

Upper E. Side Suites LLC v Cico
2018 NY Slip Op 30341(U)
February 21, 2018
Supreme Court, New York County
Docket Number: 652857/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KOHNREICH

PART 54

Justice

Index Number : 652857/2016
UPPER EAST SIDE SUITES LLC
vs.
BENEDETTO CICO
SEQUENCE NUMBER : 001
DISMISSAL

INDEX NO. _____

MOTION DATE 12/21/17

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) 5-14

Answering Affidavits — Exhibits _____ | No(s) 19-22

Replying Affidavits _____ | No(s) 29

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.

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

Dated: 2/21/18

Shirley Werner Kohnreich
SHIRLEY WERNER KOHNREICH J.S.C.
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 54

-----X
UPPER EAST SIDE SUITES LLC, ANCHOR
HOLDINGS LIMITED, FAVOURITE LIMITED,
CAP 18 SRL, CARLO OLIVIERI, MAURA MASOLA,
CLAUDIO GATELLI, SGHEDONI GRAZIANO,
ANDIA SRL, SIRIO SRL, AFIL SRL, MARCO
BONESINI, and OILE SRL,

Index No.: 652857/2016

DECISION & ORDER

Plaintiffs,

-against-

BENEDETTO CICO, CARLA CICO, and 151 EAST
HOUSTON ACQUISITION LLC,Defendants.
-----X

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001, 003, 004, and 007 are consolidated for disposition.

Defendant Benedetto Cico (Benedetto)¹ moves to dismiss the complaint, *inter alia*, for lack of standing and failure to state a claim. Seq. 001.² Benedetto also moves to dismiss the claims of plaintiffs Carlo Olivieri, Maura Masola, Marco Bonesini, Andia Srl, Cap 18 SRL (collectively, the Withdrawing Plaintiff Members), and Upper East Side Suites LLC (the Company). Seq. 007. Defendant Carla Cico (Carla) separately moves to dismiss the complaint for lack of personal jurisdiction and on the ground of *forum non conveniens*. Seq. 003. Plaintiffs Anchor Holdings Ltd. and AFIL Srl (collectively, the Anchor Plaintiffs) move to voluntarily

¹ To avoid confusion between the Cico siblings, the court refers to them by their first names.

² Benedetto's motion indicates it also was made on behalf of defendant 151 East Houston Acquisition LLC (151 East), but he now concedes that he, a *pro se* non-attorney defendant, lacks the authority to represent 151 East. The court notes that while Benedetto is *pro se*, his papers appear to have been drafted with the aid of an attorney given their quality and the nature of his sophisticated arguments regarding Delaware corporate law. The court will not further address this issue since the court's disposition of the instant motions does not turn on whether Benedetto ought to be afforded the special solicitude normally applicable to *pro se* litigants.

discontinue their claims with prejudice. Seq. 004. The court reserved on the motions after oral argument. *See* Dkt. 107 (10/19/17 Tr.).³

Benedetto and his sister Carla (collectively, the Cicos) are former Managers of the Company, a Delaware LLC governed by an operating agreement dated October 31, 2007. *See* Dkt. 8 (the Operating Agreement). The Company owned a building located at 44-46 East End Avenue in Manhattan (the Building), and the Cicos rented units in that building to tourists, mostly from Italy. The plaintiffs in this action are the Company and some of its members. They allege that the Cicos committed myriad breaches of the Operating Agreement and their fiduciary duty of loyalty during their tenure as the Company's Managers. They also allege that the Cicos failed to distribute the proceeds from the sale of the Building in 2013. Apparently, the Cicos intended to use those proceeds to purchase another building in 2014, but that sale never closed. The Cicos were purportedly removed as Managers of the Company in 2015.

There is more to this story, but the court declines to delve further into the details given the current posture of this case. At this juncture, the remaining plaintiffs seeking to prosecute this action are Company Members who are not among the Withdrawing Plaintiff Members. As discussed herein, they lack standing because the potentially viable claims in the complaint are derivative, and the complaint does not assert any derivative claims.

The complaint, filed on May 27, 2016, asserts the following *direct* causes of action: (1) breach of the Operating Agreement; (2) breach of fiduciary duty; (3) unjust enrichment; (4) accounting; (5) fraud; and (6) conversion. *See* Dkt. 2. Benedetto moved to dismiss the complaint on July 18, 2016. Carla also moved to dismiss on January 18, 2017 after she was served in Italy. *See* Dkt. 32. On April 19, 2017, the Anchor Plaintiffs moved to withdraw their

³ References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

claims with prejudice. On May 2, 2017, the law firm of Kelley Drye & Warren LLP (Kelley Drye), which originally represented all of the plaintiffs, moved to be relieved as counsel for the Withdrawing Plaintiff Members. The court granted that motion by order dated May 11, 2017. *See* Dkt. 83. Then, on June 15, 2017, Kelley Drye moved to be relieved as counsel for the Company; the court granted that motion by order dated June 27, 2017. *See* Dkt. 99. After neither obtained new counsel or appeared *pro se*,⁴ the Company and the Withdrawing Plaintiff Members defaulted in August 2017. On September 1, 2017, the Cicos moved to dismiss the claims of the Company and the Withdrawing Plaintiff Members. That motion is now granted without opposition. Additionally, the court grants the motion of the Anchor Plaintiffs to withdraw their claims with prejudice. While this motion is inexplicably opposed by the Cicos, it is granted because with-prejudice dismissal precludes the Anchor Plaintiffs from either suing the Cicos directly or serving as derivative plaintiffs (in New York, Italy, or anywhere else).

The upshot is that the remaining plaintiffs – Favorite Limited, Claudio Gatelli, Sghedoni Graziano, Alberto Brentegani, Sirio SRL, and Oile SRL (collectively, the Remaining Plaintiffs) – lack standing to prosecute the claims pleaded in the complaint. All of the complaint’s potentially viable causes of action belong to the Company because any recovery (i.e., for breach of the duty of loyalty and recovery of the sale proceeds) would go to the Company and be distributed pro rata to its members. *See Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004), accord *NAF Holdings, LLC v Li & Fung (Trading) Ltd.*, 118 A3d 175, 180 (Del 2015).⁵

⁴ The individual plaintiffs (i.e., not the Company or the members of the Company that are corporate entities) may appear *pro se*. *See Mail Boxes Etc. USA, Inc. v Higgins*, 281 AD2d 176 (1st Dept 2001), citing CPLR 321(a).

⁵ The fifth cause of action for fraud is the only claim that could theoretically be maintained directly. However, the complaint does not allege that the Cicos made any material misrepresentations that induced plaintiffs’ investment in the Company. At the time of the

While the Remaining Plaintiffs might be capable of pleading derivative claims based on demand futility, they admit in their opposition brief that they do not purport to do so in the complaint. *See* Dkt. 19 at 15 (“the Member Plaintiffs make no allegation in the Complaint that they are bringing claims derivatively or on behalf of [the Company].”). They took this position because, at the time, the Company was asserting these claims directly. Now that the Company has defaulted, the Remaining Plaintiffs must decide whether they will seek leave to file an amended complaint in which they replead their claims derivatively. Admissions made by Benedetto at oral argument suggest that the Company’s members could plead a derivative claim to recover the sale proceeds that supposedly are being held in escrow. An opportunity for them to do so is afforded in the ordering language below.

The court will not address any other grounds for dismissal proffered by the Cicos, as a dismissal for lack of standing renders them moot.⁶ The court notes, however, that if an amended derivative complaint is filed, the proper causes of action should be for breach of the Operating Agreement and breach of fiduciary duty. The remaining causes of action are either infirm (i.e., unjust enrichment and conversion, given the existence of a governing written agreement)⁷ or are

investment, in 2007, the type of short term rentals made by the Company were legal in New York City. In 2012, they became illegal. Hence, plaintiffs cannot claim they were fraudulently induced to invest in a Company meant to engage in illegal activity. The remainder of the fraud cause of action is based on allegations that merely duplicate what are derivative claims for breach of the Operating Agreement or breach of fiduciary duty and, thus, cannot be maintained as a direct claim.

⁶ Dismissal based on the grounds proffered by the Cicos would be without prejudice. As indicated below, the court will dismiss this action with prejudice if the Remaining Plaintiffs do not timely replead.

⁷ *See Capone v Castelton Commodities Int’l LLC*, 148 AD3d 506, 507 (1st Dept 2017); *Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433 (1st Dept 2013).

merely a remedy for breach of fiduciary duty (an accounting).⁸ The court also will not address Carla's motion based on lack of personal jurisdiction (which, frankly, is quite weak because she was a Manager of a real estate holding company that managed property in New York and because it appears undisputed that she was involved in the 2013 sale)⁹ or based on *forum non conveniens* (the subject properties are in Manhattan). Accordingly, it is

ORDERED that the claims asserted by Anchor Holdings Ltd. and AFIL Srl in the complaint are dismissed with prejudice, the Clerk is directed to enter judgment accordingly, and the claims of the other plaintiffs are hereby severed and shall continue; and it is further

ORDERED that all of the other claims asserted in the complaint are dismissed without prejudice; and it is further

ORDERED that, on or before March 29, 2018, the Remaining Plaintiffs have leave to file an amended derivative complaint to the extent set forth herein; and it is further

ORDERED that if the Remaining Plaintiffs do not file an amended complaint on or before March 29, 2018, defendants shall e-file and fax a letter to the court so indicating, at which time the court will issue an order dismissing the action with prejudice; and it is further

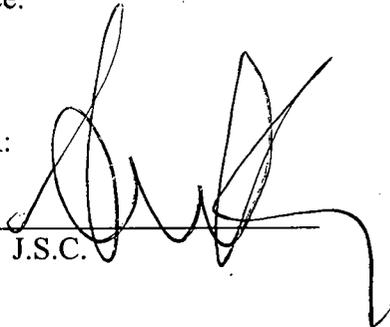
⁸ *Stevanov v O'Connor*, 2009 WL 1059640, at *15 (Del Ch 2009) (“A claim for an accounting in the Court of Chancery generally reflects a request for a particular type of remedy, rather than an equitable claim in and of itself.”); see *Gallagher v Long*, 2013 WL 718773, at *4 (Del Ch 2013) (“any request for an accounting must be based on a successful claim for breach of fiduciary duty”), *aff'd* 65 A3d 616 (Del 2013).

⁹ *Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014) (“The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York.”); see *Deutsche Bank Secs., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 (2006) (“the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it.”).

ORDERED that if the Remaining Plaintiffs timely file an amended complaint, defendants shall file an answer or motion to dismiss within three weeks, and the parties shall promptly contact the court to schedule a preliminary conference.

Dated: February 21, 2018

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH
J.S.C**