SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS MOTION 12EFM

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CSC 4540, LLC, 45-50 VERNON LP, JSMB 4540 LLC, JSMB 4540 MM LLC,

Petitioners,

- v -

VERNON 4540 REALTY, LLC, BRENT CARRIER,

Respondents.

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INDEX NO. 654464/2019

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 19, 20, 22-43 were read on this petition for attachment and injunctive relief.

This petition arises from disputes among the members of CSC 4540, LLC (LLC), which was formed for the purpose of developing a property at 45-40 Vernon Boulevard, Long Island City, New York, that required significant environmental remediation before it could be developed. Petitioners allege that respondents deprived them of valuable tax credits and other monies in connection with the property.

In their petition, petitioners seek: (1) pursuant to CPLR 7502(c), an order of attachment in aid of arbitration, directing the Sheriff of New York County, or in any other county in the state, to attach and levy upon certain Brownfield tax credits in which respondents have an interest or control in the amount of $1,924,241, in order to satisfy the amounts sought by petitioners in the arbitration; and (2) pursuant to CPLR articles 62 and 63, injunctions directing that respondents be restrained and enjoined from withdrawing, transferring, pledging, encumbering, assigning, dissipating, concealing, or otherwise diminishing in value any Brownfield tax credits received by them to the extent of $1,924,241.

At oral argument on the petition, petitioners represented that they were not seeking an injunction, having obtained a temporary restraining order, and were requesting only an attachment. (NYSCEF 43).

As respondent Vernon 4540 Realty, LLC (Vernon 4540) is not represented by counsel, it has defaulted on the motion.

I. BACKGROUND

A. The LLC agreement (NYSCEF 2)

On November 15, 2013, petitioners JSMB 4540 LLC (JMSB), JSMB 4540 MM LLC, and 45-50 Vernon LP (Vernon LP) entered into a limited liability company agreement (LLC agreement) with Vernon 4540, by which the LLC was formed in order to develop the above-referenced property. Respondent Brent Carrier, who owns and controls Vernon 4540, signed the LLC agreement on its behalf and is named in the agreement as an observer to its board of directors. Petitioners Vernon LP and JMSB are class A members of the LLC with voting and management rights; Vernon 4540 is a class B member, with no management, approval, voting, or consent rights. (NYSCEF 1, ¶¶ 18-19).

The members agree in article seven that "any disputes which may arise out of or in connection with" the agreement are to be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA) (NYSCEF 2), and that they are obligated to act in good faith toward each other, promote the LLC's best interests, and keep sensitive information confidential (*id.*, ¶ 20). Additionally, in the event that a member proposes to transfer all or any portion of its units in the LLC, a right of first offer (ROFO) will be extended to a non-offering member. (*Id.*, § 13.7 at 53).

The members also agree that the New York State "Brownfield tax credits" earned in

exchange for the environmental remediation of the property, would be allocated as follows: half of the credits to petitioners Vernon LP and JMSB, and the other half to respondent Vernon 4540 (*id.*, ¶ 21) and that they are prohibited from unreasonably withholding consent necessary to effectuate the receipt of the Brownfield tax credits (*id.*, ¶ 22).

B. Other agreements

With the execution of the LLC agreement, the LLC entered into a consulting agreement with a Vernon 4540 affiliate, CRE Vernon Consulting, LLC (CRE Consulting), of which Carrier is also a principal. Pursuant to that agreement, CRE Consulting agrees to provide services in connection with obtaining permits, variances, approvals, and tax credits for which it will be paid $50,000, and upon its successful performance, $450,000 (entitlements agreement). (NYSCEF 1, ¶ 26).

C. Pertinent allegations in petition (NYSCEF 1)

In late 2016, Carrier represented that he was having financial difficulties, and thus began asking for an advance of the $450,000 under the entitlements agreement, even though no entitlements had been procured. (*Id.*, ¶ 27). "Based on indication from Carrier that he might interfere" with the project without receiving the advance, LLC agreed to pay him, and on November 18, 2016, the LLC settled with CRE Consulting, Vernon 4540, and Carrier (settlement agreement). In exchange for Carrier's and his companies' promise to refrain from interfering in any way with the LLC's "lawful and fiduciary management and operation" of the project, the LLC promised to pay the $450,000 immediately before procurement of the entitlements. (NYSCEF 1, 3).

