GDC Bridgeport Holdings, LLC v Anderson
2017 NY Slip Op 30349(U)
February 24, 2017
Supreme Court, New York County
Docket Number: 654120/16
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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GDC BRIDGEPORT HOLDINGS, LLC, individually and on behalf of BRIDGEPORT PHASE I MANAGER, LLC, BRIDGEPORT PHASE I OWNER, LLC, BRIDGEPORT PHASE I TENANT LLC, BRIDGEPORT PHASE I COMMERCIAL LLC, BRIDGEPORT PHASE I DEVELOPER, LLC, BRIDGEPORT PHASE II MANAGER LLC, BRIDGEPORT PHASE II OWNER LLC, BRIDGEPORT PHASE II TENANT LLC, BRIDGEPORT PHASE II COMMERCIAL LLC , and BRIDGEPORT PHASE II DEVELOPER, LLC,

Plaintiffs,

Index No.654120/16

-against-

Mot Seq No. 002

ERIC ANDERSON, URBAN GREEN BRIDGEPORT PHASE I LLC, URBAN GREEN BRIDGEPORT PHASE II LLC, URBAN GREEN MANAGEMENT, LLC, URBAN GREEN EQUITIES, LLC, URBAN GREEN COMMERCIAL BUILDERS, LLC, UGE BRIDGEPORT, LLC, URBAN GREEN BUILDER/CT, LLC, UGE 912 MM LLC, UGE 912 LLC, BLOCK 912 JV, LLC, UNKNOWN MEMBERS OF BLOCK 912 JV, LLC 1-3, SUPPORTIVE HOUSING WORKS, INC., and John Does 1 through 20,

Defendants.

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OSTRAGER, J.:

Before the Court is a motion by defendant Eric Anderson and the various related Urban Green defendants to dismiss the claims against them pursuant to CPLR §3211(a)(1) and (5) based on documentary evidence, a release, and the statute of limitations. For the reasons set forth below, the motion is denied without prejudice to renewal following the completion of discovery.

This action involves a complex series of transactions regarding a major urban renewal project in Bridgeport, Connecticut that began in or about 2005 and is continuing. The plaintiff GDC Bridgeport Holdings, LLC is an investor with an equity

interest in the Bridgeport project. The moving defendants are various special purpose entities formed in connection with the project, and defendant Eric Anderson is one of the principals. During the period from 2005 through 2014, plaintiff via its representative Martin Ginsburg and defendants via their representative Eric Anderson executed a series of inter-related agreements regarding ownership, management, tenancy and tax credit financing in connection with project. In 2014 the parties entered into an agreement that purportedly separated their interests. Nevertheless, it appears that the parties signed at least one additional agreement as recently as 2016.

The project has been divided into various Phases. Phase II is at the heart of a prior action pending between only a few of the parties named in this action: *GDC Bridgeport Holdings, LLC v Urban Green Bridgeport Phase II LLC and Eric Anderson,* Index No. 651149/16. Although the Notice of Motion fails to cite CPLR §3211(a)(4), defendants in their Memorandum of Law urge this Court to dismiss this action based on the prior action pending or unlawful claim-splitting in favor of a motion to amend the complaint in the earlier action.

That request is denied. Unlike the prior action, this action involves both Phases I and II, names additional defendants, raises additional claims, and seeks additional and different relief than the first action. Dismissal of this action in favor of a motion to amend the complaint in the first action is a waste of judicial and party resources and will simply lead to delay with no real benefit. However, as the two actions indisputably relate to one another, discovery may proceed jointly and further coordination may be ordered as the two cases progress.

Defendants next seek to dismiss plaintiffs's claim for fraud relating to the Block 912/Phase III Closing and Anderson's sale of his interest in Phase III after agreeing to temporarily withdraw Count Four in this action, without prejudice to renewal after the Closing (see transcript of September 23, 2016 proceedings, NYSCEF Doc. No. 74). While the claim may well fail as the evidence develops, plaintiff's pleadings are sufficient to state a cause of action and survive dismissal under the standard applicable to pre-answer motions to dismiss, where the Court must accept the allegations as true and accord plaintiff every favorable inference. *Leon v Martinez,* 84 NY2d 83, 87-88 (1994). Here, plaintiff has pled the required elements of fraud; namely, that defendant misrepresented the true nature of the Block 912 Closing and intentionally concealed the sale of his interest in Phase III, that Anderson knew his representation was false, that plaintiff reasonably relied on the representation to withdraw its claim; and that plaintiff was damaged in that, had it known that Anderson was selling his interest, it would have required security relating to its interest in Phase III before the sale. Therefore, dismissal of the fraud claim is denied at this time. Nevertheless, as indicated during the February 16, 2017 oral argument, the Court rejects any claim of "fraud on the Court."

The Court also declines to dismiss the entire action as barred by the Release executed by the parties as part of the Separation Agreement signed in 2014, several years after GDC took control of the project. (Exh 10). The Release, which specifically references only Phase I but is otherwise broad in scope, expressly provides in paragraph 7 that it "shall be governed by and construed in accordance with the laws of the State of Connecticut." Connecticut courts have held that "a general release cannot shield an officer who fails in his duty as a fiduciary to disclose information relevant to a

transaction with the person whose confidence has been abused ..." *Lapuk v Simons,* 1995 WL 5633 at 14 (Sup. Ct. 1995), *aff'd* 41 Conn. App. 750 (1996), citing *Pacelli Bro. Transportation, Inc. v Pacelli*, 189 Conn. 401, 407 (1983). Further, fraud in the procurement acts to void releases. *Lapuk* at 13, citing *Dice v Akron C &YR Co.*, 359 US 359, 362. Again, while defendants insist the Release is valid and dispute any claim of fraud, plaintiff's allegations are sufficient to create an issue as to the enforceability and applicability of the Release to the various claims in this action. Thus, defendants' motion to dismiss the action as barred by the Release is denied at this time.

In support of its claim for dismissal of the claims as time-barred, defendants rely on the "internal affairs doctrine" to argue that the law of Delaware, where the companies at issue were incorporated, bars claims more than three years old. 10 Del. Code §§ 8106, 8112. Even if one were to apply the more generous six-year statute of limitations under either Connecticut or New York law, events prior to plaintiff's 2008 takeover would still be time-barred, defendants contend. Plaintiff argues in opposition that the internal affairs doctrine does not apply here, as defendants are not current officers, directors or shareholders of the corporation.

Under New York law, the statute of limitations for fraud claims is either six years "from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it. CPLR §213(8). Here, plaintiff alleges that it discovered the facts giving rise to its claims after Anderson's former partner James Fendt filed a lawsuit against Anderson in 2016. That lawsuit led plaintiff to discover purported wrongdoing by Anderson, such as misappropriation of project funds . These facts are

sufficient to overcome the statute of limitations defense related to the fraud claims at the pleading stage, regardless of which state's law applies, as both states recognize either a discovery rule or the concept of tolling.

The parties do agree, however, that Delaware law applies to plaintiff's breach of contract claims and that the applicable statute of limitations is three years. 10 Del. C. §8106. As to that claim, plaintiff asserts that both New York and Delaware courts recognize theories of equitable tolling and fraudulent concealment to defeat a statute of limitations defense [*see, e.g., Weiss Swanson,* 948 AD2d 433, 451 (Del. Ch. 2008); *Abbas v Dixon*, 480 F3d 636, 642 (2d Cir. 2007)], and it points to the continuing fiduciary relationship and Anderson's failure to disclose facts relating to his misappropriation of funds as a basis for the tolling. Defendant replies that the books and records were always available for plaintiff's review, casting doubt on any claim of concealment. Nevertheless, the facts alleged are sufficient to withstand dismissal at this time, albeit barely.

Defendants next urge dismissal based on the limitation of liability clauses in the relevant agreements. Specifically, defendants argue that both the Phase II Manager's and Phase II Owner's operating agreements "provide for liability under certain circumstances, while expressly eliminating the general fiduciary duties that would otherwise apply to their managers." (Defendants' Memorandum of Law at p. 19). According to defendants, these clauses "obviously apply to GDC's general 'breach of fiduciary duty' claims relating to Anderson's conduct under the Phase II Manager's Operating Agreement," thus mandating the dismissal of those claims with prejudice. However, defendants have failed to cite the specific language in the clause on which

they rely, or to even cite the relevant section number to enable the Court to locate the clause in the voluminous documents.

Plaintiff in response points to Section 4.7 of the Phase II Manager Operating Agreement entitled "Exculpation of Certain Member Liability" and Section 8.7 of the Phase II Owner Operating Agreement, entitled "Liability for Acts and Omissions." Both Sections contain comparable exceptions to the protection against liability otherwise afforded by the clause in the case of wrongful acts and omissions constituting gross negligence, misconduct, fraud, and/or a breach of the duty of good faith and fair dealing. Plaintiff points specifically to paragraphs 191-92 of the complaint wherein it is alleged that Anderson "knowingly and intentionally" diverted funds for his own use, commingled accounts, and concealed various wrongful activities.

An issue exists at the pleading stage as to whether the cited exception applies. Therefore, dismissal of the claims based on the limitation of liability clause is denied. The Court also finds the allegations sufficient to withstand dismissal of the fraud claim as duplicative of the breach of contract claim, as the claims are not completely identical.

The final issue raised by the movants relates to plaintiff's claim, based on an alleged oral agreement, to a 50% "profit and/or equity" interest in Phase III. In addition to asserting that the claimed agreement is "hopelessly vague, lacking in consideration, and unenforceable," defendants contend the claim is undermined by a letter written by Ginsburg indicating that defendant Anderson (as opposed to plaintiff GDC) had an interest in Phase III (Exh 13).

Plaintiff responds that it has sufficiently alleged the elements of a constructive trust: (1) a promise; (2) a transfer in reliance thereon; (3) a confidential relationship and

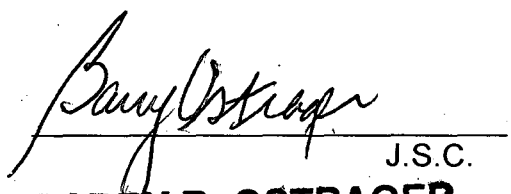
(4) unjust enrichment. *Janke v Janke,* 47 AD2d 445, 448 (4th Dep't 1975), *aff'd* 39 NY2d 786 (1976). Plaintiff alleged in the complaint that Anderson promised to provide GDC 50% of his share of the profits and/or equity in Phase III, that he failed to advise GDC of the payout, and that plaintiff's consent to a temporary dismissal of Block 912 from this litigation was procured under false pretenses so as to satisfy the "transfer in reliance" and unjust enrichment elements. As to consideration, plaintiff alleges that it was investing millions of dollars to rectify Anderson's failures in managing Phase I and Phase II, and Anderson's promise was in consideration for that investment. As for the letter, it is ambiguous and cannot be read out of context. Again, while the plaintiff's claim to an interest in Phase III based on an alleged oral agreement is somewhat specious, neither the cited letter or any of the arguments raised compels dismissal of the claim at the pre-answer stage of the litigation.

In sum, while many of the claims raised in this action appear dubious, they are sufficient to survive a pre-answer motion to dismiss.

Accordingly, it is hereby

ORDERED that defendants' pre-answer motion to dismiss is denied without prejudice to renewal as a motion for summary judgment once discovery has proceeded, defendants shall efile an Answer within twenty days of the date of this Order, and discovery shall proceed expeditiously in accordance with the orders issued by the Court.

Dated: February 24, 2017



J.S.C.
BARRY R. OSTRAGER
JSC