Matter of 1650 Realty Assoc., LLC v Golden Touch Mgt., Inc.
2012 NY Slip Op 33864(U)
November 9, 2012
Supreme Court, Nassau County
Docket Number: 005408/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

ORIGINAL

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 005408/11

MOTION DATE: March 5, 2012
Motion Sequence # 005, 006, 007

In the Matter of the Application of
1650 REALTY ASSOCIATES, LLC and
1671 REALTY ASSOCIATES, LLC,

Petitioners,

-against-

GOLDEN TOUCH MANAGEMENT, INC., PARO MANAGEMENT CO., INC., JANGLA REALTY CORP., SERHOF REALTY CORP., RONALD SWARTZ and STEVEN SWARTZ,

Respondents.

GOLDEN TOUCH MANAGEMENT, INC., RONALD SWARTZ and STEVEN SWARTZ,

Third-Party Plaintiffs,

-against-

GLADYS LIND, AMY SILBER and LARRY SILBER,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion..... X
Order to Show Cause..... X
Affirmation in Opposition..... XX
Emergency Affirmation in further Support.... X
Reply Affirmation..... X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

Motion by respondents Golden Touch Management, Inc., Paro Management Co., Inc., Jangla Realty Corp., Serhof Realty Corp., Ronald Swartz, Steven Swartz, Ronald Swartz's S Trust and Steven Swartz's S Trust for: 1) an order pursuant to CPLR 3211(a)(7) dismissing Counts One and Three of the Third Amended Petition against defendants Ronald and Steven Swartz; 2) an order pursuant to CPLR3211(a)(5), (7) dismissing Count Four of the Third Amended Petition in its entirety; 3) an order pursuant to CPLR 3211(a)(1), (5), (7) dismissing Count Six of the Third Amended Petition in its entirety; 4) an order pursuant to CPLR 3211(a)(7) dismissing Count Seven of the Third Amended Petition in its entirety; and, 5) an order pursuant to CPLR 3211(a)(7) and CPLR 3016(b) dismissing Count Eight of the Third Amended Petition in its entirety, is **granted** to the extent of dismissing the seventh cause of action against respondents Ronald and Steven Swartz and otherwise **denied**.

Motion by petitioners 1650 Realty Associates, LLC and 1671 Realty Associates, LLC for an order pursuant to CPLR 2221 granting renewal of this court's orders dated July 13, 2011 and August 8, 2011 and upon renewal, vacating those orders insofar as they failed to grant declaratory relief and issuing an order declaring that Gladys Lind was represented by the respondent attorneys Ronald Swartz and Steven Swartz when the parties' Management Agreement was entered, and further declaring that that Agreement dated June 30, 1991, is void and unenforceable based upon respondents' Ronald and Steven Swartz's violation of Disciplinary Rule 5-104(A) a/k/a § 1.8 of the Code of Professional Conduct (22NYCRR 1200.23[a]) as well as their breach of fiduciary duty, and further declaring that petitioners' March 22, 2011 discharge of the respondents Golden Touch Management, Inc., Paro Management Co., Inc., and Ronald and Steven Swartz as managing agents of their properties was not wrongful, and ordering the cancellation of the bond filed by petitioners pursuant to the order of July 13, 2011 is **granted** in part and **denied** in part.

Petitioners 1650 Realty Associates, LLC and 1671 Realty Associates, LLC seek, inter alia, to recover the management fees collected by respondent Golden Touch Management Inc based upon its management of their properties. Petitioners allege that their managing member, Gladys Lind's legal representation by Golden Touch 's members, Ronald Swartz and Steven Swartz, renders the Management Agreement unenforceable. In its orders of July 13, 2011 or August 8, 2011, the court found that petitioners had established a likelihood of success on the merits with respect to this claim. Thus, the court granted a preliminary injunction, restraining Golden Touch from serving as managing agent. Petitioners seek renewal of those orders to the extent that the court failed to grant declaratory relief, that Ronald and Swartz violated attorney disciplinary rules, and required petitioners to post a bond, as a condition of the preliminary injunction.

In her affidavit, Gladys Lind attests that her father Jacob Hoffman had ownership interests in approximately 18 real estate partnerships and that Swartz & Swartz represented both him and following his death, his estate. She attests that following her father's death, Swartz & Swartz proposed that they undertake management of the properties so as to enable the estate taxes to be paid via the rental income. She further attests that in furtherance of that goal, the Swartzes formed Golden Touch Management, Inc. and personally prepared a Management and Leasing Agreement or had one prepared which the parties executed without the assistance of any other attorneys. The management agreement was signed June 30, 1991.

Respondents maintain that Gladys Lind was independently represented because Weil, Gotshel & Manges reviewed the Management Agreement on behalf of petitioners' managing members. Petitioners allege that, following this court's decision, they learned that Weil, Gotshel & Manges was actually retained by and represented only Ronald and Steven Swartz, as principals of Golden Touch Management.

"A motion for leave to renew must be based upon new facts, not offered on the original application, 'that would change the prior determination, and the party seeking renewal must have 'reasonable justification' for the failure to present such facts on the original motion." ***Rose v Levine***, 98 AD3d 105 (2nd Dept 2012), citing CPLR 2221 (e)(2),(3); ***Matter of Korman v Bellmore Pub. Schools***, 62 AD3d 882, 884 (2nd Dept 2009).

In support of their motion, petitioners have submitted a wealth of documentation which they acquired from Weil, Gotshel & Manges on or after June 1, 2012 which establishes that Weil, Gotshel & Manges viewed its role with respect to review of the Management Agreement as limited to representing only the Swartzes and Golden Touch Management, Inc. Petitioners acknowledge that Weil, Gotshel & Manges also had a relationship with Gladys Lind's sister-in-law, Erma Hoffman, who was also an owner of the properties. However, petitioners argue that because Erma Hoffman and Gladys Lind were tenants-in-common, their interests were separate and independent. Thus, petitioners argue, Weil, Gotshel & Manges' representation of Erma Hoffman cannot be imputed to petitioners' managing member, Gladys Lind.

In opposition, respondents submit the affidavit of Erma Hoffman. Hoffman attests that she and Gladys approached Ronald and Steven Swartz about managing a large group of properties. Erma has further attested that at that time, it was her understanding that Weil had drafted, reviewed and approved the Management Agreement and that **she** considered Weil to be her attorneys at the time.

Based upon petitioners' newly discovered evidence, leave to renew is granted. In view of the conflicting evidence as to whether Gladys Lind was independently represented, petitioners' application for further declaratory relief is **denied**, with leave to renew at the conclusion of discovery. However, petitioners' application is **granted** to the extent that the bond posted pursuant to the court's order of July 13, 2011 is cancelled and no further bod is required. The preliminary injunction previously issued by this court remains in full force and effect.

In their Third Amended Petition, the petitioners allege that at the time of their father Jacob Hoffman's death in the 1980's, he had ownership interests in 18 pieces of property in New York City. They allege that the Swartz defendants were attorneys who represented Jacob Hoffman and following his death, his estate. They allege that upon Jacob Hoffman's death, estate taxes were owing and that the Swartzes proposed that they undertake management of his properties with the goal of paying the estate taxes over time with the rent which they collected. Petitioners allege that the Swartzes created the real estate management company Golden Touch Management, Inc. They further allege that the Swartz respondents prepared a Management and Leasing Agreement and that on June 30, 1991, the heirs to Jacob Hoffman's estate, i.e., the remaining partners and the Swartzes, who were the only attorneys involved, met, reviewed and executed that Agreement.

