

**Carlingford Center Point Associates v MR Realty
Associates L.P.**

2005 NY Slip Op 30065(U)

February 23, 2005

Supreme Court, New York County

Docket Number: 0604164/4164

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
CARLINGFORD CENTER POINT ASSOCIATES and
CARLINGFORD CENTER POINT, INC., individually and
as limited partners of SOUTH MIDDLESEX INDUSTRIAL
PARK ASSOCIATES, L.P.,

Plaintiffs,

- against -

MR REALTY ASSOCIATES L.P., as general partner of
SOUTH MIDDLESEX INDUSTRIAL PARK ASSOCIATES,
L.P., and PAUL E. TAYLOR, JR. and KENNETH H.
SIMPSON,

Defendants.
-----X

INDEX NO. 604164/2001

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

FILED

FEB 25 2005

NEW YORK
COUNTY CLERKS OFFICE

Dated: February 23, 2005



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS Part 3

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CARLINGFORD CENTER POINT ASSOCIATES and
CARLINGFORD CENTER POINT, INC., individually and
as limited partners of SOUTH MIDDLESEX INDUSTRIAL
PARK ASSOCIATES, L.P.,

Index No. 604164/2001

Plaintiffs,

- against -

DECISION and ORDER

MR REALTY ASSOCIATES L.P., as general partner of
SOUTH MIDDLESEX INDUSTRIAL PARK
ASSOCIATES, L.P., and PAUL E. TAYLOR, JR. and
KENNETH H. SIMPSON,

FILED

Defendants.

-----X FEB 25 2005

MOSKOWITZ, KARLA J:

NEW YORK
COUNTY CLERK'S OFFICE

The court detailed the facts of this case in its decision and order dated May 20, 2002 and will therefore not repeat them here except as necessary.

This case involves a complicated series of agreements among the parties. Defendants MR Realty Associates L.P., as general partner of South Middlesex Industrial Park Associates, L.P., and Paul E. Taylor, Jr. (Taylor) and Kenneth H. Simpson, (collectively "defendants") now move (motion seq. no. 4) for partial summary judgment dismissing certain of plaintiffs' claims. Plaintiffs Carlingford Center Point Associates and Carlingford Center Point, Inc., individually and as limited partners of South Middlesex Industrial Park Associates, L.P., (SMIPA and collectively "plaintiffs") cross-move for partial summary judgment on liability against defendants for allegedly breaching the Amended and Restated Agreement and Third Amended and Restated Certificate of Limited Partnership of South Middlesex Industrial Park Associates, L.P., dated December 29, 1986, (The "SMIPA Partnership Agreement") and defendants' fiduciary duties by

entering into a April 10, 2001 Settlement Agreement and Mutual Release between SMIPA and Matrix Realty Associates L.P. (“Matrix”) without plaintiffs’ consent (the “2001 Settlement Agreement”). Because there are disputed issues of fact for trial, the court denies defendants’ motion with respect to the property management fees for the first quarter of 1997 and damages arising from the three-month extension to Bohrens, but otherwise dismisses the claims defendants have moved against.

Plaintiffs’ cross-motion is denied in its entirety.

I. Defendants’ Motion for Partial Summary Judgment

In its opposition papers and at oral argument on July 21, 2004, plaintiffs conceded to dismissal of the following claims: \$321,918 in management fees; \$72,721 in management fee surcharges; about \$250,000 for tenant improvements; \$20,282 in fees during rent-free periods; \$57,667 in insurance costs; \$11,558 in unauthorized fees; \$10,000 in connection with the Playmobile project and sums in connection with the sale of Anixter and Southrock Parcels. Accordingly, the court dismisses these claims on consent of the parties. This decision will now address those claims for which plaintiffs contest dismissal.

A. \$165,096 in Overhead Payments

Plaintiffs contend that defendants improperly allowed Matrix to take an excessive overhead fee of 15% that reduced the amounts SMIPA realized from the rental properties, but concede that these claims arise out of the 1992 Management Agreement. This court has ruled not once, but twice, that claims arising out of the 1992 Management Agreement are time-barred. On the second motion to dismiss, I held that:

On the prior motion, plaintiffs had argued that entering into the 1992

Management Agreement constituted a breach of the SMIPA Partnership Agreement. The court dismissed that claim as time-barred. Plaintiffs did not move to reargue. Plaintiffs have now repled their claim for breach of the SMIPA Partnership Agreement because of the 1992 Management Agreement in greater detail and have changed the theory upon which they base this claim. Plaintiffs now contend, without a shred of authority, that their breach of contract claims accrued, not with the fruition of the 1992 Management Agreement, but rather when SMIPA made excessive payments to Matrix pursuant to the 1992 Management Agreement. (Def. Opp. Mem at 6). Plaintiffs have conformed their pleading to this argument by supplying the dates of the offending payments and contending those dates are the time that their breach of contract accrued. (See amended complaint ¶ 43-64). However, plaintiffs cannot, at this late date, assert an entirely new basis for a claim that this court has already considered and dismissed.

Further, even if this court were to consider plaintiffs' argument that their breach of contract claim accrued when defendants caused SMIPA to pay Matrix, the court would have to dismiss the claim. This is because a breach of contract claim accrues at the time of breach. (*Ely Cruikshank Co., Inc. v. Bank of Montreal*, 81 NY2d 399). A new cause of action does not accrue each time damages may occur. (See *Welwert v. Dataware Electronics Corp.*, 277 AD2d 372 [fraud claim accrued when misconduct occurred, not when defendants diverted payment]).

Here, the defendants breached the contract when they permitted SMIPA to enter into the 1992 Management Agreement without the proper consents. Accordingly, plaintiffs' claim for breach of contract accrued in 1992 with the execution of the 1992 Management Agreement. That plaintiffs continued to incur damages after August 1995, does not resurrect their untimely claim.

(Decision on motion sequence no. 2, dated July 2, 2003 at 2-3)

Now, the court is ruling for a third time that claims arising out of the 1992 Management Agreement are time-barred. Accordingly, the court dismisses plaintiffs' claim for \$165,096 in Overhead Payments.

B. \$233,410 in Property Management Fees for the First Quarter of 1997

Plaintiffs contend that Matrix received \$233,410 in management fees for the first quarter of 1997 that Matrix should not have received because: (1) plaintiffs had not approved the

payment of those fees to Matrix and (2) another manager for the property was already receiving compensation causing SMIPA to pay twice for property management when it should only have paid once.

Defendants argue that Joe Taylor for Matrix and Taylor for MR Realty Associates L.P (“MR Realty”) extended the 1992 Management Agreement for three months and therefore the claims are time-barred because they arise out of the 1992 Management Agreement. Plaintiffs disagree contending that the three month “extension” was actually a new agreement. Whether or not the agreement was indeed new or an extension is an issue of fact for trial, particularly given the possibility of self-dealing because Joe Taylor was Taylor’s son.

Defendants also claim that plaintiffs have no damages because the work Matrix performed was different from that of the “duplicative” property managers (Herman Simonse and John Bollerman). Defendants contend that the only support plaintiffs have for their contention that the work was the same is the deposition of Lois Golia who testified that it was his understanding that Simonse was involved with the property management and that “we” were “upset” upon learning that Matrix was still involved in property management because there was already “a new management team in” (Golia Dep. at 72-73). Defendants contend that plaintiffs have not shown that Golia had personal knowledge of what Simonse was doing. However, Golia’s testimony about the reasons for why certain members of SMIPA were “upset” was certainly based on personal knowledge and therefore is sufficient to defeat summary judgment.

Nevertheless, the court cannot discern how plaintiffs arrived at their roughly \$233,000 figure. It appears that Matrix received only slightly in excess of \$139,000 for 1997. Perhaps plaintiffs can demonstrate more clearly the amount they claim at trial. Accordingly, because

defendants have failed to eliminate all issues of fact as to the \$233, 410 in these property management fees, the court does not dismiss this particular claim.

B. \$177,355 in Construction Payables

Plaintiffs contend that the defendants improperly paid Matrix \$177, 355 for services related to construction. Plaintiffs have pled this part of their complaint upon information and belief. Plaintiffs' only contradiction to defendants' assertion that plaintiffs "have presented no evidence showing that any improper payments were made to Matrix" is to point to Golia's testimony that Taylor and Kenneth Simpson denied him access to the books and records of Matrix "thereby preventing an examination into the validity of the charges." (Pl. Opp. Mem at 14). However, plaintiffs have had years to take discovery on this issue including subpoenaing Matrix and the contractors. Plaintiffs have thus failed to substantiate their claim for \$177,355 in Construction Payables and therefore the court dismisses this claim.

C. \$8,089 in Commissions

Plaintiffs claim, on information and belief, that Matrix charged SMIPA \$8,039 in real estate commissions without plaintiffs' consent. However, defendants have demonstrated that plaintiff's witnesses could not identify what the payments were or explain why the payments were part of their claim. Plaintiffs have done nothing to refute this showing. The court therefore dismisses this claim.

D. \$202,025 in Advertising and Marketing Fees.

Plaintiffs do not contest that Matrix received the advertising and marketing fees, pursuant to the 1992 Management Agreement. As such, plaintiffs' claim that these fees were improper is time-barred and the court therefore dismisses it.

E. Unauthorized Supervision Fees

Plaintiffs contest the supervision fees for which Matrix allegedly charged SMIPA on two projects in 1996: \$23,315 on what the parties have termed the "VW project" and \$10,449 on what the parties have termed the "New Jersey project." Plaintiffs apparently challenge these payments based on their belief that the supervisors who Matrix paid were off-site and Matrix should only have paid for on-site supervisors. Defendants claim that plaintiffs have no evidentiary support for these two items. Defendants are correct. Although plaintiffs cite to page 20 of the audit report that Mr. Tanweer Ahmad wrote for SMIPA dated November 21, 1997, this page does not support that Matrix paid off-site supervisors. Rather, the document supports a different theory, that the on-site supervisors were paid too much. Plaintiffs' reference to a Mr. Foose having told Mr. Ahmad that he was the only on-site supervisor on the VW project is hearsay and alone cannot be the basis to defeat defendants' motion for summary judgment. (*See Jurato v. City of New York*, 780 NYS2d 330, 331 [1st Dep't 2004]) Accordingly, the court dismisses plaintiffs' claim for a refund of fees that Matrix charged SMIPA for off-site supervisors.

F. Three Month Extension to Bohrens

Plaintiffs claim that SMIPA lost \$20,0000 when Taylor negotiated a three month extension with "Bohrens, an existing SMIPA tenant," who was moving to a building that Matrix owned. The lease with SMIPA apparently called for a fixed monthly rental if Bohrens became a hold-over tenant, but Taylor negotiated a rent that was less than the amount the lease fixed. Plaintiffs claim that Matrix's self-interest in keeping its future tenant happy motivated the rent reduction.

Defendants claim that the business judgment rule protects Taylor's action. However, the business judgment rule does not protect corporate officials who engage in fraud or self-dealing or corporate fiduciaries who make decisions when they have a conflict of interest. (*See Wolf v. Rand*, 258 AD2d 401, 404). "The burden then shifts to defendants to prove the fairness of the challenged acts." (*Id.*) Here, there is a serious question as to Taylor's interest in Matrix through Joe Taylor that could have caused him to take actions favorable to Matrix all to SMIPA's detriment. Therefore, the business judgment rule does not protect Taylor's actions with respect to this transaction. Defendants have not come forth with evidence sufficient to show that the rent reduction was fair to SMIPA. Accordingly, the claim remains for trial.

G. \$100,000 Reduction in Prudential's Purchase Price

Plaintiffs claim "on information and belief" that, between December 1, 1998 and March 31, 1999, Taylor breached his fiduciary duty to SMIPA by failing to inform plaintiffs of a default on "the Prudential loan." (Am Compl. ¶ 126). Plaintiffs further claim that, as a result, presumably of their ignorance as to the default, "SMIPA had to reduce the land sales price to Prudential by \$100,000." (*Id.*) However, plaintiffs do not point to Taylor or any other defendant who had an interest in Prudential or were otherwise conflicted with respect to this transaction. Further, plaintiffs admit they consented to the \$100,000 reduction.

Plaintiffs next argue that their consent was "under duress." (Pl. Opp. Mem. at 18). As evidence that their consent was under duress, plaintiffs point out that they preserved their right to sue defendants for breach of fiduciary duty when they gave their consent:

"our consent to this proposed settlement with Prudential was not intended to waive any rights of Carlingford Center Point Associates and Carlingford Center Point Inc., as limited partners of SMIPA, including those rights and claims arising

from the Option Agreement with Prudential, whether or not such rights or claims are presently asserted by Carlingford in any lawsuit.”

However, this language only preserves plaintiffs rights with respect to Carlingford’s other rights. It does not, by its terms, preserve plaintiffs’ rights to sue over the reduction. The court is also perplexed as to how plaintiffs could possibly argue that they were under duress. To demonstrate duress under New York law, plaintiffs must show that they signed the agreement because of a wrongful threat that precluded the exercise of their free will. (*See Fred Ehrlich, P.C. v. Tullo*, 274 AD2d 303, 304). Plaintiffs have not pointed to any kind of threat, much less a wrongful one, that defendants made that could even begin to support a duress claim. Accordingly, the court dismisses the claim based upon the \$100,000 reduction in Prudential’s purchase price.

H. Reduction in Prudential’s Purchase Price for Lots 2 and 3

Plaintiffs also concede that they consented to the reduction in Prudential’s option price. Plaintiffs again argue that this consent was the result of duress. Because plaintiffs have done nothing to show duress, this claim too is dismissed.

II. Plaintiffs’ Cross-Motion for Partial Summary Judgment

Plaintiffs’ cross-motion for summary judgment is denied because there remain issues of fact. For example, it is for a jury to decide whether Taylor or Kenneth Simpson indirectly controlled Matrix through Joe Taylor so that Matrix was an “affiliate” of MR Realty as section 11.5.5 of the SMIPA Partnership Agreement defines that term. It is also for a jury to decide that, if Matrix was an “affiliate,” whether Taylor or Simpson benefitted from that arrangement.

Accordingly, it is

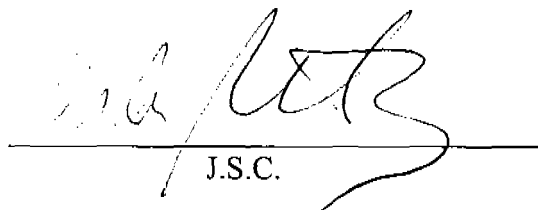
ORDERED that defendants MR Realty Associates L.P., as general partner of South Middlesex Industrial Park Associates, L.P., and Paul E. Taylor, Jr. (Taylor) and Kenneth H. Simpson motion for partial summary judgment is granted in part and denied in part as set forth in this decision; and it is further

ORDERED that plaintiffs Carlingford Center Point Associates and Carlingford Center Point, Inc., individually and as limited partners of South Middlesex Industrial Park Associates, L.P.'s motion for partial summary judgment is denied.

The parties are directed to appear for a pretrial conference by telephone at 646-386-3300 on March 2, 2005, at 11:00 a.m.

Dated: February 23, 2005

ENTER:


J.S.C.

FILED
FEB 25 2005
NEW YORK
COUNTY CLERKS OFFICE