

**Hoffman v Miller**

2012 NY Slip Op 33068(U)

December 17, 2012

Sup Ct, Suffolk County

Docket Number: 11-28458

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 48 - SUFFOLK COUNTY

**PRESENT:**

Hon. HECTOR D. LaSALLE  
Justice of the Supreme Court

MOTION DATE 11-9-11 (#004)  
MOTION DATE 12-15-11 (#005)  
ADJ. DATE 8-7-12  
Mot. Seq. # 004 - MG  
# 005 - XMD; CASEDISP

-----X		
GEORGE RONALD HOFFMAN, Individually,	:	G. RONALD HOFFMAN, ESQ.
and as a Shareholder of STATLAND CORP.,	:	Attorney for Plaintiff
	:	250 West Main Street
	:	Bay Shore, New York 11706
	:	
Plaintiff,	:	
	:	
- against -	:	JOHN B. ZOLLO, P.C.
	:	Attorney for Defendant
LINDA J. MILLER,	:	38 Southern Blvd., Suite 3
	:	Nesconset, New York 11767
	:	
Defendant.	:	
-----X		

Upon the following papers numbered 1 to 52 read on this motion for dismissal; cross motion for leave to amend the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; Notice of Cross Motion and supporting papers 33 - 47; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers 48 - 49; 50 - 52; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant pursuant to CPLR 3211 for an order dismissing the complaint and vacating a lis pendens is granted; and it is

**ORDERED** that the cross motion by plaintiff for an order granting leave to served an amended complaint is denied.

In September 2011, plaintiff George Ronald Hoffman, individually and as an alleged shareholder of plaintiff Statland Corporation, brought this action against his sister, defendant Linda Miller, following a longstanding family dispute related to the ownership of real property known as 873 Manor Lane, Bay Shore, New York. The subject property, improved with a single family residence, allegedly was purchased by Statland Corporation in May 1993 and served as the marital home of the parties' parents, George Hoffman, Sr. and Margaret Hoffman, who now are deceased. Douglas Kicklin, the parties' uncle, also resided at the residence.

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Statland Corporation, a closely held domestic corporation with 200 authorized shares of common stock, was incorporated on December 31, 1991, allegedly at the behest of plaintiff George Ronald Hoffman, an attorney. It is undisputed that George Hoffman, Sr., Margaret Hoffman, Douglas Kicklin, and Dorothy Brenneis, Margaret Hoffman's sister, each owned ten shares of common stock in Statland Corporation at the time the subject property was purchased. It appears from the record before the court that plaintiff George Ronald Hoffman (hereinafter Ron Hoffman) and his brother, Glenn Hoffman, became estranged from their parents in 1993, and that Ron Hoffman refused repeated written demands by his father to turn over the corporate books and records for Statland Corporation. It also appears that sometime after 2001, Brenneis, who passed away prior to April 2002, transferred her interest in Statland Corporation to Kicklin.

On September 26, 2002, the parties' parents and Kicklin executed a bargain and sale deed with covenants against grantors' acts transferring ownership interest in the subject property to George Hoffman, Sr. and Margaret Hoffman as tenants by the entirety. The deed was recorded by the Suffolk County Clerk on November 13, 2002. Thereafter, by bargain and sale deed with covenant against grantor's acts dated February 7, 2007, Margaret Hoffman, as surviving tenant by the entirety, transferred her interest in the 873 Manor Lane property to Miller. The deed transferring ownership of the property to Miller was recorded by the Suffolk County Clerk on February 28, 2002.

By his complaint, Ron Hoffman alleges he is the majority shareholder of Statland Corporation, and that the "minority shareholders," namely his parents and Kicklin, lived at the premises as tenants and were required to pay all the carrying costs for the property, "including, but not limited to, Statland Corp. franchise taxes, real estate taxes . . . and non-scheduled maintenance." He alleges that "[i]t was recently discovered upon the death of Margaret Hoffman on September 4, 2010, that a series of defective, void, non-compliant, nullities, fraudulent transfers, and conveyances by purported deeds, were procured by defendant, Linda Miller, with the help and assistance of others, dating back to June 12, 2001."

Claiming that "the only valid owner of the premises 873 Manor Lane, Bay Shore is Statland Corp.," the first four causes of action set forth in the complaint assert that deeds dated June 12, 2001, June 6, 2002, September 26, 2002 and February 7, 2007 were "fraudulently procured" by Miller and must be set aside and vacated as void. The fifth, sixth, seventh and ninth causes of action assert that the same four deeds must be vacated, because they violate Articles 8 and 9 of the Real Property Law, Business Corporation Law § 909, and the "constructive fraud provision of NY Fraudulent Transfer Law." The eighth and eleventh causes of action also seek to have the deed transferring ownership in the Manor Lane property vacated, with the eighth cause of action alleging simply that "the purported deeds of June 12, 2001, September 6, 2002, September 26, 2002 and February 7, 2007 are intentional, fraudulent transfers," and the eleventh cause of action alleging that Miller "participated in the conversion of the property . . . by [such] purported deeds." The tenth cause of action asserts that Ron Hoffman "is and was a creditor of Statland Corp." and that the conveyances of the Manor Lane property were made to defraud him. Finally, the twelfth cause of action alleges plaintiffs are entitled to recover attorney's fees under Debtor Creditor Law § 276-A, and the thirteenth and fourteenth causes allege plaintiffs are entitled to recover compensatory and consequential damages for the alleged fraudulent transfers. In addition to seeking a judgment vacating the subject deeds that transferred ownership of the 873 Manor Lane property and awarding damages, the complaint also seeks a declaration that plaintiffs are the owners of such property.

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Miller now moves pursuant to CPLR 3211 (a)(7) for an order dismissing the complaint for failure to state a cause of action, arguing, in part, that the allegations in the complaint do not meet the pleading requirements for fraud claims. She also moves pursuant to CPLR 3211 (a)(3) and CPLR 3211(a)(5) for dismissal on the grounds that plaintiff lacks standing and that the claims are time-barred. Significantly, Miller disputes Ron Hoffman's allegation that he had an ownership interest in Statland Corporation. She alleges that her parents, aunt and uncle each owned a 25% interest in the corporation, and that her brother never claimed to be a shareholder until he learned after Margaret Hoffman's death that he had been disinherited. Moreover, Miller asserts that Statland Corporation was dissolved by the filing of a certificate of dissolution with the New York Secretary of State on April 4, 2002, that the only asset of the corporation was the Manor Lane property, and that the statute of limitations period for the fraud causes of action expired six years after the corporation's dissolution date. Miller's submissions in support of the motion include copies of the summons and complaint; a copy of the certificate of incorporation for Statland Corporation; copies of stock certificates issued to the parties' parents, Kicklin and Brenneis; and a copy of the dissolution certificate and the filing receipt issued by the Secretary of State. Miller further submits copies of Margaret Hoffman's wills, an order issued by the Surrogate's Court in October 2010 vacating Ron Hoffman's appointment as preliminary executor of his mother's estate, correspondence between Ron Hoffman and his parents relating to the Manor Lane property and Statland Corporation, and her own affidavit.

Ron Hoffman opposes the motion, arguing, among things, that Statland Corporation was "fraudulently dissolved" and that, despite the dissolution, it may prosecute the action to recover its asset, namely the 873 Manor Lane Property. He contends that he has standing to sue as the majority shareholder of Statland Corporation, and that the alleged fraudulent transfers were concealed until his mother's death in 2010. Further, Ron Hoffman cross-moves for an order granting him leave to serve an amended complaint. The proposed amended complaint annexed to the cross-moving papers contains the same fourteen causes of action as the original complaint, as well as a fifteenth cause of action alleging that the deeds of June 12, 2001, September 6, 2002, September 26, 2002 and February 7, 2007 "are in violation of RPAPL Article," and that title in the subject property "must be re-vested in Statland Corp. as designated in a deed dated May 25, 1993." Ron Hoffman's submission in opposition to the motion and in support of the cross motion includes a copy of a Statland Corporation stock certificate, dated January 6, 1992 and signed by him as President and Secretary, stating he owns 160 shares of stock; copies of the original Statland Corporation stock certificates issued to his parents, Kicklin and Brenneis in May 1993 and copies of the replacement stock certificates issued to them in 2001; a copy of the September 26, 2002 deed transferring ownership of the property to George Hoffman, Sr. and Margaret Hoffman as tenants by the entirety; an affidavit of his former employee, Kathi Pesonen; and his own affidavit.

Defendant's motion pursuant to CPLR 3211 for an order dismissing the complaint is granted. On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). When a party seeks dismissal under CPLR 3211(a)(7) based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Sokol v Leader*, 74 AD3d 1180,

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1180-1181, 904 NYS2d 153 [2d Dept 2010]). “However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704, 864 NYS2d 70 [2d Dept 2008]). Further, in assessing whether a complaint can withstand a motion under CPLR 3211 (a)(7), a court may consider affidavits submitted to remedy pleading defects, thereby preserving “inartfully pleaded, but potentially meritorious, claims” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). If such evidentiary material is considered by the court, the test is whether plaintiff has a cause of action, not whether he or she has stated one in the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530, 846 NYS2d 368 [2d Dept 2007]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 ; see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 389 NYS2d 314 ).

