

Garnett v Petri

2008 NY Slip Op 31479(U)

May 13, 2008

Supreme Court, Nassau County

Docket Number: 0116-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 000116/07

MOTION DATE: April 1, 2008
Motion Sequence # 006, 007

MILES GARNETT individually, and as a
Limited Partner of Gaming Hospitality, L.P.,
also acting on behalf of the Limited Partners
so situated,

Plaintiff,

-against-

CHARLES PETRI, CYNTHIA GALLO a/k/a
CYNTHIA PETRI, EDWARD L. ARACE,
IRWIN GITLIN, LARRY POLHILL, ALAN
YOUNG, JOHN STEINBERG, STEPHEN B.
PALMA, STUART A. HANEY, GAMING
HOSPITALITY, L.P. and BRIDGEVILLE
HOTEL ASSOCIATES, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion.....	X
Cross-Motion.....	X
Affidavit in Opposition.....	XX
Reply Affidavit....	XX
Memorandum of Law.....	X

This motion, by defendants, for summary judgment dismissing the complaint is **granted**; and a cross-motion, by plaintiff, for an order (1) striking the appearance of

defendants' attorney and thereby dismissing defendants' summary judgment motion is **denied**. The court sees no compelling reason to disqualify the defendants' attorneys. With respect to the remainder of the application, that seeks an order compelling defendants to serve a verified bill of particulars; compelling disclosure pursuant to 3124; and compelling compliance with various subpoenas duces tecum is **denied**, as academic.

Defendant Gaming Hospitality L.P. ("Gaming") is a limited partnership, "formed for the purposes of engaging in the construction and operation of a LaQuinta Inn and Suites in the hamlet of Bridgeville, Town of Thompson, Sullivan County, New York"(Private Placement Memorandum dated January 3, 2005). Defendant Bridgeville Hotel Associates, Inc ("Bridgeville") is the general partner in the limited partnership. According to defendants, Bridgeville is a "shell entity that did not do business" (Response to Demand for Bill of Particulars, #14). The principals of Bridgeville are alleged to be defendants Edward Arace, Irwin Gitlin, Cynthia Gallo, Larry Polhill, Alan Young, John Steinberg, Stephen Palma, and former defendant Stuart Haney. Charles Petri is a real estate developer who, according to the complaint, actively participated in the operations of Bridgeville (Complaint, par. 9).

Plaintiff Miles Garnett is alleged to be a limited partner in this partnership, by virtue of his having sold subscriptions in the project to non-parties, Donald Gross and Alan Gross. The Gross brothers invested \$990,000.00 in Gaming in February, 2005. From that investment plaintiff took his commission, and wrote a check dated February 15, 2005, in the amount of \$925,714.55 to Gaming.

According to defendants, in November, 2005, LaQuinta withdrew from the project as it no longer intended to franchise a hotel in Sullivan County. Thereafter LaQuinta was bought by the Blackstone Group, an entity which stopped hotel development [Affidavit of Charles Petri at par. 13-14]. Defendant Petri claims that he advised the Grosses of these developments, and that the offering of Gaming could not go forward. In addition Petri states that the Grosses requested termination of their interest in Gaming, and utilization of their money for a separate investment.

In support of defendants' motion for summary judgment Alan and Donald Gross each submit a short affidavit admitting their investment in Gaming, acknowledging that the affidavit would be used in support of defendants' motion for summary judgment, and insisting that plaintiff was never authorized to bring the instant proceeding on their behalf, as limited partners.

In his complaint plaintiff alleges the following causes of action:

#1, on his own behalf as a limited partner, plaintiff seeks compensatory damages of 1.5 million dollars, on the grounds that the principals of the General Partner breached their fiduciary obligations by allowing the elimination of the liquidity of Gaming, so that it could no longer function as a business entity to construct a hotel;

#2, on behalf of the other limited partners, plaintiff seeks 9.5 million dollars, due to the failure to act in good faith;

#3 on his own behalf as a limited partner, plaintiff seeks 1.5 million dollars, based upon defendants' bad-faith failure to prepare various forms and reports and perform multiple obligations;

#4 on behalf of the other limited partners, 9.5 million dollars, based upon defendants' bad-faith actions in evading their obligations to the limited partners; and,

#5 on his own behalf in the amount of \$260,000 based on defendants' bad-faith failure to supply plaintiff with the documentation necessary to obtain a Letter of Commitment for a mortgage.

Defendants deny the allegations of the complaint, and allege affirmative defenses that plaintiff is in violation of DR5-101A, that the lender was not ready and willing to make any loans to Gaming, and that no agreement was ever reached with LaQuinta. Defendants further allege that to the extent plaintiff purports to act on behalf of Grofam, LP and Alan Gross, he is acting without their consent and contrary to their interests.

Summary judgment is the procedural equivalent of a trial (S. J. Capelin Assoc. Inc. v Globe Mfg. Corp., 34 NY2d 338, 341,1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (Matter of Suffolk Cty Dept. of Social Services v James M., 83 NY2d 178, 182,1994). The proponent must make a **prima facie** showing of entitlement to judgment as a matter of law (Giuffrida v Citibank Corp., 100 NY2d 72, 82 ,2003; Alvarez v Prospect Hosp., 68 NY2d 320, 324, 1986). Once a **prima facie** case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so

(Zuckerman v City of New York, 49 NY2d 557, 562, 1980). Mere conclusions, expressions of hope, unsubstantiated allegations are insufficient to withstand summary judgment (Zuckerman).

A general partner is bound in a fiduciary relationship to limited partners (Friedman v Dalmazio, 228 AD2d 549, 2nd Dept., 1996, lv app den 88 NY2d 815; see Tzolis v Wolff, 10 NY3d 100, 2008). Here Bridgeville is the general partner, bound in a fiduciary relationship to the alleged limited partners, Alan Gross, Grofam LP, and Miles Garnett. To establish a basis for piercing Bridgeville's corporate veil, there must be a showing that the principals of Bridgeville exercised complete domination of the corporation and that such domination was used to commit a fraud against the plaintiff (Morris v New York State Dept of Taxation and Finance, 82 NY2d 135, 141, 1993). To the extent that Bridgeville is a "shell entity," the element of domination does not pose a problem, although the identity of the principals of Bridgeville is not entirely clear. Aside from the matter of identity, the issue then is the existence of fraud.

Defendants have made a **prima facie** showing that the proposed hotel project in Sullivan County was permanently aborted. No contract with LaQuinta was ever executed; the "expression of interest" from La Quinta, dated September 3, 2004, does not suffice. The record contains no evidence, other than conclusory accusations by plaintiff, that bad faith or fraud was involved. Bridgeville did not usurp the opportunity, nor did any other entity or person connected to Bridgeville or the individual defendants, pursue the hotel project.

In opposition, plaintiff argues that the only reason the project did not go forward is because all of the working capital invested by the limited partners (the court presumes plaintiff is referring to the Gross brothers) was converted to the personal use of the defendants (Garnett reply affidavit, par. 17). Defendant Petri disputes this claim, and the Gross brothers support Petri.

Defendant Petri has explained his withdrawals of monies from Gaming to "pay for and reimburse costs and expenses to locate, acquire and develop property, prepare plans and IDA applications, hire experts and to repay advanced fees and costs for properties and fees for services" (Response to Demand for Bill of Particulars, # 7). As this Court has previously noted, withdrawals from a bank account do not establish looting or misappropriation. Contrary to plaintiff's belief, no triable issue of fact is presented here.

Moreover, if plaintiff is correct that limited partnership monies were misappropriated, an appropriate remedy would be the return of the working capital to Gaming. This is not what plaintiff seeks. Instead of the return of allegedly misappropriated monies, plaintiff seeks compensatory damages because defendants' conduct prevented him "from receiving the benefit of those assets which he endeavored to create"(Complaint, par. 32).

Stepping back, and looking at the big picture, the Court notes that plaintiff had two contracts with Bridgeville. The first, dated January 12, 2005, was to raise capital for the hotel project by selling "Limited Partnership Units" in Gaming. Plaintiff was to be paid "immediately upon consummation of each private placement made as a direct sale" through his efforts. The payment was to be "in cash a sum equal to 5% of the gross investments placed" through his efforts, and also, "in Limited Partnership Units" in an amount equal to "3% of the ownership of the equity." Plaintiff received his cash commission pursuant to this contract from the \$990,000 invested by the Grosses, and then he forwarded on to Gaming, \$925,714.55. Plaintiff claims that his 3% ownership of the equity of Gaming empowers him as a limited partner in Gaming, notwithstanding that the Limited Partnership Agreement was never executed and membership interests in Gaming were never issued.

The second contract, dated June 18th, 2005, is a Commission Agreement, pursuant to which plaintiff was to receive a percentage of any loan financing secured by him for the hotel project. Payment under this Commission Agreement was to take place "immediately upon acceptance by the General Partner of a letter of commitment." No letter of commitment was ever issued, because the hotel project was aborted, and no payment pursuant to the Commission Agreement was ever made.

Overall, the record before this Court compels the conclusion that the hotel project was short-lived. It appears that plaintiff is alleging breaches of duty in order to obtain monies through this action that he might otherwise have earned under the contracts, had the hotel project moved forward. Such claims are based upon nothing more than assumptions, speculation, and conjecture regarding a hotel that was not built (see, generally, **Zink v Mark Goodson Productions, Inc.**, 261 AD2d 105, 106, 1st Dept., 1999, lv app dsmd 94 NY2d 858). On this record, plaintiff has failed to raise a triable issue of fact as to these alleged breaches of fiduciary duty or fraud, and the damages allegedly arising therefrom. Consequently, defendants are entitled to summary judgment dismissing the first, third, and fifth causes of action.

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As it is apparent that plaintiff is not concerned with vindicating any rights of the other alleged limited partners, plaintiff may not pursue claims on their behalf (Cialeo v Mehlman, 210 AD2d 67, 1st Dept., 1994). Accordingly, defendants are entitled to summary judgment dismissing the second and fourth causes of action.

In view of the foregoing dismissal of the complaint, plaintiff's cross-motion challenging defendants' attorney and seeking discovery is denied as moot.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated MAY 13 2008

Stephen A. Bucaria
XXX J.S.C.

ENTERED
MAY 16 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE