

Elberg v Pewzner

2022 NY Slip Op 33172(U)

September 20, 2022

Supreme Court, New York County

Docket Number: Index No. 657021/2022

Judge: Andrew S. Borrok

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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 53

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RUBEN ELBERG,

Plaintiff,

- v -

TAMARA PEWZNER,

Defendant.

INDEX NO. 657021/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREW S. BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 19, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for CHANGE VENUE.

Upon the foregoing documents, Ruben Elberg’s motion for summary judgment in lieu of complaint (Mtn. Seq. No. 001) must be granted.

Reference is made to (i) an action captioned *Ruben Elberg v Crabapple Corp. et al*, Index No. 653373/2016 (the **2016 Action**), (ii) an action captioned *Crabapple v Elberg*, Index No. 650492/2015, (the **2015 Action**), (iii) a Decision and Order of the Appellate Division (the **Appellate Division LLC Decision**; NYSCEF Doc. No 397), (iv) a Decision and Order (the **Prior Decision**; Index No. 653373/2016, NYSCEF Doc. No. 34) dated January 20, 2021, (v) a Decision and Order dated March 23, 2021 (the **First Supplemental Order**; Index No. 653373/2016, NYSCEF Doc. No. 370) (vi) an Order to Show Cause (**the Order to Show Cause**;

Index No. 653373/2016, NYSCEF Doc. No. 427 at 2-3), dated July 25, 2022, seeking (a) a declaration that Tamara Pewzner was in contempt for violating post-judgment subpoenas issued by the plaintiff, (b) sanctions against Ms. Pewzner and (c) an order directing Ms. Pewzner to comply with post-judgment subpoenas and requiring her to transfer all gross compensation received following the Capital Event and dissolution of the LPs to an account designated by the Court, where the funds would be held until the Court ordered distribution consistent with Article 3.4 of the November LP Agreements which this Court declined to sign solely until this Court heard this Summary Judgment in Lieu of Complaint Motion (and which is being signed simultaneously herewith), (vii) an action (the **Kings County Action**) captioned *Tamara Pewzner v Levi Hunter et al*, Index No. 519693/2022, (viii) a Supplemental Order dated July 29, 2022 (the **Second Supplemental Order**; Index No. 653373/2016, NYSCEF Doc. No. 450), and (ix) an action captioned *Estate of Jacob Elberg*, File No. 2022-211/C-L (the **Surrogate Action**) pending in the Surrogate's Court (Kelly, J.), Queens County.¹

In the 2016 Action, Mr. Elberg asserted a single cause of action for a declaratory judgment that the November LP Agreements are valid and that Mr. Elberg is therefore entitled to 40% of the Net Proceeds from a Capital Event or dissolution from Royal CP and Royal HI. The Court granted Mr. Elberg's motion for summary judgment on its sole cause of action for a declaratory judgment in the Prior Decision:

ADJUDGED and DECLARED that the Limited Partnership Agreements, dated November 30, 2012 are valid and govern the affairs of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP; and it is further

¹ The Surrogate Action involves the Estate of Jacob Elberg. It was transferred from Kings County to Queens County pursuant to Administrative Transfer Order #110, dated December 3, 2021 (*see* 2016 Action, NYSCEF Doc. No. 466).

ADJUDGED and DECLARED that under the Limited Partnership Agreements, dated November 30, 2012, Ruben Elberg is a Class D Limited Partner of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP and as such is entitled to receive 40% of the Net Proceeds from a Capital Event or dissolution from Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP consistent with Article 3.4 of the November LP Agreements

(*id.*, at 16).

On March 3, 2021 (2016 Action, NYSCEF Doc. No. 352) and months after this Court issued the Prior Decision declaring that the November LP Agreements are the governing agreements and that Mr. Elberg was entitled to receive 40% of the Net Proceeds of a Capital Event, Mr. Elberg made a demand for distributions pursuant Paragraph 3.2.4 of November LP Agreements because a Capital Event had occurred. On the record before the court, Ms. Pewzner did not respond.

Mr. Elberg then moved by order to show cause to require that the relevant funds be moved into an account designated by the Court. Ms. Pewzner opposed the motion. In her opposition, notwithstanding the Appellate Division LLC Decision, Ms. Pewzner falsely argued that the issue of ownership of the relevant LLCs had never been before the Appellate Division. It had. In response, this Court issued its First Supplemental Order quoting the Appellate Division LLC Decision:

... Elberg was not removed as the sole "managing member" of the LLCs. ***The record demonstrates that he was a 40% minority member***, not a managing member with the power to act unilaterally on the LLCs' behalf. The relevant agreements contained no provision regarding the succession of management of the LLCs in the event of the death of Jacob, the majority member. Thus, Jacob's controlling interest in the LLCs passed to his estate upon his death, and Elberg and Pewzner, the co-executors of the estate, had the authority to act as co-managers of the LLCs (Limited Liability Company Law [LLC] § 608; *see also Yew Prospect v Szulman*, 305 AD2d 588, 589 [2d Dept 2003]). LLC § 608 provides that the executor of a deceased member "may exercise all of the member's rights for the purpose of settling his or her estate"

(2016 Action, NYSCEF Doc. No. 370, citing 153 AD3d 434 [1st Dept 2017] [emphasis in original]).

The Appellate Division recently reaffirmed this understanding when it reversed the court (Ramos, J.)'s order which had removed Mr. Elberg as a co-manager of the LPs and LLCs and indicated that in fact the issue had been squarely presented in a prior action:

The issue decided by the motion court – namely, plaintiff's fitness to co-manage the LLC and LP defendants – *was squarely presented in a prior action* (see *Crabapple Corp. v Elberg*, 153 AD3d 434 [1st Dept 2017]), which was voluntarily discontinued with prejudice. The stipulation of discontinuance did not preserve Pewzner's right to raise this issue. Nor was the issue raised in this case as here Elberg simply seeks a declaration that certain amended partnership agreements are valid.

(2016 Action, NYSCEF Doc. No. 397, at 2; *Elberg v Crabapple Corp.*, 201 AD3d 546, 546 [1st Dept 2022] [emphasis added]).

Subsequently, Mr. Elberg again made requests for distributions (NYSCEF Doc. Nos. 431-436) pursuant to the November LP Agreements and ultimately served post-judgment subpoenas as to the money he is owed pursuant to the November LP Agreements. In response (and instead of returning to this Court which issued the Prior Decision), Ms. Pewzner filed the Kings County Action frivolously arguing that service of the subpoenas was an abuse of process. When Ms. Pewzner continued to fail to respond to the subpoenas notwithstanding (i) the Appellate Division LLC Decision, (ii) the Prior Decision, and (iii) the First Supplemental Order, Mr. Elberg brought the instant action and the Order to Show Cause in the 2016 Action (2016 Action, NYSCEF Doc. No. 427).

At the appearance for the temporary restraining order in the Order to Show Cause, for the reasons set forth in the Second Supplemental Order (and when such motion was pending), it became clear that another supplemental order was necessary:

[T]he Court previously adjudged and declared that the November LP Agreements are valid and govern the affairs of the LPs. Thus, the plaintiff is entitled to a further declaration that the total consideration realized from the August 25, 2016 merger should be distributed in accordance with section 3.4.2 of the November LP Agreements.

Section 3.4.2 of the November LP Agreements provide:

The Net Proceeds from a Capital Event and/or a distribution resulting from the dissolution of the Partnership shall be distributed within one hundred twenty (120) days of such Capital Event or dissolution of the Partnership, in the following order and priority:

- (a) First, to the Class A Limited Partners, pro rata in accordance with their Adjusted Capital Contributions, up to their unpaid Class A Preferred Return;
- (b) Second, to the Class A Limited Partners, pro rata up to their Adjusted Capital Contributions;
- (c) Third, to the Class B Limited Partner, up to its accrued unpaid Class B Preferred Return;
- (d) Fourth, to the Class B Limited Partner, up to its Adjusted Capital Contributions, if any;
- (e) Fifth, to the Class C Limited Partners, pro rata in accordance with their Adjusted Capital Contributions, up to their Adjusted Capital Contributions; and (f) Sixth the remaining amount 59% to the Class C Limited Partners, pro rata in accordance with their Adjusted Capital Accounts immediately prior to the distribution provided in clause (e) of this Section 3.4.2, 40% to the Class D Limited Partner and 1% to the General Partner.

(NYSCEF Doc. Nos. 270 and 271, § 3.4.2).

Following the issuance of the Prior Decision and the First Supplemental Order, by letter (NYSCEF Doc. No. 352), dated March 3, 2021, from Robert Abrams to Charles Lieberman, Mr. Abrams demanded distribution of Mr. Elberg's share of the Net Proceeds. This amount remains unpaid.

As such, the plaintiff is entitled to this Additional Supplemental Order and clarification that the declaration that the plaintiff is also a Class D Limited Partner necessarily means that the total consideration of \$35,777,210 should be allocated (1) \$11,800,000 to the Class C Partners for their Capital Contributions to Royal HI and Royal CP, (2) the remaining net proceeds of \$23,977,210.00 should be

distributed 59% to the Class C Partners (i.e., \$14,146,553.90 to Royal One Real Estate LLC [**RORE**] and Royal Real Estate Management [**RREM**]), 40% to the Class D partner (i.e., \$9,590,884.00 to the plaintiff) and 1% to the General Partner (i.e., \$239,772.10), and (3) in addition to his Class D interest of \$9,590,884.00, the plaintiff is entitled to be paid 40% of the \$11,800,00 (i.e., \$4,720,000), plus 40% of \$14,146,553.90 (i.e., \$5,658,621.56) or a total payment to the plaintiff of \$19,969,505.56

(2016 Action, NYSCEF Doc. No. 450, at 5-6).

