

Gallagher v Crotty

2017 NY Slip Op 31635(U)

August 3, 2017

Supreme Court, New York County

Docket Number: 651498/2015

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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KEVIN GALLAGHER,

Plaintiff,

INDEX NO. 651498/2015
MOTION SEQ. NO. 001

- v -

DECISION AND ORDER

JOHN CROTTY, JOHN WARREN, JOHN FITZGERALD

Defendant.

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The following e-filed documents, listed by NYSCEF document number 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this application to/for PARTIAL SUMMARY JUDGMENT

HON. SALIANN SCARPULLA:

Plaintiff Kevin P. Gallagher (“Gallagher”) moves for partial summary judgment on his fourth cause of action for an accounting. Defendants John Crotty (“Crotty”), John Warren (“Warren”) and John Fitzgerald (“Fitzgerald”) (collectively “defendants”) cross-move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Background

Gallagher seeks damages against defendants for breach of fiduciary duty, breach of contract and an accounting relating to their joint venture. Gallagher alleges that he and Crotty entered into an oral agreement to form a partnership known as Workforce Housing

Advisors (“WFHA”); Warren and Fitzgerald were later added as partners. WFHA acquires distressed multi-family real estate properties and/or facilitates investments for rehabilitating properties in partnership with private investors and government agencies. Gallagher and defendants are also members/partners in various single purpose entities, which are held by managing member entities and managing member limited liability entities, for structuring and operating WFHA projects (“Workforce Entities”).

Workforce Entities include Workforce Housing Advisors MM, LLC (“MM-1”) and Workforce Housing Advisors MM II, LLC (“MM-2”), which were formed in December 2010 and May 2011, respectively. MM-1 and MM-2 consist entirely of Gallagher and defendants as members. WFHA developed the Habitare Urbana Fund, LLC (“Habitare Fund”) in December 2012, which encompassed two projects under MM-2.

Gallagher alleges that he and defendants were in negotiation with Morgan Stanley, among others, for the establishment of a new fund to be known as the NYC Distressed Multi-Family Housing I LP (“New Fund”). The New Fund would have included Gallagher as a designated developer through a WFHA entity; however, defendants formed a new entity, J-Cubed, in November 2013 and proceeded with the New Fund without Gallagher. Gallagher asserts that he did not consent in writing to defendants’ actions in the New Fund, nor was he provided with an opportunity to consent, invest or participate in the New Fund. Gallagher claims that in forming J-Cubed without him, defendants breached their fiduciary duty and breached the joint venture agreement. Gallagher further alleges that his requests for information concerning this transaction

have been rejected by defendants, and that he has been blocked from accessing his WFHA email account. Gallagher further alleges that after the establishment of the New Fund, defendants refinanced MM-2 mortgages, which were part of the Habitare Fund, with funds from the New Fund.

Gallagher now moves for partial summary judgment on his fourth cause of action, which seeks an accounting of MM-1, MM-2 and their related Workforce Entities, in which he and defendants are members or partners.¹ In support, he cites to the provisions in the MM-1 agreement that grant each member the right to inspect the books and records, and he maintains that analogous provisions are included in each of the governing agreements for the Workforce Entities.

Gallagher alleges that, as a manager and investor in these entities, he is owed distributions, which defendants previously remitted to themselves and other investors, but wrongfully withheld from him. He argues that he is entitled to an accounting to, *inter alia*, determine the full amount of the distributions that are owed to him. He also complains that, without his knowledge or consent, defendants, *inter alia*, refinanced a real estate property operated by MM-2, utilizing the New Fund to advance the loan.

Defendants oppose Gallagher's application, and cross-move for summary judgment dismissing the complaint, relying on the first three affirmative defenses

¹ For purposes of the fourth cause of action, the "related Workforce Entities" subject to this motion are (1) Sedgwick Avenue Renaissance Developers limited liability company; (2) Workforce Walton-Creston limited liability company; (3) Habitare Fund; (4) WFHA Kelly II limited partnership; (5) Creston Avenue Renaissance Developers limited liability company; (6) MM-2; (7) and MM-1 (except for WFHA Kelly II limited partnership, collectively, "LLC Workforce Entities").

interposed in their answer, *i.e.*, that the claims fail to state a cause of action; that the claims must be brought derivatively; and that the claims are barred, in whole or part, by the parol evidence rule. Defendants also argue that necessary parties have not been joined to this action.

Discussion

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a *prima facie* showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action. *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986).

I. Plaintiff's Summary Judgment Motion

Plaintiff moves for summary judgment on the fourth cause of action, seeking an accounting of MM-1, MM-2 and their related Workforce Entities, of which Gallagher is a member. Defendants admit that Gallagher is a member/partner in more than 20 Workforce Entities, including MM-1 and MM-2. Further, defendants do not dispute that, under the operating agreements of the Workforce Entities, Gallagher is entitled to inspect books and records. They acknowledge that, under LLCL § 1102, Gallagher, as a member of MM-1, MM-2 and the related LLC Workforce Entities, has an independent statutory right to conduct such inspection. *See Gartner v Cardio Ventures, LLC*, 121 A.D.3d 609, 610 (1st Dep't 2014). As a member of a limited liability company, he "may [also] seek an

equitable accounting under common law . . . [which is not] limited to statutory remedies” *Gottlieb v Northriver Trading Co., LLC*, 58 A.D.3d 550, 551 (1st Dep’t 2009). Demands for the books and records were made, and Gallagher and his counsel aver that defendants have not completely complied. *See Unitel Telecard Distrib. Corp. v Nunez*, 90 A.D.3d 568, 569 (1st Dep’t 2011).

Defendants, nevertheless, argue that I should dismiss this cause of action for an accounting because it is a derivative claim that also requires joinder of necessary parties. Because Gallagher seeks, *inter alia*, to determine the value of distributions given to others, but not to him, he seeks an accounting to assert a direct claim for which he would receive the direct benefit of any recovery. *See, e.g., Scott v Pro Mgt. Servs. Group, LLC*, 124 A.D.3d 454, 454 (1st Dep’t 2015). To that extent, there is no need to require the joinder of any of the other members of the LLC Workforce Entities, particularly because the members of MM-1 and MM-2, consisting of Gallagher and the defendants, are part of this action. *See Neary v Burns*, 44 Misc. 3d 280, 293 (N.Y. Sup. 2014) (determining that other members of the limited liability company were not necessary parties for plaintiffs’ direct claims against defendants).

The cases defendants cite are distinguishable because each simply iterates the general proposition that all *partners* are necessary parties in an action for a *partnership* accounting. *See, e.g., Goodwin v. MAC Resources Inc.*, 149 A.D.2d 666 (2d Dep’t 1989). Here, besides WFHA Kelly II limited partnership, the entities subject to the fourth cause of action are limited liability companies, and defendants cite no case that requires all

limited liability members of a limited liability company to be named in an accounting action a general rule.²

Defendants do not otherwise dispute plaintiff's allegations for an accounting, *e.g.*, existence of a fiduciary relationship; therefore, defendants have failed to raise a triable issue of fact or otherwise show that plaintiffs are not entitled to summary judgment as a matter of law. In any event, defendants have already agreed to provide Gallagher with a copy of all files and records for the entities and projects in which he possesses an ownership interest, and to restore his email account.

In view of the foregoing, that branch of defendants' cross motion for summary judgment dismissing the fourth cause of action for an accounting is denied. Gallagher's motion for summary judgment on the fourth cause of action is granted in part as to the LLC Workforce Entities.

II. Defendants' Cross Motion for Summary Judgment

A. First Cause of Action for Accounting

Defendants cross-move for summary judgment to dismiss the first cause of action, which seeks an accounting of WFHA. Although defendants deny that a partnership known as WFHA existed, Gallagher's submission of documents, wherein Crotty referred

² Even if the members were necessary parties, dismissal would not be warranted because I have the authority to order the members summoned to the action for an accounting, to the extent jurisdiction is obtainable, or find that the members' absence excused. CPLR § 1001(b). To assuage defendants' concerns, I order the partners of WFHA Kelly II limited partnership summoned, to the extent each is subject to my jurisdiction. In the meantime, Gallagher seeks the partnership agreement for WFHA Kelly II limited partnership, and defendants are directed to provide Gallagher with a copy.

to himself or was referenced as a partner of WFHA, are sufficient to raise an issue of fact as to whether such partnership existed. Further, because Gallagher included in this action all alleged partners composing the WFHA partnership, he has included all the necessary parties in this claim. The documents submitted raise and issue of fact as to the existence of WFHA, thus I deny defendants' cross motion for dismissal of the first cause of action.

B. Second and Third Causes of Action for Breach of Contract and Breach of Fiduciary Duty

With respect to Gallagher's second and third causes of action for breach of contract and breach of fiduciary duty, defendants argue that they were not required, pursuant to the MM-2 operating agreement, to obtain Gallagher's prior written consent before investing in the New Fund. Defendants claim that, when the operating agreements of MM-2 and the Habitare Fund are read together, there is an exculpatory clause that allows members to engage in any other business that is identical, similar or competitive with MM-2, upon the expiration of the Habitare Fund's acquisition period. They note that the Habitare Fund operating agreement defines the acquisition period as a "period of twenty-four (24) months following the Final Closing Date", which they claim expired on December 31, 2013. They allege that, since the New Fund did not engage in any business, or make any investments, until after the expiration of the acquisition period, *i.e.*, March 2014, Gallagher's prior consent was not required, and his claims for breach of contract and breach of fiduciary duty should be dismissed.

Gallagher disputes the expiration date of the acquisition period, which he contends was extended until May 1, 2014. In support, Gallagher submits a letter from Fitzgerald,

dated March 24, 2014, which explains and attaches a written consent and resolution of the Habitare Fund extending the acquisition period to May 1, 2014. The documentation is sufficient, at a minimum, to raise an issue of fact as to whether the New Fund engaged in business during the acquisition period, thereby requiring Gallagher's consent.

Therefore, defendants' request for summary judgment dismissing the second and third causes of action for breach of contract and breach of fiduciary duty is denied.

In accordance with the foregoing, it is

ORDERED that plaintiff's motion for summary judgment on his fourth cause of action for an accounting as to: (1) Workforce Housing Advisors MM limited liability company; (2) Workforce Housing Advisors MM II limited liability company; (3) Sedgwick Avenue Renaissance Developers limited liability company; (4) Workforce Walton-Creston limited liability company; (5) Habitare Urbana Fund limited liability company; and (6) Creston Avenue Renaissance Developers limited liability company, is granted in part; and it is further

ORDERED that defendants are directed to provide Gallagher with copies and reasonable access to all books and records of: (1) Workforce Housing Advisors MM limited liability company; (2) Workforce Housing Advisors MM II limited liability company; (3) Sedgwick Avenue Renaissance Developers limited liability company; (4) Workforce Walton-Creston limited liability company; (5) Habitare Urbana Fund limited liability company; and (6) Creston Avenue Renaissance Developers limited liability company, to the extent such books and records relate to plaintiff's interest as a member, within 20 days of entry of this order; and it is further

ORDERED and ADJUDGED that defendants are required to provide a full accounting of: (1) Workforce Housing Advisors MM limited liability company; (2) Workforce Housing Advisors MM II limited liability company; (3) Sedgwick Avenue Renaissance Developers limited liability company; (4) Workforce Walton-Creston limited liability company; (5) Habitare Urbana Fund limited liability company; and (6) Creston Avenue Renaissance Developers limited liability company, for the fiscal years 2013 – 2015, to the extent such books and records relate to plaintiff's interest as a member, including, but not limited to, all records described in Limited Liability Company Law § 1102 (a), all records described in the operating agreement that governs the respective limited liability companies named herein as applied to each, and other information regarding the affairs of each limited liability company named herein, within 60 day of entry of this order; and it is further

ORDERED that defendants are to provide Gallagher with a copy of the WFHA Kelly II limited partnership agreement within 20 days of entry of this order; it is further

ORDERED that the part of plaintiff's motion for summary judgment on his fourth cause of action for an accounting as to the WFHA Kelly II limited partnership is held in abeyance pending joinder of all necessary parties; and it is further

ORDERED that defendants' cross motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel are directed to appear for a conference in room 208, 60 Centre Street, on August 16, 2017, at 2:15 PM.

8/3/17
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>	FIDUCIARY APPOINTMENT

APPLICATION: DENIED

CHECK IF APPROPRIATE: OTHER

REFERENCE