Cortazar v Tomasino
2013 NY Slip Op 32885(U)
November 8, 2013
Sup Ct, Queens County
Docket Number: 700375/2013
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

JAMES CORTAZAR, etc., et al.,
Plaintiffs,

- against -

VINCENT TOMASINO JR.,
Defendant.

Index
No. 700375 2013

Motion
Date July 10, 2013

Motion
Cal. No. 29

Motion
Seq. No. 1

The following papers numbered 1 to 21 read on this motion by plaintiffs for an order enjoining defendant from collecting rents from the property known as and located at 27- 49 Jackson Avenue, Long Island City, New York (Parcel I); enjoining defendant from transferring, encumbering, selling or assigning the assets of Jackson Bounty LLC; compelling the defendant to facilitate the payment of all rents from Parcel I to James Cortazar; and compelling defendant to provide access to the books and records of Jackson Bounty LLC (LLC). Defendant cross moves for an order dismissing the complaint.

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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiffs commenced the within action by electronic filing on February 4, 2013; an amended verified complaint was filed on March 7, 2013. Plaintiffs, pursuant to an *ex parte* order to show cause dated April 2, 2013, seek an order, *inter alia*, enjoining defendant from collecting rents from Parcel I.

On May 2, 2013 defendant e-filed a cross motion to dismiss the complaint. The motion and cross motion were marked fully submitted on July 10, 2013. Plaintiffs had filed a notice of discontinuance of the action on June 28, 2013. However, as the defendant's pre-answer cross motion constituted a "response" to the pleadings, this court – in the order of July 22, 2013 – determined that the stipulation of discontinuance was improperly filed, and held the motion and cross motion in abeyance pending the submission of opposition and reply papers to the cross motion. These motions are now before the court. It should be noted that it was plaintiff's position that the filing of the notice of discontinuance effectively rendered, *inter alia*, his own motion moot.

Plaintiffs allege in their amended verified complaint that James Cortazar and the "Cortazar Group," which consists of James Cortazar, his brother Vincent Cortazar, Brian Scalcione, and George Leckler, entered in an agreement on October 1, 2009, "with several other entities," for the purpose of acquiring ownership interests in the LLC. A copy of said agreement is annexed to and made part of said complaint. Plaintiffs allege that the LLC was formed for the purpose of building a 44 unit residential condominium with 4,000 square feet of commercial space on the ground floor of real property identified as Parcel I, described above, and the property known as 27-51 Jackson Avenue (Parcel II).

Plaintiffs allege in the amended complaint that Cojam Realty Inc., was the owner of Parcel I, and that pursuant to the October 1, 2009 agreement, said real property was transferred to the LLC. It is alleged that Goo Young Inc., the owner of Parcel II, transferred its interest in said real property to the LLC. Pursuant to the terms of the October 1, 2009 agreement, Parcel II was transferred subject to a mortgage with Woori Bank with a principal balance of $650,000.00, and as well as a second mortgage, held by Hypothecator Realty Corp. (Hypothecator), and another entity. Defendant is the president of Hypothecator. The Cortazar Group agreed to pay a total of $1,000,000.00 to Hypothecator, and Hypothecator agreed to transfer its note and mortgage to an entity to be formed by the Cortazar Group, known as 27-51 Jackson Ave. Corp, with the principal balance reduced by $1,000,000.00, and said mortgage would be discharged without payment to the Cortazar Group and removed from the record when financing was obtained or another event occurred under the terms of the contract. Hypothecater, in turn, agreed to release the guarantor of said mortgage and to discontinue its then pending foreclosure action against Parcel II.

James Cortazar alleges in his amended verified complaint that he is a 10 % "interest holder" of the LLC and that he is also an "equal partner" of the Cortazar Group, which "collectively holds a 40% membership interest in [said LLC]" (this percentage presumably includes James Cortazar's interest). It is further alleged that James Cortazar is a 50% "partner and managing shareholder" of plaintiff Cojam Realty Inc. Defendant Vincent Tomasino is alleged to have a 60% interest in the LLC, and pursuant to the terms of the October 1, 2009 agreement, is the managing member of the LLC.

Plaintiffs allege the following causes of action: a demand for access to the books and records of the LLC, pursuant to Limited Liability Company Law § 1102; a demand for an accounting; a claim for breach of contract; a claim for breach of fiduciary duty; a claim for rescission of the October 1, 2009 agreement and for the return of Parcel I; and a claim for the judicial dissolution of the LLC.

Defendant cross moves to dismiss the complaint on the grounds of documentary evidence; lack of legal capacity to sue; collateral estoppel; failure to state a cause of action; and failure to join indispensable parties.

The amended verified complaint is verified by James Cortazar. As James Cortazar stated in his complaint that he entered into the October 1, 2009 agreement, this constitutes a statement of fact. "Facts admitted by a party's pleadings constitute formal judicial admissions. Formal judicial admissions are conclusive of the facts admitted in the action in which they are made" (*Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010] [citations omitted]; *see also Naughton v City of New York*, 94 AD3d 1 [1st Dept 2012]), and "are binding on the parties throughout the entire litigation, unless modified or relieved in the discretion of the court" (Richardson, Evidence § 216 [Prince 10th ed]; Fisch, New York Evidence § 803 [2d ed 1977]). In the absence of amendment pursuant to CPLR 3025 (a) or (b), the pleading is conclusive (*id.*). Here, as the plaintiffs have not sought leave to amend the complaint, James Cortazar is bound by his statement that he entered into the October 9, 2009 agreement (*see Weinstock v Handler*, 254 AD2d 165, 170 [1st Dept 1998]), and his statements made in opposition to the cross motion to the effect that he did not execute said agreement will be disregarded. The court further notes that as Mr. Cortazar still seeks relief based upon said agreement, he has effectively ratified said agreement.

It is well established that on a motion to dismiss pursuant to CPLR 3211(a) (7), "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action,

and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" *(Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2d Dept 2010]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703 [2d Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (*see Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], *affd* 66 NY2d 946 [1985]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (*see, id.*; *accord*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2d Dept 2006], quoting *Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Green v Gross & Levin, LLP*, 101 AD3d at 1080-1081). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]).

Plaintiff James Cortazar, in the first cause of action for access to the LLC's books and records, alleges that demand has been made for the LLC's books and records, and all documentation pertaining to its operations, and that defendant has refused to fully comply with said demand. The documentary evidence submitted herein establishes that Mr. Cortazar or his prior counsel made such a demand on January 18, 2013 and that defendant provided copies of the books and records with respect to the LLC's financial documents on January 22, 2013, and that Mr. Cortazar is in possession of other demanded documents, and that defendant would have continued access to the LLC's books and records. In addition, the documentary evidence submitted herein establishes that, although in June 2013, Mr. Cortazar claimed that he was missing copies of some checks, and claimed that some items were not provided, Mr. Cortazar did not respond to defense counsel's request that he specify the

missing items so that they could be provided. The evidence presented thus establishes that the defendant has continuously provided plaintiff access to the LLC's books and records, and conclusively establishes that the defendant has complied with the provisions of Limited Liability Company Law § 1102, as a matter of law.

The second cause of action seeks an accounting by the defendant with respect to the LLC. CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986].) "An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief" (*Morgulas v Yudell Realty*, 161 AD2d 211, 213-214 [1st Dept 1990]). Members of a limited liability company may seek an equitable accounting under common law (*Gottlieb v Northriver Trading Co. LLC*, 58 AD3d 550 [1st Dept 2009]). Plaintiffs, in their second cause of action, merely allege that defendant, as the named managing member of the LLC, owes a fiduciary duty to the LLC and its members and alleges that although a demand for an accounting has been made, defendant has refused to comply or made a bad faith efforts to comply. Plaintiffs' allegations are insufficient to support a claim for an accounting in light of the documentary evidence submitted, demonstrating that the defendant provided same. Moreover, James Cortazar's opposing affidavit makes it clear that the second cause of action for an accounting is nothing more than a further demand for access to the LLC's books and records.

The third cause of action for breach of contract alleges that defendant diverted or misappropriated rents, without authority, from Parcel I, for his own personal benefit and in violation of the agreement, and usurped without cause, James Cortazar's right to collect rents and maintain Parcel I, and that as a result of defendant's alleged breach of contract, the "Plaintiff Cortazar Group has been damaged." Neither the "Cortazar Group" nor all of the individuals who make up the "Cortazar Group" are parties to this action. Furthermore, Vincent Cortazar, George Lecker and Brian Scalone, have all submitted affidavits in support of the defendant's cross motion to dismiss, and Mr. Lecker and Mr. Scalone state that they were not advised of this action prior to its commencement and that they did not authorize Vincent Cortazar to bring this action on their behalf. As plaintiff has failed to join Vincent Cortazar, George Lecker and Brian Scalone as parties to this action, and as these individuals are necessary parties, plaintiff cannot seek relief on behalf of the "Cortazar Group."

Moreover, it is noted that James Cortazar, individually, does not have the right under the agreement to collect rents and maintain Parcel I.

The fourth cause of action for breach of fiduciary duty improperly intermingles individual claims on behalf of James Cortazar, with derivative claims brought on behalf of the LLC and, therefore, this claim must be dismissed (*see Mizrahi v Cohen*, 104 AD3d 917, 919 [2d Dept 2013]).

The court further finds that plaintiffs' allegations are insufficient to state a claim for breach of fiduciary duty owed to either James Cortazar or the LLC. With respect to the mortgage on Parcel II, the October 1, 2009 agreement provides that the owner of Parcel II would transfer it to the LLC by a bargain and sale deed "free of all liens, judgments, mortgages, violations and leasehold interests except the Mortgage and Note, a Mortgage with Woori Bank with a principal balance of $650,000.00, a mortgage with HYPOTHECATOR in the sum of $233,000 filed December 26, 2007 (the 'Remaining HYPOTHECATOR Mortgage') and the leasehold interest of New Dream Deli Inc. by lease annexed hereto as Exhibit A." Pursuant to said agreement, the defendant is obligated to satisfy the Woori Bank mortgage at the sale or financing of the project.

It is undisputed that the transfer of Parcel II constituted a violation of the Woori Bank mortgage, and that the lender called the mortgage due, at which time there was a balance due, with a pre-payment sum totaling $712,890.08. In order to avoid default and the potential loss of Parcel II in a foreclosure proceeding, said mortgage was satisfied in full pursuant to an assignment to TD Funding on January 12, 2010, at which time the interest rate on the loan was 10 % per annum. The LLC refinanced said mortgage loan with The Bethpage Federal Credit Union on March 6, 2012. Said loans thus preserved the LLC's ownership interest in Parcel II, and defendant acknowledges that he remains responsible for the repayment of this loan at the time of the refinancing or sale of said real property.

With respect to the collection of rents derived from Parcel I, the October 1, 2009 agreement did not give James Cortazar the exclusive right to collect such rents. Rather, the agreement provided that the "Cortazar Group," *i.e.*, James Cortazar, Vincent Cortazar, George Leckler, and Brian Scalcione had the right to collect rents derived from Parcel I, and also provided that these individuals would be responsible for the carrying costs associated with said real property. The documentary evidence presented establishes that James Cortazar received a notice dated November 27, 2012, calling for a meeting of the members of the LLC on December 18, 2012, regarding certain resolutions pertaining to the re-appointment of a managing member of the LLC; the appointment of Manhasset Jackson Management Corp., to manage Parcel I, and to collect rents, pay expenses, dispossess tenants and to enter into the premises to perform all normal management duties; to acknowledge that the defendant or

an entity he is affiliated with had paid taxes owed on Parcel I in the sums of $4,290.00 and $4,217.11, as well as property insurance of approximately $11,526.60; to provide for the repayment of these sums; to extend the time in which to obtain financing; and to ratify, as so modified, the October 1, 2009 agreement, as well as an operating agreement dated January 2, 2009. All of the members of the LLC, with the exception of James Cortazar, attended said meeting and adopted the resolutions set forth in the November 27, 2012 notice. James Cortazar cannot claim that the defendant usurped his right to collect the rents for Parcel I based upon *both* the agreement and the adoption of said resolution.