As discussed in the Second Supplemental Order, the amount of the total consideration subject to distribution pursuant to the terms of the November LP Agreements was **not** hatched from Mr. Elberg. This amount comes from Ms. Pewzner. Indeed, her attorney sent out the Notice of Special Meeting and Proxy Statement (2016 Action, NYSCEF Doc. No. 354) with this amount in connection with the August 25, 2016 merger. Having done this, she can not now disavow the amount sent to the partners and argue that an issue of fact exists or that Mr. Elberg is the source of this information. It is simply another false statement by Ms. Pewzner.

Inasmuch as the Appellate Division has already determined that Mr. Elberg is a 40% owner of Royal CP Hotel Holdings, LP and Royal HI Hotel Holdings, LP and that the November LP Agreements govern, and as discussed in the Second Supplemental Order, the November LP Agreements make clear the waterfall of distribution of the proceeds, there simply are no issues of fact as to (i) the amount of the proceeds, (ii) how the proceeds should be distributed including how much should have been distributed to Mr. Elberg pursuant to the terms of the November LP Agreements, (iii) that Mr. Elberg has made a demand for his share of the proceeds and (iv) that they have not been paid. Thus, summary judgment in lieu of complaint must be granted.

Sholom Elberg's motion (Mtn. Seq. No. 002) to transfer the case to Queens County, Surrogates Court, or, in the alternative, to intervene in this action is denied. This transparent attempt to litigate the issues in front of this Court in a different department fails. The 2016 Action involves the partnership and it is the partnership agreements which govern the distribution of proceeds pursuant to those agreements.

It is hereby ORDERED that Mr. Elberg's motion for summary judgment in lieu of complaint is granted; and it is further

ORDERED that Sholom Elberg's motion to transfer the case is denied; and it is further

ORDERED that a copy of this Decision and Order shall be filed in the 2016 Action and shall be brought to the attention of the court (Kelly, J.) in the Surrogate Action; and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against the ROYAL CP HOTEL HOLDINGS LP and all its successors upholding that the Limited Partnership Agreement for ROYAL CP HOTEL HOLDINGS LP, dated November 30, 2012 (NYSCEF Doc. No. 235), is valid and binding on ROYAL CP HOTEL HOLDINGS LP and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against ROYAL HI HOTEL HOLDINGS LP and all its successors upholding that the Limited Partnership Agreement for ROYAL HI HOTEL HOLDINGS LP, dated November 30, 2012 (NYSCEF Doc. No. 236), is valid and binding on ROYAL HI HOTEL HOLDINGS LP and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and it is further

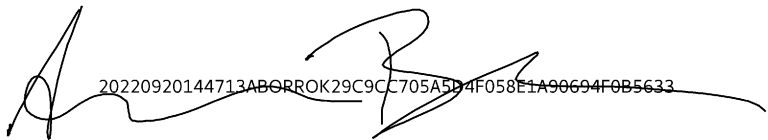
ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against ROYAL ONE REAL ESTATE, LLC and all its successors upholding that the operating agreement, dated March 2, 2005 (NYSCEF Doc. No. 232), is valid and binding on ROYAL ONE REAL ESTATE, LLC and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against ROYAL REAL ESTATE MANAGEMENT, LLC and all its successors upholding that the operating agreement, dated June 13, 2001 (NYSCEF Doc. No. 233), is valid and binding on ROYAL REAL ESTATE MANAGEMENT, LLC and all its successors including TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE

REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC; and it is further

ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against the Defendant, TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC, in the amount of \$19,969,505.56, with interest thereon at 9% per annum from the 25th day of August, 2016, along with motion costs of \$45.00, and disbursements as to be taxed by the Clerk of this Court upon the presentation of the proper papers; and that the Plaintiff have execution therefor, and it is further

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiff, RUBEN ELBERG, is granted judgment against the Defendant, TAMARA PEWZNER, individually, as co-executor and co-trustee of the Estate of Jacob Elberg, and as co-Manager of ROYAL ONE REAL ESTATE, LLC, ROYAL REAL ESTATE MANAGEMENT LLC, ROYAL LIC REAL ESTATE MANAGEMENT, LLC, in the amount of \$4,208,728.28 with interest thereon at 9% per annum from the 20th day of January, 2021, and disbursements as to be taxed by the Clerk of this Court upon the presentation of the proper papers; and that the Plaintiff have execution therefor.

9/20/2022
DATE



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ANDREW S. BORROK, J.S.C.