Gurewitsch v Korff
2021 NY Slip Op 32779(U)
December 22, 2021
Supreme Court, New York County
Docket Number: Index No. 651080/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART 53**

Justice

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INDEX NO. 651080/2020

MOTION DATE

MOTION SEQ. NO. 004 005

STEVEN GUREWITSCH, ANNE SCHWARTZ,

Plaintiff,

- v -

JOSEPH KORFF, UCL LP, UCL LLC,3618 LLC, RIVERDALE HEIGHTS LLC, RIVERDALE HEIGHTS I LLC, ARC DEVELOPMENT LLC, ARC REAL ESTATE GROUP LLC, ARC MARKETING LLC, JOHN DOES 1-10, ABC COMPANIES

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 112, 115

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 113, 114

were read on this motion to/for SEAL.

The Defendants' renewed motion to dismiss (Mtn. Seq. No. 004) must be denied much for the same reasons that the prior motion to dismiss was denied. Simply put, the gravamen of the dispute as set forth in the complaint is that Joseph Korff through his various entities paid himself substantial fees which were framed as liabilities to the Company and that the taking of these various payments when his partners received nothing constituted a breach of duty under the circumstances. The Forensic Report (hereinafter defined) does not conclusively disprove this theory. However, the Defendants' motion to seal (Mtn. Seq. No. 005) must be granted for good cause shown to protect confidential tax information.

On April 15, 2021, the court denied the Defendants' prior motion to dismiss, but granted leave to renew the motion to dismiss based on the results of a forensic accounting which the Plaintiffs had conducted and upon which they based certain allegations in their complaint (Tr. of April 15, 2021 Hearing, NYSCEF Doc. No. 100, at 27). The Plaintiffs produced to the Defendants the summaries of their forensic accounting (the **Forensic Report**, NYSCEF Doc. Nos. 104-105) and the Defendants subsequently renewed their motion to dismiss.

On a motion to dismiss, the court must accept the facts as alleged as true affording the allegations every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions and factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]).

The Defendants argue that the causes of action for breach of fiduciary duty (twelfth cause of action), equitable accounting (thirteenth cause of action), and equitable subordination (fourteenth cause of action) based on the Defendants' alleged issuance of senior equity must be dismissed because the Forensic Report disproves that such equity was ever issued. The argument fails. Although the Forensic Report did not uncover senior equity, it does not establish that senior equity was never issued because it does not conclusively establish that the funds paid to the Defendants were to reimburse the Defendants for advances made to cover shortfalls as the Defendants aver. It is significant that the Forensic Report did not find repayment schedules or any interests due on any alleged advances as one would expect. Thus, the causes of action cannot be dismissed.

The Defendants next argue that the causes of action for breach of contract (eighth cause of action) and tortious interference with contract (ninth cause of action) based on alleged fraudulent development fees must be dismissed because the development fees were expressly authorized by parties' Operating Agreement. This argument also fails. Although certain development fees were authorized pursuant to a formula set forth in the Operating Agreement, the Forensic Report does not address whether the fees paid were the amount of fees authorized pursuant to the Operating Agreement or whether the "brokerage" fees paid to Mr. Korff funneled through his other entities were duplicative. Therefore, dismissal is not appropriate.

The Defendants also argue the causes of action for breach of fiduciary duty (fifth cause of action), aiding and abetting breach of fiduciary duty (sixth cause of action), and conspiracy (seventh cause of action) based on the $1.5 million in broker fees paid to Arc Marketing LLC (i.e., Mr. Korff's brokerage company) must be dismissed because the Forensic Report provides no basis to support a breach of fiduciary duty claim. This misses the point. The point is that given the lack of return to the investors, the fees charged by Mr. Korff funneled through his affiliate in light of his developer fees were duplicative, unreasonable, and excessive as alleged. Thus, the claim for breach of fiduciary duty must not be dismissed.

The Defendants additionally argue that the causes of action for breach of contract (first cause of action), fraud (second cause of action), and unjust enrichment (fourth cause of action) based on the Plaintiffs' alleged entitlement to allocated tax losses should be dismissed because the Plaintiffs do not allege injury from non-allocation of tax losses and because the Forensic Report confirms the factual basis for the allocation to UCL. The Plaintiffs allege that the Operating Agreement required that the tax losses should be allocated in accordance with membership interests, and that the Plaintiffs each held 24.75% of the membership interests. They further allege that the Defendants filed tax returns falsely so UCL LP appeared to hold 100% of the membership interests and thus was entitled to 100% of the tax losses. This is not controverted by the Forensic Report. The Plaintiffs allege injury. Whether the Plaintiffs could have ultimately used the tax losses as a factual matter is not something to be resolved at this stage of the pleadings. Thus, this branch of the motion to dismiss must also be denied.

Lastly, the Defendants argue that the cause of action for breach of contract (third cause of action) based on alleged theft of profits should be dismissed because the Plaintiffs fail to allege that the Company had cash distributable to the Plaintiffs after payment of the Company's liabilities and the Forensic Report confirms that the Company still had unpaid liabilities. This argument fails. The Forensic Report reveals exactly that which is alleged – i.e., that Mr. Korff through his various entities paid himself pursuant to Korff liabilities such that no money was left to distribute to the Plaintiff partners and that by doing so he allocated the profits of the company to himself at the expense of the Plaintiffs.

It is accordingly hereby ORDERED that the Defendants' motion to dismiss is denied; and it is further

ORDERED that the Defendants' motion to seal is granted; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal NYSCEF Doc. Nos. 104, 105, and 108 and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

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12/22/2021
DATE

ANDREW BORROK, JSC

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**