

<b>Omega Hotels LLC v 151 East Houston Prop., Inc.</b>
2018 NY Slip Op 33832(U)
March 29, 2018
Supreme Court, Nassau County
Docket Number: 605025/16
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
OMEGA HOTELS LLC, as its own entity and  
in the Right and on Behalf of MIDTOWN  
LODGING LLC,

Plaintiff,

-against-

151 EAST HOUSTON PROPERTY, INC.,

Defendant.

\_\_\_\_\_  
OMEGA HOTELS LLC, as its own entity and in the  
Right and on Behalf of MIDTOWN LODGING LLC,

Plaintiff,

-against-

36<sup>TH</sup> STREET PROPERTY INC. and AE  
SOOK CHOI,

Defendant.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 605025/16

MOTION DATE: 03/08/18  
Motion Sequence 002, 003

INDEX No. 603802/17

MOTION DATE: 3/08/18  
Motion Sequence 001

\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion.....XXX
- Affirmation in Support.....XXX
- Memorandum of Law in Support.....XXX
- Affirmation in Opposition.....XXX
- Memorandum of Law in Opposition.....XXX
- Reply Affidavit.....X

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Motion (seq. # 2) by plaintiff Omega Hotels LLC to hold defendant in contempt of court is held in abeyance and its motion for leave to serve an amended complaint is **granted** to the extent indicated below. Motion (seq. # 1) by plaintiff Omega Hotels for a preliminary injunction restraining defendant 36<sup>th</sup> Street Property from disposing of its interest in 442 West 36<sup>th</sup> Street is **granted**. Motion (seq. # 3) by defendant 151 East Houston Property, Inc. to vacate the preliminary injunction is **denied**.

This is an action for breach of a joint venture agreement. On October 23, 2015, plaintiff Omega Hotels, LLC and defendant 151 East Houston Property, Inc. entered into an “operating agreement” to form a company known as Midtown Lodging LLC to acquire parcels of real property (Doc 11). Omega Hotels and 151 East Houston Property were each to be 50% members of the company.

Article 7 of the operating agreement provides that the “cash component” of the purchase price of the real property, i.e. the portion not financed by a mortgage loan, was to be split equally between the parties. If a member failed to meet its capital contribution, the membership interests were to be adjusted “pro-rata” to reflect the actual capital contributions. The operating agreement was signed by Raj Guru and Vinod Chand, as managing members of Omega Hotels, and by Jin Sup An, as president of 151 East Houston.

In December 2015, 151 East Houston Property, Inc. entered into a “purchase and sale agreement,” whereby 151 East Houston would purchase a hotel located at 442 West 36<sup>th</sup> Street in Manhattan from “TIC Sellers,” a group of related limited liability companies known as Gemini 442 West 36<sup>th</sup> Street MT, LLC (Doc 7). The purchase price was \$18.5 million. The contract called for the purchaser to pay \$250,000 as “earnest money,” one day after the effective date of the contract. An additional \$250,000 “earnest money” was due 31 days after the effective date. The purchase and sale agreement was signed by Jin Sup An, as president of 151 East Houston.

Section 10.3 of the agreement provides that purchaser shall not assign its rights under the agreement without first obtaining seller’s written approval. However, purchaser may assign the agreement to an entity “directly or indirectly controlled by, or under common control...with, purchaser...” Article XI of the contract provided for a 30 day “due diligence” period.

On December 9, 2015, Omega Hotels and 151 East Houston Property entered into a first amendment to the Midtown Lodging operating agreement (Doc 13). The first amendment provides that if either member desired to cancel the 442 West 36<sup>th</sup> Street contract during the due diligence period, the member would give written notice to the other member. The other member would then have the option to cancel the contract or purchase the other member’s interest in Midtown Lodging at “full value,” i.e. the cancelling member’s portion of the down payment, plus any other capital contributions of the cancelling member.

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The first amendment to the operating agreement further provides that if either member receives an offer to purchase the property from a third party, and desires to sell to the third party, the member receiving the offer shall submit the terms to the other member. The other member must then purchase the offeree member's interest based upon the terms proposed by the third party or consent to the sale to the third party.

The first amendment provides that Midtown Lodging would use SMA Management, Inc., a company owned by Jin Sup An, the president of 151 Houston Property, to manage the hotel. SMA Management was to be paid a fee of 4% of the hotel's gross receipts. However, Omega Hotels was granted the right to buy a 1/3 interest in SMS Management.

In March 2016, Omega Hotels and 151 East Houston Property discussed a second amendment to the Midtown Lodging operating agreement. The second amendment provides that 151 East Houston represented that the due diligence deadline had been extended to May 15, 2016, with a closing date set for June 15, 2016. Closing costs were to be split equally by the members. Omega Hotels was to remit \$125,000 to 151 East Houston Property, representing 1/2 of the initial down payment already made by 151 East Houston. Additionally, Omega Hotels was to provide proof of funds of no less than \$2,875,000 being held by a "qualified 1031 intermediary." In the event that financing for the acquisition of the property exceeded \$13 million, the excess over \$13 million would be "credited as capital contribution by 151 East Houston Property...." It is undisputed that the parties did not enter into the second amendment to the Midtown Lodging operating agreement.

Omega Hotels alleges that 151 East Houston Property refused to assign the purchase contract for the 36<sup>th</sup> Street hotel to Midtown Lodging.

On July 6, 2016, Omega commenced an action against 151 East Houston Property (Index No. 605025/16). Plaintiff brings the action both on its own behalf and derivatively on behalf of Midtown Lodging. In the first cause of action, plaintiff asserts a claim for breach of the Midtown Lodging operating agreement by failing to assign the purchase agreement to the company. The second cause of action is for breach of fiduciary duty by depriving Midtown Lodging of the "business opportunity" of the purchase contract. Plaintiff requests a judgment directing defendant to assign the purchase agreement to Midtown Lodging LLC. There is no claim for dissolution of Midtown Lodging.

On August 22, 2016, the court issued a preliminary injunction, enjoining defendant from transferring any portion of its interest in the property located at 442 West 36<sup>th</sup> Street, New York, or assigning the purchase agreement to any party other than Midtown Lodging, pending final judgment in the action.

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To obtain specific performance of defendant's promise to transfer the property to Midtown Lodging, plaintiff must show that it is ready, willing, and able to fulfill its contractual obligations under the joint venture agreement (**ADC Orange v Coyote Acres**, 7 NY3d 484, 490 [2006]). Although the purchase price was \$18.5 million, defendant conceded that plaintiff had over \$ 3 million to contribute to the venture. Moreover, even if plaintiff were not able to make its full capital contribution, Article 7 of the operating agreement provided that membership interests would simply be adjusted "pro-rata." Thus, plaintiff established a likelihood of success on the merits that it was ready, willing, and able to consummate the joint venture.

Omega alleges that in September 2016 Jin Sup An, the sole shareholder of 151 East Houston, stated that he had "cancelled" the purchase and sale agreement relating to 442 West 36<sup>th</sup> Street. On October 28, 2016, Gemini 442 West 36<sup>th</sup> Street, or an affiliated company, issued a deed to the property to 36<sup>th</sup> Street Property Inc., another company allegedly controlled by Jin Sup An. The cover page of the deed refers to the grantee as 36<sup>th</sup> Street Property Inc., "attn: Jin Sup An."

On May 2, 2017, plaintiff commenced a separate action, both individually and derivatively, against the grantee, defendant 36<sup>th</sup> Street Property (Index No 603802/17). In its first cause of action, plaintiff asserts a claim for tortious interference with the Midtown Lodging operating agreement. In its second cause of action, plaintiff asserts a claim for aiding and abetting 151 East Houston's breach of fiduciary duty to Midtown Lodging.

By order to show cause dated May 4, 2017, plaintiff moves for a preliminary injunction restraining defendant 36<sup>th</sup> Street Property from disposing of its interest in 442 West 36<sup>th</sup> Street. In opposition, defendant 36<sup>th</sup> Street Property argues that plaintiff cannot establish a likelihood of success on the merits with respect to its tortious interference claim.

By order to show cause dated May 4, 2017, plaintiff Omega Hotels moves to hold defendant 151 East Houston in contempt of court for violating the preliminary injunction and for leave to serve an amended complaint. In the proposed amended complaint, plaintiff seeks to add Jin Sup An as a defendant with respect to both plaintiff's claim for breach of the Midtown Lodging Operating agreement and its breach of fiduciary duty claim.

By notice of motion dated June 27, 2017, defendant 151 East Houston moves to vacate the August 22, 2016 preliminary injunction on the ground that it never agreed to the second amendment to the Midtown Lodging operating agreement.

Leave to amend a pleading shall be freely given upon such terms as may be just (CPLR 3025[b]). However, leave to amend may be denied where the proposed amendment is palpably improper or insufficient as a matter of law, or prejudice or surprise will directly

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result from the delay in seeking amendment (**Koenig v Action Target**, 76 AD3d 997 [2d Dept. 2010]).

As the principal of 151 East Houston, Jin Sup An had notice of plaintiff's claims with respect to 442 West 36<sup>th</sup> Street from the commencement of the first action. Defendant does not establish any delay or prejudice from the amendment. Accordingly, plaintiff's motion for leave to serve an amended complaint is granted. Plaintiff's amended complaint is deemed served in the form annexed as exhibit A to plaintiff's memorandum of law.

In order to be entitled to a preliminary injunction, plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]).

The parties to a joint venture agreement are under a fiduciary duty to each other (**Plumitallo v Hudson Atlantic Land Co.**, 74 AD3d 1038 [2d Dept. 2010]). As the principal of 151 East Houston, the joint venturer, Jin Sup An was under a fiduciary duty to Omega, even though 151 East Houston never executed the second amendment to the joint venture agreement. Plaintiff has established a likelihood of success on the merits with respect to its breach of fiduciary duty claim.

As noted, Jin Sup An appears to have an interest in the grantee of the property. In any event, defendant 36<sup>th</sup> Street Property has not established that it is a bona fide purchaser for value. Plaintiff's motion for a preliminary injunction is granted. Defendant 36<sup>th</sup> Street Property Inc. is restrained from transferring any portion of its interest in the property located at 442 West 36<sup>th</sup> Street, New York, to any party other than Midtown Lodging, pending final judgment in the action.

The transfer of 442 West 36<sup>th</sup> Street to 36<sup>th</sup> Street Property Inc. was a violation of this court's order of August 22, 2016. However, because 36<sup>th</sup> Street Property is not a bona fide purchaser for value and the preliminary injunction is now extended to the grantee, plaintiff has suffered limited prejudice by the violation of the preliminary injunction. Accordingly, plaintiff's motion to hold defendant 151 East Houston in contempt of court is held in abeyance. Defendant 151 East Houston's motion to vacate the preliminary injunction is **denied**.

Any argument not addressed herein is deemed to be without merit.

So ordered.

**ENTERED**

Date: MAR 29 2018

APR 02 2018

*Stephen A. Bucaria*  
J.S.C.

NASSAU COUNTY  
COUNTY CLERK'S OFFICE