

Singer v Seavey

2009 NY Slip Op 31302(U)

June 11, 2009

Supreme Court, New York County

Docket Number: 602568/08

Judge: Paul G. Feinman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. PAUL G. FEINMAN

PRESENT.

PART 12

Index Number : 602568/2008

SINGER, DOROTHY

vs.

SEAVEY, ROBERT W.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

Justice

INDEX NO.

602568-08

MOTION DATE

5/27/09

MOTION SEQ. NO.

#001

MOTION CAL. NO.

7

were read on this motion to/for

D

PAPERS NUMBERED

1-3

4-6

7-8

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

FILED

JUN 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated:

6/11/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

9/9/09 2:15 PM

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM: PART 12

----- X

DOROTHY SINGER, NORMA BRANDES,
MARS ASSOCIATES, INC., NORMEL
CONSTRUCTION CORP., GARY A. SINGER,
BRAD C. SINGER, STEVEN G. SINGER,
WENDY BRANDES, FRED A TYDINGS, ADINE
D. BRANDES, GEORGE KLEINMAN, GBK
ASSOCIATES, INC., ELISE WEINGARTEN,
LOREN KLEINMAN and GAYLE REISMAN,
individually and on behalf of FIFTH AND 106TH
ST. ASSOCIATES, L.P.,

Plaintiffs,

-against-

INDEX NO.

MOT. SEQ. NO.

SUBMISSION DATE

CALENDAR NO.

602568/08

001

5/27/09

7

ROBERT W. SEAVEY, JOHN L. EDMONDS,
BNA REALTY COMPANY, LLC, PHYLLIS
SEAVEY, and DALTON MANAGEMENT CO. LLC,
Defendants.

----- X

APPEARANCES:

For Plaintiffs:

Hogan & Hartson, LLP
By: Dennis H. Tracey, III, Esq.
Sabrina H. Cochet, Esq.
875 Third Avenue
New York NY 10022
(212) 918-3000

For Defendants:

Gibson, Dunn & Crutcher, LLP
By: Randy M. Mastro, Esq.
Marshall R. King, Esq.
200 Park Avenue, 47th Floor
New York NY 10166-0193
(212) 351-4000

Papers considered on review of this motion to dismiss:

Notice of Motion, Affirmation in Support, Memorandum of Law	1 - 3
Affidavit in Opposition, Memorandum of Law, Aff. of Service	4 - 6
Reply Affirmation, Memorandum of Law	7 - 8

PAUL G. FEINMAN, J.:

Defendants Robert W. Seavey, BNA Realty Company, Phyllis Seavey, and Dalton Management Co. LLC move for an order pursuant to CPLR 3211 and 3016 dismissing the complaint with prejudice.

This is a derivative action for breach of fiduciary duty and breach of contract brought on

behalf of a limited partnership known as Fifth and 106th St. Associates, L.P. (the "Partnership") by limited partners who hold approximately 96% of the Partnership interests. The principal asset of the Partnership is a large apartment building which is part of the Mitchell-Lama housing program (the "Property"). Defendant Robert Seavey is the managing general partner. Defendant BNA Realty is the other general partner. Defendant Phyllis Seavey is the principal of defendant Dalton Management Co., which is the managing agent for the Property.

According to the complaint (defendants' exhibit A), defendants have engaged in improper conduct in pursuit of their personal interests and to the detriment of the Partnership by, *inter alia*, skimming funds from the Partnership by causing vendors to make illicit payments to them, warehousing apartments in order to demand cash payments from tenants, misrepresenting the financial condition of the Partnership in order to conceal acts of self dealing, and refusing to sell the Property in order to perpetuate their improper activities (*id.*, ¶ 2).

The complaint asserts four causes of action referred to therein as claims. Defendants contend that plaintiffs' first claim for breach of fiduciary duty, which is asserted against the general partners, should be dismissed for the following reasons: the allegations of the complaint lack the requisite particularity; defendants' decision to hold onto the Property is protected by the business judgment rule; and, plaintiffs fail to allege their reasons for failing to make a demand on the general partners to bring this action. Next, defendants argue that plaintiffs' second claim, for breach of the Partnership agreement, which is also asserted against the general partners, and third claim for breach of the managing agent agreement, which is asserted against Dalton Management, should be dismissed because plaintiffs fail to identify the provisions of the agreements which were allegedly breached. The fourth cause of action for declaratory relief is

not addressed. Defendants do contend, however, that “almost all of the plaintiffs in this action lack standing” because they have failed to demonstrate how they acquired their limited partnership interests, and that the complaint must be dismissed with respect to defendant Phyllis Seavey because plaintiffs have failed to assert any claims against her.

Defendants’ arguments, to the extent addressed to alleged pleading deficiencies, will be treated as a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]). The standards applicable thereto are comprehensively set forth in *Khan v Newsweek, Inc.*, 160 AD2d 425, 426 (1st Dept 1990):

A motion to dismiss for failure to state a cause of action assumes the truth of the material allegations and everything reasonably to be implied therefrom. (see, *Foley v D'Agostino*, 21 AD2d 60, 65.) In determining such a motion, it is not the function of the court to evaluate the merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777) or express an opinion as to plaintiff's ability to ultimately establish the truth of the averments. (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509.) Rather, the plaintiff must be "given the benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275)

The allegations of illicit conduct and self-dealing underlying plaintiffs’ first cause of action for breach of fiduciary duty (see p 2, *supra*) are sufficient to support that cause of action (see *Kahn, supra*). If defendants need more details, they can obtain them through discovery.

The business judgment rule bars judicial inquiry into actions of corporate directors “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of

corporate purposes” (*Auerbach v Bennett*, 47 NY2d 617, 629 [1979]).¹ Given the allegations underlying plaintiffs’ first cause of action, defendants’ invocation of the business judgment rule at this time is, at best, puzzling. The same applies to defendants’ attempt to capitalize on plaintiffs’ failure to make a demand on the general partners to bring this action. It is manifest from plaintiffs’ allegations that such demand would have been futile (see *Allison Publications, Inc. v Mutual Benefit Life Ins. Co.*, 197 AD2d 463, 464 [1st Dept 1993] [demand on general partner to sue itself “futile” and therefore unnecessary]).

Defendants fare better with respect to plaintiffs’ second and third causes of action for breach of contract. “In order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based” (*Atkinson v Mobile Oil Corporation*, 205 AD2d 719, 720 [2d Dept 1994]; see also *Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408 [1st Dept 2003] [breach of contract claims dismissed for failure to state a cause of action where plaintiff failed to allege the breach of any particular contractual provision]). The complaint at bar fails to cite any provisions of the Partnership agreement or the agency agreement with Dalton Management which were allegedly breached. The second and third causes of action should therefore be dismissed.

Defendants’ contention that most of the plaintiffs lack standing presents a factual issue which is improperly raised at this stage (see *Khan v Newsweek, supra*, 160 AD2d at 426). Defendants correctly contend that the complaint asserts no claims as to defendant Phyllis Seavey. Accordingly, the complaint should be dismissed in its entirety as to her and her name stricken

¹The business judgment rule applies equally to general partners acting as fiduciaries for the partnership (see *Levine v Levine*, 184 AD2d 53, 59 [1st Dept 1992]).

* 6]
from the caption.

Finally, the court notes that the factual statements made by plaintiffs' attorney in her opposing affidavit (the only opposing affidavit) are based entirely on hearsay. Her statement that "plaintiffs inadvertently omitted Phyllis Seavey from their First Claim" does not serve as an amendment to the complaint.

Accordingly, it is hereby

ORDERED that defendants' motion is granted only to the extent that plaintiffs' breach of contract claims (the second and third causes of action) are dismissed without prejudice; and it is further

ORDERED that the entire complaint is dismissed as against defendant Phyllis Seavey; and it is further

ORDERED that the Clerk of Court is directed to enter judgment in accordance with the foregoing and shall strike Phyllis Seavey's name from the caption of these proceedings; and it is further

ORDERED that all other relief requested is denied..

This constitutes the decision and order of the court.

DATED: June 11, 2009



J.S.C.

FILED
JUN 16 2009
NEW YORK
COUNTY CLERK'S OFFICE