

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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LANCASTER MANOR, LLC,  
LANCASTER MANOR REALTY, LLC,

Plaintiffs,

vs.

COMPREHENSIVE AT LANCASTER, LLC d/b/a  
SYMPHONY MANOR AT LANCASTER,  
BROADWAY LANCASTER REALTY, LLC,  
O'CONNELL AND ARONOWITZ, P.C.,

Decision & Order

Defendants.

Index #: 816027/2019

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COMPREHENSIVE AT LANCASTER, LLC d/b/a  
SYMPHONY MANOR AT LANCASTER,  
BROADWAY LANCASTER REALTY, LLC,

Third-Party Plaintiffs,

vs.

NEIL ZYSKIND, MARY AGNES MANOR, LLC,  
MARY AGNES MANOR, MANAGEMENT, LLC,  
MARY AGNES MANOR REALTY, LLC,  
MARY AGNES PARTNERSHIP, LP,  
LANCASTER MANOR, LLC,  
LANCASTER REALTY, LLC,  
O'CONNRL AND ARONOWITZ, P.C.,  
John Does 1-5, and Richard Roe Corporations 1-5,

Third-Party Defendants.

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LAZARUS & LAZARUS, P.C.  
Yvette J. Sutton, Esq., Of Counsel  
Attorneys for Plaintiff/Third Party  
Defendants

SCHLOSS & SCHLOSS, PLLC  
Jonathan B. Schloss, Esq., Of Counsel  
Attorney for Defendants/Third Party  
Plaintiffs  
Comprehensive at Lancaster LLC &  
Broadway Lancaster LLC

**Colaiacovo, J.**

Both Plaintiff/Third-Party Defendants and Defendants/Third-Party Plaintiffs have competing motions. Defendants/Third-Party Plaintiffs Comprehensive at Lancaster LLC (hereinafter “Comprehensive”) and Broadway Lancaster LLC (hereinafter “Broadway” or collectively incorporated with “Comprehensive”), in their Order to Show Cause, seek to, *inter alia*, discharge, vacate, and cancel a Notice of Pendency filed against real property owned by Broadway. Third-Party Defendants have moved to dismiss the Third-Party complaint.

#### **STATEMENT OF FACTS & PROCEDURAL HISTORY**

The complex procedural history of this case centers on a nursing home named Symphony Manor. In 2017, the New York State Department of Health

identified Symphony Manor as operationally “deficient”, which jeopardized the health and safety of its residents. As such, the State appointed Neil Zyskind to serve as a Temporary Operator pursuant to Public Health Law §2806-a. Thereafter, in November 2017, the Department of Health, Comprehensive, and Lancaster Manor LLC (hereinafter “Lancaster Manor”) entered into a Temporary Operator Agreement for Symphony Manor. It was understood, pursuant to the Temporary Operator Agreement, that the “Lancaster Defendants” would purchase the Plaintiff’s assets, operations, and the real property at Symphony Manor. See Affidavit of Neil Zyskind, ¶8, July 2, 2019. The parties then entered into an Asset Purchase Agreement and a Real Estate Purchase Agreement in December 2017. A deposit in the amount of \$350,000 was made to O’Connell & Aronowitz, who was the designated escrow agent. In addition to the Temporary Operator Agreement, Asset Purchase Agreement, and Real Estate Purchase Agreement, several addendums were executed which extended several deadlines contained therein.

In February 2018, Lancaster Realty sent a Notice of Defects to Plaintiff Broadway, which identified defects that totaled \$362,708.59. It has been alleged that Plaintiff did not respond to the notice nor did it make any repairs requested.

As a result, on July 2, 2019, Lancaster Manor sent a Notice of Termination of the purchase agreement and requested the deposit returned.

However, prior to the termination notice, Comprehensive and Broadway filed a Summons with Complaint in Rockland County, New York seeking to recover damages for several causes of action including, but not limited to, breach of contract, tortious interference with a contract, breach of good faith and dealing, tortious interference with prospective economic advantage, piercing the corporate veil, injunctive relief, and constructive trust against the escrow holder. Similarly, Comprehensive and Broadway sought to invalidate a Notice of Pendency filed on the property by Lancaster Manor. Thereafter, an action was filed by Plaintiffs in Erie County, New York. The Rockland County matters were subsequently transferred to Erie County, New York and the two actions were consolidated. Also, another term of the New York State Supreme Court denied a Motion to Dismiss filed by Comprehensive and Broadway. See Order & Transcript, Hon. Deborah A. Chimes, J.S.C., December 5, 2019.<sup>1</sup>

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<sup>1</sup> The motion to dismiss was heard before Justice Chimes on November 25, 2019. Justice Chimes denied the motion to dismiss. However, this Court signed the Order, which attached the transcript from Judge Chimes' decision.

## ARGUMENT

Plaintiffs/Third-Party Defendants seek to dismiss the Third-Party Complaint filed by Comprehensive and Broadway. More specifically, Lancaster Manor alleges that the breach of contract cause of action is defective as they fail to specify what provisions of the contract were breached. Further, Plaintiffs/Third-Party Defendants insist that the failure to identify which specific agreement, as opposed to simply referring them collectively as Agreements, was fatal. Also, Lancaster Manor submits that Comprehensive and Broadway cannot maintain its tortious interference claims since they themselves induced the breach. They also argue that the Breach of Good Faith and Fair Dealing cause of action is duplicative and cannot be maintained simultaneously. Further, Lancaster Manor alleges that absent a showing of malice, Comprehensive and Broadway cannot maintain their Tortious Interference with a Prospective Economic Advantage cause of action. Lastly, they insist that Comprehensive and Broadway have not demonstrated that the owners of Lancaster Manor acted in such a manner that would justify piercing the corporate veil. With respect to the Order to Show Cause, Lancaster Manor insists it possesses a valid argument to maintain the *lis pendens* on the property.

Comprehensive and Broadway maintain that they have sufficiently pled their nine causes of action. While they do concede that the causes of action do seemingly overlap, they argue they are not duplicative. Instead, each cause of action states a claim and those claims should be liberally construed. Regarding the motion to vacate the Notice of Pendency, Comprehensive and Broadway insist that a *lis pendens* is not appropriate as Plaintiffs were never in possession of the property nor do the agreements specifically provide for such a lien.

## DECISION

### I.

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), "[w]e 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." Leon v. Martinez, 84 N.Y.2d 83 (1994). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." Simkin v. Blank, 19 N.Y.3d 46 (2012). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of

recovery. See Basis Yield Alpha Fund [Master] v. Goldman Sachs Group, Inc., 115 A.D.3d 128 (1st Dept. 2014). "(T)he (CPLR 3211 [a] [7]) motion is useful in disposing of actions . . . in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action". Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137 (2017).

"Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." Rabos v. R&R Bagels & Bakery, Inc., 100 A.D.3d 849 (2<sup>nd</sup> Dept. 2012); See Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Christ the Rock World Restoration Church Intl., Inc. v. Evangelical Christian Credit Union, 153 A.D.3d 1226 (2nd Dept. 2017).

"The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages." Palmetto

Partners, L.P. v. AJW Qualified Partners, LLC, 83 A.D.3d 804 (2<sup>nd</sup> Dept. 2011).

Notwithstanding Lancaster Manors arguments, Comprehensive and Broadway have pled a valid cause of action. The specificity Plaintiffs seek in justifying their motion to dismiss the Third-Party complaint does not render the complaint defective. As such, Plaintiff's motion to dismiss the Breach of Contract cause of action is hereby DENIED.

Regarding the Good Faith and Fair Dealing cause of action, "[i]n New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002). However, as Plaintiff correctly notes, it is duplicative of the breach of contract claim and cannot be maintained simultaneously. DiPizio Construction Co. Inc. v. Niagara Frontier Transportation Authority, 107 A.D.3d 1565 (4<sup>th</sup> Dept. 2013). As such, the Plaintiff's motion to dismiss the Breach of Good Faith and Fair Dealing cause of action is hereby GRANTED.

As for the Tortious Interference with a Contract cause of action, “the elements of the tort of interference with contract are: (1) the existence of a valid contract, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and (4) damages.” White Plains Coat & Apron Co., Inc. v Cintas Corp., 8 N.Y.3d 422, 426 (2007). Here, Comprehensive and Broadway have failed to demonstrate any intention to procure the breach. As such, Plaintiff’s motion to dismiss the Tortious Interference with a Contract cause of action is hereby GRANTED. The claims against Zyskind should also be dismissed as well.

With respect to the Tortious Interference with a Prospective Economic Advantage, to prevail, “a Plaintiff must demonstrate that (a) the Plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship.” Zetes v. Stephens, 108 A.D.3d 1014 (4<sup>th</sup> Dept. 2013). The culpable conduct in question must have been directed not at Plaintiff, but rather at the party with which Plaintiff had or sought to have a relationship. See Carvel Corp. v. Noonan, 3 N.Y.3d 182, 192 (2004). Here, Comprehensive and Broadway have failed to demonstrate any malice or intent to inflict any injury. See KAM

Construction Corp. v. Bergey, 151 A.D.3d 1706 (4<sup>th</sup> Dept. 2017). Nothing improper, other than a business dispute, was alleged that would rise to the level of tortious interference with a prospective economic advantage. To that end, Plaintiff's motion to deny this cause of action is hereby GRANTED.

Regarding the cause of action seeking to pierce the corporate veil, "generally, a Plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." Conason v. Megan Holding, LLC, 25 N.Y.3d 1 (2015). See also TNS Holdings v. MKI Sec. Corp., 92 N.Y.2d 335 (1998). The Plaintiff bears a "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences". At the pleading stage, "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation." East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 16 N.Y.3d 775 (2011). The Plaintiff must adequately allege the existence of a corporate obligation and that defendant "exercised complete

domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice." Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135 (1993). The burden is so great to pierce the corporate veil that mere allegations or conclusions will not suffice. Here, the complaint is vague and lacking any reference to abuse, perversion, intentional injury, or fraud that would give this Court pause to consider the dramatic relief Comprehensive and Broadway now seek. They have failed to satisfy that showing. As such, Plaintiff's motion to dismiss this cause of action is hereby GRANTED.

The causes of action for injunctive relief is a drastic remedy which should only be considered if a Plaintiff can demonstrate irreparable harm absent the injunction. No injunction has been granted by either of the other two Supreme Court Justices that were assigned to this matter. Further, Comprehensive and Broadway have failed to demonstrate any other adequate remedy at law. Pittsford Canalside Props., LLC v. Pittsford Vil. Green, 154 A.D.3d 1303 (4<sup>th</sup> Dept. 2017). The adequate remedy here, which Third-Party Plaintiffs have asserted in their complaint, is money damages. As such, the motion to dismiss this cause of action is hereby GRANTED.

Declaratory Relief to direct the down payment be released is misplaced. Third-Party Plaintiffs have failed to state a claim for declaratory relief. "A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action." Apple Records v. Capitol Records, 137 A.D.2d 50 (1st Dept. 1988). A Plaintiff "may not seek a declaratory judgment when other remedies are available, such as a breach of contract action." Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355 (1st Dept. 2006). The declaratory relief that Plaintiffs seek is either duplicated in its other causes of action or is not contested (for example, that the Agreement was lawfully terminated), evidencing the lack of a justiciable controversy. Matter of Gates v. Hernandez, 26 A.D.3d 288 (1st Dept. 2006); Bitsight Tech., Inc. v. Securityscorecard, Inc., 2016 NY Slip Op 30138(U). Accordingly, the Third-Party Defendants' motion to dismiss this cause of action is hereby GRANTED.

Regarding the cause of action seeking to impose a constructive trust, it may only be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest." Sharp v. Kosmalski, 40 N.Y.2d 119 (1976), quoting Beatty v. Guggenheim Exploration Co., 225 N.Y. 380 (1919); see Simonds v. Simonds, 45 N.Y.2d 233

(1978); Rowe v. Kingston, 94 A.D.3d 852 (2<sup>nd</sup> Dept. 2012). The elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. See Sharp v. Kosmalski, 40 N.Y.2d 119 (1976); Quadrozzi v. Estate of Quadrozzi, 99 A.D.3d 688 (2<sup>nd</sup> Dept. 2012); Rowe v. Kingston, 94 A.D.3d 852 (2<sup>nd</sup> Dept. 2012); Poupis v. Brown, 90 A.D.3d 881 (2<sup>nd</sup> Dept. 2011). The Court finds that Comprehensive and Broadway have not satisfied their burden to demonstrate this cause of action. As such, this motion to dismiss must also be GRANTED.

Lastly, with respect to attorneys' fees, as a general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule." A.G. Ship Maintenance Corp v. Lezak, 69 N.Y.2d 1 (1986). In its complaint, Comprehensive and Broadway simply allege that prevailing parties are entitled to attorneys' fees and that they have incurred legal fees which the Plaintiffs are obligated to pay. Third-Party Plaintiffs have failed to show any provision of any agreement wherein it is even suggested that there is a contractual obligation that attorneys' fees are to be directed. As such,

Third-Party Plaintiffs have failed to demonstrate a valid cause of action. Therefore, Plaintiffs motion to dismiss this cause of action is hereby GRANTED.

## *II.*

In its Order to Show Cause, Comprehensive and Broadway seek to vacate the Notice of Pendency filed against the real property of Broadway Lancaster Realty LLC. By way of background, Lancaster Manor filed a Notice of Pendency on August 22, 2019 against properties known as 5547 Broadway Street, Lancaster, New York and 3 Huntley Drive, Lancaster, New York.

Subsequent to the filing of the Rockland County action, Lancaster Manor filed an action in Erie County seeking, *inter alia*, damages for breach of the contract and a judgment for the return of the deposit and foreclosure of the common law contract vendee's lien against the property. The Notice of Pendency was filed the same date as the Erie County action.

Lancaster Manor justified the filing of the Notice of Pendency in response to the filing of the Rockland County action. In correspondence between counsel, Lancaster Manor stated,

“The Real Estate Purchase Agreement §8.01 entitled seller to retain the Deposit as liquidated damages in the event of a Buyer default.

However, Seller improperly filed the Rockland County Action for monetary damages amongst other things, in lieu seeking to retain the Deposit as liquidated damages. [sic] In doing so, Seller waived the right to keep the Deposit. For so long as Seller improperly maintains its Rockland County Action as well as the Deposit in escrow, Buyer is entitled to maintain a notice of pendency on the Property.

See Affidavit of Yvette J. Sutton, Esq., Exhibit 1, dated November 1, 2019.

It should be noted that the Rockland County action was consolidated with the Erie County actions. As such, the partial justification of imposing the Notice of Pendency no longer applies. It is undisputed that the escrow agent continues to hold the deposit. Both parties can seek damages for the alleged breach of the contract. To that end, maintaining the lien seems misplaced as affecting the title or interest in the property would appear outside the scope of the pending actions. *A lis pendens* is not to be used to gain leverage in what is otherwise a dispute between two adverse parties.

The Court agrees with Comprehensive and Broadway that there exists no agreement that there was to be a lien on the property in the event of a breach. The agreements clearly provide for the right to seek liquid damages, but no right to a lien. See generally Scivoletti v. Marsala, 61 N.Y.2d

806 (1984); M&T Joint Venture Inc. v. Laurus Master Fund Ltd., 12 N.Y.3d 798 (2009); Lee v. Ciaramella, 2010 NY Slip Op 33975(U).

While Comprehensive and Broadway seek attorneys' fees as a result of the filing, to do so would ignore the wild chase they initiated by commencing an action in an unrelated county, which without question, necessitates legal fees. As such, the Court hereby GRANTS the motion to vacate the Notice of Pendency but DENIES request for attorneys' fees.

However, the Court directs that the escrow agent, O'CONNELL & ARONOWITZ, PC retain the deposit until further order from this Court.

This shall constitute the Decision & Order of the Court. Plaintiff shall file Notice of Entry. The Court hereby schedules the matter for a status conference on July 27, 2020 at 10:30 a.m.



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Hon. Emilio Colaiacovo, J.S.C.

DATED: May 14, 2020  
Buffalo, New York  
GRANTED