

Williams v Horowitz

2009 NY Slip Op 32679(U)

October 28, 2009

Supreme Court, Nassau County

Docket Number: 007573/2009

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

JAMES T. WILLIAMS,

Plaintiff,

INDEX NO.: 007573/2009
MOTION DATE: 08/19/2009
MOTION SEQUENCE: 001

-against-

DAVID HOROWITZ and STACEY GRANAT,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavit & Exhibits Annexed	1
Affidavit of James T. Williams in Opposition, Affirmation in Opposition of Steven B. Ferber & Exhibits Annexed	2
Reply Affidavit of Stacey Granat in Support of Motion to Dismiss & Exhibits Annexed	3

Motion by defendant Stacey Granat to dismiss the second cause of action of the complaint pursuant to CPLR 3211(a)(1) and (a)(7) as to said defendant is denied.

This action arises from the sale of certain real property known as 185 Express Street, Plainview, New York, for the sum of \$3,150,000 on March 26, 2008. The premises was sold by DDJS Realty, LLC, a limited liability company in which plaintiff and defendants David Horowitz and Stacey Granat each owns a one-third membership interest. In addition to DDJS Realty, LLC, plaintiff and defendants also own interests in C&C Home Care, Inc. and Extended Care Concepts, LLC.

With respect to the real estate closing, plaintiff and co-defendants executed a document

entitled Members Certification and Consent on March 19, 2008, in which they authorized defendant David Horowitz to:

Execute and deliver at the closing of the Premises, on behalf of the Company, a Bargain and Sale Deed, and such ancillary real property transfer documents for the Premises, granting fee title interest in the Premises to the Buyer in accordance with the terms of the P&S Agreement;

Execute and deliver at the closing of the Premises, on behalf of the Company, any title affidavits, certification of non foreign status, closing settlement statement and such other documents as are customary for such transactions or as required under the P&S Agreement;

Pay, on behalf of the Company and in connection with the sale transaction, all seller title charges, transfer taxes, filing fees for satisfaction and release documents, legal fees, adjustments in favor of the Buyer, real estate broker commissions, mortgages payoffs, real property taxes due to date of closing and any other liens affecting title to the Premises.

It appears from the closing statement that, after mortgages, taxes and expenses were deducted from the balance due seller, i.e., \$3,045,143.13, various checks were dispersed including one in the amount of \$522,643.13 to the order of DDJS Realty, LLC; and two Bank of Smithtown checks: #10851 drawn to C&C Home Care, Inc. in the amount of \$150,000 and #10852 in the amount of \$29,460.81 drawn to the order of Extended Care Concepts, LLC. Plaintiff maintains that despite the fact that, after deductions, the remaining proceeds of the sale were to be divided among the three principals of DDJS Realty, LLC, and there was no agreement that funds were to be distributed to any of the other business entities in which these principals were involved, he has not received his expected share. He contends that, without authorization, the subject profits were deposited into the accounts of C&C Homecare, Inc., of which Stacey Granat is allegedly a director, and Extended Care Concepts, LLC.

Significantly, Extended Care Concepts, LLC and C&C Homecare, Inc., have filed petitions in bankruptcy under Chapter 11 of the United States Bankruptcy Code. Defendant David Horowitz has filed a petition under Chapter 7. Plaintiff's employment with C&C

Homecare, Inc. was apparently terminated on or about June, 2008 and he alleges he has received neither remuneration nor any compensation due him from any of the aforementioned business entities since May, 2008. An action pursuant to Business Corporation Law § 1104-a, commenced by the plaintiff herein, is presently pending in Supreme Court : Nassau County under Index No. 17663/2008.

Defendant Stacey Granat seeks to dismiss the claims asserted against her in the second cause of action of the complaint sounding in breach of fiduciary duty, conversion and breach of the operating agreements of limited liability companies DDJS Realty, LLC and Extended Care Concepts, LLC and breach of the shareholder's agreement of C&C Homecare, Inc. pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7). In her affidavit, the movant attests that 1) the only member of DDJS Realty, LLC present at the closing of the Express Street property was defendant David Horowitz; 2) none of the checks issued at the closing was ever delivered to her or otherwise came into her possession; 3) besides the sum of \$5,000, which was distributed by mutual consent to each of the principals of DDJS Realty, LLC, she received no further sums from DDJS Realty, LLC, Extended Care Concepts, LLC, or C&C Homecare, Inc.; and 4) to the best of her knowledge, all of the remaining proceeds of sale were used for business purposes.

In the procedural context of this motion, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, afford plaintiff the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory. Whether plaintiff can ultimately establish his allegations is not part of the calculus in determining a motion to dismiss. *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].

Where, as here, a motion to dismiss is premised on documentary evidence, such a motion may be appropriately granted only where the documentary evidence definitively disposes of plaintiff's claim as a matter of law so that a complete defense to the claim is established. *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Levenherz v Povinelli*, 14 AD3d 658, 659 [2nd Dept. 2005]. While factual affidavits submitted by plaintiff may be considered to remedy defects in the complaint (*Leon v Martinez*, 84 NY2d 83, 88 [1994]), affidavits submitted by defendants do not constitute documentary evidence upon which a proponent of dismissal may rely. *Crepin v Fogarty*, 59 AD3d 837, 838 [3rd Dept. 2009]; Siegel, Practice Commentaries,

McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10, at 21-22.

In support of her position, defendant Stacey Granat submits copies of bank statements and check registers for the months of March, April and May 2008 for DDJS Realty, LLC, C&C Homecare, Inc., Extended Care Concepts, LLC purporting to show that she received no money from said entities and the proceeds of the real estate sale were used for business purposes only. Notwithstanding such assertions, it is impossible to determine from these submissions whether, in fact, any of the sale proceeds were funneled through various entities and ultimately wrongfully retained by Ms. Granat for her own benefit, and/or whether said defendant acted in a manner to deprive plaintiff of his rightful share of the subject funds. The purported documents, in my view, are insufficient to bar plaintiff's claims at this stage of the litigation.

In order to establish a cause of action for conversion two criteria must be met: first, the plaintiff must demonstrate legal ownership or an immediate superior right of possession to a specific identifiable thing i.e., specific money; and second, it must be shown that defendant exercised unauthorized dominion over the thing in question, to the exclusion of plaintiff's rights. *Zendler Const. Co., Inc. v First Adjustment Group, Inc.*, 59 AD3d 439, 440 [2nd Dept. 2009]. Money may be the subject of conversion where, as here, it is specifically identifiable and there is an obligation to return it or treat it in a particular manner. *Salantino v Salantino*, 64 AD3d 923, 925 [3rd Dept. 2009]; *Key Bank of New York v Grossi*, 227 AD2d 841, 843 [3rd Dept. 1996].

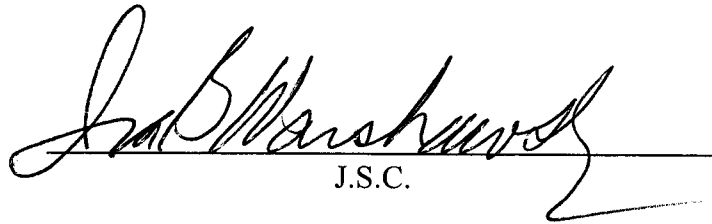
Unless the articles of organization of a limited liability company provide that management is to be vested in a manager(s), management is vested in its members (Limited Liability Company Law § 401[a]), and every member is an agent of the limited liability company for the purposes of its business. Limited Liability Company Law § 412. A managing member of a limited liability company owes fiduciary duty to the other members of the company (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 577 [2nd Dept. 2008]; Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, 2009 Pamphlet, at 42), and a member, acting as a manager, is obligated to perform his/her duties in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances. Limited Liability Company Law § 409(a); *Nathanson v Nathanson*, 20 AD3d 403, 404 [2nd Dept. 2005]. It is a breach of duty for a fiduciary to act contrary to the interests of the

person to whom the duty of loyalty is owed.

Accepting the facts alleged in the complaint as true, and affording the plaintiff the benefit of every favorable inference, the allegations of the complaint are sufficient to withstand dismissal under CPLR 3211(a)(1) and (a)(7) *vis a vis* plaintiff's claims for conversion, breach of fiduciary duty and breach of the operating agreements of DDJS Realty, LLC and Extended Care Concepts, LLC and the shareholder's agreement of C&C Homecare, Inc.

The fact that plaintiff was not present at the closing herein, and her assertion that no further sums, beyond the \$5,000 that each of the members of DDJS Realty, LLC received were distributed to any of the parties, does not negate the allegations of plaintiff's claims. As a fiduciary, she was required to avoid self dealing and act in accordance with the parties' existing agreements. Whether she failed to do so is an issue for resolution by the trier of fact.

Dated: October 28, 2009


J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE