

2351 Bedford Holding, LLC v Flatbush Funding LLC

2024 NY Slip Op 33984(U)

November 6, 2024

Supreme Court, Kings County

Docket Number: Index No. 515687/2024

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

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

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2351 BEDFORD HOLDING, LLC,

Plaintiff,

Decision and order

- against -

Index No. 515687/2024

FLATBUSH FUNDING LLC,

Defendant,

November 6, 2024

-----x
FLATBUSH FUNDING LLC,

Third Party Plaintiff,

- against -

LIOR AVNERI,

Third Party Defendant,

-----x
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking to strike the answer and third party complaint and for a default judgement against defendant the defendant. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On July 1, 2015 non party HPW Holdings Inc., and the plaintiff Bedford Holdings LLC entered into an operating agreement of Flatbush Funding LLC, an entity created to develop and lease a commercial premises located at 2351 Bedford Avenue in Kings County. On September 25, 2015 Flatbush entered into a resolution requiring each owner to contribute sums to fund the construction of the building. Further, the two owners and

Flatbush entered into a financing agreement which again provided that the parties would be required to answer any capital call to help fund the renovations at the building. The financing agreement provided that in the event HPW could not answer a capital call then Bedford had the right to answer the call and in exchange Bedford would be paid a monthly fee by Flatbush based upon certain calculations regarding the excess of contributions made by Bedford over HPW. According to the complaint Bedford made far more calls than HPW and in fact, pursuant to the financing agreement made calls that were not made by HPW. Bedford notified Flatbush of the fees it owed and as of the date of the filing of the complaint Flatbush owed Bedford \$13,957,170.23. Thus, on August 2, 2024 this lawsuit was commenced and the plaintiff asserted causes of action for breach of contract, unjust enrichment and quantum meruit seeking to recover the amount owed by Flatbush. Flatbush engaged counsel and filed an answer and a third party complaint. The plaintiff now moves seeking to dismiss the answer and third party complaint on the grounds that Flatbush had no authority to defend the action without majority support which it cannot obtain without plaintiff's consent, which has been withheld. As noted, the motion is opposed.

Conclusions of Law

In Sterling Industries v. Ball Bearing Pen Corporation, 298 NY 483, 84 NE2d 790 [1949] the corporation was controlled by four members and the by-laws of the corporation required a majority vote to commence any lawsuits. Upon the motion by the president of the corporation to sue the defendant which was a half owner of the corporation, the two board members who owned the defendant declined to approve the lawsuit. The court explained that "the circumstances of the organization of plaintiff corporation indicate that the parties intended that the corporation should be managed by its board of directors and that the board should take no affirmative action if not sanctioned by a majority. That is the arrangement the parties intended and there is no basis on which to hold such an arrangement illegal. Had the Legislature intended to eliminate the problem of a deadlock it could have done so by the simple expedient of requiring an odd number of directors. Instead, apparently realizing the desire for equal control in some closely held corporations, it has continued to permit the election of a board of directors with an even number of directors. The fact that a deadlock may result does not necessarily mean that the present law is inadequate and that it should be remedied by the approval of presidential power where none in fact exists thus disregarding fundamental rules of agency law. There is available to the group in favor of instituting suit

here the more appropriate remedy of a stockholder's derivative action..." (id). Further, in Crane, A.G. v. 206 West 41st Street Hotel Associates L.P., 87 AD3d 174, 926 NYS2d 438 [1st Dept., 2011] the court applied Sterling (supra) to bar a deadlocked corporation from defending an action. The court noted that "the unavailability to a shareholder of the remedy of mounting a defense in the right of the corporation does not require a different conclusion" (id). The court explained that if the decision not to defend a lawsuit is a breach of the fiduciary duty then the other board members can sue for a breach of that duty. Of course, such an action can only be commenced by the board members in their individual capacities and not through their membership in Flatbush.

The defendants argue that Bedford's refusal to grant consent to defend the action was itself a breach of its fiduciary duty as well as a conflict of interest. However, there is absolutely no support for that argument. Indeed, Sterling (supra) and its progeny specifically rejected that argument.


This conclusion does not mean a default will necessarily be filed against Flatbush. First, the individual members of Flatbush or HPW may personally defend the action. Moreover, as noted, the individuals may assert breach of fiduciary duty claims against the plaintiff. However, Flatbush cannot defend this action without consent from the plaintiff. Since such consent

has been withheld, the answer and third party action filed is unauthorized. Consequently, the motion seeking to strike the answer and third party complaint is granted.

So ordered.

ENTER:

DATED: November 6, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC