principals, and nonparty Sean Ludwick, formed a joint venture, Reedrock Kuafu Development Company, LLC ("Reedrock"), in November 2013, for the purpose of

developing a parcel of land in Manhattan located at Hudson Yards at 462-470 Eleventh Avenue (the "property"). Under Reedrock's operating agreement (the "operating agreement") (Verma Aff., 10/19/15, Ex. A), Siras was responsible for the development of the property and Kuafu was responsible for the debt and equity financing for the development of the property. Reedrock's members created Bifrost Land LLC ("Bifrost") to hold title to the property. Reedrock's managers consisted of Verma and Sumaida, from Siras, and Dai, Shan, and Yuan, from Kuafu. Reedrock's management is set forth in the operating agreement, and provides:

> The Managers shall act jointly in all instances and all decisions and/or determinations of the Managers shall require the affirmative vote or consent of at least 75% of all of the Managers.

(Id., p. 9).

In June 2014, Bifrost obtained from UBS Real Estate Securities ("UBS"), a loan to acquire the property in the amount of approximately $61 million (the "UBS loan"), of which $44 million was drawn at the time of Bifrost's closing on the property. The UBS loan had a maturity date of July 9, 2015, with an option to extend the maturity date for two consecutive six-month periods provided certain conditions were met. By April 2015, Siras alleges that Kuafu and its principals took a series

of actions that were part of a scheme by Kuafu to jeopardize the UBS loan and undermine the project. For instance, Siras claims that Kuafu feigned surprise that Siras had retained Urban Compass, Inc. as the project's real estate broker without Kuafu's knowledge or approval and falsely claimed that this retention constituted a default under the UBS loan (Verma Aff., 10/19/15, ¶ 12); that Kuafu blocked efforts to obtain air rights (Id., ¶ 18); that Kuafu failed to pay subcontractors (Id., ¶ 19); and that Kuafu filed a petition in February 2015 seeking the dissolution of Reedrock (Id., ¶ 22). Siras claims that due to Kuafu's actions UBS sold the UBS loan to 462-470, a Kuafu affiliate, for $46,712,256.21 (Amended Compl. ¶ 104).

Siras commenced this action (the "Siras action") in March 2015 alleging nine causes of action either directly, or on behalf of Reedrock or Bifrost, including claims for breach of contract, breach of fiduciary duty, and claims against 462-470 for a declaratory judgment and permanent injunction. In July 2015, 462-470 commenced the foreclosure action to foreclose on the UBS loan.

Discussion

The Foreclosure Action

In the foreclosure action, plaintiff 462-470 alleges that defendant Bifrost defaulted on the loan by failing to pay the

remaining principal on the loan by the initial maturity date of July 9, 2015 and by failing to satisfy certain conditions precedent to extend the maturity date, specifically, section 4.1.16 of the loan agreement. That section provides that defendant Bifrost "shall" complete the demolition of the property before the initial maturity date (Foreclosure Action Amended Compl., ¶¶ 56-57). Plaintiff 462-470 also alleges that defendant Bifrost "committed an Event of Default under Section 10.1(a)(i)(A) of the Loan Agreement" (Foreclosure Action Amended Compl., ¶ 58). Section 10.1(a)(i)(A) provides that an "Event of Default" occurs "if any monthly Debt Service, any monthly deposit of Reserve Funds or the payment due on the Maturity Date is not paid when due" (Verma Aff., 10/19/15, Ex. B).

Siras, a non-party to the foreclosure action, argues that the action should be stayed pending resolution of the Siras action because in its ninth cause of action it asserts a claim against 462-470 for a declaratory judgment and permanent injunction (Amended Compl., ¶¶ 228-236).[1] It further argues that

[1] Siras seeks a declaration that "462-470 is not entitled to exercise or attempt to exercise any of the lender's default remedies under the UBS Loan against [Bifrost]" and an injunction "[p]ermanently enjoining ... 462-470 from exercising or attempting to exercise any of the lender's default remedies under the UBS Loan against [Bifrost]" (Amended Compl., Request for Relief, ¶¶ ix and x).

if the foreclosure action is not stayed it will lose its equity investment in the project before this Court determines the merits of the Siras action, and it will face a threat of irreparable harm because 462-470 will obtain clear title to the property and divest it of its interest in the property. Siras further points out that the loan agreement provided Bifrost with the right to extend the UBS loan for two six-month extensions provided that, among other things, "no Event of Default shall have occurred and be continuing at the time the applicable Extension Option is exercised and at the time that the applicable extension occurs" and "[t]he Demolition shall be Completed" (Verma Aff., 10/19/15, Ex. B, § 2.8[a] and [h]). It argues that 462-470, an affiliate of Kuafu, should be enjoined from foreclosing based on the "maturity default" provision of the UBS loan agreement ("loan agreement") because Kuafu, through its principals, intentionally brought about the conditions to cause a default so as to prevent Bifrost from exercising its extension rights.

Under CPLR 2201, "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." While Siras sets forth numerous allegations that Kuafu schemed to undermine the project, the record demonstrates that UBS, a nonparty, made a business decision to

sell the UBS loan to 462-470, and 462-470 was within its rights to purchase the UBS loan. As Kuafu points out, there is nothing in Reedrock's operating agreement which prohibits a Kuafu affiliate like 462-470 from obtaining the UBS loan. Indeed, section 7.04(b) of the operating agreement provides:

> Each of the Members recognizes that each of the other Members and its members, managers, partners, shareholders, officers, directors, employees, agents, representatives and Affiliates, have or may have other business interests, activities and investments, some of which may be in conflict or competition with the business of the Company and that each of the other Members and its members, managers, partners, shareholders, officers and directors, employees, agents, representatives and Affiliates, are entitled to carry on such other business interests, activities and investments. Each of the Members may engage in or possess an interest in any other business or venture of any kind, independently or with others, and each of the Members may engage in any such activities, whether or not competitive with the Company, without any obligation to offer any interest in such activities to the Company or to the other Members. Neither the Company nor the other Members shall have any right, by virtue of this Agreement, in or to such activities, or the income or profits derived therefrom, and the pursuit of such activities, even if competitive with the business of the Company, shall not be deemed wrongful or improper.

(see Verma Aff., 10/19/15, § 7.04[b]). There are no allegations that 462-470 obtained the loan from UBS through fraudulent means.

Here, Siras' dilemma is due to Reedrock's management structure set forth in Reedrock's operating agreement. It argues

that the stay is critical because Bifrost, itself, cannot interpose an answer in the foreclosure action. Bifrost's inability to do so, and by logical extension an inability placed upon Siras, is due to the fact that Reedrock's operating agreement requires 75% of its managers approve any action taken by Reedrock. As such, 75% of the managers of Reedrock would have to approve acting on Bifrost's behalf to interpose an answer in the foreclosure action, an unlikely event given that three of the five managers of Reedrock are defendants in the Siras action.

The management structure language is clear and unambiguous -- "[t]he Managers shall act jointly in all instances and all decisions and/or determinations of the Managers shall require the affirmative vote or consent of at least 75% of all of the Managers." Clearly, Siras is unable to obtain the requisite controlling percentage, and, as such, it cannot interpose an answer on behalf of Bifrost in the foreclosure action, and oppose that action.

Nonetheless, in maintaining that a stay is warranted, Siras relies on Ebc Amro Asset Mgmt. v Kaiser, 256 AD2d 161 (1st Dept 1998), Grand Pac. Fin. Corp. v 97-111 Hale, LLC , 123 AD3d 764 (2d Dept 2014) and 192 Sheridan Corporation v O'Brien, 252 AD2d 934 [3d Dept 1998]. Its reliance is unavailing. All three cases

are factually distinguishable from the case at bar because they involve the borrower or mortgagor challenging the lender or mortgagee's foreclosure on a mortgage in the foreclosure action itself. Here, by this stay application, Siras seeks to have this Court disregard the parties' agreed upon management structure in their operating agreement, and rewrite that provision so as to bestow on Siras contractual rights to participate in the foreclosure action that do not exist. The record fails to demonstrate any basis to provide such an extreme remedy (see Cambridge Petroleum Holdings, Inc. v Lukoil Americas Corp., 129 Ad3d 501, 502 [1st Dept 2015] ["That these restrictions leave plaintiff without a remedy is of no moment, as a party may not rewrite the terms of an agreement because, in hindsight, it dislikes its terms"] [citation omitted]).

Accordingly, that branch of the motion in the Siras action and the foreclosure action seeking a stay of the foreclosure action is denied.

Turning to that branch of 462-470's motion in the foreclosure action for an order, pursuant to CPLR 1003, to dismiss from this action and strike from the caption the fictitious defendants "John Does" #1 through #20 inclusive, it is granted.

