

Raminfard v Poli

2008 NY Slip Op 31400(U)

May 14, 2008

Supreme Court, Suffolk County

Docket Number: 0038393/2007

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 38393-2007

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:HON. EMILY PINES

J. S. C.

Motion Date: 01-29-2008
Submit Date: 03-26-2008
Motion No.: 001 MD
002 MOTD

03-05-2008
03-26-2008
003 MD

MICHAEL RAMINFARD, Individually and on
behalf of the Shareholder of Robjan Realty Corp.,
and on behalf of Laurel Avenue
Holding Corp.,

X
Plaintiffs,

-against-

JOHN POLI, III, JOHN G. POLI, III, P.C.,
ROSEMARIE POLI, ROBERT E. TUTTLE, and
JOHN / JANE DOE Nos. 1-4,

Defendants.
X

Attorney for Plaintiff

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Attorney for Defendant Tuttle

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ORDERED, that the motion (motion sequence number 001) by defendant, Rosemarie Poli, to dismiss the complaint as against her is denied; and it is further

ORDERED, that the cross-motion (motion sequence number 002) by plaintiff to compel discovery and for ancillary relief is granted to the extent set forth herein; and it is further

ORDERED, the cross-motion (motion sequence number 003) by defendant, John G. Poli, III to dismiss the complaint is denied.

This is an action by plaintiff, both individually and derivatively, on behalf of the shareholders of two corporations, Robjan Realty Corp. ("Robjan") and Laurel Avenue Holding Corp. ("Laurel

Avenue”). The action was commenced by the filing of a Summons and Verified Complaint on or about December 7, 2007 and Defendant Rosemarie Poli (“R. Poli”) and defendants John G. Poli, III (“J. Poli”) and John G. Poli, III, P.C. (“J. Poli, P.C.”), now move to dismiss the complaint. Plaintiff served a Supplemental Summons and Amended Complaint on or about March 18, 2008 in which he adds Robjan and Laurel Avenue as party defendants.¹

THE ALLEGATIONS AND THE COMPLAINT

Plaintiff alleges that from 1991 to May of 2007, defendants J. Poli and J. Poli, P.C., represented him as his attorney and that they also became personal friends. He alleges that in 2004, J. Poli approached him regarding the purchase of two contiguous parcels of real property located at 687 Fort Salonga Road and 200-210 Laurel Avenue, Northport, New York (collectively referred to as “the subject premises”). Plaintiff states that J. Poli told him the purchase price of the subject premises was \$600,000.00, payable \$200,000.00 in cash and \$400,000.00 by a mortgage. Plaintiff further states that J. Poli told him that he (plaintiff) could purchase one-half of the subject premises and that defendant R. Poli, J. Poli’s wife and secretary, would purchase the other one-half interest. Plaintiff alleges that J. Poli represented to him that the subject premises was owned by defendant, Robert E. Tuttle (“Tuttle”), who resided in Florida. Plaintiff states that J. Poli undertook to represent him in connection with the purchase of the subject premises.

Thereafter, plaintiff alleges that in or about April of 2004, J. Poli advised plaintiff that the subject premises would be purchased in the name of Laurel Avenue, a corporation formed by J. Poli, and that he (plaintiff), and R. Poli went to the bank to open an account in the name of Laurel Avenue. According to plaintiff, the bank account opened in the name of Laurel Avenue, pursuant to the corporate resolution, required two (2) signatures on any checks greater than \$5,000.00. Plaintiff alleges that on or about February 17, 2005, J. Poli came to his place of business and plaintiff gave him a check in the amount of \$100,000.00, payable to Laurel Avenue, presumably representing his share of the cash required to purchase the subject premises. Plaintiff alleges that although he believed that R. Poli would be remitting an equal amount, to wit, \$100,000.00, toward the purchase price of the subject premises, in fact, on or

¹ Although defendants argue that the amendment of the Summons and Complaint is untimely, such argument is without merit. As set forth succinctly by Professor Siegal, “If the pleading to be amended does require a response... and the defendant, instead of answering, moves to dismiss the complaint under CPLR 3211..., the making of either kind of motion automatically extends the defendant’s responding time, and by so doing extends as well the time in which the plaintiff may amend the complaint as of course. This enables the plaintiff, even before the motion is heard, to amend the complaint and perhaps even correct the defect at which the defendant’s motion was aimed.” *New York Practice (4th Ed. Siegel 2005)*. This is precisely the situation in the case at bar. Defendant J. Poli has moved to dismiss on the ground that plaintiff failed to join indispensable parties, to wit, Robjan and Laurel Avenue and in response plaintiff filed a Supplemental Summons and Amended Verified Complaint. Such practice is proper under the CPLR. Counsel were afforded the opportunity by the Court to file additional affidavits directed to the Amended Verified Complaint but declined to do so.

about March 17, 2005, a check in the amount of \$100,000.00 was drawn on the attorney trust account of J. Poli, P.C. to Laurel Avenue. On or about March 21, 2005, the \$200,000.00 was subsequently wired from the Laurel Avenue bank account to a bank account in Florida in the name of Robjan, another corporation formed by J. Poli.

Plaintiff asserts that at the time the \$200,000.00 was wired from Laurel Avenue to Robjan, title to the subject premises was not transferred to either plaintiff or Laurel Avenue, and in fact, Robjan was not the record owner of the subject premises. Rather, on or about April 27, 2005, after the funds were transferred, a deed to the subject premises dated September 23, 2004 was recorded in the office of the Suffolk County Clerk. This deed transferred title to the subject premises from Tuttle to Robjan and was acknowledged by R. Poli. Plaintiff further alleges that subsequent to the transfer of the deed, neither he, nor Laurel Avenue, received any rents from the subject premises. Additionally, plaintiff asserts that, in or about March of 2005, after he had given J. Poli the \$100,000.00, J. Poli represented to him that instead of purchasing the subject premises directly, that plaintiff and R. Poli actually purchased the stock of Robjan.

Plaintiff states that as of May of 2007, he had received neither the deed to the subject premises, nor stock certificates evidencing his ownership interest in Laurel Avenue or Robjan. He further states that J. Poli, J. Poli, P.C. and R. Poli have failed and refused to provide an accounting of any rents collected from the subject premises.

The Complaint sets forth eight causes of action. The first cause of action alleges legal malpractice by J. Poli and J. Poli, P.C. in connection with the transaction involving the purchase of the subject premises, in that defendants did not obtain a title report, title insurance, or an environmental review regarding the property. Moreover, and significantly, plaintiff alleges that neither J. Poli, nor J. Poli, P.C. disclosed that J. Poli was an officer and director of Robjan at the time they represented plaintiff. He asserts that these defendants failed to disclose their conflicts of interest in that they represented Robjan, Tuttle, R. Poli, Laurel Avenue and J. Poli. He further alleges that J. Poli and J. Poli, P.C. has failed to disclose the source of the funds disbursed from the attorney trust account and further that they failed to inform him he should seek independent counsel.

The second cause of action against J. Poli, J. Poli, PC and R. Poli sounds in breach of fiduciary duty. This cause of action alleges that all defendants are fiduciaries of and have a fiduciary duty to plaintiff, Robjan and Laurel Avenue and that defendants breached said duties. Specifically, the complaint alleges that defendants breached their duty by, *inter alia*, failing to properly acquire title to the property for him, failing to disclose conflicts of interest, failing to provide stock certificates, by concealing information, by wasting assets of plaintiff, failing to timely pay obligations related to the property, by filing tax returns for Laurel Avenue without disclosing same and by acting and conducting themselves as if the subject premises were theirs without regard to the lawful rights of plaintiff.

The third cause of action of the complaint against all defendants alleges unjust enrichment. Here, plaintiff alleges that defendants utilized the assets of plaintiff for their own personal benefit and converted the subject premises to their own use without regard to the rights of plaintiff. The fourth cause of action against all defendants is for an accounting of all funds received, collected, disbursed or remitted in connection with the subject premises. Here, plaintiff also seeks copies of all documents pertaining to the subject premises including all leases. The fifth cause of action seeks an accounting from Tuttle regarding a purported adjustment of \$10,000.00 in conjunction with the sale of the subject premises.

The sixth cause of action is asserted against J. Poli, J. Poli, P.C. and R. Poli for fraud, and alleges that these defendants made material misrepresentations to plaintiff that induced him to purchase the subject premises and deliver monies to J. Poli in connection with said purchase. The seventh cause of action against all defendants is for specific performance. In this cause of action, plaintiff alleges that he is entitled to ownership of one half of the interest of the property with a tax basis equal to the price he paid. Finally, the eighth cause of action seeks a declaratory judgment regarding the status of the respective parties with regard to the subject premises. Plaintiff seeks money damages, together with punitive damages and counsel fees.

THE MOTIONS

Defendant, R. Poli, moves to dismiss the complaint against her on the following grounds: pursuant to CPLR Rule 3211(a)(1), a defense founded on documentary evidence; pursuant to CPLR Rule 3211(a)(3), that plaintiff does not have standing nor legal capacity to sue; pursuant to CPLR Rule 3211(a)(7), that the complaint fails to state a cause of action against her and that the claims by plaintiff in his individual capacity and in his derivative capacity as a shareholder of Robjan and Laurel Avenue are improperly joined and intertwined²; and dismissing the claim for punitive damages and counsel fees.

Defendants, J. Poli and J. Poli, PC, move to dismiss the complaint pursuant to CPLR Rule 3211(a)(8) on the ground that plaintiff's shareholder derivative action must be dismissed because he failed to join Robjan and Laurel Avenue as necessary parties. These defendants also seek, pursuant to CPLR §§3012(d) and 2004, an extension of time to serve a late answer. As set forth above, this motion becomes moot in that plaintiff has filed, as of right, a Supplemental Summons and Amended Verified Complaint naming both Robjan and Laurel Avenue as nominal defendants. Thus, defendants

²This claim becomes moot by the Amended Verified Complaint which sets forth separate and distinct derivative and individual causes of action.

J. Poli and J. Poli, PC, can timely serve Verified Answers and/or otherwise move with respect to the Amended Verified Complaint.

Plaintiff moves for an Order compelling defendants to comply with certain outstanding discovery demands and to vacate the stay predicated upon a motion to dismiss. This motion also becomes moot upon the determination of the motions herein as the stay upon discovery will be automatically lifted.

Thus, the only remaining motion for the Court's consideration is the motion of R. Poli to dismiss the original Verified Complaint.

R. Poli's Motion to Dismiss

Defendant, R. Poli, moves to dismiss the complaint based upon documentary evidence and failure to state a cause of action and submits a copy of a Stock Purchase Agreement dated March 18, 2005 for the purchase of the stock of Robjan. This agreement was between Tuttle, as sole shareholder of Robjan, and plaintiff and R. Poli as purchasers of the stock, for the purchase of 100% of the stock for the price of \$600,000.00. The agreement provided for a down payment of \$60,000.00, to be held in escrow by Tuttle's attorney, defendant J. Poli, \$140,000.00 paid upon closing, and the \$400,000.00 balance of the purchase price by execution of a promissory note. The Stock Purchase Agreement provided for a closing date on or about June 30, 2006 or upon delivery of the subject premises by the gas station tenant. R. Poli also annexes a copy of the Escrow Agreement, also dated March 18, 2005, in which the plaintiff and defendants, Tuttle and R. Poli agreed that defendant J. Poli would hold the stock certificates for Robjan in escrow until payment of the obligations on the promissory note.

R. Poli states that "for administrative purposes", the parties established a bank account in the name of Laurel Avenue, in which plaintiff and R. Poli were equal shareholders. Attached to the motion papers is the banking resolution of Laurel Avenue, setting forth that two (2) signatures were required on checks over \$5,000.00. R. Poli states that she and plaintiff each deposited \$100,000.00 in the Laurel Avenue account and she then wire transferred \$200,000.00 "per the instructions of John." In or about October 30, 2006, R. Poli alleges that a special meeting of the shareholders of Robjan was held, with Tuttle appearing by proxy. At this meeting, according to the minutes annexed to the motion papers, Tuttle and J. Poli resigned as directors and officers of Robjan and plaintiff and R. Poli were elected as directors. Plaintiff was also elected president and treasurer and R. Poli was elected as vice-president and secretary. The purported minutes further reflect that it was agreed that the promissory note to Tuttle would be amended to an amount of \$300,000.00 and that plaintiff and R. Poli would each deliver the sum of \$50,000.00 to be paid to Tuttle to reduce the balance of the promissory note.

R. Poli states that after the amended promissory note was executed, plaintiff did not actively participate in the operations of Robjan and she was forced to perform all responsibilities on behalf of the corporation. She states that she paid the 2007 real estate taxes on the property because plaintiff did not contribute his share toward the payment of the taxes. R. Poli alleges that plaintiff has not done anything to assist in the leasing of the subject premises or paid any of the expenses of Robjan.

With regard to the second cause of action for breach of fiduciary duty, R. Poli argues that she does not owe a fiduciary duty to plaintiff, but only to the corporation. She states that she acted pursuant to the agreement and plaintiff has not contributed any efforts or financial support to the operation of the corporation. R. Poli argues that both she and plaintiff received what they bargained for; to wit, ownership in Robjan, which in turn, owns the subject premises. Interestingly, R. Poli argues that the transaction was arranged and developed by co-defendant, J. Poli, who represented both plaintiff and defendant Tuttle, the seller. Thus, R. Poli argues that plaintiff has failed to set forth a cause of action against her for breach of fiduciary duty.

On the third cause of action for unjust enrichment, R. Poli argues that the allegations are “broad, sweeping and conclusory” and that the claim is without merit, substance or factual support. Turning to the fourth cause of action seeking an accounting, R. Poli alleges that an accounting is not necessary because plaintiff is authorized to review all corporate bank accounts and moreover, that the finances of the transaction were not complex. Regarding the fifth cause of action seeking damages for fraud, R. Poli argues that the allegations of the Verified Complaint are directed solely at co-defendant J. Poli and that there are no specific allegations against her. As to the sixth cause of action for specific performance, R. Poli asserts that the contract between the parties specifically provided that plaintiff would obtain an interest in Robjan, and not the subject premises in his individual capacity. She argues that plaintiff is, in essence, attempting to restructure the transaction to acquire title individually, when that was never the parties’ agreement. Finally, on the seventh cause of action seeking a declaratory judgment, R. Poli argues that the documentary evidence unequivocally demonstrates that plaintiff owns a one-half interest in Robjan, which owns the subject premises. She asserts that this is what plaintiff bargained for and what he now owns and he should not be permitted to reform the agreement.

In opposition to the motion by R. Poli, plaintiff argues that she has failed to demonstrate that the documentary evidence conclusively establishes a defense to the claims as a matter of law. Plaintiff points to numerous inconsistencies between the Stock Transfer Agreement and R. Poli’s affidavit and further submits his own documentation demonstrating factual issues. Notable among such representations, is the accounting documents of Laurel Avenue, indicating that J. Poli is the 100% shareholder of such corporation, after the date that plaintiff and R. Poli purportedly became officers of that entity. In sum, plaintiff argues that in 2004, J. Poli, who was his attorney and friend, presented him with an opportunity to purchase the subject premises. He asserts that J. Poli, again, his attorney, made certain representations to him regarding the investment potential of the subject premises and directed him to take certain actions to acquire the property. Then, however, he asserts

that J. Poli told him that the subject premises was going to be acquired in the name of Laurel Avenue, a corporation in which J. Poli was a shareholder. He believed that R. Poli was going to deposit her share of the down payment, to wit, \$100,000.00, yet a check was later disbursed from J. Poli's attorney escrow account, without explanation. Moreover, plaintiff claims he was not present at the October 20, 2006 Robjan shareholder meeting and that despite his repeated requests, he did not receive information regarding the subject premises, including leases in effect for the property. He further alleges that he paid the entire cash portion of the purchase price in 2005, R. Poli is alleging that the closing did not take place until November of 2006. He states he was not aware of the closing and the tax returns of Robjan indicate the property was sold in March 2005, when the initial \$200,000.00 was wired to Robjan.

Regarding the failure to state a cause of action, plaintiff argues that R. Poli clearly had a fiduciary duty to him individually and points to her admission that she and J. Poli had a longstanding personal and business relationship with plaintiff. Plaintiff urges the Court to recognize that as joint shareholders in a closely held corporation, each had a fiduciary duty to the other, akin to that between partners.

In reply, R. Poli again argues that she was a "purchaser and a client" of J. Poli, same as the plaintiff and that plaintiff mixes up the allegations against the two as defendants. She also argues that plaintiff entered into an agreement, the agreement was performed and he received what he bargained for. Thus, she argues that the claims against her must be dismissed. As to the fiduciary duty claim, R. Poli argues that both she and plaintiff relied on the representations of J. Poli and that plaintiff did not rely on any advice given by her. R. Poli asserts that certain tax documents provided by plaintiff were incorrect and subsequently amended, including the Robjan documents indicating the sale of the subject premises in 2005 and the Laurel Avenue documents stating that J. Poli was the sole shareholder therein.

The Law

At the outset, it is important to note that the motions pending before the Court, despite their voluminous nature, are pre-answer, pre-discovery motions to dismiss, not post-discovery motions for summary judgment. Whether the complaint at issue will later survive a motion for summary judgment, or even if plaintiff will be able to later prove his claims, plays no part in this initial determination. *Shaya B. Pacific, LLC., v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 827 N.Y.S.2d 231 (2d Dept. 2006).

Keeping this principle in mind, it is well settled that dismissal pursuant to CPLR 3211(a)(1) based upon documentary evidence is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leibowitz v. Impressive Homes*, 43 A.D.3d 1003, 843 N.Y.S.2d 120 (2d Dept. 2007)(internal citations omitted). *See also*,

Fleming v. Kamden Properties, LLC., 41 A.D.3d 781, 839 N.Y.S.2d 197 (2d Dept. 2007); *Matovick v. Times Beacon Record Newspapers*, 46 A.D.3d 636, 849 N.Y.S.2d 75 (2d Dept. 2007); *L & S Motors, Inc., v. Broadview Networks, Inc.*, 25 A.D.3d 767, 808 N.Y.S.2d 777 (2d Dept. 2006); *Klein v. Gutman*, 12 A.D.3d 417, 784 N.Y.S.2d 581 (2d Dept. 2004). A dismissal based on documentary evidence is not appropriate where factual issues remain. *Del Pozo v. Impressive Homes, Inc.*, 29 A.D.3d 621, 816 N.Y.S.2d 123 (2d Dept. 2006).

A motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) will fail if “taking all the facts alleged as true and according them every possible inference to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.” *Sheroff v. Dreyfus Corp.*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2008 WL 1746955 (2d Dept. 2008)(internal citations omitted). Moreover, affidavits may be used to preserve “inartfully pleaded, but potentially meritorious claims.” *Id.*

In the case at bar, the documentary evidence submitted by R. Poli, does not conclusively establish her entitlement to dismissal of the complaint against her. Rather, the Stock Purchase Agreement, taken together with the complaint, plaintiff’s affidavit and R. Poli’s affidavit, raises more questions than it answers. The gravamen of plaintiff’s action is that he was approached by J. Poli, his friend and lawyer, about purchasing some property in partnership with R. Poli, J. Poli’s wife and secretary. According to plaintiff, it turns out, when all is said and done, that he ends up, supposedly agreeing to purchase stock in Robjan, an entity purportedly holding title to the property, in the name of Laurel Avenue. Both corporations are owned by J. Poli, who is representing all sides of this transaction and has a personal interest in the corporations and subject premises; accusations which have not escaped the Court’s notice, although not directly addressed herein. R. Poli, an employee of J. Poli P.C. and wife of J. Poli, was supposed to transfer her own funds as a portion of the down payment, and instead remits a check from J. Poli’s attorney escrow account. Assuming the allegations of the Complaint to be true, as required on this motion to dismiss, plaintiff repeatedly requested that both R. Poli and J. Poli, provide documentation regarding the transaction, the subject premises, leases, tax information, and other pertinent information. According to plaintiff, such requests went unanswered and ultimately required him to commence this proceeding.

Contrary to the arguments of R. Poli, shareholders of a closely held corporation do owe each other a duty to act in good faith. *See, Cassata v. Brewster-Allen Wichert, Inc.*, 248 A.D.2d 710, 670 N.Y.S.2d 552 (2d Dept. 1998). It is irrelevant whether plaintiff will ultimately prove any of his claims as against R. Poli. The allegation that she breached her duty to act in good faith to her friend and co-shareholder as set forth in the allegations of the Complaint is clearly sufficient to withstand a pre-answer motion to dismiss. Although R. Poli attempts to shift any potential liability solely to J. Poli, at this early stage of the litigation, the Court cannot say that the Complaint fails to state a cause of action against her. Significant issues of fact exist regarding whether plaintiff relied on any misrepresentations of R. Poli and such issues cannot be resolved on a motion directed at the

pleadings. *Segal v. Cooper*, 49 A.D.3d 467, __N.Y.S.2d __, 2008 WL 795830 (1st Dept. 2008). Moreover, the allegations that R. Poli, together with J. Poli, acted to deprive plaintiff of his share of the income such as rents and other profits. of the corporation, adequately states a cause of action for unjust enrichment. *Id.*

Based on the foregoing, the motion by defendant Rosemarie Poli to dismiss the Complaint is denied in its entirety.

CONCLUSION


As set forth above, in light of the determination herein, the cross-motion by plaintiff to lift the stay on discovery is denied as moot. Defendants are directed to comply with all outstanding discovery demands. The cross-motion by defendants John G. Poli, III and John G. Poli, III, PC are also denied in light of the Court's determination herein that plaintiff is entitled, as of right, to file and serve a Supplemental Summons and Amended Verified Complaint. Defendants shall answer or otherwise move with respect to the Amended Verified Complaint within twenty (20) days from service of a copy of this Order with Notice of Entry.

Counsel are reminded that a compliance conference is scheduled for June 11, 2008 at 9:30 a.m. before the undersigned.

Plaintiff shall serve a copy of this Order upon counsel for all parties and file same in the Suffolk County Clerk's Office, Riverhead County Center, 310 Center Drive, Riverhead, New York 11901.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: May 14, 2008
Riverhead, New York



EMILY PINES
J. S. C.