

Lai v Gartlan

2008 NY Slip Op 31183(U)

April 7, 2008

Supreme Court, New York County

Docket Number: 0602425/2002

Judge: Charles E. Ramos

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

PRESENT: CE Ram
Justice

PART 53

Index Number : 602425/2002
LAI, DUNNIE
vs.
GARTLAN, H.J. JR.
SEQUENCE NUMBER : 025
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

FILED
APR 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with
accompanying memorandum decision and order.

Dated: 4/17/08

[Signature]
CHARLES E. RAMOS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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
DUNNIE LAI AND GENERATION PROPERTIES
INVESTMENT CO., individually and as
Limited Partners of 150 LAFAYETTE STREET
PROPERTY INVESTMENT CO., suing on behalf
of themselves and all others similarly
situated, for the benefit and in the
right of 150 LAFAYETTE STREET PROPERTY
INVESTMENT CO.; also as Shareholders of
DOUBLE FORTUNE PROPERTY INVESTORS CORP.,
suing in the right of DOUBLE FORTUNE
PROPERTY INVESTORS CORP.; and
LIANG LIANG,

Plaintiffs,

-against-

H.J. GARTLAN, JR., a/k/a JAY GARTLAN,
a/k/a HARRY GARTLAN, DOUBLE FORTUNE
PROPERTY INVESTORS CORP., RICKY LEUNG,
HENRIETTA LEUNG and DAVID WANKOFF,

Defendants.

Index No. 602425/02

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APR 23 2008
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NEW YORK

-----x
Charles Edward Ramos, J.S.C.:

This action arises out of a dispute between limited partners involving ownership of a building located at 150 Lafayette Street in New York City.¹ The partnership, 150 Lafayette Street Property Investment Co. (150 Lafayette), was formed in 1981. Plaintiffs Dunnie Lai and Generation Properties Investment Co. (GPIC) are partners along with defendant Henrietta Leung. Defendant Double Fortune is the general partner. Double Fortune is controlled by defendant Harry Gartlan.

Plaintiffs commenced this action in July of 2002 against defendants Gartlan, Double Fortune, Ricky and Henrietta Leung,

¹ The facts of this case have been set forth previously in greater detail in decisions by this Court and the Appellate Division, First Department, and are only briefly recited herein.

and David Wankoff. The complaint, which was amended twice, "generally alleges that the defendants secretly conspired to deprive the plaintiffs of their equity interest in the building by destroying the partnership and acquiring the building for themselves." Lai v Gartlan, 46 AD3d 237, 239 [1st Dept 2007].

The building was eventually sold for \$33.5 million on June 9, 2005. A portion of the sale proceeds was paid to creditors and the balance, over \$23 million, was placed in an escrow account pending the winding up process, a final accounting and distribution of partnership assets.

Gartlan originally moved, pursuant to CPLR 3211, for an order dismissing the second, fourth, fifth, sixth, seventh and eighth causes of action set forth in the Second Amended Complaint. The motion was converted by this court into a motion for summary judgment.²

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]. The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560

² Plaintiffs state that the sixth cause of action has previously been withdrawn. Gartlan now states that he is moving for summary judgment dismissing the second, fourth and fifth causes of action.

[1980].

Breach of Fiduciary Duty

Plaintiffs' second cause of action is for breach of fiduciary duty against Gartlan in his capacity as the principal of Double Fortune. Plaintiffs allege, generally, that Gartlan conspired with the other defendants in this action to restructure the various ownership interests in the Partnership and to decrease the value of the building, to the detriment of the plaintiffs.

Specifically, plaintiffs allege that Gartlan permitted the Partnership to default on certain installment payments that it was obligated to make to former partner Winnie Mok pursuant to a sales agreement, whereby Mok had sold her partnership interest back to the other partners for \$2.5 million. Upon the default, Mok sued the Partnership and eventually obtained a default judgment for \$3.9 million.

First, plaintiffs assert that Gartlan breached his fiduciary duty by failing to oppose the Mok action, resulting in the eventual default judgment, and failing to assert certain counterclaims. However, the default judgment in the Mok action was obtained in April of 1995, more than six years before the commencement of the instant action. Therefore, insofar as this claim is based upon the Mok action, it is untimely and is dismissed. See, Dragon Inv Co II LLC v Shanahan, ___ AD3d ___, ___ NYS2d ___, 2008 WL 714067 [1st Dept 2008].

Plaintiffs also allege that Gartlan breached his fiduciary

duty by allowing Henrietta Leung and Ricky Leung to eventually acquire the Mok judgment. Plaintiffs contend that Gartlan knew that the Leungs were going to try to enforce the default judgment against the Partnership as part of an overall plan to devalue the building and change the ownership interests.

CPLR 3016(b) requires that a cause of action for breach of fiduciary duty be alleged in detail. See, DeRaffele v 210-220-230 Owners Corp, 33 AD3d 752, 753 [2d Dept 2006] (dismissing claim for breach of fiduciary duty for failure to allege sufficient specific facts). Here, plaintiffs have not put forth sufficient evidence to support this cause of action against Gartlan.

Rather, plaintiffs speculate that Gartlan knew or should have known that the Leungs were scheming to restructure the ownership of the building. To the extent that plaintiffs contend that Gartlan was an active member of such a scheme, they have not put forth sufficient evidence to demonstrate that any triable issues of fact exist with regards to such a contention. In fact, despite extensive discovery done in this action, plaintiffs concede that "[it] is unclear to what extent Gartlan was directly involved in structuring the 1997 Mok Settlement and the subsequent assignment of judgment...to the Leungs." (Plaintiffs' Memorandum of Law at 14). Further, they assert that "[i]t is hard to believe that Gartlan...did not know that the Leungs were going to try to acquire the Mok Judgment". (Plaintiffs' Memorandum of Law at 14). Such speculation is not sufficient to support this cause of action.

Moreover, plaintiffs fail to put forth evidence sufficient to demonstrate that Gartlan breached his fiduciary duty by failing to "correct the situation" once he learned of the assignment of the judgment to Henrietta Leung. (Plaintiffs' Memorandum of Law at 14). Plaintiffs assert that Gartlan's alleged inaction was a deliberate part "of a greater scheme to ruin the 150 Partnership and give his friend, business partner, and client, Ricky Leung, the opportunity to take the 150 Partnership for himself." (Plaintiffs' Memorandum of Law at 13).

Plaintiffs contend that this scheme involved the use of the Partnership's own funds and borrowing power in order to allow defendants to destroy the Partnership and acquire the building for themselves. However, plaintiffs have not put forth evidence to support their contention that such a scheme existed or that Gartlan took part in it in violation of his fiduciary duties. Therefore, this claim is dismissed.

Plaintiffs also allege that Gartlan, in his role as principal of Double Fortune, wrongfully terminated Lai from her position as leasing and managing agent for the building. Plaintiffs allege that Lai's removal and Gartlan's assumption of her role as managing and leasing agent was done for his self-serving, personal interests.

Gartlan states that Lai was an at-will employee and was terminated for cause. He alleges numerous wrongful acts by Lai as the managing agent, including the use of rental monies for her personal use.

This claim is dismissed. Plaintiffs have not put forth evidence to demonstrate that questions of fact exist as to whether Lai was wrongfully terminated or that such termination constituted a breach of Gartlan's fiduciary duty to the Partnership.

Fraud

Plaintiffs' fifth cause of action is for fraud. "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co v Smith Barney Inc, 88 NY2d 413, 421 [1996]. CPLR 3016[b] requires that the facts underlying a claim for fraud be stated in detail.

Plaintiffs' fraud claim is premised on the same alleged scheme set forth in support of the claim for breach of fiduciary duty. Plaintiffs state that "Gartlan's liability for fraud arises not from specific statements to Plaintiffs, but from his duty to inform [plaintiffs] of the scheme and his failure to do so." (Plaintiffs' Memorandum of Law at 19).

The cause of action for fraud is dismissed. As set forth above, plaintiffs have not put forth sufficient evidence to demonstrate that questions of fact exist as to whether Gartlan was engaged in a scheme to ruin the Partnership through the enforcement of the Mok judgment by the Leungs. Therefore,

plaintiffs cannot demonstrate that Gartlan committed fraud by failing to inform them of the existence of such a scheme.

Legal Malpractice

Plaintiffs' fourth cause of action is for legal malpractice. "In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." Bishop v Maurer, 33 AD3d 497, 498 [1st Dept 2006], aff'd 9 NY3d 910 [2007].

Plaintiffs' claim is based on their assertion that, in 1995, Gartlan allowed the Partnership to default on the installment payments that it owed to Mok arising from the Partnership's purchase of Mok's partnership interest. This default eventually led to the enforcement action by Mok during which Gartlan allegedly failed to oppose Mok's motion for summary judgment, resulting in a default judgment against the Partnership for \$3.9 million.

This cause of action is dismissed as untimely. The statute of limitations for a legal malpractice claim is three years. CPLR 214 [6]; Espie v Murphy, 35 AD3d 348, 349 [2d Dept 2006]. Here, the events complained of allegedly took place in 1995 and the instant action was not commenced until 2002, several years after the limitations period expired.

Plaintiffs contend that the statute should be tolled under the doctrine of continuous representation. Plaintiffs assert that Gartlan acted as the attorney for the Partnership until at least

2002. However, at best, plaintiffs have demonstrated that there may have been a "general professional relationship" whereby Gartlan acted as the attorney for the Partnership. See, Lai v Gartlan, 28 AD3d 263, 264 [1st Dept 2006]. Nonetheless, plaintiffs fail to put forth sufficient evidence to demonstrate "an ongoing representation concerning the specific matters from which their claims arose", i.e., the action by Mok to enforce the judgment. See, Lai v Gartlan, supra at 264 (dismissing the legal malpractice claim in this action against defendant David Wankoff). Therefore, plaintiffs have not demonstrated that the statute of limitations should be tolled.

Plaintiffs also contend that Gartlan was negligent in failing to inform them of his conflict of interest, i.e., that he was acting as the attorney for the Partnership at the same time that he was allegedly engaged in a scheme to ruin the Partnership through the enforcement of the Mok judgment by the Leungs. However, as set forth above, plaintiffs failed to demonstrate the existence of such a scheme.

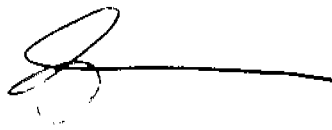
Finally, in light of the Court's disposition herein, the sole remaining causes of action for a declaratory judgment and a permanent injunction, are dismissed as moot.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, and the second, fourth, fifth, sixth, seventh and eighth causes of action are dismissed, and the Clerk is directed to enter judgment in favor of said defendants.

Dated: April 7, 2008

ENTER:



J.S.C.

CHARLES E. RAMOS

J.S.C.

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