

Blue Chip Emerald LLC v Allied Partners Inc.

2005 NY Slip Op 30070(U)

March 29, 2005

Supreme Court, New York County

Docket Number: 0601415/4152

Judge: Herman Cahn

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

PRESENT: HERMAN CARR

PART 49

0601415/2001

BLUE CHIP EMERALD
VS
ALLIED PARTNERS

SEQ 8

REARGUMENT/RECONSIDERATION

INDEX NO. _____

NOTION DATE 3/3/05

NOTION SEQ. NO. 008

NOTION CAL. NO. _____

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

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

FILED
MAR 30 2005
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE FOLLOWING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

Dated: 3/29/05 [Signature]

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

Check if appropriate: DO NOT POST

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-

ALLIED PARTNERS INC., CEPPETO HOLDING
ENTERPRISES LLC, CEPPETO CORP., 57TH STREET
HOLDING CO. LLC, ERIC HADAR, RICHARD HADAR,
ROBERT GROSSMAN, 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 SHEHEBAR,
RAYMOND GINDI, ISAAC GINDI, and 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

Cahn, J.

Motion sequences 008 and 010 are consolidated for disposition.

In motion sequence 008, defendants/counterclaim plaintiffs Allied Partners Inc., Ceppetto Holding Enterprises LLC, Ceppetto Corp., 57th Street Holding Co. LLC, Eric Hadar (Eric) and Richard Hadar (Richard) (collectively, the Hadars) move, pursuant to CPLR 2221, for leave to reargue this court's decision dated June 4, 2004, and filed June 8, 2004 (the June 4 Decision), and, upon reargument, denying counterclaim defendants' and third-party defendants' motions to dismiss.

In motion sequence 010, defendants Robert Grossman and the law firm Olshan Grundman Frome Rosenzweig & Wolosky LLP (collectively, Olshan) move, pursuant to CPLR 2221, for leave to reargue the June 4 Decision, to clarify that it resolved no issues of fact in granting plaintiffs' motion to dismiss Olshan's counterclaim.

Plaintiff Blue Chip Emerald LLC is owned by the three other plaintiffs, 57th Street Emerald LLC, Isaac Raymond Associates LLC, and Trina Sultan (collectively BCE). Eric and his father Richard are the principals of defendant Ceppetto Holding Enterprises LLC, which, in March 2000, entered into a venture with BCE whereby they created a Delaware limited liability company called Ceppetto Enterprises LLC (the Venture). The purpose of the Venture was to acquire the building at 1 East 57 Street in Manhattan (the

Property) through an entity the Venture owned and controlled, called 57th Street Acquisition Co., LLC. Eric was named managing member of the Venture. Olshan represented the Venture and also represented the Hadars in the transaction whereby they later bought out BCE's interest in the Property.

The Venture closed on the Property on March 15, 2000, and on November 1, 2000, BCE sold its interest in the Venture to the Hadars for a price based on an \$80 million valuation of the Property (the Buy-Out Agreement). Two weeks later, the Hadars entered into a contract to sell the Property to LVMH, a European conglomerate, for \$200 million.

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 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 bringing about a sale or lease of the Property. Among other alleged misrepresentations, the Hadars allegedly failed to disclose and 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.

In an earlier motion to dismiss, 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 (a)(iii) of the Buy-Out Agreement 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 of the Buy-Out Agreement 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) 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 re-sell

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, on October 10, 2001, this court granted defendants' motions to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7). That decision was reversed by the 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). In reversing this court's dismissal, the First Department stated 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 ...' " Id. at 279, quoting Birnbaum v Birnbaum, 73 NY2d 461, 466 (1989) (additional citations omitted).

The First Department 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 bear on the beneficiary's consideration of the fiduciary's offer.'" Id., quoting Dubbs v Stribling & Assoc., 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 release agreements 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 and obligations under the agreement being entered into on even date between Blue Chip Emerald LLC and 57th Street Holding Co. LLC.

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 the same language as that quoted above from the BCE Release.

The First Department 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 v Allied Partners, Inc., 299 AD2d at 280. The First Department also reinstated the fraud and breach of fiduciary duty claims, as well as the legal malpractice claim, as against Olshan.

After the First Department's 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.

In the June 4 Decision, this court granted BCE's motion to dismiss the counterclaim brought by Olshan, which alleged that BCE breached the BCE Release by asserting meritless claims relating to the buy-out that BCE had previously released and agreed to waive. This court also granted counterclaim defendants' motion to dismiss the counterclaims interposed by the Hadars, which sounded in fraudulent inducement, breach of contract and indemnification. Finally, in the June 4 Decision, this court also granted the motion to dismiss the third-party complaint, in a motion brought by third-party defendants Philip Pilevsky, David Segal, PL 57 LLC and Philips International Group, Inc. The counterclaims and the third-party complaint contained many of the same allegations against the counterclaim defendants and the third-party defendants. Some additional claims were brought against the third-party defendants.

The Hadars seek relief in the instant motion to reargue, claiming that the June 4 Decision misapprehends the effect of the

First Department's decision on the Hadars' counterclaims and third-party claims, and overlooks the Hadars' claims that the counterclaim-defendants and third-party defendants fraudulently induced the Buy-Out Agreement, to which the releases and waivers on which this court relied could not possibly apply. The court denies the Hadar's motion to reargue the prior motion, which resulted in the June 4 Decision. The Hadars, who repeat previously made arguments, have not shown that the court misapplied the law. See Foley v Roche, 68 AD2d 558, 567-68 (1st Dept 1979).

Olshan seeks leave to reargue, not because it disputes this court's dismissal of its counterclaim, but rather because it is concerned that some of the dicta of the June 4 Decision seemed to resolve ultimate issues of fact, including the effect on Olshan of the BCE Release, the use of the BCE Release as a defense, Olshan's alleged duty to plaintiffs, and whether, if there was a duty, it was satisfied. The court states that it did not resolve any ultimate issues of fact in the June 4 Decision, and Olshan has not shown that the court misapplied the law in determining the prior motion which resulted in that order, and, therefore, Olshan's motion is denied.

Accordingly, it is

ORDERED that the Hadars' motion for leave to reargue, motion sequence 008, is denied; and it is further

ORDERED that Olshan's motion for leave to reargue, motion

sequence 010, is denied.

Dated: March 29, 2005

ENTER:

Alan Cole

J.S.C.

FILED

MAR 30 2005

**NEW YORK
COUNTY CLERK'S OFFICE**