

Don v Singer

2014 NY Slip Op 31288(U)

May 19, 2014

Sup Ct, New York County

Docket Number: 105584/06

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN

PART 11

Justice

Dow

INDEX NO. 105584/06

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 031

- v -

Singer
Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for set aside
verdict.

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

PAPERS NUMBERED _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion is decided in accordance
with the answered Memorandum Decision and order.

FILED

MAY 20 2014

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 5-19-14

JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
GARY DON, LAWRENCE GERSTEIN and
NEW YORK DEVELOPERS COLLABORATIVE, LLC,

Plaintiffs,

-against-

Index No. 105584/06

BARUCH SINGER, MARK JUNGER, MOSES
ROSNER, HERALD SQUARE DEVELOPMENT LLC,
ROSMA DEVELOPMENT LLC, and MNM
INVESTORS GROUP INC.,

Defendants,

855 REALTY OWNERS, LLC and ISTAR FM
LOANS, LLC,

Intervener-Defendants.

-----X
JOAN A. MADDEN, J.:

Plaintiffs Gary Don ("Don"), Lawrence Gerstein ("Gernstein") and New York Developers Collaborative, LLC, ("Developers Collaborative") move pursuant to CPLR 4404(a) to set aside the judgment in favor of defendants and for judgment in their favor as a matter of law, or ordering a new trial on the grounds that certain interrogatories and corresponding instructions constituted fundamental error, and the verdict as to the cause of action for unfair competition is against the weight of the evidence. Defendants Moses Rosner ("Rosner"), Mark Junger ("Junger") and Baruch Singer ("Singer") oppose the motion, variously arguing that the issues are unprepreserved for review, and that the interrogatories and instructions correctly reflected the law. For the reasons below, plaintiffs' motion is denied, as plaintiffs requested the charge to which they now object, and did not object to the charge as given. Moreover, plaintiffs mischaracterize the nature of the charge, and when the interrogatory at issue and the charge are considered together with other findings, their argument with respect fundamental error lacks merit. As to the unfair competition cause of action, ample evidence supports the jury's verdict.

The trial of this action involved claims that plaintiffs and defendants entered into a joint venture to acquire and develop certain real estate, that all three defendants breached their fiduciary duty to plaintiffs, violated confidentiality agreements and engaged in unfair

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competition. With respect to Singer, as an alternative theory to their breach of fiduciary duty cause of action, plaintiffs asserted a cause of action for aiding and abetting Junger and Rosner to breach their respective fiduciary duty to plaintiff. The joint venture as contemplated by plaintiffs involved a project to purchase property located on 6th Avenue between 30th and 31st Streets in New York County, consisting of a lot with a building, an adjoining lot and air rights to three buildings on adjacent property. According to plaintiffs, they located the property, conceived a project to develop a residential tower and commercial space, analyzed zoning issues, consulted architects and other professionals, and created a construction plan for the site. Plaintiffs provided Junger and Rosner with information about the project after Junger signed a confidentiality and non-circumvent agreement. Junger and Rosner, in turn, approached Singer about the project.¹ Singer did not sign the confidentiality agreement, although he participated in certain meetings with the representatives of the sellers of the property where plaintiffs were present. Ultimately, Singer purchased the property plaintiffs identified in their plan, as well as abutting property (the expanded project"), including the buildings whose air rights plaintiffs had proposed purchasing. Singer did not develop this property, but sold it at a later date at which time Junger and Rosner received a fee of \$1,960,000. Plaintiffs sought as damages the fee Junger and Rosner received as a result of Singer's sale of the expanded property; and disgorgement damages from Singer in connection with certain profits and tax benefits including 1031 exchange benefits, which plaintiffs asserted Singer received as a result of the transactions.

