

**Board of Mgr. of Foundry at Washington Park
Condominium v Foundry Dev. Co., Inc.**

2012 NY Slip Op 33702(U)

July 7, 2012

Supreme Court, Orange County

Docket Number: 4484/2010

Judge: Paul I. Marx

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE
HON. PAUL I. MARX, J.S.C.

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

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**THE BOARD OF MANAGERS OF
FOUNDRY AT WASHINGTON PARK
CONDOMINIUM, AS AGENT FOR ALL
UNIT OWNERS,**

Plaintiff,

-against-

**FOUNDRY DEVELOPMENT CO., INC.
PAUL & JOSEPH MANAGEMENT
COMPANY, INC., POLONIA VENTURES
LLC, GERARDO SANCHEZ, NIRVA
SANCHEZ, JOSEPH SUAREZ and "JOHN
DOE" and/or "JANE DOE" the last 2 names
being fictitious and unknown to plaintiff, the
person or parties intended being the persons or
parties, if any, having or claiming an interest in
or lien upon the mortgaged premises described
in the complaint,**

Defendants.

-----X

DECISION AND ORDER

Index No.: 4484/2010

Motion Date: April 18, 2012

Motion Sequence # 18

The following papers numbered 1 through 4 were read on Defendant Joseph Suarez's motion to dismiss based upon documentary evidence, pursuant to CPLR §3211(a)(1), failure to state a cause of action, pursuant to CPLR §3211(a)(7), and failure to plead with specificity, pursuant to CPLR §3016(b):

Notice of Motion-Affidavit of Joseph E. Suarez-Exhibit 1 - 16	1-2
Affidavit in Opposition by Gardiner S. Barone-Exhibit A - B	3
Reply Affidavit	4

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Upon reading the foregoing papers it is ORDERED that the motion to dismiss is denied for the reasons that follow.

This action by the Board of Managers of Foundry at Washington Park Condominium seeks to recover all of the unpaid common charges related to the unsold units owned at different times by Defendants Foundry Development Co., Inc. ("FDC"), Polonia Ventures LLC, and Paul & Joseph Management Co. (collectively "Defendant Companies"). Plaintiff alleges that Defendants Nirva Sanchez, Gerardo Sanchez, and Joseph Suarez (collectively "Individual Defendants") were principals of, or had a financial interest in, one or all of the Defendant Companies. As such, Plaintiff claims that the Individual Defendants acted in bad faith and violated their fiduciary duties to the Plaintiff as board members by failing to assess and collect common charges owed by Defendant Companies. Plaintiff alleges that Defendant Companies improperly sold or transferred their units to avoid paying said common charges. Plaintiff also alleges that Defendant Companies and the Sanchez and Suarez defendants acted against the interests of the condominium by improperly exercising control over the condominium board, causing the board to amend the Declaration and By-Laws for their personal benefit, and causing Plaintiff to take over FDC's obligation as a sponsor to complete the pool, garage and other common elements.

Joseph Suarez moves to dismiss the First and Fourth Causes of Action in the First Amended Complaint "on the grounds that the complaint fails to state a cause of action, that the specificity of pleading required by CPLR 3016(b) is absent, that the elements of claimed breaches of fiduciary duties are non-existent, that the facts as established via documentation vitiate and definitively contradict the relevant factual allegations of the complaint." Notice of Motion at p. 1. In his affidavit, Mr. Suarez provides a lengthy and detailed recitation of his history and involvement with Plaintiff, Defendant Gerardo Sanchez, FDC, and Paul & Joseph Management Co., Inc.

Suarez argues that he does not owe a fiduciary duty because he was not a board member at the time that the actions which form the crux of Plaintiff's amended complaint were actually undertaken. He asserts that he did not become a board member until more than a year later. He avers that the documents attached to his moving papers establish conclusively that Plaintiff has no claim against him for breach of fiduciary duty or unjust enrichment. The documents he submits in support of his motion consist of minutes of board meetings, a treasurer's report written by him,

written observations of board member Peter Devito about a board meeting, a memorandum written by Suarez interpreting the voting clause in the By-Laws, an email from Peter Devito on the history of the condominium, a list of the owners who supported an amendment to the voting clause in the By-Laws, the affidavit of the Director of Housing and Community Renewal for the City of Newburgh, a legal memorandum from Newburgh corporation counsel to the city manager regarding common charges, and an affidavit of the Director of Economic Development and Administrative Director of the City of Newburgh Industrial Development Agency.

The materials submitted by Defendant are documentary in nature but they are not “documentary” for purposes of CPLR §3211(a)(1). In order for the Court to grant a motion to dismiss based upon documentary evidence, “the documents alone [must] ‘definitively dispose of plaintiff’s claim.’” *Carroll v The Charles House Condominium*, 33 Misc. 3d 1214A, 939 NYS2d 739 [N.Y. Sup. Ct. 2011] (quoting *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 808 NYS2d 214 [1st Dept 2006], citing *Bronxville Knolls Inc. v Webster Town Center Partnership*, 221 AD2d 248, 634 NYS2d 62 [1st Dept 1995]). As an initial matter, the documents must be “unambiguous and of undisputed authenticity” to be deemed “documentary” for purposes of CPLR §3211(a)(1). *Fontanetta v John Doe 1*, 73 AD3d 78, 898 NYS2d 569 [2nd Dept 2010]. The types of documents submitted by Defendant in support of his motion do not qualify as “documentary” for CPLR §3211(a)(1) purposes. Affidavits, emails, and letters have been held to not qualify as documentary evidence, as have any other written documents that raise issues of credibility for the jury to decide. *Id.* at 85-87. Moreover, “[d]ocuments that can be characterized at best as letters, summaries, opinions, and/or conclusions ... do not pose an ‘essentially undeniable’ defense and therefore do not qualify as ‘documentary’ under CPLR § 3211[a][1].” *Carroll*, 33 Misc. 3d at 1214A (citing *Fontanetta*, 73 AD3d 78). Affidavits, letters, meeting minutes, emails, and summaries and opinions of Defendant and other board members clearly fail to qualify as “unambiguous and of undisputed authority” and they are rife with hearsay and credibility issues. Defendant has not submitted any documents that meet the high standards of CPLR §3211(a)(1) or that establish an absolute defense to Plaintiff’s claims. Therefore, Defendant’s motion for CPLR §3211(a)(1) relief is denied.

Defendant’s motion based upon failure to state a cause of action meets a similar fate. Although the Court may “consider evidentiary material submitted by a defendant in support of a

motion to dismiss pursuant to CPLR 3211(a)(7) (see CPLR 3211(c)),” *Sokol v Leader*, 74 AD3d at 1181, the affidavits and other material that may be considered for this purpose do not, in fact, establish conclusively that Plaintiff has no cause of action.

Moreover, in determining a motion to dismiss, the Court is required to “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *County of Suffolk v MHC Greenwood Vill., LLC*, 91 AD3d 587, 589, 937 NYS2d 89 [2nd Dept 2012] (quoting *Sokol v Leader*, 74 AD3d 1180, 1181 [2nd Dept 2010]).

The facts as alleged by Plaintiff state a cause of action for breach of fiduciary duty arising out of the board’s failure to adhere to its statutory obligation under Real Property Law §339-m to insure that common expenses “shall be charged to, the unit owners according to their respective common interests.” Defendant also owed a fiduciary duty in his capacity as a unit owner to all other unit owners. “In regard to the payment of common charges and maintenance of the unit itself, each unit must be operated by the unit owner so as not to diminish the interest of other owners. Each and every unit may either be benefitted or damaged by the actions of any individual unit. This further supports the conclusion that a “fiduciary” relationship exists between each unit owner ... and all other unit owners.” *Barry v Board of Managers of Elmwood Park Condominium II*, 18 Misc. 3d 559, 568, 853 NYS2d 827 [Civ. Ct. 2007]. Accordingly, Defendant owed a fiduciary duty, either as a board member or acting as a unit owner on behalf of the companies that actually owned the units, to all other unit owners to ensure that the common charges owed by those companies were paid. To the extent that Defendant used his position as a board member or “unit owner” to avoid paying common charges, Plaintiff has also stated a claim against him for unjust enrichment.

Defendant’s unsupported claim that there was never an affirmative duty to collect common charges on unsold units because common charges had never been assessed on such units from the inception of the condominium need not be rebutted by Plaintiff. “[O]n a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party.” *Sokol v Leader*, 74 AD3d at 1181 (citations omitted). “Whether the plaintiff can ultimately establish its allegations is not part of the calculus.” *County of Suffolk*, 91 AD3d at 589

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(quotes omitted). Thus, dismissal of the amended complaint pursuant to CPLR §3211(a)(7) is not warranted.

Contrary to Defendant's additional contention, the amended complaint sets forth Plaintiff's claims with sufficient specificity to satisfy the requirements of CPLR §3016(b). In fact, Defendant's motion papers and supporting documents belie his claim that the amended complaint lacks sufficient specificity given his ability to marshal so many documents, however unsuccessfully, in response to Plaintiff's allegations.

The foregoing constitutes the decision and order of the Court.

Dated: July 7, 2012
Goshen, New York

ENTER



HON. PAUL I. MARX, J.S.C.