

**Arfa v Samir**

2008 NY Slip Op 30137(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 0603602/2005

Judge: Charles E. Ramos

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

Charles Edward Ramos

53

PRESENT: \_\_\_\_\_

PART 53

Justice

ARFA

INDEX NO.

603602/05

MOTION DATE

- v -

MOTION SEQ. NO.

029

MOTION CAL. NO.

Zamir

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

IS DISPOSED OF  
IN ACCORDANCE WITH THE ACCOMPANYING  
MEMORANDUM DECISION.

FILED

JAN 18 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/7/08



J.S.C.

HON. CHARLES E. RAMOS

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
RACHEL L. ARFA, ALEXANDER SHPIGEL, ARGELT, LLC,  
on behalf of themselves and on behalf of HARLEM  
HOLDINGS LLC., HARLEM MAINTENANCE SERVICES, INC.,  
and AMELITE MANAGEMENT SERVICES, INC.,

Plaintiffs,

Index No.  
603602/05

-against-

GADI ZAMIR and ZAMIR PROPERTIES INC.,

Defendants,

546-552 WEST 146<sup>TH</sup> STREET LLC, 522-536 WEST 147<sup>TH</sup>  
STREET LLC, WEST 162<sup>ND</sup> STREET AND ACADEMY STREET  
LLC, 100-102 EAST 124<sup>TH</sup> STREET PACKAGE LLC, HARLEM  
I LLC, and HARLEM II LLC, (the "LLCs")

Intervenor-Defendants.

**FILED**  
JAN 18 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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**Charles Edward Ramos, J.S.C.:**

In motion 29,<sup>1</sup> plaintiffs Rachel L. Arfa, Alexander Shpigel, and Argelt LLC move pursuant to CPLR 3025(b): (1) for leave to amend the complaint to add 552-563 Academy Street LLC as a plaintiff, to add additional causes of action on behalf of Academy Street LLC against defendants Gadi Zamir and Zamir Properties Inc. ("ZPI") and to add additional allegations and causes of action based on events that transpired after the complaint was filed; and (2) amending the caption to conform to the amendment. Defendants Eli Mor, Jacob Perry and Ilan Calic (the "Investors") cross move pursuant to CPLR 3211(a)(7) dismissing the complaint.

According to the amended complaint,

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<sup>1</sup> Motion 22 was mistakenly decided by a short form order dated February 21, 2007. The motion was restored to the calendar as motion 029.

"Arfa and Shpigel [through their holding company Argelt] are the majority entities that invested in real estate partnerships that owned and operated residential buildings in Manhattan and the Bronx. The purpose of the partnerships was to purchase the buildings, renovate them, obtain new renters and then ultimately resell them at a profit."

Argelt is the majority owner of Harlem Maintenance, LLC ("Maintenance") and AmElite Management Services Inc. ("AmElite"). AmElite and Harlem provided management and maintenance services for the various properties. Zamir owns 40% of Maintenance and AmElite. Defendants Mor, Perry and Calic are some of the investors in the properties.

In October 2005, plaintiffs on behalf of themselves and on behalf of Harlem Holdings, LLC ("Holdings"), Maintenance and AmElite commenced this action. The complaint alleged causes of action for breach of the parties shareholders' Governance Agreement, breach of fiduciary duty, a declaratory judgment that the Governance Agreement was null and void, and an accounting. In addition to seeking damages and rescission of the Governance Agreement, plaintiffs sought a preliminary injunction removing Mr. Zamir as a fiduciary of the controlled entities in order to break a management deadlock that was allegedly destroying the parties residential real estate portfolio.

In October 2005, there was a proxy contest resulting in Zamir managing some properties while plaintiffs managed other properties. In August 2006, Zamir was removed from management. Subsequently, a temporary receiver was appointed for Maintenance, Holdings and AmElite.

