MEMORANDUM DECISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

J. LEONARD SPODEK a/k/a LEONARD SPODEK, ROSALIND SPODEK and IRVING SPODEK,

Plaintiffs,

-against- INDEX NO: 32644/96

CHARLES NEISS, individually and as executor of the Estate of BENCION NEISS, FAY NEISS a/k/a FAY PODRABINEK, DEVORAH RUBIN, MICHAEL RUBIN, JACOB NEISS, BRENDA GARCIA, MOSES FRIED, BERNICE FRIED, NEISS MANAGEMENT CORP., BERTA MANAGEMENT CORP., 80 CLARKSON REALTY CORP., PREMIUM 600 REALTY CORP., ROBINSON 1601 REALTY CORP., 789 ST. MARKS REALTY CORP., NORTH 751 REALTY CORP., 751 ST. MARKS, LLC, 985 OCEAN AVENUE, LLC, THE NEISS FAMILY TRUST and JOHN DOE "1" through JOHN DOE "10",

Defendants.

Appearances:

For Plaintiff:

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For Defendants:

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Plaintiffs moved this Court pursuant to CPLR 6401 for the appointment of a receiver relative to seven (7) properties located in Brooklyn, New York and pursuant to CPLR 3025 for leave to amend the amended complaint. Pursuant to the order of this Court (Lally, J.) dated November 1, 2010 a hearing was conducted on November 30th, December 1st, 2nd, 8th, 9th, 10th, 13th, 15th and 16th, at which time eleven witnesses testified and some 46 exhibits were introduced into evidence. The parties submitted post-hearing Memoranda of Law.

Plaintiffs claim that defendants should be precluded from managing the Brooklyn properties as they are not licensed pursuant to RPL § 440(a), are guilty of mismanagement, self-dealing, waste, and are in violation of the New York City Administrative Code (NYC AC). (§ 28-118.42).

It is undisputed that defendants and their employees do not have a real estate broker's license. Plaintiffs called Howard Muehlgay who testified that he has been employed by defendants as property manager for 20 years and that he and others manage the buildings.

RPL § 440 defines a real estate broker as "any person, firm, limited liability company or corporation, who, **for another** (emphasis added) and for a fee....sells.... exchanges, buys or rents,...". Mr. Muehlgay (and others) collected the rent in the course of their employment with defendants and not "for another". This article was enacted to protect dealers in real estate and the public from unlicensed persons and unscrupulous conduct and is not applicable to the within circumstances. (*Herson v Troon Management Inc.*, 58 AD3d 403; *Dodge v Richmond*, 5 AD2d 593).

Based upon the credible evidence, plaintiffs have failed to show that Mr. Muehlgay's failure to have a real estate licence and/or formal educational background in the management of real estate has resulted in any damages to plaintiffs. Further, assuming arguendo, that such damages can be proven at trial, the remedy will be to compensate plaintiffs and, therefore, it does not constitute irreparable harm.

NYCAC § 28-214.3 is also inapplicable as it provides for penalties for harm or injuries as a result of violations of an "order to seal, secure and close" and plaintiffs have failed to show that such an order exists, or is imminent.

While defendants have demonstrated that certain buildings (789 St. Marks, 600 East 18th Street, 1601 Beverly Road, 400 East 21st Street) have illegal apartments and some of which, such as 789 St. Marks, have existed for fifteen years, they failed to show that any damages have yet accrued as a result thereof. Further, defendants have taken steps to remedy any violations by hiring expeditors, and any damages which may result in the future due to a failure to cure such violations are compensable by money damages.

As to plaintiffs allegations that defendants are failing to deposit cash rents, plaintiffs have failed to prove that any cash rents are being diverted . Both Mr. Muehlgay and Aaron

Wenger testified that such wrongdoing ceased at least five years ago.

With respect to Plaintiffs' allegations that defendants failed to obtain rent increases for Major Capital Improvements (MCI) and real estate tax exemptions under the J-51 program, no proof was offered what, if any, harm resulted and if such injuries are proven at trial they are compensable by money damages.

Plaintiffs further claimed that defendants failed to solicit competitive bids for repairs and maintenance and that Mr. Muehlay engaged in self dealing by purchasing supplies from an entity owned by defendant, Charles Neiss. Mr. Muehlay denied this during his testimony and even plaintiff, J. Leonard Spodek, admitted that in the past few years such competitive bids were sought by Mr. Muehlgay. Again, whatever harm may have been caused by defendants' actions, it is not irreparable but compensable by way of an award of damages if proven at trial.

It should be noted that defendants' expert, Larry Jayson, a tenants' advocate with Brooklyn Housing and Family Services, testified that a building is not considered distressed unless the notice of violations to units is at least 4:1. Plaintiffs failed to prove that the Brooklyn properties come even close to that ratio. Further, a number of violations have been corrected or closed. (See Exhibits "C," "O," and "P"). Significantly, Mr. Jayson, whom the Court found credible, testified that three (3) of the buildings were in very good condition and three (3) in good condition and that problems brought to defendants' attention were resolved in an adequate manner.

CPLR 6401(a) provides for the appointment of a temporary receiver "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." It is well settled that the appointment of a receiver is a drastic remedy and can

be invoked only where there is danger of irreparable loss. (*Quick v Quick*, 69 AD3d 828; *Modern Collection Associates, Inc. v Capital Group, Inc.*, 140 AD2d 594).

Unsupported allegations are insufficient and the moving party must show by clear and convincing evidence that there is a danger of irreparable loss. (*Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d 631; *Sardaroglu v Serdaroglu*, 209 AD2d 606).

Based upon the foregoing, defendants failed to demonstrate that they would suffer irreparable harm, rather, the record shows that any alleged injuries are compensable by money damages. Further, the value of the real estate which is the subject of this lawsuit provide sufficient security to protect plaintiffs' interests. (*In the Matter of Kristensen v Charleston Square, Inc.*, 273 AD2d 312). Where, as here, there is no threatened insolvency, such a drastic remedy is not justified (*Romano v Belt Painting Corp.*, 77 AD2d 565). Consequently, plaintiffs' motion for an order to appoint a temporary receiver pursuant to CPLR 6401 is denied.

The second prong of plaintiffs' motion seeks leave to amend the Amended Complaint to add a cause of action for managerial neglect and removal of Howard Muehlgray and defendants as property managers. While these allegations may be a basis for an award of damages or other relief once liability has been established, they do not constitute causes of action and plaintiffs' requests for leave to add these causes of actions is hereby denied.

Further, plaintiffs' request for leave to join as defendants Daniel Rubin (misnamed Michael Rubin), Michael Kanof (misnamed Michael Rubin), Howard Muehlgay, Hefker Management Corporation and TSP Management Corporation, is denied.

No proof was adduced at the hearing that could have enlightened this Court about the relationship between Daniel Rubin, Michael Rubin and Michael Kanof. If these three names are used by the same individual, then this individual is already a named defendant, to wit: Michael Rubin. If not, then this Court declines to add any new defendants 15 years after commencement of this action and after this action has been certified as ready for trial.

Further, the motion with regard to Howard Muehlgay is denied as he is an employee of defendant Neiss Management Corp. and plaintiffs have failed to demonstrate that he has any individual responsibility with respect to the causes of action asserted by plaintiffs.

If plaintiffs claim is correct that use of Hefker Management Corporation and/or TSP Management Corporation and their interrelationship with other buildings and entities results in an excessive management fee being siphoned off the buildings in question then an award of damages after liability is established will make plaintiffs whole. To that end plaintiffs will be able to call any witnesses that can shed light on the vague, convoluted and confusing interrelationship that appears to exist between the various entities.

Finally, adding new parties and engaging in further discovery would cause further inordinate delay and it is in the interest of the parties and the Court that this 15 year old war of attrition comes to an end.

Dated: April 18, 2011

UTE WOLFF LALLY, J.S.C.

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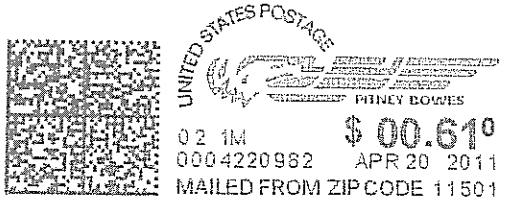
SUPREME COURT OF THE STATE OF NEW YORK
JUSTICES' CHAMBERS
MINEOLA, N.Y. 11501



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