With respect to the remaining allegations of fraud and fraudulent inducement, in order to plead a cause of action for fraud, a plaintiff must allege (1) that the defendant made a representation or an omission as to a material fact that was false and known to be false, (2) that the misrepresentation or omission was made for the purpose of inducing the plaintiff to rely upon it, (3) that the plaintiff justifiably relied on the misrepresentation or material omission, and (4) that the plaintiff suffered an injury as a result of such reliance (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Pace v Raisinan & Assoc., Esqs., LLP*, 95 AD3d 1185 [2d Dept 2012]; *Levin v Kitsis*, 82 AD3d 1051[2d Dept 2011]; *Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077 [2d Dept 2011]). Moreover, a cause of action rooted in fraud must meet the pleading requirement set forth in CPLR 3016 (b) that "the circumstances constituting the wrong shall be stated in detail." Although "unassailable proof" is not required at the pleading stage, a complaint alleging fraud must set forth "the basic facts to establish the elements of the cause of action" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559). Here, plaintiffs' mere conclusory language, without specific and detailed allegations of a material misrepresentation of fact by the defendant, of defendant's knowledge of the fraud or reckless disregard of the truth, of plaintiff's justifiable reliance, and of the damages proximately caused by such misrepresentation, is insufficient to state a cause of action to recover damages for fraud (*see Sanford/Kissena Owners Corp. v Daral Props., Inc.*, 84 AD3d 1210[2d Dept 2011]; *Heffez v L G Gen. Constr., Inc.*, 56 AD3d 526, 527 [2d Dept 2008]; *Friedman v Anderson*, 23 AD3d 163 [1st Dept 2005]; *Old Republic Natl. Title Ins. Co. v Cardinal Abstract Co.*, 14 AD3d 678 [2d Dept 2005]; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2d Dept 2001]).

In the fifth cause of action, Cojam Realty Inc., seeks to rescind the October 1, 2009 contract and recover possession of Parcel I on the grounds that it transferred Parcel I to the LLC without good and valuable consideration and without the express authority of its shareholders. Plaintiff Cojam Realty Inc.'s claim that the subject transfer of real property was made without the authority of the shareholders, is contrary to the terms of the October 1, 2009 agreement and is refuted by the documentary evidence. The October 1, 2009 agreement, states at paragraph 28 that "As to the corporate parties, each acknowledges that

the execution of this Agreement has been authorized by their Board of Directors." The documentary evidence submitted herein establishes that James Cortazar and Vincent Cortazar, each 50 % shareholders of Cojam Realty Inc., executed a corporate resolution consenting to the transfer of Parcel I subject to the October 1, 2009 agreement.

The claim that the transfer of Parcel I to the LLC was not supported by consideration is also contrary to the terms of the October 1, 2009 agreement, which is annexed to and made part of the amended verified complaint. Said agreement provides that upon the transfer of Parcel I to the LLC, defendant would pay all costs relevant to obtaining building permits, that he would secure the building permits and secure financing for the construction of the project. The agreement further provided that James Cortazar, George Leckler, Vincent Cortazar and Brian Scalcione would be entitled to collect the rents derived from Parcel I and that these individuals would be responsible for the carrying costs, including real property taxes, income taxes, liability insurance and other maintenance costs. As consideration for the transfer of Parcel I, and Scalcione and Leckler's contribution of $1,000,000.00 to the project, James Cortazar, Vincent Cortazar, Scalcione and Leckler each received a 10% interest in the LLC. In addition, the agreement provides that once the financing was procured, Cojam Realty Inc., would receive $2,000,000.00, and that if the financing did not take place within the a certain period of time, unless there was mutual consent, the property would be put up for sale at a price of no less than $6,000,000.00; that following the sale the first $3,000,000.00 would be paid to James Cortazar, Vincent Cortazar, Scalcione and Leckler; the next $3,000,000.00 would be paid to defendant; and any remaining proceeds of sale would be spilt equally between all of the members of the LLC.

The sixth cause of action for judicial dissolution of the LLC alleges that the defendant breached his fiduciary duties to the LLC, and engaged in fraudulent and oppressive conduct and therefore the "plaintiff" has been damaged. The claims of breach of fiduciary duty are not adequately pleaded and plaintiff Cortazar has not alleged that in the context of the terms of the operating agreement or articles of incorporation that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible (*see* Limited Liability Company Law § 702; *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131[2d Dept 2010]).

In view of the foregoing, defendant's cross motion to dismiss the complaint is granted, and plaintiffs' motion for injunctive relief is denied as moot.

Dated: November 8, 2013

J.S.C.