The jury was instructed on three causes of action. The first involved claims of breach of the fiduciary duty a participant in a joint venturer owes to other participants. Plaintiffs asserted this cause of action against Junger, Rosner, and Singer. The second involved plaintiffs' alternative theory against Singer of aiding and abetting Junger and Rosner to breach their individual fiduciary duty to plaintiffs. The third, asserted against all defendants, involved unfair

¹At trial an issue existed as to whether Singer learned about the property from plaintiff's plan or from other sources. Although evidence at trial showed that information that the property was for sale was publicly available, including from the brokerage firm marketing the property, Singer did not present any dispositive evidence as to how he learned about its availability.

competition through the appropriation of proprietary or trade information.

The jury found that Junger and Rosner, but not Singer, entered into a joint venture with Don and Gerstein and that Rosner and Junger breached their respective fiduciary duties to Don and Gerstein in connection with the joint venture. However the jury found that Junger and Rosner's breach was not a substantial factor in causing plaintiffs' damage. As a result, the jury did not consider whether Junger and Rosner profited from the breach. Moreover, the jury was instructed to consider the aiding and abetting cause of action against Singer, only if the jury awarded plaintiffs damages on the breach of fiduciary duty claims. The jury therefore did not consider this cause of action against Singer. As to the unfair competition cause of action, although the jury found that certain information in plaintiffs' proposed plan constituted proprietary information, the jury also found that plaintiffs failed to ensure its confidential nature.

With respect to the cause of action for breach of fiduciary duty, plaintiffs claimed that Rosner and Junger breached their duty to them by their work with and for Singer with regard to Singer's purchase of the property in the expanded project, which, as noted above, included the property in plaintiffs' plan. Plaintiffs argue that the court erred in its final instructions and jury interrogatories that if the jury determined a defendant entered into a joint venture agreement and breached his fiduciary duty to plaintiffs, then the jury was to determine whether the breach was a substantial factor in causing damage to plaintiffs.² Specifically, plaintiffs argue that the court erred in instructing the jury to consider the interrogatory asking whether a defendant profited from the breach only if they answered yes to the immediately preceding interrogatory which asked whether defendant's breach was a substantial factor in causing damages to plaintiffs. Plaintiffs base this argument on the grounds that since they sought disgorgement damages, that is, disgorgement of profits and benefits which defendants wrongfully obtained due to their breach, there was no requirement that plaintiffs sustain any damage. Plaintiffs further argue that if the jury found that a defendant breached his fiduciary duty, the court should

²The interrogatories at issue are as to Junger, 2(d); as to Rosner, 3(d). The Interrogatory asks "[w]as such breach a substantial factor in causing plaintiff to sustain damages?" Since the jury found that Singer did not enter into the joint venture, the interrogatory as to Singer is not in issue.

have instructed, and the verdict sheet should have directed, the jury to consider disgorgement damages. Specifically, the jury should have been instructed to answer the interrogatory asking whether a defendant profited as a result of his breach, even if they found that the breach was not a substantial factor in causing plaintiffs to sustain damages.³

Plaintiffs further argue that since it was undisputed that Rosner and Junger received \$1,960,000 from the proceeds of the sale when Singer sold the property in the expanded project, that this fee was a direct result of Rosner and Junger's breach, that judgment should be entered in their favor in this amount as disgorgement damages, or in the alternative, a new trial ordered as to damages.

With respect to the aiding and abetting charge as to Singer, plaintiffs argue that the court compounded the error in connection with the substantial factor charge referenced above, by instructing the jury to answer interrogatories related to the aiding and abetting claim against Singer, only if they found that plaintiffs were entitled to an award on the breach of fiduciary duty claims against Junger and or Rosner.

Finally, plaintiffs argue that a new trial should be ordered as to the unfair competition claim since the jury's finding that plaintiffs did not ensure the confidentiality of their proprietary information in connection with the joint venture was against the weight of the evidence.

In opposition to the motion, defendants argue that plaintiffs have waived issues related to instructions and interrogatories as to whether they sustained damage as a result of the breach as, at trial, plaintiffs did not argue that disgorgement damages do not require a plaintiff to show damages as a result of a defendant's breach, nor did they object to the interrogatory which asked this question. Defendants point out that plaintiffs submitted in their request to charge with respect to their cause of action for breach of fiduciary duty, the following:

If you find that Defendants Singer, Junger and Rosner or any of them, did breach their fiduciary duty to the Plaintiffs, you must then decide whether that

³Interrogatories 2(e), as to Junger, and 3(e), as to Rosner ask if the defendant "realized profits as a result of his breach of fiduciary duties to plaintiffs?" The jury was instructed on the verdict sheet to answer question 2(e) and 3(e) only if they found that the defendant's breach was a substantial factor in causing plaintiffs to sustain damages, that is, if the jury answered yes to 2(d) and /or 3(d).

breach was a substantial factor in causing the Plaintiffs to sustain damages. If you find that it was not a substantial factor in causing the Plaintiffs to sustain damages, you need proceed no further. However, if you find that Defendants Singer, Junger and Rosner's breach was a substantial factor in causing the plaintiffs to sustain damages, you must then determine the amount of damages the Plaintiffs sustained.

Defendants also point to plaintiffs' request for a similar substantial factor charge in connection with their cause of action against Singer for aiding and abetting Junger and Rosner to breach their fiduciary duties.⁴

As to the plaintiffs cause of action for unfair competition, the defendants point to evidence that supports the jury's finding that the plaintiffs did not ensure the confidential nature of the information.

CPLR 4404(a) provides that "the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial . . . where the verdict is contrary to the weight of the evidence [or] in the interests of justice." The standard for setting aside the verdict and entering judgment for the moving party as a matter of law is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict." Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493, 499 (1978). However, "in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus, a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." Id.

The standard used in determining a motion to a set aside a verdict as against the weight of the evidence is "whether the evidence so preponderated in favor of [the moving party], that the verdict could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., 86 N.Y.2d 744, 746 (1995) (quoting Moffatt v. Moffatt, 86 A.D.2d 864 [2nd

⁴Plaintiffs requested a charge that if "Singer did provide substantial assistance to Defendants Junger and Rosner in breaching their fiduciary duties to plaintiffs...you must then determine if the breach by Defendants Junger and Rosner was a substantial factor in causing Plaintiffs to sustain damages."

Dept 1982], aff'd 62 N.Y.2d 875 [1984]). This does not involve a question of law, but rather "a discretionary balancing of many factors." Cohen v. Hallmark Cards, Inc., supra at 499.

CPLR 4110-b, to the extent relevant, provides that "[n]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds for his objection." Here, plaintiffs failed to object to either the charge or the interrogatory instructions, that the jury need not consider disgorgement damages unless they found that the breach resulted in damage to a plaintiff. Moreover, plaintiffs in their requests to charge under both the request for the breach of fiduciary duty charge and the aiding and abetting charge, included language mirroring the questions in issue. As to the requirement of an objection, the Court of Appeals has emphasized that in the absence of an exception to a claimed error in a trial court's charge, "[an appellate court] has no occasion to address the correctness of the instructions as a general statement of the law. The requirement of a timely exception is not merely a technicality. Its function 'is to give the court and the opposing party the opportunity to correct an error in the conduct of the trial.'" Barry v Manglass, 55 N.Y.2d 803, 805-806 (1981), quoting Delaney v Philhern Realty Holding Corp., 280 N.Y. 461, 467; see 4 Weinstein-Korn-Miller, NY Civ Prac, par 4017.06; Goldberg v Wirtosko, 182 A.D.2d 350 (1st Dept 1992) (affirming the trial courts determination that an issue was not preserved for review where the plaintiff failed to object to a supplemental instruction); see also Ruiz v. Summit Appliance Div., 92 A.D.3d 429, (1st Dept. 2012)(plaintiff waived her challenge to the verdict where she failed to object to the second verdict before the jury was discharged, which prevented the court from taking corrective action, including resubmitting the matter to the jury with additional instructions); Bergstrom v. Plaza Const., 16 A.D.3d 256 (1st Dept.2005) (the claimed error in the court's charge was not preserved for review by an objection). In their reply, plaintiffs proffer as an excuse that their failure to withdraw the request was an "oversight" as their requests were submitted prior to the dismissal of their claims for future lost profits and prior to the withdrawal by plaintiffs of their

contractual causes of action.⁵ Significantly, plaintiffs offer no excuse for failing to object to the charge as given. Under these circumstances, such "oversight" and failure to object denied the defendants, and the court the opportunity to correct the alleged error and is fatal to plaintiffs' motion.

Plaintiffs make various arguments for the first time in their reply papers including that their failure to object does not preclude judicial review, as the charge and interrogatory constituted a "fundamental error" and created confusion and doubt as to the principle of law to be applied. For the reasons discussed below, neither the charge nor interrogatory constitute fundamental error so as to warrant awarding plaintiffs judgment as a matter of law or setting aside interrogatories at issue and ordering a new trial.

Plaintiffs fashion the issue as error based on their characterization of the charge as requiring the jury to determine whether defendants' breach was a substantial factor in causing plaintiffs' actual damage. This mischaracterizes the charge. The interrogatory cannot be viewed in isolation, but must be considered in the context of the court's instructions with respect to the interrogatory. The court instructed that in order to find a breach was a substantial factor in causing plaintiffs to sustain damages, the jury was

to make a determination as to whether there was a direct relationship between Plaintiffs' original concept as it evolved to acquire and develop property in the air rights project and the purchase and development of the Herald Square Property, the expanded project. In making this determination consider the property and the concept for development of the Herald Square Property which Mr. Singer purchased and whether that the property and development potential differed from Plaintiffs' original concept as it evolved so materially that the essence of the project had changed. Plaintiffs contend that the Herald Square Property and its development potential as purchased by Mr. Singer bore a direct relationship to his original, to their original concept. Plaintiffs argue that the essence of their concept was to develop the original property and while the scope of the property purchased changed, the essence of the project remained the same.

Defendants contend that the project when Mr. Singer purchased the Herald Square Property had materially changed from plaintiffs' original concept and that the parties never came to terms for the expanded project.

If you find that it was Plaintiffs' efforts and their original concept as it evolved to acquire and develop property with the use of air rights which lead directly to Mr. Singers' purchase of the buildings in the expanded project and that the essence of the project in Plaintiffs' original concept as it evolved remained

⁵Plaintiffs' claims for future lost profits were dismissed as speculative at the end of plaintiffs' case and they withdrew their contractual claims immediately prior to scheduled summations.

the essence of the expanded project, you may find that a Defendant's breach was a substantial factor in causing Plaintiffs' damage and go on to consider damages for that Defendant.

If you find that it was not Plaintiffs' efforts and that the original concept as it evolved to acquire and develop property with the use of air rights which lead directly to Singer's purchase of the buildings in the expanded project or that the essence of the project in Plaintiffs' original concept did not remain the essence of the expanded project, you need not consider damages.

Thus, the context of the instruction clearly demonstrates that it was given with respect to the issue of whether a relationship existed between plaintiffs' proposed plan and the expanded project so as to establish a connection between the two, and, thus, plaintiffs' entitlement to damages. Significantly, the instruction does not direct the jury to consider whether plaintiffs sustained actual damages as a result of a defendant's breach. Rather, the instruction directs the jury to determine whether plaintiffs were entitled to recover damages under their breach of fiduciary duty cause of action, which was dependent on a relationship between plaintiffs' original concept as envisioned in their proposed plan and Singer's purchase of the property in the expanded project. Accordingly, plaintiffs argument that the court's instructions and interrogatory constituted fundamental error as they required proof of actual damages is without merit. Moreover, at trial, plaintiffs' theory was that they were damaged as they lost an opportunity to develop the property, and, while their claim for damages for future lost profits was dismissed as speculative, plaintiffs were not precluded from arguing that they lost such opportunity in connection with other issues.

With respect to the foregoing instruction and interrogatories, I note plaintiffs cite cases in support of their argument that a plaintiff need not establish a causal connection between the breach and damages to plaintiff, where disgorgement is sought.⁶ Plaintiff relies in part on Excelsior 57th Corp. V Lerner, 160 A.D.2d 407, 408-409 (1st Dept. 1990), which holds that "where claims of self-dealing and divided loyalty are presented, a fiduciary may be required to

⁶ With respect to plaintiffs' arguments, I note that the commentary to PJI 3:59 indicates there must be a causal connection between the breach of fiduciary duty and a loss asserted by plaintiff. However, the cases cited in support, address the issue as to causation where damages related to the breach are claimed, and not to disgorgement damages.

disgorge any ill-gotten gain even where the plaintiff has sustained no direct economic loss.”⁷ Recently, addressing the issue of disgorgement damages, the First Department held that in “a claim based on fraudulent activity, disgorgement may be available as an equitable remedy, notwithstanding the absence of loss to individuals or independent claims for restitution.” (citation omitted). People v Ernst & Young, LLP, 114 A.D.3d 569 (1st Dept. 2014). However, as stated above, the jury was not specifically instructed that plaintiffs had to sustain actual damages or a causal connection between the breach and actual damages. Moreover, under the factual findings of the jury, even if, the instructions with respect to substantial factor constituted error, Plaintiffs requested the charge and failed to object to it. Furthermore, even if the charge constituted fundamental error, plaintiffs would not be entitled to either judgment as a matter of law or a new trial in connection with Singer’s profits and 1031 exchange benefits or Junger and Rosner’s fee from the sale of the property in the expanded project. This is so as the jury found that the joint venture did not include the expanded project, and therefore any breach in connection with the joint venture would not encompass the property purchased by Singer.⁸

Plaintiffs also argue for the first time in their reply, that these instructions were erroneous as they pre-empted the jury’s discretion in finding a nexus between the breach and benefit received by the defendants, linked inextricably the issue of substantial factor to the issue of the original versus the expanded project, and dwelled on the substantial factor element. These arguments are patently without merit. Not only did plaintiffs fail to raise such objections at trial or in plaintiffs’ moving papers, but the argument implies that the jury had unfettered discretion in determining whether a relationship existed between plaintiffs’ plan and Singer’s

⁷The rationale for this rule is that damages have “never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty. ... This is because the function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but..., as this court declared many years ago (Dutton v. Willner, 52 N.Y. 312, 319), ‘to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.’” (emphasis in original) Diamond v Oreamuno 24 N.Y.2d 494, 498 (1969).

⁸The jury answered “no” to interrogatory 5, which asked whether the joint venture included the expanded project,

purchase of the property in the expanded project so as to establish a basis for awarding damages for benefits received. Plaintiffs cite no law in support of this implication, and, such unfettered discretion is without a legal basis

Plaintiffs' arguments that the court erred with respect the interrogatories and instructions as to the aiding and abetting cause of action asserted against Singer, are based on the argument that the court erred in connection with the charges discussed above as to Rosner and Junger. Thus, for the same reasons that plaintiffs' arguments lack merit as to the Rosner and Junger charges, their arguments lack merit s to the aiding and abetting charges.

Also without merit is plaintiffs' argument that the verdict finding that the plaintiffs did not ensure the confidentiality of their proprietary information in their confidential memorandum is against the weight of the evidence. Plaintiffs claimed that pages 13 through 16 in their confidential memorandum contained proprietary information as it contained plaintiffs' business concept and compilation of data uniquely combined through the efforts of Mr. Gerstein. It is undisputed that the evidence at trial showed that Singer did not sign the confidentiality agreement. At trial there was an issue of fact as to whether defendants told plaintiffs that Singer signed the agreement. Plaintiffs claimed they were told he signed it, and defendants denied this. However, it was undisputed that plaintiffs never obtained a copy of the agreement signed by Singer. Based on this evidence it cannot be said that the jury's finding that plaintiffs failed to ensure the confidentiality of their proprietary information was against the weight of the evidence.

Accordingly, it is

ORDERED that plaintiffs' motion to set aside the judgment in favor of defendants and for judgment in their favor as a matter of law is denied; and it is further

ORDERED that plaintiffs' motion to set aside the verdict as against the weight of the evidence is denied.

Dated: May 19, 2014

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HON. JOAN A. MADDEN

J.S.C.