Maccabi Mgt. LLC v Cavan 2356 LLC
2016 NY Slip Op 30451(U)
February 11, 2016
Supreme Court, Bronx County
Docket Number: 304744/2013
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 304744/2013**

Maccabi Mgmt LLC, as assignee of
Arash Merabi
Plaintiff,

-against-

Cavan 2356 LLC et al.,

Defendants.
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DECISION and ORDER

Present:

Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of Defendant Shawn M. Curry's motion, pursuant to CPLR 3211 (a)(7), to dismiss all causes of action asserted against him.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Memorandum of Law	**2**
Affirmation in Opposition & Exhibits	**3**
Reply Memorandum of Law	**4**

The instant action arises out of an Agreement of Sale ("the Agreement") to purchase the premises located at 2356 Lorillard Place, Bronx, NY ("2356 Lorillard") entered into between Arash Merabi (buyer) and Defendant Cavan 2356 LLC (seller) on or about August 31, 2012. Shawn M. Curry, the sole member of Cavan 2356 LLC ("Cavan"), executed the Agreement on behalf of Cavan. In October of 2012, Arash Merabi assigned his rights and obligations as purchaser under the Agreement to Plaintiff Maccabi Mgmt LLC ("Maccabi"). By Assignment dated December 5, 2013 (the "Assignment"), Curry assigned his membership interest in Cavan to Defendants F&M Funding LLC ("F&M Funding"), Frank G. Palazzolo ("Frank") and/or their designee. The Assignment provides, *inter alia,* that the assignee "shall have sole liability for all obligations arising from and/or relating to the ownership and/or operation of" 2356 Lorillard. The Assignment also provides that the assignor "shall indemnify and defend the assignee from and against all such obligations."

Defendant Curry now moves for an Order, pursuant to CPLR 3211 (a)(7), dismissing all causes of action asserted against him in the Amended Complaint.

The Amended Complaint alleges, *inter alia,* that: Despite repeated demands, Cavan has "failed and/or refused to schedule a closing" for the sale of 2356 Lorillard and Cavan "has indicated that it was unable and/or unwilling to close the transaction." F&M Funding and Defendant Bronx VIII LLC ("Bronx VIII") claim an interest adverse to that of Cavan and Plaintiff in 2356 Lorillard based upon a "Sundry Agreement," dated August 13, 2012, and an "Option Agreement," dated April 5, 2012, each between F&M Funding and Bronx VIII. Pursuant to those agreements, F&M Funding purports to grant Bronx VIII an option to purchase 2356 Lorillard together with two other real properties. Bronx VIII was required to exercise its option to purchase the properties in writing prior to August 1, 2012. Bronx VIII "did not timely exercise its option to buy the property or had canceled and vacated its exercise of such purported option." Because the owner of 2356 Lorillard, Cavan, was not a party to either agreement, neither agreement constitutes a cloud on title to permit Cavan to terminate its agreement to sell 2356 Lorillard to Plaintiff.

The fifth, sixth, seventh and eighth causes in the Amended Complaint are asserted against F&M Funding, Frank, Mary R. Palazzolo ("Mary") and Curry. The fifth cause of action, titled Tortious Interference With Contract, alleges that: Plaintiff had a valid contract with Cavan for the sale and purchase of 2356 Lorillard. Prior to the transfer by Curry of his interest in Cavan, Frank, Mary, F&M Funding and Curry were aware that 2356 Lorillard was the subject of a contract of sale between Cavan and Plaintiff. Frank, Mary, F&M and Curry were also "aware or reasonably should have been aware" that neither the Sundry Agreement nor the Option Agreement constituted a "valid encumbrance on 2356 Lorillard or a cloud on title or an impediment to closing." Frank, Mary, F&M Funding and Curry "have wrongfully and intentionally used the existence . . . of the Sundry Agreement and Option Agreement to deprive the plaintiff of the benefit of its bargain." Rather than "properly permitting CAVAN to abide by the terms of the Agreement of Sale and close the transaction, Frank, Mary, F&M Funding and Curry have "intentionally procured CAVAN's breach of the contract and/or tortiously interfered with the Agreement of Sale." Their actions constitute "an intentional interference with the

Agreement of Sale." Such actions "were willfully and knowingly undertaken by" Frank, Mary, F&M Funding and Curry "in violation of plaintiff's rights in the subject premises."

The sixth cause of action, titled Conspiracy and Aiding and Abetting Breach of Contract, alleges that: Frank, Mary, F&M Funding and Curry have "wrongfully conspired together, in violation of the rights of plaintiff, to prevent the transfer of title to the subject premises to plaintiff" and have "further aided and abetted CAVAN in breaching the Agreement of Sale." As a result, Plaintiff is entitled to damages "flowing therefrom."

The seventh cause of action, titled Waste, alleges that: Cavan, Frank, Mary, F&M Funding and Curry "have caused, permitted and/or allowed CAVAN to default or fail to make its payments or meet its obligations under a certain mortgage or mortgages affecting the subject premises." Cavan, Curry, F&M Funding, Bronx VIII and the Plaintiff are named defendants in a foreclosure action related to 2356 Lorillard pending in Supreme Court, Bronx County. As a result of Cavan's alleged default, including interest on the principal balance at a default rate of 24% per annum, "the subject premises has and continues to suffer waste." In addition, Cavan, Frank, Mary, F&M Funding and Curry have "permitted complaints, violations and/or fines to accrue against the subject premises without taking reasonable steps to avoid, remedy or cure same." Cavan, Frank, Mary, F&M Funding and Curry have also "failed to properly manage, maintain, care for and/or repair the subject premises as the need has arisen." Cavan, Frank, Mary, F&M Funding and Curry have been collecting and continue to collect rents from the tenants of 2356 Lorillard. And, Cavan, Frank, Mary, F&M Funding and Curry "have otherwise committed waste and neglect of the subject premises, all to the detriment of the plaintiff."

The eighth cause of action, titled Unjust Enrichment, "repeats, reiterates and realleges" each and every allegation contained in the prior paragraphs of the Amended Complaint and adds that: "By reason of the foregoing, Cavan, Frank, Mary, F&M Funding and Curry have been unjustly enriched at the expense of the plaintiff. Accordingly, Cavan, Frank, Mary, F&M Funding and Curry are liable to plaintiff for all damages flowing therefrom."

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I. Tortious Interference With Contract

A cause of action for tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. *See Lama Holding Company v. Smith Barney Inc.*, 88 N.Y.2d 413, 424, 668 N.E.2d 1370 (1996). A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard. *See Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 269 A.D.2d 103, 109-110, 744 N.Y.S.2d 384 (1st Dept. 2002). The failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action. *See Bonanni v. Straight Arrow Publs.*, 133 A.D.2d 585, 587, 520 N.Y.S.2d 7 (1st Dept. 1987). Here, to the extent that the amended complaint alleges that the reason Cavan refused to sell 2356 Lorillard is due to a cloud on title based on the Sundry Agreement and/or the Option Agreement, it is bereft of any factual allegations that Curry was aware of the existence of either the Sundry or the Option Agreement. Notably, the amended complaint alleges that Cavan was not a party to either agreement and there are no factual allegations that Curry played any role in the making of either agreement. And, other than the assignment of his interest in Cavan to F&M Funding and Frank Palazzolo, there are no factual allegations that Curry had any relationship with either F&M Funding, Frank Palazzolo or Bronx VIII. The mere fact that Curry assigned his interest in Cavan to F&M Funding and Frank Palazzolo in December of 2013, more than a year after the Sundry and Option agreements were allegedly entered into, is insufficient to support an inference that Curry was either aware of those agreements or that he participated in any way in the making of those agreements. Nor are any specific facts alleged that Curry wrongfully and intentionally participated in the alleged breach of the Agreement of Sale by Cavan. Indeed, given that under the Assignment Curry is obligated to defend and indemnify F&M Funding and

Frank Palazzolo from and against all obligations related to the ownership and/or operations of 2356 Lorillard, it would not be in his interest to induce a breach of the Agreement of Sale. As such, the amended complaint falls far short of satisfying the enhanced pleading requirements to hold Curry responsible for the alleged breach of the Agreement of Sale by Cavan.

II. Conspiracy and Aiding and Abetting Breach of Contract

A claim of conspiracy (and aiding and abetting) does not constitute a substantive tort and may be alleged only to connect a defendant to an otherwise actionable tort. *See Chemical Bank, v. Ettinger,* 196 A.D.2d 711,715, 602 N.Y.S.2d 332 (1st Dept. 1993); *Monsanto v. Electronic Data Sys. Corp.,* 141 A.D.2d 514, 515, 529 N.Y.S.2d 512 (2nd Dept. 1988). Thus, the conspiracy and aiding and abetting breach of contract claim must fail because of the failure of the tortious interference with contract cause of action. Even if the tortious interference claim survived, the bare, conclusory allegations that Curry "wrongfully conspired" and "aided and abetted" Cavan in breaching the Agreement of Sale are insufficient to state a cause of action against Curry. *See Gertler v. Goodgold,* 107 A.D.2d 481, 487 N.Y.S.2d 565 (1st Dept. 1985).

III. Waste

New York courts have recognized two general categories of waste with respect to real property, namely, a substantive cause of action for waste against one in control of real property who allows the property to deteriorate and decrease in value and a cause of action for waste by a mortgagee against a mortgagor who impairs the mortgage. *See The Travelers Ins. Co. v. 633 Third Associates,* 14 F.3d 114 (2nd Cir. 1994). However, "corporate officers are not liable for nonfeasance; they are liable for misfeasance, or malfeasance." *See Joseph Michaels v. Lispenard Holding Corp.,* 11 A.D.2d 12, 14, 201 N.Y.S.2d 611. And, the First Department has determined that negligence in the maintenance of a building is "nothing more than nonfeasance," for which a corporate officer bears no liability. *See Robles v. Palazzolo Realty Corp.,* 66 A.D.3d 417, 418, 886 N.Y.S.2d 388 (1st Dept. 2009). Here, Plaintiff alleges that Curry caused or allowed Cavan to default on its mortgage, that a foreclosure action is pending in which Curry is a named defendant, that Curry failed to properly manage the building and that Curry permitted complaints, violations and/or fines to accrue against the building. Without any specific factual

allegations as to conduct of Curry which might constitute misfeasance or malfeasance, the amended complaint fails to state a cause against Curry for waste.

III. Unjust Enrichment

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *See Paramount Film Distrib. Corp. v. State of New York,* 30 N.Y.2d 415, 421 (1972). Here, there are no allegations that Curry has retained anything that Plaintiff seeks to recover. The court also notes that, in opposition to the motion, Plaintiff submitted the affidavit of Frank Palazzolo which was submitted in an unrelated matter brought by Palazzolo against Curry in Westchester County. In his affidavit, Palazzolo alleges that the assignment of Curry's interest in Cavan was part of a settlement reached in December of 2013 in the Westchester County action. However, the connection between the assignment and the settlement in the Westchester County matter and the instant matter is too attenuated to demonstrate that Curry was unjustly enriched at the expense of Plaintiff. Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal. *See Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465.

To the extent that Plaintiff seeks leave to replead, such application is denied. Plaintiff has not submitted evidence sufficient to establish that Plaintiff may maintain a cause of action against Curry.

Based on the foregoing, Curry's motion, pursuant to CPLR 3211 (a)(7), for an order dismissing all causes of action asserted against him in the Amended Complaint, is granted in its entirety.

Dated: Bronx, New York
February 11, 2016

Hon. Julia I. Rodriguez, J.S.C.