Fendt v WHGA Hamilton Hgts. Cluster, Inc.
2017 NY Slip Op 30696(U)
April 7, 2017
Supreme Court, New York County
Docket Number: 652188/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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JAMES FENDT, MICHAEL NIKOLAI, JAMES HUANG, and BONNICKLEWIS ENTERPRISES, LLC,

Plaintiffs,

Index No.: 652188/2016

-against-

Mot. Seq. No. 002

WHGA HAMILTON HEIGHTS CLUSTER, INC., WEST HARLEM HAMILTON HEIGHTS CLUSTER, INC., WEST HARLEM GROUP ASSISTANCE, INC., and ERIC ANDERSON

Defendants.

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ANIL C. SINGH, J.S.C.:

Defendants WHGA Hamilton Heights Cluster, Inc. (Old GP-1), West Harlem Hamilton Heights Cluster, Inc. (New GP-1), and West Harlem Group Assistance, Inc. (WHGA, and, collectively, the West Harlem entities), move, pursuant to CPLR 3211 (a) (3), (4), and (5), to dismiss the first through fourth causes of action asserted against them by plaintiffs James Fendt (Fendt), Michael Nikolai (Nikolai), James Huang (Huang), and Bonnicklewis Enterprises, LLC (Bonnicklewis), for lack of capacity to sue, a prior pending action, and collateral estoppel.

Background

Plaintiffs allege that they are owners of A&F HHC Equities LLC (HHC Equities), the limited partner of Hamilton Heights Cluster Associates, L.P. (the Partnership) (amended complaint, ¶ 1), in which Fendt, Nikolai, Huang, and Bonnicklewis, respectively, own interests of 45.5%, 10%, 2.5% and 4% (*id.*, ¶¶ 12-15). Defendant Eric Anderson[1] (Anderson) allegedly owns the remaining 38% of HHC Equities (*id.*, ¶ 16). One of the general partners of the

[1] Anderson has moved separately to dismiss the complaint against him, and that motion is not decided herein.

Partnership, A&F Hamilton Heights Cluster Inc. (A&F Hamilton Heights) is equally co-owned by Fendt and Anderson (*id.*, ¶¶ 12, 16).

Defendant WHGA is a "community based development corporation," and the owner of Old GP-1 and New GP-1 (*id.*, ¶¶ 20-21). In the mid-1990s, WHGA owned and controlled five Housing Development Fund companies that held title to 504, 505, 529, and 531 West 145th Street, 542 West 140th Street, and 115 Hamilton Place (*id.*, ¶ 22). WHGA entered into a partnership with Fendt and Anderson in order to renovate and operate the buildings (*id.*, ¶¶ 23-24). On December 16, 1998, the Partnership was established, with Old GP-1, as general partner, owning 1%, and A&F Hamilton Heights, as limited partner, owning 99% (*id.*, ¶¶ 25, 27).

On October 1, 1999, the Partnership was restructured (*id.*, ¶ 28). A&F Hamilton Heights became a second general partner, and A&F Equities LLC (A&F Equities), a company owned by Fendt and Anderson, became the limited partner (*id.*, ¶¶ 28-29). As of January 1, 2000, Fendt and Anderson each owned 38% of A&F Equities; Fendt and Anderson's employees owned the remaining amount, i.e., Nikolai owned 6%, Bonnicklewis owned 8%, Huang owned 5%, nonparty Thomas Farrell (Farrell) owned 3%, and nonparty Justin Jon Baptiste (Baptiste) owned 2% (*id.*, ¶¶ 29-30). According to the partnership agreement, the "limited partner may assign his interest in the partnership, and the assignee shall have the right to become a substituted limited partner and entitled to all the rights of the assignor if all the partners (except the assignor) consent thereto" (*id.*, ¶ 32). Old GP-1 owned 67% of the restructured Partnership, A&F Hamilton Heights owned 32%, and A&F Equities owned the remaining 1% (*id.*, ¶ 33).

On March 14, 2001, the Partnership acquired the deeds to the above described buildings (*id.*, ¶ 35). In order to redevelop the buildings, the Partnership borrowed a total of $4.2 million from and through the New York City Department of Housing Preservation and Development

(HPD), and acquired a $1.5 million mortgage from the EAB Community Development Corporation (EAB) (*id.*, ¶¶ 36-37). In addition, between March 2001 and December 2004, A&F Equities paid $600,000 in debts owed on the buildings, $200,000 in maintenance and operation costs previously borne by WHGA, and other unspecified costs (*id.*, ¶ 38).

In December 2004, the Partnership refinanced the EAB mortgage and restructured the Partnership again (*id.*, ¶¶ 41, 43). New GP-1 replaced Old GP-1 as a general partner, and HHC Equities replaced A&F Equities as limited partner (*id.*, ¶¶ 44-45). The equity structure was changed so that the limited partner owned 99% of the Partnership and the general partners owned 1% (*id.*, ¶ 46). These changes were memorialized in an amended partnership agreement dated December 22, 2004 (*id.*, ¶ 48), which Anderson submitted to New York Community Bank (NYCB) in connection with the refinancing (*id.*, ¶ 49). On December 30, 2004, Anderson submitted a General Partners' Consent to NYCB on behalf of HHC Equities, as limited partner, and A&F Hamilton Heights, as one of two general partners (amended complaint, exhibit 4, General Partners' Consent at 3). It does not appear from the record, however, that the amended partnership agreement was ever signed.

At around the same time, Fendt and Nikolai withdrew from operations of A&F Equities, but maintained their interests in HHC Equities and the Partnership, as memorialized in a Withdrawal Agreement dated March 1, 2005 (amended complaint, ¶¶ 53, 55). Fendt and Anderson then agreed to dissolve their business partnership (*id.*, ¶ 54). Nonparties Farrell and Baptiste later transferred their ownership shares of HHC Equities to Fendt, and Huang and Bonnicklewis' shares were diluted (*id.*, ¶¶ 61-62). Following the transfers, the ownership of HHC Equities was as follows: 45.5% by Fendt, 38% by Anderson, 10% by Nikolai, 4% by Bonnicklewis, and 2.5% by Huang (*id.*, ¶ 63).

Plaintiffs allege that thereafter, all tax filings, Form K-1s, and other tax documents reflected this ownership structure for HHC Equities, and that HHC Equities was the limited partner of the partnership (*id.*, ¶¶ 64-90). Specifically, Anderson served as tax matters partner for the Partnership, HHC Equities, and A&F Equities for the 2004 to 2013 tax years (*id.*, ¶ 65). In that capacity, Anderson prepared tax returns for the relevant entities and distributed Form K-1s to parties with ownership interests in those entities (*id.*, ¶ 67). The Partnership's tax returns from 2004 until 2014 reflected that HHC Equities, as limited partner, owned 99% of the Partnership, with the remaining 1% split between New GP-1 and A&F Hamilton Heights (*id.*, ¶¶ 72-74). Similarly, the Form K-1s from 2004 through 2013 reflected the same ownership percentages (*id.*, ¶¶ 75-77). Plaintiffs allege that New GP-1 received the same forms, never objected to the reported ownership percentages, and, indeed, filed no tax returns between 2005 and 2015 (*id.*, ¶¶ 78-79). Finally, the tax returns for HHC Equities for this time period also reflected that HHC Equities was the limited partner of, and owned 99% of, the Partnership (*id.*, ¶¶ 81-83, 89).

On October 7, 2014, Fendt, purportedly acting through HHC Entities as limited partner of the Partnership, commenced a lawsuit captioned *Hamilton Heights Cluster Assoc., L.P., et al. v Urban Green Mgt, Inc. and Eric Anderson*, index No. 653038/2014 (Sup Ct, NY County 2014) (the Fraud Action), alleging various fraud, breach of fiduciary duty, and other claims relating to Anderson's alleged mismanagement of the Partnership assets, and problems with Urban Green's management of the properties (Fraud Action, NYSCEF Doc. No. 1, Fraud Action complaint at 9-13). On June 2, 2015, the West Harlem entities moved, pursuant to CPLR 1001, 1012, and 1013, to intervene in the fraud action; to dismiss claims by the Partnership for lack of capacity to sue, pursuant to CPLR 3211 (a) (3); and, for leave to file a complaint for a judgment declaring

that, among other things, the 2004 restructuring of the Partnership was ineffective (Fraud Action, NYSCEF Doc No. 110, notice of motion dated 6/2/15).