Dismissal of the first, second, third, fourth, eighth, ninth, twelfth, thirteenth and fourteenth causes of action pursuant to CPLR 3211 (a)(7) is granted. To plead a cause of action for fraud, a plaintiff must allege (1) that the defendant made a representation or an omission as to a material fact that was false and known to be false, (2) that the misrepresentation or omission was made for the purpose of inducing the plaintiff to rely upon it, (3) that the plaintiff justifiably relied on the misrepresentation or material omission, and (4) that the plaintiff suffered an injury as a result of such reliance (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 [2009]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 646 NYS2d 76 [1996]; *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 945 NYS2d 118 [2d Dept 2012]; *Levin v Kitsis*, 82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]; *Selechnik v Law Off. of Howard R. Birnbach*, 82 AD3d 1077, 920 NYS2d 128 [2d Dept 2011]). Moreover, a cause of action rooted in fraud must meet the pleading requirement set forth in CPLR 3016 (b) that “the circumstances constituting the wrong shall be stated in detail.” Although “unassailable proof” is not required at the pleading stage, a complaint alleging fraud must set forth “the basic facts to establish the elements of the cause of action” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147). Mere conclusory language, without specific and detailed allegations of a material misrepresentation of fact by the defendant, of defendant’s knowledge of the fraud or reckless disregard of the truth, of plaintiff’s justifiable reliance, and of the damages proximately caused by such misrepresentation, is insufficient to state a cause of action to recover damages for fraud (see *Sanford/Kissena Owners Corp. v Daral Props., Inc.*, 84 AD3d 1210, 923 NYS2d 692 [2d Dept 2011]; *Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526, 527, 867 NYS2d 198 [2d Dept 2008]; *Friedman v Anderson*, 23 AD3d 163, 803 NYS2d 514 [1st Dept 2005]; *Old Republic Natl. Title Ins. Co. v Cardinal Abstract Co.*, 14 AD3d 678, 867 NYS2d 198 [2d Dept 2005]; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 734 NYS2d 205 [2d Dept 2001]).

Here, the first cause of action alleges only that the “purported deed of June 12, 2001 was fraudulently procured by defendant Linda Miller and was void on its face, did not comply with Business Corporation law and was a fraudulent transfer from Statland Corp.” The second, third and four causes of action allege only that the deeds dated June 6, 2002, September 26, 2002 and February 7, 2007 were “fraudulently procured by defendant Linda Miller with the help and assistance of others,” and the twelfth, thirteenth and fourteenth causes of action allege only that damages were suffered as a result of Miller’s “attempt to defraud plaintiff” and her “fraudulent conveyances,” namely the four deeds at issue. The Court notes that copies of the deeds of June 12, 2001 and June 6, 2002 have not been submitted by the parties, and that no factual allegations

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have been made in the papers as to the transfers allegedly effected by such deeds. Further, the eighth cause of action merely states that the four deeds at issue “are intentional, fraudulent transfers.” Significantly, the complaint does not contain any allegations that Miller made any misrepresentations to Statland Corporation, the alleged owner of the Manor Lane property, to induce it to transfer its ownership interest in the property (see *Sanford/Kissena Owners Corp. v Daral Props., Inc.*, 84 AD3d 1210, 923 NYS2d 692; *Ladino v Bank of Am.*, 52 AD3d 571, 861 NYS2d 683 [2d Dept 2008]; *Wint v ABN Anro Mtge. Group, Inc.*, 19 AD3d 588, 800 NYS2d 411 [2d Dept 2005]). In fact, the eighth cause of action does not even allege any conduct on the part of defendant. Furthermore, Ron Hoffman’s affidavit in opposition to the dismissal motion does not set forth any specific allegations of material misrepresentations by Miller (see *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 734 NYS2d 205).

The tenth cause of action, which alleges that Ron Hoffman was a creditor of Statland Corporation and that the “fraudulent conveyances” represented by the subject deed were made to defraud him, suffers from a similar deficiency in that it does not allege any misconduct on the part of Miller. Moreover, an individual shareholder may not maintain an individual action for a wrong against a corporation, even though he or she loses his investment or incurs personal liability in an attempt to maintain the solvency of a corporation (*Abrams v Donati*, 66 NY2d 951, 952, 498 NYS2d 782 [1985]; see *Niles v New York Cent. & H.R.R. Co.*, 176 NY 119, 68 NE 142 [1903]; *Fifty States Mgt. Corp. v Niagara Permanent Sav. & Loan Assn.*, 58 AD2d 177, 396 NYS2d 925 [4th Dept 1977]). Although an exception to this rule has been recognized when the stockholder alleges the tortfeasor breached a duty owed to the shareholder that was independent of any duty owed to the corporation (*Abrams v Donati*, 66 NY2d 951, 952, 498 NYS2d 782; *Behrens v Metropolitan Opera Assn., Inc.*, 18 AD3d 47, 50, 794 NYS2d 301 [2d Dept 2005]), no allegation has been made that Miller breached an independent duty owed to Ron Hoffman (see *Jobson v Prognio*, 100 AD3d 1407, 953 NYS2d 523 [4th Dept 2012]). Thus, dismissal of the tenth cause of action is granted.

Furthermore, the fifth cause of action in the complaint merely alleges that the deeds of June 12, 2001, September 6, 2002, September 26, 2002 and February 7, 2002 “are in violation of NYSRPL Article 8,” and the sixth cause of action merely alleges that such deeds “are in violation of NYSRPL Article 9.” The seventh cause of action alleges only that the same deeds “are non-compliant and in violation of BCL § 909.” The complaint, however, does not allege any conduct by Miller in connection with such causes of action. Further, the vague, conclusory statements that the deeds at issue violate Real Property Law Articles 8 and 9, as well as Business Corporation Law § 909, are insufficient to state causes of action cognizable at law (see CPLR 3013; *Allen v Murray House Owners Corp.*, 130 AD2d 356, 515 NYS2d 18 [1st Dept 1987]; *Shapolsky v Shapolsky*, 22 AD2d 91, 253 NYS2d 816 [2d Dept 1964]). Accordingly, dismissal of the fifth, sixth and seventh causes of action is granted.

Dismissal of the eleventh cause of action pursuant to CPLR 3211 (a)(7) also is granted. Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44, 637 NYS2d 342 [1995]; see *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 827 NYS2d 96 [2006]; *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 746 NYS2d 637 [2002]; *Peter Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 452 NYS2d 599 [1st Dept 1982]). An action for conversion, however, does not lie where, as here, the subject property is real property (see *Scott v Fields*, 85 AD3d 756, 925 NYS2d 135 [2d Dept 2011]; *Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85

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[2d Dept 2010)].

Finally, the cross motion for leave to serve the proposed amended complaint is denied. Although leave to amend pleadings “shall be freely given upon such terms as may be just” (CPLR 3025 [b]), a proposed amendment that would cause prejudice to the opposing party should be denied (*see Surgical Design Corp. v Correa*, 31 AD3d 744, 819 NYS2d 542 [2d Dept 2006]; *Voyticky v Duffy*, 19 AD3d 685, 798 NYS2d 494 [2d Dept 2005], *lv dismissed in part, denied in part* 6 NY3d 800, 812 NYS2d 33 [2006]; *ALD Holding Corp. v F & O Port Corp.*, 15 AD3d 508, 790 NYS2d 514 [2d Dept 2005]), as should a proposed amendment that is “palpably insufficient or patently devoid of merit” (*Tornheim v Blue & White Food Products Corp.*, 56 AD3d 761, 761, 868 NYS2d 279 [2d Dept 2008]; *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007], *affd* 10 NY3d 941, 862 NYS2d 855 [2008]; *see Trystate Mech., Inc. v Macy’s Retail Holdings, Inc.*, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]; *Scofield v DeGroot*, 54 AD3d 1017, 864 NYS2d 174 [2d Dept 2008]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). Here the proposed amendment is a new cause of action alleging only that the deeds at issue “are in violation of RPAPL Article 15” and seeking to have title to the Manor Lane property “re-vested in Statland Corporation.” The proposed amendment, however, is palpably insufficient, as it fails to set forth how Statland Corporation, an entity dissolved in April 2002, has a present ownership interest in the 873 Manor Lane property and can be awarded possession of such property (*see* RPAPL 1515; *Putnam County Sav. Bank v Aditya*, 91 AD3d 840, 938 NYS2d 98 [2d Dept 2012]). Further, the undisputed documentary evidence in the record clearly shows the proposed amendment is devoid of merit, as Ron Hoffman’s relatives had possession of the property since May 1993, and title to the subject property was vested in the parties’ parents as tenants by the entirety in September 2002 (*see generally Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 920 NYS2d 123 [2d Dept 2011]; *Scofield v DeGroot*, 54 AD3d 1017, 864 NYS2d 174; *cf. Saline v Saline*, 94 AD3d 1080, 944 NYS2d 162 [2d Dept 2012]).

The foregoing constitutes the Order of this Court.

Dated: December 17, 2012  
 Central Islip, NY

  
 HON. HECTOR D. LASALLE, J.S.C.

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION