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

CHANA VASHOVSKY, individually and derivatively on behalf of HUDSON VALLEY NY HOLDINGS LLC,

Plaintiffs, Decision and Order

-against-

Index No. 507373/21

YOSEF ZABLOCKI and NATIONAL JEWISH CONVENTION CENTER,

Defendants,

And May 16, 2023

HUDSON VALLEY NY HOLDINGS LLC,

Nominal Defendant,

YOSEF ZABLOCKI and NATIONAL JEWISH CONVENTION CENTER,

Counterclaim Plaintiffs,

-against-

CHANA VASHOVSKY and EPHRAIM VASHOVSKY,

Counterclaim-Defendants,

PRESENT: HON. LEON RUCHELSMAN Motion Seq. #26, #27 & #28

The defendants have moved seeking to reargue a decision and order dated March 15, 2023 which delineated the terms of the sale of the subject property. The defendants have also moved pursuant to CPLR §5519(a)(6) seeking, essentially, a stay. The motions have been opposed. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The facts have been adequately presented in prior decisions and need not be repeated here. As noted, in a companion case *Vashovsky v. Zablocki*, Index Number 528729/2022 the court granted the plaintiff's request seeking dissolution. Moreover, the court

afforded the defendant to right to first purchase the property for the same price the receiver had been offered by a third party. Furthermore, specifically because the defendant had provided substantial sums to the property, the court permitted the defendant the right to purchase the property without any down payment.

The defendants argue the terms of the order which permitted the defendant Yossi Zablocki a right to purchase the property constituted "financial injustice" because it failed to consider the sums Zablocki had already contributed in excess of the plaintiff (see, Affirmation in Support, ¶ 6 [NYSCEF Doc. No. 546]). Indeed, the defendant's sole objection to the court's order is the fact the defendant is required to purchase the property, if he so chooses, without considering the substantial sums he has already contributed. The plaintiffs oppose that request and argue that the payments made by the plaintiff were merely "voluntary payments" and that pursuant to the voluntary payment doctrine they cannot be recovered in any manner by the defendant.

Whether an infusion should be treated as a loan is determined by the intent of the parties (Doyle v. Icon LLC, 135 AD3d 642, 24 NYS3d 602 [1st Dept., 2016]). Thus, whether the payments were voluntary is a legal conclusion that simply cannot be determined at this time. In any event, there are numerous

reasons the payments should not be treated as voluntary at this time. First, in Man Chou Chiu v. Chiu, 125 AD3d 824, 4 NYS3d 279 [2d Dept., 2015] the court held, essentially, that contributions are generally treated as loans since that is the default reason infusions are made. Further, notwithstanding the conclusions that cannot be made at this time, the voluntary payment doctrine may have no applicability to this case at all. That doctrine bars the recovery of payments voluntarily made with full knowledge of the facts absent fraud or mistake (Overbay LLC v. Berkman, Henoch, Peterson, Peddy & Fenchel P.C., 185 AD3d 787, 128 NYS3d 56 [2d Dept., 2020]). The rationale for the rule is the simple truism that "when a party intends to resort to litigation in order to resist paying an unjust demand, that party should take its position at the time of the demand, and litigate the issue before, rather than after, payment is made" (see, Gimbel Brothers Inc., v. Brook Shopping Centers Inc., 118 AD2d 532, 499 NYS2 435 [2d Dept., 1986]). In Peyser v. City of New York, 70 NY 497, 25 Sickles 497 [1877] the court expanded upon that reason and explained that "the reason of this principle is, that a person shall not be permitted, with the knowledge that the demand made upon him is illegal and unfounded, to make payment without resistance, where resistance is lawful and possible, and afterwards to choose his own time to bring an action for restoration, when, perchance, his adversary has lost the evidence

to sustain his side" (id). Other jurisdictions are in accord. Thus, in Putnam v. Time Warner Cable of Southeast Wisconsin Ltd. Partnership, 649 NW2d 626, 255 Wis2d 447 [Supreme Court of Wisconsin 2022] the court explained "there are two primary reasons why courts have adopted the voluntary payment doctrine. First, the doctrine allows entities that receive payment for services to rely upon these funds and to use them unfettered in future activities...Second, the doctrine operates as a means to settle disputes without litigation by requiring the party contesting the payment to notify the payee of its concerns. After such notification, a payee who has acted wrongfully can react to rectify the situation" (id).