On November 22, 2016, without the LLC's consent, Carrier applied to the New York State Department of Environmental Conservation (DEC) for certification that the property had

been fully remediated (COC), which certification would entitle the certificate holder to receipt of the Brownsfield tax credits. Although all of the remediation was performed by the LLC's affiliate and the property owner, CSC 4540 Property Co., LLC (Property Co.), Carrier did not list Property Co. on the COC and the LLC was thereby precluded from receiving the Brownfield tax credits to which it was entitled. The tax returns filed by Vernon 4540 reflect that it is entitled to receive a refund from the tax credits in the sum of approximate $1.9 million. (NYSCEF 6).

Sometime in 2017, Carrier attempted and failed to purchase the property adjoining 45-40 Vernon Boulevard, and in March 2017, he diverted the $250,000 deposit funded by LLC to his own wholly-owned entity Vernon 4528 Realty LLC (Vernon 4528). When confronted by petitioners, Carrier admitted to having taken the deposit and refused to return the balance to the LLC.

On May 18, 2017, petitioners commenced a state court action (*CSC 4540, LLC et al v 4528 Vernon Realty LLC et al*, Sup Ct, NY County, Index No. 154628/2017) and a related special proceeding (Index No. 652680/2017) seeking an order of attachment and a temporary restraining order (TRO) in aid of arbitration, prohibiting dissipation or transfer of respondents' assets up to $250,000. The TRO was granted and respondents were prohibited from transferring, removing, or secreting assets from the state to the extent of $250,000, pending a decision on petitioners' motion for an attachment. (NYSCEF 4).

On June 5, 2017, petitioners commenced an arbitration, seeking the return of the $250,000 deposit and damages for respondents' breach of the LLC agreement and settlement agreement.

As Carrier had refused to consent to amend the COC by including Property Co. on it, petitioners again sought injunctive relief, which was granted by order dated December 21, 2017.

(NYSCEF 1, 34). Carrier then signed the consent as ordered, but the DEC's internal policies posed obstacles to the amendment.

In June 2018, the DEC permitted the amendment of the COC via a transfer to Property Co. of a portion of Vernon 4540's interest in the COC whereby all parties would retain their benefits as certificate holders. Carrier refused to execute the transfer.

Pursuant to their management rights under the LLC agreement, in September 2018, petitioners entered into an agreement to sell the property to a third-party purchaser for approximately $43 million with the closing scheduled for February 2019. (NYCSCEF 1, 2 at §§ 2.3[b], 1). Respondents, however, claimed that the sale constituted a "prohibited transfer" under the LLC agreement and that they were thereby entitled to a ROFO to purchase the property. The issue was brought before the arbitrator, who refused to prohibit the sale. Respondents nonetheless filed a notice of pendency on the property, allegedly relating to the ROFO.

On November 13, 2018, an order of attachment in aid of the arbitration was granted in the related special proceeding to the extent of the $250,000 deposit for the adjoining property. (NYSCEF 7). Petitioners, however, were unable to locate and attach any funds. On December 11, 2018, Carrier admitted in court that the deposit was "gone," having been spent by Vernon 4528. (NYSCEF 11 at 9).

In April 2019, the third-party purchaser cancelled the sale agreement with petitioners, and to date, the property has not sold. Moreover, title to the property appears unmarketable due to respondents' assertion of the ROFO. (NYSCEF 10).

By decision and order dated April 8, 2019 and rendered in the related special proceeding, petitioners' motion to vacate the notice of pendency was granted, along with an award to

petitioners of their costs and fees. (NYSCEF 8). Petitioners obtained a money judgment for approximately $19,000 for attorney fees, costs, and expenses in connection with the judgment. They have been unable to locate any of respondents' assets in order to execute on the judgment.

On April 24, 2019, without respondents' consent or assistance, the DEC agreed to amend the COC by adding Property Co. as a certificate holder. Petitioners filed amended tax returns for 2016 and 2017, claiming the Brownfield tax credits and allocating to respondent Vernon 4540 its share.

On August 19, 2019, petitioners filed an amended demand for arbitration with the AAA (NYSCEF 42), whereby it adds claims based on respondents' conduct in refusing to consent to changes to the COC and obstructing the sale of the property. Respondents answered the original arbitration demand, asserting 17 counterclaims, and they submitted a copy of their March 20, 2019 amendment to counterclaims and supplemental answer, adding five more counterclaims (NYSCEF 30).

During a December 11, 2018 appearance in the related special proceeding, Carrier admitted that he has no liquid assets and that he had unsuccessfully tried to sell a boat. He is also unable to afford an attorney and is now representing himself. Carrier is also a defendant in an action commenced against him in this court. (*Gudkova v Carrier*, index no. 150409/17).

II. CONTENTIONS

A. Petitioners (NYSCEF 1-19)

Petitioners assert that they have a right to safeguard the money judgment they will likely obtain against respondents by attaching respondents' only material asset, the Brownfield tax credits. They observe that Carrier is adept at dissipating, concealing, and/or absconding with money he has taken from the LLC and that notwithstanding the attachment they obtained in the

related special proceeding, they have been unable to attach any of respondents' funds. Moreover, they allege, the approximate $19,000 money judgment remains outstanding. They thus maintain that absent the attachment of the Brownfield tax credits, respondents will continue to dissipate and/or secrete assets, and that any arbitration award will be rendered ineffectual.

B. Respondent Carrier (NYSCEF 23-39)

Carrier characterizes as "baseless" petitioners' claims that he has dissipated funds in violation of the TRO. He maintains that they falsely accuse him of stealing all of the deposit, having known "all along" that more than $60,000 of the $250,000 deposit was paid by the escrow agent. He also complains that petitioners failed to comply with a court order dated December 2017 by not properly restoring respondents' capital account in the LLC or correcting the 2013-2016 partnership tax filings.

III. ANALYSIS

This is a special proceeding brought pursuant to CPLR 7502(c), by which a court:

> may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of article 62 [attachment] and 63 [injunction] of this chapter shall apply to the application, including those relating to undertakings and the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above.

(*See Matter of Kadish v First Midwest Sec., Inc.*, 115 AD3d 445, 445 [1st Dept 2014]).

Attachment is a "harsh" remedy, consistently construed narrowly in favor of the party against whom it is sought. (*VisionChina Media*, 109 AD3d at 59; *see Glazer & Gottlieb v Nachman*, 234 AD2d 105, 105 [1st Dept 1996] [attachment denied but court directed that escrowed funds remain in escrow]). The determination of a motion for an attachment rests in the court's discretion. (*VisionChina Media*, 109 AD3d at 59; *J.V.W.*

Inv. Ltd. v Kelleher, 41 AD3d 233, 234 [1st Dept 2007]; *see also Moquinon, Ltd. v Gliklad*, 55 Misc 3d 1212[A], 2017 NY Slip Op 50548[U], * 3 [Sup Ct, NY County 2017]).

In deciding whether to grant an attachment in aid of arbitration, the court applies the "rendered ineffectual" standard pursuant to CPLR 7502(c) as the sole criterion. (*Matter of Kadish*, 115 AD3d at 446; *Matter of Sojitz Corp. v Prithvi Info. Solutions Ltd.*, 82 AD3d 89, 96 [1st Dept 2011], citing *Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270, 271 [1st Dept 1996]; *Sullivan & Worcester LLP v Takieddine*, 73 AD3d 442, 442 [1st Dept 2010]).

Carrier admits that respondents have no readily available assets absent the Brownfield tax credits, that he is insolvent, and that he withheld from petitioners the refund of the $250,000 deposit, minus the seller's expenses. (*See* NYSCEF 11, at 8, 9). Moreover, it is not disputed that petitioners are funding the arbitration proceedings due to his claims of insolvency (*id.* at 6, 8; *see also* NYSCEF 1; NYSCEF 15), that he has not satisfied the $19,000 judgment against him for costs and fees in connection with the notice of pendency, and that he is unable to pay his attorney. Petitioners thus establish that any potential arbitration award in their favor may be rendered ineffectual due to respondents' apparent inability to pay it. (*See Habitations Ltd., Inc. v BKL Realty Sales Corp.*, 160 AD2d 423 [1st Dept 1990] [attachment warranted given showing that respondent had no assets, had failed to pay creditors, and did not intend to satisfy award]).

IV. CONCLUSION

Based on the foregoing, it is hereby

ORDERED and ADJUDGED, that the petition for an order of attachment in aid of arbitration is granted; it is further

ORDERED and ADJUDGED, that the amount to be secured by this order of attachment, inclusive of probable interest, costs, and Sheriff's fees and expenses is $1,924,241; it is further

ORDERED and ADJUDGED, that petitioners' undertaking is fixed in the sum of $19,242 conditioned on the requirement that petitioners pay to respondents all costs and damages, including reasonable attorney fees which may be sustained by reason of the attachment, and must pay to the Sheriff all of his or her allowable fees, if respondents recover judgment/arbitration award or if it is decided that petitioners were not entitled to an attachment of the property of respondents; and it is further

ORDERED, that the Sheriff of the City of New York, or the Sheriff of any County of the State of New York, levy within his or her jurisdiction, at any time before final arbitration award, upon certain Brownfield tax credits in which respondents have an interest or control in the amount of $1,924,241, the amount of petitioners' demand, together with probable interest, costs, and the Sheriff's fees and expenses, and that the Sheriff proceed herein in the manner and make his or her return within the time prescribed by law.

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11/12/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE