

Lavi v Assa
2017 NY Slip Op 31241(U)
June 8, 2017
Supreme Court, New York County
Docket Number: 651982/2016
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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ABRAHAM LAVI,

Plaintiff,

-against-

SALIM ASSA, BEN SUKY a/k/a BEN ZION SUKY,
ASSA PROPERTIES INC., WEST 46th STREET
INVESTORS LLC, and WEST 46th STREET
MANAGEMENT CORP.,

Defendants.

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DECISION AND ORDER

Index No. 651982/2016

Mot. Seq. Nos. 001, 002

Hon. James E. d'Auguste

Motion Sequence Nos. 001 and 002 are consolidated for the purposes of disposition. In Motion Sequence No. 001, plaintiff Abraham Lavi (“Lavi”) moves, by order to show cause dated April 14, 2016, for an order, pursuant to CPLR 6301, enjoining defendants Salim Assa (“Assa”), Ben Suky a/k/a Ben Zion Suky (“Suky”), Assa Properties Inc. (“Assa Properties”), West 46th Street Investors LLC (“West 46th LLC”), and West 46th Street Management Corp. (“West 46th Corp.”) (collectively, “defendants”) from selling, transferring, or hypothecating the premises located at 334-336 West 46th Street, New York, New York (the “property” or “subject property”) without Lavi’s consent and, pursuant to CPLR 6401, appointing a temporary receiver for West 46th LLC and West 46th Corp. during the pendency of this action. In Motion Sequence No. 002, Lavi again moves, by order to show cause dated March 29, 2017, for an order, pursuant to CPLR 6401, appointing a temporary receiver for West 46th LLC and West 46th Corp. Motion Sequence No. 002 is essentially a supplement to Motion Sequence No. 001, which was under consideration by this Court for a significant period of time. For the reasons stated herein, Motion Sequence Nos. 001 and 002 are granted.

Factual and Procedural History

On or about April 10, 2012, Direct Realty, LLC (“Direct Realty”) commenced a Chapter 11 bankruptcy proceeding, pursuant to 11 U.S.C. 101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York (Case No. 12-11483) (the “Bankruptcy Proceeding”). Lavi alleges that Suky, on behalf of Direct Realty, signed the petition in the Bankruptcy Proceeding and represented that he would be operating the subject property during said proceeding.¹ Direct Realty’s sole asset was the subject property, which consisted of two adjoining four-story mixed-use, walk-up buildings and a large amount of unused development rights. As approved by the Bankruptcy Court, the minimum bid for the property was \$9,000,000.

In or about June 2013, Assa allegedly contacted Lavi about jointly purchasing the property. There is a sharp dispute regarding the terms of the contemplated purchase of the subject property. It was originally proposed in a signed offer sheet, dated July 31, 2013, that a limited liability company, with a corresponding operating agreement, would be created for the purpose of purchasing the property (the “LLC”). NYSCEF Doc. No. 11. The terms of the offer sheet state that Lavi will pay “\$1,250,000 for a 20% equity interest in the property. Mr. Lavi will own a 20% equity Member Interest in the newly-formed

¹ Suky’s affidavit filed in the Bankruptcy Proceeding admits that he is the sole member of Direct Realty, the debtor, that filed the Chapter 11 proceeding relating to the property and “fell behind on mortgage payments following the 2008 economic crisis and cash flow problems.” NYSCEF Doc. No. 7, ¶¶ 1-3, 9. He also admits that there is a first mortgage claim on the property in the amount of approximately \$4,000,000, that the property is subject to a foreclosure judgment in favor of the second mortgagee in the amount of approximately \$1,800,000, and that there is a third mortgage claim on the property in the amount of approximately \$4,000,000. *Id.*, ¶¶ 6-7. Further, Suky swore, under penalty of perjury, that he would be responsible for management of the property during the Bankruptcy Proceeding. *Id.*, ¶ 15. Further, in his own affidavit, Assa admits that more than 80% of the equity interest in the property belongs to him and his brother, despite also admitting that Lavi has some unquantified equity interest in the property. NYSCEF Doc. No. 42, ¶¶ 11-12. Further, the documents submitted in support of Lavi’s motion showing the transfer of equity ownership, namely: the Agreement of Purchase and Sale of Company Interest, the Assignment and Assumption Agreement, and the Irrevocable Proxy Agreement, all dated November 5, 2015, are indicative of some suspicious transaction. NYSCEF Doc. Nos. 55-57. Furthermore, the text messages from Lavi to Suky, as related to Lavi’s failed attempt to sell the property, indicate that Suky had some involvement in the management or ownership of the property despite Lavi’s intent to exclude Suky from the joint venture to purchase the property. NYSCEF Doc. Nos. 17-19.

single purpose limited liability company which will own 100% of the Property.” *Id.* at 1. In exchange for the remaining 80% membership interest, Assa would advance at least \$2,750,000 as an equity contribution, be responsible for a \$5,000,000 mortgage on the subject property, and have day-to-day management responsibilities. *Id.* The signed offer sheet specifically states that the funding for the purchase of the Property would occur as follows:

\$760,000.00 due from Mr. Lavi upon execution hereto to be held in escrow by Seller’s attorneys . . . as part of the downpayment towards the Purchase Price of the Property pending acceptance by the [Bankruptcy] Court and closing on the acquisition of the Property.

Assa Properties, Inc., or an affiliate (“Assa”) will be responsible for the payment balance of the Purchase Price of the Property and for the closing of a mortgage loan on the Property in the amount of \$5,000,000.

Id. With respect to the daily management of the property, the terms of purchase in the offer sheet state that “[a]ll management of the Property, and day-to-day operations, shall be the sole responsibility of Assa, Manager of the limited liability company that owns the Property. . . . Assa will report operations and financial information to Mr. Levi [sic] twice a year, and will supply tax information after the close of each year.” *Id.* The offer sheet provided each party with a right of first offer and right of first refusal. *Id.* at 2. The rights of first refusal and first offer paragraph states: “Either party shall have the right of first offer and the right of first refusal. Except, Assa shall be permitted to transfer among its family members and affiliated entities.” *Id.*

Lavi claims that he insisted Suky not have any involvement in this joint venture because of numerous lawsuits against him arising from failed real estate deals,² including the fact that Suky had

² The Court takes judicial notice of the other actions in which Suky is currently or has been a defendant, which include: *Board of Members of Cielo Condominium v. Suky*, Index No. 154206/2013 (Sup. Ct. N.Y. County) (judgment by confession of \$56,478.71 entered May 7, 2013); *Segev v. Cohen et al.*, Index No. 850039/2014 (Sup. Ct. N.Y. County) (Mendez, J.) (residential mortgage foreclosure action); *122 East 58th Funding LLC v. Israel et al.*, Index No. 650973/2014 (Sup. Ct. N.Y. County) (Scarpulla, J.) (commercial mortgage foreclosure action). There is also a separate nuisance action before the undersigned regarding the alleged improper use of the subject property, along with a second property, as an illegal hotel. *City of New York v. NYC Midtown LLC et al.*, Index No. 450151/2015 (Sup. Ct. N.Y. County) (the “City Action”). Additional lawsuits alleging fraud and Suky’s improper use of other properties for the

previously mismanaged the subject property, forcing it into bankruptcy in the first place. Suky is also involved in two other bankruptcy proceedings concerning real property: *In re Madison Hotel, LLC*, Case No. 11-1256 (Bankr. S.D.N.Y.), and *In re East 81st, LLC*, Case No. 13-13685 (Bankr. S.D.N.Y.). Moreover, Suky, an estate fiduciary for Direct Realty, represented to the Bankruptcy Court that the purchaser of the property was a “non-insider unrelated to the Debtor.” NYSCEF Doc. No. 4, ¶ 17.

Lavi asserts that, while the parties allegedly continued to negotiate the terms of their agreement, he provided \$1,100,000 as an equity contribution towards purchasing the property, with the remainder to follow. Lavi contends that the transaction was restructured so that the property would be purchased as an all-cash deal. Lavi claims that at an auction on August 1, 2013, Assa Properties, an entity owned and managed by Assa, purchased the property for \$9,500,000, with Suky, unbeknownst to him, allegedly operating behind the scenes to direct the purchase of the property. Lavi asserts that, on December 24, 2013, Direct Realty gave a quitclaim deed for the property to West 46th LLC, an entity in Assa’s exclusive control. Lavi further alleges that, as a part of the purchase of the subject property, West 46th LLC took out an \$8,500,000 mortgage on the property with Cantor Commercial Real Estate Lending, L.P. (the “mortgage”) on that same day, securing the subject property without his knowledge or consent. Lavi asserts that the mortgage was executed on behalf of West 46th LLC by its “Managing Member” West 46th Corp., an entity also within Assa’s exclusive control that has a 1% interest in West 46th LLC, and was signed by Ezak Assa, Salim Assa’s brother, as an authorized person. NYSCEF Doc. No. 15. Lavi contends that the real world implications of Assa’s renegeing on the parties’ joint venture is that he is the

purpose of operating illegal hotels include *The City of New York v. US Suite Management LLC et al.*, Index No. 450084/2015 (Sup. Ct. N.Y. County) (Ramos, J.) (operation of illegal short-term hotels constituting public nuisances), and *U-Trend New York Investments L.P. v. US Suite LLC et al.*, Index No. 652082/2014 (Sup. Ct. N.Y. County) (Ramos, J.) (where a temporary receiver was appointed to manage a property allegedly used as an extended-stay hotel), the latter of which contains facts similar to those alleged in the instant litigation, such that a property managed by Suky was subject to related bankruptcy proceedings and eventual default under the terms of the mortgage.

only person who advanced funds in the transaction and that Assa essentially used Lavi's money as leverage to secure the mortgage, such that he is being wrongfully deprived of his ownership interest in the property.³