As to that branch of the motion, pursuant to RPAPL § 1321, seeking a reference to a Referee, the only defendants to interpose opposition to 462-470's motion are Mutual, LLC, 554 West 38th Street, LLC, and Jacob I. Sopher a/k/a Hank Sopher (collectively, the "ROFR defendants"). The ROFR defendants interposed an answer in the foreclosure action (Sopher Aff., Exs. B and C). They claim that at the time UBS extended the loan and mortgage to Bifrost the ROFR defendants had a right of first refusal to any garage that may be built on the mortgaged premises. Counsel to the ROFR defendants, Robert T. Holland, raised this issue with counsel to 462-470, Janice Mac Avoy, by email on June 1, 2016 (Holland Affirm., ¶ 5). Mac Avoy responded to Holland "shortly after she received [his] letter" that 462-470 would evaluate the ROFR defendants' claim (Id., ¶ 6). Holland claims that he "heard nothing from Ms. Mac Avoy about either the substantive issues raised or the issue of adjourning [462-470's] motion" (id.), and, as such, interposed opposition to 462-470's motion on June 3, 2016 (NYSCEF Doc. Nos. 119 and 120). Subsequently, 462-470's counsel responded to Holland by email dated June 22, 2016, and agreed to dismiss the foreclosure action as to the ROFR defendants (Mac Avoy Affirm., 8/5/16, Ex. A). A draft stipulation of discontinuance was enclosed with the email

(Id.). Apparently, the ROFR defendants declined to sign the stipulation of discontinuance. Holland claims that the ROFR defendants incurred legal fees and costs in defending against 462-470's foreclosure action (Holland Affirm., ¶ 14). In a reply affirmation, Mac Avoy requests that this Court discontinue the foreclosure action as to the ROFR defendants pursuant to CPLR 3217(b) (Mac Avoy Affirm., 8/5/16, ¶ 13).

CPLR 3217(b) provides, in relevant part:

> Except as provided in subdivision (a) [not applicable herein], an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper.

Counsel's application for such substantive relief submitted on reply is not proper (CPLR 2211). Accordingly, that branch of 462-470's motion to refer this matter to a Referee is denied without prejudice to renew pending submission of a proper motion pursuant to CPLR 3217(b) to discontinue against the ROFR defendants, or a stipulation of discontinuance executed by all parties appearing in the action.

The Siras Action

Siras moves for leave to file and serve a second amended complaint ("SAC") to assert a claim for civil conspiracy against defendants 462-470, Dai, Dwyer, and Dai & Associates in the

seventh cause of action (Leyva Affirm., 7/7/16, Ex. J, SAC, ¶¶ 204-209). Leave to file an amended complaint is freely given unless there is prejudice or surprise to the defendant as a result of the delay in amending, "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v Odell, 96 AD3d 449 [1st Dept 2012] [internal quotation marks and citations omitted]).

While "New York does not recognize an independent cause of action for conspiracy to commit a civil tort ... [a]llegations of conspiracy are permitted ... to connect the actions of separate defendants with an otherwise actionable tort" (Abacus Federal Savings Bank v Lim, 75 AD3d 472 [1st Dept 2010] [internal quotation marks omitted]). In order to allege civil conspiracy, Siras must sufficiently allege a tort claim, and the following elements: "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (Id.).

The amended complaint presently sets forth causes of action for breach of fiduciary duty asserted by Siras, and derivatively, by Reedrock on behalf of Bifrost (second and fourth causes of action) against Dai, Dwyer, Dai & Associates, and others. The

proposed cause of action for civil conspiracy provides that defendant 462-470, an affiliate of defendant Kuafu, purchased the UBS loan as:

> part and parcel of a conspiracy with Kuafu and its principals designed to prevent UBS from extending the UBS Loan, unlawfully manufacture a supposed default, and acquire title to the Property free and clear of Siras's interest in the Project, all in furtherance of Kuafu and its principals' breach of their fiduciary duties to the Company.

(Leyva Affirm., 7/7/16, Ex. J, SAC, ¶ 205). The proposed SAC goes on to detail the acts and participation of the parties in furtherance of the alleged conspiracy to "acquire title to the Property free and clear of Siras' interest in the Project" (Id., ¶¶ 206-207).

Kuafu and D&A claim that the conspiracy allegations are conclusory and insufficient. Moreover, neither the amended complaint nor the proposed SAC sets forth a breach of fiduciary duty claim against defendant Kuafu or defendant 462-470. Kuafu argues that the operating agreement prohibits such a claim and points to the following provision of the operating agreement:

> Subject to the terms of this Agreement, the Managers shall serve as the managers of the Company with the right to bind the Company as permitted hereunder. No Member, in its capacity as a Member, shall have the authority to bind the Company. The Members, in exercise of their duties hereunder as Members, shall have no fiduciary duties towards each other, provided,

> however, nothing in this sentence shall limit the fiduciary duties any Members may have in its capacity as Manager.

(Verma Aff., 10/19/15, Ex. A, § 3.01(b) [emphasis in original]).

Contrary to Kuafu's argument, this provision does not prohibit all fiduciary duty claims. Notwithstanding this finding, Siras' proposed seventh cause of action is insufficiently pleaded. According to the amended complaint and the proposed second amended complaint, Kuafu was a main actor in Siras' allegations supporting any breach of fiduciary duty claims, yet there is no claim being asserted against Kuafu for breach of fiduciary duty. Also, Siras is not seeking to assert the conspiracy claim against Kuafu. Instead, the allegations set forth in the proposed seventh cause of action attempt to create a nexus between the actions of defendant 462-470 with an unpleaded underlying tort allegedly committed by Kuafu. As such, the proposed seventh cause of action is not sufficiently pleaded against defendant 462-470. Further, this proposed cause of action as against defendants Dai, Dwyer, and Dai & Associates is duplicative of the breach of fiduciary duty claims already asserted against these defendants.

Accordingly, that branch of Siras' motion for leave to serve a second amended complaint to assert a seventh cause of action for conspiracy is denied.

Turning to defendant Kuafu's cross motion to dismiss the amended complaint as to defendant 462-470, it is denied. Here, only the eight and ninth causes of action in the amended complaint are asserted against defendant 462-470. They both seek a declaratory judgment and a permanent injunction. Specifically, in the eighth cause of action, individual plaintiffs Sumaida and Verma seek to prevent 462-470 from enforcing the personal guarantees they executed in connection with the UBS loan (Amended Compl., ¶¶ 218-227). In the ninth cause of action, Siras seeks a judicial declaration that "462-470 is not entitled to exercise or attempt to exercise any of the lender's default remedies under the UBS Loan against [Bifrost]" and injunctive relief to enjoin "462-470 from exercising or attempting to exercise any of the lender's default remedies under the UBS Loan against [Bifrost]" (Amended Compl., Request for Relief, ¶¶ ix and x).

Although Siras does not have the authority to defend the foreclosure action given that it does not appear to have the requisite seventy-five percent interest to exert managerial control, that does not mean that it is barred from asserting direct claims in this action for declaratory and injunctive relief against defendant 462-470 to protect its purported interest in the property.

Nonetheless, Kuafu argues that the amended complaint should be dismissed as against defendant 462-470 because there are no substantive claims asserted against defendant 462-470. This argument is unavailing. Here, in this action, Siras asserts substantive claims against Kuafu and its principals which, in part, concern defendant 462-470's acquisition of the UBS loan. And, significantly, in defendant Dai's own words, defendant 462-470 is "an affiliate controlled by two of Kuafu's three members" (Dai Aff., 8/12/16, ¶ 29), whose members are defendants in this action. The cases relied upon by Kuafu to support its argument are factually distinguishable from the case at bar. Those cases involve dismissal of all the substantive claims that formed the basis for the declaratory and injunctive reliefs (see Canestaro v Raymour and Flanigan Furniture Co., 42 Misc 3d 1210(A) [Sup Ct, Erie County 2013]; Held v Macy's Inc., 25 Misc 3d 1219(A) [Sup Ct, Westchester County 2009]). Here, unlike Canestaro and Held, Siras' substantive claims, namely, allegations of wrongful conduct perpetrated by Kuafu and D&A, remain, and, as such, form the basis for the declaratory and injunctive reliefs sought against defendant 462-470.

Accordingly, it is hereby

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Mtn Seq. Nos. 001 & 002

ORDERED that Siras' motions under Index Nos.: 650868/2015 (mtn seq. no. 007) and 850216/2015 (mtn seq. no. 002) are denied in their entirety; and it is further

ORDERED that the cross motion by Kuafu, 462-470, Dai, Shan, and Yuan under Index Nos.: 650868/2015 (mtn seq. no. 007) and 850216/2015 (mtn seq. no. 002) to dismiss the amended complaint against 462-470 11th Avenue LLC is denied; and it is further

ORDERED that 462-470 11th Avenue LLC's motion under Index No.: 850216/2015 (mtn seq. no. 001) is granted to the extent of dismissing from this action and striking from the caption the fictitious defendants "John Does" #1 through #20 inclusive, and amending the caption accordingly, and is otherwise denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/29/17

HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.