

**Divine Capital, L.L.C. v Legado Inv. Group, L.L.C.**

2019 NY Slip Op 30411(U)

February 21, 2019

Supreme Court, New York County

Docket Number: 650535/2018

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

-----X

DIVINE CAPITAL, L.L.C., KB CAPITAL, L.L.C.,	<b>INDEX NO.</b>	<u>650535/2018</u>
Plaintiff,	<b>MOTION DATE</b>	<u>08/07/2018</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>004</u>
LEGADO INVESTMENT GROUP, L.L.C., ROD SIMON, DOES 1- 100 XXX		
Defendant.		

**DECISION AND ORDER**

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 156 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing papers, the Decision/Order on this motion is as follows:

This is an action brought by Plaintiffs Divine Capital, L.L.C. (**Divine Capital**) and KB Capital, L.L.C. (**KB Capital**) (collectively, the **Plaintiffs**) to recover \$4 million entrusted to Defendant Legado Investment Group, L.L.C. (**LIG**) as a reserve fund for an investment in a proposed assisted living facility (the **New Windsor Project**). At issue in this case is which of two agreements governs the investment: (i) a Project Equity Reserve Agreement, dated January 3, 2017, by and between KB Capital and LIG (the **KB PERA**), or (ii) a second Project Equity Reserve Agreement, dated May 26, 2017, by and between Divine Capital and LIG (the **Divine PERA**).

Divine Capital and KB Capital have filed a motion pursuant to CPLR § 3212 for partial summary judgment against LIG on the second cause of action of the first amended complaint for breach of contract based on judicial estoppel. For the reasons set forth below, Divine Capital and KB Capital's motion for partial summary judgment is denied.

### RELEVANT FACTS

The facts in this case are relatively straightforward. Divine Capital transferred \$4 million to KB Capital as a pass-through entity with instructions to transfer the funds into an account maintained by LIG at Merrill Lynch (the **LIG Account**).<sup>1</sup> The purpose of the transfer was to create a reserve fund to finance the New Windsor Project, subject to the condition that LIG close a construction loan with the New Windsor Project's developer.<sup>2</sup>

The initial transfer was governed by the KB PERA, which provides that following a 180-day grace period but prior to the end of the 60-month term, KB Capital may withdraw the funds in the LIG Account plus accrued interest thereon, subject to a 10% termination penalty deducted from the gross principal balance.<sup>3</sup> The KB PERA further provides that the funds shall become immediately due and payable in full upon the earlier of: (i) the maturity date or (ii) an event of default, including the failure of LIG to make a distribution of any amount when due or any other breach of the KB PERA by LIG.<sup>4</sup> The Divine PERA, which came into effect after the KB PERA when a specific development project was identified, also has an initial term of sixty months, but provides that Divine may unilaterally terminate the agreement and demand return of the funds

---

<sup>1</sup> First Amended Complaint, ¶¶ 1-2, 5.

<sup>2</sup> *Id.*, ¶ 4.

<sup>3</sup> King aff, exhibit 1, at 1.

<sup>4</sup> *Id.*

subject to a 10% early termination penalty only upon satisfaction of certain enumerated conditions precedent.<sup>5</sup>

On or about September 13, 2017, Divine Capital served a demand upon LIG for the immediate return of the \$4 million in the LIG Account based on its determination that LIG was unable to close on the construction loan and, therefore, the Development Project would not be moving forward.<sup>6</sup> LIG refused to return the funds.<sup>7</sup>

Divine Capital commenced this action on February 2, 2018, seeking the return of its \$4 million investment.<sup>8</sup> Also on February 2, 2018, Divine Capital brought an *ex parte* motion for pre-judgment attachment of the funds pending resolution of the case.<sup>9</sup> Following oral argument, the Court entered an Order denying Divine Capital's motion for attachment.<sup>10</sup> On February 26, 2018, KB Capital sent a written demand to LIG and Mr. Simon again demanding the return of the funds pursuant to the KB PERA.<sup>11</sup> On March 15, 2018, LIG and Mr. Simon refused to return the funds.<sup>12</sup> On March 29, 2018, Divine Capital filed an Amended Complaint, adding KB Capital as a co-plaintiff.<sup>13</sup>

In the Amended Complaint, Divine Capital and KB Capital added a second cause of action for breach of contract under the alternative theory that, if the KB PERA is the controlling agreement

---

<sup>5</sup> First Amended Complaint, exhibit A.

<sup>6</sup> Complaint, ¶¶ 29-32.

<sup>7</sup> *Id.*, ¶ 33.

<sup>8</sup> *Id.*, ¶ 1.

<sup>9</sup> Plaintiff's Order to Show Cause at 1-2.

<sup>10</sup> Decision and Order, Mtn. Seq. 001 at 1-2.

<sup>11</sup> King aff. ¶ 4.

<sup>12</sup> *Id.* at ¶ 6.

<sup>13</sup> See First Amended Complaint at 1.

rather than the Divine PERA, Divine Capital and KB Capital are entitled to a return of the \$4 million by virtue of KB Capital's written demand.<sup>14</sup> On May 1, 2018, Divine Capital and KB Capital brought a second Order to Show Cause, again seeking an order of attachment.<sup>15</sup> This motion was denied by Decision and Order entered June 14, 2018.<sup>16</sup> On August 7, 2018, Divine Capital and KB Capital filed the instant motion for partial summary judgment as to the second cause of action in the amended complaint for breach of contract under the KB PERA based on judicial estoppel.<sup>17</sup>

## DISCUSSION

Summary Judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit.<sup>18</sup> The burden is initially on the movant to make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact.<sup>19</sup> Failure to make such a prima facie showing requires denial of the motion.<sup>20</sup> Once the showing has been made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact which requires a trial.<sup>21</sup>

---

<sup>14</sup> *Id.* ¶¶ 77-82.

<sup>15</sup> Plaintiff's Second Mot. for Attachment, at 1-3.

<sup>16</sup> Decision and Order, Mot. Seq. 002, at 1.

<sup>17</sup> NYSCEF Doc. No. 112.

<sup>18</sup> CPLR § 3212(b).

<sup>19</sup> *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

<sup>20</sup> *Id.*, citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851 (1985).

<sup>21</sup> *Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Divine Capital and KB Capital's motion for partial summary judgment is premised on the theory that LIG and Mr. Simon should be judicially estopped from taking the position that the Divine PERA controls the investment at issue. To invoke the doctrine of judicial estoppel, a party must demonstrate that: (i) the other party has taken one position in a prior proceeding, (ii) in which that party secured a favorable judgment, and (iii) that party has thereafter taken a contrary or inconsistent position in a subsequent proceeding.<sup>22</sup> In general, judicial estoppel only applies in cases where the court has relied on or adopted a party's prior inconsistent position in ruling in that party's favor.<sup>23</sup> In other words, judicial estoppel does not apply where the court in the prior proceeding did not unambiguously adopt the prior inconsistent position in some manner.<sup>24</sup>

Here, Divine Capital and KB Capital have failed to establish that the Court relied on LIG and Mr. Simon's prior position that the KB PERA was the operative agreement. The record demonstrates that the Court denied Divine Capital and KB Capital's first motion for attachment because KB Capital was an indispensable party and based on LIG and Mr. Simon's representations that they would hold the funds in the LIG Account pending resolution of the case.<sup>25</sup> In denying the second motion for attachment, the Court stated that Divine Capital and KB Capital failed to allege any new facts that would warrant granting an order of attachment.<sup>26</sup> The record does not reflect that the Court relied upon or adopted LIG or Mr. Simon's statements regarding which agreement controls or whether the Divine PERA is null and void. For the

---

<sup>22</sup> *Kalikow 78/79 v State of New York*, 174 AD2d 7, 11 (1st Dept 1992).

<sup>23</sup> *Herman v 36 Gramercy Park Realty Assoc., LLC*, 165 AD3d 146, 147 (1st Dept 2018); *Lory v Parsoff*, 296 AD2d 535, 536 (2d Dept 2002).

<sup>24</sup> *Stewart v Chautauqua County Bd. of Elections*, 14 NY3d 139, 149-50 (2010) (finding that judicial estoppel was inapplicable where it was not clear on the record whether the trial court adopted the party's initial position).

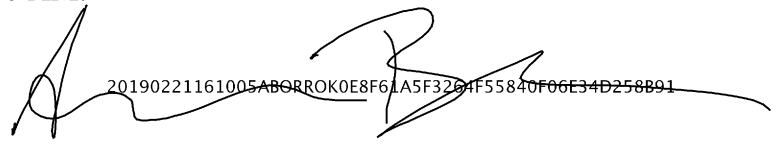
<sup>25</sup> Tr. of February 15, 2018 hearing (Ramos, J.) at 8-9.

<sup>26</sup> Tr. of May 17, 2018 Hearing (Ramos, J.) at 39.

avoidance of doubt, it appears that the Court only determined that relief required additional parties. Accordingly, judicial estoppel does not apply,<sup>27</sup> and it is hereby

ORDERED that the motion for partial summary judgment (Motion Sequence No. 004) is denied; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference in Room 238 at 60 Centre Street on May 1, 2019 at 11:30 AM.

  
20190221161005ABORROK0E8F61A5F3264F55840F06E34D258B91

2/21/2019  
DATE

\_\_\_\_\_  
ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>27</sup> *Dato Jewelry, Inc. v Western Alliance Ins. Co.*, 238 AD2d 193, 193 (1st Dept 1997) (“The statement was too ambiguous to warrant judicial estoppel, and, in context, could be construed as insinuating the exact opposite position.”) (internal citation omitted).