Assa then allegedly turned over day-to-day control of the property to Suky and his brother, Eran Suki, who operated the property as an illegal hotel. Lavi asserts that the property has received numerous violations from the New York City Department of Buildings ("DOB") and has incurred thousands of dollars in civil penalties that are still unpaid, none of which Lavi had been informed. Lavi further claims that, unbeknownst to him at the time, in November 2015, Assa entered into several agreements with Meital Suky, Suky's wife, and another individual named Michael Herskowitz ("Herskowitz"), an attorney who was recently indicted in a real estate scheme targeting the elderly and allegedly paid a fine for his role in a similar mortgage relief scam in Florida. *See* NYSCEF Doc. No. 75.⁴ Pursuant to said agreements, Assa allegedly sold a 49% equity interest in West 46th LLC by an "irrevocable proxy" to Suky's wife and Herskowitz for approximately \$1,000,000. *See* NYSCEF Doc. Nos. 55-57. At the time, Lavi claims that

³ Lavi asserts that, because he "contributed 100% of the equity necessary to acquire the Property, and then had his equity leveraged in order to acquire the Mortgage, Lavi is the one-hundred percent (100%) owner of the Property, or the 100% membership interest holder of West 46th LLC." NYSCEF Doc. No. 4, ¶ 31.

⁴ During the time period prior to filing Motion Sequence No. 002, again seeking a temporary receiver, Herskowitz was indicted and arrested in Queens for his role in a real property deed theft scheme, in which he and others stole homes of elderly individuals. *Id.* According to a press release issued by the Queens County District Attorney's Office, dated March 1, 2017, Herskowitz was charged with "second-degree larceny, second-degree criminal possession of stolen property, fraudulently obtaining a signature and first-degree scheme to defraud. If convicted, [Herskowitz] faces up to 15 years in prison." *Id.* at 3. The press release states that Herskowitz and the other indicted individuals were charged "with preying on New York City homeowners in financial distress and defrauding them into signing over their properties." *Id.* at 1. Further, the press release contains the following statement from Queens District Attorney Richard A. Brown:

Instead of tossing the victims a lifeline, half of whom were elderly individuals, the defendants are accused of creating a financial nightmare for the homeowners and placing them in worse financial situations than when first contacted by the defendants. As a result of the alleged fraudulent deed transfer scheme, the homeowners are no longer the titled owners of their own properties and therefore cannot move toward a resolution with their own mortgage companies. In each case, the homeowner must retain a real estate attorney to have the fraudulent deed reversed, resulting in additional financial hardships on them.

Id.

Assa represented to Suky's wife and Herskowitz that Lavi's equity investment was an interest-free loan. As a result of this alleged transfer, an entity controlled by Suky's wife holds an irrevocable proxy over West 46th Corp.'s 1% interest in West 46th LLC, such that she is now the managing member of the entity that holds the property. Lavi asserts that, while this transaction occurred, Suky transferred significant funds to West 46th LLC. Further, Lavi claims that the transfer of interest to Suky's wife violated certain provisions of the mortgage on the property, resulting in a default. Specifically, Section 3.8 of the mortgage dated December 24, 2013 reads as follows:

Borrower shall not change . . . Borrower's corporate, partnership or other structure without notifying Lender of such change in writing at least thirty (30) days prior to the effective date of such change and, in the case of a change to Borrower's structure, without first obtaining prior written consent of Lender.

NYSCEF Doc. No. 63. Further, Section 12(d) of the Gap Mortgage, which is incorporated by reference into the mortgage (*id.*, § 3.2), states that a default occurs "if any material representation or warranty of Mortgagor . . . made herein . . . shall have been false or misleading in any material respect when made." NYSCEF Doc. No. 64.

In or about March 2016, Lavi claims to have learned of a potentially imminent sale of the property. Suky and Assa allegedly admitted to an attempted sale of the property and offered to return Lavi's \$1,100,000 equity contribution, depriving him of the proceeds of any such sale and his ownership interest in the property, despite the fact that his own equity interest was leveraged to obtain the \$8,500,000 mortgage to purchase the property in the first place. Additionally, Lavi asserts that the DOB has continued to issue violations against the property for conducting construction or renovation work without required permits and additional violations on the ground that Assa is permitting the property to function as an illegal hotel. NYSCEF Doc. No. 65. By interim order dated November 3, 2016, this Court ordered that the temporary restraining order, as set forth in Lavi's order to show cause in Motion Sequence No. 001,

shall remain in effect pending the determination of the instant motion, or until the Court directs an evidentiary hearing, pursuant to CPLR 6312(c). NYSCEF Doc. No. 67.⁵

To the contrary, Assa contends that West 46th LLC is the title owner of the property and that the members of West 46th LLC, at all relevant times, were West 46th Corp., the managing member of West 46th LLC, and non-party West 46th Street Equity LLC (“West 46th Equity”). NYSCEF Doc. No. 42, ¶¶ 3-4. Assa asserts that, in the summer of 2013, he attempted to acquire the property, which was in bankruptcy at the time. *Id.*, ¶ 5. Assa states that Lavi contacted him and asked him to participate in the acquisition of the property, such that the parties agreed to the terms in the signed offer sheet (NYSCEF Doc. No. 11). NYSCEF Doc. No. 42, ¶ 5. As stated in the signed offer sheet, Assa asserts that “regardless of any other details,” the property would be acquired by the LLC, which was important with respect to “limited liability, but also as this bankruptcy-remote, single purpose entity would be a necessary condition for the contemplated financing for the mortgage lender to fund the close of title, with title vested 100% solely in this [LLC], not in any joint tenancy, general partnership nor joint venture.” *Id.*, ¶ 6. While Assa has handled dozens of real estate transactions, he claims that he has never entered into an all-cash transaction. *Id.*, ¶ 8.⁶ Assa further asserts that since “Plaintiff had no management experience, he wanted

