

**Kew Gardens Hills Apartment Owners, Inc. v Horing,
Welikson & Rosen, P.C.**

2005 NY Slip Op 30313(U)

February 10, 2005

Supreme Court, Queens County

Docket Number: 7783/01

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA PART 17
Justice

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KEW GARDENS HILLS APARTMENT OWNERS, INC.	Index Number <u>7783</u> 2001
- against -	Motion Date <u>December 1,</u> 2004
HORING, WELIKSON & ROSEN, P.C., et al.	Motion Cal. Numbers <u>24,25,26</u>

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The following papers numbered 1 to 16 read on this motion by defendant Cheshire Kew Village, L.P., defendant Cheshire Group, and defendant Susan Hewitt (collectively "the Cheshire defendants") for, inter alia, an order dismissing the complaint against them pursuant to CPLR 3211(a) (7) for failure to state a cause of action and for summary judgment, on this motion by defendant Horing, Welikson & Rosen, P.C., defendant Horing & Welikson, P.C., defendant Eric Schultz, Esq., and defendant Robert Gordon, Esq. (collectively "the Horing Welikson defendants") for summary judgment dismissing the complaint and all of the cross claims against them, on this cross motion by defendant Gordon Miller for summary judgment dismissing the complaint and all of the cross claims against him, and on this motion by defendant Insignia Residential Group, Inc. for an order dismissing the plaintiff's complaint against it for failure to make disclosure.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-3
Notice of Cross Motion - Affidavits - Exhibits ...	4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-10
Other (Memoranda of Law).....	11-16

Upon the foregoing papers it is ordered that:

That branch of the motion by the Chesire defendants which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them for failure to state a cause of action is denied.

That branch of the motion by the Cheshire defendants which is for summary judgment dismissing the complaint against them is denied without prejudice to renewal at the conclusion of discovery.

The remaining branches of the motion by the Cheshire defendants are denied.

The motion by the Horing Welikson defendants for summary judgment dismissing the complaint and all of the cross claims against them is denied without prejudice to renewal at the conclusion of disclosure.

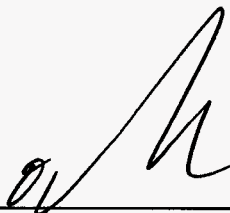
The cross motion by defendant Gordon Miller for summary judgment dismissing the complaint and all of the cross claims against him is denied without prejudice to renewal at the conclusion of disclosure.

The motion by defendant Insignia Residential Group, Inc. is granted to the extent that the plaintiff's complaint against it is dismissed unless the plaintiff complies with the defendant's discovery demands within 20 days after the service of a copy of this order with notice of entry.

Unless otherwise agreed, the parties shall complete disclosure within 90 days of the service of a copy of this order with notice of entry.

(See the accompanying memorandum.)

Dated: February 10, 2005



J.S.C.

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
 IA PART: 17

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 KEW GARDENS HILLS APARTMENT
 OWNERS, INC.

INDEX NO. 7783/01

BY: KITZES, J.

-against-

DATED: FEBRUARY 10, 2005

HORING, WELIKSON & ROSEN, P.C.,
 et al.

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Defendant Cheshire Kew Village, L.P., defendant Cheshire Group, and defendant Susan Hewitt (collectively "the Cheshire defendants") have moved for, inter alia, an order dismissing the complaint against them pursuant to CPLR 3211(a)(7) for failure to state a cause of action and for summary judgment. Defendant Horing, Welikson & Rosen, P.C., defendant Horing & Welikson, P.C., defendant Eric Schultz, Esq., and defendant Robert Gordon, Esq. (collectively "the Horing Welikson defendants") have moved for summary judgment dismissing the complaint and all of the cross claims against them. Defendant Gordon Miller has cross-moved for summary judgment dismissing the complaint and all of the cross claims against him. Defendant Insignia Residential Group, Inc. has moved for an order dismissing the plaintiff's complaint against it for failure to make disclosure.

