Lou-Text Trust Co. v Urban Home Ownership Corp.
2019 NY Slip Op 33431(U)
November 20, 2019
Supreme Court, New York County
Docket Number: 653842/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LOU-TEX TRUST COMPANY, in the right of CROTONA VI REDEVELOPMENT COMPANY, L.P.,

Plaintiff,

-against-

URBAN HOME OWNERSHIP CORPORATION,

Defendant,

-and-

CROTONA VI REDEVEPOLPMENT COMPANY, L.P.,

Nominal Defendant.

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DECISION AND ORDER
Index No.: 653842/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. BACKGROUND

In this case, defendant moves for summary judgment dismissing the complaint. Plaintiff cross moves for summary judgment in its favor. Neither side filed a Rule 19-a statement. As a consequence, these are the general facts as stated in the complaint and in the record.

II. FACTS

Plaintiff Lou-Tex Trust Company (LOU-TEX) is a limited partner of Crotona VI Redevelopment Company, LP (Crotona), a low income housing provider. Urban Home Ownership Corporation (Urban) is the general partner of Crotona. Crotona is governed by a limited partnership agreement (the Partnership Agreement or ALP).

Plaintiff claims Urban failed to send out audited financials to the limited partners, as required by the Partnership Agreement. As a result of plaintiff's suit against Crotona and Urban, plaintiff received audited financial statements for 2014-16 on November 6, 2017. Those documents indicated the partners may have been entitled to "an annual non-accruing" incentive performance fee (IPF) of 1.99% of effective gross income (Complaint, ¶ 22). IPFs were distributed to Urban in amounts of $26-27,000 in the years 2014-17. LOU-TEX did not receive any of these funds.

LOU-TEX asserts claims for

1) Breach of Fiduciary Duty- for Urban's diversion of partnership funds, conversion of those funds, self dealing for distributing those funds to itself, and failing to provide the audited financials in a timely manner;
2) Unjust Enrichment- for Urban's wrongful retention of funds that should have been delivered to Crotona and then distributed to Crotona's partners;
3) An Accounting;
4) Breach of Contract- for Urban's breach of the partnership agreement by causing Crotona to distribute IPFs to Urban, and not to the limited partners; and
5) Declaratory Judgment- Plaintiff seeks a declaratory judgment that Urban is not entitled to distribute IPFs to itself to the exclusion of the other limited partners (Complaint, ¶ 66).

III. ARGUMENTS

a. Crotona's Motion for Summary Judgment

IPFs are fees to reward efficient management of properties to benefit low income tenants, issued pursuant to a financing program Crotona entered into in 2001. Defendant claims IPFs were fully disclosed in audited financial statements approved by the US Department of Housing and Urban Development (HUD). The IPFs are not payable to the limited partners (Memo at 1). These are management incentives, payable to the manager.

"[I]nvestments of the limited partners are highly regulated investments, where their original investments were based upon tax driven strategies, and there were no IPFs at the time of the original investment" (*id.* at 3). Crotona was formed, and the Partnership Agreement signed, in April 1978. The Mark to Market Program became available to Crotona in 2001. Crotona used that program to refinance. The refinancing terms required that 90% of Crotona's surplus cash be used to pay down mortgage debt, leaving the remaining 10% for distribution to the members. Crotona's audited financial statements clearly identify surplus cash and deduct IPFs before determining how much will be paid on the mortgage debt and how much will be distributed to the partners.

The Partnership Agreement provides that the limited partners do not control the company or participate in management. Accordingly, the IPFs, which are incentives for effective management, should not be paid to the limited partners (*id.* at 7). Further, if the IPFs became part

of Crotona's surplus cash, so as to be payable to the limited partners, 90% of it would have to go toward mortgage debt repayment (*id.*).

Second, all claims are limited by the six-year statute of limitations for contracts or actions for which no limitations period is provided, pursuant to CPLR section 213 (*id.* at 7-8). As this action was filed on August 3, 2018, the claims here should be limited to the audit years 2012-17.

Third, punitive damages and attorneys' fees are not available and those claims should be stricken. There are no allegations of fraud aimed at the public, or which is gross and involves high moral culpability, and the Partnership Agreement does not provide for the recovery of attorneys' fees (*id.* at 8).

Urban also argues the claims for breach of fiduciary duty, unjust enrichment, and declaratory judgment should be dismissed as duplicative of the breach of contract claim (*id.* at 9).

