

68 Burns New Holding Inc. v Burns St. Owners Corp.
2010 NY Slip Op 33565(U)
November 24, 2010
Sup Ct, Queens County
Docket Number: 23816/2000
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

	x	Index Number <u>23816</u> 2000
68 BURNS NEW HOLDING INC.		
- against -		Motion Date <u>July 14,</u> 2010
BURNS STREET OWNERS CORP., et al.	x	Motion Cal. Number <u>59</u> Motion Seq. No. <u>5</u>

The following papers numbered 1 to 15 read on this motion by plaintiff 68 Burns New Holding Inc. for an order granting summary judgment against the defendant in the sum of \$29,803.54, plus costs and statutory interest from the date of the filing of the summons and complaint. Defendants cross-move for an order granting summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavit-Exhibits (1-10, A-M).....	1-6
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Memorandum of Law.....	
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Upon the foregoing papers the motion and cross motion are determined as follows:

Burns Street Owners Corp., defendant herein is a residential cooperative, consisting of five separate buildings located at 68-12, 68-20, 68-30, 68-36 and 68-44 Burns Street, Forest Hills. Each building has approximately 24 apartments, numbered 1A-4F. Century Management Services, Inc., defendant herein, is the cooperative's managing agent.

Plaintiff 68 Burns New Holding Inc., is an investor and holder of unsold shares to several apartments. At the time this action was commenced in October 2000, plaintiff owned shares to 16 apartments located within various buildings in the cooperative. Plaintiff has since sold six or more apartments.

The Senior Citizen Rent Increase Exemption (SCRIE) provides assistance to eligible seniors who reside in rent controlled or rent stabilized housing. Seniors who apply for and are approved for SCRIE benefits are exempt from paying rent increases, and their landlords receive a equivalent credit (abatement) on their property taxes. Plaintiff asserts that since 1994, the defendant cooperative has failed to fully credit it with SCRIE tax credits for apartment F1 located at 68-20 Burns Street, and occupied by Johanna Reichel, and apartment A1 located at 68-12 Burns Street and occupied by Nat Ray, totaling \$29,803.54.

Plaintiff commenced this action to recover damages for the defendants' failure to properly apply SCRIE credits on October 12, 2000. The court, in an order dated November 27, 2000 denied the plaintiff's motion for a preliminary injunction and dismissed the complaint for the failure to state a cause of action. The Appellate Division, in an order dated, May 31, 2005 affirmed the denial of the injunction, and the dismissal of the first and fourth causes of action and reinstated the second and third causes of action (*68 Burns New Holding, Inc. v Burns Street Owners Corp.*, 18 AD3d 857 [2005]). Plaintiff thereafter moved to amend the complaint and restore the action to the general calendar and the court, in an order dated May 30, 2007, granted the motion to restore and granted the motion to amend the complaint to the extent that the first cause of action for fraud, the fourth cause of action for tortious interference with contract and the ninth cause of action for a shareholders' derivative action were stricken.

Plaintiff thereafter served the supplemental complaint which noted the stricken causes of action and defendants served an amended answer. Plaintiff's second cause of action for breach of contract alleges that the defendants failed to properly and timely credit plaintiff for SCRIE tax credits, causing plaintiff to pay a maintenance in a higher amount than that actually owed; the third cause of action for breach of contract alleges that defendants have refused to permit plaintiff to sell its shares to the apartments absent the payment of legal and late fees and that defendants are in breach of the bylaws. The fifth cause of action for conversion alleges that defendants failed to provide plaintiff with the SCRIE credits or their monetary equivalent. The sixth cause of action alleges that defendants breached their fiduciary duty to plaintiff by failing to pass on the SCRIE tax credits. The seventh cause of action seeks an accounting. The eighth cause of action for negligence alleges a breach of duty based upon the failure to apply for SCRIE credits and crediting them to the plaintiff.

Plaintiff alleges that the defendants failed to pay over to it SCRIE credits the cooperative received for apartments F1 at 68-20 Burns Street, occupied by Johanna Reichel, and apartment A1 at 68-12 Burns Street, occupied by Nat Ray, and now seeks an order granting summary judgment in the sum of \$29,803.54, together with statutory interest from October 12, 2000. In support of the motion, plaintiff has submitted an affidavit from Gideon Raviv, who states that he is the “principal owner” of the plaintiff corporation. According to Mr. Raviv’s calculations, defendants received SCRIE tax credits with respect to Johanna Reichel (apartment F1) of \$5,081.76 for the period of April 1, 1994 through March 31, 1996 and SCRIE credits of \$10,589.10 for the period of April 1, 1996 through September 30, 1999, for a subtotal of \$15,670.86; and a 2001 adjustment from New York City for 2001 of \$6,737.94. These SCRIE credits, together with said adjustment, totals \$22,408.80.

With respect to the SCRIE credits for Nat Ray (apartment A1), plaintiff asserts that for each of the period from January 1, 1994 through June 30, 1994, July 1, 1994 through December 31, 1994, January 1, 1994 through June 30, 1995, and July 1, 1995 through December 31, 1995, defendants received SCRIE credits of \$1,245.90 ($\$1,245.90 \times 4$); for the periods of January 1, 1996 through March 31, 1996, April 1, 1996 through June 30, 1996, July 1, 1996 through September 3, 1996; October 1, 1996 through December 31, 1996 defendants received SCRIE credits of \$711.93 ($\711.93×4); for the periods of January 1, 1997 through June 30, 1997 and for April 30, 1997 [sic] defendants received SCRIE credits of \$807.60 ($\807.60×2); for the period of July 1, 1997 through December 31, 1997 defendants received SCRIE credits of \$1,615.20; for the period of January 1, 1998 through December 31, 1999 defendants received SCRIE credits of \$4,983.60; for the period of January 1, 2000 through December 31, 2001 defendants received SCRIE credits of \$4,983.60; for the period of January 1, 2001 through December 31, 2001 defendants received SCRIE credits of \$4,983.60; and for the period of January 1, 2004 through December 31, 2009 defendants received a SCRIE credit of \$309.38 a month, totaling \$22, 275.36. Plaintiff also asserts that the defendants received an adjustment in 2001 from New York City of \$8,215.44. Plaintiff asserts that these SCRIE credits, together with said adjustment for this apartment totals \$56,503.32.

According to plaintiff’s calculations, in 1999 it received SCRIE credits totaling \$15,838.08 for both apartments for the period of January 1, 1996 through December 31, 1998; and that it received SCRIE credits totaling \$49,108.58 for the period of January 1, 2006 through December 31, 2007 for the apartment occupied by Mr. Ray, which were received on various dates between November 1, 2000 and 2007. Plaintiff asserts that it was due a total of \$78,912.12 in SCRIE credits, that it only received credits of \$49,108.58, and therefore is due the sum of \$29,803.54.

Defendants' cross-move in opposition and seek an order granting summary judgment dismissing the complaint. Defendants, in support of their cross motion have submitted an affidavit from Thomas Spatarella, the controller of Excel Bradshaw Management Group LLC (Excel). Mr. Spatarella states that Excel was retained by the cooperative on January 1, 2009 to manage the buildings located at 68-12, 68-20, 68-30, 68-36, and 68-44 Burns Street, Forest Hills, New York and replaced Century Management Services, Inc., as the managing agent. Mr. Spatarella states that his duties include reviewing the cooperative's accounting, tax and financial records, and that he is responsible for auditing the cooperative's accounts and managing its general financial affairs. Mr. Spatarella states that plaintiff has been credited with all SCRIE credits it is entitled to receive for the disputed period, totaling \$64,580.93.

Mr. Spaterella states that the tenant residing in apartment F1 located at 68-20 Burns Street ceased to occupy the apartment after October 1999 and that no SCRIE credits were allocated for this apartment after that date. He states that plaintiff has omitted from his calculations SCRIE credits it received in 2000, totaling \$15,472.35, which were applied to his maintenance account, and were also included in a stipulation of settlement dated July 20, 2000.

Mr. Spaterella states that for the period of 1996 through 1998, plaintiff admittedly received SCRIE credits of \$15,838.08; that for the period of 2000-2001, plaintiff received the sum of \$12,609.87 from the cooperative for all previously outstanding SCRIE credits attributable for the years between 1994 and 2000, including a payment of \$622.95 in 2000; that plaintiff admitted to having received the sum of \$622.95; that plaintiff received and cashed a check in the sum of \$4,983.60 for SCRIE credits which accrued between 2002 and 2003; that plaintiff received and cashed a check for SCRIE credits of \$3,916.00 in 2004; that plaintiff received and cashed checks for SCRIE credits that accrued in 2005 totaling \$3,712.56; and that plaintiff was paid the sum of \$7,425.12 for SCRIE credits that accrued in 2006 and 2007, which were applied to his maintenance account until December 2007.

Defendants further assert that plaintiff's calculations are in error as it has counted twice, two "tax adjustments" received by the cooperative on its 2001-2002 tax bill, in the amount of \$6,737.94 and \$8,215.44. Defendants assert that these adjustments are clerical transfers between the Department of Aging and the Department of Finance and do not represent SCRIE credits received over and above the amounts the Department of Aging previously calculated and credited to the cooperative for the same time period. Defendants thus assert that plaintiff, in calculating the SCRIE credits, may not count these amounts twice.

In addition, defendants assert that the claimed adjustment of \$6,737.94 for apartment 1F is problematic, as plaintiff stopped renting apartment 1F to a qualifying elderly tenant in

October 1999, and plaintiff's documentary evidence establishes that the Department of Aging stopped crediting the cooperative for apartment 1F in October 1999. Therefore, defendants assert that plaintiff is not entitled to receive any SCRIE credits for this apartment after that date. Defendants further assert that the SCRIE credit set forth in the tax bill relied upon by plaintiff does not designate a particular apartment and in fact was for another cooperative apartment, not one owned by the plaintiff. Defendants thus assert that plaintiff's calculated total of \$78,912.12 must be reduced by \$14,953.38 (the total of the two adjustments), to \$63,958.74. Defendants assert that as plaintiff admittedly received SCRIE credits of \$49,108.58, as well as SCRIE credits of \$15,472.35 in 2000, plaintiff received SCRIE credits totaling \$64,580.93, which is in excess of the SCRIE credits it was to be entitled to during the subject period. Defendants thus assert that there are no sums due plaintiff.

Mr. Raviv, in opposition to the cross motion and in support of plaintiff's motion, takes issue with Mr. Spatarella's affidavit on the grounds that he is not associated with the defendants and lacks personal knowledge of the facts. Mr. Raviv further asserts that with respect to the stipulation entered into in the Queens County Civil Court in 2000, which indicates that plaintiff received SCRIE credits of \$15,472.35, defendants' accounting records do not show that they credited plaintiff with this amount. Mr. Raviv also asserts that Mr. Spatarella lacks personal knowledge as to whether clerical transfers were made between the Department of Finance and the Department of Aging, and that these transfers were made as a result of a personal visit Raviv made to the Department of Aging on August 16, 2000. He states that he submitted ten "Owner's Affidavits for Verification of Unused Rent Controlled Tax Abatement Certificate"; that the Department of Aging approved the requests; and that these approvals were transferred to the Department of Finance for payment. Mr. Raviv states that these SCRIE credits were paid over to the defendants and that defendants have not transmitted these sums to the plaintiff. He asserts that these two "clerical adjustments" represent sums that are due the plaintiff, totaling \$14,953.38, and that the total amount due plaintiff is \$29,803.54, together with 9% interest from the date this action was commenced.

Contrary to plaintiff's assertions, Mr. Spatarella's affidavit is properly before the court, as he is employed by the cooperative's current managing agent and his job duties encompass the review of the cooperative's financial records, including tax records.

The documentary evidence submitted herein establishes that the cooperative, Burns Street Owners Corp., as petitioner-landlord and 68 Burns New Holdings Inc., as respondent-tenant entered into a stipulation in actions commenced by the cooperative in the Civil Court, Housing Part (L & T Index No. 59094-59108/2000) whereby 68 Burns New Holdings Inc., acknowledged that:

“1. Respondents owe \$18,773.20 as all base maintenance due through July 31, 2000 and have paid the same in full by Attorney IOLA check #1623.” The stipulation further states that :

2. The above figure includes SCRIE credits as follows:

68-20 Apt. 1F	1/94-3/94	3 motion X \$190.95	\$ 572.85
	4/94-12/95	21 motion X \$211.74	\$ 4,446.54
	1/99-7/99	7 motion X \$247.38	\$ 1,731.66
68-12 Apt. 1A	1/94-12/94	12 motion X \$207.65	\$ 2,491.80
	1/95-12/95	12 motion X \$207.65	\$ 2,491.80
	1/99-6/00	18 motion X \$207.65	<u>\$ 3,737.70</u>
			\$15,472.35

3. The parties agree that each side preserves its right to any additional scie credits and/or adjustments which may be due...”

Defendants have submitted a copy of the face of IOLA check 1623, dated July 20, 2000, in the sum of \$18,773.20, drawn on the IOLA account of Meryl Wenig, an attorney who also executed the stipulation on behalf of 68 Burns New Holding Inc. Plaintiff does not assert that this check was not negotiated by the cooperative. Plaintiff’s assertion that the defendants “accounting records” do not reflect that it credited plaintiff the SCRIE credits set forth in the stipulation of settlement, is rejected. Plaintiff is bound by the terms of said stipulation of settlement. Having turned over to the cooperative SCRIE credits totaling \$15,472.35 for the two subject apartments for the periods set forth in the stipulation, plaintiff may not recover these same SCRIE credits from the cooperative.

Plaintiff has also failed to demonstrate that the Department of Aging transferred additional SCRIE credits for the period in question to the Department of Finance which were allocated to the defendant cooperative and not paid over or credited to the plaintiff. The ten requests filed by plaintiff with the Department of Aging state on their face that they are used for the purpose of processing a request for a duplicate Rent Control Tax Abatement Certificate. These requests, however, do not establish that any further funds were credited to the defendants as a result of Mr. Raviv having filled out these forms.

The documentary evidence submitted herein establishes that the Department of Finance issued annual real estate bills from 2001-2002, for 68-12 Burns Street and 68-20 Burns Street. The bill for 68-12 Burns Street states that there is a SCRIE adjustment of \$8,215.44 and the bill for 68-20 Burns Street states that there is a SCRIE adjustment for

\$6,737.94. These bills, however, do not specify the apartment numbers or tenants in each building which received the SCRIE adjustment.

Plaintiff's claim that it is entitled to SCRIE credits of \$6,737.94, based upon the 2001-2002 tax bill, is rejected. It is undisputed that apartment 1F located at 68-20 Burns Street was occupied by Johanna Reichel, and that no SCRIE credits were allocated to this apartment after October 1999. The documentary evidence submitted by plaintiff includes a statement from the Department of Aging issued in 2000, which lists Ms. Reichel's status as "deceased." There is no evidence that Department of Finance permitted SCRIE credits for apartment 1F after October 1999. There is also no evidence that plaintiff owned any other apartment located at 68-20 Burns Street which was granted SCRIE credits after October 1999.

With respect to the 2001-2002 tax bill for 68-12 Burns Street, plaintiff has failed to establish that any portion of the \$8,215.44 SCRIE adjustment pertains to apartment A1 occupied by Nat Ray. None of the documents issued by the Department of the Aging submitted by plaintiff pertain to the tax assessment period of 2001-2002. In addition, at least one other apartment at this address was granted SCRIE tax abatement credits, and plaintiff does not assert that it owned that apartment as well as the unit occupied by Mr. Ray. The documentary evidence submitted herein thus is insufficient to establish that plaintiff is entitled to a SCRIE adjustment in the sum of \$8,215.44 with respect to apartment 1A. In addition, plaintiff has failed to establish that it is entitled to any portion of the SCRIE funds set forth in the 2001-2002 tax bill. Plaintiff has not submitted an affidavit from a person with personal knowledge regarding the alleged transfer of said funds from the Department of Finance to the defendants, and Mr. Raviv's self-serving affidavit is insufficient to establish that such a transfer occurred.

In view of the foregoing, plaintiff's motion for summary judgment in its favor is denied. Since plaintiff cannot establish that the defendants owe it any SCRIE credits or funds for to the relevant periods, that branch of defendants' cross motion which seeks to dismiss the second cause of action for breach of contract, is granted.

That branch of defendants' motion which seeks to dismiss the third cause of action for breach of contract, is granted. Plaintiff in its third cause of action alleges that the defendants prevented it from selling shares of stock to three apartments, by conditioning such sales upon the payment of maintenance arrears, including late fees and attorney fees, in violation of the bylaws. This claim is now moot, as it is undisputed that plaintiff is no longer the owner of the shares of stock and proprietary lease to apartment 2C located at 68-36 Burns Street, apartment 1B located at 68-30 Burns Street, and apartment 1F located at 68-20 Burns Street.

That branch of defendants' cross motion which seeks to dismiss the fifth, sixth and eight causes of action for conversion, breach of fiduciary duty and negligence, is granted. These causes of action are duplicative of the breach of contract claims, as they based on the same facts alleged in the breach of contract claims, and are not based upon legal duties independent of the contract allegedly violated (*see generally New York University v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Brown v Brown*, 12 AD3d 176 [2004]).

That branch of defendants' cross motion which seeks to dismiss the seventh cause of action for an accounting is granted. Plaintiff, having moved for summary judgment, no longer seeks an accounting, and does not contest defendants' assertion that they have provided all documents previously sought.

Finally, that branch of defendants' motion which seeks to dismiss all claims against Century Management Services Inc., is granted. "It has long been an 'established rule of law that the agent is not liable to third persons for non-feasance but only for affirmative acts of negligence or other wrong' (*Greco v Levy*, 257 App Div 209, 211, 12 NYS2d 470 [1939], *affd* 282 NY 575, 24 NE2d 989 [1939]). The reason is clear. 'Unless the agent has assumed authority and responsibility, as if he were acting on his own account, then the duty which the agent fails to perform is a duty owing only to his principal and not to the third party to whom he has assumed no obligation (*Jones v Archibald*, 45 AD2d 532, 535, 360 NYS2d 119 [1974]).'" (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [2006]). Here, it is undisputed that at all times Century Management Services acted as a disclosed principal for its agent, the cooperative. Plaintiff has not pleaded or shown circumstances that would demonstrate either that the then managing agent owed plaintiff a duty or that it was affirmatively negligent. Plaintiff, therefore, may not maintain any claims against Century Management Services.

Accordingly, plaintiff's motion for summary judgment is denied, and defendants' cross motion to dismiss the complaint in its entirety is granted.

Dated: November 24, 2010

J.S.C.