Petitioners allege that the Management Agreement afforded Golden Touch Management 50% of the net sales proceeds of the properties (as defined by the Agreement) and 50% of the increased cash flow (as defined by the Agreement). They also allege that the Agreement had a ten year term and automatically renewed every ten years for an additional 40 years making the Agreement of 50 years duration. They also allege that either Ronald and/or Steven Swartz and/or the Ronald Swartz S Trust and/or the Steven Swartz S Trust are the sole shareholders of Golden Touch Management. Petitioners allege that Golden Touch Management managed the properties at 1650 Ocean Parkway and 1671 East 17th Street in Brooklyn from 1991 until they were removed as the managing company pursuant to the preliminary injunction.

Petitioners allege that the ownership of Jacob Hoffman's 18 pieces of property was realigned in 1998, when Gladys became the sole owner of 1650 Ocean Parkway and 1671 East 17th Street. Petitioners allege that Gladys Lind retained her own attorney for that transaction but the Swartz respondents represented the remaining owners. Gladys Lind created the petitioners 1650 Realty Associates, LLC and 1671 Realty Associates, LLC to hold title to the properties. She is the managing member of both LLCs and her son and daughter are minority members.

Petitioners allege that, despite the shift in ownership, they never entered into a new Management Agreement with Golden Touch Management and that at some point, Paro Management Co., Inc., which is also allegedly owned by the Swartz defendants or their trusts, took over management of the petitioners' properties. Petitioners allege that rent rolls of the two properties exceeded one million dollars; that they now total approximately $1.3 million dollars; and, that despite the lack of any underlying debt, and these substantial rent rolls, Gladys Lind's K-1 distribution totaled only $166, 575.00, or 14%, leaving 86% of the rent rolls unaccounted for. The petitioners allege that their request for an accounting has led them to discover that PMH Company, Ltd., which is also owned by the Swartz defendants, was being funneled money and that the Swartzes had created two more companies, Golden Touch Management-Painting and Golden Touch Management-Plumbing, to which rental income has also been diverted.

In their first cause of action, petitioners seek to recover of Golden Touch Management, Paro Management, and Ronald and Steven Swartz for their ongoing breach of fiduciary duty. Petitioners allege that since 1999 petitioners have allegedly commingled petitioners' properties' rents, overpaid entities within their control at a profit to them, and otherwise diverted petitioners' properties' rents.

In their second cause of action, petitioners seek to recover of all of the respondents for conversion to the extent that they have retained and/or diverted sums in excess of that to which they were entitled under the Management Agreement.

In their third cause of action, petitioners seek to recover of Golden Touch Management, Paro Management, and Ronald and Steven Swartz for breach of duty of loyalty/faithless servant to the extent that they have retained and/or diverted sums in excess of that to which they were entitled.

In their fourth cause of action against Golden Touch Management, Paro Management, and Ronald and Steven Swartz, petitioners seek a declaration that the Management and Leasing Agreement is unconscionable and void *ab initio* and therefore unenforceable. They allege that the Swartz respondents violated the Code of Professional Conduct by entering into the Management Agreement with Gladys Lind in 1991. They allege that the Swartz respondents were the only attorneys advising her when the Agreements with Golden Touch Management and Paro Management were entered. The Agreements provided that Ronald and Steven Swartz would receive 50% of net sales price or net financing proceeds from 18 pieces

of property, in addition to their fees for managing the properties. Petitioners allege that this Agreement was "grossly unreasonable," given the lack of meaningful choice to Lind, with the Swartzes as both advisors and beneficiaries.

In the alternative, in their fifth cause action as against Golden Touch Management, Paro Management and the individual Swartz respondents, petitioners seek a declaration that the Management Agreement became unenforceable in 1998, when Gladys Lind acquired the properties owned by 1650 Realty Associates, LLC and 1671 Realty Associates, LLC. The petitioners allege that, at that point, there was no longer privity between the petitioners and Golden Touch Management, Paro Management and/or the Swartzes.

In their sixth cause of action, petitioners seek, in the alternative, a declaration that the Agreement's automatic renewal provisions are unenforceable under General Obligations Law § 5-903.

