

Blue Chip Emerald LLC v Allied Partners Inc.

2004 NY Slip Op 30088(U)

June 4, 2004

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: NEWMAN CASE
Justice

PART 49

Blue Chips

INDEX NO. 601415/01

MOTION DATE 9/8/03

- v -

MOTION SEQ. NO. 004

Allied Partners

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	_____
Answering Affidavits – Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUN 08 2004

OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/4/04

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

x

BLUE CHIP EMERALD LLC, 57TH STREET EMERALD
LLC, ISAAC RAYMOND ASSOCIATES LLC, and
TRINA SULTAN,

Plaintiffs,

Index No. 601415/01

-against-

DECISION AND ORDER

ALLIED PARTNERS INC., CEPPETO HOLDING
ENTERPRISES LLC, CEPPETO CORP., 57TH STREET
HOLDING CO. LLC, ERIC HADAR, RICHARD HADAR,
ROBERT GKOSSMAN, and OLSHAN GRUNDMAN FROME
ROSENZWEIG & WOLOSKY LLP,

Defendants.

-----x
ALLIED PARTNERS INC., CEPPETO HOLDING
ENTERPRISES LLC, CEPPETO CORP., 57TH STREET
HOLDING CO. LLC, ERIC HADAR, and RICHARD
HADAR,

Counterclaim Plaintiffs,

-against-

BLUE CHIP EMERALD LLC, 57TH STREET EMERALD
LLC, ISAAC RAYMOND ASSOCIATES LLC, and
TRINA SULTAN, ALBERT CHEHEBAR, JACK
CHEHEBAR, JOSEPH CHEHEBAR, ISAAC SHEHFAH,
RAYMOND GINDI, ISAAC GINDI, EZRA SULTAN,

Counterclaim Defendants.

-----x
ALLIED PARTNERS INC., CEPPETO HOLDING
ENTERPRISES LLC, CEPPETO CORP., 57TH STREET
HOLDING CO. LLC, ERIC HADAR, and RICHARD
HADAR,

Third-Party Plaintiffs,

-against-

PHILIP PILEVSKY, DAVID SEGAL, PL 57 LLC and
PHILIPS INTERNATIONAL GROUP, INC.,

Third-Party Defendants.
-----x

FILED

JUN 02 2004

CLERK OF THE COURT
JULIUS ROSENBLUTH
CLERK OF THE COURT
CLERK OF THE COURT

[*3]
Cahn, J.

Motion sequence nos. 004, 005 and 006 are consolidated for disposition.

In motion sequence 004, plaintiffs move to dismiss the counterclaim interposed by defendants Robert Grossman and the law firm of Olshan Grundman Frome Rosenzweig & Wolosky LLP (collectively, Olshan), for failure to state a cause of action, CPLR 3211 (a) (7).

In motion sequence 005, counterclaim defendants move to dismiss the counterclaims interposed by counterclaim plaintiffs Allied Partners Inc., Ceppetto Holding Enterprises LLC, Ceppetto Corp., 57th Street Holding Co. LLC, Eric Hadar and Richard Hadar (collectively, the Hadars), for failure to state a cause of action, CPLR 3211 (a) (7).

In motion sequence 006, the third-party defendants move to dismiss the Hadars' third-party action, on the basis of documentary evidence, CPLR 3211 (a) (1).

On October 10, 2001, the court granted defendants' motions to dismiss the complaint, CPLR 3211 (a) (1), (5), (7). That decision was reversed by the Appellate Division, First Department, and the complaint was reinstated to the extent not previously withdrawn by stipulation (*Blue Chip Emerald LLC v Allied Partners, Inc.*, 299 AD2d 278 [1st Dept 2002]).

* 4]

FACTUAL AND PROCEDURAL SUMMARY

The facts are succinctly stated in the Appellate Division's decision, 299 AD2d 278, as follows:

Plaintiff Blue Chip Emerald LLC, which is owned by the three other plaintiffs bringing this action (collectively BCE), held an interest of approximately 50% in a joint venture known as Ceppetto Enterprises LLC (the Venture). The remainder of the venture was owned by its managing member, defendant Ceppetto Holding Enterprises LLC, the principals of which are defendants Eric Hadar and Richard Hadar (collectively with the other defendants controlled by the Hadars, the Hadar defendants). The Venture's sole substantial asset was the commercial building located at One East 57th Street in Manhattan (the Property). Eight months after the formation of the Venture and its purchase of the Property, BCE sold its interest therein to the Hadar defendants for a price based on an \$80 million valuation of the Property. Two weeks later, the Hadar defendants entered into a contract to sell the Property to a third party (LVMH) for \$200 million.

BCE previously stipulated to the dismissal of its equitable claims, such that the remaining claims in the main action sound in fraud and breach of fiduciary duty against all defendants, and in legal malpractice against Olshan. Plaintiffs also consented to the closing of the sale of the Property to LVMH.

Plaintiffs allege that the Hadars induced them to sell their interest in the Venture for an unfairly low price by misrepresenting the discussions the Hadars were then conducting with third parties for the purpose of selling or leasing the Property. Among other alleged misrepresentations, the Hadars allegedly failed to disclose or misrepresented to BCE both the true price range of their negotiations with LVMH for a sale of

the Property, and the alleged existence, as of the date BCE sold its interest, of LVMH's oral agreement to purchase the Property for \$200 million.

The defendants argued that the complaint should be dismissed because paragraphs 6.2 and 6.3 of the Buy-Out Agreement expressly and unambiguously negated the allegations of the complaint. Paragraph 6.2 (iii) (Notice of Motion [3/4/03] Ex. C) contains a representation that the buyer and the Hadars "have not had any material discussions concerning the operation, leasing, sale and/or valuation of the Property to the date hereof other than to the persons and/or entities as set forth in Exhibit B." LVMH, the ultimate purchaser of the Property, was one of the entities listed in Exhibit B.

Paragraph 6.3 states, in part.:

Except as expressly set forth herein, neither Buyer, Seller, Holding nor the Venture has made and such parties do not make any representations or warranties as to... (x) The actual or projected value of the Property for sale or leasing or to any other matter affecting or related to the Property, and Seller and Buyer hereby expressly acknowledge that except as set forth in Section 6.2(a)(iii) no such representations have been made. Except for a breach of the representations set forth in Section 6.2(a)(iii), Seller and Holding specifically disclaim any claim for fraud, breach of loyalty or fiduciary duty arising out of their relationship as members of the Venture. As of the Closing, Seller shall specifically disclaim any claim for any interest in the profits, losses, cash, distributions ... or other assets in the Venture, or from the future value of the Venture or the Property, except to the extent following the Closing, Seller shall be entitled to damages as a result of a breach of Seller's representations under Section 6.2(a)(iii)

[6]

hereof... Seller has been afforded an opportunity to conduct its own due diligence with respect to the persons or entities listed on Exhibit B and is satisfied with the information made available to it. Seller acknowledges that after Closing Buyer may resell Seller's Interest, or cause the sale or lease of all or part of the Property to another person or entity, including without limitation, those set forth on Exhibit B, for a profit, and Seller shall have no interest whatsoever therein nor any claim relating thereto, except only if (i) Seller sells or leases the Property to a person or entity not set forth on Exhibit B and (ii) the representation set forth in 6.2(a)(iii) was untrue when made.

In light of these representations and disclaimers, this court dismissed the complaint in its entirety. The Appellate Division reversed on the law, stating that the "key fact." that this court overlooked was that the Hadars "as co-venturers and, in particular, as managing co-venturers, were fiduciaries of BCE in matters relating to the Venture until the moment the buy-out transaction closed, and therefore 'owe[d] [BCE] a duty of undivided and undiluted loyalty . . .'" (*Blue Chip Emerald LLC, supra*, 299 AD2d at 279 [quoting *Birnbaum v Birnbaum*, 73 NY2d 461, 466 (1989)] [additional citations omitted].)

