

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

251 West 121 Street, Inc. : Chapter 11
Debtor. : Case No. 03-14377

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APPEARANCES:

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BEATTY, PRUDENCE CARTER, U.S.B.J.

MEMORANDUM DECISION DENYING MOTION FOR RECONSIDERATION AND
DENYING STAY PENDING APPEAL

A motion for reconsideration (the “Reconsideration Motion”) (ECF Doc. No.125) of this Court’s decision of December 10, 2009 (ECF Doc. No. 124) and order of the same date (ECF

Doc. No.123) has been made by the Debtor, 251 West 121 Street, Inc. (the “Debtor”). The motion also sought a stay pending appeal.

No notice of appeal or motion for reconsideration was filed on behalf of Elayne Richards (“Richards”). Richards’ time to appeal or file a motion for reconsideration has expired. No motion for a stay pending appeal was made on her behalf.

Familiarity with this Court’s decision is presumed. The definitions used in the decision will also be used in this decision.

The issues raised in the Reconsideration Motion, with one exception, do not address the Claims made by Addison against the Debtor. The one exception is this Court’s ruling at the conclusion of the Debtor’s case that the Debtor had failed to prove any right to collect rent from Addison. This Court perceives no factual or legal error in that ruling.¹ The Debtor simply failed to make out a prima facie case to entitlement to collect rent.²

This Court refused to allow the testimony of Nader Sorhabi (“Sorhabi”) as to the dealings he had with Addison after he was the successful bidder and purchaser of the Property. According to Debtor’s counsel, the excluded testimony would have shown that Addison admitted that he was a tenant at the Property which would in turn have supported the Debtor’s claim against Addison for rent for the period August 2002 through December 2005.

¹ The Debtor’s counterclaim for rent would, to the extent allowed, have offset Addison’s Claims against the Debtor.

² Counsel for Richards conceded at trial that there was no evidence on record to establish a value for or an itemization of any furniture or belongings that Richards’ individually claims to have been lost.

However at the conclusion of the Debtor's case, this Court denied the claim for rent on the grounds that no showing had been made that any demand for rent had ever been made or that any objection had ever been made to Addison living at the Property or that he had ever been asked by Richards to quit the Property. There was no dispute that Addison lived in the Property from August 2002 until the Property was sold.³ How Addison characterized his status to the purchaser does not affect what rights the Debtor had. As between Richards and Addison, the only two shareholders of the Debtor, there was no agreement that either Richards or Addison would be required to pay rent to the Corporation if they lived at the Property.

Richards would not have been entitled to collect rent personally since she could not have been the landlord; only the Corporation could have been the landlord. However, in her capacity as president of the Debtor, she could have made demand on Addison to pay rent. If she had, Addison would then have had the right to contest the demand. No demand by Richards on behalf of the Corporation was ever made before the Property was sold. The claim for rent was waived by failure to assert it or it was barred by estoppel. In any event the testimony of Sorhabi would have done nothing to support the rent claim since it related only to transactions that occurred after the sale of the Property.

The Debtor's effort to castigate this as an erroneous ruling because it was made "mid-trial" is wrong because the ruling was not made until after the Debtor rested its case. The Debtor's motion for a stay pending appeal will be denied as no grounds have been shown why the order should be stayed insofar as it directs payment of the Claims. None of the arguments in the

³ That he lived there after the Property was sold is irrelevant to any claim for rent by the Debtor.

Reconsideration Motion are addressed to the Claims. Since this Court finds no error in its ruling or fair grounds for possibility of success on an appeal, the request for a stay pending appeal will be denied. See *In re Suprema Specialties, Inc.*, 330 B.R. 93, 94-95, (S.D.N.Y. 2005).

All of the other grounds raised in the Reconsideration Motion relate to the Addison/Fuller Shares. Since Richards has not filed a motion for reconsideration, the Court does not need to reach these grounds although it has determined that a brief comment would be appropriate to articulate why even if Richards would have moved for reconsideration, her motion would lack merit.

Debtor's counsel argues that Sorhabi's testimony would have shown that Addison's post-petition communications with Sorhabi were similar to his communications with Richards so as to demonstrate Addison's fraudulent scheme in obtaining the Addison/Fuller Shares.⁴ At trial, this Court found that the testimony was too remote in time to the creation of the Corporation to be relevant. The exchanges between Addison and Sorhabi were simply immaterial to the negotiations and business agreement that established the Corporation and made Richards and Addison co-shareholders.

The other disputed evidentiary ruling involved this Court's refusal to allow counsel on redirect to question Addison on the circumstances surrounding his resignation from the bar. Counsel called Addison on his direct case but failed to question Addison on the subject and was

⁴ The Debtor improperly attempted to characterize this evidence as "probative habit evidence" under Federal Rule of Evidence ("F.R.E.") 406 that would suggest a pattern of engaging in a fraudulent scheme with regard to the Property. This Court held at trial that F.R.E. 406 applies only to habitual and routine acts.

barred from going into it on redirect. A belated attempt has been made to comb the record for a reference in the cross examination of Addison that would have opened the door to this line of questioning. The effort is unavailing since the subject is one that so obviously could have been covered on direct examination. It is wholly unnecessary that an adverse party be designated as a “hostile” witness in order to attack his credibility when the adverse party is called on the plaintiff’s case.⁵

In any event the fact that Addison had been permitted to resign from the bar was established in the record especially since witnesses including Fuller were asked questions about it. It was clear that his resignation was the result of disciplinary proceedings against him.

Even if a more extended version of the disciplinary proceedings had been put on the record, it would not have affected this Court’s ruling. Again the event was remote in time and there was nothing in the record that reflected that any aspect of the matters leading to his resignation were relevant to how Richards and Addison ended up in a business deal together. Richards simply chose to voluntarily enter into a business deal with Addison under which she may have given up more than she ultimately wished she had. However, in return she received at least \$6,900 at a time when she appears to have been without funds. In addition she got a business partner who devoted many hours and considerable funds to the Property.

As this Court ruled, it did not accept the testimony of Richards that she did not or could not understand that by being a shareholder Addison would have a financial interest in the

⁵ F.R.E. 607 provides that “the credibility of a witness may be attacked by any party, including the party calling the witness.”

Property. This Court also found that there was no relationship of blood or prior friendship that would have induced Addison to “volunteer” both his time and the substantial amount of money he did. The record is barren of any evidence that would reflect that Addison had sought Richards out in order to prey on her. While the person who introduced them is deceased and his testimony is unavailable, it was clear from Richards’ testimony that she procured the introduction to Addison rather than the other way around. Although Richards did not file a motion for reconsideration, the Court reiterates that the facts at trial were insufficient to establish Richards’ claim of fraud.

Conclusion

For the foregoing reasons, this Court denies the Reconsideration Motion and denies the request for a stay pending appeal. Since Richards time to appeal has expired, all payments directed by the order, including on the Addison/Fuller Shares, should be made forthwith.

A separate order has been signed.

Dated: New York, New York
December 30, 2009

_____/s/ Prudence Carter Beatty_____
United States Bankruptcy Judge