In their seventh cause of action, petitioners seek to recover for breach of contract. More specifically, they seek to recover excess management fees allegedly collected by Golden Touch Management, Paro Management and the individual Swartz respondents. Petitioners allege that these respondents violated the Management Agreement by calculating their "50% Increased Cash Flow" upon an accrual basis as opposed to a cash basis.

In their eighth cause of action, petitioners seek to recover of Golden Touch Management, Paro Management and the Swartz respondents for fraud. Petitioners allege that:

> "[t]hese Respondents artificially and fraudulently inflated the rent rolls of [their] properties solely for the purpose of creating "increased cash flow" where none existed [and that] in so doing, these respondents knowingly and fraudulently paid themselves from the income of the petitioners an amount termed '50% of the excess cash flow' when, in fact, there was no excess cash flow and the amount paid to these respondents rightfully belonged to the petitioners."

Respondents Golden Touch Management, Inc., Paro Management Co., Inc., Jangle Realty Corp., Serhof Realty Corp., Ronald Swartz, Steven Swartz, Ronald Swartz's Trust and Steven Swartz's Trust move pursuant to various sections of CPLR 3211 to dismiss the first and third claims as against the individual Swartz defendants and the fourth, sixth, seventh and eight claims in their entirety.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." ***Leon v Martinez***, 84 NY2d 83, 87 (1994), citing CPLR 3026. "We [must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." ***Leon v Martinez***, **supra**, at p. 87-88, citing ***Morone v Morone***, 50 NY2d 481, 484 (1980); ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 634 (1976).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." ***Leon v Martinez***, **supra**, at p. 88, citing **Heaney v Purdy**, 29 NY2d 157 (1971).

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (quotations omitted)." ***Vilsack v Meyer***, 96 AD3d 827, 828 (2nd Dept 2012), quoting ***Zaborowski v Local, 74, Serv. Empls. Intl. Union, AFL-CIO***, 91 AD3d 768, 768-769 (2nd Dept 2012), quoting ***Baptiste v Harding-Marin***, 88 AD3d 752, 753 (2011), lv den., 19 NY3d 808 (2012).

Respondents Ronald and Steven Swartz move to dismiss the first cause of action sounding in breach of fiduciary duty against them on the grounds that piercing the corporate veil has not been pled and in any event, they were not shareholders of Golden Touch Management. "The elements of a cause of action to recover for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." ***Rut v Young Adult Inst., Inc.***, 74 AD3d 776, 777 (2nd Dept 2010), citing ***Kurtzman v Bergstol***, 40 AD3d 588, 590 (2nd Dept 2007).

An attorney is under a fiduciary duty to the client and may be liable for breach of fiduciary duty, where facts are alleged separate from a malpractice claim (***Kurman v Schnapp***, 73 AD3d 435 [1st Dept 2010]). On this motion to dismiss, the court must assume that Ronald and Steven Schwartz were Gladys Lind's attorneys with respect to the management agreement. The court must further assume that Weil, Gotshel's involvement in the execution of the agreement did not constitute Gladys' independent representation. Respondents Ronald and Steven Swartz' motion to dismiss the first cause of action against them pursuant to CPLR 3211(a)(1)(7) is **denied**.

One who owes a duty of fidelity to a principal and who is faithless in the performance

of his services forfeits his compensation, whether salaried or computed on some other basis (***X-Med, Inc v Western New York Spine***, 74 AD3d 1709 [4th Dept 2010]). The management and leasing agreement provides that the manager shall "contract in the name and at the expense of the owner, for gas, electricity, water, and other services to be furnished to the premises." (Ex B to Third Amended Petition). On this motion to dismiss, the court must assume that Ronald and Steven Swartz acted as Gladys Lind's agent, and assumed fiduciary duties to her, when contracting in "her name" for painting and plumbing services. Breach of fiduciary duty is a tort (**Sergeants Benevolent Ass'n v Renck**, 19 AD3d 107, 110 [1st Dept 2005]). Because corporate officers are liable for torts committed in the course of their employment (**Id**), there is no need to pierce the corporate veil. Respondents breached the fiduciary duty of loyalty to the extent that they engaged in self-dealing by channeling the painting and plumbing work to their own companies.

Respondents Ronald and Steven Swartz' motion to dismiss the third cause of action against them pursuant to CPLR 3211(a)(7) is **denied**.

Respondents move to dismiss the fourth cause of action, whereby petitioners seek a declaration that the Management Agreement is unconscionable and void ab initio, as barred by the six year Statute of Limitations as well as the doctrines of waiver and estoppel. CPLR 3211(a)(5).

An unconscionable contract is one which is so grossly unreasonable as to be unenforceable according to its literal terms because of an absence of meaningful choice on the part of one of the parties ("procedural unconscionability"), together with contract terms which are unreasonably favorable to the party to the other party ("substantive unconscionability") (***Lawrence v Miller***, 11 NY3d 588, 595 [2008]). Such contracts are usually voidable, rather than void ab initio, since a party to a contract has the power to validate or ratify the contract, as well as the power to avoid it (***King v Fox***, 7 NY3d 181, 191 [2006]). The six year statute of limitations of CPLR 213(2) does not apply to an action to declare a contract void at its inception. The purpose of such an action is to declare that no valid contractual obligation ever existed; it is not an action "upon a contractual obligation or liability" (***Riverside Syndicate v Munroe***, 10 NY3d 18, 24 [2008]). An agreement which is void at its inception does not become valid by the mere passage of time (Id).

The management agreement was signed in June 1991. However, if it was unconscionable it did not become valid merely by the passage of time. Furthermore, on this motion to dismiss, the court must assume that Gladys Lind did not ratify the management agreement at any time prior to the commencement of the action in 2011. Respondents' motion

to dismiss the fourth cause of action based upon the statute of limitations is **denied**.

The respondents seek dismissal of the sixth cause of action on the grounds that General Obligation Law § 5-903 does not apply to the parties' Management Agreement and as barred by the Statute of Limitations, CPLR 3211(a)(1), (5), (7). General Obligation Law § 5-903 provides:

> No provision of a contract for service, maintenance or repair to or for any real or personal property **which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term**, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair . . . shall give to the person receiving the service, maintenance or repair written notice . . . calling the attention of that person to the existence of such provision in the contract.

GOL 5-903 is construed broadly in order to engage the "variegated evil the statute was intended to meet' (***Mobile MRI Assoc v Lawrence Hospital***, 242 AD2d 686 [2d Dept 1997]).

Article VIII of the management agreement provides that the term is ten years. The agreement provides for automatic renewal for four successive ten year periods, unless the manager notifies the owner 90 days prior to the renewal date that the manage elects not to renew. The owner may also terminate if the manager fails to perform its obligations, if either party files bankruptcy, if both Ronald and Steven Swartz die or become disabled, or both Ronald and Steven Swartz cease to be employed by or cease to control the manager.

The court concludes that, even though Gladys' right to terminate was limited, GOL § 5-903 should apply to the automatic renewal provision in the management contract. Respondents do not allege that they gave Gladys notice, calling her attention to the automatic renewal provision, at least 15 days before the most recent renewal on June 30, 2011. Respondents' motion to dismiss the sixth cause of action for statute of limitations or failure to state a cause of action is **denied**.

Respondents seek dismissal of the seventh cause of action sounding in breach of contract under the doctrine of judicial estoppel and for failure to state a claim. Initially, respondents seek dismissal of the breach of contract claim on the grounds that recovery cannot be had for breach of contract because petitioners seek to void their agreement in its entirety. Claims in the alternative are permitted. See ***Vays v 139 Emerson Place***, 94 AD3d 480 (1st Dept 2012), citing ***Jeremy's Ale House Also, Inc. v Josepyn Luchnick Irrevocable Trust***, 22 AD3d 6 (1st Dept 2005); see also, ***Federal Insurance Company v Tyco Intern. Ltd.***, 2 Misc3d 1006(A) (Supreme Court New York County 2004), app dism., 18 AD3d 33 (1st Dept 2005). Nor does the doctrine of judicial estoppel or estoppel against inconsistent positions require dismissal of the petitioners' breach of contract claim.

The breach of contract claim fails, however, against the individual Swartz defendants. No agreement is alleged to have been made with either of them, individually. Accordingly, respondents Ronald and Steven Swartz' motion to dismiss the seventh cause of action, as asserted against them, for failure to state a cause of action is **granted**. Respondents' motion to dismiss the seventh cause of action is otherwise **denied**.

Respondents seek dismissal of the eighth cause of action sounding in fraud. The elements of a cause of action sounding in fraud are "a misrepresentation or omission of material fact which the defendant knew was false, that misrepresentation or material omission was made to induce the plaintiff's reliance, the plaintiff's justifiable reliance on the misrepresentation or material omission, and a resulting injury." ***Sobel v Anaselli***, 98 AD3d 1020, (2nd Dept 2012), citing ***Lama Holding Co. v Smith Barney***, 88 NY2d 413, 421 (1996); ***Robertson v Wells***, 95 AD3d 862 (2nd Dept 2012); ***Orchid Constr. Corp. v Gottbetter***, 89 AD3d 708 (2nd Dept 2011); see also ***Ross v Louise Wise Servs., Inc***. 8 NY3d 478, 488 (2007). CPLR 3016 requires that when advancing a cause of action sounding in fraud, "the circumstances constituting the wrong . . . be stated in detail" ***Stein v Doukas***, 98 AD3d 1024 (2nd Dept 2012), citing ***Scott v Fields***, 92 AD3d 666, 668 (2nd Dept 2012).

The petitioners have alleged that the respondents engaged in fraudulent accounting practices. More specifically, the petitioners allege that the respondents fraudulently inflated the rent rolls to give rise to the appearance of an increased cash flow (when in reality there wasn't an increased cash flow) which resulted in the respondents receiving undue amounts of income from the petitioners' property. Petitioners have alleged the fraud in sufficient detail, even though they allege that all of the respondents were responsible for these misrepresentations.

"[E]ven when these elements are properly pled, 'it is well settled that a cause of action to recover damages for fraud does not lie when the only fraud alleged relates to a breach of contract.' " ***Doron Realty, Inc. v Thor Realty, LLC***, 36 Misc 3d 1241(A) (Supreme Court Kings County 2012), citing ***Jim Longo, Inc. v Rutigliano***, 251 AD2d 547, 548 (2nd Dept 1998); see also, ***Lama Holding Co. v Smith Barney***, supra; ***Kaufman v Torkan***, 51 AD3d 977 (2nd Dept 2008); ***Ross v DeLorenzo***, 28 AD3d 631 (2nd Dept 2006). "Merely alleging scienter in a cause of action to recover for breach of contract, unless the representations alleged to be false are collateral or extraneous to the agreement, do not convert a breach of contract cause of action into one sounding in fraud." ***Board of Educ. of Farmingdale Union Free School Dist. v Grillo***, 36 Misc 3d 1221(A) (Supreme Court Nassau County 2012) at p. 10, citing ***Ka Foon Lo v Curis***, 29 AD3d 525 (2nd Dept 2006).

The court concludes that petitioners' allegations as to fraudulently inflated rent rolls are not duplicitous of the petitioners' breach of contract claim. Respondents' motion to dismiss the eighth cause of action for failure to state a cause of action or lack of specificity is **denied**.

So ordered.

Dated NOV 09 2012

Stephen A. Bucaria
J.S.C.

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