

Casavecchia v Mizrahi
2011 NY Slip Op 30321(U)
January 27, 2011
Sup Ct, Nassau County
Docket Number: 011406-08
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
JOSEPH CASAVECCHIA, SR.,

Plaintiff,

-against-

**WILLIAM W. MIZRAHI, BLOOMINGDALE
GREENS, INC., and CHARLESTON SQUARE, INC.,**

Defendants.
-----x

**TRIAL/LAS PART: 20
NASSAU COUNTY**

**Index No: 011406-08
Motion Seq. No: 3
Submission Date: 12/2/10**

The following papers having been read on this motion:

- Notice of Cross Motion, Affirmation in Support and Exhibits.....x**
- Affidavit in Opposition and Exhibits.....x**
- Reply Affirmation.....x**

This matter is before the Court for decision on the motion filed by Defendants William W. Mizrahi ("Mizrahi"), Bloomingdale Greens, Inc. ("Bloomingdale Greens") and Charleston Square, Inc. ("Charleston Square") (collectively "Defendants") on July 29, 2010 and submitted on December 2, 2010. For the reasons set forth below, the Court 1) denies Defendants' motion to dismiss the Amended Complaint; 2) vacates the Note of Issue previously filed; 3) directs Defendants to file and serve their answer to the Amended Complaint within twenty (20) days of this decision; and 4) permits Defendants to conduct additional discovery, including an additional deposition of the Plaintiff, limited to new issues raised by the new causes of action asserted in the Amended Complaint, to be completed on or before March 18, 2011. The Court directs counsel for the parties to appear for a Certification Conference before the Court on March 23, 2011 at 9:30 a.m. **Counsel for the parties shall not be required to appear before the Court on February 8, 2011 as previously directed.**

A. Relief Sought

Defendants move for an Order, 1) pursuant to CPLR §§ 3211(a)(5) and (7), dismissing the Amended Verified Complaint (“Amended Complaint”); or, alternatively, 2) striking the Amended Complaint on the grounds of unfair surprise and prejudice.

Plaintiff Joseph Casavecchia, Sr. (“Plaintiff”) opposes Defendants’ motion.

B. The Parties’ History

This action was the subject of a prior decision of the Court dated August 11, 2010 (“Prior Decision”) in which the Court denied the Defendants’ motion to dismiss this action or, alternatively, to transfer this matter to the Supreme Court of Richmond County, New York. The Court set forth the parties’ history in detail in the Prior Decision, and incorporates the Prior Decision herein by reference.

Bloomingdale Greens is a New York Domestic Business Corporation formed on April 17, 1987 with its principal place of business at 9 Borman Avenue, Staten Island (Richmond County), New York. Charleston Square is a New York Domestic Business Corporation formed on April 30, 1985 whose principal place of business is also located in Richmond County and whose purpose is to carry on and conduct a general construction business. Charleston Square involves a tract of land located in Charleston, Staten Island, New York which, depending on the type of unit constructed, would result in approximately fourteen (14) buildable units.

Plaintiff commenced this action in June of 2008 and filed the Verified Complaint (“Complaint”) on or about June 20, 2008. The Complaint asserted four (4) causes of action. The first challenged the validity of a loan made from Charleston Square to Bloomingdale Greens. The second alleged that Mizrahi breached his fiduciary duty to Plaintiff by, *inter alia*, refusing to distribute certain Bloomingdale Greens profits to its shareholders. The third sought declaratory relief regarding a dispute between Mizrahi and Plaintiff concerning Bloomingdale Greens’ assets. The fourth sought to hold Mizrahi liable, pursuant to Business Corporation Law (“BCL”) §§ 719(a)(4) and 720, for wasting Bloomingdale Greens’ assets by making unauthorized loans. There are several related lawsuits which are described in the Prior Decision.

In her Affirmation in Support of the instant motion, counsel for Defendants affirms as follows:

By Order dated April 29, 2010 (Ex. C to Wedinger Aff.), the Court 1) directed Plaintiff to serve and file a note of issue within ninety (90) days, by July 30, 2010; and 2) directed that dispositive motions were to be made returnable on September 7, 2010. Defendants, in response to Plaintiff's demand, served an Answer to the Complaint.

Plaintiff subsequently served the Amended Complaint (Ex. D to Wedinger Aff.) which contains additional causes of action. The Amended Complaint contains seven (7) causes of action: 1) breach of fiduciary duty by Mizrahi with respect to the distribution of Bloomingdale profits, 2) breach of contract by Mizrahi with respect to the agreement between Plaintiff and Mizrahi that, after the completion of Bloomingdale's business, its profits would be distributed equally between them; Mizrahi allegedly breached the written or oral operating agreement between Plaintiff and him, 3) request for declaratory judgment determining the respective rights of the parties with respect to Bloomingdale's assets, 4) breach of fiduciary duty by Mizrahi with respect to the Charleston Loan, 5) request for declaratory judgment determining the respective rights of the parties with respect to the Charleston Loan, 6) violations of Business Corporation Law ("BCL") §§ 714, 719 and 720 by Mizrahi and Charleston in connection with the Charleston Loan, and 7) request for injunctive relief with respect to Bloomingdale's assets.

Counsel for Defendants submits that Defendants have been prejudiced by the filing of the Amended Complaint, which was served less than thirty (30) days prior to the completion of discovery. Defendants contend that they have been effectively precluded from completing discovery with respect to the Amended Complaint.

Defendants note that the Amended Complaint contains a new cause of action for breach of the Bloomingdale operating agreement and argue that 1) if this agreement was oral, it is unenforceable as violating the Statute of Frauds; 2) if it is written, the Amended Complaint does not plead this cause of action with sufficient particularity; and/or 3) the Court should strike the Amended Complaint as untimely and resulting in unfair surprise and prejudice to the Defendants.

In addition, the Amended Complaint alleges new claims 1) pursuant to the BCL, and 2) against Charleston and Mizrahi, as opposed to Mizrahi only. Defendants submit that these

new causes of action do not satisfy the pleading requirements and, therefore, should be dismissed.

In his Affirmation in Opposition, counsel for Plaintiff outlines the differences between the Complaint and the Amended Complaint, and submits that the Amended Complaint “makes very little substantive change to the Initial Complaint” (Miller Aff. at ¶ 10). Plaintiff’s counsel submits that the only significant change is the breach of contract claim set forth in the Second Cause of Action in the Amended Complaint, and contends that this new cause of action is based on the same facts that formed the basis of the Complaint.

Plaintiff’s counsel argues, further, that Plaintiff filed the Amended Complaint as a matter of right, pursuant to CPLR § 3025(a) which permits the amendment of a complaint within twenty (20) days after service of a pleading responding to it. Defendants served their Answer to the Complaint on June 18, 2010 (Ex. I to Miller Aff.), and Plaintiff served the Amended Complaint fourteen (14) days later, on July 2, 2010 (Ex. J to Miller Aff.), within the statutorily prescribed period of time.

With respect to Defendants’ argument that the new contract claim violates the Statute of Frauds, counsel for Plaintiff contends that 1) Defendants failed to assert the Statute of Frauds as an affirmative defense in its initial Answer to the Complaint; 2) Plaintiff has failed to articulate why the agreement at issue was required to be in writing; 3) the agreement at issue was not required to be in writing; 4) even if the agreement at issue was required to be in writing, it is enforceable by reason of partial performance and/or detrimental reliance; and 5) the new contract claim provides adequate specificity.

Defendants submit, further, that the cause of action in the Amended Complaint based on violations of the BCL is sufficient. That cause of action makes reference to the relevant statutory provisions and outlines the matter in which Mizrahi’s participation in the Charleston Loan was violative of these provisions.

In her Reply Affirmation, Defendants’ counsel outlines the procedural history of this action, which included efforts to resolve the matter, and suggests that Plaintiff’s counsel “is using the ‘of right’ time period as a tactic to allege additional causes of action on the eve of the Note of Issue date in an effort to preclude discovery on new causes of action now raised” (Wedinger Reply Aff. at ¶ 7).

With respect to Plaintiff's argument that Defendants failed to raise the defense of the Statute of Frauds in its Answer to the Complaint, Defendants note that it is the Amended Complaint that alleged the agreement to which the defense of Statute of Frauds was applicable. Defendants did not raise this defense in its initial Answer because there was no cause of action to which it was applicable. Defendants affirm, in a footnote, that they will raise this affirmative defense in their Amended Answer if the Court denies the instant motion to dismiss.

Defendants also submit that the BCL claims cannot withstand scrutiny because 1) there is no allegation that a loan was made to a director (BCL § 719(a)(4)); and 2) no unlawful transfer occurred that would support a cause of action pursuant to BCL §§ 720(a)(1) or (2).

C. The Parties' Positions

Defendants submit, *inter alia*, that 1) Defendants have been prejudiced by the filing of the Amended Complaint, which was served less than thirty (30) days prior to the completion of discovery; 2) the new cause of action for breach of the Bloomingdale operating agreement is deficient as violative of the Statute of Fraud and lacking in specificity; and 3) the new claims pursuant to the BCL, and against both Charleston and Mizrahi, do not satisfy the pleading requirements.

Plaintiff opposes Defendants' motion to dismiss submitting, *inter alia*, that 1) the differences between the Complaint and Amended Complaint are *de minimis*; 2) the new cause of action for breach of contract is based on the same facts that formed the basis of the Complaint; and 3) Plaintiff filed the Amended Complaint as a matter of right, pursuant to CPLR § 3025(a).

Defendants submit, further, that the cause of action in the Amended Complaint based on violations of the BCL is sufficient. That cause of action makes reference to the relevant statutory provisions and outlines the matter in which Mizrahi's participation in the Charleston Loan was violative of these provisions.

RULING OF THE COURT

A. Standards of Dismissal

Pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained, *inter alia*, because of the statute of frauds.

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint

for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Amendment of Complaint

Pursuant to CPLR 3025(a), a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

C. Relevant BCL Provisions

BCL §§ 719(a)(1) - (4) provide as follows:

(a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of such action:

- (1) The declaration of any dividend or other distribution to the extent that it is contrary to the provisions of paragraphs (a) and (b) of section 510 (Dividends or other distributions in cash or property).
- (2) The purchase of the shares of the corporation to the extent that it is contrary to the provisions of section 513 (Purchase or redemption by a corporation of its own shares).
- (3) The distribution of assets to shareholders after dissolution of the corporation without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limit set in a notice given to creditors under articles 10 (Non-judicial dissolution) or 11 (Judicial dissolution).
- (4) The making of any loan contrary to section 714 (Loans to directors).

BCL §§ 720(a)(1) and (2) provide as follows:

- (a) An action may be brought against one or more directors or officers of a

corporation to procure a judgment for the following relief:

(1) Subject to any provision of the certificate of incorporation authorized pursuant to paragraph (b) of section 402, to compel the defendant to account for his official conduct in the following cases:

(A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

D. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

E. Statute of Frauds

General Obligations Law § 5-701 requires certain designated agreements, promises or undertakings to be in writing. For a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must be subscribed by the party to be charged therewith and must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Currier v. Prudential Insurance*, 266 A.D.2d 596, 598 (3d Dept. 1999), citing GOL § 5-701(a) and *HPSC, Inc. v. Matthews*, 179 A.D.2d 974, 975 (3d Dept. 1992), quoting *Mentz v. Newwitter*, 122 N.Y.491, 497 (1890), *reh. den.*, 26 N.E. 758 (1891).

F. Application of these Principles to the Instant Action

The Court denies Defendants' motion to dismiss the Amended Complaint. First, although the Amended Complaint was filed and served relatively late in the context of this litigation, its filing is statutorily authorized, and it was filed after it became apparent that this matter could not be resolved. Moreover, the Amended Complaint is substantially similar to the initial Complaint and, therefore, does not create undue surprise or prejudice to Defendants.

The Court also denies Defendants' motion to dismiss the Amended Complaint, in light of the Court's conclusion that the factual allegations in the Amended Complaint state causes of action and provide sufficient particularity with respect to the new contract and BCL causes of action.

The Court also denies Defendants' motion to dismiss based on the Statute of Frauds, as counsel has not articulated the specific basis for that dismissal. This denial is without prejudice to the filing of a subsequent motion by Defendants on that ground after the completion of additional discovery, as discussed below.

The Court does conclude, however, that Defendants are entitled to conduct additional discovery with respect to the new causes of action in the Amended Complaint alleging breach of the alleged agreement to divide profits, and violations of the BCL against Mizrahi and Charleston. Accordingly, the Court vacates the Note of Issue filed by Plaintiff and directs Defendants to file and serve their answer to the Amended Complaint within twenty (20) days of this decision. Defendants may assert the defense of the Statute of Frauds in their answer to the Amended Complaint, as well as any other applicable defenses, given that it is the newly-asserted cause of action for breach of contract to which this defense may apply.

The Court also authorizes Defendants to conduct additional discovery, including an additional deposition of the Plaintiff, limited to new issues raised by the new causes of action. Plaintiff's counsel is directed to make Plaintiff available for that additional deposition if Defendants so request. This additional discovery shall be completed on or before March 18, 2011. The Court directs counsel for the parties to appear for a Certification Conference before the Court on March 23, 2011 at 9:30 a.m. **Counsel for the parties shall not be required to appear before the Court on February 8, 2011 as previously directed.**

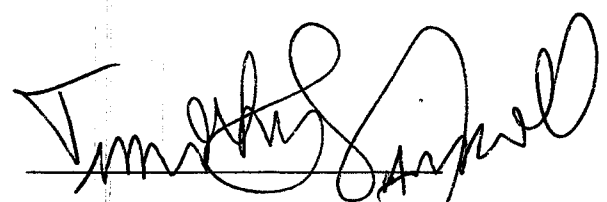
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel for the parties are reminded of their required appearance before the Court for a Certification Conference on March 23, 2011 at 9:30 a.m. as directed herein.

ENTER

DATED: Mineola, NY
January 27, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
FEB 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE