

Gratch v Denholtz

2012 NY Slip Op 33323(U)

January 20, 2012

Supreme Court, New York County

Docket Number: 650607/2011

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

ARIEL GRATCH,

Plaintiff,

-against-

STEVEN DENHOLTZ, et al.,

Defendants.

INDEX NO. 650607/2011

MOTION DATE Jan. 12, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to ___ were read on this motion to dismiss action.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____


Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the defendant's motion to dismiss the complaint is decided in accordance with the accompanying decision and order.

Dated: January 20, 2012


O. PETER SHERWOOD, 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 49**

-----X
ARIEL GRATCH,

Plaintiff,

-against-

**DECISION AND
ORDER**

Index No. 650607/2011

**STEVEN DENHOLTZ, DENHOLTZ HOLDINGS LLC,
DENHOLTZ MANAGEMENT CORP. a/k/a
DENHOLTZ ASSOCIATES, D. PIKE ALOIAN,
JEROLD ZARO, ROTHSCHILD REALTY INVESTORS
IV L.L.C., FIVE ARROWS REALTY SECURITIES L.L.C.,
FIVE ARROWS REALTY SECURITIES IV, L.P.,
and JOHN DOES 1-20,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

Defendants move, pursuant to CPLR 3211 (a)(7) and CPLR 3211 (a)(1), to dismiss counts two and three of the amended complaint. In the second cause of action, plaintiff alleges breach of fiduciary duty by the directors of Denholtz Holding for approving in bad faith a loan transaction referred to as the "GECC buyout". In the third cause of action, plaintiff alleges aiding and abetting of the director's breach by the corporate defendants.

Background

The facts are taken from the amended complaint and are assumed true for purposes of the motion. Plaintiff, Ariel Gratch ("Plaintiff"), is an investor in real property. He has invested in various real estate transactions introduced to him by defendant, Steven Denholtz ("Denholtz"), for roughly fifteen years. Denholtz is a real estate developer and entrepreneur with substantial experience in real estate transactions. At some point before December 2005, Denholtz was involved as a managing partner in a number of real estate holdings, each structured as a limited partnership

(the “Limited Partnerships”). Plaintiff, along with other investors (collectively, the “Investors”), made investments in these Limited Partnerships in return for proportional shares of the partnerships. By the end of 2005, plaintiff’s investments with the Limited Partnerships were more than \$2,000,000.00.

In or around December of 2005, Denholtz sought a financial partner to provide growth capital for his real estate business. Denholtz advised the Investors that, based on his search of the market and discussion with various potential parties, he believed that Rothschild Realty (“Rothschild”) would be the most appropriate party, given its impressive record as a long term investor and a true management partner. Denholtz further represented that partnering with Rothschild would enable the Investors to invest in much larger real estate transactions (which, because of their size, were less competitive and provided better returns). In order to partner with Rothschild, however, Denholtz advised that the Investors would have to agree to fold all the Limited Partnerships into a single entity in which Rothschild would invest and take an active role in management.

Denholtz and Rothschild reached an agreement, pursuant to which an entity called “Denholtz Holdings” would be created, and into which the various Limited Partnerships would be folded. Denholtz Holdings would then become part of a portfolio of an entity known as “FARS”, a subsidiary of Rothschild. The Investors were then offered an opportunity to make an election – either to have their entire limited partnership interest converted into equity in Denholtz Holdings (in which case they would exchange their partnership interests for shares of Denholtz Holdings), or to convert 50% of their partnership interest into shares of Denholtz Holdings and, for the other 50%, receive 83% of its value in cash from funds provided by FARS as underwriter of the transaction.

To induce Gratch to make the swap, Denholtz and FARS represented and promised that consolidating the real estate portfolio of the various Limited Partnerships into Denholtz Holdings would allow FARS to make a significant long-term capital commitment to Denholtz Holdings, take an active role in management, and fund its growth into a major real estate company. “It was made clear to Gratch that FARS would be Denholtz Holdings’ partner, not a traditional lender providing credit to Denholtz Holdings, but an equity partner and source for long term growth capital. Further, Gratch was assured that by folding all the Limited Partnerships into Denholtz Holdings, all of the Denholtz real estate interests would be consolidated and the interests of all the Investors aligned, and the particular Rothschild entity would actively supervise Denholtz and his management team on behalf of the Investors” (Amended Compl. ¶18). The Board of Directors of Denholtz Holdings (the “Board”) was comprised of Denholtz, defendant, Jerald Zaro (a Denholtz appointee), and two FARS appointees, one of which was defendant Pike Aloian. FARS maintained certain veto powers over the activities of management.

Plaintiff elected to convert his entire investment in the Limited Partnerships to equity in Denholtz Holdings (Amended Compl. ¶20). Plaintiff alleges that, unbeknownst to him, most, (and possibly all) of the other Investors chose to accept the cash discount, with Denholtz and his wife receiving approximately \$10,000,000 in cash as a result of the creation of Denholtz Holdings (*id.*) Of significance on this motion, Plaintiff alleges that he was not aware (although other Investors were) that Denholtz’s personal life was rapidly deteriorating. Denholtz was allegedly in the midst of an antagonistic separation from his wife; a romantic affair with another woman; and a growing and serious addiction to drugs, among other personal distractions. No effort was made to inform Gratch of these facts (Amended Compl. ¶21).

Denholtz was unable to – or simply did not – devote his time and attention to the management of Denholtz Holdings. As a result, the company was unable to realize any true benefits from its partnership with FARS, and its value quickly plummeted. As soon as FARS became aware of Denholtz’ problems (but before the Denholtz Holdings had begun its rapid financial downturn) FARS sought to exit Denholtz Holdings. FARS pressured Denholtz to find a lender that would replace part of the loan FARS had made to the Denholtz Holdings.

Denholtz proceeded to negotiate with General Electric Capital Corporation (“GECC”) to arrange for senior, secured traditional financing (the “GECC buyout”). The parties dispute the value of the GECC buyout to the Limited Partnerships; Plaintiff alleges that it was financially disastrous from its conception. Defendants claim that it was a sensible business decision at the time it was made. It is undisputed that shortly after the GECC buyout, Denholtz Holdings failed. As a result Plaintiff lost his entire \$2 million investment. The amended complaint asserts causes of action for fraud against Denholtz only, breach of fiduciary duty against Denholtz, Denholtz Holdings, and Denholtz Holdings board members Aloian, Zaro, and one unnamed board member (“John Doe 1”). Finally, Plaintiff alleges a cause of action for aiding and abetting breach of fiduciary duty against FARS, “FARS IV”, Rothschild Realty, Rothschild Realty IV, and 19 unnamed defendants (John Does 2-20”).

Defendants move to dismiss the second and third causes of action only. Delaware Law governs the parties’ dispute.

DISCUSSION

Defendants argue that Plaintiff cannot sue directly and should have brought the claim derivatively because any harm that Plaintiff would have incurred would have similarly been incurred

by the members of Denholtz Holdings. Under Delaware law, courts have held that in order to maintain a direct claim, the shareholder (or member) must allege a direct injury that is independent of any alleged injury to the corporation. The shareholder must show that the duty breached was owed to the shareholder and that he or she can prevail without showing an injury to the corporation (*see Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 AD2d 1031, 1039 [Del 2004]). In determining whether a plaintiff has alleged either a direct or derivative claim, Delaware courts examine two factors: first, “who suffered the alleged harm, the LLC or its members, and second, who would receive the benefit of any recovery or other remedy” (*see Kelly v. Blum*, No. 4516-VCP, 2010 WL 629850 at *9 [Del Ch Feb 24, 2010][internal quotation omitted]). This requires an analysis of “the nature of the wrong alleged, not merely ... the form of the words used in the complaint” (*id.*)

Defendants maintain that this is a garden-variety shareholder derivative suit (*i.e.* that a Plaintiff-shareholder disagrees with the way the company was managed, which resulted in a loss to all shareholders). The court agrees.

The thrust of the second and third causes of action alleged in the amended complaint, is that Denholtz and the Denholtz Holdings’ board members approved the GECC buyout knowing that by so doing the company would be left in the hands of Denholtz who they knew was unable to manage and that the corporate defendants were complicit in that approval action. Plaintiff alleges further that all board members knew about Denholtz’s personal problems and inability to manage the company effectively but approved the transaction with the intention of favoring the interests of Denholtz and FARS. Such an allegation, does not state a direct injury to plaintiff independent of any injury to the corporation. The claim of aiding and abetting is likewise not a claim that is independent of any possible claims of the corporation.

Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the second and third causes of action in the amended complaint herein is granted; and it is further

ORDERED that the amended complaint is dismissed as against all defendants, except Steven Denholtz, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against Steven Denholtz only; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49**

-----X
ARIEL GRATCH,

Plaintiff,

Index No. 650607/2011

-against-

STEVEN DENHOLTZ,

Defendant.

-----X

and it is further

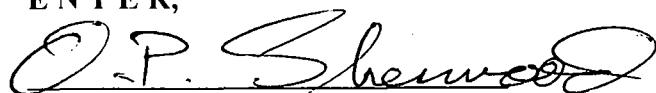
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the remaining defendant shall serve and file his answer within twenty (20) days of service of this decision and order with notice of entry; and it is further

ORDERED that counsel shall appear for a preliminary conference on Wednesday, March 21, 2012 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

DATED: January 20, 2012

ENTER,

O. PETER SHERWOOD
J.S.C.