Seidler v Knopf
2017 NY Slip Op 31430(U)
June 29, 2017
Supreme Court, Kings County
Docket Number: 506453/2014
Judge: Sylvia G. Ash

At an IAS Term, Part Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of June, 2017

P R E S E N T:

HON. SYLVIA G. ASH,
Justice.

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STEVEN SEIDLER, et al.,

Plaintiffs,

- against -

JACOB KNOPF a/k/a JACK KNOPF a/k/a YAKOV KNOPF a/k/a YAAKOV KNOPF a/k/a JAY KNOPF, et al.,

Defendants.

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DECISION & ORDER

Index # 506453/2014

Mot. Seq. 3 - 11

The following papers numbered 1 to 57 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4, 5-8, 9-12, 13-16 17-18, 19-21, 22-25 26-27, 28-29
Opposing Affidavits (Affirmations)	30, 31, 32-34, 35, 36 37, 38, 39, 40-42, 43 44, 45
Reply Affidavits (Affirmations)	46, 47, 48, 49, 50, 51 52-53, 54, 55
Affidavits (Affirmations) In Support	56, 57
Other Papers	

Upon the foregoing papers, plaintiffs Steven Seidler, Stephanie Seidler Family Trust and Scott Seidler Family Trust move for an order, pursuant to CPLR 3016[b] and 3212[e],

dismissing the first, second and third counterclaims of defendants Robert Teitelbaum, Esq. and Loft E, LLC (Loft) (collectively, "Teitelbaum defendants") to the extent they are asserted against plaintiffs (Motion Seq. No. 3). By separate motion, plaintiffs move for an order, pursuant to CPLR 3212[e], dismissing the second, fifth, sixth, eleventh, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-second affirmative defenses of the Teitelbaum defendants (Motion Seq. No. 4). By separate motion, plaintiffs move for an order, pursuant to CPLR 3212[e], dismissing the second, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth affirmative defenses of defendants Hyman Schattner, Atlantic Lev Y LLC and 1236 Atlantic LLC (1236 LLC)(collectively, "Schattner defendants") (Motion Seq. No. 5). By separate motion, plaintiffs move for an order, pursuant to CPLR 3212[e], dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, twelfth, thirteenth, fourteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-second, twenty-third, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth affirmative defenses of defendants Jacob Knopf, Chaya Knopf, Solomon Knopf and Ruth Knopf (collectively "Knopf defendants")(Motion Seq. No. 6). The Teitelbaum defendants cross-move for an order: (1) pursuant to CPLR 3126[3], dismissing plaintiffs' causes of action or precluding plaintiffs from submitting evidence in support of their claims; (2) barring plaintiffs' separately pending motion against the Teitelbaum defendants; or (3) in the event the Court finds the Teitelbaum defendants' first and/or second counterclaims improperly pleaded, permitting the Teitelbaum defendants to

replead or amend (Motion Seq. No. 7). By separate motion, plaintiffs move for an order: (1) pursuant to CPLR 305[c], correcting the name of defendant Fischer Knopf to reflect her actual name; (2) pursuant to CPLR 3215, declaring Fischer Knopf in default on the ground that she has not served an answer to the verified amended complaint in accordance with an order dated August 6, 2015; (3) directing the clerk to enter judgment in favor of plaintiffs against Fischer Knopf on the seventh cause of action in the sum of $500,000.00 plus eight separate payments of $50,000.00 that were due each August 1st from 2009-2016 with statutory interest; (4) directing the clerk to enter judgment on the ninth cause of action in favor of plaintiffs and against Fischer Knopf in the sum of $100,000.00 plus statutory interest from August 15, 2008, plus $50,000 with statutory interest from September 10, 2009; and (5) pursuant to CPLR 603 and 5012, severing Fischer Knopf from this lawsuit (Motion Seq. No. 8). By separate motion, plaintiffs move for an order, pursuant to CPLR 3212[e], granting plaintiffs summary judgment on their thirteenth cause of action against all defendants or, if summary judgment is denied, an order pursuant to CPLR 3212[g] specifying the facts that are undisputed or incontrovertible and deeming such facts established for all purposes of this lawsuit (Motion Seq. No. 9). By separate motion, plaintiffs move for an order, pursuant to 3025[b], granting leave to serve a second amended complaint (Motion Seq. No. 10). The Schattner defendants cross-move for an order imposing sanctions against plaintiffs' counsel, Doron Zanani, Esq., for filing numerous frivolous motions in this action (Motion Seq. No. 11).

Plaintiffs commenced this action on July 15, 2014 to recover damages from the various defendants based on an alleged fraudulent scheme whereby plaintiffs were persuaded to invest money toward defendants' acquisition of commercial property at 1236 Atlantic Avenue in Brooklyn but were denied any ownership interest, profits or other benefits therefrom. According to plaintiffs' amended complaint, Teitelbaum, a licenced real estate broker, arranged for his agents, the Knopf defendants, to solicit investors to contribute money for the purchase of the subject property by Teitelbaum and the Knopf defendants with the promise that the investors would realize an immediate return on their investment. Plaintiffs maintain that Teitelbaum specifically sought investors who would invest in the building without insisting on being title owners so that Teitelbaum would receive an interest in the property without having to contribute any of his own funds. Plaintiffs also contend that the Knopf defendants, similarly, were seeking an ownership interest in the building but did not wish to invest their own funds. The Knopf defendants solicited plaintiffs to invest money in the transaction, and prior to the closing, plaintiffs gave Teitelbaum a $100,000.00 check and further remitted a $100,000.00 cashier's check payable to Titan Servicing LLC. Further, according to a purported agreement executed by Steven Seidler, Jay Knopf and Sol Knopf, dated August 1, 2008, Seidler had given the Knopfs approximately $500,000 ($200,000 in personal loans and $300,000 toward the purchase of the subject property). The purported agreement states that Steven Seidler has been promised a "75% partnership of the Knopfs' profits regarding the [subject] property, or 10% interest whichever is greater" and that "all money must be paid back to the trust within one year."

By deed dated October 10, 2008, the property was conveyed to 1236 LLC. According to the operating agreement of 1236 LLC, the members of the company consisted of Teitelbaum's company Loft, with a 17% interest, the Knopf defendants' company, defendant AAR Group Holdings LLC (AAR), with a 41.5% interest and Shattner's company, Atlantic Lev Y LLC with a 41.5% interest. Plaintiffs allege that Schattner is the sole managing member of 1236 LLC and has sole access to all of its books and records. Plaintiffs maintain that despite their investment of at least $650,000, defendants prevented plaintiffs from deriving any meaningful benefit in the building or any ownership interest therein. Plaintiffs also assert that Teitelbaum failed to give them required disclosures about the profitability and risks of investing in the subject building.

In their amended complaint, plaintiffs set forth causes of action against Teitelbaum for fraud (first), against Chaya Knopf for fraud (second), against Schattner, as alleged principal of the Knopf defendants, for fraud (third), against all defendants for breach of fiduciary duty (fourth), against all defendants for fraudulent concealment by fiduciary (fifth) and against all defendants for civil conspiracy to defraud (sixth). Additionally, plaintiffs allege alternative causes of action sounding in breach of contract against the Knopf defendants (seventh, eighth and ninth), against Solomon Knopf and Ruth Knopf for breach of "Iska" contracts (tenth and eleventh) and assert causes of action against all defendants for rescission under federal securities law and regulations (twelfth) and for violation of federal securities law and regulations based on failure to provide required disclosures (thirteenth).

Subsequent to the filing and service of the amended complaint, the Teitelbaum defendants, Knopf defendants and Schattner defendants interposed answers which included various affirmative defenses as well as counterclaims and/or cross-claims. In particular, the Teitelbaum defendants asserted three counterclaims against plaintiffs for fraud, tortious interference with a contract and contribution/indemnification. On October 22, 2015, the parties entered into a preliminary conference (PC) order setting forth a discovery schedule. Shortly thereafter, on November 11, 2015, plaintiffs brought the instant Motion Seq. No. 3 for partial summary judgment dismissing the Teitelbaum defendants' counterclaims, followed by the separate motion to dismiss certain enumerated affirmative defenses of the Teitelbaum defendants.

By Order dated February 4, 2016, the Court (Hon. Martin M. Solomon) adjourned the partial summary judgment motion and stayed all discovery pending the motion. Plaintiffs subsequently moved separately to dismiss certain enumerated affirmative defenses of the Knopf defendants and Schattner defendants, which motions defendants charge were intended as a way to circumvent the stay of discovery by compelling defendants to produce evidence in opposition. Following additional motion practice by the Teitelbaum defendants (for relief pursuant to CPLR 3126) and by plaintiff for a default judgment against Fischer Knopf and for summary judgment on its thirteenth cause of action based on violation of federal securities law and regulations, plaintiff brought the instant Motion Seq. No. 10 to serve a second amended complaint. The Court will first address this motion as it may render moot certain of the other motions in this matter.

In their second amended complaint, plaintiffs seek to add causes of action grounded in unjust enrichment and constructive trust. The amendments also include expanded allegations regarding the third cause of action against Schattner for fraud, the fourth cause of action against all defendants for breach of fiduciary duty and the sixth cause of action for civil conspiracy to commit fraud. Plaintiffs also amend the alleged amount of money they invested in the subject property.

Motions for leave to amend pleadings should be freely granted except when the delay in seeking leave would directly cause undue prejudice or surprise the opposing party, or when the proposed amendment is palpably insufficient or patently devoid of merit (CPLR 3025 [b]; *see Fough v August Aichhorn Ctr. for Adolescent Residential Care, Inc.*, 139 AD3d 665 [2d Dept 2016]; *Edwards v 1234 Pac. Mgt., LLC*, 139 AD3d 658 [2d Dept 2016]; *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 731-732 [2d Dept 2012]; *Lucido v Mancuso*, 49 AD3d 220, 222, 227 [2d Dept 2008]). "[T]he legal sufficiency or merits of a claim need not be examined unless such insufficiency or lack of merit is clear and free from doubt" (*Edwards v 1234 Pac. Mgt., LLC*, 139 AD3d at 659). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" (*Gitlin v Chirinkin*, 60 AD3d 901, 902 [2d Dept 2009]; *see Galanova v Safir*, 127 AD3d 686, 687 [2d Dept 2015]).

"'The elements of a cause of action to recover for unjust enrichment are '(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*GFRE,*

Inc. v U.S. Bank, N.A., 130 AD3d 569, 570 [2d Dept 2015] quoting *Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). In general, to impose a constructive trust, four factors must be established: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]). However, as these elements serve only as a guideline, a constructive trust may still be imposed even if all of the elements are not established (*see Simonds v Simonds*, 45 NY2d at 241; *see also Latham v Father Divine*, 299 NY 22, 27 [1949]). The proposed additional causes of action are grounded in the allegations that defendants, as fiduciaries of plaintiffs, were given money to purchase the subject property by plaintiffs with the promise of a return on plaintiffs' investment, but that plaintiffs were given no interest in the property and are not deriving any benefit therefrom. Based on the allegations in the proposed second amended complaint, the added causes of action sounding in unjust enrichment and constructive trust are neither patently insufficient nor palpably devoid of merit.

Contrary to the contention of defendants, the amendments are not time-barred. The "relation-back doctrine" permits a plaintiff "to interpose a claim or cause of action which would ordinarily be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint" (*Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]; see CPLR 203 [f]; *39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2d Dept 2006]). Under this doctrine, a new theory of recovery may be asserted, so long as it arises from the same transactions alleged in the original

complaint (*see 39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d at 455; *C-Kitchens Assoc., Inc. v Travelers Ins. Cos. [Travelers Ins. Co.]*, 15 AD3d 905, 906 [4th Dept 2005]). Where the allegations of the original complaint gave the defendants notice of the facts and occurrences giving rise to the new cause of action, the new cause of action may be asserted (*see Pendleton v City of New York*, 44 AD3d at 736; *Schutz v Finkelstein Bruckman Wohl Most & Rothman*, 247 AD2d 460, 460-461 [2d Dept 1998]). As the new causes of action are based on the same transactions and allegations regarding plaintiffs' investment of funds toward defendants' purchase of the building and the denial by defendants of a promised return and/or profits, benefits and/or interest in the building, the new causes of action relate back to the original complaint. The six-year statute of limitations applies to a cause of action to impose a constructive trust as measured from the time of repudiation of a promise to convey (*see DiRaimondo v Calhoun*, 131 AD3d 1194, 1198 [2d Dept 2015]). Likewise, a cause of action alleging unjust enrichment is governed by the six-year statute of limitations, which begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution (*see Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2d Dept 1993]). Here, the alleged wrongful acts constituting the claims for constructive trust and unjust enrichment occurred following defendants' taking title to the property on October 10, 2008, when they repudiated an alleged promise to afford plaintiffs benefits or profits arising from the property. Because the original complaint was filed within six years of the conveyance, the amended claims are timely.

Defendants have not otherwise shown any demonstrable prejudice as a result of the amendments. The passage of time alone, without a further showing of prejudice, is insufficient to deny leave to amend a pleading (*see Eng v Di Carlo*, 79 AD2d 1018 [2d Dept 1981]). To show prejudice, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*Loomis v Civeta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981]). There has been little, if any, discovery completed thus far in this matter and while defendants have expended time and resources in answering the original and first amended pleadings and in opposing plaintiffs' motions, there is no showing that the delay in moving to amend has hindered defendants in the preparation of their case or prevented them from taking some measure in support.

As a result, plaintiffs' motion to serve and file a second amended complaint is granted.

"When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case. Thus, defendants' original answer has no effect and a new responsive pleading must be substituted for the original answer. Defendants are not confined to answering the amended pleading and the amended answer may contain new allegations in their defenses and counterclaims" (*St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.*, 170 AD2d 957, 957-958 [4th Dept 1991] [citations omitted]). As the original and first amended complaint, and the answers, cross-claims and counterclaims interposed in response are essentially nullified by the second amended complaint, the motions of plaintiff for summary judgment (Motion Seq. Nos. 3, 4, 5, 6 & 9) and for a default judgment against

Fischer Knopf (Motion Seq. No. 8), which applications are based on the nullified prior pleadings, are each denied as moot.

The motion of the Teitelbaum defendants for sanctions against plaintiff "for discovery abuses" is denied. Despite the allegation that plaintiffs refused to comply with discovery demands and/or have engaged in "abusive discovery practices," relief under CPLR 3126 is only available where a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." Inasmuch as there has been no motion to compel discovery resulting in an order which has been disobeyed, the court declines to assess any sanction against plaintiffs under CPLR 3126 at this time.

Under 22 NYCRR §130-1.1[a], a party may be sanctioned for engaging in "frivolous" conduct, meaning conduct that is: (1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false. While the filing of multiple motions by plaintiffs resulted in significant devotion of time and resources by defendants, there is insufficient indication that the motions were undertaken primarily to harass defendants, prolong this litigation or that plaintiffs otherwise engaged in sanctionable conduct. Accordingly, the cross-motion of the Schattner defendants for sanctions is denied.

Nonetheless, the Court is cognizant that, in opposing plaintiffs' motions for summary judgment dismissing defendants' counterclaims and/or affirmative defenses, defendants

devoted time and expenses which were rendered inconsequential due to plaintiffs' second amendment of its complaint sought twenty-two months after the filing of the first amended complaint. When the court grants leave to a party to amend a pleading under CPLR 3025 [b], such permission may be subject to certain conditions, including costs and reasonable counsel fees (*see e.g. Sheppard v Smith Well Drilling & Water Sys.*, 102 AD2d 919, 919-920 [3d Dept 1984]; *Mirabella v Banco Indus. de la Republica Argentina*, 34 AD2d 630, 630-631 [1st Dept 1970]). In light of plaintiff's delay in adding the new causes of action, defendants shall be awarded costs and reasonable attorney's fees incurred in responding to the second amended complaint. Defendants shall submit their proposed fees along with details of its accounting within 30 days of notice of entry of this Order. The Court will thereafter determine the appropriate fees by a supplemental Order.

All remaining requests for relief are denied.

All stays of discovery are hereby vacated.

The foregoing constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.