

JC Real Estate Fund I, LLC v Berman

2014 NY Slip Op 34006(U)

June 27, 2014

Supreme Court, Rockland County

Docket Number: 030893/2014

Judge: William A. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

P R E S E N T:
HON. WILLIAM A. KELLY
SUPREME COURT JUSTICE

-----x
JC REAL ESTATE FUND I, LLC

Plaintiff,

Index No. 030893/2014

-against-

ORDER

ROBERT BERMAN, JOSEPH BERNSTEIN,
AVON ROAD ROCK HILL, LLC, and CARMEL
EQUITIES

Defendants.
-----x

The following papers were read on this motion by the defendants Robert Berman and Joseph Bernstein for an Order dismissing the action:

Notice of Motion - Affidavit - Memorandum of Law	1-3
Affirmation in Opposition - Memorandum of Law in Opposition	4-5
Reply Memorandum of Law	6

Upon the foregoing papers it is hereby ORDERED that the defendant's motion is denied.

Defendant Berman is the principal shareholder in RH Land Development,

LLC [hereinafter “RH Land”]. In 2005 RH Land Purchased 500 acres of land in Thompson, NY [hereinafter “Thompson property”]. To do so, RH Land granted a mortgage in the amount of \$5,800,000.00. The Thompson property is the sole asset of RH Land.

According to the complaint, RH Land defaulted on the mortgage. Thereafter, it is alleged that defendant Bernstein convinced Jeffrey Camp, the sole owner of plaintiff JC Real Estate Fund I [hereinafter “JC Real Estate”] to invest in RH Land. JC Real Estate invested \$500,000.00 for a 5.85% share in RH Land. According to the complaint, the mortgage default was not made known prior to JC Real Estate’s investment.

The complaint goes on to allege that defendants Berman and Bernstein caused the mortgage to be sold to defendant Carmel Equities at a very substantial discount. In essence, it is alleged that Berman has a close relationship with Carmel Equities which allow him to retain ownership and control of the property at the expense of RH Land.

“In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference” EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005) (citing Goshen v Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. Id.

“Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail

(citations omitted).” Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275 (1977).

“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, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (citations omitted).” Id.

The instant motion to dismiss is based upon an allegedly improperly plead derivative action.

“Derivative actions brought by minority shareholders vindicate the corporation's rights. On the one hand, derivative actions are not favored in the law because they ask courts to second-guess the business judgment of the individuals charged with managing the company. On the other hand, derivative actions serve the important purpose of protecting corporations and minority shareholders against officers and directors who, in discharging their official responsibilities, place other interests ahead of those of the corporation.” Marx v. Akers, 88 N.Y.2d 189 (1996). The requirements for bringing such an action are set forth in B.C.L. §626.

The plaintiff has standing to bring a derivative action. A “derivative action lies whenever there is a clear legal right to maintain the action, regardless of the plaintiff shareholder's individual motive for bringing the suit.” Meredith v. Camp Hill Estates, 77 A.D.2d 649 (2nd Dep’t 1980). Although the complaint is worded in regards to minority shareholder JC Real Estate’s loss rather than the loss to the

corporation, RH Land, the minority shareholder's motivation does not control. At the core of every derivative action is financial loss to the shareholders rather than a desire to champion the rights of the corporation. In this case, JC Real Estate is a minority shareholder in RH Land and is entitled to bring a derivative suit with regard to the alleged wasteful disposition of RH Land's sole asset. Id. See also Glenn v. Hotel Tron Systems, 74 N.Y.2d 386 (1989).

However, B.C.L. §626(c) requires the shareholder to "set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." However, the prerequisite of requesting the board to initiate a suit is deemed waived if such demand would be futile.

"Demand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit. That occurs in three circumstances:

(1) Demand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction. Director interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction

is 'controlled' by a self-interested director. (2) Demand is excused because of futility when a complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances. The 'long-standing rule' is that a director 'does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers'. (3) Demand is excused because of futility when a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors.'" Bansbach v. Zinn, 1 N.Y.3d 1 (2003)(quoting Marx v. Akers, 88 N.Y.2d 189 (1996)).

The complaint sets forth allegations that sufficiently set forth the futility of a demand. Defendant Berman owns approximately 47% of RH Land and, according to the allegations in the complaint, controls the operation of RH Land. It is also Berman who is accused of defrauding JC Real Estate and profiting from the transfer of the mortgage. It would be futile to request a Berman controlled board to bring a suit alleging fraud against Berman. Id. See also Walsh v. Wwebnet, Inc., 116 A.D.3d 845 (2nd Dep't 2014); Hecht v. Andover Associates Management, 114 A.D.3d 638 (2nd Dep't 2014).

Accordingly, the motion is denied.

This Decision shall constitute the Order of the Court.

ENTER

Dated: New City, New York
 June 27, 2014



HON. WILLIAM A. KELLY
J.S.C.