

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

2012 NY Slip Op 33863(U)

April 16, 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

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

Petitioners,

-against-

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

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 X
- Cross-Motion..... X
- Affirmation in Opposition..... XX

Motion by third-party plaintiffs Golden Touch Management, Inc., Ronald Swartz, and Steven Swartz to dismiss third party defendant Amy Silber's counterclaims for failure to state

a cause of action is **granted**. Motion by third-party plaintiffs for a default judgment against third party defendant Larry Silber is **denied**. Cross-motion by third party defendant Larry Silber to dismiss the third party complaint for failure to state a cause of action is **granted**.

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

Third party defendant Gladys Lind is the daughter of Jacob Hoffman, who died in August 1987. At the time of Hoffman's death, he 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. Pursuant to the distribution plan, Gladys became the sole owner of two apartment buildings in Brooklyn, 1650 Ocean Parkway and 1671 East 17th Street, and relinquished her ownership interest in the other properties. Gladys then created petitioners 1650 Realty Associates, LLC and 1671 Realty Associates, LLC to hold title to the apartment buildings.

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. Gladys further claims that in March 2011 she 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. Thus, Gladys claims that management expenses attributable to the other buildings may have been charged to her properties.

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On April 12, 2011, petitioners commenced this proceeding seeking an accounting. 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).

In their answer, defendants 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 are breach of the management agreement by wrongful termination, unjust enrichment, fraud with respect to third party defendants' intention to continue the management agreement, promissory estoppel, equitable estoppel, a declaratory judgment that the management agreement is still binding, and an accounting.

In her answer to the third party complaint, third party defendant Amy Silber asserted counterclaims for sanctions based upon defendants having submitted frivolous third party claims.

Third party plaintiffs move to dismiss third party defendant Amy Silber's counterclaims for failure to state a cause of action on the ground that there is no a separate cause of action for sanctions. Although New York does not recognize a separate cause of action for sanctions, such relief is available for frivolous conduct in civil litigation upon motion (22 NYCRR § 130-1.1; *Cerciello v Admiral Ins. Brokerage*, 2011 NY App Div LEXIS 9588 [2d Dept 2011]). Accordingly, third party plaintiffs' motion to dismiss third party defendant Amy Silber's counterclaims for failure to state a cause of action is **granted**. The dismissal is without prejudice to third party defendant Amy Silber's right to seek sanctions upon motion upon the issuance of final judgment in the action.

Third party plaintiffs move for a default judgment against third party defendant Larry Silber based upon his failure to appear or answer. In order to enter a default judgment, plaintiff must make a showing of a meritorious cause of action (*Smith v Arce*, 78 AD3d 612 [1st Dept 2010]). Third party plaintiffs fail to make a showing of merit with respect to their third party claims. Accordingly, third-party plaintiffs' motion for a default judgment against third party defendant Larry Silber is **denied**.

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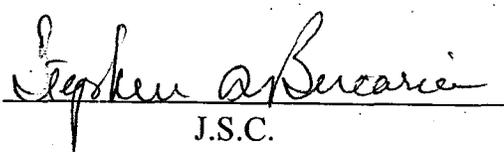
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Third party defendant Larry Silber moves to dismiss the third party complaint for lack of personal jurisdiction and failure to state a cause of action. On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

Giving third party plaintiffs the benefit of every possible favorable inference, it is nonetheless clear that third party defendants' termination of the management agreement was not wrongful. Accordingly, third party defendant Larry Silber's motion to dismiss the third party complaint for failure to state a cause of action is **granted**.

So ordered.

Dated APR 16 2012


J.S.C.

ENTERED
APR 19 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE