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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

HAMAD ALI, 2591 REALTY, INC., 800 REALTY
CORP., and RKAN REALTY, LLC.,

DECISION/ORDER

Plaintiffs,

-against-

Index No.: 381035/11

FARES ALI, SELIM ZHERKA, SILAS METRO HOLDINGS
CORP., JAMES G. DIBBINI AND ASSOCIATES, P.C.,
JAMES G. DIBBINI, ESQ., SIGNATURE BANK, CUSTOM
TITLE SERVICES, INC.,

Defendants.

X

The following papers numbered 1 to 6 read on the below motions noticed on **December 5, 2011**
and duly submitted on the Part IA15 Motion calendar of **January 4, 2012**:

<u>Papers Submitted</u>	<u>Numbered</u>
Pls' Affirmation in support of motion, exhibits, memorandum of law	1,2,3
Def. Silas Metro's Affirmation in Opposition, exhibits	3,4
Def. Custom Title Serv.'s Affirmation in Opposition	5
Pl.s' Affirmation in Reply	6

In an action involving an allegedly fraudulent real estate transaction, the plaintiffs move,
by way of Order to Show Cause, for an order appointing a temporary receiver.

Plaintiffs Hamad Ali, 2591 Realty, Rkan Realty, LLC, and 800 Realty (collectively
hereinafter referred to as "Plaintiffs") are alleging that they are the proper owners of three parcels
of real property that were fraudulently converted by defendant Fares Ali ("Fares"). The three
parcels are 2591 Eight Avenuc, 1480 Westchester Avenue, and 1531/1535 Westchester Avenue.
Plaintiffs allege that defendant Fares transferred shares and Plaintiffs' interests in the three
premises on July 14, 2011 to co-defendants without authorization. Plaintiffs allege that Fares
accomplished this by fraudulently representing that he was the sole owner of the entities.
Plaintiffs further assert that the defendants were complicit in this scheme "because it is simply

incredible that the other defendants did not know that Fares was not the true owner of the Plaintiff entities." At the time of the transfer, Fares was 24 years old, and the combined value of the properties was around \$10,000,000. Given these facts, Plaintiffs allege that "it is difficult to imagine a scenario where some, if not all, Defendants were not complicit in the scheme to fraudulently convert" the ownership interest in the properties. Plaintiffs argue that, in light of the foregoing, the transfers must be considered void and a receiver must be appointed to manage the properties. Plaintiffs argue that a receiver must be appointed to preserve the properties during the pendency of this action. From the time the transfers took place, Plaintiffs allege that there are outstanding bills from vendors totaling \$53,000 for heating oil, pest control, and insurance, among other creditors. Moreover, since taking control of the premises, the City has issued violations for illegal use in contravention of the existing Certificates of Occupancy. Plaintiffs also allege that the properties yield a monthly profits that may no longer be available to Plaintiffs without appointment of a temporary receiver.

A temporary receiver may be appointed "[u]pon motion of a person having an apparent interest in property which is the subject of [the] action." CPLR 6401. Appointment is authorized where "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." *Id. See also Mandel v. Grunfeld*, 111 A.D.2d 668 (1st Dept. 1985). Importantly, "[t]he appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits." *Quick v. Quick*, 69 A.D.3d 828 (2nd Dept. 2010), citing *Vardaris Tech, Inc. v. Paleros, Inc.*, 49 A.D.3d 631 (2nd Dept. 2008). Accordingly, such a motion is to be granted only where the applicant makes "a clear evidentiary showing of the necessity for the conservation of property and the protection of the interests of the litigant." *Schachner v. Sikowitz*, 94 A.D.2d 709 (2nd Dept. 1983), citing *Glassner v. Kaufman*, 19 A.D.2d 885 (1st Dept. 1963). General accusations set forth by the movants will not sufficiently establish a clear and convincing need for such a drastic remedy. *Id. See also Harmon v. Marks*, 175 A.D.2d 44 (1st Dept. 1991).

Plaintiffs here have not established by the requisite clear and convincing evidence that the subject properties are in danger, or that a receiver is otherwise necessary to protect their interests. While Plaintiffs have submitted voluminous records pertaining to the alleged merits of the

underlying matter, there must be evidence that the subject properties are in impending danger to necessitate appointment of a receiver. To that end, Plaintiffs assert (1) that they have been receiving collection calls from vendors that have provided services to the premises. To date, there are outstanding bills totaling \$53,600 for heating oil, pest control, insurance, and other creditors; (2) the City of New York has issued violations for illegal use of the premises in violation of the Certificate of Occupancy; and (3) since the premises yield monthly profits in the amount of \$29,660, a receiver must be appointed to "prevent Defendant Silas Metro's mismanagement of the Premises and its dissipation of the substantial profits during the pendency of this action." Plaintiffs attach no evidence, however, that said profits are being mismanaged.

In opposition, defendant Selim Zerkha ("Zerkha"), president of defendant Silas Metro Holdings Corp., submits an affirmation that includes an affidavit of George M. Klett, a representative from defendant Signature Bank's commercial lending division. Zerkha asserts that in July 2011, Silas Metro obtained a \$4.9 million loan from Signature Bank for the purpose of refinancing the delinquent mortgages on the subject properties and otherwise enhance their value. Mr. Klett states that he has been doing business with Mr. Zerkha regularly over the past two years, and has never encountered issues concerning mismanagement or neglect of properties he owned or managed. With respect to the subject properties, he has not been advised of any issues that might be construed as a default under the terms of the mortgage loan issued by Signature Bank. He states that the appointment of a receiver would result in unnecessary monthly operating expenses to the properties in the form of a property manager and legal counsel, that would deplete any profits that the premises might otherwise gain. The Zerkha affirmation refutes Plaintiffs' assertion that the premises enjoy monthly profits of \$29,600, attaching tax returns from 2008, 2009 and 2010 which demonstrate that the properties suffered net losses before the alleged transfer, and these deficits are being remedied by virtue of Silas Metro's overtaking of the properties. Regarding the alleged \$53,600 in unpaid utility bills, Zerkha notes that those bills were incurred before Silas Metro took over management of the properties. Regarding the alleged pending violations from the City of New York, Zerkha again notes that those violations were incurred before Silas Metro took ownership of the properties. Moreover, the violations annexed to Plaintiffs' moving papers note that the tenant responsible had its plans

approved in September 2011 and a permit issued for work to cure the violations on October 19, 2011.

In reply, Plaintiffs' again argue over the merits of the underlying matter. They concede that the affidavit of George M. Klett "tends to establish that Zherka is a businessman of substance," but asserts that this does not exclude the possibility that co-defendants participated in a "mammoth fraud" and therefore conclusively state that "Plaintiffs are entitled to be protected" during this litigation.

In light of the heavily disputed evidence regarding the alleged deficiencies in the subject Premises' management, the court finds no "clear and convincing" need for the appointment of a receiver. Accordingly, Plaintiffs' motion by way of Order to Show Cause will be denied.

III. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion for appointment of a temporary receiver is DENIED.

The above constitutes the Decision and Order of this Court.

Dated: January 31, 2012



Hon. Mary Ann Brigantti-Hughes, J.S.C.