Finally, the audited financial statements have been provided, and are attached to the moving affidavit. They disclose the IPF for each year. There is no need for a further accounting.

b. LOU-TEX's Opposition and Cross-Motion for Summary Judgment

LOU-TEX moves for summary judgment, arguing Urban has acknowledged, and the financials show, that Crotona only paid IPF money to Urban, and not to the limited partners. The Partnership Agreement provides that all distributions should be made to the partners pro rata. The "Regulatory Agreement defines the recipients entitled to IPFs to include all partners" (Opp at 10). Accordingly, Crotona only paying IPF funds out to Urban constitutes a breach of the Partnership Agreement.

LOU-TEX claims defendants are liable for a breach of fiduciary duty because they misappropriated funds. The (limited and late) financial statements for 2011-2016 provided by defendants state that "[t]he partners may also be entitled to" an IPF (*id.* at 11). Plaintiff is a partner. Managing partner is not specified. The 2017 financial statement provides that "The Partnership may also be entitled" to an IPF (*id.* at 12). The Regulatory Agreement states that payments will be payable to the Owner- Crotona, not the manager. The Partnership Agreement does not provide any payment to the Managing Partner for its management work (*id.* at 13).

LOU-TEX claims the defendants are liable for violating the Regulatory Agreement with HUD, as that agreement states the IPF is payable to the Owner, not exclusively the managing partner (*id.* at 14-15). LOU-TEX also claims defendants violated New York Partnership Law section 121-403(a), which provides that, absent an agreement to the contrary, no partner will

receive compensation for doing partnership business, other than winding up (*id.* at 15). Accordingly, Urban is not entitled to be compensated for its management services. LOU-TEX notes that defendants' only support for their position that Urban is entitled to those entire payments is a statement from the affidavit of Paul Moore (president of Urban), who swears his late father inquired from attorney Stanley Berman, a "pre-eminent authority of regulated housing who told former employees of the Company that the Managing General Partner was entitled to be paid the IPFs" (Opp at 16, quoting Moore Aff, NYSCEF Doc. No. 19, ¶ 14). The letter requesting counsel and the handwriting on the letter purporting to embody that counsel are unsworn, cannot be introduced as evidence, and are insufficient for a motion for summary judgment (Opp at 17).

Plaintiff also contends the IPF does not have to be paid 90% to repay mortgage debt, as the Mortgage Restructuring Note (attached as Exhibit H to defendants' motion) provides the borrower must pay "100% of Restricted Surplus Cash" to the lender (§B[1]). Restricted Surplus Cash is defined as "90% of Surplus Cash" (*id.* at § A[2][e-2 ("e" is used twice in this section)]). Surplus Cash is defined as "any cash remaining after . . . the payment of [monies required to be paid pursuant to the first mortgage, priority subordinate FHA insured or HUD held mortgages, certain other payments, and] the annual Incentive Performance Fee, if any" (*id.* at §A[2][e-1]). Accordingly, the calculation of Restricted Surplus Cash is performed after IPFs are deducted, and those funds are not included in that amount (Opp at 18).

Defendants have admitted paying IPFs only to Urban and not to the limited partners. This violates the Partnership Agreement. Accordingly, summary judgment should be granted to plaintiff.

As far as defendants assert a statute of limitations defense, they should be estopped from doing so because they have failed to provide financial statements for many years, only providing them after this litigation began, effectively concealing their conduct. Even if this court considers defendants' claim to have provided financial statements, those statements asserted IPFs were due to the partners, and defendants never advised plaintiffs that the IPFs were paid only to the general partner. The limited partners were not required to conduct their own inquiries (*id.* at 20).

The claims for punitive damages and attorneys' fees should survive because the misrepresentations here are reprehensible. Further, there is independent tortious conduct, so public harm is not required to receive punitive damages (*id.* at 21, citing *MacQuesten Gen. Contr., Inc. v HCE, Inc.*, 296 F Supp 2d 437, 446-47 [SDNY 2003], *affd,* 128 Fed Appx 782 [2d Cir 2005]

["Some New York caselaw does suggest that where a conversion claim arises out of a breach of contract, punitive damages may only be awarded if the culpable party's conduct was directed at the public. However, this requirement applies only where there is a close nexus between the allowed tortious conduct and the contract from which it is said to arise . . . . Here, by contrast, the conversion of HCE's equipment was independent of the terms of the contract—it was separate tortious conduct—and so the requirement of public harm as a prerequisite for punitive damages was not triggered"] [internal citations omitted]). Punitive damages have been issued in derivative claims (Opp at 21). The claim for attorneys' fees should stand because the Partnership Agreement requires such a payment, if there is a recovery of money on behalf of the partnership (*id.*at 22, citing §23 of the Agreement of Limited Partnership, attached as Exhibit G to Cross-Motion, NYSCEF Doc. No. 54). Here, there will be substantial recovery for the partnership, so plaintiff must be reimbursed (Opp at 22).

