

**Matter of 1650 Realty Assoc., LLC v Golden
Touch Mgt., Inc.**

2012 NY Slip Op 33862(U)

June 25, 2012

Supreme Court, Nassau County

Docket Number: 005408/11

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ORIGINAL

TRIAL/IAS, PART 1
NASSAU COUNTY

In the Matter of the Application of
1650 REALTY ASSOCIATES, LLC and
1671 REALTY ASSOCIATES, LLC,

INDEX No. 005408/11

MOTION DATE: May 10, 2012
Motion Sequence # 008

Petitioners,

-against-

GOLDEN TOUCH MANAGEMENT, INC.,
PARO MANAGEMENT CO., INC., JANGLA
REALTY CORP., SERHOF REALTY CORP.,
RONALD SWARTZ and STEVEN SWARTZ,

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Respondents.

GOLDEN TOUCH MANAGEMENT, INC.,
RONALD SWARTZ and STEVEN SWARTZ,

Third-Party Plaintiffs,

-against-

GLADYS LIND, AMY SILBER and LARRY
SILBER,

Third-Party Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Memorandum of Law..... X

Motion by petitioners 1650 Realty Associates LLC and 1671 Realty Associates LLC

for leave to serve a second amended petition is **granted**. Cross-motion by respondents to dismiss the amended petition as against respondents Ronald Swartz, Steven Swartz, Jangla Realty Corp., and Serhof Realty Corp. is **denied**.

This is an action for breach of fiduciary duty and an accounting.

Petitioner 1650 Realty Associates, LLC owns an apartment building located at 1650 Ocean Parkway in Brooklyn. Petitioner 1671 Realty Associates, LLC is the owner of a Brooklyn apartment building located at 1671 East 17th Street. The principal member of each of the companies is Gladys Lind, who received her interest in the buildings from her father, Jacob Hoffman, who died in August 1987. At the time of his death, Hoffman held an ownership interest in 18 real estate partnerships which held title to commercial properties located in Brooklyn and Queens. Respondents Ronald Swartz and Steven Swartz had been Hoffman's attorneys, and, after his death, they continued to represent his estate.

On June 30, 1991, Ronald Swartz, as president of respondent Golden Touch Management, Inc., entered into a management and leasing agreement with the surviving partners, as well as Gladys and the other beneficiaries of Jacob Hoffman's estate. The management agreement, which covered all 18 of the commercial properties, provided for a base management fee of \$325,000 per year. In addition, the manager was entitled to 50 % of the "Increased Cash Flow," 50 % of the "Net Sales Proceeds upon a sale of any property, and 50 % of the "Net Financing Proceeds" upon the refinancing of mortgages on the properties. The agreement was for a ten year term, subject to four automatic 10-year renewal periods.

In 1998, the surviving partners and beneficial owners of the properties made certain ownership changes and distributed certain of the properties. Gladys became the sole beneficial owner of 1650 Ocean Parkway and 1671 East 17th Street and relinquished her ownership interest in the other properties at that time.

On April 12, 2011, petitioners commenced this proceeding seeking an accounting. Gladys claims that in 2007 she discovered that the combined rent rolls of the two buildings was approximately \$1.2 million but that only \$166,573, or 14 % of the rent roll, was being distributed to her as income. In March 2011, petitioners began to receive distribution checks, not from Golden Touch, but from respondents Paro Management Co., Jangla Realty Corp., and Serhof Realty Corp. According to Gladys, Jangla and Serhof own other properties, which are managed by Golden Touch, in which Gladys has no ownership interest. In the first cause

of action, petitioners sought an accounting. In the second cause of action, petitioners sought examination of their own books and records, including management expenses charged against their properties.

In their answer, respondents Golden Touch and Ronald and Steven Swartz asserted a number of third party claims against third party defendants Gladys Lind, Amy Silber, and Larry Silber. The third party claims were for alleged wrongful termination of the management agreement, unjust enrichment, fraud with respect to third party defendants' intention to continue the management agreement, promissory estoppel, equitable estoppel, and a declaratory judgment that the management agreement was still binding.

By order dated August 8, 2011, the court enjoined Golden Touch from serving as managing agent for 1650 Ocean Parkway and 1671 East 17th Street, pending final judgment in the action. The court ruled that petitioners had established a likelihood of success with respect to their claim that the long term management agreement was voidable because the Swartz' had entered into a business transaction with their client, without obtaining informed consent, and further that the transaction was neither fair nor reasonable (See Rule 1.8 of the Professional Conduct Rules).

Petitioners move for leave to serve a second amended petition, asserting claims for breach of fiduciary duty, conversion, overcharging of management fees, and fraud. In the second amended petition, petitioners allege that respondents have commingled rent monies received on petitioners' properties with monies belonging to other parties and/or the respondents. Thus, the second amended petition suggests that respondents may have charged petitioners for management expenses properly attributable to other buildings. Petitioners further allege that respondents have created affiliated companies, Golden Touch Painting and Golden Touch Plumbing, to perform maintenance services for petitioners' properties at inflated rates. Petitioners allege that respondents have collected large sums of money as rent on petitioners' buildings, which respondents have wrongfully withheld rather than turning over to petitioners. Petitioners assert that, by using the accrual method of accounting, respondents inflated the "increased cash flow," and the corresponding management fees which they paid themselves pursuant to the management agreement.

Respondents cross-move to dismiss the amended petition as against respondents Ronald Swartz, Steven Swartz, Jangla Realty Corp., and Serhof Realty Corp. for failure to state a cause of action. In addition to arguing that the breach of fiduciary duty, conversion, overcharging, and fraud claims are legally insufficient, respondents argue that petitioners

cannot “pierce the corporate veil” in order to hold respondents personally liable.

Leave to amend a pleading shall be freely given upon such terms as may be just (CPLR 3025(b)). However, leave to amend may be denied where the proposed amendment is palpably improper or insufficient as a matter of law, or prejudice or surprise will directly result from the delay in seeking amendment (*Koenig v Action Target*, 76 AD3d 997 [2d Dept 2010]). The overcharging and fraud claims asserted in the second amended petition arise from the same conduct alleged in the prior pleadings. Thus, respondents cannot claim surprise or prejudice. Accordingly, petitioners’ motion for leave to serve a second amended petition is **granted**. The second amended petition shall be deemed served in the form annexed as Exhibit K to petitioners’ motion.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory”(*Arnav Industries, Inc. v. Brown*, 96 NY2d 300, 303 [2001]).

A fiduciary shall not engage in self-dealing, and when the fiduciary is so charged, his actions will be scrutinized most carefully (*Birnbaum v Birnbaum*, 117 AD2d 409, 416 [4th Dept 1986]). Because of the conflict of interest inherent in such a transaction, it is voidable by the beneficiaries unless they have consented (Id). Where a fiduciary duty is breached, the beneficiary’s remedy may include the equitable remedy of disgorgement of the fiduciary’s profits for the six year period prior to the commencement of the action (See *IDT Corp. v Morgan Stanley*, 12 NY3d 132 [2009]).

Giving petitioners the benefit of every possible favorable inference, the court must assume that respondents Ronald and Steven Schwartz were under a fiduciary duty to petitioners by virtue of having originally acted as Jacob Hoffman’s attorney and continuing to represent his estate. The court must further assume that respondents breached their fiduciary duty to avoid self-dealing by entering into the management agreement without Gladys Lind’s informed consent. If proved, the remedy for such a breach of fiduciary duty may well be disgorgement of all profits earned by Golden Touch, on the management of petitioners’ buildings, for six years prior to the commencement of the present action.

One who aids and abets a breach of fiduciary duty is liable for that breach, if he renders substantial assistance to the fiduciary in the course of effecting the breach (*Velazquez v*

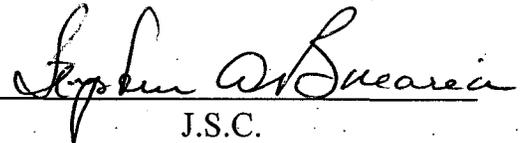
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Decaudin, 49 AD3d 712, 716 [2d Dept 2008]). The court must assume that respondents Jangla Realty Corp. and Serhof Realty Corp. provided substantial assistance to the Schwartz' by inflating management expenses and funneling distribution checks. Thus, Jangla Realty and Serhof Realty may be liable for aiding and abetting a breach of fiduciary duty by the Schwartz,' even if the corporations were not under an independent fiduciary duty to petitioners. Respondents' motion to dismiss the amended petition for failure to state a cause of action is **denied**.

So ordered.

Dated JUN 25 2012


J.S.C.

ENTERED

JUN 27 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE