Bremond Houses, Inc. v Lemle & Wolff, Inc.

2014 NY Slip Op 32228(U)

August 18, 2014

Supreme Court, New York County

Docket Number: 161966/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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BREMOND HOUSES, INC,
Individually and as General Partner of BREMOND HOUSES ASSOCIATES, L.P.

Plaintiffs,

Index No.
161966/2013

Decision and Order

- against -

Mot. Seq. 001

LEMLE & WOLFF, INC.,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, Bremond Houses, Inc. ("Bremond, Inc."), individually and as general partner of Bremond Houses LP ("Bremond LP") (collectively, "Plaintiffs") bring this action based on, *inter alia*, an alleged agreement between Bremond LP and defendant Lemle & Wolff, Inc. ("Defendant" or "Lemle"). Bremond, Inc. claims that Bremond LP is the deed owner of certain properties located at 602-604 Saint Nicholas Avenue, New York, New York, and 123-127 Edgecombe Avenue, New York, New York (collectively, the "Properties"), and that Bremond, Inc., as general partner of Bremond LP, is responsible for the management and operations of the Properties. Bremond, Inc. further claims that Defendant was retained to provide management services for the Properties, and that Defendant improperly retained possession of funds collected in connection with the Properties. Bremond, Inc. seeks a declaration that Bremond, Inc. is the sole partner of Bremond LP and that non-party Crystal Norman is the proper representative of Bremond, Inc. Bremond, Inc. also asserts causes of action against Defendant for accounting and breach of contract.

Defendant now moves for an Order, pursuant to CPLR 3211(a)(1), (a)(7), and (a)(10), dismissing Plaintiffs' complaint on the basis of documentary evidence and failure to state a claim. In support, Defendant submits the attorney affirmation of

Barry Jacobs ("Jacobs"); a copy of the Bremond LP partnership agreement (the "Partnership Agreement"); and, a copy of the management agreement contract between Defendant and Bremond LP (the "Management Agreement Contract") dated February 12, 2004.

Plaintiffs oppose.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;
>
> (7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep't, 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The compulsory joinder of parties avoids a multiplicity of suits and protects absentees who should not be jeopardized or embarrassed by "judgments purporting to bind their rights or interests where they have had no opportunity to be heard." (*First Nat'l Bank v. Shuler*, 153 N.Y. 163, 170 [1897]). To this end, CPLR § 1001(a) provides that persons "should" be joined if their presence in the action is necessary to accord "complete relief" between those who already are parties; or, "who might be inequitably affected by a judgment in the action". (CPLR § 1001[a]). If a plaintiff

fails to join a person who should be joined under CPLR § 1001(a), CPLR § 1001(b) allows the court to "order him summoned" and to dismiss the action in the event of nonjoinder. (*Id.*).

In order to state a valid claim for declaratory relief, pursuant to CPLR § 3001, a plaintiff must allege a justiciable controversy. (CPLR § 3001). In addition, "[a] declaratory judgment serves a legitimate purpose only when all interested persons who might be affected by the enforcement of rights and legal relations are parties." (*White v. Nationwide Mut. Ins. Co.*, 228 A.D.2d 940, 941 [3d Dep't 1996]; *citing Matter of J-T Assocs. v Hudson Riv.--Black Riv. Regulating Dist.*, 175 A.D.2d 438, 440 [3d Dep't, 1991]; CPLR § 1001).

Plaintiff's complaint seeks a declaratory judgment that Bremond, Inc. "is the sole and only lawful general partner of Bremond LP which is authorized to act on behalf of Bremond LP and that Crystal Norman is the proper representative of said corporation." Plaintiff's complaint alleges that "no other party or entity has any authority or legal basis to claim any rights or responsibilities as the Bremond LP general partner." Here, Plaintiff's claim for a declaratory judgment is not predicated on a justiciable controversy between Plaintiff and Lemle. In addition, Defendant submits the Partnership Agreement, which demonstrates that Bremond LP is a partnership that exists pursuant to a written Partnership Agreement between Bremond, Inc. and non-party New York Equity Fund 1993 Limited Partnership (the "Limited Partner"). Plaintiffs' complaint does not name the Limited Partner (or Crystal Norman, for that matter) as a party. Accordingly, Plaintiffs' claim for a declaratory judgment should be dismissed, as Plaintiffs' complaint fails to name interested persons who might be affected by a declaration as to the allocation of powers and ownership interests in Bremond LP. (CPLR § 1001).

As for Plaintiff's second cause of action, for an accounting, "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." (*Palazzo v. Palazzo*, 121 A.D.2d 261, 265 [1st Dep't 1986]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." (*HF Mgmt. Servs., LLC v. Pistone*, 34 A.D.3d 82, 84 ([1st Dep't 2006] [citations and quotations omitted]).

Defendant argues that the Management Agreement Contract between Defendant and Bremond LP flatly contradicts Plaintiffs' claim for an accounting. Defendant argues that Bremond, Inc. is not a party to the Management Agreement,

which serves as the basis for the fiduciary relationship alleged. Absent the requisite fiduciary relationship, Defendant contends, Bremond, Inc.'s claim for an accounting must be dismissed.

Plaintiff's complaint alleges that Defendant "has acted as a fiduciary for and on behalf of [Bremond LP] and [Bremond, Inc.] and has managed and handled the financial matters for the subject properties" and that, Plaintiff is entitled to "an accounting of the funds and financial circumstances of the Properties from [Lemle]." Accepting these allegations as true, the four corners of Plaintiffs' complaint sufficiently plead a cause of action for accounting. Here, although Bremond, Inc. is not a party to the Management Agreement Contract individually, Bremond, Inc., as general partner of Bremond LP, is authorized to bring a derivative action on the partnership's behalf. (P'ship Law § 115). Indeed, the Management Agreement Contract obligates Defendant to act as "Agent" for Bremond LP and to perform duties, such as the collection of rents, on Bremond LP's behalf, and requires that Defendant maintain records, "containing rent and lease records, insurance policies, mortgage documents, correspondence, receipted bills and vouchers, and other records, documents and papers pertaining to the Owner or the operation of the Premises, and the same shall be made available to the Owner, its designees, representatives, accountants and attorneys . . .". Accordingly, the Management Agreement Contract fails to flatly contradict Plaintiffs' allegations that Defendant acted as a fiduciary for Plaintiffs in connection with the Properties, and Defendant's documentary submissions do not conclusively establish a defense to Plaintiffs' claim for an accounting as a matter of law.

As for Plaintiffs' third cause of action, for breach of contract, "[t]he elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 71 A.D. 3d 80, 91 [1st Dep't 2009]).

Plaintiffs' complaint alleges a written contract whereby "[Lemle] was retained to perform management services for the Properties." The complaint further alleges that Lemle was paid for its services in connection with the Properties, and that, Defendant received funds that should have been distributed to Plaintiffs, and that, "the withholding of the distribution of these funds is a breach of the contract between Defendant and Plaintiffs."

Here, Defendant argues that the Management Agreement Contract and the Partnership Agreement flatly contradict Plaintiffs' breach of contract claim. Defendant argues that Bremond, Inc. lacks standing to enforce the Management

Agreement Contract because Bremond, Inc. is not a party thereto. Defendant also argues that the Management Agreement Contract neither authorizes nor requires Defendant to make disbursements to Bremond, Inc. As a result, Defendant contends, the complained-of conduct does not articulate a breach of this contract.

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint sufficiently state a claim for breach of contract. As discussed above, Bremond, Inc., as general partner of Bremond LP, is authorized to sue on the partnership's behalf. Moreover, while the Management Agreement Contract does not contain an express provision directing Defendant to distribute funds to Bremond, Inc., the Management Agreement Contract does obligate Lemle to collect funds in connection with the Properties, and to deposit such funds into a building management account. The Partnership Agreement, in turn, provides that, to the extent there are surplus proceeds from the funds collected in connection with the Properties, "the balance thereof shall be distributed to the General Partner and the Limited Partner in the percentages set forth in schedule A [of the Partnership Agreement]". Accordingly, insofar as Plaintiffs' complaint appears to allege that Defendant failed to manage funds pursuant to the Management Agreement Contract, and that Defendant's claimed mismanagement affected the amount of surplus proceeds deposited into the building management account—thereby depriving Bremond, Inc. of the distributions to which Bremond, Inc. is entitled from those surplus amounts—the four corners of the complaint are sufficient to support Bremond, Inc.'s claim for breach of contract at this early stage of litigation.

Wherefore it is hereby,

ORDERED that Defendant Lemle & Wolff, Inc.'s motion to dismiss is granted only to the extent that Plaintiffs' first cause of action for a declaratory judgment is dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiffs' second cause of action, for accounting, and Plaintiffs' third cause of action, for breach of contract, are severed and shall continue.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 18, 2014

Eileen A. Rakower, J.S.C.