

Lai v Gartlan

2010 NY Slip Op 32013(U)

July 8, 2010

Supreme Court, New York County

Docket Number: 602425/02

Judge: Charles E. Ramos

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

Index Number : 602425/2002

PART _____

LAI, DUNNIE

vs.

GARTLAN, H.J. JR.

INDEX NO. _____

SEQUENCE NUMBER : 027

MOTION DATE _____

OTHER RELIEFS

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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
JUL 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Is decided in accordance with
accompanying memorandum decision and order.

Dated: 7/8/2010


HON. 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 other 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., and LIANG LIANG,

Plaintiffs,

Index No. 602425/02

-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.

FILED

JUL 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Plaintiffs Dunnie Lai and Generation Properties Investment Co. (GPIC) move for an order directing defendant Double Fortune Property Investors Corp. (Double Fortune) to issue a status report regarding the wind-up and final accounting of 150 Lafayette Street Property Investment Co., L.P. and for a preliminary distribution of seventy-five percent of its assets.

Defendant Double Fortune cross-moves to dismiss the third cause of action on the basis of unclean hands, 3211 (a) (7), and CPLR 3212, or in the alternative, limiting the issues for trial to the extent of the third cause of action and barring plaintiffs from introducing any evidence with respect to fraud and damages.

Background

The facts of this action have been previously set forth in

greater detail in decisions by this Court and the Appellate Division, and are only briefly recited herein.

This action and a related action bearing the index number 604459/02,¹ arise from a dispute amount the partners of 150 Lafayette Street Property Investment Co., L.P. (the Lafayette Partnership), which owned a building (Building) located at that address.

The Lafayette Partnership was formed in 1981. The limited partners are plaintiffs Dunnie Lai, GPIC and defendant Henrietta Leung. The general partner is Double Fortune, that is controlled by Jay Gartlan (Gartlan). In 1993, Dunnie Lai took over as leasing and managing agent for the Building until 2002, when Gartlan, in his capacity as principal of Double Fortune, terminated her.

The complaint, which was amended twice (Complaint), alleged that defendants were secretly conspiring to deprive plaintiffs of their equity interest in the Building by using the funds and borrowing power of the Lafayette Partnership. Gartlan, through Double Fortune, allegedly spearheaded this scheme.

Further, Gartlan allegedly permitted the Building to fall

¹ This Court ordered the two actions consolidated for discovery purposes (*Generation Properties v Henrietta Leung*, 2003 WL 25594091 [Sup Ct, NY County 2003], *appeal dismissed* 9 AD3d 917 [1st Dept 2004]). Lai and GPIC had commenced the second action solely against Henrietta Leung in December 2002, seeking a declaration as to her ownership interest in the partnership, that was ultimately settled in March 2006 (2006 Settlement). Subsequently, plaintiffs defaulted on the payments due under the 2006 Settlement, which was enforced by court order (*Lai v Gartlan*, 34 AD3d 242 [1st Dept 2006]).

into disrepair, to lose tenants, rent collections and to incur unnecessary expenses in furtherance of the scheme to destroy the Lafayette Partnership. Further, Gartlan allegedly caused the Lafayette Partnership to be sued by the Bank of East Asia for defaulting on the mortgage note for the Building.²

Plaintiffs originally commenced this derivative action in 2002. The Lafayette Partnership was ultimately dissolved by court order prior to the sale of the Building, which sale occurred in 2005.

In dispute in the action were the terms of specific the ownership interests in the Lafayette Partnership. In addition, plaintiffs asserted causes of action for breach of fiduciary duty by Double Fortune and Gartlan, breach of contract by Double Fortune, legal malpractice against Gartlan and Wankoff, fraud as against Gartlan, Ricky Leung, Henrietta Leung and Wankoff, slander per se,³ and sought a declaratory judgment, a permanent injunction and an accounting.

The Court previously declared the parties' respective ownership interests in the Lafayette Partnership (*Lai*, 2004 WL 5657285, *affirmed as modified* 28 AD3d 263 [1st Dept 2006]).

In 2007, the Appellate Division determined that the

² A judgment of foreclosure was initially granted, but ultimately vacated prior to a private sale of the Building in 2005 for \$33.5 million. The balance of the sale proceeds were placed in an escrow account, and totaled \$23 million in 2007 (Sale Proceeds). The Sale Proceeds remain in escrow pending a final accounting and distribution.

³ Plaintiffs previously withdrew the cause of action for slander per se (*Lai*, 2008 WL 1881569).

plaintiffs established their entitlement to an accounting as a matter of law, and that the Sale Proceeds of the Building be distributed according to each partner's respective partnership interest (*Lai*, 46 AD3d 237).

In 2008, the Court dismissed the causes of action for breach of fiduciary duty, fraud, and malpractice asserted against Gartlan (*Lai*, 2008 WL 1881569).

As to the motion and cross-motion presently before the Court, it was partially resolved to the extent that Double Fortune produced a status report (12/10/09 Tr 3:9-11, 4:12-14; 3/18/10 Tr 3:7-8). As to the motion for a final accounting and preliminary distribution, a partial accounting has been completed, while the complete, final accounting is pending (3/10/10 Tr 3:8-11).

Discussion

Double Fortune cross-moves to dismiss the remaining cause of action asserted against it, for breach of contract. In support of its cross-motion, Gartlan asserts that the claim is time-barred because more than ten years have elapsed between the alleged conduct and the commencement of the action. In addition, Double Fortune submits affidavit testimony of Gartlan who attests that the Partnership never paid Double Fortune for management services as alleged in the complaint (Gartlan Aff., ¶¶ 18-20).

Finally, Double Fortune asserts that Lai has made false accusations that warrants dismissal of the action for unclean hands.

In opposition, Lai asserts that Double Fortune's motion for

summary judgment is untimely, and insists that its cause of action is viable (Gordon Aff., ¶¶ 25-28).⁴

At the outset, the Court rejects Lai's contention that Double Fortune's motion is defective because it was made more than thirty days after the filing of the note of issue, as required by Part 53 Rules.

Typically, a party must obtain leave of court and demonstrate good cause for moving for summary judgment beyond the time period specified by court rules (*Rivera v City of New York*, 73 AD3d 413 [1st Dept 2010]).

Nonetheless, Double Fortune seeks alternative relief under CPLR 3211 (a) (7), in addition to summary judgment. Thus, the Court need not reject its motion, and will consider it under CPLR 3211 (a) (7) (see generally *Brill v City of New York*, 2 NY3d 648, 652-53 [2004]).

The statute of limitations for a cause of action for breach of contract is six years (CPLR 213 [2]). According to the complaint, Double Fortune began engaging in misconduct in breach of the partnership agreement in 1991 (Complaint, ¶¶ 33, 43). This action was commenced in 2002.

The Court is unable to discern from the allegations of the Complaint the operative time period that the allegedly breaching conduct occurred. Lai asserts that the Partnership Agreement

⁴ The parties' papers are replete with procedural irregularities, uncognizable arguments and personal attacks. Rather than address the substance of these largely meritless arguments, the Court will focus solely on the viability of the cause of action for breach of contract as against Double Fortune.

called for continued performance over a period of time, and that Double Fortune's breach continues to this day. However, the 150 Partnership was dissolved by court order prior to the sale of the Building, that occurred in 2005.

In any event, the cause of action for breach of contract fails to meet even the liberal pleading standards of CPLR 3211 (a) (7). The Complaint merely alleges that Double Fortune agreed to manage the 150 Partnership, and breached the partnership agreement by "failing to manage" and by "perpetrating the misconduct" outlined in the Complaint, that caused damage (Complaint, ¶¶ 64-68).

The failure to even identify the express terms of the agreement that were allegedly breached is fatal the cause of action for breach of contract (*Sklover & Donath, LLC v Eberschmid*, 71 AD3d 497 [1st Dept 2010]; *Gordon v Curtis*, 68 AD3d 549, 550 [1st Dept 2009]). In addition, beyond conclusory allegations of "misconduct," Lai fails to allege any specific breach that occurred (*Id.*).

Therefore, Double Fortune's cross-motion to dismiss the third cause of action for breach of contract is granted.

In light of this disposition, the remaining arguments in support of dismissal were not considered.

Accordingly, it is

ORDERED that the motion of plaintiffs Dunnie Lai and Generation Properties Investment Co. was partially resolved to the extent that a status report was produced, and is otherwise

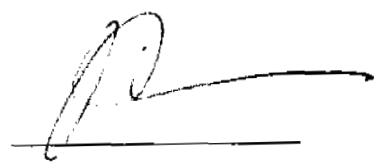
denied as premature; and it is further

ORDERED that the cross-motion of defendant Double Fortune Property Investors Corp. is granted to the extent that the third cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue, and the parties are directed to appear in Part 53 for a conference on July 26 at 10:45AM to advise on the status of the final accounting.

Dated: July 8, 2010

ENTER:



J.S.C.

HON. CHARLES E. RAMOS

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