

Barrett v Toroyan

2005 NY Slip Op 30048(U)

June 24, 2005

Supreme Court, New York County

Docket Number: 0112012/2012

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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PATRICK D. BARRETT, individually and as a
Limited Partner of Delma Associates, LP, for the
benefit of Delma Associates, LP,

Plaintiff,

INDEX NO.
112012/04

-against-

KEVORK TOROYAN, DELMA ASSOCIATES,
LP, DELMA PROPERTIES INC., DELMA
ASSOCIATES II, LLC, NABIL SHAWWA,
WA'EL KHOURY, TEMA DEVELOPMENT
(1988), INC. and ISSAM HOURANI,

Defendants.

----- X

RICHARD B. LOWE, III, J.:

Defendants Kevork Toroyan ("Toroyan"), Delma Associates, LP ("Delma Associates"),
Delma Properties, Inc. ("Delma Properties"), Delma Associates II, LLC ("Delma II"), Nabil
Shawwa ("Shawwa"), Wa'el Khoury ("Khoury") and Tema Development (1988), Inc. ("Tema
Inc.") move for an order: (1) dismissing all counts of plaintiff's verified complaint against
defendants Shawwa, Khoury and Tema Inc. pursuant to CPLR 3211(a)8 for lack of personal
jurisdiction or, alternatively, dismissing all counts of the complaint against Shawwa and Khoury
pursuant to CPLR 3211(a)7 for failure to state a cause of action; (2) dismissing counts VII and
VIII of the complaint against defendant Delma Associates pursuant to CPLR 3211(a)7 for failure
to state a cause of action; (3) dismissing counts I, III, V (demand for punitive damages) and VII-

X of the complaint against Delma Properties pursuant to CPLR 3211(a)7 for failure to state a cause of action; (4) dismissing counts VI, VII and VIII of the complaint against Delma II pursuant to CPLR 3211(a)7 for failure to state a cause of action; (5) dismissing counts I,II, III,V (including the demand for punitive damages), VI-VIII and X of the complaint against defendant Toroyan pursuant to CPLR 3211(a)7 for failure to state a cause of action; and, (6) alternatively, or in addition, correcting the complaint pursuant to CPLR 3024 (a) and (b).

Background

Plaintiff, who resides in New York, was the executive vice president of Delma Properties and a limited partner in Delma Associates until his employment with Delma Properties was terminated in February 2002. Defendant Delma Properties, the general partner of Delma Associates, is a Delaware Corporation with its principal place of business in New York. Defendant Delma Associates is a Delaware limited partnership with its principal place of business in New York. Defendant Delma II is a Delaware limited liability company with its principal place of business in New York. Defendants Toroyan, Khoury and Shawwa are the directors of Delma Properties. Toroyan resides in Connecticut. Khoury and Shawaa reside in London, England. Khoury is the sole principal of defendant Tema Inc. Tema, Inc., a Delaware corporation with its principal place of business in Texas, is a limited partner of Delma Associates and Delma II.

The complaint asserts 10 causes of action, referred to as "Counts," based on allegations of breach of fiduciary duty, aiding and abetting the breach, waste, breach of contract, conversion and "tortious interference with contract/economic advantage." Count I, asserted derivatively on behalf of Delma Associates, alleges that Delma Properties, Toroyan, Khoury and Shawwa

breached the fiduciary duty they owed to Delma Associates by usurping investment opportunities, misappropriating goodwill and misappropriating asset management fees for the benefit of Delma II. Count II, asserted on behalf of Delma Associates, alleges that Toroyan, Khoury and Shawwa, individually and as members of the Board of Directors of Delma Properties, aided and abetted the alleged breach of fiduciary duty. Count III, asserted on behalf of Delma Associates, alleges that Delma Properties, Toroyan, Khoury and Shawwa committed waste by spending Delma Associates' money, including marketing expenses, allocation of Dead Deal costs and overhead, for the benefit of Delma II. Count IV, which is asserted against Hourani who has not appeared in this action, has not been addressed by movants and will not be addressed by the court. Count V, asserted by plaintiff individually, alleges that Delma Properties and Toroyan breached the Delma Associates partnership agreement and committed "an independently tortious act as either prima facie, interference with contract or economic relations or other tort" which "threatened the public fisc" by failing to pay for plaintiff's income tax liability. Plaintiff seeks both compensatory and punitive damages on this count. Count VI, asserted on behalf of Delma Associates, alleges that Delma II and its members Hourani, Toroyan, Tema Inc. and Shawwa converted asset management fees belonging to Delma Associates for the benefit of Delma II. Counts VII and VIII, asserted on behalf of plaintiff individually, allege that Toroyan, in his individual capacity or on behalf of Delma Associates, Delma Properties or Delma II, tortiously interfered with plaintiff's contract or economic relationship with Khoury with respect to the purchase of a real estate investment known as Great Woods and the pursuit of other real estate investments. Count IX, asserted by plaintiff individually, alleges that he was entitled to receive severance pay, unpaid vacation time and unpaid bonuses from Delma Properties.

