SUPREME COURT : NEW YORK COUNTY
COMMERCIAL DIVISION : PART 48

CARA ASSOCIATES, L.L.C., HUDSON SOUTH ASSOCIATES, LLC and HUDSON SOUTH SITE B ASSOCIATES, LLC, as the majority in interest of MARINER'S COVE SITE B ASSOCIATES, MARINER'S COVE SITE J ASSOCIATES, and MARINER'S COVE SITE K ASSOCIATES, the latter three entities being New York general partnerships, and MICHAEL L. NELSEN and IVAN G. GOODSTEIN,

Plaintiffs,

-against-

HOWARD P. MILSTEIN and RECTOR PARK ASSOCIATES LLC,

Defendants.

Index No. 651726/2015
(Oing, J.)

AFFIRMATION OF ADAM B. GILBERT

Motion Seq. No. 2

ADAM B. GILBERT, an attorney duly licensed to practice law in the courts of the State of New York and a member of Nixon Peabody LLP, affirms the following under the penalties of perjury:

1. I, together with Christopher R. Belmonte of Satterlee Stephens Burke & Burke LLP, am counsel for Plaintiffs. I make this affirmation in support of Plaintiffs' application for an order (a) directing Defendants to make all of the Partnership books and records available to Plaintiffs on dates certain for inspection and copying by Plaintiffs and (b) expediting the date for a Preliminary Conference to the return date of this motion and, at the conference, setting an expedited schedule for the final determination of this action. I have personal knowledge of the facts stated herein.

2. For more than a month, Plaintiffs have repeatedly sought access to the books and records of each of the Partnerships above-named, for purposes of inspecting and copying the same. This is an unfettered right granted to any partner of a partnership under NY Partnership

Law § 41. It is a fundamental right that the **Defendant Milstein has repeatedly conceded** belongs to his partners here. Indeed, Defendants' counsel told this Court on May 26, 2015 that "Plaintiffs were advised *prior to the commencement of these proceedings* that the partners are, as such, entitled to examine and copy a wide variety of documents and records. Those materials are currently being assembled and will be made available at the Partnerships' office for examination and copying. All Plaintiffs' counsel needs to do is telephone to make an appointment for that purpose."

3. Notwithstanding repeated promises of access given to Plaintiffs and made to this Court, Defendants have studiously avoided compliance. These "bait and switch" tactics must end. The time has come for the Court to direct Defendants to keep their commitments and to open up the books and records of the Partnerships for inspection and copying.

4. Regrettably, Defendants' actions cannot be viewed in isolation, for they form a pattern of adjournment, abuse, and avoidance by Defendants of their obligations to the entity Plaintiffs which control the majority in interest:

- Despite innumerable efforts to establish a consensual date for a meeting of all Partners, Defendants and their counsel issued excuse upon excuse to avoid attendance. Ultimately, such a Partnership meeting was held on June 11, 2015 -- without the participation of Defendant Milstein or Defendant Rector Park Associates LLC, Milstein's controlled 40% partner.
- The majority of Partners repeatedly stated to Defendants that they did not want to extend the Wells Fargo loan on June 24, 2015 when the same was scheduled to mature. In blatant disregard (and in an unquestioned effort to entrench himself), Defendant Milstein – on the day before the vote removing him as the Manager of the

Partnerships – unilaterally extended the Wells Fargo loan for six months – without the signatures or consent of Defendants' other partners. To do so, Milstein personally indemnified Wells Fargo against any claims of lack of authority to execute the loan modification.

- Extending an already broken "olive branch," Defendant Milstein then offered to meet with his partners on June 17, 2015 at his office at 2:30 pm. This offer was accepted by the individual Plaintiffs as representatives of the Partnerships and the 60% majority in interest. Despite an agreement to the date, time and place of his choice for a meeting, Milstein cancelled.
- Despite the presentation to Defendants of a Certificate memorializing the actions of the majority in interest of the partners to remove Milstein and to substitute in new managers, Defendant Milstein has studiously avoided any communication with Plaintiffs. He has not recognized their authority and, fundamentally, he has frustrated their ability to exercise control in accordance with the Agreement of Partnership executed on June 17, 2010. This is the very Agreement of Partnership that this Court has already reviewed and construed.

5. While the time frame may be in issue, the ultimate outcome of this case cannot be. Milstein is party to an Agreement of Partnership that permits his removal by the majority in interest. The majority in interest complied with this Court's legal directive to provide Milstein with notice and an opportunity to be heard before taking action. Milstein and his controlled entity, Rector, deliberately refused to attend such a meeting. Yet Milstein was apparently sufficiently concerned that **he extended the mortgage on the day prior to his removal**. At

some point, Judgment Day will come. That day will afford the majority in interest with control over the Partnerships, as is their right under the governing Partnership Agreement.

6. The rules within the CPLR were implemented "to secure the just, speedy and inexpensive determination of every civil judicial proceeding." CPLR 103. Similarly, the Commercial Division Rules regarding a Preliminary Conference are intended to ensure that, where appropriate, orders are made that contain "specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure." Com. Div. Rule 11.

7. In advance of this motion, Plaintiffs have done two things. They have filed a Request for a Preliminary Conference. They have also filed an Amended Verified Complaint. The latter is now limited to a single cause of action – a declaration that Plaintiffs are now the Co-Managers of the Partnerships. All partners are now parties to the dispute. In the context of the present case, the Court is asked to exercise its power to use the Preliminary Conference to achieve an expedited schedule designed to ensure the just, speedy and inexpensive disposition of the single issue before the Court.

8. At the end of the May 29, 2015 hearing before this Court, the following colloquy ensued (at pp. 58-59):

> MR. GILBERT: [J]ust to flag it, in the way that Mr. Moerdler has told you about his schedule, I am flagging issues that I think may be coming up. One is how easy it will be to have this [Partner] meeting. And the second issue I see coming up is a fight

over whether the written consent gave [Defendant] abilities beyond:

THE COURT: Let's not use the word "fight." What is the Chinese saying? Let's not use a kine-ahora (sp) and see where that goes and let's keep optimistic.

MR. GILBERT: I see the glass as half full all of the time.

THE COURT: I see it as overflowing most of the time. Thank you, counsel.

Respectfully, recent history teaches that everything in this case will be a fight. Regrettably, there is no reason for optimism. Defendants did everything they could think of to avoid a meeting. And Defendants avoided the second issue -- by unilaterally extending the Wells Fargo loan and providing Wells Fargo with an indemnity with respect to their authority.[1] (*See* Indemnity Agreement, Ex. 1). The only basis for optimism will come through this Court's order (a) granting Plaintiffs access to books and records and (b) setting an expedited schedule for the disposition of single issue now presented.

9. With the foregoing introduction, I turn to the evidentiary proof of the statements made above.

An Order Directing Access to the Partnerships Books and Records Is Plainly Required Here

10. On May 14, 2015, Plaintiffs requested access to specific books and records of the Partnerships. (*See* 5.14.15 letter, Ex. 2). Thereafter, by letter dated May 15, 2015, counsel for

[1] Milstein indemnified Wells Fargo for any losses incurred from "any challenge, disagreement or judgment with respect to [Milstein] being an authorized signatory . . . ." (Indemnity Agreement, Ex. 1).

Defendant wrote that "with respect to your request for documents and information, Kevin Buckley is assembling relevant documents and information and will forward those materials." (*See* 5.15.15 letter, Ex. 3). Only a small and incomplete response was ever forthcoming – consisting primarily of a month of rents rolls and insurance certificates.

11. On May 19, 2015, Charles Moerdler, Esq., counsel for Defendants, specifically represented to this Court that "With respect to the documents, as Mr. Gilbert has accurately pointed out, **we believe we have an obligation under the Partnership Law to make available documents for examination [and] copy** . . . ." (*See* 5.19.15 Transcript (excerpted), Ex. 4 (emphasis supplied)).

12. On May 26, 2015, Mr. Moerdler informed the Court that the books and records of the Partnerships were "currently being assembled" and "[a]ll Plaintiffs' counsel need to do is **telephone to make an appointment** for that purpose." (*See* Defendant's Brief (excerpted), Ex. 5 (emphasis supplied)).

13. On June 1, 2015, I requested in writing, and again via telephone (to Andrew Berkman, counsel to Defendants), that Plaintiffs be provided with a specific date and time when Plaintiffs could inspect the Partnerships' books and records. (*See* 6.1.15 letter, Ex. 6). There was never a response to these inquiries.

14. On June 10, 2015, I provided Defendants' counsel with a letter documenting the history of Defendants' promises and breaches with respect to an inspection. (*See* 6.10.15 letter, Ex. 7). Again, there was no response from Defendant.

15. On June 12, 2015, I informed counsel for Defendants, in writing, that representatives of the Partners would arrive at the office of the Partnerships at 10:00 am on June 18, 2015 to inspect the books and records. (*See* 6.12.15, Ex. 8).

16. On June 17, 2015, counsel to Defendants (Berkman) stated by email that it would provide copies of additional written materials that he believed would satisfy the Partners. What ultimately materialized was **not** access to the Partnership records – but was, in fact, an additional set of the very same materials previously provided on May 15.

17. Plaintiffs are not interested in a run-around. Plaintiffs want access to the Partnership books and records. Defendants have had unfettered control of the same for more than 30 years and should be able to provide immediate access to any category of document requested. Lest there be any issue over what it is that Plaintiffs wish to see, I annex a list of the specific categories of documents requested – limited, in the first instance, to a 3-year history. (*See* listing, Ex. 9).

18. Given the history of obfuscation and avoidance, an order directing Defendants to live up to their promises is obviously needed. An order directing Defendants to provide immediate access is essential.

A Preliminary Conference Order Providing for an Expedited Disposition of this Single Issue Case Is Warranted

19. The refusal to make books and records available is part of a transparent pattern by Defendants to ignore completely the majority in interest – be it for spite or personal amusement. Giving the coming "fights," it is only appropriate that this Court be made aware of recent history, understand what is coming down the pike, and enter an appropriate expedited scheduling order to control the process and the Court's docket.

The Partnership Meeting

20. On June 1, I wrote to Defendants' counsel in an effort to secure a mutually convenient date for a meeting of the Partners. Unfortunately, this invitation was utterly abused

by Defendants. During the period from June 1 through June 4, counsel for Plaintiffs and Defendants exchanged innumerable emails. On behalf of Plaintiffs, I sought to assure a prompt meeting date. Defendant, however, would have none of this.

21. I have placed the entirety of the exchanges between counsel before the Court (Ex. 15, *infra*), and I respectfully invite the Court's attention to them in their entirety. Despite 11 separate email communications, the 60% Partners were:

- Never provided with any date when Mr. Moerdler and Mr. Milstein would attend a meeting;
- Never provided with any response to our offers to hold a meeting on either June 10, 11, 12 or 15, at any time of the day; and
- Critically, never advised that the date actually selected, namely June 11, 2015 at 10:30 am, was an inconvenient date for anyone on the Defendant side. (We were mindful of Mr. Moerdler's trip abroad (although it did not impact in the slightest his ability to communicate), and set a date after his return.)

The fact of quintessential importance is that Messrs. Milstein and Moerdler were available for a meeting on the date and time noticed, and consciously chose to avoid attendance.

22. On June 11, 2015, the majority of the Partners in interest met at my offices in accordance with the Notice dated June 3, 2015 that had been previously served. That meeting was transcribed and six exhibits were marked at the meeting. The transcript appears at Exhibit 10 hereto. The Notice of the Meeting of Partners of the Partnerships appears as Exhibit 11. The Agreement of Partnership appears as Exhibit 12 hereto. The transcript of the May 29, 2015 oral argument before the Court appears as Exhibit 13. The Certificate and Consent of the Partners appears as Exhibit 14. The collected correspondence with Defendants' counsel appears as

Exhibit 15. And the so-called "Notice and Formal Objections" of Defendants, received at approximately 5:00 pm on the evening before the scheduled meeting, appears as Exhibit 16. Other than the transcript of the meeting of the Partnerships, each of foregoing documents was separately marked and made a part of the record of the Partnerships' meeting.

23. Following the meeting, the Secretary for the meeting executed a Certificate that certified the resolutions adopted at the meeting. (Resolutions, Ex. 17). Those resolutions stated that Mr. Milstein had been removed as the Manager of the Partnerships and that Messrs. Nelsen and Goodstein had been substituted as the new Co-Managers of the Partnerships.

24. The Certificate documenting the Resolutions was promptly served upon Mr. Milstein and his counsel. Mr. Milstein has not responded to the Resolutions or taken any steps to transfer management in accordance with the stated will and actions of the majority in interest.

Milstein Refinances Over the
Stated Objections of His Partners

25. The entity Plaintiffs, owing 60% of the interests in each of the Partnerships, made it abundantly clear to Defendants – and to the Court – that they had no interest in refinancing so long as Milstein remained the Manager. (*See* 5.20.15 letter, Ex. 18; 5.19.15 Transcript (excerpted), Ex 19).

26. In utter disregard, Milstein unilaterally and autocratically extended the Wells Fargo mortgage – with absolutely no notice to the majority in interest until it was a *fait accompli*.

27. The very first notification was timed to be issued moments after the June 11 meeting of Partners had concluded. By memo from Andrew Berkman emailed on June 11 at 11:37 am, Berkman stated:

> I am pleased to inform you that the Wells Fargo mortgage has been extended and a copy of the papers will be forwarded to you. Now that the danger and time pressure of a mortgage default has been

> averted, I have also had an opportunity to review with Howard Milstein his availability for a meeting with all of the equity partners of the several Mariner's Cove entities, and can offer 2:30 p.m. on June 17 in his offices at 6 East 43rd Street. As this will be Mr. Milstein's first opportunity to meet most of the current partners due to various deaths and trust arrangements among your respective clients, no lawyers should be present. If all partners cannot make themselves available at that time, please offer dates when that will be possible. We believe that a meeting among principals is the best way to resolve this situation to everyone's satisfaction.
>
> Finally, to the extent that there remain any documents that you wish to see, please let me know what they are and we will try and arrange to have them available for inspection immediately after the meeting. In order to address the security issues in the Emigrant building, please let me have the names of the several partners who will be attending.

See Exhibit 20 hereto.

28. The Berkman memo is offensive from several perspectives:

- Milstein knowingly extended the Wells Fargo loan without any discussion in advance with his partners.
- Milstein never disclosed the terms of the extension. Only within the last day did we receive what Defendants purport to be the entirety of the loan modification documents.
- Milstein conditioned a meeting upon the attendance of all "equity partners," knowing that – given (a) the number of beneficiaries of the original owners of each partner of each Partnerships and (b) their geographic locations in the United States – a meeting of all "equity partners" was virtually impossible to arrange; and
- Milstein also conditioned any inspection of books and records upon the holding of a meeting with Milstein upon his specific terms and conditions,

with "any documents that you wish to see [being]…available for inspection immediately after the meeting."

29. Notably, the individual Plaintiffs here – as the new Co-Managers and as the representatives of the 60% Partners – advised Milstein that they were prepared to meet, on the date, at the time, and at the place that he had selected. Because all of Milstein's conditions were not met, the meeting did not take place.

Conclusion

30. Despite the Court's optimism, Defendants have done everything in their power to be obstructive.

31. Despite repeated promises, Defendants **have not** made the books and records of the Partnerships available for inspection and copying.

32. Despite repeated statements from the majority in interest, Milstein unilaterally extended the Wells Fargo loan – one day before he was stripped of power.

33. Despite a reasonably noticed meeting and repeated statements of accommodation by Plaintiff, Defendants refused to attend a noticed meeting of the Partners. They (through counsel) have unearthed every invented excuse in the book to justify their behavior.

34. Despite being presented with a Certificate of the Resolutions adopted at the June 11, 2015 meeting removing him as Manager, Milstein has refused to relinquish control over the Partnerships.

35. As noted above, while the ultimate time frame may not be known, the ultimate outcome of this case should not be. Milstein is party to an agreement that permits his removal by the majority in interest. The majority in interest complied with this Court's legal directive to provide Milstein with notice and an opportunity to be heard before taking action.

36. Plaintiffs have served and filed an Amended Verified Complaint as of right. (*See* Amended Complaint, Ex. 21). It sets forth a single cause of action – a declaration that, having afforded Milstein notice and an opportunity to be heard pursuant to a common law right found by this Court, Plaintiffs are now the duly-appointed Co-Managers of the Partnerships.

37. Plaintiffs have also served a Notice of Preliminary Conference. (*See* Notice, Ex. 22). By expediting the return date of a Preliminary Conference, this Court can and should:

(i) Fix the time for an answer to the declaratory judgment complaint;

(ii) Set a schedule for summary judgment motions based upon the pleadings; and

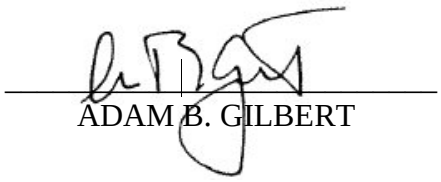
(iii) Make such other orders as are consistent with the "just, speedy and inexpensive" disposition of this single issue case.

38. Plaintiffs are not interested in getting the continued "run-around." Plaintiffs have an unfettered right to remove the designated agent of the Partnerships and insert a new agent as they determine. Defendants forfeited any right to be heard pursuant to a common law right found by this Court. An orderly and ordered process to get to the end of this case is therefore appropriate.

39. I move by order to show cause because of a desire to advance the case promptly.

40. No prior application for the relief requested herein has been made.

New York, New York
June 24, 2015



ADAM B. GILBERT