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SHORT FORM ORDER

INDEX No. 11-9188

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 4-18-12 (#001)
MOTION DATE 5-24-11 (#002)
ADJ. DATE 10-3-12
Mot. Seq. # 001 - MD
002 - MD

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INCORPORATED VILLAGE OF MASTIC BEACH,

Plaintiff,

- against -

MASTIC BEACH PROPERTY OWNERS ASSOCIATION, INC.,

Defendant.

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Upon the following papers numbered 1 to 59 read on this motion for the appointment of a receiver/preliminary injunction and cross motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 37 - 47 ; Answering Affidavits and supporting papers 13 - 15, 50 - 51 ; Replying Affidavits and supporting papers 18 - 29, 53 - 54 ; Other sur-reply 31 - 36, 57 - 58; memoranda of law 16 - 17, 30, 48 - 49, 52, 55 - 56, 59; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for the appointment of a receiver of the real property currently owned by the defendant and to manage the defendant's operations in the maintenance, administration, collection of rentals and other income relating thereto while this action is pending, for a preliminary injunction enjoining the defendant until the determination in this action from 1) taking any action regarding monies collected from the fees, income, revenues or rental of said property; 2) accepting any fees, income, revenues or rental derived from said property and disbursing same; and 3) assigning, mortgaging, pledging, leasing, or taking any action affecting or encumbering the title, use, status and possession of said property, and for an order directing the defendant to account to the Court and the plaintiff for all monies generated from said property, is denied; and it is further

ORDERED that the cross motion by the defendant for an order pursuant to CPLR 3211 (a) (1), (5), and (7) dismissing the complaint or, in the alternative, dismissing the complaint pursuant to CPLR

3211 (c), on the grounds that it is entitled to judgment as a matter of law in accordance with RPL 345 and/or EPTL 9-1.1, is denied.

This is an action to enforce the provisions in a deed dated July 30, 1940 and recorded on August 9, 1940 (the deed), in which the grantor conveyed certain real property (the property) to the defendant which, upon the formation of an incorporated village of Mastic Beach, was to be conveyed or dedicated by the defendant to said village. It is undisputed that the plaintiff was incorporated on September 16, 2010 as the Incorporated Village of Mastic Beach (plaintiff or Village). Thereafter, the plaintiff made a written request to the defendant to transfer title to the property to the Village, which was rejected. By letter dated January 21, 2011, the plaintiff demanded that the defendant deliver an executed deed and transfer documents sufficient to transfer title to the Village. The defendant has failed to do so. The plaintiff then commenced this action seeking to enforce its rights under the deed.

The plaintiff alleges that the property generally consists of waterfront parcels in the Village on which docks and piers and two marinas are located, that the defendant has rented the docks and piers generating approximately $500,000.00 per year, and that the defendant has improperly retained the revenues generated since September 16, 2010. The plaintiff also alleges that the defendant is not using the property in the manner contemplated by the deed, is using the property and revenues generated therefrom for its own uses without regard to its obligation to transfer the title to the Village, and is wasting the property and revenues.

The plaintiff now moves by order to show cause for the appointment of a receiver, a preliminary injunction, and an order directing the defendant to account for all monies generated from the property. In support of its motion, the plaintiff submits, among other things, a copy of the complaint, a copy of the deed, the affidavit of its mayor, and correspondence between the parties. In his affidavit, Paul Breschard swears that he was elected the first mayor of the newly formed village on November 22, 2010, that the Village requested that the defendant transfer the property to it after its incorporation, and that the defendant has refused to transfer the property. He states that the defendant has breached its obligations with respect to the deed, that the defendant has collected revenues which belong to the Village, and that the defendant is a not-for-profit corporation which is required to use the property for the residents of the Village of Mastic Beach. He further swears that the defendant's "improper use and wasting of the [property] and the [defendant's] exclusive use of the [property] and [revenues]," and the denial of access to all the residents of the Village will cause irreparable harm.

In considering that branch of the plaintiff's motion which seeks the appointment of a receiver, the Court notes that the defendant objects to the plaintiff's submission of a reply which expands on its allegation that the property is being "wasted" or materially injured by submitting additional affidavits, and the plaintiff objects to the defendant's submission of a sur-reply to rebut those affidavits. However, the Court finds that both the reply and sur-reply submitted do not add any new legal arguments or raise additional issues. Both sets of papers merely expand upon, or refute, facts raised in the initial papers submitted in support of and in opposition to the plaintiff's motion, and both parties have had an ample opportunity to respond to the other. Thus, the Court will exercise its discretion and consider both the reply and sur-reply in deciding these motions (see ***Bayly v Broomfield***, 93 AD3d 909, 939 NYS2d 634 [3d Dept 2012]; ***Whale Telecom Ltd. v Qualcomm Inc.***, 41 AD3d 348, 839 NYS2d 726 [1st Dept

2007]; ***Allstate Ins. Co. v Raguzin***, 12 AD3d 468, 784 NYS2d 644 [2d Dept 2004]; ***Barbuto v Winthrop Univ. Hosp.***, 305 AD2d 623, 760 NYS2d 199 [2d Dept 2003]).

CPLR 6401, entitled "Appointment and powers of temporary receiver" provides : "Upon motion of a person having an apparent interest in property ... a temporary receiver of the property may be appointed ... where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." However, "[t]he appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits" (***Vardaris Tech, Inc. v Paleros Inc.***, 49 AD3d 631, 632, 853 NYS2d 601 [2d Dept 2008] [internal quotation marks omitted]; *see* ***Quick v Quick***, 69 AD3d 828, 829, 893 NYS2d 583 [2d Dept 2010]; ***Schachner v Sikowitz***, 94 AD2d 709, 462 NYS2d 49 [2d Dept 1983]). Thus, a temporary receiver should only be appointed where there is a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect a party's interests in that property (*see* ***Quick v Quick***, *supra*; ***Vardaris Tech, Inc. v Paleros Inc.***, *supra*; ***Singh v Brunswick Hosp. Ctr.***, 2 AD3d 433, 767 NYS2d 839 [2d Dept 2003]; ***Schachner v Sikowitz***, *supra*).

The defendant contends that the plaintiff's initial submission fails to establish its entitlement to the appointment of a receiver herein. In response to the defendant's opposition, the plaintiff submits a reply which includes the affidavits of two village officers and three nonparty witnesses. In his affidavit, Gary Stiriz (Stiriz) swears that he is the deputy mayor of the Village, that he witnessed the defendant removing "stick docks" from the property which were in good condition, and that the defendant did not have permits from the New York State Department of Environmental Conservation (DEC) or the Village to remove those docks. He further states, among other things, that the defendant has driven heavy machinery over the wetlands, erected a dangerous barrier across one of the access roads to the property, and "rejected applications and restricted entry by residents of the Village." In his affidavit, Timothy Brojer swears that he is the Village Administrator, that he witnessed the removal of the same stick docks as Stiriz, and that the DEC issued tickets to the defendant for work outside the scope of a permit and for driving machinery over wetlands.

In the case of both of these affidavits, the Court finds that the plaintiff has failed to establish its entitlement to the appointment of a receiver. Despite the testimony of the two affiants, there has not been a showing that the alleged activities pose a significant threat to the property, or would otherwise result in the "danger that the property will be removed from the state, or lost, or materially injured or destroyed" (CPLR 6401 [a]). In addition, there is no evidence to support the allegations that the defendant has undertaken work without the necessary permits, or that the defendant has been cited for the violation of any state or local law. The affidavits of the three nonparty witnesses are conclusory and otherwise do not establish that the defendant is materially injuring or destroying the property. In his affidavit, nonparty Frank Fugarino, swears that a review of the defendant's applications to the DEC for permits reveals that the number of docks permitted has dropped significantly over the years. It is undisputed that the DEC has jurisdiction over the wetlands on the property. There is nothing in said affidavit, or its exhibits, which indicates the reasons for said decline in the number of docks permitted on the property, that the decline can be attributed to any wrongful conduct by the defendant, or that the DEC has objected to any of the defendant's activities on the property.

