

Landes v Provident Realty Partners, II. L.P.
2015 NY Slip Op 30753(U)
April 16, 2015
Sup Ct, New York County
Docket Number: 155096/2014
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

-----X
DAVID LANDES, NAOMI S. LANDES, HOWARD
N. GILBERT, STEPHEN J. LANDES,
RAANANAH KATZ and AVIVAH LITAN
individually and derivatively on behalf of
PROVIDENT REALTY PARTNERS II, L.P.,

Plaintiff,

DECISION AND
ORDER

-against-

Index Nos.
155096/2014

PROVIDENT REALTY PARTNERS II, L.P.,
PRP II CORP., BRG GRAMERCY UNITS LLC,
DANIEL BENEDICT, IMICO UN RENTAL LLC,
and JOHN DOES 1-50,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

In this action for breach of fiduciary duty, defendants PRP II Corp., BRG Gramercy Units LLC, and Daniel Benedict (collectively referred to as “Benedict”), move for an order dismissing plaintiffs’ complaint pursuant to CPLR §3211 (a) (7). Plaintiffs oppose (Mot. Seq. 001). Defendant Imico UN Rental LLC (“Imico”) also moves for an order dismissing plaintiff’s complaint pursuant to CPLR §3211 (a) (7). Plaintiffs oppose (Mot. Seq. 002).

Motion Sequence 001 and 002 are consolidated for disposition.

Plaintiffs contend this derivative action is brought by limited partners of Provident Realty Partners II, L.P. (“PRP II LP”) for the wrongful self-dealing of

Benedict in purchasing, at a deep discount, virtually all of Imico's 50% membership interest in 303 BRG-IMICO LLC ("303 LLC"), an LLC in which PRP II LP holds the other 50% membership interest. Plaintiffs allege that Benedict, utilizing information obtained in his fiduciary capacity and aided and abetted by Imico, secretly and without the consent of the limited partners¹, diverted the transaction – a business opportunity belonging to PRP II LP – to himself in breach of his fiduciary duty.

Defendant PRP II Corp. is General Partners with PRP II LP. Both entities owe a fiduciary duty to one another. Defendant Benedict, the individual, is the principal of defendant PRP II Corp. Defendant Benedict, the individual, is also the managing member of defendant BRG Gramercy Units LLC ("BRG Gramercy"). Prior to the deal at issue, defendant Imico was a 50% shareholder in 303 LLC and defendant PRP II LP was the remaining 50% shareholder in 303 LLC.

Motion sequence 001

Benedict argues that plaintiffs' complaint should be dismissed because the complaint does not indicate which claims are brought in an individual capacity and which claims are brought on a derivative basis. On the other hand, plaintiffs state

¹ 303 LLC's Operating agreement required it to obtain consent from PRP II LP before transferring its assets which Plaintiff contends they did not do. Defendant disputes this.

that the individual defendants are all suing derivatively on behalf of one plaintiff PRP II LP.

The caption states that the claims are brought individually and derivatively but the causes of action do not specify which party in what capacity is bringing each claim, it plainly states “plaintiffs”.

A complaint in which the allegations confuse a shareholder's derivative and individual rights will, therefore, be dismissed, though leave to replead may be granted in an appropriate case. (See Abrams v Donati, 66 NY2d 951, 953 [1985]). Here, the only reference to plaintiffs suing on an individual capacity is in the caption thus in the interest of judicial economy, the reference to “individually and” in the caption is hereby stricken and plaintiff is ordered to file an amended complaint reflecting as such within 14 days of entry of this order.

Motion sequence #002

Plaintiffs allege a claim against defendant Imico for aiding and abetting Benedict’s breach of fiduciary duty. A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (Kaufman v Cohen, 307 AD2d 113, 125 [1st Dept 2003]). Under the second element, knowing participation

requires an “actual knowledge of the breach of duty” and participation must be in the form of “substantial assistance to the primary violator”. (Id. at 126).

The Imico defendant argues that the aiding and abetting claims against it fails because it is not plead with sufficient particularity. CPLR § 3016 requires particularity for pleadings pertaining to “breach of trust”. However, the pleadings will be considered sufficient so long as they provide sufficient detail to inform defendants of the substance of the claims. Id. at 120-21.

The alleged self-dealing occurred in September 2011, when defendant Imico sold a 49.9%² membership interest in 303 LLC to BRG Gramercy, for a price of approximately \$499,900.00. Plaintiffs allege this price was substantially below market and that defendant Imico knew BRG Gramercy was owned and controlled by, the individual, Benedict. Defendant Imico and PRP II LP were both 50% owners in 303 LLC with the sole business objective of managing the Property at issue thus through those course of dealings plaintiffs also contend defendant Imico knew that Benedict, the individual, had a fiduciary relationship to PRP II LP.

² Imico’s partnership agreement prevented it from disposing of all of its assets, after this transaction it was left with 0.1 % ownership in 303 LLC which was its only asset.

In sum, they allege, Benedict the controller of BRG Gramercy, usurped the business opportunity of purchasing the shares in 303 LLC from PRP II LP. Full ownership of 303 LLC would have been held at a premium to PRP II LP.³

Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur (See Kaufman v Cohen, 307 AD2d 113, 126 [1st Dept 2003]). Here, Benedict would not have been able to breach their fiduciary duty if defendant Imico did not sell to them its interest. Moreover, Defendant Imico sold its interest to Benedict for \$499, 000 even when the market rate of the property was worth \$2,800,000. This indicates that defendant Imico was not engaging in routine business therefore the substantial assistance prong of an aiding and abetting claim was sufficiently plead. (C.F. 21st Century Diamond, L.L.C. v Allfield Trading, L.L.C., 119 AD3d 489 [1st Dept 2014]) (finding no substantial assistance when “defendants are alleged to have done nothing more than engage in their routine business.”).

Now turning to the scienter prong of the aiding and abetting claim, plaintiffs contend that the self-dealing nature of the Transaction required defendant Imico to ensure that the disinterested partners of PRP II LP had consented and defendant Imico’s failure to inquire alone would establish the requisite scienter. Defendant

³ If PRP II LP took advantage of this deal they would have went from a 50% owner of 303LLC to then become a 99.9% owner thus would have had greater ability to obtain a large liquid profit.

Imico's failure to seek consent for the deal does not constitute substantial assistance here since the mere inaction of an alleged aider only gives rise to liability if the defendant owes a fiduciary duty directly to the plaintiff. (Kaufman v Cohen, 307 AD2d 113, 126 [1st Dept 2003]). Defendant Imico did not owe a fiduciary duty to plaintiffs.

On the other hand, "wilful blindness" under New York law does subject defendant Imico to aiding and abetting liability. See AIG Fin. Products Corp. v ICP Asset Mgt., LLC, 108 AD3d 444, 446-47 [1st Dept 2013] ("One could reasonably infer based on the allegations that the opportunity to realize such an unexpected windfall, considering the market conditions, would not be randomly bestowed on an innocent party, but rather that the party had to be knowledgeable as to why it was the recipient of such good fortune."). Here Benedict received the shares in 303 LLC from defendant Imico in what could be reasonably determined as a windfall.

Affording plaintiffs the benefit of every favorable inference we accept as true the complaint's allegations that defendant Imico knew or should have known that the active assistance it provided to Benedict was harmful to PRP II LP's interest (Yuko Ito v Suzuki, 57 AD3d 205 [1st Dept 2008]).

Plaintiff also contends that precisely what IMICO UN knew when it offered its membership interest in 303 LLC to Benedict is information uniquely within

IMICO UN's possession and cannot be further stated without discovery. Likewise, dismissal of plaintiffs claim would prevent plaintiffs from obtaining discovery on the precise issues of each defendant's knowledge and intent. (Kaufman v Cohen, 307 AD2d 113, 121 [1st Dept 2003]). Accordingly, defendant's motion to dismiss plaintiffs' complaint is denied.

This constitutes the decision and order of the Court.

Date: April 16, 2015
New York, New York



Anil C. Singh