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\$2.7M Verdict Ends

Hartz Mountain's

Long, Uphill Battle

By Henry Gatlifsh

Hartz Mountain Industries rarely seeks partners to operate its 200-property real estate empire, and one of New Jersey's largest cases suggests that's a sound policy for all developers who want to avoid court.

After 12 years of litigation, a judge has ruled that Hartz owes \$2.7 million plus interest and future revenues to one of its few partners, a limited shareholder in 707 Broad St., Newark.

One-third partner ABS Associates Ltd. claimed that two-thirds owner Hartz mismanaged the renovation and subsequent operation of the 10-story, office building, failed to share revenue and fired cost allocations.

The case was so bitter that after 71 days of trial, a year of deliberations and a 98-page opinion, the lawyers can't agree who won.

ABS lawyer Bruce Nagel of Roseland's Nagel Rice & Mazze says the final judgment in ABS's favor, with interest and future revenue, will rise to between \$4 million and \$5 million.

On the other hand, ABS has no reason to gloat, given the claims worth millions that it lost on summary judgment of that Mercer County Superior Court Judge Mary Jacobson rejected in her May 9 opinion, says Hartz counsel Justin Walder of Roseland's Walder, Hayden & Brogan.

As it turns out, Walder may be the only unalloyed victor. Defense costs totaled \$4.2 million as long ago as 2004, and may be at the \$5 million mark now. Because Jacobson ruled that ABS prevailed on claims that accounted for 20 percent of the defense costs, Hartz as a corporate entity must pay 20 percent.

The rest is chargeable to the Hartz-ABS partnership. So ABS is responsible for one-third, about \$1 million, of the cost of defending the partnership against ABS's own suit.

How much of that went to Walder's firm and how much went to experts and for massive document production is not in the opinion. Nor will Nagel say how much ABS paid him and two preceding firms.

The final judgment is still subject to wrangling, and drafts are due Wednesday. Judging from their size, the parties

can afford to pay plenty of lawyers and so can the high-powered principals behind the companies. For Braka of ABS and Leonard Stern, Hartz's chairman.

Braka got his start in real estate 30 years ago as a court-appointed liquidator

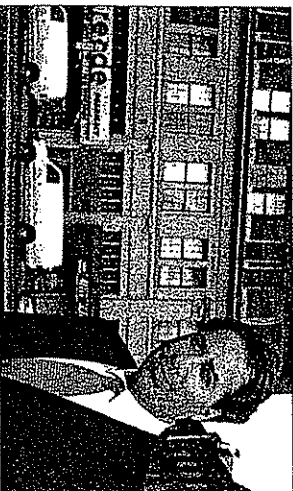


PHOTO BY GUYLORD WATKINS

in New York and is president of United States Realty & Investment Co., which owns office buildings, industrial sites and retail space across the country.

Stern's success at Hartz's plinlock is palpable. *Forbes* magazine ranks him the 83rd richest American, with a worth of \$2.7 billion, equal to Donald Trump's.

In essence, Braka tried to get Jacobson to hit Stern with Trump's famous line, "You're fired." The court said no, but Braka won millions.

"This was a battle between a billionaire and a half a billionaire, both strong minded," says a lawyer outside the case who knows Braka and Stern.

The saga, as Jacobson called *ABS Associates Ltd. v. Hartz Mountain*

Development Corp., ESX-C-330-94, started in 1980, when Braka created ABS and bought an interest in 707 Broad St., just as a Newark redevelopment surge began.

The owners planned to renovate the building and attract the state and Newark

Board of Education to long-term leases, but it didn't pan out until Hartz got involved in 1987.

The company preters not to have other partners in its properties, Walder said last week. But at 707 Broad St., Hartz took two-thirds ownership plus complete control of the project, and ABS took one-third, and had reason to feel it was a good deal. With Hartz in the picture, the state took a 20-year lease and a renovation of more than \$21 million began in 1989.

Hartz's driving force was Gene Heller, a quick-witted entrepreneur who made institutional decisions, sometimes after scribbling alternatives on a napkin.

The original plan had called for a busenck parking garage with 250 spaces for the state and 20 for the Board of Education, but Heller weighed the difficulties of underground parking on the site and decided to put retail space in the basement. Parking for remains would be at nearby parking lots owned by Hartz.

Braka said later that no one told him about the changes and the evidence showed it wasn't memorialized, Jacobson found. Meanwhile, strains in the partnership began developing. Heller, who was close to Braka, left Hartz in 1991 and Stern took a more active role, which increased Braka's distrust of Hartz, the opinion said.

Braka felt Hartz wasn't consulting him and wasn't paying ABS its fair share. He felt Stern had demeaned him in front of relatives during a meeting. Offers to buy each other out went nowhere and, with a whirl of litigation in the air, relations worsened. ABS sued in 1994.

ABS first hired New York's Cold & Wachel, later turned to Newark's Sills Cuminis Epstein & Gross and finally took the case to Nagel, who handled the long trial with partner Robert Solomon and associate Andrew O'Connor.

Walder, with partner K. Roger Plawker, had Hartz's case from the start, and all the lawyers say it took so long because of the complexity.

"We both had 1,500-page briefs," Nagel says. "We wrote novels." In her opinion, Jacobson ruled that Hartz's decision to relocate the parking, while not a breach of contract, did damage ABS. Money for parking that would have gone to the partnership went instead to Hartz alone, she found.

She ruled Hartz owed the partnership \$4.1 million for the parking after expenses as of May 30. ABS's share is \$1.4 million; it gets prejudgment interest and a share of the parking proceeds going for-

ward until the state lease expires in 2010. Nagel says the total comes to \$3 million. Jacobson also ruled that Hartz, in its role as project manager, overcharged the partnership for some construction costs. Hartz agreed to charge \$27 million for most of the renovation and charge on a cost-plus basis for other work. Jacobson ruled that Hartz misallocated some work to the cost-plus account, entitling ABS to about \$1 million in reimbursements.

Jacobson ruled that 20 percent of defense costs were attributable to work on the parking and misallocation claims that ABS won. The partnership, having prevailed on the remaining 80 percent of the work, pays the rest. Bottom line: Assuming the legal costs total \$5 million now that the case is over, ABS will get a refund of about \$300,000, Nagel estimates. If so, ABS is still on the hook for about \$1 million in defense costs.

Nagel disagrees that the high cost of the litigation made it a questionable endeavor. "Saying the winner is the lawyer who collects the most fees is crazy," he says. "If all anyone cared about was fees, nobody would ever go to court."

Even so, he is attempting to recoup some of the money ABS has to pay for the partnership's defense costs. Before the 2004 trial, Nagel filed a separate conversion claim against Walder's firm. The suit, which has been in abeyance, alleged the firm took fees it knew to be unattributable to the partnership and the fees were unreasonable to boot.

The limited partner has a right to pursue claims that the fees were unreasonable, Nagel says.

Walder says that during the litigation, a judge denied a motion to prevent legal fees by the partnership, and he points for support to Jacobson's decision that the partnership is responsible for 80 percent of the defense costs.

"How can they go against us?" y.ack says of ABS. "We're just a law firm receiving fees from a partnership that the court has now said has a right to defend and be indemnified."

The 80-20 split, Walder says, also is the lip-off that Hartz prevailed on most issues, despite Nagel's statements that ABS won the big ones.

"They had about 20 discrete claims and were seeking in excess of \$50 million," Walder says. On summary judgment, for example, the plaintiff lost a claim that the partnership overpaid \$9 million — ABS's share was \$3 million — for asbestos remediation.

Just to cite a few, ABS also failed to oust Hartz from management and failed to win a claim for repayment of management and bank fees and loan interest.

Walder notes Jacobson's conclusion that "despite the acrimony of this litigation, and the breakdown of the relationship between ABS and Hartz, the partnership has continued to function and achieve many — if not all — of the purposes it was intended to accomplish."

Adds Walder, "She upheld 80 percent of the partnership's obligations: Hartz made all the necessary difficult decisions to ensure the success of the project for the benefit of the partnership."

Walder says that while large sums were at stake, the opinion provides no general principles, except perhaps that when a limited partner signs a contract ceding control to a managing partner, there should be no complaints if the managing partner does a good job for all concerned, as Hartz did, he says.

Nagel has another view.

"The message of the case is, don't get in bed with Hartz Mountain as a partner." ■