Discussion

Jurisdiction

Defendants, Khoury, Shawwa, and Tema, Inc. move to dismiss the complaint for lack of jurisdiction. According to the complaint (defendants' exhibit 1), plaintiff is a resident of New York (¶¶ 10, 26). He was employed by Delma Properties in New York (¶ 3). The wrongs complained of were sustained by plaintiff in New York (¶ 25). Delma Properties, Delma Associates and Delma II are headquartered in New York (¶¶ 11, 12, 14, 27). Khoury and Shawwa, along with Toroyan comprise the Board of Directors of Delma Properties (¶ 22). Khoury and Shawwa attended Delma Properties Board meetings in New York (Barrett affidavit ¶ 3).

Defendants cite CPLR 302(a), then argue that all claims against Shawwa and Khoury should be dismissed for lack of personal jurisdiction because the complaint fails to allege that they transacted business, provided services or executed contracts in New York related to plaintiff's claims, or that they committed tortious acts within the state or without the state causing injury to plaintiff within the state, or that they solicited business in or derived substantial revenue from the state.

It is manifest that the Court examine the nexus between the acts complained of and their connection with New York in order to determine whether jurisdiction may be obtained. As to Khoury and Shawwa, the fact that they were not present in this state when they allegedly committed the acts complained of does not shield them from the jurisdiction of this court even if they were acting in their capacity as directors or officers of Delma Properties (see Kreutter v.

McFadden Oil Corp., 71 NY2d 460, 470-471 [1988] [fiduciary shield doctrine, which provides that an individual should not be subject to jurisdiction if his dealings with the forum state were solely in a corporate capacity, cannot be invoked to protect individual who has not physically entered New York from personal jurisdiction]).

Tema Inc.'s investment in Delma Associates is, in itself, insufficient to confer jurisdiction (see Lynn v. Cohen, 359 F Supp 565, 567 [SDNY 1973]). Defendants contend that the court also lacks personal jurisdiction over Tema Inc. because it is a Delaware corporation with its principal place of business in Houston, Texas and because Tema Inc.'s only contact with New York is its investment in Delma Associates and Delma II.

Plaintiff argues that Tema Inc. previously participated in an arbitration proceeding in this state (see Barrett affidavit, exhibit 2) and consented to arbitration here in numerous instances (id., exhibits 30-39) and is therefore subject to jurisdiction. However, these acts do not confer jurisdiction over Tema, Inc. because there is no nexus between the arbitration and plaintiff's claims (see Family Internet, Inc. v. Cybermex, Inc., 1999 WL 796177 *5 [SDNY 1999]; but see Intermar Overseas, Inc. v. Argocean S.A., 117 AD2d 492, 497 [1st Dept 1986]). Accordingly, Count VI against Tema is dismissed for lack of jurisdiction.

Motions to Dismiss Pursuant to CPLR3211(a)(7)

The standards applicable to the balance of defendants' motion are set forth by the First Department as follows:

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, Foley v D'Agostino, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (Carbillano v Ross, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately

establish the truth of the averments. (219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (Rovello v Orofino Realty Co., 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law". (Guggenheimer v Ginzburg, 43 NY2d 268, 275).

(Khan v. Newsweek, Inc. 160 AD2d 425, 426 [1st Dept 1990]).

Counts I, III, and III

Counts I through III allege, in essence, that defendants breached their fiduciary duties to Delma Associates by transferring funds, opportunities and goodwill to Delma II. Defendants argue that all of plaintiff's derivative claims fail to state a cause of action because his personal economic interests are in conflict with the economic interests of the other limited partners of Delma Associates. They further argue that Counts I, II, and III fail to state a cause of action for the additional reasons that Toroyan, Khoury and Shawwa are not alleged to be partners of Delma Associates and therefore owed no fiduciary duty to Delma Associates or plaintiff and the Delma Associates partnership agreement as well as plaintiff's employment agreement with Delma Properties expressly permit Delma Properties, the general partner of Delma Associates, to compete with Delma Associates. Count II fails to state a cause of action for the additional reason that plaintiff failed to plead that Toroyan, Khoury and Shawwa had actual knowledge of the alleged breach of duty. Lastly, defendants argue that Count III fails to state a cause of action for the additional reason that the allegations of waste are nonspecific.

The Counts are validly pled because Plaintiff is alleging harm done to Delma Associates, not just to himself, and therefore he can bring these causes of action. Furthermore, the allegations of corporate waste in Count III are specific enough to maintain a cause of action.

The issue of whether Khoury, Shawwa, and Toroyan controlled the other limited partners of Delma Associates (their spouses and Tema Inc.) cannot be addressed in the context of a motion to dismiss.

However, despite the valid pleading of these causes of action, they must be dismissed based on documentary evidence. The acts complained of, while generally giving rise to a cause of action, are explicitly authorized by the Delma Associates partnership agreement as well as plaintiff's employment contract. Both agreements allow Delma Properties to compete directly or indirectly with the operation of Delma Associates (see defendants' Exhibit 3, § 5.03; Exhibit 2, § 6; Caniglia v. Chicago Tribune-New York News Syndicate Inc., 204 AD2d 233 [1st Dept 1994] [allegations flatly contradicted by documentary evidence are subject to dismissal]). Under Delaware law (Delma Associates is a Delaware limited partnership and the partnership agreement contains a Delaware choice of law provision), the conflict between the fiduciary duty owed by a general partner to a limited partner and a contract provision which curtails that duty is resolved in favor of contract provision (see Continental Insurance Company v. Rutledge & Company, Inc., 750 A2d 1219, 1235 [Del Ch 2000]). Accordingly Counts I, II, and III are dismissed.

Count V

In Count V, plaintiff seeks a payment for his income tax liability. Defendants argue that this count fails to state a cause of action as to Toroyan because he is not a party to the Delma Associates partnership agreement and therefore cannot be held liable for a breach of that agreement. They further argue that Plaintiff's request for punitive damages should be dismissed because he failed to allege a "public wrong" or a "high degree of moral culpability."

This count is validly pled. Here Defendants Delma Properties and Defendant Toroyan are alleged to have breached their duties by failing to make promised distributions. Failing to make required distributions, may give rise to liability for a breach of fiduciary duty. See Meinhard v. Salmon, 249 NY 458 (1928).

The request for punitive damages will be stricken because Plaintiff has failed to allege a high degree of moral culpability (see Sabol & Rice, Inc. v. Poughkeepsie Galleria Company, 175 AD2d 555, 557 [3d Dept 1991]) or a wrong aimed at the general public (see Walker v. Sheldon, 10 NY2d 401, 406 [1961]) which would give rise to such damages.

Count VI

Count VI, alleging conversion of asset management fees for the benefit of Delma II, is dismissed for the same reason that Counts I through III will be dismissed: the acts complained of were authorized by the Delma Associates partnership agreement as well as plaintiff's employment contract.

Counts VII and VIII

Defendants argue that Counts VII and VIII fail to state a cause of action against Delma Associates, Delma Properties or Delma II because plaintiff failed to allege that those defendants knew of Toroyan's purported interference and fail to state a cause of action against Toroyan because plaintiff failed to allege whether his relationship with Khoury was contractual or economic, since the pleading requirements differ for each.

Counts VII and VIII, alleging tortious interference with plaintiff's contractual or economic relationship with Khoury, are not be dismissed in view of the liberal standards applicable to the complaint (see Khan v. Newsweek, *supra*). Upon review, Plaintiff successfully

makes the required allegations necessary to maintain these causes of action.

Count IX

Count IX, where plaintiff seeks to recover severance pay, unpaid vacation time and unpaid bonuses, is validly pled. Defendants argue Count IX fails to state a cause of action because plaintiff's employment agreement with Delma Properties does not provide for the relief he seeks. Plaintiff's employment agreement with Delma Properties, relied on by defendants, does not dispose of the issue of whether plaintiff is owed money under that agreement (see e.g., defendants' exhibit 2, § 7(a) which provides for paid vacation and sick leave days). Therefore, the cause of action will remain.

Count X

Count X, asserted on behalf of Delma Associates, alleges that Delma Properties, Toroyan, Khoury and Shawwa breached their fiduciary duty to Delma Associates by using Delma Associates' assets to benefit Toroyan's civic and community associations and family. This Count alleging misappropriation of Delma Associates assets for Toroyan's personal benefit is validly pled. The alleged acts do not constitute competition with Delma Associates, which was permitted under the Delma Associates partnership agreement and plaintiff's employment agreement (see *supra*). Therefore, the cause of action may be maintained.

Paragraph 39 of the Complaint

Defendants request that the allegations in the complaint concerning the Abu Ghraib prison complex in Iraq be stricken as irrelevant and prejudicial. Plaintiff's allegations in paragraph 39 of the complaint concerning Toroyan and the "notorious Abu Ghraib prison complex" built for Saddam Hussein will be stricken as irrelevant and prejudicial (see CPLR 3024[b]). Accordingly,

this request is granted.

Conclusion

Based on the foregoing it is hereby,

ORDERED that that Counts I through III and VI, along with plaintiff's plaintiff's request for punitive damages and the allegations concerning the Abu Ghraib prison complex and Saddam Hussein are hereby stricken and it is hereby

ORDERED that the claim asserted against Tema Inc. in Count VI is stricken on the additional ground that Tema Inc. is not subject to the court's jurisdiction and it is hereby


ORDERED that the motion is in all other respects denied and it is further

ORDERED that Plaintiff is directed to serve an amended complaint in accordance with the above within 20 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of the court.

DATED: June 24, 2005

ENTER:


RICHARD B. LOWE III

FILED

JUN 29 2005

NEW YORK
COUNTY CLERK