SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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In re EMPIRE STATE BUILDING ASSOCIATES, LLC. PARTICIPANTS LITIGATION,

DECISION AND ORDER
Motion Sequence No.: 002

Index No.: 654456/2013

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O. PETER SHERWOOD, J.:

Defendants Anthony E. Malkin, Peter L. Malkin, and Malkin Holdings L.L.C. (collectively, "the Malkins") move, pursuant to CPLR 3211(a), to dismiss the Complaint. At the close of oral argument the court announced its tentative decision. This Decision and Order sets forth the reasons for granting the motion.

BACKGROUND

These facts are taken from the Complaint and are assumed true for purposes of the motion. They are supplemented by information drawn from decisions and orders issued by this court in the class action lawsuit brought on behalf of the "Participants" in Empire State Building Associates L.L.C. ("ESBA") against the Malkins and other owners of the Empire State Building ("ESB") (the "ESRT Action", Index No. 650607/2012).

A. In re Empire State Realty Trust, Inc. Investor Litigation

The ESRT Action complaint alleged that "the Malkin Defendants scheme[d] to convert the equity interests owned by the Participants . . . into cash or interests in the REIT through a one-sided, unfair 'roll up' transaction (the 'Proposed Transaction')" (ESRT Compl. ¶ 2). The ESRT complaint alleged that the defendants violated "their fiduciary duties to the Participants" by "unilaterally agree[ing] to the Proposed Transaction . . . without considering possible alternatives to the Proposed Transaction, including alternatives that would have been more favorable to the Participants" (ESRT Compl. ¶ 7). On September 28, 2012, the parties stipulated to settlement of the ESRT Action. The court preliminarily approved the settlement on February 21, 2013. A fairness hearing was held on May 2, 2013 at which time the settlement class was certified and the settlement approved. On May 17, 2013 the court issued a Decision and Order to address certain arguments made by objectors to the settlement.

By terms of the settlement, the defendants agreed to provide a settlement fund of $55,000,000 comprising 80% cash and 20% of REIT securities (or, at defendants' option, cash) (ESRT Final Order ¶ 3, NYSCEF Doc. No. 37). In exchange, members of the class "fully, finally, and forever settled, released, discharged, extinguished, and dismissed with prejudice, completely, individually, and collectively, the Released Claims against the Released Parties" (*id.* ¶ 7). Released Claims were defined as:

> all claims, demands, causes of action, judgments and suits, of any kind or nature whatsoever, whether known or unknown, contingent or absolute, disclosed or undisclosed, hidden or concealed, matured or unmatured, and whether individual, class, derivative, representative, legal equitable or any other type or in any other capacity, that have been, could have been or in the future might be asserted in the Action by Plaintiffs or the putative class members, in their capacities as Participants in the Public LLCs and/or Private Entities, arising out of or relating directly or indirectly to any of the facts alleged in the Complaints or in any other court, tribunal or proceeding or relating to the acceptance, rejection, consummation, or failure to consummate the Consolidation or any Third Party Transaction (collectively, the "Proposals") . . . against any of the Released Persons in connection with the transactions, acts or occurrences described in the Complaints or relating to the Proposals.

(id. ¶ 8). The settlement agreement also contains a "covenant not to sue" (*Stipulation of Settlement* ¶ C2, NYSCEF Doc. 24; *see also* ESRT Final Order ¶ 13).

B. The REIT IPO and Intervening Offers

By late May 2013, the Malkins had procured approval from the minimum 80% of the Participants required to go forward with an initial public offering ("IPO") for the REIT (Compl. ¶ 3). The Malkins represented that the Empire State Building was worth in excess of $2.5 billion as of June 30, 2012 (*id.*). Between June and September 2013, as many as six real estate developers submitted unsolicited offers for the Empire State Building, with bids topping $2.3 billion (Compl. ¶ 5). In addition, Thor Equities submitted a $1.4 billion offer to acquire ESBA (which owned a portion of the Empire State Building). The offer valued ESBA at $100,000 more than the Malkins' appraisal (*id.*). The Malkins rejected all offers and stated that they "will not entertain any additional alternatives" (Compl. ¶ 7).

On September 19, 2013, the Malkins announced the IPO would proceed with the REIT shares priced between $13 and $15 per share. This translated into a valuation of the Empire State Building at between $1.89 and $2.18 billion and a valuation of ESBA at between $1.1 and $1.26 billion (Compl. ¶ 8). The IPO was launched on October 1, 2013, priced at $13 per share (Compl. ¶ 9).

Accordingly, on October 8, 2013, the Empire State Building was transferred to ESRT for $1.89 billion, including $1.1 billion for ESBA's interest.

C. Procedural History

On December 24, 2013, Mark Postelnek, as trustee of the Mabel Abramson Irrevocable Trust #2, brought the instant class action. On February 13, 2014, the court consolidated several related actions with this action. The Amended Consolidated Class Action Complaint bearing the caption set forth in this Decision and Order, contains a cause of action for breach of fiduciary duty, alleging that the Malkins refused to entertain premium offers from independent third parties for the Empire State Building and ESBA, relied on an outdated appraisal, and asserted that they would not entertain offers for the Empire State Building, all in breach of fiduciary duties owed to the class (Compl. ¶ 72). In a second cause of action, plaintiffs allege that the Malkins were unjustly enriched by their failure to consider alternative offers. The Malkins now move to dismiss the entire amended consolidated complaint.

DISCUSSION

A. CPLR 3211 Standards

A cause of action may be dismissed pursuant to CPLR 3211 (a) (5) on grounds that "the cause of action may not be maintained because of . . . release [or] *res judicata* . . . ."

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005] [citation omitted]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]). Indeed, "[s]o liberal is the standard under these provisions that the test is simply whether the proponent of

the pleading has a cause of action, not even whether he has stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no cause of action" (*Lawrence v Miller,* 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.,* 40 NY2d at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

B. Settlement Bar Arising From the ESRT Action

The Malkins argue that plaintiffs' claims are barred by the "Released Claims" provision and covenant not to sue clause of the court approved settlement agreement. Plaintiffs do not dispute the existence of a broadly worded release in the settlement agreement that is intended to extend to future claims involving the subject matter of the ESRT Action (*see* n. 2, *infra*). Instead, plaintiffs argue that because the offers for the ESB and ESBA which took place after effective date of the settlement, under prevailing law, the claim for breach of fiduciary duty could not be a "Released Claim". Thus, the action is not barred. Defendants respond that the settlement bars prosecution of "all claims . . . that have been, could have been or in the future can or might be asserted."

In New York the "meaning and coverage" of a release "necessarily depend . . . upon the purpose for which the release was actually given" (*Cahill v Regan*, 5 NY2d 292, 299 [1959]). "[A] release may not be read to cover matters which the parties did not desire or intend to dispose of" (*id.*). Courts in the First Department have enforced releases arising out of settlement agreements that release claims "after the Approval Date" (*see Matter of New York Mellon*, 42 Misc 3d 1237(A) [Sup Ct, NY County, Jan. 31, 2014]).

Plaintiffs rely heavily on the "identical factual predicate doctrine" developed by the federal courts for the proposition that a class action release may not bar "a later claim that requires 'proof

of further facts' in addition to those at issue of in the settled action" (Plaintiff's Mem of Law, at 20). This doctrine, applied in the Second Circuit and elsewhere but not New York State Courts,[1] can be traced to *TBK Partners, Ltd v Western Union Corp.* (675 F2d 456 [2d Cir 1982]). In that case the Second Circuit held that "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action" (*id.* at 460). The applicability of the doctrine to future conduct has split courts that have considered the issue (*see generally* James Grimmelman, *Future Conduct and the Limits of Class-Action Settlements*, 91 NC L REV 387, 445 [2012]). The Delaware Chancery Court has held that "[i]f the facts have not yet occurred, then they cannot be the basis for the underlying action" (*UniSuper Ltd. v News Corp*, 898 A2d 344 [Del Ch 2006]). However, the Second Circuit has held that a "settlement's release of claims regarding future [conduct] is not improper" (*In re Literary Works in Electronic Databases Copyright Litigation*, 654 F3d 242, 248 [2011]). The Seventh Circuit similarly rejected an objection to a class action settlement where the class members had only "future claims" (*see Uhl v Thoroughbred Technology and Telecommunications Inc.*, 309 F3d 978, 984 [7th Cir 2002]).

Plaintiffs have cited no New York State case and the court's research has uncovered none that would bar parties in a class action who are well represented from entering into a court approved settlement containing a provision releasing future claims relating to the facts alleged in the class action complaint. However, in *Hotel 57 LLC v Tyco Fire Products*, (2007 NY Slip Op 33820[U] [Sup Ct, NY County 2007], *affd* 59 AD3d 305 [1st Dept 2009]) Justice Tolub of this court rejected an effort to avoid the *res judicata* effect of a prior class action

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[1]The sole reported New York case at any level referencing the "identical factual predicate" doctrine is *Cox v Microsoft Corp.* (48 AD3d 215 [1st Dept 2008]), which uses the phrase without citation while describing the objectors' argument. The First Department held that "[c]laims based on a factual predicate different from the factual predicate of this action are not barred by the release, because the release does not bar claims relating to conduct that was not alleged and could not have been alleged in this action." The *Cox* case is distinguishable on its facts because the release at issue there was limited to claims relating to conduct occurring on or before December 31, 2004 and expressly "exclude[d] claims relating to conduct, acts or omissions that occurred after December 31, 2004," which was two years *prior* to the date the settlement was approved.

settlement based on an argument that the operative facts in the case before him post-dated the class action settlement.

In determining the intent of the parties, "[a] written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible will be so interpreted as to give effect to its general purpose" (*Westmoreland Coal Co. v Entech, Inc.*, 10 NY2d 352, 358 [2003]). Plaintiffs argue that because the release in the ESRT Action only referenced claims that "can or might be asserted in the Action," (Plaintiff's Mem of Law, at 20) it could not possibly apply to offers that were made after the settlement was finally approved.[2] The principal claim in the ESRT Action had nothing to do with specific offers. Instead, the relevant portion of the ESRT Complaint alleged that "the Malkin Defendants failed to consider reasonable alternatives to the Proposed Transaction, which were potentially more beneficial to the Participants" (ESRT Compl. ¶ 2). The ESRT Complaint added that the Malkins pushed forward with the Proposed Transaction "without considering possible alternatives to the Proposed Transaction" (ESRT Compl. ¶ 7). The Malkins' alleged refusal to consider alternatives, rather than any specific rejection of individual offers, was a core element of the ESRT Action and is the sole basis for this action. Thus, even assuming that the "identical factual predicate doctrine" applies, the breach of fiduciary duty claim asserted in this case is barred.

At the final hearing on the settlement of ESRT Action, the court explicitly stated that the case related "to the failure to consider alternatives to consolidation" (Tr. of May 2, 2013, at 16). Thus, there can be no question that the key issue in this action was an important element in the ESRT Action.

C. Injunctive Bar and Res Judicata

The settlement agreement in the ESRT Action contains a covenant not to sue. Correspondingly, the Final Judgment provides that:

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[2]Plaintiff's Opposition brief quotes only a portion of the operative language of settlement agreement. It reads in full ". . . that have been, could have been or *in the future* can or might be asserted in the Action" (emphasis added). This language specifically contemplates both claims that accrued prior to the settlement as well as claims that have not yet accrued.

> Plaintiffs and the Class are hereby permanently enjoined from asserting, commencing assisting, instigating or in any way participating in the commencement or prosecution of any action or other proceeding, in any forum, asserting any Released Claims . . .

Dewey Affm, Ex R ¶ 13. This clause is a second, independent reason, for dismissal of the Complaint (*see Polar Int'l Brokerage Corp. v Richman*, 32 AD2d 717, 720 [1st Dept 2006] [The purpose of a covenant not to sue is "to bar any future suit" by the parties on the subject matter]; *see also McMahon v Bass*, 250 AD2d 460, 461 [1st Dept 1998]).

D. Res Judicata Bar

The Malkins observe that the ESRT Action was dismissed with prejudice and argue that as a result this case is barred by *res judicata*. Except as to the now rejected assertion that the settlement cannot operate as a bar to claims based on facts that occur after approval of the settlement, plaintiffs do not contest the Malkins' assertion.

The doctrine of *res judicata* bars all "future actions between the same parties on the same cause of action" *Parker v Baluvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999] ("Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred"). Here plaintiffs (who are also members of the settlement class in the ESRT Action) have asserted the same claim (breach of fiduciary duty) against the same defendants concerning the same transaction. As such the current claim is barred by *res judicata* (*see Hotel 57 LLC v Tyco Fire Products*, 59 AD3d 305, 306 [1st Dept 2009]). The motion to dismiss must be granted for this additional reason.

E. Unjust Enrichment Claim

Regarding the Second Cause of Action, plaintiffs assert that the Malkins were unjustly enriched because the Malkins failed to consider "premium offers" in order to preserve benefits for themselves at plaintiffs expense. Plaintiffs cite no case in support of this novel theory. The unjust enrichment cause of action must be dismissed because plaintiffs rights are defined by the terms of the written contracts (*see Costello v Verizon N.Y., Inc,* 18 NY 3d 777, 790 [2012] ["An unjust enrichment claim is not available where it simply duplicates or replaces a conventional contract or tort claim"]; *see also N.Y.C. Educ. Constr. Fund v Verizon, N.Y., Inc.*, 114 AD3d 529, 532 [1st Dept 2014]). It is also duplicative of the breach of fiduciary duty claim (*see Amer. Mayflower Life Ins.*

Co. of N.Y. v Moskowitz, 17 AD3d 289, 293 [1st Dept 2005]; *Weir v Holland & Knight, LLP*, 34 Misc 3d 1207[A], 2011 NY Slip Op 52439[U] [Sup Ct, NY County 2011]).

Accordingly, the motion of defendants to dismiss the entire complaint shall be granted. It is hereby,

ORDERED that the motion of defendants to dismiss the complaint herein is GRANTED and complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

This constitutes the decision and order of the court.

DATED: July 17, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.