Here, the plaintiff has failed to make a clear evidentiary showing of the necessity for the conservation of the property at issue and the need to protect the interests of the plaintiff (*see* ***Hoffman v Hoffman***, 81 AD3d 601, 916 NYS2d 145 [2d Dept 2011]; ***Quick v Quick***, *supra*; ***Rahman v Park***, 63 AD3d 812, 880 NYS2d 704 [2d Dept 2009]). Accordingly, that branch of the plaintiff's motion which seeks the appointment of a receiver is denied.

To be entitled to a preliminary injunction, the moving party has the burden of demonstrating (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6301; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 552 NYS2d 918 [1990]; ***Dixon v Malouf***, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; ***Coinmach Corp. v Alley Pond Owners Corp.***, 25 AD3d 642, 808 NYS2d 418 [2d Dept 2006]). The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*see* ***Dixon v Malouf***, *supra*; ***Ruiz v Meloney***, 26 AD3d 485, 810 NYS2d 216 [2d Dept 2006]; ***Ying Fung Moy v Hohi Umeki***, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see* ***Dixon v Malouf***, *supra;* ***Ruiz v Meloney***, *supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (***Blueberries Gourmet v Aris Realty Corp.***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]; *see* ***Hoeffner v John F. Frank, Inc.***, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]; ***Peterson v Corbin***, 275 AD2d 35, 713 NYS2d 361 [2d Dept 2000]; ***Nalitt v City of New York***, 138 AD2d 580, 526 NYS2d 162 [2d Dept 1988]).

Applying these principles here, the Court finds that the plaintiff has not sufficiently demonstrated its entitlement to injunctive relief pending the determination of the action (*see* CPLR 6301; ***Winchester Global Trust Co. Ltd v Donovan***, 58 AD3d 833, 873 NYS2d 130 [2d Dept 2009]). First, the likelihood of success on the merits has not been demonstrated regarding its cause of action seeking to enforce its claim to the property pursuant to RPAPL Article 15, or its remaining causes of action for declaratory judgment, trespass, and permanent injunction.

The Village contends that there is no question that the defendant is required to convey title to and deliver possession of the property to it. It is undisputed that the property was granted to the defendant in the deed, which includes the following provision:

> Upon the formation of an incorporated village of Mastic Beach, the grantee Association agrees that it will convey or dedicate without consideration to the said Village, such part of the within described property as may be included within the described corporate limits of such Village, subject to a covenant and agreement, however, that any premises so conveyed will be kept and maintained for the use and benefit of the residents of such Village.

However, as discussed more fully below, there are issues of fact which have not been resolved, and questions of law which have not been addressed by the parties, whether the subject provision violates the rule against perpetuities, and whether the provision should be deemed a condition

subsequent, a restrictive covenant, or a vested/unvested future interest in the property. A review of the motion and cross motion reveals that there are issues and legal arguments which must be resolved in the Village's favor to enable it to succeed in its action, and that the Court is not able to state that the Village is likely to succeed therein. In addition, the Village has not demonstrated irreparable injury in the absence of a preliminary injunction herein. It is undisputed that the defendant has functioned for approximately 70 years. Moreover, there is no evidence that the defendant is in financial difficulty or that the Village cannot be compensated by a money judgment should it succeed in its action. Although the Village contends that it seeks to protect the revenues "wrongfully" retained by the defendant since the Village's incorporation on September 16, 2010, again, there is no evidence that those funds have been, or are in danger of being, misused or dissipated. Finally, while it might appear that the equities would favor a more expansive use of the property, it remains the fact that the defendant is an ongoing not-for-profit corporation, and that there has been no determination by a court of competent jurisdiction divesting it of title to the property.

In light of the issues of fact and questions of law remaining, the Court finds that the Village's request for an order directing the defendant to account to the Court and the Village for all revenues generated by the property is premature. Accordingly, the Village's motion is denied in its entirety.

The defendant cross-moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (5), and (7) or, in the alternative, asking the Court to treat its cross motion as a motion for summary judgment pursuant to CPLR 3211 (c) and to dismiss the complaint pursuant to RPL 345 and/or EPTL 9-1.1. Addressing those branches of the defendant's motion which seek dismissal of the complaint based on documentary evidence (CPLR 3211 [a] [1]) and on statute of limitations grounds (CPLR 3211 [a] [5], the Court notes that the motion, having been made subsequent to service of the answer, erroneously seeks relief under CPLR 3211 and should have been brought under CPLR 3212. Both of the cited grounds are not permissible grounds for a post-answer motion to dismiss (*see* CPLR 3211 [e]). Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211 [c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Hopper v McCollum***, 65 AD3d 669, 885 NYS2d 304 [2d Dept 2009]; ***Myers v BMR Bldg. Inspections, Inc.***, 29 AD3d 546, 814 NYS2d 686 [2d Dept 2006]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]). Here, upon review of the papers, it cannot be said that the parties have deliberately charted such a course. In addition, the Court finds that both grounds for dismissal depend for their success on a determination of the issues of fact and questions of law yet to be determined in this action. Specifically, the application of the rule against perpetuities under the facts of this case, as discussed below.

Pursuant to CPLR §3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471,

764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v. Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]). Here, a review of the complaint reveals that the Village has plead cognizable causes of action seeking a determination of its rights, title and interests in the property and the revenues generated therefrom. Accordingly, those branches of the defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) are denied.

The Court now turns to that branch of the defendant's motion which seeks to dismiss the complaint pursuant to CPLR 3211 (c), on the grounds that it is entitled to judgment as a matter of law in accordance with RPL 345 and/or EPTL 9-1.1. Here, it cannot be said that the parties have deliberately charted a summary judgment course regarding the cited statutes, and the Court finds that it is inappropriate to treat the cross motion as one for summary judgment, even upon adequate notice. Discovery has yet to commence in this action and the parties have not adequately briefed the legal issues raised in this action. The defendant contends that the subject provision in the deed is a condition subsequent subject to the rule against perpetuities as codified in EPTL 9-1.1. The Village contends that said provision is a restrictive covenant which is not subject to EPTL 9-1.1. However, the parties do not address the legal issues as they pertain to this conveyance made in 1940. EPTL 14-1.1 makes the application of the current rule against perpetuities prospective only; therefore, the rule cited does not apply to transfers before September 1, 1958. In addition, whether an instrument creates a condition or a covenant depends upon the intention of the parties and the surrounding circumstances (***Post v Weil***, 115 NY 361, 22 NE 145 [1889]; ***Grand Union Co. v Cord Meyer Dev. Co.***, 761 F2d 141 [2d Cir. 1985]; Stillwell v Morley, 26 AD2d 740, 272 NYS 2d 193 [3d Dept 1966]; ***Carruthers v Spaulding***, 242 AD 412, 275 NYS 37 [4th Dept 1934]). There are issues of fact, and questions of law which have not been briefed, regarding the intent of the parties to the deed, the law to be applied to the conveyance, and whether the Village's interest might have vested at some time prior to its being subject to the applicable rules against unreasonable restraint on alienation and remote vesting. In addition, the parties have not adequately addressed the fact that the Village is a municipal corporation, and the fact that the conveyance as well as the Village's purported interest in the property may well be considered as having been made for "benevolent" purposes.

Finally, the parties have not addressed whether the subject deed provision provides for a right of reentry or possibility of reverter in the Village. RPL 345 provides, in pertinent part:

> 1. Except as provided in subdivision eight of this section, a condition subsequent or special limitation restricting the use of land and the right of entry or possibility of reverter created thereby shall be extinguished and become unenforceable, either at law or in equity ... unless within the time specified in this section a

> declaration of intention to preserve it is recorded as provided in this section ...
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> * * *
>
> 8. This section shall not apply where the condition subsequent or special limitation was created in favor of (a) the United States, the state of New York, or any governmental subdivision or agency of the United States or of the state of New York ...

The Court deems it unwise to make a determination as to the applicability of this statute, or the exception included therein, without the benefit of adequate discovery on the issues, and further briefing of the applicable law. Accordingly, the defendant's cross-motion is denied in its entirety.

Dated: 1/9/13

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**