The amended complaint consists of eleven causes of action:  
(1) breach of contract (the Governance Agreement) against Zamir

and ZPI; (2) breach of contract (the Operating Agreements) against Zamir, ZPI, The Academy St. LLC and 158<sup>th</sup> St. LLC; (3) Indemnification against Zamir and ZPI; (4) breach of fiduciary duty against Zamir; (5) fraud against Zamir for the Academy St. Transaction; (6) fraud in the inducement of the Governance Agreement against Zamir; (7) libel and defamation against Zamir; (8) tortious interference with contract (the property ownership entities operating agreements) against Zamir, Mor, Perry, and Calic; (9) aiding and abetting breach of fiduciary duty against Mor and Perry; and (10) tortious interference with prospective economic advantage against Mor, Perry and Calic.

Plaintiffs argue that the Zamir Defendants waived their right to oppose the amendment by failing to move or answer. CPLR 3025 provides:

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

The amended complaint was handed to defendants' counsel on November 1, 2006 and filed in the County Clerk's office as well. Plaintiffs fail to state whether this original service was made under CPLR 3025(a). However, it is unlikely that it was made within 20 days of a responsive pleading as the original complaint was filed in 2005. Therefore, plaintiffs were required to comply

with CPLR 3025(b) and make a motion for leave to amend. Having failed to do so, defendants were not required to respond to the amended complaint. *Bernstein v M. Kazemi & Co.*, 221 AD2d 244 (1<sup>st</sup> Dept 1995). Therefore, plaintiffs' procedural argument is rejected.

The Investors argue that the amended complaint is defective as it is signed by plaintiffs attorney who has no personal knowledge. Although not required, the complaint is not verified. CPLR 3020. The motion to amend is supplemented by attorney affirmations, which cannot cure the deficiencies in the amended complaint, if any.<sup>2</sup> Ms. Arfa submitted an affidavit dated April 23, 2007 in support of the motion to amend and in opposition to the Investors' motion to dismiss. However, her four and a half page affidavit is limited to refuting a few factual issues. Accordingly, the amended complaint is defective and the motion to amend must be denied on this procedural ground. *Morgan v Prospect Park Assocs. Holdings, L.P.*, 251 AD2d 306 (2d Dept 1998).

Plaintiffs may serve a verified second amended complaint within 10 days of service of this order with notice of entry. Otherwise, the action shall proceed based on the original complaint. Defendants may move or answer within 20 days of service of the second amended complaint.

The following shall guide plaintiffs in preparing the second

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<sup>2</sup> Counsel are directed to NYCRR 202.8(c) and reminded that affidavits are for facts while briefs are for statements of law.

amended complaint.

In the first cause of action, plaintiff states a viable claim for breach of contract (the Governance Agreement) against Zamir, but not ZPI. Plaintiffs allege:

125. Zamir and ZPI have repeatedly and materially breach the Governance Agreement by, among other things: (1) refusing to govern the controlled Entities; (b) deliberately setting out to disrupt the operations of the controlled Entities, which are the subject of the Agreement; © hiring personnel to work for the Controlled Entities without first obtaining the consent of Arfa/Shpigel; (d) transferring funds of the controlled Entities without first obtaining the consent of Arfa/Shpigel; (e) executing the VRAs without first obtaining the consent of Arfa/Shpigel; and 9f) refusing to reimburse Arfa/Shpigel for 40% of the Overdue Citibank Mortgage Payments.

Defendants complain that plaintiffs fail to identify which provision of the agreement was breached and that plaintiffs fail to allege how they were damaged. Plaintiffs have stated a claim for breach of Agreement as well as the implied obligation of good faith and fair dealing. *WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1023 (Sup Ct, NY County 1999). *Wood v Lucy, Lady Duff-Gordon*, 222 NY 88 (1917). However, plaintiffs are required to plead the provision of the contract upon which the claim is based. *Sud v Sud*, 211 AD2d 423 (1<sup>st</sup> Dept 1996). Plaintiffs' allegations of damages are sufficient at this stage of the case. Plaintiffs concede that ZPI was not a party to the Governance Agreement.

In the second cause of action, plaintiffs claim breach of contract (the Operating Agreements) against Zamir, ZPI, the Academy St. LLC and 158<sup>th</sup> St. LLC and seek indemnification. Plaintiffs allege that Zamir and ZPI breached the operating

agreements for Academy St. LLC and 158<sup>th</sup> St. LLC by refusing to indemnify Arfa and Shpigel for 40% of the \$350,000 and \$150,000 payments to Eldan as well as breach of the covenant of good faith and fair dealing. Plaintiffs must specify which provision of the contract was breached. *Sud, supra*. Otherwise, plaintiffs' allegations are sufficient to state claim for breach of contract. *Furia v Furia*, 116 AD2d 694 (2d Dept 1986)

In the third cause of action, Mr. Shpigel seeks indemnification from ZPI and Zamir for 40% of the \$500,000 he paid to Eldan for the benefit of 158<sup>th</sup> St. LLC and Academy LLC. Defendants argue based on documentary evidence that Zamir and ZPI are not members of the LLCs and thus are not responsible for indemnification. In her April 23, 2007 affidavit, Arfa raises the agreement entitled Distribution of Equity Interests which appears to give ZPI an interest in the LLCs. Accordingly, an issue exists with regard to the documents; defendants' documentary evidence is not conclusive. Also, defendants argue that the motion to amend should be denied because the numbers do not add up. This argument is premature and better addressed on a motion for summary judgment.

In the fourth cause of action, plaintiffs allege a claim for breach of fiduciary duty against Zamir. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Kurtzman v Bergstol*, 40 AD3d 588, 590 (2d Dept 2007). First,

defendants object that the claim belongs to Maintenance, Holdings and AmElite. This argument is rejected because Zamir has a fiduciary duty to the LLC,<sup>3</sup> its investors and his fellow managers. *Lerner v Wetreich*, 12 Misc3d 1164 (Sup Ct, NY County 2006) ("Delaware courts have found that a manager of a limited liability corporation owes a fiduciary duty of loyalty to the LLC, its investors and his fellow managers under the common law."). As to the New York entities, managing members and members of closely held entities, such as the Property Owning LLCs, Academy, Maintenance and AmElite owe fiduciary duties to each other. *Salm v Feldstein*, 20 AD3d 469 (2d Dept 2005). Defendants argue that plaintiffs fail to allege damages and fail to plead with particularity as required by CPLR 3016(b). Plaintiffs allegation is sufficient at this stage to satisfy the damages requirement. Likewise, the Court finds the plaintiffs' 54 page amended complaint is sufficiently particular.

In the fifth cause of action, plaintiffs allege fraud against Zamir for the Academy St. transaction. This claim is based on Zamir's alleged misrepresentations about the physical condition of the Academy St and renovation costs for that project. These alleged misrepresentations induced Arfa and Shpigel to acquire Academy. Defendants argue that the fraud claim is barred by the release in the Governance Agreements which released all claims prior to June 9, 2005. However, a release cannot insulate a party from intentional, willful or grossly

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<sup>3</sup> Holdings is a Delaware LLC.

negligent acts. *Great Northern Associates, Inc. v Continental Casualty*, 192 AD2d 976, 977-78 (3d Dept 1993). Here, the claim is for fraud, an intentional act. Therefore, plaintiffs state viable claim.

In the sixth cause of action, plaintiffs allege fraud in the inducement of the governance agreement against Zamir. At plaintiffs' request at oral argument, that claim is permitted to be withdrawn.

In the seventh cause of action, plaintiffs allege libel and defamation against Zamir. Plaintiffs allege that defamatory statements were made in a proxy letter dated October 27, 2005. The amended complaint is dated October 31, 2006. Plaintiffs' motion to amend with a copy of the amended complaint was filed on March 1, 2007. The statute of limitations for defamation is one year. CPLR 215. Plaintiffs service of the amended complaint on defendants' counsel did not toll the statute of limitations. Therefore, the claim is barred by the statute of limitations.

In the eighth cause of action, plaintiffs allege tortious interference with contract (the property ownership entities operating agreements) against Zamir, Mor, Perry, and Calic. "A claim of tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages." *Lama Holding Co. v Smith Barney*, 88 NY2d

413, 424 (1996). The agreements at issue are the operating agreements with the LLCs whose investors terminated Shpigel as their manager during the proxy contest. Paragraph 6.4 provides for 60 days notice and a 60 day cure period before a manager may be removed. Defendants allegedly had knowledge of these operating agreements. Indeed, defendants argue that they were parties to these agreements and thus, they conclude, a claim for tortious interference cannot lie. Rather, LLCs established by defendants were parties to the agreements. Plaintiffs allege that Zamir's efforts to persuade investors to retain him as manager were improper and without justification. Plaintiffs allege that Mor and Perry served as surrogates for Zamir during the proxy fight, hosting meetings with certain investors, promising that they would supervise Zamir and distributing Zamir's proxy letter. This is sufficient to allege tortious interference. Defendants' arguments that they were justified are premature.

In the ninth cause of action, plaintiffs allege aiding and abetting Zamir's breach of fiduciary duty against Mor and Perry. The elements of such a claim are: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant[s] 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, 125 (1st Dep't 2003). The Court rejects Mor and Perry's argument that one allegation in the complaint that they knew that Zamir was breaching his fiduciary duty is insufficient;

one allegation is enough. Likewise, the Court rejects Mor and Perry's objection that the complaint fails to allege their substantial assistance of the breach. Whether their assistance is substantial or not is for a jury to decide.

In the tenth cause of action, plaintiffs allege tortious interference with prospective economic advantage against Mor, Perry and Calic. Defendants contend that the complaint fails to identify which if any prospective business relationships were disadvantageous. Arfa states in her April 23, 2007 affidavit in opposition to defendants' motion to dismiss that "the majority investor in 571-573 West 159<sup>th</sup> Street LLC will not enter into any new business with plaintiffs." She also states that another investor abandoned plans to invest as a result of defendants' statements. Discovery is necessary to determine this issue. Finally, a claim for tortious interference with prospective business advantage must be "motivated solely by malice or to inflict injury by unlawful means beyond mere self-interest or other economic considerations." *Shared Communications Services of ESR Inc. v Goldman Sachs & Co.*, 23 Ad3d 162, 163 (1<sup>st</sup> Dept 2005). Clearly, defendants sought to protect their investments which would pardon defendants's acts. However, plaintiff raises a good question: did defendants go beyond protecting their own investments and ruin plaintiffs' reputations? This is not a question that can be answered without discovery or on a motion to amend.

In the eleventh cause of action, plaintiffs seek a

declaratory judgment that they are entitled to indemnification. This claim is viable for the same reasons stated above with regard to the second and third cause of action.

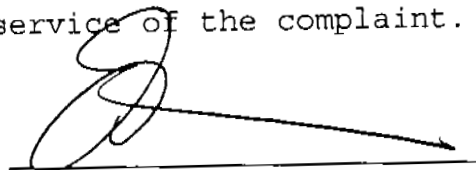
Accordingly, it is

ORDERED, that the motion to amend is denied; and it is further

ORDERED, that defendants' motion to dismiss is granted; and it is further

ORDERED, that plaintiffs have 10 days for leave to replead. If plaintiffs serve a second amend complaint, then defendants' shall answer or move within 20 days of service of the complaint.

Dated: January 7, 2008



J.S.C.

**HON. CHARLES E. RAMOS**

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

**FILED**  
JAN 18 2008  
NEW YORK  
COUNTY CLERK'S OFFICE