

Estate of Rosenberg v 470 Kent Owner LLC
2018 NY Slip Op 31613(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 651770/2017
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 3

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 THE ESTATE OF ISACK ROSENBERG, ABRAHAM
 ROSENBERG, ISACK ROSENBERG 2012 FAMILY TRUST,
 ABRAHAM ROSENBERG 2012 FAMILY TRUST,
 IRREVOCABLE TRUST FBO OF DESCENDENTS OF
 ABRAHAM ROSENBERG U/A 12/31/12, IRREVOCABLE
 TRUST FBO OF DESCENDENTS OF ISACK ROSENBERG
 U/A 12/31/12, WATERFRONT REALTY II LLC, CLC OWNERS
 LLC, and CL SPE LLC,

Petitioners,

Index No.: 651770/2017

-against-

Mot. Seq. Nos. 003

470 KENT OWNER LLC,

Respondents.

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EILEEN BRANSTEN, J.S.C.:

On motion sequence No. 003, Petitioners move under Section 753 of the Judiciary Law for sanctions against Respondent, 470 Kent Owner LLC, for its alleged failure to comply with a confirmed arbitration award.

BACKGROUND

This underlying action involves a real estate transaction concerning property located at 470 Kent Avenue, Brooklyn, New York (the "Property") governed by a letter agreement and a contribution agreement. Petitioners acquired the Property in 1981. *Israel Rosenberg Affid.*, ¶4. Since 1871 to Present, the Property was, at various times,

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used as a manufactured gas plant, a barrel maker, molasses storage, a sugar refinery, a warehouse, a brewer-bottler, and most recently, a lumber yard. *Id.*, ¶7.

Between 2004 and 2014, six environmental investigations of the Property revealed the following contaminants: petroleum, semi-volatile organic compounds, metals, pesticides, and PCBs in soils; and petroleum, chlorinated solvents, semi-volatile organic compounds, metals pesticides and PCBs in groundwater. *Id.*, ¶8. The environmental investigations did not identify when the pollution occurred, but the reports described the appearance of contaminants as “weathered” and degraded, indicating that the pollution occurred many years ago. The investigations attributed the contamination to the placement of historic fill materials at the site, the storage of petroleum, and general, long-term industrial operations. *Id.*, ¶9. The existing structures on the Property were built in 1939, 1940, and 1979. *Id.*, ¶10.

In or about early 2014, non-party Mr. Roy Stillman expressed an interest in forming a joint venture to acquire the Property for redevelopment under the New York environmental Brownfield Cleanup Program. *Id.*, ¶15. Ultimately, under this joint venture, Mr. Stillman would obtain rezoning, perform environmental remediation, and ultimately own the Property. In turn, the Rosenberg Family would purchase additional properties for themselves. *Id.*, ¶18.

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On or about May 28, 2015 Petitioner and Mr. Stillman entered into a Letter Agreement relating to the Property. Specifically, the Letter Agreement memorialized the terms under which Mr. Stillman's companies (Imperial Companies, Stillman Development International and/or affiliates thereof) would be willing to form a joint venture to invest in the Property with the existing Property Owners (Petitioners). *Id.*, ¶19. Mr. Stillman and his affiliates were given exclusivity, requiring Petitioners to cease negotiations with other potential buyers in exchange for the provision of documents and assignment of rights under the Brownfield Program if the acquisition of membership interests in the Property Owners was not consummated. *Id.*, ¶21.

On December 31, 2015, Petitioners and Respondent, 470 Kent Owner LLC, (a company once wholly owned and controlled by Mr. Stillman) entered into a Contribution Agreement (the "Contribution Agreement") consistent with the proposed terms of the Letter Agreement. *Id.*, ¶23. Under the Contribution Agreement, Respondent agreed to make payments (the "Payments") and provide guaranties (the "Guaranties") in exchange for a member interest in the Property Owners and control of the Property. *Id.* Respondent failed to comply and the matter was taken to arbitration. Significantly, the only parties who participated in arbitration were the instant Petitioners and Respondent, 470 Kent Owners. Neither Mr. Stillman nor 470 Kent Avenue LLC (another company owned and controlled by Mr. Stillman) participated in the arbitration.

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On March 3, 2017 a Final Arbitration Award was rendered. See, Exhibit "B" to Boyle Supplemental Affirm. In the Award, Petitioners Rosenberg, et al. were awarded judgment against Respondent 470 Kent Owner LLC insomuch as 470 Kent Owner was directed to turn over the Brownfield Rights and Information to Petitioners, at no cost to Petitioners. *Id.*

After appearing for oral argument on May 21, 2017 before Judge Oing, on June 21, 2017 Justice Oing granted Petitioner's Motion to confirm the arbitration in part. Of note, Petitioner requested Justice Oing extend the judgment to non-party 470 Kent Avenue LLC and Roy Stillman, which he declined to do.

On June 12, 2017, Petitioners sent Respondent and Stillman a demand letter with an unentered copy of the Judgment via email and U.S. Mail, requesting compliance with the Judgment. *Wood Affidavit, Exhibit C.* Likewise, Respondent was served with the entered Judgment on June 28, 2017. *Entry of Judgment (Docket No. 57).* Respondent and Stillman never replied. *Pet. Memo in Supp at 6.*

On August 3, 2017, Petitioners' designee filed an Application to Amend the Brownfield Cleanup Agreement (the "Application to Amend") to facilitate a transfer pursuant to the Judgment, and on September 15, 2017, Petitioners sent Stillman a letter requesting that he execute the same. *Wood Affidavit, Exhibits J and K.* On September 18, 2017, Respondent replied stating that it had searched its records and "determined that it

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has not now, nor at any time, held any right in its name under the Brownfield Program relating to 470 Kent Avenue, Brooklyn, New York.” *Wood Affidavit, Exhibit L.*

On September 27, 2017, at Petitioners’ request, the Department of Environmental Conservation (“DEC”) sent Stillman, as managing member of 470 Kent Avenue, a letter compelling him to execute the Application to Amend and stating that the DEC would process the amendment without Stillman’s signature in thirty days if Stillman failed to sign. *Wood Affidavit, Exhibit M.*

On October 13, 2017, Respondent replied to the DEC threatening litigation and stating it would allegedly suffer unspecified “significant money damages” if the DEC transferred the Brownfield Cleanup Agreement to Petitioners’ designee without Respondent’s consent. *Wood Affidavit, Exhibit N.*

Petitioners now complain Respondent has failed to comply with the confirmed Arbitration Award and seeks to hold Respondent in contempt for such failure. Respondent opposes.

DISCUSSION

Pursuant to Section 753 of the Judiciary Law, “A court of record has power to punish, by fine and imprisonment, or either, . . . [a] party to the action or special proceeding . . . or other person . . . for any . . . disobedience to a lawful mandate of the court”. *Judiciary Law § 753(A)(3).*

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To support a finding of civil contempt, the following elements must be established by clear and convincing evidence: (1) “it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect;” (2) “[i]t must appear, with reasonable certainty, that the order has been disobeyed;” (3) “the party to be held in contempt must have had knowledge of the court’s order, although it is not necessary that the order actually have been served upon the party;” and (4) “prejudice to the right of a party to the litigation must be demonstrated.” *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29 (2015).

This matter, which very clearly has a belabored history, is presenting itself to this Part for the first time in light of Justice Oing’s elevation to the Appellate Division. Justice Oing conducted a lengthy oral argument prior to confirming the arbitration award in May 2017. While he did not ultimately decide the issue, he did entertain discussions on whether the judgment/arbitration award was intended to and/or should encompass more than just Respondent, 470 Kent Owners, the only party explicitly directed to perform. (emphasis added).

We now find ourselves with the proverbial “who has the ball” analysis. Petitioners argue 470 Kent Owners made several representations during the arbitration hearing that it had the Brownfield Rights. Specifically, in an August 15, 2016 Affidavit offered by Mr. Stillman, he swore: “Claimant [470 Kent Owner LLC] entered into a Brownfield Agreement and secured a permit to undertake certain remedial activities

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related to the Property. ... due to our swift action, we were able to secure a Brownfield Permit...” Ex. D to Boyle Supplemental Affid., ¶7(d). Additionally, during the arbitration proceedings Mr. Stillman also swore he was the sole, Managing Member of 470 Kent Owner LLC. *See, Id* ¶6 and Exhibit “E” to Boyle Supplemental Affid., 309:13-310:2.

Despite these admissions, 470 Kent Owner LLC now denies it has possession of the Brownfield documents. In short, it seems Mr. Stillman, as the individual who executed the Brownfield Agreement, is the person best positioned to advise who has the requested information. That aside, however, Mr. Stillman represents he currently is only a 50% shareholder of 470 Kent Owner and therefore, is not the alter ego of 470 Kent Owner. *Blumenstein Affirm.* ¶8. The Court notes while it is clear Mr. Stillman initially owned 100% of 470 Kent Owner LLC, it is unclear when his interest decreased to 50%.

Armed with this information Petitioner requests this Court sanction 470 Kent Owner for failing to provide the Brownfield documents in compliance with the confirmed arbitration award. The Petitioner also asks this Court to direct Mr. Stillman to provide the documents on 470 Kent Owner’s behalf. It seems obvious to the Court that either Mr. Stillman has the documents produce or 470 Kent Owner – itself – has the documents. The Court, at this moment, only has jurisdiction over 470 Kent Owners. As that is the only Respondent named to the Petition, the Court can only address the relief sought against 470 Kent Owner. In that vein, the Court cannot punish a party for not providing

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that which it does not have. There have been sworn statements offered to this court that, indeed, 470 Kent Owner does not have the Brownsfield Documents to turn over.

Blumenstein Affirm., ¶23. Now, the Court will note, it has not been provided any evidence as to when Mr. Stillman's ownership in 470 Kent Owner decreased to 50%.

Therefore, if there is any evidence Mr. Stillman transferred his ownership interest after the arbitration award was confirmed, a strong argument could be made the transfer was done fraudulently to avoid satisfying the arbitration award. *See, N.Y. Debt & Cred. Law* §276 ("Every conveyance made...with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.").

At this juncture, however, there has not been a sufficient showing of "alter ego" between 470 Kent Owner and Mr. Stillman sufficient that the judgment against 470 Kent Owner can be extended to Mr. Stillman and/or 470 Kent Avenue (this has already been twice attempted by Petitioners and twice rejected). Now, however, because the universe of potential document holders appears to be limited to Mr. Stillman and/or 470 Kent Avenue, Petitioners were previously questioned at their November 20, 2017 appearance why they had not sought relief specifically against Mr. Stillman and/or 470 Kent Avenue. In response, Petitioners advised they had, indeed, commenced an action which was "being routed to this Part." (Nov. 20, 2017 Tr: 14:18-16:19). Nearly 8 months later, the Court has not been apprised of the status of such a matter.

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While the Court is sympathetic to Petitioners' position, the Court cannot direct one party to produce what it does not have. Further, as the parties to the "related" action are not before this Part, the Court cannot enjoin any further transfer be taken to the Documents. The Court can, and does, however, direct 470 Kent Owner (including Mr. documents held by Mr. Stillman when he was the 100% owner) to turn over the Brownsfield documents that are currently in its possession and/or were in its possession at the time the arbitration was confirmed -- May 24, 2017. If Petitioners present evidence to this Court that the Brownsfield documents were in the possession of 470 Kent Owner (including through Mr. Stillman, as 100% owner) when the award was confirmed and nevertheless transferred the documents to a non-party, sanctions will be issued.

CONCLUSION

Petitioners Motion for sanctions is DENIED without prejudice as stated herein.

This constitutes the Decision and Order of the Court.

July 10, 2018

ENTER:


HON. EILEEN BRANSTEN, J.S.C.