

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10

THE ELLEN C. GRIMES IRREVOCABLE TRUST, by  
PHILIP B. SEATON, as TRUSTEE, and THE JUDITH ZIPP  
IRREVOCABLE TRUST, by PHILIP B. SEATON, as  
TRUSTEE,

Plaintiffs,

Index No.606201/98

- against -

cal.#2 -1/1199

NORTHSTAR CAPITAL INVESTMENT CORP., NATREST  
FUNDING I, INC., NORTHSTAR Capital PARTNERS, LLC,  
ALGM I LLC, VORNADO REALTY, L.P., formerly known as  
THE MENDEK COMPANY, L.P., NATIONAL RESTAURANTS  
MANAGEMENT, INC. and DENNIS RIESE,

Defendants.

**BEATRICE SHAINSWIT, J:**

Plaintiff Trusts move for a preliminary injunction, enjoining defendants Northstar Capital Investment, Northstar Capital Partners, Natrest Funding, National Restaurants Management, Inc., and ALGM from transferring any of the Trust assets to Dennis Riese or his affiliates or designees.

This is a family dispute in which sisters Ellen C. Grimes and Judith Zipp wish to halt the transfer of their 50% interest in the family business, National Restaurants Management, Inc. ("NRMI"), to their first cousin, Dennis Riese. At the time the complaint was filed, the sisters' Trusts collectively owned fifty (50%) percent of the voting interest of NRMI and almost fifty (50%) percent of the stock (collectively, the "Trusts assets"). Defendant Dennis Riese owns the remaining fifty (50%) percent.

On August 4, 1988, the Bank of Tokyo-Mitsubishi Trust Co. ("BOT") made a \$140,000,000 loan to The Riese Organization, Inc. (not named as a defendant) and its parent corporation NRMI. By written agreement, the shareholders pledged all NRMI shares, including the Trust assets, as collateral to secure the Loan.

On June 4, 1997, Vornado Realty, L.P. ("Vornado") agreed to pay \$1 million to the Trusts to obtain the right of first refusal with respect to any sale or transfer of the Trusts' assets in NRMI. Specifically, the Trusts agreed that they and their affiliates would not cause the transfer of any interest in NRMI to any person or entity, or cause any event that could allow Dennis Riese, NRMI or any stockholder in NRMI, to exercise any right to acquire the NRMI interests without providing Vornado a right of first refusal ("Vornado Agreement" §F, dated June 4, 1997). Section G of the Vornado Agreement includes a remedies clause, which specifically states:

The parties hereto acknowledge that remedies at law would be inadequate to protect the parties hereto against any breach of the terms of this Letter Agreement<sup>1</sup>, and without prejudice to any other rights or remedies otherwise available, the parties agree that each may bring an equitable action for specific performance.

(Id.)

In the event that the Trust privately contracted to sell its assets, Vornado would get 10 days notice to meet the terms. If, on the other hand, the Loan went into foreclosure, the bargained for right of first refusal would not be operative,

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<sup>1</sup> Referred to as the "Vornado Agreement" in this decision.

and Vornado would participate in a judicially administered foreclosure proceeding. Vornado accepted that risk.

The Loan went into default in May 1998. On or about June 4, 1998, defendant ALGM (an entity created for the purpose of these transactions) agreed to purchase the defaulting Loan from BOT. At the June 30, 1998 closing, ALGM transferred the Loan to Natrest, another one of the named defendants.

Thereafter, on June 25, 1998, without notification to Vornado, ALGM and the *Trusts* entered into an agreement (the "Settlement Agreement"). According to this agreement, in exchange for the *Trusts*' assets, ALGM agreed to provide the *Trusts* with future profits derived from the *Trust* assets.

Article 9 of the Settlement Agreement recognizes Vornado's right of first refusal by limiting the assignability of the *Trusts*' assets, as follows: "no such transfer shall violate . . . the 'Right of First Refusal' set forth in the Letter Agreement, any such transferee shall . . . be bound by all the terms of this Agreement."

As of January 27, 1999, the *Trusts*' assets were conveyed to defendant ALGM. Natrest Funding, so far as its interests appear, and ALGM now seek to transfer the assets to Dennis Riese and/or his affiliates without regard to Vornado's Right of First Refusal. The scheduled date for this transaction is February 10, 1999. The *Trusts* seek to enjoin that transfer. All of the defendants oppose except Vornado, which supports plaintiffs' motion for an injunction.

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The opposing defendants contend that the preliminary injunction is inappropriate because they are not prohibited, by either the Vornado or Settlement agreements, from transferring the Trusts' assets to Dennis Riese and affiliates. It is their argument that the Settlement Agreement is the functional equivalent of a foreclosure proceeding, which would negate Vornado's right of first refusal. Furthermore, they say, Riese cannot be excluded from participating in a public foreclosure proceeding. Under defendants' analysis, no parties to this action would be bound or limited by Vornado's bargained for right of first refusal.

The fallacy in this argument is that the Settlement Agreement is not, and was never intended by the parties to be, the equivalent of a contested foreclosure proceeding, but is instead a bargained for, private agreement between two mutually obligated parties. The Settlement Agreement clearly states that "WHEREAS, in consideration of Lender's (ALGM) forbearance and agreement to accept a transfer in lieu of foreclosure of or other exercise on the Trust Assets, the Trusts are willing . . . to transfer or otherwise convey, as directed by Lender, the Trust Assets to Lender or its designee . . ."

Moreover, the only limitation placed on Vornado's right of first refusal, in any anticipated private transaction, is:

The Right of First Refusal contained herein is subject to the lien of Bank of Tokyo-Mitsubishi Trust Co. securing the loan made to NRMI and/or its affiliates . . .

(Vornado Agreement, ¶F(vi))

The parties to this action strongly disagree as to the intent of the words "subject to the lien of Bank." Any declaration as to the rights of the parties depends, in large part, on the meaning of these words. The defendants contend that Vornado's right is subject to that of the other defendants to wholly exclude

Vornado from any reconveyance of the assets, because they purchased the defaulting Loan. On the contrary, however, the parties plainly intended either (a) that the lien was to be paid off by Vornado or (b) that Vornado's right would be subject to that of the other defendants to select whether they would enter into either a public foreclosure proceeding, or a private transfer of the Trust's assets. The legal interests of the Trusts and Vornado are aligned for the purpose of this motion.

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For the following reasons, this court grants a preliminary injunction until such time as the rights of the parties in respect of the matters in controversy can be judicially ascertained and declared.

It has been established that prior to the default on the Loan, the Trusts entered into the Vornado Agreement, granting to Vornado a right of first refusal on the private sale of the Trusts' assets. The parties to the Settlement Agreement were aware of Vornado's right of first refusal, agreed to comply with it in the Settlement Agreement, and specifically referred to it in an indemnification clause, contemplating potential litigation arising from its breach.

Plaintiffs have evidenced a likelihood of success on the merits, in that they will be able to demonstrate at trial that the defendants' overall scheme, for obtaining and transferring to Dennis Riese the Trusts' interest in NRMI, violates the terms of the Settlement Agreement, including the Right to First Refusal.

This court finds no basis for the defendants' argument that the Trusts, in their "self-created web of deceit, greed and wrongdoing," have purported to convey or sell to different parties, on multiple occasions, conflicting rights of first refusal or interests in plaintiffs' shares of NRMI (NRMI and Dennis Riese Memorandum of Law, at 1-2). Similarly without support is defendants' claim that Vornado's right of first refusal could never attach. The Settlement and Vornado

agreements spell out clearly that the parties intended Vornado to have a right of first refusal upon the transfer of the Trust's assets.

The Trusts allege they will suffer irreparable harm and will have no adequate remedy at law if ALGM is permitted to reconvey the Trust assets to Riese or his affiliates, since the effect of such a conveyance would be to deny meaningful compensation to the Trusts. The injury to the Trusts and Vornado is potentially far greater than can be adequately measured at this juncture.

Defendants contend that if the preliminary injunction were issued, they would be the ones to suffer irreparable harm. However, they provide no financial statements or other evidence to substantiate these claims. Bare and conclusory allegations are insufficient to demonstrate irreparable injury (Benjamin Kurzban & Son. Inc. v Board of Educ. of City of New York, 129 AD2d 756 [2<sup>nd</sup> Dept 1987]).

Finally, if plaintiffs and Vornado are ultimately successful, their victory might nevertheless be pyrrhic because, absent an injunction, they might lose to Dennis Riese the very assets the Trusts were specifically prohibited from transferring to him without providing Vornado its right of first refusal.

Accordingly, it is

ORDERED that the motion is granted and that the plaintiffs are entitled to a preliminary injunction on the ground that the defendants have threatened or are about to do, or are doing or procuring or suffering to be done, an act in violation of the plaintiffs' rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision; and it is further

ORDERED that defendants, their agents, servants, employees and all other persons acting under their jurisdiction, supervision and/or direction are enjoined and restrained, during the pendency of this action, from transferring any of the Trust assets referred to in this decision to Dennis Riese or any of his affiliates or designees; and it is further

ORDERED that plaintiff is directed to file an undertaking in the sum of \$1 million as a condition of this preliminary injunction.

Dated: February \_\_\_\_, 1999

ENTER:

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J.S.C.