

Tawil v Spitzer

2014 NY Slip Op 32195(U)

August 12, 2014

Supreme Court, New York County

Docket Number: 652720/11

Judge: Jeffrey K. Oing

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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SAUL TAWIL, DAVID TAWIL, VICTOR TAWIL,
ANEIL LIPP, LLC, JACK FRANCO, SONJA
CABASSO, ALBERT MALEH, MARK MANELA,
EZRA I. SHEHEBAR, GABRIEL SHEHEBAR,
JACKSON GROUP LLC, HAROLD JARNICKI,
MICHAEL GAD and BERGMAN FAMILY LP,
individually and derivatively on
behalf of Nashville Properties, LLC,

Plaintiffs,

-against-

ELIOT SPITZER, MICHAEL STEINBERG,
E&S DEVELOPMENT AND PROPERTIES LLC,
NASHVILLE PROPERTIES LLC, ABRAHAM
POZNANSKI, SOVA MANAGEMENT, LLC,
ARMAND LASKY, 401 CHURCH STREET LLC,
AEL CHURCH STREET, INC. and JOHN
DOES A through C,

Defendants,

Index No.: 652720/11

Mtn Seq. No. 006

DECISION AND ORDER

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JEFFREY K. OING, J.:

Defendants, AEL Church Street, Inc. ("AEL") and Armand Lasky ("Lasky"), move, pursuant to CPLR 3211(a)[7], to dismiss the second and sixteenth causes of action asserted against them in the second amended complaint.

Briefly, as alleged in the second amended complaint, plaintiffs became members of defendant Nashville Properties, LLC ("Nashville") by investing in excess of \$2 million in Nashville. Nashville, in turn, used this and other investment funds to obtain a membership interest in defendant 401 Church Street LLC ("Church Street") in order for Church Street to purchase a large commercial building located in Nashville, Tennessee. Church Street's managing member is defendant AEL, whose sole member is

defendant Lasky. Plaintiffs then allege that they subsequently learned that defendants, Eliot Spitzer ("Spitzer") and Michael Steinberg ("Steinberg"), Nashville's managing members, entered into a transaction with defendant Sova Management LLC ("Sova") and defendant Abraham Poznanski ("Poznanski"), who solely owns and controls Sova, in which Spitzer and Steinberg borrowed \$3 million from Sova (the "Sova loan"). Plaintiffs allege that Spitzer and Steinberg invested those proceeds with defendant E&S Development and Properties LLC ("E&S"), a management company solely owned and controlled by Spitzer and Steinberg. Unbeknownst to plaintiffs, as security for these loan proceeds, Spitzer and Steinberg, without obtaining approval from the Nashville members, transferred to Sova the right to control Nashville and its membership interest in Church Street. In order to effectuate the transfer of Nashville's membership interest in Church Street, plaintiffs allege that AEL and Lasky, its sole member, approved the transfer. Plaintiffs allege that in 2008 Spitzer and Steinberg defaulted on the Sova loan, and, that, as a consequence, Sova took over control and ownership of Nashville and its membership interest in Church Street, which included receiving Church Street distribution income.

In a decision and order, dated June 18, 2012, I dismissed without prejudice plaintiffs' claims asserted in an amended complaint for declaratory judgment, accounting, breach of fiduciary duty, and aiding and abetting that breach against defendants Church Street, AEL and Lasky on the ground that

plaintiffs failed to plead sufficient facts to sustain those claims. Plaintiffs thereafter filed the instant second amended complaint.

Discussion

In the second amended complaint, plaintiffs allege the following new relevant facts against defendants AEL and Lasky:

8. Defendant AEL Church Street, Inc. ("AEL") is the managing member of Church Street. AEL is solely owned and controlled by Defendant Armand E. Lasky ("Lasky") who, through AEL, controls and manages Church Street.

* * *

34. Upon information and belief, at the time of the aforesaid transaction with Poznanski and Sova, Church Street, AEL and Lasky knew that Nashville was a limited company and had various members, all of whom maintained a financial interest in Church Street through Nashville. Both Church Street and Nashville were formed at virtually the same time and for the same purpose. Church Street was referred to as an affiliate of Nashville in the Memorandum of Understanding prepared by Spitzer and Steinberg, and AEL, Lasky's company and the managing member of Church Street, was listed as a member of Nashville, including AEL. AEL and Lasky received and reviewed a copy of the Schedule listing the Plaintiffs and other persons as Nashville investors. See Schedule to Exhibit A.

35. Church Street, AEL and Lasky were required to consent to the transfer of Nashville's interest in Church Street to Sova to make it effective.

36. Church Street, AEL and Lasky despite their knowledge of Plaintiffs' and other investors' membership interest in Nashville and that the transfers were improper and wrongful, consented to such transfers, treated Sova as a successor to Nashville, deemed Nashville's membership interest in Church Street as now being owned by Sova and paid distributions to Sova that were due and owing to Nashville and the Plaintiffs

37. Neither Church Street, AEL nor Lasky exercised good faith with respect to such transactions and improperly approved the transactions as part of their business dealings with Nashville, Spitzer, Steinberg, E&S, Sova and Poznanski.

* * *

52. Church Street, AEL and Lasky, authorized and consented to such transfer, and treated Sova as a successor to Nashville's membership interest in Church Street and paid distributions to Sova that should have been paid to Nashville, even though they knew that there were other members of Nashville who did not consent to and had no notice of such transfers.

53. Even if Church Street, AEL and Lasky did not have knowledge of such facts and did not fail to exercise good faith, they need to be parties hereto to effectuate the return to Nashville of its membership interests in Church Street that were wrongfully transferred to Sova, Poznanski or to use other persons or entities affiliated with them.

54. By reason of the foregoing, Nashville and Plaintiffs are entitled to a declaration that the transfer of Nashville's membership interest in Church Street to Sova, Poznanski or other persons or entities affiliated with them and the granting to Sova and Poznanski of a security interest in Nashville's membership interest in Church Street, were void, and should be set aside, that Sova or Poznanski do not maintain any membership interest in Church Street by reason of such purported transfer of or security interest in Nashville's membership interest in Church Street and that Nashville at all times maintained and maintains a 66% membership interest in Church Street and is entitled to all distributions and payments and rights, by reason of such membership interest.

* * *

90. Church Street, AEL and Lasky owed Nashville, as a member of Church Street, a fiduciary duty.

91. Church Street, AEL and Lasky, by authorizing and permitting the transfers of Nashville's membership interest in Church Street to Sova or those acting in conjunction with it and not distributing to Nashville and Plaintiff the distributions and payments due and owing to them, notwithstanding its knowledge of

Plaintiffs membership interest in Nashville, violated their fiduciary duties due and owing to Nashville and Plaintiffs and are liable to Nashville and Plaintiffs, jointly and severally, for all damages and payments caused thereby.

Contrary to defendants argument, these new allegations, particularly paragraphs 52-54, assumed to be true on a pre-answer motion to dismiss, when read in conjunction with the provisions set forth in section 11, "Assignment of Preferred Interests," of Church Street's operating agreement, clearly demonstrate that plaintiffs have sufficiently pleaded a declaratory judgment claim against defendant AEL.

Similarly, assuming the truth of these new allegations, particularly paragraphs 90-91, and read together with section 14.1, which provides AEL, as manager, a "special and limited power of attorney as the attorney-in-fact," plaintiffs have sufficiently pleaded a claim for breach of fiduciary duty against AEL (Salm v Feldstein, 20 AD3d 469 [2d Dept 2005]).

Next, defendants argue that the second and sixteenth causes of action should be dismissed against defendant Lasky. In that regard, defendants AEL and Lasky argue that Lasky is shielded from personal liability for transactions entered into by AEL, the corporate defendant, and that plaintiffs have failed to allege sufficient facts supporting the theory of piercing the corporate veil. There is no dispute that the allegations demonstrate that AEL is the manager of Church Street, and that pursuant to section 14 of the Church Street operating agreement AEL is empowered to perform any act to "carry out fully [the operating agreement's]

provisions." Thus, although AEL is a proper defendant with respect to these causes of action, the question that remains is whether plaintiffs have alleged sufficient facts to have Lasky named as a defendant in this action.

Defendants' reliance on the purported insufficiency of the allegations regarding Lasky's acts and the theory of piercing the corporate veil is misplaced. In that regard, defendants overlook a critical new allegation against Lasky:

[d]efendant AEL Church Street, Inc. ("AEL") is the managing member of Church Street. AEL is solely owned and controlled by Defendant Armand E. Lasky ("Lasky") who, through AEL, controls and manages Church Street.

(Second Amended Complaint, ¶ 8). This allegation that Lasky is the alter ego of AEL coupled with the allegations set forth in paragraphs 52-54, 90-91 sufficiently state that Lasky exercised complete domination of AEL with respect to the challenged transaction, namely, the transfer of Nashville's interest in Church Street to Sova, and that such domination was allegedly used to commit a wrong against plaintiffs, namely, an improper transfer and breach of fiduciary duty (Morris v New York State Department of Taxation and Finance, 82 NY2d 135, 141-143 [1993]). In that regard, although the allegations are sufficient to withstand a pre-answer motion to dismiss, that may not be the result on a motion for summary judgment (Sass v TMT Restoration Consultants Ltd., 100 AD3d 443 [1st Dept 2012]).

Accordingly, it is

ORDERED that defendants, AEL and Lasky, motion to dismiss the second and sixteenth causes of action against them is denied; and it is further

ORDERED that defendants, AEL and Lasky, are directed to serve an answer to the second amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 48, Room 242, on September 11, 2014 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/12/14



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.