SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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TOBY S. MOSKOVITS, YECHIAL LICHTENSTEIN a/k/a MICHAEL LICHTENSTEIN, NORTHSIDE SEIGEL LLC, 232 SEIGEL DEVELOPMENT LLC and 232 SEIGEL ACQUISITION LLC,

Plaintiffs, Decision and order

- against - Index No. 500963/20

RICHMOND HILL INVESTMENT CO. LP, ER 215 MOORE LLC, and ER 215 MOORE HOLDINGS LLC,

Defendants, September 15, 2020

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint pursuant to CPLR §3211. The plaintiff opposes the motion arguing the lawsuit has been discontinued and in any event there is a bankruptcy stay. After reviewing all the arguments this court now makes the following determination.

Toward the end of 2014 the defendants loaned the plaintiffs approximately thirty million dollars to develop properties in Kings County. The loans were secured by mortgages in two properties and the defendant ER 215 Moore Holdings LLC was given a 12.89 percent membership interest in an entity owned by the plaintiffs called Northside Moore LLC. A few years later the loans were refinanced and again the defendant ER 215 Moore Holdings LLC was given a 12.5 percent ownership interest in Northside Siegel LLC another entity owned by the plaintiffs. Further, in February 2018 Moskovitz and Lichtenstein entered into an agreement with ER 215 Moore Holdings LLC to purchase the

membership interests in those two entities. The plaintiffs failed to pay the loans when due and extensions were granted by the defendants. On August 6, 2018 a default and acceleration notice was sent to the plaintiffs for their failure to pay the loans when due. Further, on October 16, 2018 the defendants notified plaintiffs they would be conducting a UCC sale of the membership interests in the two entities. Negotiations between the parties continued and the plaintiffs sought a further refinancing of the debt and offered to execute confessions of judgement for any outstanding amounts. The parties eventually agreed to a refinance and part of the loan was paid. When the rest of the loan remained unpaid the defendants filed the confessions of judgement.

The plaintiffs commenced this action alleging three causes of action including breach of fiduciary duty, breach of implied covenant of good faith and fair dealing and a declaratory judgement. The basis for the allegations is the fact that ER 215 Moore Holdings LLC as part owner of the plaintiff's entities had a fiduciary duty to help its co-members be able to refinance the debt and it failed to do so.

The plaintiffs sought and obtained a temporary restraining order preventing the enforcement of the confessions of judgement. The defendants then moved seeking to oppose any preliminary injunction and moved seeking to dismiss the complaint. On July

24, 2020, prior to answering the motion to dismiss, the plaintiffs voluntarily discontinued the action without prejudice. Moreover, on July 14, 2020 both 232 Seigel Development LLC and 232 Seigel Acquisition LLC filed for bankruptcy. Indeed, the basis for the discontinuance was the fact a bankruptcy had been commenced and upon reorganization all debts could be paid obviating the need for this lawsuit. The defendants insist the motion to dismiss that was filed prohibits a voluntary discontinuance and that consequently the motion should be granted and the case dismissed with prejudice.

Conclusions of Law

The Fourth Department clearly holds that a motion to dismiss is not a responsive pleading pursuant to CPLR §3217(a)(1) and therefore notices of discontinuance served after a motion to dismiss has been filed is not untimely (Harris v. Ward Greenberg Heller & Reidy LLP, 151 AD3d 1808, 58 NYS3d 769 [4th Dept., 2017]). However, the First Department holds a motion to dismiss is a responsive pleading and consequently once a motion to dismiss is filed a notice of discontinuance can longer be served (BDO USA, LLP v. Phoenix Four Inc., 113 AD3d 507, 979 NYS2d 45 [1st Dept., 2014]). Thus, there is a conflict among the various Divisions of the Appellate Division. While the Second Department has yet to issue a ruling on this matter, other courts in Kings County have decided that a motion to dismiss is a responsive

pleading and thus no notice of discontinuance can be served (see, High Class Realty SB LLC v. Nasimov, 2020 WL 2839209 [Supreme Court Kings County 2020]). This court adopts that conclusions reached in High Class and therefore the notice of discontinuance was invalid.

Further, it is well settled that a bankruptcy stay is not available where the debtor initiated the lawsuit. Thus, such bankruptcy stay is only possible in suits against the debtor not suits brought by the debtor (Koch v. Preuss, 2020 WL 1304084 [S.D.N.Y. 2020]). Therefore, the plaintiffs cannot benefit from any bankruptcy stay in this case.

Thus, the defendants have filed a motion to dismiss which has not been opposed. Therefore, the plaintiffs shall have thirty days from receipt of this order in which to oppose the motion to dismiss. The defendants will then have two weeks in which to reply. At that time the court will arrange to conduct a hearing to hear arguments regarding the motion to dismiss.

So ordered.

ENTER:

DATED: September 15, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC