

Gersten v Wolff

2019 NY Slip Op 33342(U)

November 8, 2019

Supreme Court, New York County

Docket Number: 651949/19

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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IRA N. GLAUBER LEWIS GERSTEN, GILDA
ROTHENBERG and JOSEPH KLEINPLATZ,
individually and on behalf of
CONGREGATION EMUNATH ISRAEL.

Plaintiffs,

-against-

Index Number 651949/19
Motion seq. Nos. 004 and
005

YECHZEKEL WOLFF, MANHATTAN JEWISH
CENTER, INC., BRUCE KIRSCHNER, GWENN
KIRSCHNER, ELI KIRSCHNER, HARVEYLIPKIS,
NOAM SPANIER, AMI KRIGER, and
CONGREGATION EMUNATH ISRAEL,

Defendants.

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CAROL R. EDMEAD. J.:

Motion sequence numbers 004 and 005 are consolidated for disposition. In motion sequence number 004, defendants Bruce Kirschner and Gwen Kirschner move to dismiss all claims alleged against them in plaintiffs' second amended complaint (Complaint), to dismiss the 8th and 9th causes of action in the Complaint, and to strike plaintiffs' demand for punitive damages. In motion sequence number 005, defendants Yechezkel Wolff and Manhattan Jewish Student Center, Inc. move to dismiss the Complaint.

The Complaint alleges the following 11 causes of action: against Wolff, (1) breach of contract, (2) fraudulent inducement, (3) rescission, (4) conversion, (5) fraud, (6) breach of fiduciary duty, and (7) a request for an accounting; against the Kirschners, (8) breach of fiduciary

duty and (9) aiding and abetting; against Wolff, (10) a request for a declaratory judgment, and (11) an award of legal fees. The Complaint also seeks punitive damages, in connection with the cause of action alleging conversion. The Complaint is brought by plaintiffs individually, and derivatively on behalf of defendant Congregation Emunath Israel (the Congregation). Plaintiffs are members of the Congregation. Plaintiffs Glauber, Gersten, and Rothenberg are members of the Congregation's board of trustees. In addition, Glauber and Gersten are officers of the Congregation. Defendant Bruce Kirschner is the long-time president of the Congregation, and defendant Gwenn Kirschner is its long-time secretary.

Not-For-Profit Corporation Law § 623 (c) provides that, in a derivative action, "the complaint shall set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board o[r] the reason for not making such effort." The Complaint states that:

"from mid-2017 to the present, plaintiffs have sent numerous demand letters, emails, memos, and other written communications to both Wolff, Kirschner, Mrs. Kirschner, and other Board members requesting that they take action against Wolff. In particular, several formal notices of default were issued to Wolff demanding that he cure his numerous defaults under [his contract]. . . . Similarly, plaintiffs sent numerous emails to the Kirschners and other Board Members urging them to take action against Wolff, but they have failed and refused to do anything in response to these requests."

Complaint, ¶ 33. This recitation fails to state to which trustees, besides the Kirschners, the demands were made, and it fails to state that such demands, as were made, were demands to initiate litigation against Wolff. Indeed, it appears that plaintiffs merely urged a number of the trustees to prevail upon Wolff to act in the manner that plaintiffs demanded that Wolff act. According to the Complaint, the failure of those trustees was not a failure to commence an

action, but a failure “to do anything.” Accordingly, the derivative action must be dismissed. *Tomczak v Trepel*, 283 AD2d 229, 229 (1st Dept 2001) (dismissing derivative action, where complaint failed to specify the board members to whom demands were made, or the content of the demands); *see also Soho Snacks, Inc. v Frangioudakis*, 129 AD3d 636, 636 (1st Dept 2015).

As far as the complaint is brought by plaintiffs personally, the claims pertaining to Wolff’s contract, that is, the first, second, and third causes of action, must be dismissed, because as nonparties to that contract, plaintiffs lack standing to make the claims. The causes of action for conversion must be dismissed, because the property allegedly converted belonged to the Congregation, not to the plaintiffs, and plaintiffs lack standing to make the claim (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801 [2003] [noting that “(f)or generations, New York courts have treated standing as a common-law concept, requiring that the litigant have something truly at stake in a genuine controversy]; *Tenants United at: 20 Magaw Place, N.Y., N.Y.10033 v Attorney Gen. of State of N.Y.*, 260 AD2d 161 [1st Dept 1999] [holding that the plaintiffs had no standing as they failed to show any actual harm to them as a result of the alleged conversion]).

The cause of action alleging breach of fiduciary relationship fails, because “[a]llegations that give rise only to a general clergy-congregation relationship . . . do not generally impose a fiduciary duty upon the cleric.” *Marmelstein v Kehillat New Hempstead: the Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 22 (2008). More generally, a fiduciary duty “exists only where a person reposes a high level of confidence and reliance in another, who thereby exercises control and dominion over him.” *People v Coventry First LLC*, 13 NY3d 108, 116 (2009). The Complaint alleges no such dominance and control on the part of either Wolff, or the Kirschners.

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justified reliance by the plaintiff, and damages." *Euryclea Partners, LLP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). The Complaint alleges that Wolff induced donors, who intended to contribute to the Congregation, to draw checks to the order of "The Chelsea Shul," deposited those checks into an account that he controlled, and failed to turn the funds over to the Congregation or its officers. While the donors were allegedly defrauded, the Complaint does not allege that plaintiffs, individually, suffered damages.

Plaintiffs, as individuals who are not in a confidential or fiduciary relationship with Wolff, have no right to an accounting from him. *Saunders v AOL Time Warner, Inc.* 18 AD3d 216, 217 (1st Dept 2005), citing *Palazzo v Palazzo*, 121 AD2d 261, 264 (1st Dept 1986).

The 9th cause of action recites in a completely conclusory manner that "[t]he Kirschners gave substantial assistance to Wolff to engage to engage in his tortuous conduct," and that they failed to take action against him. These allegations do not state a claim for aiding and abetting.

The 10th cause of action seeks a declaratory judgment in relation to Wolff's alleged breach of his contract with the Congregation and his alleged violation of a 2012 court order that approved a lease between the Congregation and a corporate entity owned by Wolff. As individuals, plaintiffs lack standing to bring this claim.

The 11th cause of action must be dismissed, because the claim for legal fees is premised on the bringing of derivative claims on behalf of the Congregation. Those claims, however, are dismissed.

Accordingly, it is hereby

ORDERED that, in motion sequence number 004, the motion of defendants Bruce Kirschner and Gwenn Kirschner to dismiss the claims raised against them in the second amended complaint is granted and said complaint is dismissed as against them, with costs and disbursements as taxed by the Clerk upon the presentation of an appropriate bill of costs; and it is further

ORDERED that, in motion sequence number 005, the motion of defendants Yechezkel Wolff and Manhattan Jewish Center, Inc. to dismiss the second amended complaint is granted and said complaint is dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that counsel for the Kirschners is to serve, on all parties, a copy of this decision, along with notice of entry, within 10 days of entry.

Dated: 11/8/19

ENTER:



J.S.C.

HON. CAROL R. EDMOAD
J.S.C.