It is clear that where a potential member of an entity infuses the entity with cash where litigation has already commenced and no payments are demanded then the voluntary payment doctrine may well be entirely inapplicable.

The plaintiff's argue that "the reason Defendants made these voluntary payments was so that he could continue his windfall" (see, Affirmation in Opposition, ¶ 8 [NYSCEF Doc. No. 548]) and not to provide loans to the company. However, according to records maintained by the receiver as of April 30, 2023 the defendant infused the hotel with $2,369,400. Further, since April 2022 the receiver has documented total receipts of $2,751,867.45 and disbursements of $2,808,093.45. The evidence

of any windfall is curious indeed. The plaintiff's further argue and have consistently argued that the defendant charges high fees to various vendors and clients and only forwards a small portion of the receipts to the receiver. However, if true, that means the defendant is depositing unreported money he receives back into the hotel just to permit the receiver to pay expenses to keep the hotel barely afloat. The circuitous nature of these actions really defies common sense. This convoluted scheme does not explain why the defendant would act in this fashion and why he would continue a cycle of deficit and unprofitability. Of course, these issues will be resolved in the court of litigation. They are only highlighted here to demonstrate that defendant's payments cannot be unrecoverable pursuant to the voluntary payment doctrine at this time.

Thus, while the nature of the payments made still require further litigation, the defendant has presented sufficient evidence the payments made were in furtherance of the hotel and were not voluntary. Therefore, the defendant's motion to reargue to the extent that the defendant will be required to close upon the property with a purchase price of $5,130,600 which is $7,500,000 less the $2,369,400 he has already paid, is granted. In the event it is later determined those payments should not have reduced the purchase price the plaintiff will maintain a judgement against the defendant for any difference. The hotel

itself can serve as collateral for that eventual debt, if any. Likewise, pursuant to prior determinations, if the defendant fails to close within the requisite time and the plaintiff chooses to purchase it, the purchase price for the plaintiff is now $7,477,000 which is $7,500,000 less the $23,000 the plaintiff has contributed.

Turning to the motion seeking a stay, that motion really contradicts the motion for reargument and must be viewed as an alternative relief sought.

Thus, the application for a stay is only being entertained if neither party chooses to purchase the property. If the defendant or the plaintiff elect to purchase the property no stay shall be imposed. If neither party seeks to purchase the property then a review of the relevant statutes is necessary.

CPLR §5519(a)(6) states that "service upon the adverse party of a notice of appeal...stays all proceedings to enforce the judgment or order appealed from pending the appeal...where...the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving

party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency" (id).

Thus, where a party is in possession or control of real property then an automatic stay can be obtained by fixing an appropriate undertaking.

The plaintiff argues that since a receiver has been appointed the defendants are no longer in possession and control of the property. Thus, the plaintiffs concede that Zablocki could have moved prior to the appointment of a receiver "because Defendants, at that time, were in control of HVR before the Receiver's Order by virtue of Zablocki's position as the Managing Member of HVNY" (see, Memorandum of Law in Opposition, page 4 [NYSCEF Doc. No. 552]). Thus, the plaintiffs assert that upon the appointment of a receiver Zablocki no longer controls or is in possession of the property. However, a receiver can only act with the powers granted pursuant to CPLR §6401(b) as contained in a court order. Consequently, "a Receiver is an officer of the court and not an agent of the mortgagee or the owner...His duty is to preserve and operate the property, within the confines of

the order of appointment and any subsequent authorization granted to him by the court" (see, Jacynicz v. 73 Seaman Associates, 270 AD2d 83, 704 NYS2d 68 [1st Dept., 2000]). Thus, while the receiver is charged with managing the property the receiver does not divest the defendant of possession or control for purposes of the automatic stay pursuant to CPLR §5519(a)(6). Further, it was surely never contemplated that the appointment of a receiver would inhibit appellate rights of any party. Therefore, if neither party purchases the property a stay will be imposed pending any appeals.

Concerning any undertaking, the court has afforded the plaintiff the ability to purchase the property if the defendants fail to do so. That option obviates the need for any undertaking.

Therefore, a stay, without any undertaking, will be imposed only in the event neither party exercises the option to purchase the property.

Further, no party may file any motion or order to show cause for any relief without prior court approval.

So ordered.

ENTER:

DATED: May 16, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

8