The claims for Breach of Fiduciary Duty, Unjust Enrichment, and Declaratory Judgment are not duplicative and should survive (*id.*). Breaches of contract and fiduciary duty are not necessarily duplicative, when the breach of fiduciary duty is separate from the obligation in the contract (*id.* at 22-23). The breach of contract alleged here is the diversion of funds. The breaches of fiduciary duty alleged include failing to provide financial statements and attempting to conceal their wrongs by manipulating the language in those documents (*id.* at 23). Nor does the unjust enrichment claim rely on the Partnership Agreement (*id.*). The case cited by defendants on this issue is misleading (*id.* at 24).

Finally, an accounting is necessary because defendants have engaged in fraudulent misrepresentations. Defendants still have not produced financial statements for the period between 2002 and 2012. An accounting is needed to determine the disposition of any IPFs from the missing period (*id.* at 25). Despite defendants' affidavit, plaintiffs submit an affidavit stating the financial statements for that period were never provided (*id.*). Therefore, the accounting is needed.

IV. DISCUSSION

a. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the

party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver,* 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop,* 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.,* 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]).

b. Claim 1- Breach of Fiduciary Duty

In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct (*Pokoik v Pokoik,* 115 AD3d 428 [1st Dept 2014]). A fiduciary is "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (*Meinhard v Salmon*, 249 NY 458 [1928]). The fiduciary is bound to exercise the utmost good faith and undivided loyalty to the principal throughout their relationship (*Sokoloff v Harriman Estates Development Corp.,* 96 NY2d 409 [2001]).

The determination of whether a fiduciary duty exists is "necessarily fact-specific" and looks to whether the relationship is "grounded in a higher level of trust than normally present in

the marketplace between those involved in arm's length business transactions" marketplace (*Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584, 593 [2012]) [internal quotation marks and citation omitted]). A fiduciary relationship may be found where a party "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation," or "when confidence is reposed on one side and there is resulting superiority and influence on the other" (*Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]). Although "a contractual relationship is not required for a fiduciary relationship, 'if [the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them'" (*id.*, quoting *Northeast Gen. Corp.*, 82 NY2d at 162).

Defendants argue this claim should be dismissed as duplicative of the breach of contract claim, as the meat of the claim is for failure to make the payments required by the Partnership Agreement. "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000]). Plaintiff contends a portion of this claim is for actions taken to hide the failure to make those improper payments. However, plaintiff has not alleged any damages directly caused by that alleged misconduct. Accordingly, the claim for breach of fiduciary duty fails.

c. Claim 2- Unjust Enrichment

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

This claim is about defendants' alleged taking of IPF funds in violation of the Partnership Agreement. Accordingly, the claim fails as duplicative as there is an actual agreement on the subject matter between the parties concerned.

d. Claim 3- Accounting

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Palazzo v Palazzo*, 121 AD2d 261, 265 [1st Dept 1986]). "To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011], *see Kastle v Steibel*, 120 AD2d 868, 869 [3d Dept 1986]). The breach of contract claim shows that plaintiff has an adequate remedy at law, so this claim, too, fails.

e. Breach of Contract

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Defendants move for summary judgment on the contract claim, arguing that Urban was entitled to the entirety of the IPF payments because Urban performed the management tasks, that any remaining contract claim should be limited by the 6-year statute of limitations, and that the requests for punitive damages and attorneys' fees should be dismissed. Urban offers a 2003 writing of its then-lawyer advising that the IPF incentive fee was properly paid to Urban based upon applicable HUD guidance (Doc. No. 29).

Plaintiff argues it should receive summary judgment on the contract claim because the Regulatory Agreement with HUD states the IPF payments are made to the owner (Crotona), and so the payments should be distributed to all of Crotona's partners. Urban effectively concedes this point (*see* Paul Moore Aff'd. ¶ 11) (*see also* 2012-17 Fianancial Statements, n.9 ["The partners

may also be entitled to an annual non-recurring Incentive Performance Fee"]). As plaintiff's position is supported by the Regulatory Agreement, defendant's position is supported by no law, and the lawyer's opinion is unsupported, summary judgment shall be granted to the plaintiff on this claim.

Regarding the statute of limitations, it is undisputed that the six year statute of limitations applicable to breach of contract claims applies to this claim. However, plaintiff argues the defendants should be equitably estopped from asserting the 6 year limitation period because defendants deceived plaintiff about the state of affairs and so stopped them from filing a timely action. The parties dispute whether the plaintiffs were provided with timely copies of the financial statements, with Hershy Beigel, the manager of LOU-TEX, stating that LOU-TEX did not receive Partnership financial statements from 2008 through 2016 (Doc. 47). Walter Jackler, Urban's comptroller from 1981 to 2010, states that financial statements were mailed to all limited partners on an annual basis (Doc. No. 40, ¶ 12). Moreover Plaintiff admits that the IFP payment issue has been referenced in Partnership financial statements since 2002. Plaintiffs contend, however, that if financial statements were provided, they "repeatedly – and falsely – asserted that IPFs were due to the 'partners'. At no time did Defendants advise the partners, including the Plaintiff, that IPFs were paid only to the General Partner" (Opp at 20). The financial statements are not deceptive. The language in the statements agrees with the language in the agreements that the partners may be due the IPF (*see* statements for 2002, 2012, 2013 NYSCEF Docs. No. 30, 31 and 32). If what the plaintiff was due as reported by the financial statement was not what it received, that is within plaintiff's ability to know.

Accordingly, summary judgment shall be granted to the plaintiff with damages limited to six years' of the breach of contract claims. Damages outside the statute of limitations period is barred.

As to the claims for attorneys' fees and punitive damages, the Partnership Agreement, section 23(a), contemplates "[a]ll expenses, obligations and liabilities incurred on behalf of the Partnership shall be paid or otherwise discharged by the Partnership." In its Reply, defendants do not contest this point. Accordingly, attorney's fees may be granted. As to punitive damages, this is a breach of contract case for failure to pay. There is no gross fraud, wanton dishonest, or high moral culpability. Nor is there independent tortious conduct. The punitive damages claim shall be dismissed.

f. Declaratory Judgment

"The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (Civil Practice Law and Rules 3001).

"Under the principle that a court may legitimately exercise judicial discretion by declining declaratory relief where the plaintiff has another adequate remedy, courts have held that a declaratory judgment action should normally not be entertained when a full and adequate remedy is already provided through other judicial proceedings, such as . . . an action for breach of contract" (NYJUR DECLJUDS § 13).

Here, plaintiff has an adequate remedy in its action for breach of contract. Accordingly, this claim will be dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of plaintiff LOU-TEX is GRANTED as to the fourth cause of action only and otherwise DENIED, and it is further

ORDERED that the motion for summary judgment of defendant Urban Home Ownership Corporation is GRANTED to the extent that the first, second, third, and fifth causes of action are hereby DISMISSED and otherwise DENIED; and it is further

ORDERED that plaintiff's claim for damages shall be limited by the six year statute of limitations; and it is further

ORDERED that within 14 days of this decision and order the parties shall meet and confer to prepare a form of judgment consistent with this decision and orders. Failing agreement, plaintiff shall submit a proposed judgment on 14 days notice within 30 days of the date of this decision and order; defendant shall have 10 days thereafter to propose its version; and it is further

ORDERED that failing agreement, counsel shall appear at a compliance conference on Tuesday, January 14, 2020, at 10:30 am in Part 49, Room 252, 60 Centre Street, New York, New York, 10007.

This constitutes the decision and order of the court.

DATED: November 20, 2019

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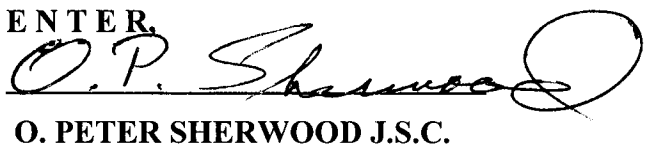

O. PETER SHERWOOD J.S.C.