⁵ A temporary receiver is similarly sought by the City of New York (the “City”) in the related City Action before the undersigned in Motion Sequence No. 007. *See n. 2, supra.*

⁶ Assa, in his affirmation, specifically states the following:

As an experienced real-estate investor with more than 20 years of real estate acquisitions, sales and management, including three hotels in Midtown, construction of two major condominium buildings in midtown Manhattan as well as other residential and commercial properties, I know the importance of having the correct amount of mortgage financing to any deal. I would never attempt to close any acquisition unless the mortgage financing was correct both as to principal amount and payment terms and conditions. We never negotiated or agreed upon an “all-cash deal” with Plaintiff.

Id. He further affirms that “[i]ndeed, in my more than 20 years of experience as a real estate investor, which has involved dozens of purchases and sales of commercial and residential buildings, I have never entered into an all-cash transaction to purchase commercial real estate.” *Id.*, ¶ 16. Moreover, he affirms that “[a]t no point in time did I ever discuss with Plaintiff or commit to Plaintiff that the Property would be acquired on an all-cash basis.” *Id.*

me to manage the Property. Here, I was to manage the Property for a 5% fee and Plaintiff was to be a 'silent partner' minority investor with a 20% member equity interest. I, or my affiliates, would then have the 80% balance of the equity." *Id.*, ¶ 9.

As stated above, a contract of sale was executed with the seller of the property and the Bankruptcy Court approved the sale in October 2013. *Id.*, ¶ 10. Before the closing on the property took place, the necessary entities to close the mortgage loan and take title were formed: West 46th LLC was created as the single-purpose entity holding title, the LLC; West 46th Corp. was created as the managing member with a 1% interest in West 46th LLC and West 46th Equity to hold the 99% member interest in West 46th LLC. *Id.*, ¶ 11. Assa states that his brother, Ezak Assa, and himself each held 50% member interests in West 46th Equity. *Id.*

In December 2013, the closing of the mortgage loan and the transfer of title took place. *Id.*, ¶ 12. Assa asserts that, despite Lavi having provided him "with information as to the closing, its funding, costs and expenses" in advance of the closing taking place, Lavi "releged on his promise to fund \$1,250,000 for the closing." *Id.* Assa alleges that Lavi only contributed \$1,100,000 to the purchase of the property, which "forc[ed Assa] to make up the balance" as all funding was required to be provided in order to close on the property. *Id.* Assa states that "[t]he cash funding [he] raised for the closing was some \$1,223,314.90 along with being liable (with Ezak Assa) under the guarantee for the entire \$8,500,000 mortgage loan (under the conditions stated therein), making [them] solely responsible for more than 85% of the purchase price of the Property." *Id.*

Assa claims that, prior to and after the closing of the property, he provided Lavi with a draft closing statement, a final closing statement, and other documentation relating to the funding, costs, and expenses for the purchase of the property. *Id.*, ¶ 13; *see* NYSCEF Doc. Nos. 46-47. Assa asserts that his contribution of \$1,223,314.90 "is clearly shown in the closing statement given to Plaintiff which Plaintiff apparently forwarded to his prior counsel, Edward Feldman, Esq." NYSCEF Doc. No. 42, ¶ 13; *see* NYSCEF Doc. No. 48. Assa further claims that he "had much communication with Plaintiff's prior

counsel, Mr. Feldman, in January and February of 2014” and in that correspondence, “it was made clear that Plaintiff *knew* that [he] had procured a mortgage to purchase the Property.” NYSCEF Doc. No. 42, ¶ 14. Assa states that Lavi “never expressed to [him] any problem or objection with the mortgage financing” and that if Lavi “had an issue with this mortgage, surely his attorney, Mr. Feldman, would have raised it,” but “[h]e did not.” *Id.* Assa also claims that, “despite Plaintiff’s knowledge of the mortgage from at least January of 2014, it appears that the first time he raises the issue is with this filing, nearly two and one-half years after the fact[.] Indeed, not only was Plaintiff aware of the mortgage, he was pleased that the sole guarantors of that mortgage were [Assa] and Ezak Assa.” *Id.*, ¶ 15.

More importantly, Assa affirms that, at all times relevant to this action, only he and his brother Ezak Assa were the majority equity investors in the property and that Suky “has no interest, equity or otherwise in the Property.” *Id.*, ¶ 17. Assa asserts that Lavi “has had nothing to do with this Property from February of 2014 to the time of this application.” *Id.*, ¶ 18. More specifically, Assa affirms that Lavi “never paid the balance of the funding he had promised” nor made any additional capital contributions towards the property. *Id.* Instead, Assa and his brother allegedly paid all carrying costs of the property, which included real estate taxes, utilities and maintenance costs, as well as mortgage payments that amounted to over \$1,000,000 in costs. *Id.* Assa claims that Lavi was provided with paperwork in order to document him as a “Preferred Return Member” of West 46th LLC. *Id.* However, Lavi “disappeared and [did not] even communicate with [him] until July of 2015,” at which time an amendment to the Amended and Restated Operating Agreement of West 46th Equity was forwarded to, but never signed by Lavi, decreasing his equity member interest to 17.6% from the originally intended 20% due to Lavi’s default on his last payment. *Id.* & n.1.⁷

⁷ The Court notes that an Exhibit G is referenced in the footnote, however, there is no such exhibit e-filed in opposition to Motion Sequence No. 001.

Assa further states that neither Lavi nor Suky were managing the property at the time and, as a result, he undertook management of the property through the entities that he controls. *Id.*, ¶ 19. Assa asserts that it was Lavi who “initiated contact with Suky in July of 2015 with regard to a potential purchaser of the Property.” *Id.* Assa claims that Lavi was the one who had a relationship with Suky and that, when the proposed sale did not go forward, Lavi again disappeared until December 2015. *Id.* Assa states that he believes Lavi “was pleased and content with my management, leasing and day-to-day operation of the Property for at least two straight years after the closing” and that Lavi “only re-appeared in December of 2015 because he apparently heard that the Property was being sold,” however no such sale ever took place. *Id.* Assa affirms that the property is “not under contract or ‘on the verge’ of [being sold].” *Id.*

Furthermore, Assa contends that Lavi’s “invocation of the unrelated City lawsuit, which this Court is presiding over, is also unfair and inappropriate”⁸ and cites to language in an interim order issued by this Court on February 11, 2016 that states that the basis for the City’s pending motion for the same relief sought herein may have been abated long ago. *Id.*, ¶ 20; *see* NYSCEF Doc. No. 51. Assa further states that “[s]ince then, there has been no finding by this Court otherwise nor has there been evidence adduced by the City or any other party that Suky is managing this Property or that the Property is not being properly managed or maintained by [him], or [West 46th LLC].” NYSCEF Doc. No. 42, ¶ 20. Instead, Assa contends that Lavi’s allegations, specifically “that he contributed 100% of the equity, that the parties established an oral ‘joint venture,’ that the purchase of the Property would be an ‘all-cash deal,’ that he is not in default of funding the entire amount of his commitment, and that a receiver is necessary,” all “lack factual support, are contradicted by documentary evidence and fail to provide any basis for granting [Lavi]

⁸ In this vein, Assa has filed as an exhibit in opposition to Motion Sequence No. 001 an article from *Haaretz* entitled “Moshe Katzav’s Former Attorney Suspected of Laundering \$20 Million,” which alleges that Lavi “sold fake art works worth tens of millions of dollars, defrauded insurance companies and laundered money” in Israel in an attempt to disparage Lavi’s character. NYSCEF Doc. No. 50. Lavi, however, asserts in his reply affirmation that no civil or criminal charges were ever filed against him in connection with these allegations. NYSCEF Doc. No. 54, ¶ 26.

the extraordinary relief of an injunction.” *Id.*, ¶ 21. Finally, Assa affirms that “[n]either [he] nor anyone associated with the Property ever agreed to or discussed entering into a joint venture agreement, written or oral. At no point did the parties enter into a written joint venture agreement.” *Id.*, ¶ 22.

With respect to Motion Sequence No. 002, Lavi asserts that Assa sent an e-mail on March 27, 2017 containing a notice that the property required emergency funding and attempted to set up a meeting with Lavi. NYSCEF Doc. No. 78. This correspondence from Assa states the following:

Gentlemen:

The Property is in immediate need of emergency funding. Your failure to respond adequately and quickly will now result in mortgage default, jeopardizing current litigation, additional creditor litigation and foreclosure of the Property. We must meet and resolve this now.

As previously discussed with you, and based upon the information made available and disclosed to you, the gross receipts of the Property together with the proceeds of any accessible reserve account maintained by or on behalf of the Company are insufficient to permit the Company to discharge its financial commitments due its creditors or due under the Mortgage Loan or as needed for current operations (a “Shortfall”). The Company continues to be in dire need of funding for operational necessities. The Company has previously notified you that it determined that the Property is in need of current additional funding from you, a “shortfall Notice” and Capital Call Assessment.

Among the more pressing of outstanding debts for which there are now no funds available are: \$129,834.74 due on the Mortgage Loan; \$32,000.00 and \$44,000.00 on separate accounts claimed on amounts due the City handed over to collection; over \$16,000 due for current water bills; over \$5,700 due for electric bills, including a “turn-off” notices [sic]; and, \$3,015.16 due on a \$45,289.00 NYC DEP Payment Agreement. And there are more.

Further, it is imperative that a settlement be reached in the Lavi case, *Abraham Lavi v. Salim Assa, Ben Suky, West 46th Street Investors LLC, et al* (Sup. Ct. NY, Index # 651982/2016)[.]

Id. Lavi asserts that attached to the e-mail were a series of bills and invoices that apparently had not been paid. NYSCEF Doc. No. 79. The attachments specifically indicate the amount of past due principal and interest that was owed on the mortgage as of March 10, 2017, indicating a payment due in the amount of \$129,834.74 on April 6, 2017 and includes final demands for payment, as well as other Con Edison and water bills indicating delinquent payment. *Id.* Lavi allegedly rejected the notice contained in Assa’s

e-mail as “facially defective because it failed to provide timely notice of the meeting and stated that no action could be taken without Lavi’s vote because [he] is the majority equity interest holder of the Property.” NYSCEF Doc. Nos. 77, ¶ 6; 80. Lavi claims that the invoices he received demonstrate, *inter alia*, that the mortgage on the property is in default, that the City issued past due fines totaling approximately \$76,000, and unpaid water and electricity bills totaling \$66,000 and \$4,300, respectively. Lavi further states that the invoices indicating the above past due amounts were selectively chosen by Assa and that more outstanding funds may be owed.

The last appearance date for Motion Sequence No. 002 before this Court was April 7, 2017, at which time the motion was adjourned for control purposes to allow defendants a chance to supplement their opposition papers. Per Assa’s supplemental opposition papers to Motion Sequence No. 002 dated April 12, 2017, Assa purportedly paid a substantial amount of the outstanding bills owed on the property. NYSCEF Doc. No. 94. With respect to the mortgage on the property, defendants assert that as of April 12, 2017, the amount of \$129,834.74 was outstanding; however, proof of two payments in the amounts of \$61,839.16 and \$61,814.16 were made on April 4, 2017 and February 21, 2017, respectively.⁹ NYSCEF Doc. No. 95. Defendants further state that a Con Edison bill issued to West 46th LLC for an account number ending in 0044 was paid in full in the amount of \$186.22 on April 10, 2017. NYSCEF Doc. Nos. 94, 96. Similarly, a Con Edison bill issued to West 46th LLC for an account number ending in 0069 was paid in full in the amount of \$3,921.73 on April 10, 2017. NYSCEF Doc. Nos. 94, 96. Defendants also assert that a water bill from the New York City Department of Environmental Protection, NYC Water Board (“NYC DEP”) issued to West 46th LLC for an account number ending in 1001 was paid in full in the amount of \$5,657.22 on April 10, 2017. NYSCEF Doc. Nos. 94, 96. A second NYC DEP water bill

⁹ This Court notes that the payment of \$61,839.16 was made on April 4, 2017, two days before the total payment of \$129,834.74 became due on April 6, 2017. NYSCEF Doc. No. 95. However, the above payments are misleading because one of the \$61,000.00 payments appears to not take into account arrears owed on the mortgage. Further, adding up the two sums only amounts to \$123,653.32, which leaves an amount due and owing on the mortgage since the full amount has not yet been paid.

issued to West 46th LLC and Assa Properties for an account number ending in 2001 had an outstanding balance in the amount of \$24,095.64 as of April 12, 2017. NYSCEF Doc. Nos. 94, 96. Defendants assert that “[d]efendant entered into a payment agreement, pursuant to which [d]efendant shall make an additional monthly payment of \$132.81” (NYSCEF Doc. No. 94) and that \$9,884.98, the minimum payment due, was paid on April 10, 2017 (NYSCEF Doc. Nos. 94, 96). A third NYC DEP water bill issued to West 46th LLC and Assa Properties for an account number ending in 3001 had an outstanding balance in the amount of \$44,735.67 as of April 12, 2017. NYSCEF Doc. Nos. 94, 96. In their supplemental opposition papers, defendants assert that “[d]efendant entered into a payment agreement, pursuant to which [d]efendant shall make an additional monthly payment of \$377.41” and that \$4,512.36 had been paid toward this bill. NYSCEF Doc. No. 94.¹⁰ Further, defendants state that they owe \$76,000.00 in City violations as of April 12, 2017, but said violations are being contested. *Id.*

Discussion

It is evident to this Court that, given the foregoing facts, both a preliminary injunction and the appointment of a temporary receiver are warranted. To be entitled to a preliminary injunction, a movant must show (1) a likelihood of success on the merits, (2) irreparable injury absent the injunction, and (3) a balancing of the equities in their favor. *1234 Broadway LLC v. W. Side SRO Law Project, Goddard Riverside Comty. Ctr.*, 86 A.D.3d 18, 24 (1st Dep’t 2011). Lavi has met the three elements required to grant a preliminary injunction. He demonstrates a likelihood of success on the merits based upon Assa’s apparent failure to respect his equity interest in the property. While this Court makes no quantification, at this juncture, as to what Lavi’s equity interest is in the property, it is evident that one exists. Indeed, while defendants have essentially conceded this point in court submissions, Lavi’s interest was described

¹⁰ This Court presumes that the defendant referred to in NYSCEF Doc. No. 94 is West 46th LLC, but it is unclear to which defendant the letter refers. Further, this Court also notes that despite defendants’ assertion that they did not have the funds to pay the above bills and asked for capital from Lavi to cover said bills, many of the bills were paid prior to the control date set in this matter for supplemental submissions.

in documents transferring a significant interest in the property as solely being a non-interest bearing loan. Further, the apparent transfer of a 49% equity interest to Suky's wife appears to be an attempt to dilute Lavi's ownership interest, which constitutes irreparable harm. *See Suchodolski Assocs. v. Cardell Fin. Corp.*, 2003 WL 22909149, at *4 (S.D.N.Y. 2003) ("The dilution of a party's stake in, or a party's loss of control of, a business constitutes irreparable harm."); *Hemmings v. Ivy League Apt. Corp.*, 42 Misc. 3d 1215(A), at *5 (Sup. Ct., N.Y. County 2013) (Madden, J.). This Court also finds that irreparable harm exists because mortgage covenants were violated and apartments in the property have been rented for transient use, resulting in the imposition of significant fines and requiring the City to commence nuisance abatement proceedings, including the existence of a fully litigated pending motion for contempt of court. Moreover, the balancing of the equities favors Lavi in this instance, since the appointment of a temporary receiver would merely preserve the status quo and prevent the property from being sold, as such a sale would result in a permanent loss of Lavi's ownership and managerial rights of the property. *Gramercy Co. v. Benenson*, 223 A.D.2d 497, 498 (1st Dep't 1996); *Ruiz v. Meloney*, 26 A.D.3d 485, 486 (2d Dep't 2006).

Here, Lavi has made the required showing for the appointment of a temporary receiver. An order appointing a temporary receiver is appropriate "[u]pon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court . . . before or after service of summons and at any time prior to judgment . . . where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." CPLR 6401(a); *see also Rosan v. Vassell*, 257 A.D.2d 436, 437 (1st Dep't 1999) (holding that a receiver was properly appointed when a receiver was needed to ensure corporation's assets were maintained during litigation). The Court notes that extreme caution must be exercised in deciding whether to appoint a temporary receiver and thus the moving party is required to make a clear and detailed evidentiary showing of the need to safeguard the property at issue and protect its interest in the subject property. *See Moran v. Moran*, 77 A.D.3d 443 (1st Dep't 2010). Lavi has demonstrated that he has an interest in the subject property and that the property is in danger of

being lost, materially injured, or destroyed through defendants' actions. The "appointment of a receiver [is thus] necessary to conserve the personal and real property and protect the parties' interests, given the state of affairs between them." *Suissa v. Baron*, 107 A.D.3d 689, 689 (1st Dep't 2013).

While the original application for the appointment of a temporary receiver was under submission, the financial condition of the building has deteriorated. The defendants themselves have informed Lavi that the subject property is in danger of a "mortgage default, jeopardizing current litigation, additional creditor litigation and foreclosure of the Property." NYSCEF Doc. No. 78. The threat of the property being placed in foreclosure cannot be viewed as mere posturing given the purported transfer of 49% of the equity interest in the property to the wife of the individual who originally drove the property into bankruptcy.¹¹ Further, the transfer of equity interest also constitutes a covenant default under the terms of the mortgage on the subject property. Likewise, regardless of the percentage of Lavi's equity interest, as an individual with an equity interest in the property, he has significant exposure to his investment based upon the potential accrual of statutory penalties of up to \$1,000 per day for the defendants' allegedly permitting an ongoing public nuisance to exist at the property in the form of renting apartments for illegal transient use. Considering all of the relevant facts, the Court finds that Lavi has adequately demonstrated an entitlement to have a temporary receiver appointed.

In accordance with the foregoing, it is hereby

ORDERED that the branch of Motion Sequence No. 001 seeking a preliminary injunction, pursuant to CPLR 6301, to enjoin defendants from selling, transferring, or hypothecating the premises located at 334-336 West 46th Street is granted; and it is further,

¹¹ Lavi notes that this is not the first time that a property associated with Suky has had a receiver appointed. In *U-Trend New York Investments L.P. v. US Suite LLC*, Index No. 652082/2014 (Sup. Ct. N.Y. County), the Hon. Charles Ramos appointed a receiver based upon Suky's testimony that he used assets belonging to the property at issue, at which he apparently operated as an illegal hotel, to pay off his personal debts, such as his wife's credit card bills and parking violations. See NYSCEF Doc. No. 4, ¶ 10.

ORDERED that the undertaking for the preliminary injunction is fixed in the sum of \$150,000.00 conditioned that the plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the defendants all damages and costs which may be sustained by reason of this injunction; and it is further,

ORDERED that Motion Sequence Nos. 001 and 002 seeking the appointment of a temporary receiver, pursuant to CPLR 6401, are granted such that a temporary receiver is appointed to manage the premises located at 334-336 West 46th Street during the pendency of this action; and it is further,

ORDERED that Darren R. Marks, Esq., Partner at Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., 377 Broadway, New York, New York 10013, Tel. No. (212) 431-1300, is hereby appointed as temporary receiver; and it is further,

ORDERED that the temporary receiver is authorized to take charge of and enter into possession of the properties; and it is further,

ORDERED that any assets being held in the accounts of the Board(s), Corporations, counsel for the Corporations, or managing agent of the Corporations are to be turned over to the temporary receiver, except for any funds held by either the managing agent or counsel for services rendered up to the date of this Order; and it is further,

ORDERED that said temporary receiver be and is hereby directed to demand, collect, and receive from the occupants, tenants, and licensees in possession of said premises, or other persons liable therefore, all the rents now due and unpaid or hereafter to become due, and that temporary receiver is hereby authorized to institute and carry on all legal proceedings necessary for the protection of the property or to recover possession of the whole, or any part thereof, and/or apply to the Court to fix reasonable rental value and license fee value and to compel the tenants and occupants to attorn to the temporary receiver; and it is further,

ORDERED that said temporary receiver, or any party hereto, may at any time, on proper notice to all parties who may have appeared in this action, apply to this Court for further or other instructions or powers necessary to enable said temporary receiver to properly fulfill his duties; and it is further,

ORDERED that before entering upon his duties, said temporary receiver shall be sworn to fairly and faithfully discharge the duties committed to him and shall execute to the People of the State of New York and file with the Clerk of this Court an undertaking in the penal sum of \$100,000.00, conditioned for the faithful discharge of his duties as such temporary receiver; and it is further,

ORDERED that, pursuant to the provisions of the General Obligations Law Section 7-105, anybody holding any deposits or advances of rental as security under any lease or license agreement affecting space in the premises affected by this action shall turn over the same to said temporary receiver within five (5) days after said temporary receiver shall have qualified; and thereupon the temporary receiver shall hold such security subject to such disposition thereof as shall be provided in an order of this Court to be made and entered in this action; and it is further,

ORDERED that anybody in possession of the same shall turn over to the temporary receiver all rent lists, orders, unexpired and expired leases, agreements, correspondence, notices and registration statements relating to rental space or facilities in the premises; and it is further,

ORDERED that the temporary receiver be and is authorized to rent or lease any part of the premises for terms not exceeding one (1) year or such longer terms as may be required by the City and State of New York; to keep said premises insured against loss by damage or fire; to pay the taxes, assessments, water rates, sewer rents, vault rents, salaries of employees, supplies and other charges; to comply with all the lawful requirements of any municipal department or other authority of the municipality in which the mortgaged premises are situated; and to procure such fire, plate glass, liability and other insurance as may be reasonably necessary; and it is further,

ORDERED that the tenants, licensees, or other persons in possession of said premises attorn to the temporary receiver and pay over to the temporary receiver all rents, license fees, and other charges of such premises now due and unpaid or that may hereafter become due; and that respondents be enjoined and restrained from collecting the rents, license fees, and other charges of said premises and from interfering in any manner with the property or its possession; and from transferring, removing or in any way

disturbing any of the occupants or employees; and that all tenants, occupants, employees and licensees of the premises, and other persons liable for the rents be and hereby are enjoined and restrained from paying any rent, license fees, or other charges for such premises to the defendants, their agents, servants, or attorneys; and it is further,

ORDERED that the temporary receiver is prohibited from incurring obligations in excess of the monies in his hands without further order of this Court or written consent of plaintiff's counsel; and it is further,

ORDERED that West 46th Street Investors LLC and West 46th Street Management Corp. turn over to the temporary receiver all rents collected from and after the date of this Order; and it is further,

ORDERED that the temporary receiver named herein shall comply with Section 35-a of the Judiciary Law, Sections 6401-6404 of the CPLR, Section 1325 of the RPAPL, and Rule 36 of the Chief Judge; and it is further,

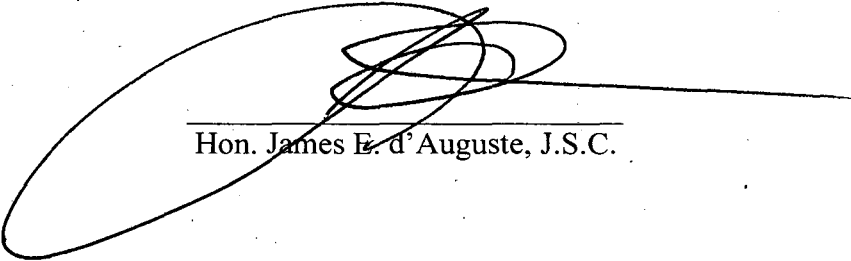
ORDERED that any proposed settlement of this matter be subject to approval by the temporary receiver and presented to the Court for review; and it is further,

ORDERED that the temporary receiver may enter into, adjust, and make payments on any payment or installment agreements with the City of New York in order to keep the premises from entering default; and it is further,

ORDERED that movant shall serve a copy of this order with notice of entry upon all parties, and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158) in accordance with e-filing protocol, within thirty (30) days.

This constitutes the decision and order of this Court.

Dated: June 8, 2017



Hon. James E. d'Auguste, J.S.C.