The Appellate Division stated that "when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make 'full disclosure' of all material facts." (299 AD2d at 279.) "Stated otherwise, the fiduciary is obligated in negotiating such a transaction to disclose any information that could reasonably

* 7]

bear on the beneficiary's consideration of the fiduciary's offer." (Id. [quoting *Dubbs v Stribling & Assocs.*, 96 NY2d 337, 341 (2001)].) "Absent such full disclosure, the transaction is voidable." (299 AD2d at 279-80.)

In connection with the buy-out, the parties entered into two general releases on November 1, 2000. Pursuant to one of the releases (the BCE Release), BCE released the Hadars and others, including Olshan, from any claim which BCE:

ever had, now have, or hereafter can, shall, or may have for, upon, or by reason of any matter, cause, or thing whatsoever, whether known or unknown to **RELEASORS** from the beginning of the world to the date of this **RELEASE**, excluding however, all rights of the Releasers and obligations of the Releasees under the agreement being entered into on even date between Blue Chip Emerald LLC and 57th Street Holding Co. LLC.

(Notice of Motion [3/4/03] Ex. D.)

Pursuant to the other release (the Hadar Release), the Hadars released BCE, the counterclaim defendants and one of the third-party defendants, and others using virtually the same language as that quoted above from the BCE Release (Notice of Motion [5/23/03] Ex. 5).

The Appellate Division held that: the BCE Release was "ineffective to bar this action at the pleading stage," stating that "[i]n sum, a fiduciary cannot by contract relieve itself of the fiduciary obligation of full disclosure by withholding the very information the beneficiary needs in order to make a reasoned judgment whether to agree to the proposed contract."

(*Blue Chip Emerald LLC, supra*, 299 AD2d at. 280.) The Court also reinstated the fraud and breach of fiduciary duty claims, as well as the legal malpractice claim, against Olshan.

After that decision was rendered, Olshan asserted a counterclaim against BCE, the Hadars asserted counterclaims against BCE and others, and the Hadars brought a third-party action against other parties involved in the transactions at issue. The three motions now at issue address those counterclaims and the third-party complaint.

MOTION SEQ. NO. 004

BCE seeks dismissal of Olshan's counterclaim. That counterclaim alleges that BCE breached the BCE Release by asserting meritless claims relating to the buy-out that BCE had previously released and agreed to waive. Olshan argues that it is entitled to damages, including attorneys' fees and other costs and expenses of this action, as a result of BCE's alleged breach of its Release.

In moving to dismiss, BCE refers to the appellate decision, which held that the BCE Release and the waivers contained in the Buy-Out Agreement were ineffective against the specific claims BCE alleged. BCE complains that Olshan has simply reconstituted an already rejected defense into the form of a counterclaim, and that, for the reasons set forth in the appellate decision, the counterclaim should be similarly rejected.

BCE further argues that even if its release provided a legally viable defense to the specific misconduct alleged, it nevertheless does not provide an affirmative right to reimbursement for litigation costs and fees incurred in the exercise of that defense, because such expenses cannot be recovered in a lawsuit unless such an award is explicitly and unambiguously agreed upon by the parties. The BCE Release does not contain any such agreement.

Olshan replies that it is not precluded from the damages it seeks, because the costs and expenses of defending this lawsuit are part of the "natural and probable consequences" of BCE's breach. Olshan further argues that the appellate reinstatement of BCE's claim; is not a bar to the counterclaim, because the Appellate Division merely held that the BCE Release could not work to bar BCE's claims "at the pleadings stage." According to Olshan, the fact that BCE's claims were properly pleaded does not establish the invalidity of the BCE Release as a matter of law, and thus, Olshan may bring a claim for its enforcement.

In further support of the motion to dismiss Olshan's counterclaim, BCE argues that although the Appellate Division held that the pleadings were sufficient, the reasoning of the Court establishes a controlling rule for this litigation; to wit, that the claims alleged by BCE are outside the releases and waivers: being pressed in defense. Thus, BCE asserts that if it

proves the allegations in the complaint, it will prevail, notwithstanding any terms of the Buy-Out Agreement or the BCE Release. BCE states that if it does not prove its allegations, its claims will falter because of lack of proof, not because the statement of those claims violated the BCE Release.

The Appellate Division has clearly recited and found the law in this action, that is, that the three causes of action brought by BCE against Olshan are outside of the BCE Release. If, as BCE alleges, the defendants did not meet their obligation to fully disclose the relevant information, then, as the Appellate Division stated, the Buy-Out Agreement and the BCE Release are voidable. Thus, Olshan's counterclaim could only possibly apply if it is later determined that the defendants fully disclosed the relevant information to BCE, such that BCE would therefore fail to prove its causes of action.

Even then, however, Olshan would not be entitled to assert that BCE breached its Release, because the claims BCE now asserts are outside the scope of those covered by that release, as they go to the question of whether the BCE Release is voidable or valid,

Furthermore, Olshan is not entitled to recover attorneys' fees and litigation costs, because the winning party in a lawsuit is not entitled to recover such costs "unless such an award is authorized by agreement between the parties, statute, or court.

rule." (*American Motorists Ins. Co. v Trans Intl. Corp.*, 265 AD2d 280, 281 [2d Dept 1999].) This rule also applies as to litigation costs incurred in the context of the breach of a release agreement. (*See, e.g., Knoll v Equinox Fitness Clubs*, 2003 WL 23018807 [SD NY, Dec. 22, 2003]). There was no agreement among the parties permitting recovery of such fees and costs. It is not BCE's complaint or motion which was frivolous.

Therefore, BCE's motion to dismiss Olshari's counterclaim is granted.

MOTION SEQ. NOS. 005 AND 006

In motion sequence no. 005, counterclaim defendants seek dismissal of the counterclaims interposed by the Hadars, which sound in fraudulent inducement, breach of contract and indemnification. In motion sequence no. 006, third-party defendants Philip Pilevsky, David Segal, PL 57 LLC and Philips International Group, Inc. (collectively, the Pilevsky Group) move to dismiss the third-party complaint on the basis of documentary evidence. The counterclaims and the third-party complaint contain many of the same allegations against the counterclaim defendants and the third-party defendants (collectively, the Blue Chip Group). Some additional claims are brought against the third-party defendants.

The Hadars allege that the Blue Chip Group participated in a fraudulent scheme to deprive them of the opportunity to own,

control and redevelop the Property. They assert that, when the Blue Chip Group's efforts to force the Hadars to relinquish their interest in the Property failed, Pilevsky and Segal, acting for themselves and as agents for the rest of the Blue Chip Group, fraudulently induced the Hadars to purchase BCE's interest at an enormous profit to BCE. This was allegedly accomplished by falsely representing that BCE would not thereafter interfere with the Hadars' efforts to redevelop, rent or sell the Property. The Hadars argue that the Blue Chip Group's interference with the Hadars' control of the Property, despite their promises, has led to the claims brought against the Hadars in this action.

The Hadars allege that the Blue Chip Group: (1) fraudulently induced them to enter into the Operating Agreement; (2) fraudulently induced them to enter into the Buy-Out Agreement, in which the Hadars bought out the Blue Chip Group's interest in the Venture; (3) breached the terms of both contracts; (4) breached fiduciary duties owed to the Hadars; and (5) are liable to the Hadars for indemnification under the Buy-Out Agreement.

If these motions are granted, the Hadars seek leave to replead, CPLR 3211 (c), to set forth in greater detail allegations concerning the Blue Chip Group's pre-contractual representations concerning the Operating Agreement and the Buy-Out Agreement, and, as to the third-party defendants, a certain consulting agreement they entered into.

The Hadars argue that Blue Chip Group owed them fiduciary obligations under the Operating Agreement. They maintain that the Blue Chip Group bears the same duties that BCE seeks to impose on the Hadars in the main action, and that the allegation of such duties entitles the Hadars to the same inferences on which BCE relied in defending its own complaint. The Hadars argue that one claim infuses the entirety of the counterclaims and third-party complaint, in that they all allege the essential elements of a claim for breach of fiduciary duty. The Hadars maintain that the claims they assert are to be judged by the same pleadings standards that the Appellate Division adopted in reinstating the claims in the complaint.

The Blue Chip Group argues that, with respect to the formation and operation of the Venture, the Hadars allege that the Blue Chip Group misrepresented its intention to go forward with the business plan proposed by them, and objected to that plan after the Venture was formed. The Hadars allege that these misrepresentations fraudulently induced the Operating Agreement, and that subsequent unauthorized objections by BCE breached the Operating Agreement.

The Blue Chip Group asserts that the Operating Agreement explicitly provided them with the right to take the positions and actions that they took. They further argue that, in the Hadar Release, the Hadars released them from any claims arising out of

this alleged misconduct. They state that, unlike the previously undisclosed material facts which underlie BCE's claims against the Hadars, the conduct alleged in support of the Hadars' claims was open and known to the Hadars at the time they executed the Buy-Out Agreement and the Hadar Release. The Blue Chip Group further maintains that because the Hadars never had to execute their business plan, and, instead, sold the Property for a much larger profit immediately after buying out BCE, the Hadars fail to allege that the Blue Chip Group's purported misconduct caused them any damage.

The Hadars also allege that the Blue Chip Group fraudulently induced the Buy-Out Agreement by promising to abide by its terms and then breaching that agreement by bringing the instant action.

Counterclaim defendants are entitled to dismissal of the counterclaims brought against them (motion seq. no. 005). The key fact upon which the Appellate Division reinstated the complaint is not present in the allegations set forth in the counterclaims, as BCE did not fail to fully disclose any material facts to the Hadars. Thus, the Hadar Release and the waivers entered into by the parties are valid and enforceable as against the Hadars.

As for motion sequence no. 006, Pilevsky's supporting affidavit states that Segal does not share, directly or indirectly, in any profits of PL 57 LLC, Philips International

Group, Inc., or any other enterprises or businesses in which Pilevsky has or had interests. He states that Segal is simply his attorney. Thus, Pilevsky argues, whether or not the claims against him and his entities in the third-party complaint are dismissed, the allegations and claims about, and against, Segal are baseless and should be dismissed.

The Pilevsky Group states that the essence of the counterclaims and the third-party complaint is that the members of the Blue Chip Group were engaged in a conspiracy by which they could ultimately "steal" the Property from the Hadars. According to the Pilevsky Group, the Hadars allege that they were tricked into admitting BCE into the Venture, and they were again tricked into buying out BCE's interests in the Venture. Those causes of action are dismissed as against the counterclaim defendants, on the basis of the Hadar Release entered into on November 1, 2000. Although PL 57 LLC is the only one of the third-party defendants specifically named as a releasee in the Hadar Release, the remaining third-party defendants are also covered by this release, based on the broad language that applies the Hadar Release also to the Releasees' "past and present members, shareholders, directors, officers, employees, subsidiaries, affiliates, representatives, agents, attorneys, successors, heirs, executors, assigns, administrators, transferees, and successors in interest." This language covers the third-party

defendants, and for reasons similar to those set forth for dismissal of the counterclaims in motion sequence no. 005, the third-party complaint is also dismissed.

Accordingly, it is

ORDERED that the motion to dismiss the Olsan counterclaim (motion seq. no. 004) is granted, and said counterclaim is dismissed; and it is further

ORDERED that the motion to dismiss the counterclaims interposed by the Hadars (motion seq. no. 005) is granted, and said counterclaims are dismissed; and it is further

ORDERED that the motion to dismiss the third-party action (motion seq. no. 006) is granted, and the third-party complaint is dismissed; and it is further-

ORDERED that the remainder of the action shall continue.

Dated: June 4, 2004

ENTER :

J.S.C.

FILED
JUN 08 2004
NEW YORK
COURT CLERKS OFFICE