

89/5 Greene St. LLC v Moore
2012 NY Slip Op 30035(U)
January 6, 2012
Supreme Court, New York County
Docket Number: 111791/07
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK

PART 2

Justice
J.S.C.

895 Greene Street, W.C.S. et al

INDEX NO. 111791/07

MOTION DATE _____

MOTION SEQ. NO. 04

MOTION CAL. NO. _____

- v -
Moore et al

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/6/12

Joy

LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----x
89/5 GREENE STREET LLC and
GEORGE HARGREAVES,

Plaintiffs,

-against-

PETER MOORE, E&G REALTY LLC and
GREENE STREET PARTNERS, LLC,

Defendants.
-----x

Index No. 111791/07
(Consolidated Action)

FILED

JAN 11 2012

Louis B. York, J.:

NEW YORK
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This is an action for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and breach of fiduciary duty by plaintiffs 89/5 Greene Street LLC (89/5 Greene Street) and George Hargreaves (Hargreaves) against defendants Peter Moore (Moore), E&G Realty LLC (E&G) and Greene Street Partners, LLC (the Company), in connection with the conversion of an apartment building into a condominium. Plaintiff moves, pursuant to CPLR 3212, for an order granting summary judgment. For the reasons stated below, the motion is denied.

The following facts are drawn, in part, from this court's decision, dated August 23, 2010, which granted a motion to disqualify Moore's counsel and denied Moore's cross motion for summary judgment.

The Company is a limited liability company that was formed to acquire and convert an apartment building at 89 Greene Street in Manhattan into a condominium (the Property). Hargreaves, E&G and Moore all had membership interests in the Property.¹ E&G also issued a Purchase Money Mortgage to the Company for \$2.8 million.

On March 26, 2003, the Company's members entered into an operating agreement, pursuant to which Moore was authorized to conduct the day-to-day affairs of the Company for two years. Relevant here, the Company had to approve any member's transfer of its ownership interests. Moreover, under § 7.01 (c) of the agreement, certain matters related to the operation of the Company required the written approval of 85% in interest of the members. These matters included amendments to the operating agreement, mortgaging a material part of the Company's assets and paying compensation or fees to a member.

On May 22, 2003, Hargreaves transferred his 20% interest in the Company to 89/5 Greene Street, which is a company owned by him and of which he is the managing member. On December 28, 2004, Moore executed a First Modification to the operating agreement. It provided that if the Property was not converted to a condominium by February 1, 2006, E&G would have the right to buy out the other

¹The other members were Richard Orenstein and James Healy.

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members of the Company and take ownership of their units. A day later, on December 29, 2004, Moore mortgaged the Company's assets in connection with a mortgage refinance with non-party Interinvest National Bank (Interinvest), to pay off the Company's previous mortgage, refinance costs and related expenses. Plaintiffs allege that Moore then transferred more than \$300,000 of this money to his own company, Peter Moore Associates, to develop his own unit in the Condominium. Plaintiffs state that this transfer was never authorized by the Company members.

Plaintiffs also allege that 89/5 Greene Street did not sign the First Modification, although Hargreaves states that he did consent to the refinancing deal. Moore asserts that Hargreaves, representing 89/5 Greene Street, orally consented to the First Modification. He submits an affidavit from E&G's counsel, Stewart Rothman, who states that he was at the closing, and that Hargreaves verbally agreed to the modification and stated that he would execute the necessary documents in connection with the modification. Rothman Affidavit, ¶ 5. Moore contends that Interinvest would not have agreed to the refinancing without the modification.

On June 1, 2005, Moore executed a Second Modification to the operating agreement, providing that, in the event the Property was

not converted to a condominium as of February 1, 2006, E&G would grant the other Company Members an extension until March 15, 2006. Hargreaves states that he signed the Second Modification on behalf of 89/5 Greene Street, but crossed out the part which said that the Second Modification was deemed a ratification of the First Modification.

The Property was converted into a condominium in July, 2006, several months after the February 1, 2006 deadline. E&G demanded that 89/5 Greene Street and other members of the Company pay a monthly penalty of \$5,000 from February 2006 through the conversion date, pursuant to the terms of the First Modification, and stated that it would take over the ownership interests of the other members if the penalty was not paid. Plaintiffs state that 89/5 Greene Street paid its portion of the penalty, in order to avoid the buyout, even though they contend that Hargreaves never signed the First Modification and Moore's conduct pursuant to the First Modification was, therefore, unenforceable.

Plaintiffs assert claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and breach of fiduciary duty against the various defendants. Among other things, plaintiffs claim that Moore did not get the 85% approval of Company members required by the operating agreement to

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execute the First Modification, and did not get the 85% approval required for the refinancing deal. Additionally, they claim that he did not have permission to transfer the extra funds from the mortgage refinance to his own company to develop his unit in the condominium.

Plaintiffs now move for summary judgment. A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Grob v Kings Realty Assoc. LLC*, 4 AD3d 394 (2d Dept 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Here, numerous questions of fact exist which preclude a granting of summary judgment.

Plaintiffs' causes of action rest on their contention that Moore never received the consent of 85% of the Members required to take certain actions, including the First Modification to the operating agreement, the refinancing of the mortgage and the transfer of money to Peter Moore Associates. However, numerous questions of fact exist with respect to whether Moore obtained the required consent to take these actions.

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First, plaintiffs contend that Moore did not obtain consent to execute the First Modification to the operating agreement. However, as set forth above, defendants have put forth evidence to demonstrate that Hargreaves may have given such permission on his part at the closing. Thus, a factual dispute exists on this issue. Moreover, even assuming that he did consent, none of the parties has adequately demonstrated whether the required 85% consent was obtained in any event.

Similarly, questions of fact exist as to whether consent was obtained for the refinancing. On the one hand, the complaint alleges that no such consent was obtained. However, Hargreaves states in his affidavit that he "generally consented" to the refinancing, but did not consent to the transfer of funds to Moore's company. Hargreaves Affidavit, ¶ 7. Thus, an issue of fact exists in connection with consent to the refinancing.

Defendants also raise an issue as to whether consent by 85% of the members was actually required to take certain of the actions at issue here, including the disbursement of funds to Moore, or whether a 2/3 majority was sufficient. It is undisputed that section 7.01 (b) of the operating agreement states that once the Purchase Money Mortgage was paid off, the required consent was reduced from 85% to a 2/3 majority. Defendants have put forth

evidence to demonstrate that the mortgage was paid off once the closing occurred. Thus, consent by a 2/3 majority may have been sufficient. However, even assuming that a 2/3 majority would suffice, defendants have not put forth proof that such a majority consented to the actions at issue here.

Therefore, in light of the questions of fact set forth above, plaintiffs have not demonstrated that they are entitled to summary judgment on their causes of action for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment and breach of fiduciary.

Plaintiffs also assert a cause of action seeking to examine the company's books and records. It is undisputed that section 8.01 of the operating agreement states that members of the Company have the right to examine the Company's books and records, on reasonable notice, for reasons reasonably related to the member's interest in the Company. However, plaintiffs have not demonstrated that they made any request for such an examination or that such a request was improperly denied. Therefore, they have not demonstrated that they are entitled to an order directing defendants to produce such records.

Finally, plaintiffs assert a cause of action seeking an accounting "reflecting each and every financial transaction of the

Company up to the time Moore sold his unit on December 1, 2006." Complaint, ¶ 70. Plaintiffs cite to *Gottlieb v Northriver Trading Co. LLC*, in which the Appellate Division, First Department, noted that "members of a limited liability company may seek an equitable accounting under common law." 58 AD3d 550, 551 (1st Dept 2009).

Defendants do not oppose the request for an accounting, stating that such an accounting is available, but that plaintiffs have never demanded one. Therefore, plaintiffs' request for an order directing such an accounting is denied with leave to renew, if necessary, upon a demonstration that a proper demand for an accounting was made by plaintiffs and denied by defendants.

Accordingly, it is

ORDERED that the motion for summary judgment by plaintiffs George Hargreaves and 89/5 Greene Street LLC is denied.

DATED: 1/6/12

ENTER:

FILED

JAN 11 2012

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