

<b>Bassuk Org., Inc. v Criterion Group LLC</b>
2018 NY Slip Op 32528(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 651049/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

-----X  
THE BASSUK ORGANIZATION, INC., GREYSTONE  
EB-5 HOLDINGS CORP. and GS EB5 VI LLC,

Plaintiffs,

Index No. 651049/2018  
Mot. Seq. No. 002

-against-

CRITERION GROUP LLC, SHIBBER A. KHAN, EFIM  
KOGAN, YUNG CHING SIU and DAVID LUBINITSKY,

Defendants,

-and-

11-12 30<sup>th</sup> DRIVE LLC,

Nominal Defendant.

-----X  
**Masley, J.:**

In motion sequence number 002, defendant David Lubinitsky moves by Order to Show Cause for an order enjoining any sale of the property located at 30-77 Vernon Boulevard and 30-89 12<sup>th</sup> Street, Astoria New York (the Property). Alternatively, Lubinitsky moves for an order requiring that the entire proceeds from the sale of the Property be retained and placed in an attorney's escrow account pending the outcome of this litigation. Lastly, non-party APRILIA Trust (APRILIA) moves for leave to intervene in this action pursuant to CPLR 1012.

On March 6, 2018, plaintiffs The Bassuk Organization, Inc., Greystone EB-5 Holdings Corp., and GS EB5 VI LLC commenced this action against defendants Criterion Group LLC (Criterion), Shibber A. Khan, Efim Kogan, Yung Ching Siu, David Lubinitsky and nominal defendant 11-12 30<sup>th</sup> Drive LLC (11-12 30<sup>th</sup> Drive). Plaintiffs claim that they entered into two written agreements with defendants to perform consulting services to (1) obtain construction financing for defendants' real estate project (the Project) and (2) to obtain millions of dollars in financing for the Project. Plaintiffs allege that they spent over a year and a half securing both types of financing in forms and under terms that were accepted by defendants. However, plaintiffs allege that the defendants abandoned the Project and elected to sell the Property for \$85 million. In their complaint, plaintiffs allege causes of action for breach of a term sheet, breach of the implied covenant of good faith and fair dealing, quantum meruit, and tortious interference with contract. Since the commencement of this litigation, the parties have engaged in negotiations and entered into numerous stipulations.

On March 28, 2018, Lubinitsky filed this application with his answer. In his answer, Lubinitsky alleges, that the Property is owned by nominal defendant 11-12 30<sup>th</sup>

Drive as owner in fee; 11-12 30<sup>th</sup> Drive is wholly owned by LIC Clock Tower LLC (Clock Tower); a 20% interest in Clock Tower is owned by APRILIA; and Lubinitzky is the settlor of APRILIA. Lubinitzky also asserts five cross-claims for: (1) indemnification and/or contribution from Kogan, Khan, Siu, and Criterion for any losses, damages, or liability incurred by APRILIA through its interest in 11-12 30<sup>th</sup> Drive LLC and Clock Tower; (2) indemnification or contribution from Kogan, Khan, Siu, and Criterion for any judgment entered against Lubinitzky; (3) a judgment against Kogan, Khan, Siu, and Criterion in favor of Lubinitzky, as Settlor of APRILIA, in an amount equal to twenty percent; (4) an accounting of 11-12 30<sup>th</sup> Drive; and (5) a judgment against Kogan, Khan, Siu, Criterion, and 11-12 30<sup>th</sup> Drive in favor of Lubinitzky for twenty percent of the proceeds of the sale of the Property.

On July 5, 2018, this court so ordered a stipulation filed by the parties. The stipulation provided the following:

“WHEREAS, the Court has issued several orders, inter alia (i) an Order dated March 6, 2018 directing Defendants to maintain the sum of \$7,300,000.00 in a segregated attorney’s escrow account (the “Escrowed Funds”), (ii) an Order dated March 27, 2018 enjoining Defendants Criterion, Khan, Siu, Kogan and 11-12 30<sup>th</sup> Drive LLC (“Fee Owner”) from selling the property located at 30-77 Vernon Boulevard and 30-80 12<sup>th</sup> Street, Astoria, New York (the “Project”), (iii) an Order dated April 17, 2018 modifying the March 27, 2018 Order to the extent of permitting the sale of the Project but directing that all proceeds from the sale of the Project be held in an escrow account maintained by Reitler Kailas & Rosenblatt LLC (“Escrow Agent”) pending further order of the Court, (iv) a So-Ordered Stipulation dated April 23, 2018 directing the proceeds from the sale of the Project minus Closing Fees, as defined therein, be maintained in an interest-bearing attorney escrow account maintained by Escrow Agent pending further order of the Court, and (v) an Interim Order dated May 9, 2018 directing that Escrow Agent maintain \$10,800,000 in its escrow account and return the balance of the funds in escrow, including interest, to the Fee Owner (the “May 9, 2018 Order”, and together with the other orders, the “Escrow Orders”); and . . .

IT IS HEREBY STIPULATED AND AGREED, that this stipulation shall not be construed to impair, waive, or release any claim by Defendant Lubinitzky or proposed intervener Aprilia Trust against any defendant herein, or their affiliated entities, including any claim or defense that (i) the agreements at issue in this action were not binding upon 11-12 30<sup>th</sup> Drive LLC or any person or entity in 11-12 30<sup>th</sup>

Drive LLC's ownership structure, or (ii) the Settlement Payment is not properly a liability of 11-12 30th Drive LLC, or (iii) no part of the Settlement Payment is deductible from or chargeable against the interests of Defendant Khan, Lubinitsky and/or proposed intervener Defendant Aprilia Trust in 1 1-12 30th Drive LLC and its parent entity LIC Clock Tower LLC"

(NYSCEF Doc. No. 182).

On July 9, 2018, plaintiffs filed another stipulation discontinuing their claims against Criterion, Khan, Kogan, Siu and 11-12 30<sup>th</sup> Drive (NYSCEF Doc. No. 186). Plaintiffs also filed a notice of voluntary discontinuance on July 20, 2018 discontinuing their action as against Lubinitsky (NYSCEF Doc. No. 188).

On August 3, 2018, counsel for Lubinitsky and APRILIA informed the court by letter that they had reached a tentative settlement with Kogan, which when executed, will result in Lubinitsky's discontinuance of his remaining cross-claims against all defendants, the withdrawal by APRILIA of its motion to intervene, and the discontinuance of this entire litigation (NYSCEF Doc. No. 189). To date, the court has not been informed of a settlement and no discontinuances have been filed.

Accordingly, to the extent that motion sequence number 002 has not been resolved by the parties, this court is left to decide whether to grant APRILIA leave to intervene.

At the time of this application's filing, Lubinitsky and APRILIA asserted that because the Property is allegedly on the verge of being sold by Kogan, Khan, Siu and Criterion to a Russian investor, and a portion of the proceeds of the sale will be used as payment for transactions unknown and unauthorized by Lubinitsky and APRILIA, the disposition of the Property will adversely impact APRILIA. Additionally, Lubinitsky and APRILIA assert that APRILIA's interests are not adequately represented by any other party to this action because no other party has standing to assert APRILIA's 20% ownership interest in Clock Tower. Lubinitsky and APRILIA claim that there can be no delay and no prejudice because this action was only commenced on March 3, 2018 with no discovery having taken place.

Kogan opposes and argues that APRILIA is not a party to any agreement with plaintiffs, and therefore, leave for APRILIA to intervene should be denied. Additionally, Kogan asserts that APRILIA's interest is in Clock Tower, and not in the entity that owns the Property. Accordingly, Kogan asserts that members of a limited liability company are prohibited by Section 610 of the New York Limited Liability Company Law from individually intervening in an action brought against the limited liability company except where the object is to enforce the member's right against the limited liability company. Additionally, Kogan asserts that APRILIA's interests are adequately protected by the existing parties. Among other things, Kogan notes that Criterion is also named as a

defendant and has an interest in vigorously defending against the claims brought by plaintiffs.

CPLR 1012 (a) (3) provides, "[u]pon timely motion, any person shall be permitted to intervene in any action when . . . the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment."

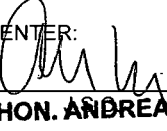
CPLR 1012 (a) (3) applies when the proposed intervenor "may be affected adversely by the judgment" in connection with a disposition or distribution of property (CPLR 1012 [a] [3]). Here, plaintiffs have discontinued the action against all defendants. At this juncture, there can be no judgment to adversely affect the proposed intervenor, APRILIA. To the extent that Lubinitsky asserted cross-claims, none seek relief against APRILIA.

Accordingly, it is hereby,

ORDERED that defendant David Lubinitsky and proposed intervenor APRILIA Trust's motion seeking leave to intervene is denied; and it is further

ORDERED that the remainder of Lubinitsky's motion is denied as moot.

Dated: 10/3/18

ENTER:   
HON. ANDREA MASLEY