On July 8, 2015, the court in the Fraud Action granted the motion to the extent of allowing Old GP-1 and New GP-1 to intervene and file a declaratory judgment complaint, and dismissing the Fraud Action insofar as it was brought on behalf of the Partnership (Goldberg affirmation dated 6/7/16, exhibit D, Order dated 7/8/15 at 21). In that decision, the court held that HHC Equities and Fendt had no authority to bring the action in HHC Equities' capacity, as limited partner, because the 2004 restructuring was never memorialized in a signed writing (*id.* at 8). Thus, HHC Equities was never substituted as the limited partner, because such a substitution, along with the change in ownership percentages contemplated by the restructuring, would have required written consent of Old GP-1 and A&F Hamilton Heights, under both the partnership agreement and pursuant to Partnership Law § 121-110 (c)[2] (*id.*). In any case, the record before the court did not contain any written authorization from the partners for the Partnership to bring a direct claim (*id.*).

On September 11, 2015, Old GP-1 and New GP-1 filed an intervenors' declaratory judgment complaint (DJ complaint) in the Fraud Action (Fraud Action, NYSCEF Doc. No. 277, DJ complaint). Regarding the ownership interest of the Partnership, the DJ complaint alleges that neither Old GP-1 nor New GP-1 was consulted about giving up the majority of its ownership interest in the Partnership, nor would either have agreed to ceding 99% of the Partnership to the

[2] "The partnership agreement of a limited partnership may be amended from time to time as provided therein; provided, however, that, except as may be provided otherwise in the partnership agreement, without the written consent of each partner adversely affected thereby, no amendment of the partnership agreement shall be made which ... alters the allocation for tax purposes of any items of income, gain, loss, deduction or credit . . . [or] alters the manner of computing the distributions of any partner" (Partnership Law § 121-110 (c) (ii–iii).

limited partner (DJ complaint, ¶¶ 17-19). Further, the signed agreement, memorializing the 1999 restructuring, is allegedly the only signed agreement that any of the partners of the Partnership have been able to locate (*id.*, ¶ 20). Thus, the intervenors sought a declaration that the 2004 restructuring was ineffective and not applicable to the Partnership (*id.* at 12). In response, Fendt and A&F Hamilton Heights, derivatively, on behalf of, among others, the Partnership and HHC Equities, filed an answer to the DJ complaint (Fraud Action, NYSCEF Doc. No. 374, answer to the DJ complaint). Fendt asserted counterclaims for a declaratory judgment and breach of fiduciary duty against Old GP-1 and New GP-1 (*id.* at 10-13). Specifically, Fendt argued that the 2004 restructuring was, in fact, effective (*id.* at 10-11).

On November 19, 2015, Anderson filed a motion in the Fraud Action, pursuant to 22 NYCRR 130-1.1, to preclude Fendt from arguing that the 2004 restructuring was effective (*see generally* Fraud Action, NYSCEF Doc. No. 446, affirmation of Andrew Hayes dated 11/19/15). On March 21, 2016, during the oral argument on the motion, the court repeatedly stated that its order of July 8, 2015 had determined that HHC Equities had never become the limited partner of the Partnership (Goldberg affirmation, exhibit E, court tr dated 3/21/16 at 3, 7:26-8:4, 9:10-15, 13:17-18). Ultimately, however, the court denied the motion as frivolous (Fraud Action, NYSCEF Doc. No. 558, Order dated 4/11/16 at 7). Notably, the court stated that "[t]he 2015 Decision determined only that Fendt did not have authority to bring the action based on the documents submitted at the time, including the signed Partnership Agreement. However, the 2015 Decision clearly pointed to issues of fact surrounding the Unsigned Agreement that would benefit from discovery, which is ongoing" (*id.* at 4).

Shortly after the court's 4/11/16 order in the Fraud Action, plaintiffs filed their declaratory judgment complaint in the instant action. The West Harlem entities moved to

dismiss, and, in response, plaintiffs filed their amended complaint. The amended complaint seeks: a declaration that HHC Equities is the limited partner of the Partnership with a 99% ownership interest (first and third causes of action); an order estopping defendants from arguing that HHC Equities is not the limited partner or owns less than 99% of the Partnership (second and fourth causes of action); a declaration regarding the effects of the withdrawal agreement (fifth cause of action); damages for breach of the withdrawal agreement against Anderson (sixth cause of action); and, an order estopping Anderson from disputing, among other things, the ownership percentages of the Partnership (seventh cause of action).

Discussion

The West Harlem entities now move, pursuant to CPLR 3211 (a) (3), (4), and (5), to dismiss the amended complaint based on lack of capacity to sue, a prior pending action, and collateral estoppel.

CPLR 3211 (a) (3) provides that a court may dismiss one or more causes of action where "the party asserting the cause of action has not legal capacity to sue." The issue of capacity to sue arises herein, because this case involves, among other things, HHC Equities' status as a limited partner in the Partnership. The court must therefore determine whether plaintiffs' claims are properly brought directly by plaintiffs, or whether they are derivative claims that must be asserted on behalf of the Partnership. It is settled law that a harm to a partnership gives rise to a derivative claim, and not an individual cause of action (*Sterling v Minskoff*, 226 AD2d 125 [1st Dept 1996]; *see also Broome v ML Media Opportunity Partners*, 273 AD2d 63, 64 [1st Dept 2000] ["the claims are derivative in nature, in that they allege no more than the mismanagement and diversion of assets, and do not implicate any injury to plaintiffs distinct from the harm to the partnership"]). "In order to distinguish a derivative claim from a direct one, the court considers

(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)" (*Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014] [internal quotation marks and citations omitted).

The West Harlem Entities argue that plaintiffs are attempting to vindicate HHC Equities' interest in the Partnership, not their own. Plaintiffs counter that HHC Equities exists only as a vehicle for their investment in the Partnership and, therefore, any harm done to them, and any recovery for that harm, will benefit them directly, as opposed to HHC Equities. Essentially, plaintiffs contend that they invested in HHC Equities, which was then to become the limited partner of the Partnership, as a means of participating in the Partnership. Further, they argue that their second and fourth causes of action for estoppel are direct claims because Anderson made representations regarding HHC Equities' status, as limited partner, directly to them.

The first and third causes of action seek declaratory judgments that HHC Equities is the limited partner of the Partnership and owns 99% of the Partnership. The second and fourth causes of action seek an order estopping defendants from arguing otherwise. The issue then is whether HHC Equities is a limited partner and, if so, what percentage of the Partnership it owns. Because the first through fourth causes of action are derivative claims regarding harm to HHC Equities' alleged interest in the Partnership, plaintiffs have no standing to maintain them as direct claims. While plaintiffs frame their arguments in terms of their interests in the Partnership, directly, the only interest they have is in HHC Equities, the Partnership's alleged limited partner. Nothing in the record before the court indicates that the plaintiffs ever had an individual ownership interest in the Partnership. Thus, when plaintiffs argue that their investment in the Partnership will be destroyed if HHC Equities is not the limited partner, what

they really mean is that the value of their investment in HHC Equities will be destroyed.

"The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder" (*Serino*, 123 AD3d at 41). Generally speaking,

> "Statutes permitting limited partnerships are intended to encourage investment in business enterprise by affording a limited partner a position analogous to that of a corporate shareholder. The object to be accomplished ... is to protect the special partner and exempt him from a general liability and to place his capital alone at the peril of the business"

(*Matter of Brandt*, 81 AD2d 268, 280 [1st Dept 1981] [internal quotation marks and citations omitted]). Thus, any diminution in the value of HHC Equities' interest in the Partnership is akin to an investor's shares in a corporation losing value, and is unquestionably derivative in nature.

Further, while plaintiffs allege that the estoppel claims are direct claims because representations were made to them directly, the estoppel claims also revolve around a harm to the entity; specifically, defendants' claim that HHC Equities is not the limited partner and has no interest in the Partnership. Thus, plaintiffs do not have standing to bring direct claims related to HHC Equities' status, and the first through fourth causes of action must be dismissed.

Further, even were the first through fourth causes of action pled derivatively, on behalf of HHC Equities, those claims are barred by CPLR 3211 (a) (4), which provides that a cause of action may be dismissed where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." In other words, dismissal is proper where "a pending action existed between the same parties for essentially the same relief and involving the same actionable wrong" (*GSL Enters. v Citibank*, 155 AD2d 247, 247 [1st Dept 1989] [internal quotation marks and citation omitted]).

