

Besen v Doshi

2019 NY Slip Op 33761(U)

December 27, 2019

Supreme Court, New York County

Docket Number: 652691/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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MICHAEL BESEN, INDIVIDUALLY AND DERIVATIVELY,
ON BEHALF OF, 94-16 34 ROAD LLC, 223 WEST 20
LLC, EAST 116TH LLC, 42 MULBERRY LLC, 1320
FULTON LLC, 1320 FULTON AVENUE MANAGEMENT
CORP., 2721 HEATH LLC, 34447 EQUITIES INC.,
BESEN & ASSOCIATES INC.,

Plaintiffs,

- v -

AMIT DOSHI, 223 WEST 20 LLC, EAST 116TH LLC, 42
MULBERRY LLC, 1320 FULTON AVENUE
MANAGEMENT CORP., 2721 HEATH LLC, 34447
EQUITIES INC., BESEN & ASSOCIATES INC., KALPANA
DOSHI, JAMES COLEMAN, RAMA BASSALALI,
ROBERT FARHADIAN, JACKSON PARTNERS LLC, 94 -
16 34 ROAD LLC, 1320 FULTON LLC, NEW YORK 2000
LLC, NEW YORK CITY MANAGEMENT, LLC, BESEN
CAPITAL, LLC, BESEN RESIDENTIAL, LLC, THE BESEN
GROUP, LLC, BESEN RETAIL, LLC, NYC RENTALS,
LLC, NYCM 2018 LLC,

Defendants.
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INDEX NO. 652691/2018
MOTION DATE 10/11/2019,
11/06/2019
MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 188, 189, 190, 191,
192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 208, 210, 234, 244, 245, 246, 247,
248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 270, 271, 272, 273, 274, 275, 276, 277, 278, 315

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 215, 216, 217, 218,
219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 258, 259, 260, 261, 262, 263, 264,
280, 281, 282, 283, 284, 285, 286, 316, 355, 356

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS

Upon the foregoing documents, it is

In motion sequence number 004 (motion 04), plaintiff Michael Besen moves (1)
pursuant to BCL § 1113 compelling defendant Amit Doshi to execute the documents
necessary to release certain commissions currently held in escrow to be paid to Besen

& Associates Inc. (B&A) and Besen Capital LLC (collectively, the Companies); or (2) declaring that the Companies are entitled to receipt of the commissions and ordering the escrow agents to release the funds to the Companies; or (3) pursuant to CPLR 3212 (e), granting Besen partial summary judgment on the third cause of action for injunctive relief and directing Doshi to cooperate in releasing commissions from escrow to be paid to the Companies. (NYSCEF Doc. No. [NYSCEF] 208, OSC). Doshi's cross motion for summary judgment dissolving and appointing a receiver for 223 West 20th Street LLC, 1320 Fulton Avenue Management Corporation, 1320 Fulton LLC, 2721 Heath LLC, and 34447 Equities Inc., of which Doshi and Besen are 50% owners, is denied without prejudice for the reasons discussed on the record.¹ (NYSCEF 243, Cross Motion; NYSCEF 316, Oct. 11, 2019 Argument Transcript).

In motion sequence number 05 (motion 05), Besen moves pursuant to CPLR 3103 to quash Doshi's document demand for "hard copy documents" in B&A's possession and its affiliates and property entities all co-owned by Besen and Doshi. (NYSCEF 230, Sept. 6, 2019, OSC). Besen also seeks an order conditioning production of documents on Doshi's payment of 50% of the cost of such production.

Besen and Doshi have worked together since 1989, and became 50% co-owners of B&A and other business entities involved in this action. (NYSCEF 17, Amended Complaint ¶¶ 1, 20-28, 91). On July 20, 2018, Doshi resigned as an employee, officer, and director of B&A, though he did not resign as a 50% shareholder of B&A, or the

¹Doshi is directed to read Part 48's rules and comply with them. For example, Doshi shall meaningfully describe his exhibits in NYSCEF; "Doshi Aff. Ex 1" is useless.

other companies that the parties own together. (Id., ¶ 123; NYSCEF 316, Argument Oct. 11, 2019 Tr., 74:14-21).

Besen initiated this action with a Summons with Notice against defendant Doshi on May 31, 2018. (NYSCEF 1). In his March 11, 2019 amended complaint, Besen added Farhadian and other defendants, asserting claims for: (1) breach of fiduciary duty with respect to B&A; (2) conversion with respect to B&A against Doshi; (3) a permanent injunction enjoining Doshi from using funds in B&A's operating account; (4) an accounting against Doshi with respect to B&A; (5) breach of fiduciary duty against Doshi with respect to 223 West 20 LLC; (6) a permanent injunction enjoining Doshi to refinance the mortgages on the 20th Street property; (7) judicial dissolution of 223 West 20 LLC pursuant to LLC Law § 702; (8) judicial dissolution with respect to East 116th LLC pursuant to LLC Law §702; (9) breach of fiduciary duty against Doshi with respect to 42 Mulberry LLC; (10) judicial dissolution with respect to 42 Mulberry LLC pursuant to LLC Law §702; (11) breach of fiduciary duty against Doshi with respect to 1320 Fulton Avenue Management Corp.; (12) a permanent injunction enjoining Doshi to execute documents to refinance the existing mortgage with respect to 1320 Fulton Avenue Management Corp.; (13) judicial dissolution of 1320 Fulton Avenue Management Corp. pursuant to BCL §1104 (a) (1) and (a) (3); (14) judicial dissolution with respect to 1320 Fulton LLC pursuant to LLC Law § 702; (15) breach of fiduciary duty against Doshi with respect to 2721 Heath LLC; (16) a permanent injunction enjoining Doshi to execute documents to refinance the existing mortgage; (17) judicial dissolution with respect to 2721 Heath LLC pursuant to LLC Law § 702; (18) breach of fiduciary duty against Doshi with respect to 34447 Equities Inc.; (19) a permanent injunction enjoining Doshi to

execute documents to refinance with respect to 34447 Equities Inc.; (20) judicial dissolution with respect to 34447 Equities Inc. pursuant to BCL §1104(a)(1) and (a) (3); (21) breach of fiduciary duty against Doshi and Farhadian with respect to 94-16 34 Road LLC; (22) aiding and abetting breach of fiduciary duty against Doshi and Farhadian with respect to 94-16 34 Road LLC; (23) a permanent injunction enjoining Doshi and Farhadian from taking any steps to foreclose on the Queens property with respect to 94-16 34 Road LLC; and (24) judicial dissolution with respect to 94 -16 34 Road LLC pursuant to LLC Law §702. (NYSCEF 17, March 11, 2019, Amended Complaint). Of the 24 causes of action, 1, 2, 3, 4, 5, 6, 9, 11, 12, 15, 16, 18, 19, 21, 22, and 23 are brought individually and derivatively. (Id.). Besen alleges that his differences with Doshi are “irreconcilable,” that it is impossible for Besen to continue to operate any business with Doshi; and that the work environment is “dysfunctional” and “toxic.” (Id., ¶¶ 60, 115, 150, 156, 163, 177, 183, 194, 201, 206, 223, 212, 229, 240, 247, 265, 271).

The allegations in the amended complaint relevant to motion 04, are:

“Since his resignation from Besen & Associates, Doshi has interfered with the payment of commissions to Besen & Associates by instructing third-party sellers not to pay commissions to Besen & Associates ... Historically, those commissions have always gone to Besen & Associate’s account ... Now, Doshi has instructed the parties responsible for payment of the commissions to make payments directly to Doshi and his designees ... As a consequence, substantial sums of money are being held in escrow and no one is getting paid, including third-party salespeople who are demanding payment.” (NYSCEF 17 at ¶¶ 108-111.)

B&A entered an agreement to sell 2172 Amsterdam Avenue which provided for a 5% commission. (NYSCEF 191, Nov. 1, 2016, Exclusive Right to Sell Agreement

between B&A and seller). The transaction closed for \$5 million on October 25, 2018. (NYSCEF 189, Besen Affidavit ¶ 21). The \$250,000 commission is held in an escrow account held by Goldberg Weprin Finkel Goldstein LLP. (NYSCEF 194, Oct. 25, 2018, Escrow Agreement). As a result, B&A owes the salesperson, Matthew Garcia, \$37,500, the payment of which Doshi consents. (NYSCEF 195, Garcia's Dec. 14, 2018 letter demanding unpaid commission). However, Doshi claims to have caused the sale without any effort by Besen, and thus Doshi insists on collecting the remaining balance on the commission. (NYSCEF 245, Doshi Aff., ¶ 7).

B&A's affiliate, The Besen Group, entered into a brokerage agreement for the sale of 507-511 Third Avenue and 207-211 East 34th Street with a .6% commission. (NYSCEF 196, June 19, 2018, Brokerage Agreement; NYSCEF 189, Besen Aff., ¶ 31). The transaction closed on November 29, 2018 for \$79.5 million. (NYSCEF 189, Besen Aff., ¶ 28). B&A seeks the commission of \$477,000 which is held by an escrow agent. (NYSCEF 197, Nov. 6, 2018, Besen invoices; NYSCEF 189, Besen Aff. ¶¶ 32, 33, 34). It is undisputed that other non-party brokers are entitled to \$143,000 of B&A's commission. (NYSCEF 198, Broker Invoices; NYSCEF Doshi Aff., ¶¶ 13, 18). Doshi claims that he caused the sale, and thus the balance of the commission belongs to him, not Besen. (NYSCEF 245, ¶ 7).

On December 12, 2018, 348 West 118 LLC refinanced a loan in the amount of \$6.1 million. (NYSCEF 189, Aug. 14, 2019, Besen Aff. ¶¶ 36, 37). According to Besen, Besen Capital LLC was the mortgage broker, and thus Besen asserts that B&A is entitled to the commission consistent with longstanding practice. (Id., ¶ 38). Doshi and Besen are each 50% shareholders of Besen Capital, the financing arm of B&A. (Id.,

¶4). There is no written agreement before the court. Rather, according to Besen, since 2005, Besen Capital LLC has collected a 1% mortgage fee on such transactions. (Id., ¶39). Accordingly, the \$61,000 commission is held by Smith Gambrell & Russell, LLP, as escrow agent. (NYSCEF 200, Dec. 12, 2018, Escrow Agreement). Doshi objects because Besen Capital LLC has not appeared in this action and has no claims here. Further, Doshi opines that the BCL does not apply to Besen Capital LLC, issues of fact abound, and the availability of money damages and lack of irreparable harm all preclude Besen's requested relief.

Repeatedly, Doshi argues that he worked on these deals before he resigned from B&A, and continued working on them after he left, based on his understanding that he would be paid directly for his share of any commissions earned. (NYSCEF 245, Sept. 23, 2019, Doshi Aff., ¶¶ 7, 10). Doshi insists it was common practice for the parties to be paid their commissions directly when transactions closed instead of paying B&A. (Id., ¶¶14, 15). Doshi also challenges Besen's reliance on BCL § 1113 because this is a plenary action, not a dissolution. Likewise, Doshi objects that injunctive relief is inappropriate because damages are available in this plenary action. Finally, and again repeatedly, Doshi challenges Besen's veracity. (Id., ¶¶ 2, 6, 14, 19, 20, 5 n 2, 11 n 5).

Doshi's understanding and past practices about payment of commissions, along with Besen's understanding of past practices as to mortgage broker commissions, are irrelevant. The actual broker agreements do not allow for oral modification. Moreover, Doshi and Besen, the owners, either partners, members, or shareholders, are hopelessly divided as to the management of their mutually owned companies and dissolution proceedings abound.

As to 2172 Amsterdam Avenue, the escrow agent shall release the \$250,000 to B&A, consistent with the agreement, and B&A shall pay Garcia forthwith. The balance shall remain in the B&A account until B&A's dissolution is resolved. Contrary to Doshi's assertion, Besen did not agree to split the commission. (See NYSCEF 251, B&A invoice, Oct. 23, 2018, signed by brokers and Doshi, but not Besen; NYSCEF 192, Besen's B&A invoice, Oct. 25, 2018 demanding payment to B&A). Even if he did so agree, B&A's assets must be marshalled for purposes of dissolution. As the court is simultaneously granting Doshi's petition to dissolve B&A (See 651696/2019), there is authority under BCL §1113 to preserve B&A's assets and conduct its business until dissolution. Creditors must be paid, and brokers' litigation resolved.

As to 507-511 Third Avenue and 207-211 East 34th Street, the escrow agent shall release the \$477,000 commission to the Besen Group LLC, consistent with the agreement, and it shall pay the non-party brokers forthwith. The balance shall remain in the Besen Group LLC's account until dissolution of B&A is resolved. (See 651696/2019).

As to 348 West 118 LLC, in the absence of an agreement or consent, and without legal authority, Besen's request is denied. There is no pending request to dissolve Besen Capital LLC.

Besen and Doshi shall not be paid any commissions, distributions, or receive any other remuneration, until these financial issues are resolved by the dissolution proceedings or settlement. Any payments to either Doshi or Besen by a dissolving entity may constitute a fraudulent transfer, in which case a claw back would be appropriate. (Debtor & Creditor Law §§273, 273-a, 274, 275, 276, 276-a, 277, and

278). Non-party expenses must be paid first. Accordingly, it should not come as a surprise to either party that funds shall be held by B&A and the other entities which the parties seek to dissolve. (See NYSCEF 356, Dec. 18, 2019, Mark Walfish Aff, at 3 n 1)

As to motion 05, Doshi served his first document request in this action on March 21, 2019. (NYSCEF 256, Besen's responses and objections, April 22, 2019). Besen insists that Doshi should pay for the production. At oral argument, the parties agreed that Besen and Doshi shall both receive copies of the monthly bank statements, or have electronic access to view B&A's checking account. (See NYSCEF 316, Certified Transcript Oct. 11, 2019). Besen was directed to provide Doshi with a list of monthly expenditures if the bank statements do not include copies of checks. (Id.). If Doshi objected to a payment, his attorney would inform Besen's attorney within 10 days of Doshi's receipt of the statement, or the first date of electronic access. (Id.). As of the December 18, 2019 status conference, none of these directives had been implemented.

Besen's motion is granted to the extent that he shall not be required to produce "hard copy documents." The days of producing paper copies are over. Moreover, the cost of data collection, image processing, and storage of responsive ESI of the roughly 5.1 terabytes of data residing on the B&A servers, is estimated to cost \$80,000 to \$100,000, and take twelve months. (NYSCEF 355, Heppt Dec. 17, 2019 Aff., ¶ 10).

As to that part of the motion 05 to quash defendants' subpoena for B&A documents, the parties agreed to investigate options and report back to the court at the November 6, 2019 discovery conference for all related cases. Specifically, the parties agreed to investigate the cost of imaging the server until the date of Doshi's resignation, or limiting access through a portal. However, the November 6, 2019 conference order

is silent on this issue. (NYSCEF 319). Rather, on December 17, 2019, the night before the next scheduled court conference, Besen filed an affirmation of counsel admitting that he finally investigated the costs and service providers quoted \$1,500 to image the server up to the date to Doshi's termination and \$6,000 for a portal. (NYSCEF 355, Hept Affirmation, ¶¶ 12,16).

However, of the two remaining options, the court rejects Besen's selection of the more expensive portal option. Besen insists that because Doshi resigned as officer, director and employee of B&A, Doshi is no longer entitled to access B&A documents. Rather, Besen contends that Doshi, a mere shareholder, may have access to inspect certain books and records, but not unfettered access to the server. (NYSCEF 355, ¶¶ 12,14,15). Besen overlooks that Doshi is entitled to access because Besen sued Doshi. Besen may not limit or control Doshi's access to only those documents Besen deems discoverable. B&A shall image the server and produce the image to Doshi. This shall satisfy Besen's and B&A's obligation to produce documents responsive to Doshi's document request up to the date of Doshi's resignation.

Despite this court's clear order on the record, the parties did nothing to move this matter along since October 11, 2019 until the night before a conference on December 18, 2019. The bickering over who shall pay the \$1,500 cost to image the server evidences the dissention, deadlock and division. (See BCL 1104 [a]). Their inability to cooperate to the detriment of their co-owned companies yields one conclusion: dissolve all of the joint businesses, now.

Accordingly, it is

ORDERED, that as Doshi's cross-motion for summary judgment (NYSCEF 243) is denied without prejudice; and it is further

ORDERED, that as to 2172 Amsterdam Avenue, the escrow agent shall release the \$250,000 to B&A consistent with the agreement and B&A shall pay Garcia forthwith; and it is further

ORDERED, that as to 507-511 Third Avenue and 207-211 East 34th Street, the escrow agent shall release the \$477,000 to the Besen Group consistent with the agreement and it shall pay the non-party brokers forthwith; and it is further

ORDERED, that as to 348 West 118 LLC, Besen's motion is denied; and it is further

ORDERED, that motion 05 is denied as to the production of actual documents and granted to the extent that B&A shall image its server as to all documents and electronic materials, including metadata, created on or before July 20, 2018, and B&A shall pay the cost. The imaged server shall be produced to Doshi within 10 days of this order; and it is further

ORDERED, that neither Besen nor Doshi shall be paid any commissions, distributions or receive any other remuneration from any entity that they co-own and is the subject of a dissolution proceeding until these financial issues are resolved by the dissolution proceedings, settlement, or otherwise.

Motion Seq. No. 04:

12/27/19
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

Motion Seq. No.05:

12/27/19
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY