

**Alizio v Perpignano**

2011 NY Slip Op 30449(U)

February 14, 2011

Sup Ct, Nassau County

Docket Number: 19181/03

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 2  
NASSAU COUNTY

INDEX No. 19181/03

MOTION DATE: Dec., 17, 2010  
Motion Sequence # 020, 026, 028

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ANTHONY ALIZIO, individually and as a  
General Partner in OCEANVIEW REALTY  
COMPANY, OCEANVIEW ASSOCIATES,  
OCEANVIEW II ASSOCIATES, HEYSON  
GARDENS ASSOCIATES, BRIDGEVIEW II  
ASSOCIATES and BRIDGEVIEW III  
ASSOCIATES,

Plaintiffs,

-against-

PETER ROBERT PERPIGNANO, LILLIAN  
EISENBERG, AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF IRVING EISENBERG,  
BERNICE EISENBERG, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
LEONARD EISENBERG, JOSEPH ALIZIO,  
CHARLES TITONE, GREGORY RONAN,  
GODDARD, RONAN & DINEEN, LLP, OCEANVIEW  
REALTY COMPANY, OCEANVIEW ASSOCIATES,  
OCEANVIEW II ASSOCIATES, HEYSON  
GARDENS ASSOCIATES, BRIDGEVIEW II COMPANY,  
BRIDGEVIEW II ASSOCIATES and BRIDGEVIEW  
III ASSOCIATES, BRIDGEVIEW III HOUSING  
CORP. and MAYPORT HOUSING PARTNERSHIP,  
JOSEPH DINEEN, ANITA OTTON, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF EDWARD  
T. OTTON and SHEILA LEIPSNER,

Defendants.

The following papers read on this motion:

Notice of Motion.....	XX
Cross-Motion.....	X
Affirmation/Affidavit in Opposition..	XXX
Affirmation in Support.....	XX
Reply Affirmation.....	X
Memorandum of Law.....	XXXXX
Reply Memorandum of Law.....	X

Motion by defendants Peter Perpignano, Lillian Eisenberg, Bernice Eisenberg, Charles Titone, Anita Otton, Sheila Leipsner, Ocean View Realty Company, Ocean View Associates, Ocean View II Associates, Heyson Gardens Associates, Bridgeview II Company, Bridgeview II Associates, Bridgeview III Associates, Bridgeview III Housing Corp, and Mayport Housing Partnership, Ltd to dismiss the amended pleadings in the above actions is **granted** in part and **denied** in part.

Motion by plaintiff Anthony Alizio for partial summary judgment with respect to his first cause of action is **denied**. Cross-motion by defendant Joseph Alizio for partial summary judgment dismissing plaintiff Anthony Alizio's first cause of action is **denied**.

Anthony Alizio and Joseph Alizio are brothers. They were also members of various partnerships formed in the 1970s for the purpose of constructing, owning and operating HUD-subsidized apartment buildings in Queens. On May 14, 1991, each of the defendant partnerships—namely, Ocean View Realty Company, Ocean View Associates, Ocean View II Associates, Bridgeview II Company, Bridgeview II Associates, Bridgeview III Associates and Heyson Garden Associates— entered into management agreements with P.J. Alizio Realty, Inc., calling for P. J. Alizio to become the managing agent of each of the partnerships' properties for five years beginning on July 1, 1994. P.J. Alizio Realty was owned and controlled by Anthony and his son, Peter Alizio. Pursuant to the management agreements, P.J. Alizio extended their term for another five years to June 30, 2004.

By 2002, many of the original general and limited partners were in their 70's or 80's or had passed away. Pursuant to the terms of the partnership agreements, beneficiaries of deceased general partners inherited the deceased's economic interest, but not the right to participate in the management of the partnerships. Moreover, the relationships among the

individuals holding interests in the partnerships had deteriorated significantly. Many of the general partners and holders of economic interests in the partnerships wanted to sell the properties and terminate the partnerships.

The partnership agreement for Oceanview Realty provided that the managing partner could not transfer any portion of the partnership property “without the written consent of a majority in interest of the partners” (Aff. of Darlene Fairman, ex. H at 10). There was a similar provision in the partnership agreement for The Bridgeview II Company (Aff. of Darlene Fairman, ex. J at 11). The partnership agreement for Bridgeview III Associates provided that, prior to January 1, 1996, the general partners could not sell the project without the consent of 75% in interest of the limited partners (Aff. of Darlene Fairman, ex. K at 15). The agreement did not contain any limitation on the general partners’ right to sell the project after that time. The partnership agreement for Heyson Gardens Associates did not contain any restriction on the general partners’ power to sell the property (Aff. of Darlene Fairman, ex. L). Nevertheless, Anthony Alizio alleges that a sale of Ocean View Realty, Ocean View II, or Heyson Gardens’ building required the consent of a majority of the general partners of the partnership (Aff. of Anthony Alizio at ¶ 18).

Initially, both Anthony and Joseph Alizio opposed the sale of any of the properties. Anthony wished to keep P.J. Alizio in place as the managing agent of the buildings. Additionally, Anthony asserted that the properties could have been refinanced on favorable terms. Joseph wanted to avoid incurring a substantial capital gains tax upon the sale of the properties. However, Joseph hoped to discharge P.J. Alizio when its contract expired at the end of June 2004 and replace it with a more efficient managing agent.

In July 2003, Irving and Leonard Eisenberg, Peter Perpignano, defendant Sheila Leipsner, and Joseph Alizio entered into a written agreement providing for the sale of the properties owned by Bridgeview II, Bridgeview III, Oceanview, Oceanview II, and Heyson Gardens. The properties were to be sold at “bid prices already received” as set forth on an annexed schedule. In consideration for his signing the agreement, Joseph was to be paid \$1,575,000, at the rate of \$525,000 upon the closing of Bridgeview II, Oceanview, and Oceanview II. The agreement further provided that as compensation for winding up the affairs of the partnerships, Joseph was “assigned” \$300,000 and 50 % of the proceeds of the partnerships’ recovery against P.J. Alizio Realty or Anthony Alizio (Aff. of Peter Perpignano, ex. 1).

On July 9, 2004, Oceanview, Oceanview II, Bridgview II, and Heyson Gardens sold

their properties to a group of affiliated limited liability companies for a total price of \$35 million (Aff. of Peter Perpignano at ¶ 29). Anthony asserts that the prices which were accepted for the individual buildings were less than the fair value of the properties.

In his first cause of action, Anthony Alizio alleges that the July 2003 Agreement constituted a breach of the fiduciary duty which was owed to him by his partners, defendants Perpignano, Leonard and Irving Eisenberg, Joseph Alizio, and Charles Titone. (Although the July 2003 agreement had a signature line for Charles Titone, it does not appear that he signed the agreement.) In addition to a judgment for damages, plaintiff seeks a declaratory judgment that the July 2003 “vote selling agreement” was against public policy and unenforceable.

Defendant Joseph Alizio cross moves for partial summary judgment dismissing the plaintiff’s first cause of action on the following grounds: (1) plaintiff’s motion is barred by the “law of the case;” (2) plaintiff lacks standing to challenge the July 2003 Agreement; (3) the July 2003 Agreement is a valid and enforceable agreement that did not breach any fiduciary duty owed to the plaintiff; (4) plaintiff has unclean hands; (5) the partnerships are not entitled to the repayment of money paid to Joseph under the July 2003 Agreement. Alternatively, Joseph argues that there are numerous genuine issues of material fact that preclude an award of summary judgment to the plaintiff.

To obtain summary judgment a party must establish its cause of action or defense “sufficiently to warrant the court as a matter of law in directing judgment” in its favor (CPLR 3212[b]), and it must do so, by tender of evidentiary proof in admissible form (*Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). CPLR 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses (*Stone v. Continental Ins. Co.*, 234 AD2d 282, 284 [2<sup>nd</sup> Dept. 1996]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the issue is “arguable” (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY3d 395, 404 [1957]).

In determining a motion for summary judgment, the court’s function is not to resolve

issues of fact or to determine matters of credibility but to determine whether issues of fact exist precluding summary judgment (*Roth v. Barreto*, 289 AD2d 557, 558 [2<sup>nd</sup> Dept. 2001]). The Court should view the evidence in the light most favorable to the non-moving party and give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]; *Haymon v. Pettit*, 9 NY3d 324 [2007]).

Standing involves a determination of whether “the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution” (*Graziano v. County of Albany*, 3 NY3d 475, 479 [2004]). “Injury-in-fact has become the touchstone” and requires “an actual legal stake in the matter being adjudicated” (*Society of Plastics Indus., Inc. v. County of Suffolk*, 77 NY2d 761, 772 [1991]).

Although plaintiff Anthony Alizio was not a party to the July 2003 Agreement, he allegedly sustained injury in the form of a reduced price upon the sale of the properties. Thus, Alizio has standing to assert a claim for breach of fiduciary duty arising from the July 2003 agreement. This court’s prior ruling that Joseph had standing to maintain claims on behalf of the partnership is not law of the case with respect to Anthony Alizio’s standing. However, so as not to cast any cloud upon the purchasers’ titles, the court declines to issue declaratory relief with respect to the agreement authorizing sale of the properties (See CPLR § 3001).

Joseph Alizio argues that the partners modified their fiduciary duties to each other in the partnership agreements. The partnership agreements provided that the partners were free to engage in real estate transactions, which would not be considered business opportunities of the partnerships. However, there is no language in the agreements modifying the partners’ duty of loyalty and good faith with regard to the actual business of the partnerships (*Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 [1<sup>st</sup> Dept 2000]). “As a fiduciary, a partner must consider his partners’ welfare, and refrain from acting for purely private gain”. (*Id* at 184).

Joseph Alizio relies upon *Manson v. Curtis*, 223 NY 313 (1918) in order to uphold the voting agreement. However, that case is readily distinguishable because it deals not with a partnership but a corporation. While members of a partnership who disagree as to the conduct of the business may form alliances against one another, they must have a legitimate business reason in order to take action in good faith.

On his motion for summary judgment, it is Joseph Alizio’s burden to establish prima

facie that he had a legitimate business reason for entering into the July 2003 voting agreement. Joseph has not explained why he was no longer concerned with the tax considerations or why the agreement provided for him to receive such a large consideration. Although the July 2003 agreement provided that the properties were to be sold at “bid prices already received,” the schedule of prices has not been submitted to the court. Moreover, the properties were sold, not in a series of separate transactions as the agreement seemed to contemplate, but rather to an affiliated group of purchasers, a year after July 2003 agreement. The court concludes that defendant Joseph Alizio has not established prima facie that the July 2003 agreement was entered into in good faith. Defendant Joseph Alizio’s motion for summary judgment dismissing plaintiff’s first cause of action for breach of fiduciary duty is **denied**. Because there is a triable issue as to whether the partners were in good faith in entering into the agreement, plaintiff’s motion for partial summary judgment with respect to the first cause of action is also **denied**.

#### Joseph Alizio’s Second Amended Cross Claims

The Perpignano defendants move to dismiss defendant Joseph Alizio’s cross claims against the Estate of Irving Eisenberg and Perpignano in Action No. 2 (Index No. 312-04) on the ground of the doctrine of laches. Defendants argue that Joseph unduly delayed in the assertion of his new cross claims and that the death of Irving Eisenberg during the pendency of this action has substantially prejudiced the Estate’s ability to defend. Defendants assert that Lillian Eisenberg, Irving’s personal representative, has no personal knowledge of the transactions alleged and the other individual partners who do have such knowledge are barred from testifying about them under the Dead Man’s Statute (CPLR 4519). The Perpignano defendants also argue that the cross-claims against the Estate of Irving Eisenberg and Perpignano are barred by the three year statute of limitations and that Joseph Alizio is not entitled to rely on the “relation back doctrine” (CPLR 203[f]) with respect to his new claims.

The amendment of plaintiff Anthony Alizio’s complaint and defendant Joseph Alizio’s answer was pursuant to a stipulation dated March 10, 2009, wherein the parties agreed that the pleadings could be amended, without prejudice to the right of any party to move to dismiss the amended pleading on any grounds that could have been raised in opposition to a motion to amend (Aff. of Darlene Fairman, ex. F).

While amendment of a pleading should be freely granted (CPLR 3025[b]), it may be denied where the proposed amended cause of action plainly lacks merit (*Lucido v. Mancuso*,

49 AD3d 220, 221-22 [2<sup>nd</sup> Dept. 2008]). Amendment should not result in prejudice or surprise to the opposing party (Edenwald Contracting Co. v. City of New York, 60 NY2d 957, 959 [1983]; Acuri v. Ramos, 7 AD3d 741 [2<sup>nd</sup> Dept. 2004]). “It is considered an improvident exercise of discretion to deny leave to amend in the absence of an inordinate delay and a showing of prejudice” (Courageous Syndicate, Inc. v. People-to-People Sports Committee, Inc., 141 A.D.2d 599 [2<sup>nd</sup> Dept. 1988]).

When a motion to dismiss based upon documentary evidence is made pursuant to CPLR 3211(a)(1), the defendant must show that “the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff’s claim” (Unadilla Silo Co. v. Ernst & Young, 234 AD2d 754 [3<sup>rd</sup> Dept. 1996]; see also, Leon v. Martinez, 84 NY2d 83 [1994]; Sheridan v. Town of Orangetown, 21 AD3d 365 [2<sup>nd</sup> Dept. 2005]).

CPLR 3211(a)(7) permits the defendant to seek a dismissal of a cause of action asserted against it when the plaintiff fails to state a cause of action. In deciding a motion made pursuant to CPLR 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action (Leon v. Martinez, *supra*; Well v. Yeshiva Rambam, 300 AD2d 580 [2<sup>nd</sup> Dept. 2002]). In so doing, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true (511 West 232nd Street Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 [2002]; Well v. Yeshiva Rambam, *supra*). If, from the facts alleged in the complaint and the inferences which can be drawn from the opposition to the motion, the court determines that the pleader has a cognizable cause of action, the motion to dismiss must be **denied** (Sokoloff v. Harriman Estates Development Corp., 96 NY2d 409 [2001]; Stucklen v. Kabro Assocs., 18 AD3d 461 [2<sup>nd</sup> Dept. 2005]).