The complaint alleges, inter alia: Plaintiff Kew Gardens Hills Apartment Owners, Inc., a residential cooperative, owns

premises known as Kew Village Estates, Flushing, New York. Defendant Kew Gardens Hills Associates, LP, acting as the sponsor, first offered shares in the cooperative in or about July 1987. From around 1990 through around 1998, defendant Gordon Miller served as the president of the Board of Directors of Kew Gardens Hills Apartment Owners, Inc. At around the time that the cooperative was formed, First Nationwide Bank held a first mortgage on the premises. On or about March 19, 1989, the cooperative became subject to a wrap around mortgage in favor of the sponsor, defendant Kew Gardens Hills Associates, LP, in the amount of \$11,000,000, and the sponsor obligated itself to pay the principal and interest on the underlying mortgage held by First Nationwide Bank. On or about October 13, 1988, the defendant sponsor obligated itself to the shareholders of the cooperative and to the cooperative to improve the property by, inter alia, removing asbestos and installing new windows. On or about October 9, 1990, the sponsor filed its fifth amendment to the offering plan falsely declaring that certain obligations toward the cooperative had been discharged. The cooperative made mortgage payments to the sponsor, but the sponsor defaulted on payments due on the underlying bank mortgage. In 1993, the bank accelerated its mortgage and began a foreclosure proceeding. The sponsor did not pay certain taxes, and the sponsor failed to make maintenance payments from 1993 to 1998. The sponsor also failed to make improvements to the property. In

or about May 1995, defendant Cheshire Kew Valley Village, LP purchased the sponsor's defaulted note from the bank for around \$5,000,000. During the period from around 1997 to around 2002, defendant Cheshire Kew Village, LP held an underlying mortgage on the premises which eventually went into default. In or about March 1998, defendant Cheshire devised a refinance plan. At this time, the sponsor owed the cooperative more than \$12,000,000, and the sponsor's general partner was personally liable for the entire amount. The complicated refinance plan greatly favored the sponsor and greatly prejudiced the cooperative. The cooperative, inter alia, lost a claim to the sponsor's assets (unsold apartments) worth more than \$12,000,000. The cooperative "paid more than \$22,000,000 (\$9,500,000 in a new loan; relinquishing a claim of \$3,740,958 in Sponsor's unpaid interest and taxes; relinquishing a claim of \$8,657,038; and the Coop's contributions of \$569,000 and \$75,000) to satisfy a \$14,000,000 obligation." Defendant Horing, Welikson & Rosen, P.C., a law firm, its successor Horing Welikson, PC, Eric Schultz, Esq., and Robert Gordon, Esq. gave detailed advice to the Board of Directors concerning the restructuring agreement. Nevertheless, the Board disregarded the advice of its attorneys and approved the restructuring agreement, which wasted the assets of the cooperative corporation and left it in grave financial difficulty.

The plaintiff alleges that the Cheshire defendants "conspired with the Sponsor to breach its fiduciary duties to the Coop" and "aided and abetted the Sponsor in breaching its fiduciary duties owed to the Coop." In or about May, 1995, First Nationwide Bank assigned its mortgage to Cheshire Kew Valley Village, LP, which thereafter participated in a refinancing plan for the cooperative. On the date of the refinancing, the sponsor owed the cooperative \$8,657,038 for overdue maintenance charges. The cooperative assigned this debt to defendant Chesire Kew, which also received a payoff from Credit Suisse in the sum of \$7,823,077. According to the plaintiff's attorney, "Cheshire from these two sources alone was receiving the sum of \$16,480,115 to satisfy what it has acknowledged is a debt of \$14,385,515 consisting of outstanding principal of \$10,482,082, accrued interest of \$3,125,487, and negative escrow for real estate taxes of \$777,946." Cheshire Kew also allegedly improperly received \$260,215 from a former receiver's account and also allegedly could conditionally receive an additional \$500,000 from the vacancy fund escrow and \$81,760 from the debt service escrow.

On the other hand, the Cheshire defendants allege the refinancing agreement they participated in provided the plaintiff cooperative with the following benefits: "[1] It resolved the Foreclosure Action with prejudice and discharged the receiver that had been appointed in the Foreclosure Action; and [2] [i]t resolved

the Cooperative's conceded default under the terms of the Mortgage; and [3] [i]t secured for the Cooperative a new first mortgage and reduced its debt by thirty per cent (30%) and at nearly two basis points below the interest rate the Cooperative had been paying Lender [defendant Cheshire Kew Village LP]; and [3] [i]t dissolved the indebtedness of the Cooperative to Sponsor under the wrap around mortgage; and [4] [i]t provided a funding source for urgently needed repairs to the Buildings through contributions of the Lender and others so as to bring them to a condition where they could be sold or leased."

That branch of the motion by the Cheshire defendants which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them for failure to state a cause of action is denied. The complaint adequately states a claim based on conspiracy. It is true, as the defendants contend, that there must be tortious or other wrongful conduct supporting a conspiracy claim. (See, Small v Lorillard Tobacco Co., Inc. 94 NY2d 43; Multiloan Mortg. Co., LLC v. Asian Gardens Ltd., 303 AD2d 658; Sokol v. Addison, 293 AD2d 600.) In the case at bar, the plaintiff has adequately alleged (1) that the sponsor, which held a seat on the cooperative's Board of Directors, breached fiduciary duties owed to the cooperative and its shareholders (see, BCL 713; Alpert v 28 Williams Street Corp., 63 NY2d 557; Kavanaugh v Gould, 223 NY 103; Giblin v Murphy, 97 AD2d 668) such as by obtaining the

sponsor's release from financial obligations payable to the cooperative and (2) that the Cheshire defendants joined in an agreement or common scheme to commit the wrongful acts. (See, Standish-Parkin v. Lorillard Tobacco Co., 12 AD3d 301.) The complaint also adequately states a claim for aiding and abetting a breach of fiduciary duty. (See, Shearson Lehman Bros. Inc. v. Bagley, 205 AD2d 467.) "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach ***." (Kaufman v. Cohen, 307 AD2d 113.) In the case at bar, the plaintiff has adequately alleged a cause of action for aiding and abetting a breach of fiduciary duty by the sponsor which allegedly held a seat on the cooperative's Board of Directors. The court notes that "on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference***." (Jacobs v. Macy's East, Inc., 262 AD2d 607, 608; Leon v. Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion. (See, Stukuls v. State of New York, 42 NY2d 272; Jacobs v. Macy's East Inc., supra.) Finally, defendant Hewitt and defendant Cheshire Group are individually

liable for any tortious conduct they may have committed notwithstanding sections 609 and 610 of the Limited Liability Company Law. Their position is analogous to corporate officers who can be held personally liable for tortious behavior they directly participated in. (See, Huggins v. Parkset Plumbing Supply, Inc., 7 AD3d 672.)

That branch of the motion by the Cheshire defendants which is for summary judgment dismissing the complaint against them is denied without prejudice to renewal at the conclusion of discovery. Unless otherwise agreed, the parties shall complete disclosure within 90 days of the service of a copy of the order to be entered hereon with notice of entry. This motion for summary judgment is premature before the conclusion of discovery which is in its early stages in this action. (See, Barletta v. Lewis, 237 AD2d 238; Welsh v. County of Albany, 235 AD2d 820; Wee v. City of Rome, 233 AD2d 876.) The plaintiff has shown the need for discovery from the Cheshire defendants on such issues as (1) the exact relationship between the Cheshire defendants and the sponsor, (2) what role, if any, the Cheshire defendants played in obtaining the sponsor's release of some of its obligations toward the cooperative, since the Cheshire defendants stood to gain when they assumed the sponsor's obligations, (3) whether the Cheshire defendants participated in allegedly illegal conduct whereby the plaintiff cooperative was induced to consent to Cheshire Kew's

receiving a sum allegedly greatly in excess of the amount the plaintiff cooperative owed to it for the unpaid principal balance of the mortgage, accrued interest arrears, and escrow debt, and (4) whether the claims against the Cheshire defendants for conspiracy and for aiding and abetting the sponsor in its alleged breach of fiduciary duty toward the cooperative are barred by a valid release.

The remaining branches of the motion by the Cheshire defendants are denied.

The cross motion by defendant Gordon Miller for summary judgment dismissing the complaint and all of the cross claims against him is denied without prejudice to renewal at the conclusion of disclosure. Unless otherwise agreed, the parties shall complete disclosure within 90 days of the service of a copy of the order to be entered hereon with notice of entry. Defendant Miller, a member of the cooperative's Board of Directors from 1990 to 1998, previously moved for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against him. In denying his motion, this court stated, inter alia: "the plaintiff has adequately alleged that defendant Miller breached duties of care and good faith owed to the cooperative and its shareholders by (1) not obligating the bank holding the first mortgage to notify the board if the sponsor defaulted on the payment of the mortgage, (2) not obligating the sponsor to notify the board if there was a default in the payment

of real estate taxes, (3) overlooking the sponsor's failure to make maintenance payments between 1993 and 1998, (4) overlooking the sponsor's failure to make renovations as promised, and (5) entering into a financial restructuring arrangement which unduly favored the sponsor and greatly prejudiced the cooperative. *** There are issues of fact pertaining to whether defendant Miller acted in good faith and with due care which cannot be resolved here. (See, Ackerman v 305 East 40th Owners Corp., 189 AD2d 665; Bryan v West 81 Street Owners Corp., 186 AD2d 514.)" Defendant Miller's motion for summary judgment is premature before the plaintiff has had a full opportunity to conduct discovery regarding the issues raised by these allegations.

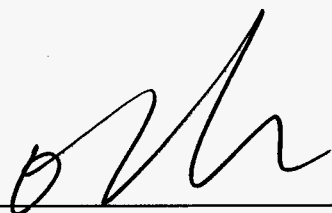
The motion by the Horing Welikson defendants for summary judgment dismissing the complaint and all of the cross claims against them is denied without prejudice to renewal at the conclusion of disclosure. (See, Barletta v. Lewis, supra; Welsh v. County of Albany, supra; Wee v. City of Rome, supra.) Unless otherwise agreed, the parties shall complete disclosure within 90 days of the service of a copy of the order to be entered hereon with notice of entry. The Horing Welikson defendants were the attorneys for the plaintiff cooperative at the time of the refinancing. "An action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the plaintiff's loss or injury, and evidence of

actual damages ***." (Pellegrino v. File, 291 AD2d 60, 63; see, Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63; Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 114, affd 80 NY2d 377.) The plaintiff alleges that the Horing Welikson defendants failed to properly advise the cooperative regarding, inter alia, the sponsor's default on its maintenance and mortgage obligations. (See e.g., Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo, 259 AD2d 282.) The plaintiff has shown the need for further discovery on such issues as whether the Horing Welikson defendants failed to properly advise the cooperative regarding (1) measures that could be taken to enforce the sponsor's maintenance obligations, (2) remedies, if any, available to the cooperative in the event the sponsor filed for bankruptcy, (3) the cooperative's alleged right pursuant to the regulations of the Attorney General to declare the sponsor's wrap-around mortgage satisfied based on the latter's default in payment of the underlying mortgage, and (4) special rights on the payment of maintenance given by the cooperative allegedly in violation of BCL 501(c) and the cooperative's proprietary lease and by-laws to defendant Cheshire Kew, which assumed control of the sponsor's apartments pursuant to a power of attorney.

The motion by defendant Insignia Residential Group, Inc. is granted to the extent that the plaintiff's complaint against it is dismissed unless the plaintiff complies with the defendant's

discovery demands within 20 days after the service of a copy of the order to be entered hereon with notice of entry. "A conditional order is an appropriate remedy when it affords the party who is refusing to comply with a disclosure order an additional opportunity to comply prior to the imposition of the final sanction ***." (Casas v. Romanelli, 232 AD2d 445.) The plaintiff commenced this action by the filing of a summons with notice on March 23, 2001. Thereafter, on or about May 1, 2003, the Honorable Martin E. Ritholz issued a compliance conference order which the plaintiff has not obeyed. In view of the length of time that this action has been pending and in view of the plaintiff's disobedience of the compliance conference order, a conditional order of dismissal is appropriate.

Short form order signed herewith.



J.S.C.