

Hudmor Corp. v Mickey
2013 NY Slip Op 32346(U)
September 27, 2013
Sup Ct, NY County
Docket Number: 158732/12
Judge: Eileen A. Rakower
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 158732/2012
HUDMOR CORP.
vs
MICKEY, LENORA
Sequence Number : 002
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

Answering Affidavits — Exhibits _____ | No(s) 3

Replying Affidavits _____ | No(s) 4

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 9/27/13

 _____, J.S.C.

HON. EILEEN A. RAKOWER

- 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 -

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” or “Hudmor”) seeks damages and an accounting from defendant Lenora Mickey (“Lenora”), its former President, treasurer, and director for her breach of fiduciary duties. 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. Terence interposed an answer to Plaintiff’s Complaint and filed a cross-claim against Duffy for contribution.

It is alleged in Plaintiff’s Complaint that Plaintiff owns properties located at

Index No.
158732/12

**DECISION
and ORDER**

Mot. Seq. 2

447 Hudson Street and 73 Morton Street. Lenora, in her capacity as President, treasurer, and director, is alleged to have breached her fiduciary duties to Plaintiff by, among other things, failing to advise Duffy and 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."

With respect to Terence, the Complaint alleges that he conspired with Lenora to evict a paying tenant from 3F so that he could live there at under market value and sublet the apartment at a profit allegedly retained by Terence and Lenora. Based on these allegations, the third cause of action of the Complaint alleges that Terence conspired with Lenora to divert a lucrative business opportunity from Plaintiff and misappropriated funds belonging to Plaintiff. The fourth cause of action of the Complaint alleges that Lenora and Terence have been unjustly enriched at Plaintiff's expense.

Presently before the Court is Duffy's motion, pursuant to CPLR §3211(a)(1) and (7), to dismiss the cross claim filed by Terence. Duffy submits an affidavit, which submits a copy of the Terence's lease which she states contained a clause prohibiting Terence from subleasing the Apartment without Plaintiff's approval.

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:

(1) a defense is founded upon documentary evidence;

(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]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

CPLR §3019 allows a defendant to assert a cross claim against another defendant. 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.” As stated by the First Department in addressing a cross-claim for contribution:

The critical issue, therefore, in determining the validity of the City’s [initial defendant/cross-claimant] claim for contribution is whether it can be shown that Transit [the cross-claim defendant from whom contribution is sought] allegedly breached some duty which it owed to plaintiff or to the City which breach contributed to plaintiff’s injuries. *Petrucci v. City of New York*, 167 A.D. 2d 29, 35 [1st Dept 1991].

“[A] defendant may not seek contribution from other defendants where the alleged ‘tort’ is essentially a breach of contract claim.” *Rothberg v. Reichelt*, 270 A.D. 2d 760, 762 [3d Dept. 2000](citations omitted).

The third cause of action of the Plaintiff's Complaint alleges that Terence conspired with Lenora to divert a lucrative business opportunity from Plaintiff and misappropriated funds belonging to Plaintiff. The fourth cause of action alleges that Lenora and Terence have been unjustly enriched at Plaintiff's expense.

Terence's cross claim alleges that Duffy, as director and officer of Plaintiff owed Plaintiff certain fiduciary duties and the duty of loyalty, that Duffy knew and approved of Terence's rental of Apartment 3F for \$700 per month and Terence's allowing others to stay in the apartment, and "[t]herefore, to the extent that Hudmor succeeds on its causes of action for diversion of a lucrative business opportunity, misappropriation of Hudmor's funds, or unjust enrichment, Marybeth [Duffy], as Director or Co-Director of Hudmor and as officer of Hudmor at all relevant times, is also responsible for all such conduct and should accordingly be held jointly and severally liable for any resultant damages."

Duffy contends that Terence has no basis to assert a contribution claim against Duffy because Hudmor's alleged claims against Terence are essentially a breach of contract and therefore do not fall within the ambit of CPLR §1401. Duffy argues, "Although Hudmor's pleading sounds in tort, Hudmor's allegation of [Terence] Mickey's conspiracy with Lenora to divert Hudmor's business opportunities and unjust enrichment derive exclusively from [Terence] Mickey's contractual status as Hudmor's tenant." Contrary to Duffy's contention, however, Plaintiff's Complaint does not allege a cause of action or seek damages as against Terence in connection with any alleged breach of contract.

Accepting the allegations as true, the four corners of Terence's cross claim states a claim for contribution as against Duffy. Moreover, Duffy's submissions do not flatly contradict the legal conclusions and factual allegations of the cross claim.

Wherefore, it is hereby

ORDERED that third party defendant Marybeth Duffy's motion to dismiss defendant/cross claimant Terence Mickey's cross claim for contribution is denied.

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

DATED: 9/27/13



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