CPLR 3211(a)(5) permits the defendant to move for dismissal of one or more causes of action asserted against it on the ground that the cause of action is barred by the statute of limitations. CPLR § 203(f) provides that a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences or series of transactions or occurrences to be proved pursuant to the amended pleading.

In his original cross-claims against Irving Eisenberg and Perpignano, Joseph Alizio alleged that Irving and/or Perpignano was acting as the managing partner responsible for handling the partnership’s affairs, and that if Alizio Realty should recover in its claim against

Joseph Alizio, it is because of the actions or omissions of Irving and/or Perpignano, and therefore, Joseph Alizio is entitled to contribution or indemnity. In his amended answer, Joseph asserts causes of action against Irving and Perpignano: (1) for breach of fiduciary duty in connection with the alleged failure to properly supervise P.J. Alizio in its role as the managing agent of the partnerships and Wardell (another apartment house owned by the parties) and protect those entities from P.J. Alizio malfeasance; and (2) for mismanagement and waste in connection with the alleged mishandling of P.J. Alizio's termination as managing agent for the partnerships and in connection with the withholding of Anthony's distributive share of the proceeds from the sale of Wardell and the ensuing litigation (See Alizio v Ronan, Suffolk County Index No 17792/03).

Joseph Alizio's new claims regarding the Wardell litigation were known to him no later than June 17, 2005, the date of Justice Austin's decision regarding Anthony Alizio's distribution of the proceeds from the sale of Wardell (Aff. of Darlene Fairman, ex. B). Having all of the information necessary to make those allegations in June 2005, Joseph will not now be permitted to add claims based on the Wardell property. Not only is this prejudicial, but Joseph has failed to proffer any excuse for not bringing these claims before Irving's death in April 2006. In her affidavit, Lillian Eisenberg, asserts she has no personal knowledge of any facts or claims of this case and was not involved in her husband's business dealings. Accordingly, defendant Lillian Eisenberg's motion to dismiss Joseph's Alizio's second cross claim against the Estate of Irving Eisenberg, and so much of the third cross claim as is based on Wardell, based on the statute of limitations is **granted**. Since the original cross claims for contribution or indemnity related to the management of the other partnerships, defendant Lillian Eisenberg's motion to dismiss the first cross claim against the estate, and the balance of the third cross claim, based on the statute of limitations is **denied**.

Since defendant Joseph Alizio's original answer gave notice of his claims with regard to the management of the partnerships, his cross claims, concerning the partnerships other than Wardell, relate back to the time of his original answer. Defendant Perpignano's motion to dismiss defendant Joseph Alizio's second amended cross claims based on the statute of limitations is **granted** as to those claims based upon the Wardell property and is otherwise **denied**.

#### Anthony Alizio's Amended Complaint

In the amended complaint, Anthony Alizio seeks to add several new parties, Sheila Leipsner, Anita Otton, Mayport Housing Partnership, Ltd, and Bridgeview III Housing Corp.

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CPLR § 203[c] provides that, in an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.

Plaintiff alleges that Anita Otton is the personal representative of one of the partners, Edward Otton. However, Anita denies that she is the personal representative and asserts that Edward's estate was settled in 1988. The court concludes that Anita Otton is not united in interest with the original defendants (CPLR § 203[c]; *Austin v. Interfaith Med. Ctr.*, 264 AD2d 702 [2<sup>nd</sup> Dept. 1999]). Nor is it clear what relationship Mayport Housing had to the partnerships involved in these actions. Accordingly, defendants Otton and Mayport Housing's motion to dismiss the amended complaint based upon the statute of limitations is **granted**.


Defendant Sheila Leipsner alleges that none of the causes of action in the amended complaint relate to her. However, the court notes that Sheila Leipsner was a signatory to the July 2003 agreement. Thus, the court concludes that Sheila Leipsner is united in interest with the other defendants. Defendant Sheila Leipsner's motion to dismiss the amended complaint based upon the statute of limitations is **denied**.

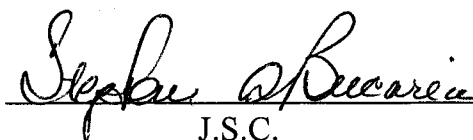
As the property owned by Bridgeview III Associates was a subject of the July 2003 agreement, Bridgeview III Housing Corp appears to be united in interest with the other defendants. Defendant Bridgeview III Housing Corp's motion to dismiss the amended complaint based on the statute of limitations is **denied**. To the extent not granted herein, the Perpignano defendants' motions to dismiss the amended complaint are **denied**.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

This shall constitute the decision and order of this Court.

Dated 14 February 2011



  
J.S.C.

**ENTERED**

FEB 18 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE