

**Matter of Garcia v East Asia Land Fund, LLC**

2019 NY Slip Op 33426(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 152829/2017

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

INDEX NO. 152829/2017
MOTION DATE 11/19/2019
MOTION SEQ. NO. 003, 005

In the Matter of
MARIA VICTORIA CHICA GARCIA and GIAMBATTISTA TAGLIONI,

Petitioners,

- v -

EAST ASIA LAND FUND, LLC, KATHERINE STEINER, ELIZABETA LEVIS, STEVEN HARRIS, STEVEN G. HARRIS ARCHITECTS, J. CALLAHAN CONSULTING, INC., DELBERT SMITH, CES ENGINEERING, LLC, CES ENGINEERING INC., REGELE BUILDERS, INC., THE BIG IC LLC, ROSS DALLAND, ROSS DOLLAND ENGINEERS P.C., MILLENNIUM MAINTENANCE AND ELECTRICAL CONTRACTORS INC., HENLIA CHEN, CHEN ENGINEERING SERVICES, P.C., ROSE ASSOCIATES, INC., and ADAM ROSE

DECISION + ORDER ON MOTION

Respondents.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 134, 135, 136, 137, 138, 139, 140, 141, 142, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 182, 183, 185, 186

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 187, 188, 189, 190, 191

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

In this proceeding seeking injunctive relief in connection with construction activities adjacent to the petitioners' building, the respondents Katherine Steiner, Elizabeta Levis, Rose Associates, Inc., and Adam R. Rose (hereinafter collectively the moving respondents) move pursuant to CPLR 3211(a)(7) to dismiss the petition against them. The petitioner Maria Victoria Chica Garcia opposes the motion, except as to Levis, and cross-moves pursuant to CPLR 103(c) to convert the proceeding into a plenary action alleging trespass, negligence, and

nuisance (MOT SEQ 003). Carl Witowsky, who was appointed as a receiver of the subject building by the Supreme Court (Katz, J.) in a matrimonial action commenced by the petitioner Giambattista Taglioni, against the petitioner Maria Victoria Chica Garcia (*see Taglioni v Chica Garcia*, Sup Ct, N.Y. County, Index No. 306925/17), moves pursuant to CPLR 1017 for leave to be substituted as petitioner in place and stead of the Taglioni and Chica Garcia, and to amend the caption accordingly (SEQ 005). No opposition has been submitted to Witowsky's motion.

At oral argument of the motions on November 19, 2019, Witowsky informed the court that, if his substitution motion were granted, he would agree to discontinue the proceeding against the moving respondents, without prejudice to re-joining them in the matter, provided that, if he did so, they would waive the affirmative defense of statute of limitations in connection with the timeliness of any such re-joinder; the parties agreed that the moving respondents, if re-joined, would be permitted to assert, as an affirmative defense, that the initial proceeding was not timely commenced against them. The parties also agreed that the proceeding should be converted to an action.

Witowsky's motion to be substituted as the petitioner, and to amend the caption accordingly, is granted without opposition. The moving respondents' motion to dismiss the petition as against them is granted, on consent and in accordance with the stipulated conditions described above. Chica Garcia's cross motion to convert the proceeding to an action, as joined in by Witowsky, is granted on consent.

The petitioners are spouses who jointly own marital property, and are parties to a pending matrimonial action. Prior to the commencement of the matrimonial action, they together commenced this proceeding against the owners of an adjacent parcel of property, as well as the owners' managing agents and principals of the managing agents, among others, seeking to enjoin them from undertaking certain construction activities that the petitioners alleged were causing damage to the marital property. The petitioners asserted claims sounding in trespass, nuisance, waste, and injury to property, and seek monetary, injunctive, and

declaratory relief. The petitioners claim that the respondents improperly excavated, or seek to excavate, underneath a common wall (or “party wall” in the parlance of the construction industry), and that this conduct threatens the integrity of the petitioners’ building. The respondents had applied for building permits. Steiner is the manager of the respondent East Asia Land Fund, LLC, and signed an application in her capacity as manager. The petitioners essentially seek to pierce the corporate veil to hold her personally liable for any trespass or wrongful filing committed by East Asia. There are no allegations that either Rose or Rose Associates performed design or construction services in connection with the project; rather, they performed only a preconstruction condition survey and vibration monitoring, and acted as East Asia’s agent. The moving respondents contend that the petition does not state a cause of action against them in their personal capacities.

After the moving respondents submitted their motion to dismiss under Motion Sequence 003, Taglione consented to dismiss the proceeding against them; Chica Garcia only consented to dismiss the proceeding against the respondent Levis. Chica Garcia cross-moved to convert the proceeding to an action. On June 6, 2019, and thus while that motion and cross motion were pending, Justice Katz granted Taglione’s motion to appoint a receiver for the marital property that is the subject of this action. By order dated on or about August 12, 2019, Justice Katz appointed Witowsky as receiver of the property.

Witowsky now appears, and seeks to substitute himself as party petitioner, consents to dismiss the petition against the moving respondents, convert the proceeding to a plenary action, and amend the caption accordingly. All parties, in effect, consent to this relief.

CPLR 1017 provides that “[i]f a receiver is appointed for a party, or a corporate party is dissolved, the court shall order substitution of the proper parties.” Since Witowsky was appointed as receiver for the petitioners in connection with the subject marital property, substitution is proper (*see generally Vitale v City of New York*, 183 AD2d 502 [1st Dept 1992]). Since there is no basis for holding the moving respondents liable for the acts of the adjacent

building owner, its managing agent, or its contractors, and all parties consent now consent to the dismissal of the petition against the moving respondents, their motion to dismiss, under the “terms and conditions” described above, should be granted (CPLR 3217[b]). Finally, since this matter alleges common-law causes of action sounding in trespass, nuisance, waste, and injury to property, and seeks monetary, injunctive, and declaratory relief, the matter is properly prosecuted as an action rather than a special proceeding (*see generally Matter of Jacobs v Cartalemi*, 156 AD3d 635 [2d Dept 2017]; *Matter of Agoglia v Benepe*, 84 AD3d 1072 [2d Dept 2011]).

Accordingly, it is,

ORDERED that the motion of Carl Witosky to be substituted as party petitioner in place and stead of Giambattista Taglioni, and Maria Victoria Chica Garcia, and to amend the caption accordingly (SEQ 005), is granted; and it is further,

ORDERED that the motion of the respondents Katherine Steiner, Elizabeta Levis, Rose Associates, Inc., and Adam R. Rose to dismiss the petition against them (SEQ 003) is granted, without opposition, and the petition is dismissed against those respondents; and it is further,

ORDERED that the proceeding is severed against Katherine Steiner, Elizabeta Levis, Rose Associates, Inc., and Adam R. Rose, and the Clerk of the court is directed to enter judgment dismissing the petition against those respondents, without prejudice to re-joinder of those parties as defendants, upon the condition that they waive the affirmative defense of statute of limitations to the extent that it is based solely on their re-joinder subsequent to the expiration of the applicable limitations periods; and it is further,

ORDERED that the cross motion of the petitioner, Maria Victoria Chica Garcia, as joined in by the plaintiff, Carl Witosky, to convert the proceeding to an action (SEQ 003) is granted, and the petition is deemed to be a complaint, and any affidavits submitted in opposition thereto are deemed to be answers to the complaint; and it is further,

ORDERED that the caption of the matter shall now read:

CARL WITOWSKY, AS RECEIVER OF REAL PROPERTY  
JOINTLY OWNED BY MARIA VICTORIA CHICA GARCIA and  
GIAMBATTISTA TAGLIONI AT 143 EAST 18TH STREET,  
NEW YORK, NEW YORK,

Plaintiff,

Index No. 152829/17

V

EAST ASIA LAND FUND, LLC, STEVEN HARRIS, STEVEN G.  
HARRIS ARCHITECTS, J. CALLAHAN CONSULTING, INC.,  
DELBERT SMITH, CES ENGINEERING, LLC, CES ENGINEERING,  
INC., REGELE BUILDERS, INC., THE BIG IC LLC, ROSS  
DALLAND, ROSS DOLLAND ENGINEERS P.C., MILLENNIUM  
MAINTENANCE AND ELECTRICAL CONTRACTORS INC., HENLIA  
CHEN, and CHEN ENGINEERING SERVICES, P.C.,

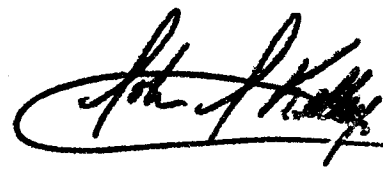
Defendants

and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the trial support clerk, and shall file the notice required by CPLR 8019(c) and a completed Form EF-22 with the County Clerk, and the trial support clerk shall thereupon amend the court records accordingly.

11/19/2019

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: