

Hudmor Corp. v Mickey
2013 NY Slip Op 32025(U)
August 22, 2013
Supreme Court, New York County
Docket Number: 158732/12
Judge: Eileen A. Rakower
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Justice

Index Number : 158732/2012
HUDMOR CORP.
vs.
MICKEY, LENORA
SEQUENCE NUMBER : 001
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1,2,3
Answering Affidavits - Exhibits No(s) 4
Replying Affidavits No(s) 5

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/22/13

[Signature]
HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

HUDMOR CORP.,

Plaintiff,

- v -

Index No.
158732/12

**DECISION
and ORDER**

Mot. Seq.

LENORA MICKEY and TERENCE MICKEY,

Defendants.

-----X

LENORA MICKEY,

Third-party Plaintiff,

-v-

MARYBETH DUFFY,

Third-Party Defendant.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

In this action, Plaintiff Hudmor Corp. ("Plaintiff") seeks damages and an accounting from defendant Lenora Mickey ("Lenora"), former President, treasurer, and director of Plaintiff for her alleged breach of fiduciary duties to Plaintiff. Plaintiff owns properties located at 447 Hudson Street and 73 Morton Street. Defendant Terence Mickey ("Terence") is Lenora's son. Lenora filed a third party Complaint against third party defendant Marybeth Duffy ("Duffy"), seeking contribution for Lenora's alleged breach of fiduciary duties. Duffy now moves to dismiss Lenora's third party Complaint pursuant to CPLR §3211(a)(7).

The Complaint alleges that Lenora, in her capacity as President, treasurer, and director, breached her fiduciary duties to Plaintiff by, among other things, failing to advise Marybeth Duffy and the other shareholders of Plaintiff's business interests, failing to provide access to Plaintiff's business records and documentation, and "after evicting the paying tenant from apartment 3F ("3F"), plac[ing] her son Terence in 3F, which is the nicest and largest apartment at Hudson from in or about August 2007 through 2012, with a sweetheart deal whereby the rent was \$700 a month although the fair market rental value of 3F was substantially higher," "allow[ing] Terence to sublet 3F at a profit, which, upon information and belief, was kept by Terence and/or Lenora," and "permitt[ing] Terence to operate plaintiff's business and make business decisions in connection therewith." The Complaint further alleges that Lenora entered into a brokerage agreement with Art State LLC, in which Plaintiff paid an excessive commission, made an overpayment with respect to the mortgage on Hudson instead of making distributions to Plaintiff's shareholders, used approximately \$135,000 of Plaintiff's funds to pay for the renovations of Village Restaurant Group LLC, a tenant of Hudson's, and unilaterally approved substantial payments to various contractors.

The Complaint further alleges that as a result of the breach of her fiduciary duties, on February 13, 2012, Lenora was removed as president of Plaintiff and as a member of Plaintiff's board of directors, and Duffy was elected president, vice president, secretary, treasurer and the sole director of Plaintiff. Duffy had previously served as vice president and secretary.

Lenora filed a third party Complaint against Duffy for contribution for Lenora's alleged breaches of fiduciary duty to Plaintiff in the event that Plaintiff is successful in recovering from Lenora on the basis that Duffy knew of and consented to Terence's rental of 3F and other alleged breaches. The third party Complaint alleges:

Hudmor has accused Lenora of violating fiduciary duties and the duty of loyalty in conducting Hudmor's business. Lenora vigorously denies that she has violated any duty owed to Hudmor. Nonetheless, to the extent that Hudmor succeeds on its action for breach of any fiduciary duties, Marybeth, as Co-Director and Secretary and either Vice President or Co-President of Hudmor at all relevant times, is also responsible for any such breach and

should accordingly be held jointly and severally liable for any resultant damages.

Duffy seeks to dismiss the third party Complaint pursuant to CPLR §3211(a)(7) on the basis that it fails to plead facts sufficient to sustain a claim for contribution, fails to plead facts with requisite particularity, and fails to plead facts supporting the allegation of breach of fiduciary. Duffy also seeks to dismiss on the basis that corporate officers are not liable for others officers' misconduct.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

With regard to a claim for contribution, CPLR §1401 provides that “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.” To state a contribution claim, the “critical requirement” is an allegation that “the breach of duty by the contributing party ... had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v Braun*, 90 N.Y.2d 177, 183 [1997] (citation omitted)).

BCL §717(a) provides, “A director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may

serve, in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.” BCL §715(h) imposes the same obligation on corporate officers. See BCL §715(h) (“An officer shall perform his duties as an officer in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.”)

Here, Lenora’s Third Party Complaint and contribution claim alleges that Marybeth, as co-director and officer of Plaintiff during all relevant times, owed Hudmor fiduciary duties, and that Marybeth knew and consented to Terence’s rental of Apartment 3F, knew and approved of Plaintiff’s making a payment toward the principal on the mortgage, knew that Lenora approved payments to various contractors, knew that Plaintiff granted the commercial tenant a rent abatement, and knew or should have known and was responsible for the business activities of Plaintiff. Lenora’s contribution claim therefore states a cause of action as against Marybeth.

Wherefore, it is hereby

ORDERED that defendant Marybeth Duffy’s motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

8/22/13



EILEEN A. RAKOWER, J.S.C.