

<b>East 51st St. Dev. Co., LLC v HFZE. 51, LLC</b>
2019 NY Slip Op 33724(U)
December 18, 2019
Supreme Court, New York County
Docket Number: 652135/2016
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 652135/2016

EAST 51ST STREET DEVELOPMENT COMPANY,
LLC,968 KINGSMEN, LLC, and JAMES KENNELLEY,

MOTION DATE 12/13/2019

Plaintiffs,

MOTION SEQ. NO. 005

- v -

HFZ EAST 51, LLC, HFZ CAPITAL GROUP, LLC, 51ST
STREET MAIN LOT OWNER, LLC, HFZ CORNER LOT
OWNER, LLC, 51ST STREET CORNER LOT OWNER,
LLC, ZIEL FELDMAN, JOHN DOES 1-10, and XYZ
COMPANIES 1-10,

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 62, 63, 64, 67, 68,
69, 70, 71, 72, 73, 74

were read on this motion to/for REARGUMENT/RECONSIDERATION

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiffs for leave to reargue
defendants' motion to dismiss to the extent of the fifth count for
fraudulent conveyance (fifth cause of action) of the first amended
complaint is granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior
order, dated July 17, 2019, and denies defendants' motion for
dismissal as to such fifth cause of action; and it is further

ORDERED that the fifth cause of action for fraudulent
conveyance is reinstated; and it is further

ORDERED that the Court otherwise adheres to its prior order, dated July 17, 2019, as follows, it is further

ORDERED that the motion to dismiss of defendants is granted to the extent that the second, third and fourth causes of action as against defendant Ziel Feldman; the second cause of action as against defendants HFZ East 51, LLC, 51<sup>st</sup> Street Main Lot Owner, LLC and 51<sup>st</sup> Street Corner Lot Owner; the third cause of action as against defendants HFZ Capital Group, LLC, 51<sup>st</sup> Street Main Lot Owner, LLC, HFZ Corner Lot Owner LLC, and 51<sup>st</sup> Street Corner Lot Owner, LLC; the fourth cause of action as against defendants HFZ East 51, LLC, and HFZ Capital Group, LLC; and the sixth causes of action as against defendants HFZ East 51<sup>st</sup> St, LLC, HFZ Capital Group, LLC, 51<sup>st</sup> Street Main Street Owner, LLC, HFZ Corner Lot Owner LLC, and 51<sup>st</sup> Street Corner Lot Owner, LLC, are dismissed; and it is further

ORDERED that the foregoing claims are severed, and the balance of the action shall continue; and it is further

ORDERED that the motion of defendants to dismiss the fifth cause of action for fraudulent conveyance against defendants HFZ East 51<sup>st</sup> St, LLC, HFZ Capital Group, LLC, 51<sup>st</sup> Street Main Street Owner, LLC, HFZ Corner Lot Owner, LLC, and 51<sup>st</sup> Street Corner Lot Owner, LLC, is denied; and, it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Ziel Feldman dismissing the claims against him

in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of cost; and it is further;

ORDERED that the remaining defendants are directed to serve their answer(s) to the verified first amended complaint within 20 days after entry of this order; and it is further

ORDERED that the motion to vacate the CPLR 3214 stay (Motion Sequence Number 004) is denied as moot.

#### DECISION

Notwithstanding that defendant Ziel Feldman was not a signatory to the Cooperation and Deed in Lieu of Foreclosure Agreement (Cooperative Agreement), such Cooperation Agreement bars the unjust enrichment (second) cause of action against such individual defendant. Vitale v Steinberg, 307 AD2d 107 (1<sup>st</sup> Dept. 2003).

This court also agrees that the complaint insufficiently pleads a fraudulent conveyance claim (fourth cause of action) as against individual defendant Ziel Feldman, as there are only allegations that such defendant acted in his capacity as owner or manager of the corporate entities in question and there are no allegations that such individual defendant exercised complete domination and control over such corporate entities or that he abused the privilege of doing business in the corporate form to

perpetrate such fraudulent transfer. See D'Mel & Associates v Athco, Inc., 105 AD3d 451, 452 (1<sup>st</sup> Dept. 2013).

With respect to HFZ East, the second cause of action for unjust enrichment must be dismissed because the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R. Co., 70 NY2d 382, 388 (1987); Loreley Financing (Jersey) No. 3 Ltd. v Citigroup Global Markets, Inc., 110 AD3d 136, 148 (1<sup>st</sup> Dept. 2014).

As to the other defendants, the Court has held that "in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. . . [W]hile a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not 'too attenuated.'" Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (2012) (citations and internal quotation marks omitted). In Paragraph 21 of the Complaint, it is alleged that pursuant to the Agreement, "the Corner Lot was conveyed to Defendant HFZ Corner, the entity designated by Defendant HFZ 51, to Defendant HFZ Capital, to receive the conveyance." Thus the

allegation is that as part of their performance under the Agreement, plaintiffs were required at the direction of defendant and contract signatory HFZ East, to cause property to be transferred to non-signatory HFZ Corner. It is also alleged that defendant non-signatory Capital Group LLC (HFZ Capital) directed the plaintiffs to transfer the property in satisfaction of plaintiffs' obligations under the Agreement.

The court finds that as to defendants HFZ Corner and HFZ Capital, the plaintiffs have sufficiently stated, for pleading purposes, a claim for unjust enrichment. Assuming the allegation of the plaintiff are true, HFZ Corner was a non-signatory to the Agreement that received a benefit, the property, under the Agreement on behalf of signatory HFZ East. As to defendants HFZ Capital, it directed the performance under the contract although it is not alleged to be a party to the contract. Thus assuming the allegations to be true, the plaintiffs have established a requisite nexus between the contractual performance and these non-signatory defendants for the purposes of pleading an unjust enrichment cause of action. This is because it is alleged that the transfer to non-signatory HFZ Corner took place at the behest of these defendants. See Georgia Malone & Co., Inc. v Ralph Rieder, 86 AD3d 406, 408 (1<sup>st</sup> Dept 2011), affd sub nom. Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511 (2012) ("cases from this Court and the other

Departments have held that an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest").

However, as to the other defendants, 51<sup>st</sup> Street Main Lot Owner, LLC, and 51<sup>st</sup> Street Corner Lot Owner, who were allegedly subsequent transferees of property from the other defendants, the unjust enrichment claim is too attenuated to be sustained against those defendants and is properly dismissed.

With respect to the standard for pleading a cause of action for tortious interference with contract, the Court has held that

To state a cause of action alleging tortious interference with contract, the plaintiff must allege: the existence of a valid contract between it and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages. The plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct.

Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC, 82 AD3d 1035, 1036 (2d Dept 2011).

In this case, plaintiffs allege in their third cause of action that the defendants intentionally procured HFZ's alleged breach of its obligation to make payment to the plaintiffs under the Agreement. However, plaintiffs' conclusory allegations fail to set forth facts in support of their contention from which any inference could be drawn of defendants' culpable conduct on this theory. Id. ("although on a motion to dismiss the allegations

in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation").

Additionally, plaintiffs fail to allege that "but for" the defendants' actions, HFZ East would have made payment under the Agreement. Furthermore, defendants are correct that the allegations of the amended complaint that the defendants are related or affiliated undermine the tortious interference claim, which does not lie against any entity affiliated with the alleged breaching party. See Koret, Inc. v Christian Dior, S.A., 161 AD2d 156, 157 (1st Dept. 1990) and MTI Image Group, Inc. v Fox Studios E., Inc., 262 AD2d 20, 23-24 (1st Dept. 1999). Thus the Court shall dismiss the third cause of action.

The court shall also grant dismissal of plaintiffs' constructive fraudulent conveyance claims (the fourth cause of action) under the Debtor and Creditor Law 273, 274 and 275 except as against defendants 51<sup>st</sup> Main Lot Owner, LLC, and 51<sup>st</sup> Street Corner Lot Owner. It is alleged that the property conveyed by plaintiffs under the Agreements was subsequently transferred to 51<sup>st</sup> Main Lot Owner, LLC, and 51<sup>st</sup> Street Corner Lot Owner for the inadequate consideration of \$1 apiece given the obligations of the transferor defendants to the plaintiffs and the lack of other assets of the transferor defendants. See 172 Van Duzer Realty Corp. v 878 Educ., LLC, 142 AD3d 814, 817



(1<sup>st</sup> Dept 2016). However, a cause of action for fraudulent conveyance claims is limited to transferees or beneficiaries of the conveyance and therefore these claims must be dismissed against the other defendants. See Fed. Deposit Ins. Corp. v Porco, 75 NY2d 840, 842 (1990).

With respect to plaintiffs' claim of actual fraudulent conveyances under Debtor and Creditor Law § 276, the court finds that plaintiffs' fifth cause of action is sufficiently pled as it alleges specific facts that "establish several 'badges of fraud' indicative of fraudulent intent (Pen Pak Corp. v LaSalle Natl. Bank, 240 AD2d 384)". Taylor-Outten v Taylor, 248 AD2d 934, 936 (4<sup>th</sup> Dept. 1998). See also Wall St. Assoc. v Brodsky, 257 AD 526 (1<sup>st</sup> Dept. 1999).

With respect to the sixth cause of action for an equitable lien/constructive trust, it has been held that "[i]n the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." Sharp v Kosmalski, 40 NY2d 119, 121 (1976) (citations omitted). Here, the plaintiffs have failed to allege any confidential or fiduciary relation between themselves and the defendants. The Court has further stated that "[t]he existence of an equitable lien requires an express or implied

contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation." Ryan v Cover, 75 AD3d 502(2d Dept 2010). The plaintiffs fail to allege that there is any express or implied agreement that the property at issue here was to be held as security for the obligations defendants allegedly owed to plaintiffs. Therefore, the sixth cause of action is properly dismissed.

12/18/2019  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	