1925 Owners Corp. v Gutman Mgt. Co. Inc.
2017 NY Slip Op 33291(U)
June 13, 2017
Supreme Court, Kings County
Docket Number: 500222/16
Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 11

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1925 OWNERS CORP.

Plaintiff, Decision and order
Index No. 500222/16

- against -

GUTMAN MANAGEMENT CO. INC., BSD GENESIS HOLDING, LLC., ROCHELLE DEUTSCH A/K/A ROCHELLE GUTMAN, ESTER M. BERMAN, HARRY DRYFUS AND KASOVITZ ENTERPRISES LLC,

Defendants, June 13, 2017

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking an order enjoining defendant BSD Genesis Holdings LLC [hereinafter 'BSD'] from participating in any shareholder meetings or votes or board of director's meetings concerning the Co-Op located at 1925 Ocean Avenue in Kings County. The defendant's Dreyfuss and Kasovitz Enterprises LLC cross-move seeking to dismiss the complaint on documentary evidence and that it fails to state a cause of action. The plaintiff, as defendant on counterclaims has likewise moved seeking to dismiss the counterclaims on the grounds they fail to state any cause of action. The defendants Gutman Management Co., Inc., BDS, Rochelle Deutsch and Esther Berman also cross move seeking to dismiss the complaint on the grounds it fails to state any cause of action. Papers were submitted by all the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

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Findings of Fact

During 2014 the owners of apartment 6B of a Co-Op located at 1925 Ocean Avenue in Kings County defaulted on their mortgage. The mortgage holder at the time, Wells Fargo, notified the Co-Op pursuant to a Recognition Agreement that they would commence foreclosure proceedings. The notification was furnished to defendant Gutman Management Company Inc., the managing agent of the Co-Op at the time. On December 18, 2014 a foreclosure auction was conducted and defendant Rochelle Deutsch through defendant BSD ultimately obtained the shares of the apartment 6B. While approval of the purchase was obtained by Gutman as managing agent, the Board of Directors of the Co-Op was never notified of the purchase. Following the auction, defendant Dreyfuss issued a stock certificate to BSD corresponding to the number of shares represented by the apartment and negotiated a proprietary lease with BSD. The plaintiff instituted this action alleging fraud, breach of fiduciary duty and usurpation of Co-Op opportunity. These motions soon followed.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law"

(see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989] stating individuals jointly managing a limited liability corporation creates a fiduciary duty among the members analogous to that of partners).

The first element requires a fiduciary relationship between the management company and the board of directors. It has been well established that "a fiduciary, in the context of condominium management, is 'one who transacts business, or who handles money or

property, which is not his [or her] own or for his [or her] own benefit, but for the benefit of another person, as to whom he [or she] stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part'"(Carper v. Nussbaum, 36 AD3d 176, 825 NYS2d 55 [2d Dept., 2006]). In Carper, (supra) the court noted that the by-laws of the condominium permitted the board of directors to delegate its powers in specific areas of management and thus the management company was a fiduciary of the board of directors. In this regard there is no legal or practical distinction between the relationship between a condominium board and the management company or a Co-Op board and the management company. Therefore, a management company is a fiduciary of the board of directors.

In this case the by-laws expressly authorize the delegation of a management company. The by-laws state in Article II Section 7 that "the directors shall at all times act as a board, regularly convened, and they may adopt such rules and regulations for the...execution of their resolutions and the management of the affairs of the corporation as they may deem proper" authorizing hiring a management company to fulfill those duties. Therefore, a fiduciary relationship existed.

The second element of misconduct must now be examined. Misconduct by a fiduciary constituting a breach of duty can take

one of two forms, either breach of loyalty or breach of care (Higgins v. New York Stock Exch., Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). Generally, a breach of loyalty will be established where plaintiff can show that defendant participated on both sides of a transaction. "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" Birnbaum, supra).

"The duty of care refers to the responsibility of a [] fiduciary to exercise, in the performance of his or her tasks, the care that a reasonably prudent person would use under similar circumstances" In re Ticketplanet.com, 313 BR 46 (S.D.N.Y. Bankruptcy Court, 2004), citing Norlin Corp. v. Rooney, Pace, Inc., 744 F2d 255,[2d Cir. 1984]). In turn, the fiduciary duty of due care, "obligates [fiduciaries] to act in an informed and 'reasonably diligent' basis in 'considering material information'" (Higgins, supra). Lastly, concerning damages, plaintiffs must demonstrate that they did in fact suffer financial injury caused by defendant's breach of duty (105 East Second St. Assocs. v. Bobrow, 175 AD2d 746, 573 NYS2d 503 [1st Dept., 1991]). To establish the damages component of a claim for a breach of fiduciary duty plaintiff is required to show at a minimum, that the defendant's actions were "a substantial factor"

in causing an "identifiable loss" (see, (105 East Second St. Assocs. v. Bobrow, supra).

The defendants argue the breach of fiduciary duty should be dismissed because the acquisition of the apartment by BSD was not "improper or illegal in any way" (see, Affidavit of Rochelle Deutsch in Support of Cross Motion and in Opposition to Order to Show Cause, ¶64). However, Gutman, as the management company, of which Deutsch was a member, surely had a duty to inform the board of any impending litigation that may take place, including any imminent foreclosures of any apartments. In addition, Deutsch was a member of BSD and consequently, there are certainly questions whether the failure to notify the board of the foreclosure action was precipitated by a desire to benefit BSD (see, Commander Terminal Holdings, LLC v. Poznanski, 84 AD3d 1005, 923 NYS2d 190 [2d Dept., 2011]). It is well settled that failing to disclose dealings that can have an adverse impact upon the party the fiduciary is charged to protect can constitute a breach of a fiduciary duty (A.G. Homes LLC v. Gerstein, 52 AD3d 546, 860 NYS2d 546 [2d Dept., 2008]). Therefore, the motion seeking to dismiss the claim of breach of fiduciary duty as to defendants Gutman, Berman and Deutsch is consequently denied.

The doctrine of usurpation of corporate opportunity generally forbids fiduciaries from diverting "any opportunity that should be deemed as asset of the corporation" without board

approval (see, Alexander & Alexander of NY Inc., v. Fritzen, 147 AD2d 241, 542 NYS2d 530 [1st Dept., 1989]). The claim is only applicable if the corporation has a "tangible expectation" in the opportunity (American Federal Group Ltd., v. Rothenberg, 136 F3d 897 [2d Cir. 2008]). Thus, the opportunity must be closely associated with the business activities of the corporation to allege any wrongdoing (see, Turner v. American Metal Co., 268 AD 239, 50 NYS2d 800 [1st Dept., 1944]).

The defendants Dreyfuss and Kasovitz Enterprises argue that the plaintiff did not have any expectation in purchasing shares of foreclosed Co-Op units. However, that unduly narrows the usurpation alleged. First, the board has an interest in maximizing all available resources and the existence of an unoccupied unit would surely enhance the board's financial wherewithal. Moreover, the unit, specifically the potential asset and the ability to utilize it in any beneficial way is surely part of the overall responsibilities and duties of the board of directors. The argument that the purchasing of the unit "was neither necessary for, nor essential to, 1925 Owners Corp's business" (Affirmation in Support of Cross Motion and in Opposition to Plaintiff's Motion, ¶3 b) fails to consider the entire scope of the duties of the board of directors. The existence of an available Co-Op unit, at this stage of the lawsuit, can surely be viewed as an asset of the corporation and

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therefore, the motion seeking to dismiss this cause of action is denied (see, Pangia & Co., CPAs PC v. Diker, 291 AD2d 539, 741 NYS2d 242 [2d Dept., 2002]).

Turning to the cause of action for a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). There is thus no merit to the argument that the conduct of Gutman was proper based upon Article 17 of the proprietary lease. That provision of the lease does not permit the successful bidder at a foreclosure auction to transfer the property to any party without board consent. It merely permits the bank in a foreclosure proceeding to transfer the property only to a successful bidder. Therefore, the board was authorized to enter into a proprietary lease with East Fork Funding LLC, the successful bidder in the foreclosure action. However, there was no mechanism whereby East Fork could transfer or assign its rights to BSD without board approval and there is no language in Article 17 of the lease which authorizes such transfers. Considering the allegations and the early stage of this litigation any motion seeking to dismiss this cause of action is denied.

Turning to the claim of fraud, it is well settled that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs, _AD3d_, _NYS3d_ 2017 WL 1484705 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept., 2014]). Moreover, it is well settled that to successfully plead fraud, the fraud must be pled with specificity from which intent or reasonable reliance might be inferred (see, CPLR §3016(b), Goldstein v. CIBC World Markets Corp., 6 AD3d 295, 776 NYS2d 12 [1st Dept., 2004]). The plaintiff's complaint describes in elaborate detail the scheme, which if proven true, includes not only BSD, Gutman and Deutsch but Dreyfuss and Kasovitz Enterprises as well. The complaint provides far greater than mere conclusory assertions of fraud. Thus, the motion seeking to dismiss the fraud cause of action is denied as to all defendants.

Turning to the motion seeking to dismiss the cause of action for unjust enrichment, it is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New

York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Consequently, the claim of unjust enrichment is dismissed. Likewise, any claims seeking punitive damages are dismissed (see, Kelly v. Defoe Corp., 223 AD2d 529, 636 NYS2d 123 [2d Dept., 1996]).

Concerning the counterclaims, the first counterclaim argues the plaintiff improperly terminated the lease with Gutman. That counterclaim is dismissed. The rationale for this determination is fully explained in the companion case Kasovitz Enterprises v. Rybakov, Index Number 51268/2016.

The second counterclaim is one for defamation. To establish a cause of action for defamation, the party must allege that there was a "[1] false statement, [2] published without privilege or authorization to a third party, [3] constituting fault as judged by, at a minimum, a negligence standard, and [4] it must either cause special harm or constitute defamation per se'" (Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 [2d Dept., 2009]). The conclusory assertion contained in the Answer that "Plaintiff, has by written word and deed, defamed Defendant and its business activity and reputation, by asserting falsely that Defendant has breached lawful and contractual provisions of law" is insufficient to allege any concrete defamation and consequently that counterclaim is dismissed. Likewise, the

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counterclaim seeking legal fees is dismissed.

The motion seeking a preliminary injunction is granted. The defendants are restrained from participating in any shareholder meetings or votes or any board of directors meetings or votes. In addition, the defendants must continue paying maintenance and any common charges. If it is ultimately determined that the defendant's maintain no ownership interest in the unit the plaintiff shall reimburse all the charges already paid. Lastly, the plaintiff shall post a bond in the amount of $200,000 until the lawsuit is resolved.

So ordered.

ENTER:

DATED: June 13, 2017
Brooklyn NY

Hon. Leon Ruchelsman
JSC