The West Harlem entities argue that the claims asserted against them in the instant action are identical to the derivative counterclaims asserted by Fendt, on behalf of HHC Equities and

A&F Hamilton Heights against Old GP-1 and New GP-1 in the Fraud Action. Plaintiffs argue in response that since neither the parties nor the relief sought are identical, CPLR 3211 (a) (4) does not apply. Further, they contend that the intervenors' declaratory judgment complaint and counterclaims in the Fraud Action do not include the estoppel claims, or the other causes of action asserted solely against Anderson.[3] As set forth below, these arguments are not persuasive.

In the intervenors' declaratory judgment complaint, Old GP-1 and New GP-1 seek a declaration that the 2004 restructuring, as evidenced by the unsigned partnership agreement, was ineffective (Fraud Action, NYSCEF Doc. No. 277, DJ complaint, ¶¶ 42-47). Such a declaration would, among other things, declare that HHC Equities is not the limited partner and has no ownership interest in the Partnership. In response to the complaint, Fendt derivatively counterclaimed, on behalf of HHC Equities, for a declaratory judgment that the unsigned partnership agreement was "valid and enforceable" (Fraud Action, NYSCEF Doc. No. 374, answer to DJ complaint at 10, 14). Such a declaration would, among other things, declare that HHC Equities *is* the limited partner and owns 99% of the partnership. These are the exact issues on which plaintiffs herein seek a declaratory judgment and to estop defendants. The fact that the estoppel claims are not included in the Fraud Action does not affect this conclusion. Seeking a declaratory judgment that HHQ Equities is the limited partner, and an order estopping defendants from arguing that HHC Equities is not the limited partner, provide the identical result sought by plaintiffs, i.e. that HHC Equities is the limited partner in the Partnership. Relief on one provides the same relief sought on the other (*e.g. Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, 110

[3] Plaintiffs also contend that the court in the Fraud Action authorized them to bring a declaratory judgment action. A review of the record indicates no such explicit authorization, and in any case, such authorization would not require the court to retain claims that are defective as a matter of law.

AD3d 783, 784-785 [2d Dept 2013] [dismissal under CPLR 3211 (a) (4) proper where prior pending action and instant action sought competing declarations as to which insurer had duty to defend]). CPLR 3211 (a) (4) does not require an exact identity of claims, merely that they be substantially similar and arise out of the same transaction or series of transactions (*see e.g. Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013] [internal quotation marks and citations omitted] ["It is not necessary that the precise legal theories presented in the first action also be presented in the second action"]; *Josephs v Bank of N.Y.*, 302 AD2d 318, 319 [1st Dept 2003] ["Dismissal of the declaratory judgment action was also warranted by the circumstance that it was duplicative of plaintiff's embezzlement action, the two actions involving substantially the same parties, issues and underlying facts).

Nor is strict identity of parties required. "Indeed, substantial, not complete, identity of parties is all that is required to invoke CPLR 3211 (a) (4)" (*Syncora*, 110 AD3d at 96). Here, it is not necessary to have all of the members of HHC Equities joined as parties to the action, because the claims sought to be dismissed are, as the court has previously stated, derivative claims. Therefore, the real party in interest is HHC Equities itself, and Fendt already has asserted this claim derivatively, on HHC Equities' behalf, as a counterclaim in the Fraud Action (Fraud Action, NYSCEF Doc. No. 374, answer to DJ complaint at 10, 14). Further, Old GP-1 and New GP-1, defendants herein, are the intervenors in the Fraud Action. Thus, there is sufficient identity of parties to dismiss the claims asserted against the West Harlem entities.

Finally, whether the Fraud Action includes the causes of action asserted solely against Anderson is irrelevant, as this motion does not address Anderson or the claims asserted against him.

For the foregoing reasons, the West Harlem entities' motion to dismiss is granted, and the

claims against them are dismissed. In view of the foregoing, the court need not address the balance of this application.

Accordingly, it is hereby

ORDERED that the motion by defendants WHGA Hamilton Heights Cluster, Inc., West Harlem Hamilton Heights Cluster, Inc., and West Harlem Group Assistance, Inc. to dismiss the complaint against them is granted, and the complaint is dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the remainder of this action shall continue.

Dated: April 7, 2017

ENTER:

HON. ANIL C. SINGH, J.S.C.