

Plato v Charles

2022 NY Slip Op 33605(U)

October 20, 2022

Supreme Court, New York County

Docket Number: Index No. 100803/2018

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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DANNETTE PLATO, CAMILLE PLATO, AMITHEY
WEATHERS, EZEKIEL WEATHERS, 63 MORNINGSIDE
AVENUE HDFC

Plaintiff,

- v -

MARLENE CHARLES, BERNADETTE LAWRENCE,
GOLDSTON CHARLES, DSS SERVICES LLC,

Defendant.

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INDEX NO. 100803/2018

MOTION DATE 06/28/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 43, 62, 63, 64, 65, 66, 67, 68, 69, 72

were read on this motion to/for DISMISS.

Defendant DSS Services LLC (DSS) moves for dismissal of the complaint pursuant to CPLR 3211 (a) (7).

Plaintiffs are shareholders of 63 Morningside Avenue HDFC, a cooperative corporation (hereinafter, "Co-op"). Dannette and Camille Plato are shareholders of Unit 1 South and Amithy and Ezekiel Weather are shareholders of Unit 1 North. Defendants Marlene Charles and Bernadette Laurence are members of the Board of Directors (Board) of the Co-op. Plaintiffs allege that these defendants have been on the Board since March 2013 without holding certified annual elections. Said defendants engaged the services of DSS, a real estate management corporation, as managing agent of the Co-op as of October 2017. The complaint alleges that these Board members are liable for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, self-dealing and objectionable conduct. Plaintiffs seek injunctive relief and compensatory and punitive damages.

DSS moves for dismissal on the ground of failure to state a cause of action. DSS states that plaintiffs allege that it is liable for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, self-dealing and objectionable conduct. DSS contends that all four causes of action should be dismissed against it. DSS argues that as managing agent, it cannot be liable for breach of fiduciary duty because it only has a fiduciary duty to the Co-op, not the individual shareholders like plaintiffs. DSS argues that it cannot be liable for aiding and abetting breach of fiduciary duty because plaintiffs' allegations are not particularized enough to make out a cause of action. DSS argues that the claims of self-dealing and objectionable conduct are not actual causes of action in this jurisdiction or are not sufficiently specific.

In opposition to the motion, plaintiffs argue that the motion is untimely. They also argue that DSS had a fiduciary duty to them, that in aiding and abetting the other defendants, they can be liable for breach of fiduciary duty, and that such conduct was objectionable and self-serving.

DSS submitted a document that it is no longer the managing agent of the Co-op as of November 2019.

When a party moves to dismiss a complaint pursuant to CPLR §3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11,19 [2005]). In considering the motion, the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

DSS is a defendant in this action and the complaint states the following allegations

against it: (1) DSS is in possible collusion with defendant shareholders to attempt an illegal assumption of the subject property; (2) DSS and other defendants failed to provide to plaintiffs contracts between defendants and other documents as of January 2017; (3) DSS entered into an agreement with other defendants to gain financial benefits; and (4) DSS sent rent demand letters related to alleged construction work done without a permit, resulting in plaintiffs sending cease and desist letters.

With respect to the failure to provide certain documents to plaintiffs, the demand for documents from plaintiffs occurred on January 18, 2017, according to the complaint. Since DSS was not the managing agent of the Co-op at that time, it could not have been involved in this alleged action.

The complaint alleges that DSS is liable for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. While it is settled that the Board of directors of a co-operative has a fiduciary duty to the individual shareholders, the managing agent has a fiduciary duty to the co-operative corporation, not the individual unit owners (*see Caprer v Nusbaum*, 36 AD3d 176, 192 [2d Dept 2006]). The exception to this rule is when such an entity commits an aiding and abetting a breach of a fiduciary duty. One who aids and abets a breach of fiduciary duty is liable for that breach as well, even if he or she has no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered ‘substantial assistance’ to the fiduciary in the course of effecting the breach (*see Caprer* at 193).

Substantial assistance means that defendant would have actual knowledge of the breach while participating in it (*see Schroeder v Pinterest, Inc.*, 133 AD3d 12, 16 [1st Dept 2015]). The complaint fails to make out such a claim. There is a possible collusion with the individual defendants regarding an illegal agreement, but there is no indication of knowledge or

involvement in wrongdoing on DSS's part. The allegations are too vague and conclusory to implicate DSS in the affairs of the other defendants. Therefore, the court shall dismiss these causes of action.

The self-dealing cause of action is not a separate cause of action, though it is considered an element in determining a claim for breach of fiduciary duty (*see Birnbaum v Birnbaum*, 73 NY2d 461 [1989]). Also, there is no case law affirming objectionable conduct as a cognizant cause of action.

The court notes that plaintiffs' opposition papers refer to allegations against DSS which are not mentioned or expanded upon in their complaint. Plaintiffs should have moved for leave to amend their complaint to include these additional allegations. The court is analyzing the complaint in its present form and finds it insufficient in substance.

Accordingly, it is

ORDERED that the motion of defendant DSS Services LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

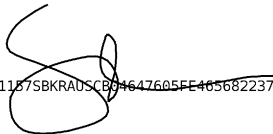
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre

Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office 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/suptctmanh); and it is further

ORDERED that the parties shall appear for an in person preliminary conference at 111 Centre Street, New York, New York in Room 575 at 11:00 am on January 9th, 2023.

202210201711575BKRAUSCB94647605FE4656822376512037B214


10/20/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: