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| Arliss v B.L. Mgt. Inc. |
| 2015 NY Slip Op 31197(U) |
| July 13, 2015 |
| Supreme Court, New York County |
| Docket Number: 152710/2014 |
| Judge: Debra A. James |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SARAH ARLISS, 127 EAST 102nd Street CORP.
and FOREST 156 CORP.,

Index No.: 152710/2014

Plaintiffs,

Motion Date: 11/21/14

- v -

Motion Seq. No.: 001

B.L. MANAGEMENT INC., GABRIEL MANAGEMENT
CORP. and STEVEN DYM,

Defendants.

The following papers, numbered 1 to were read on this motion to dismiss first, fifth and sixth
causes of action

Table with 2 columns: Document Type and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits (1), Answering Affidavits - Exhibits (2), and Replying Affidavits - Exhibits (3).

Cross-Motion: [] Yes [x] No

Upon the foregoing papers, it is ordered that this motion of defendants to dismiss the first
and fifth causes of action on the grounds that such claims are barred by the statute of limitations
shall be denied, and to dismiss the fifth and sixth causes of action for failure to state a cause of
action shall be granted in part.

According to the complaint, which is rather inartfully
drawn, plaintiff Arliss is the chief operating officer of
plaintiffs 127 East 102nd Street Corp. (102 East) and Forest 156
Corp. (Forest 156). Though the complaint is silent, Forest 156
presumably owns 25-88 Francis Lewis Boulevard, Queens, New York
(Francis Lewis property).

The complaint alleges that defendant Dym is the chief

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [x] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

operating officer of both defendants B.L. Management Inc. (B.L. Management) and Gabriel Management Corp. (Gabriel Management).

In the complaint, Arliss alleges that, being inexperienced in real estate matters, she entered into a management agreement dated December 9, 2004 with B.L. Management, as the sole and exclusive managing agent of real property. Such management agreement, attached to the complaint, is between Sarah and non-party Charles Arliss, as Owners, and B.L. Management, as Managing Agent, and delineates nine properties in Queens, New York, one property in Manhattan, New York, and 14 apartment units in Queens, New York as subject to such agreement. The Francis Lewis property is not listed in the management agreement.

Arliss alleges that the management agreement created a fiduciary relationship between she and B.L. Management, as well as between she and Dym, B.L. Management's principal.

In the first cause of action, plaintiffs allege a breach of fiduciary duty arising out of a lease dated July 8, 2008, in which Arliss and 156 Forest Corp. let the Francis Lewis property to Gabriel Management, as well as out of the management agreement. Plaintiffs allege that B.L. Management and Dym violated their duties as fiduciaries by (1) engaging in self-dealing regarding the lease of the Francis Lewis property, (2) failing to collect security deposits, or segregate such security deposits for residential tenants, (3) failing to maintain proper

records and (4) making false statements on financial statements.

The fifth cause of action alleges breach of fiduciary duty and unjust enrichment on the part of Dym and Gabriel Management arising out of such defendants self-dealing that resulted in lease "terms far less favorable than could have been obtained" but for defendants' self-dealing, such as a lack of a personal guaranty and no limitations on subletting.

The sixth cause of action alleges punitive damages.

The complaint was filed on March 24, 2014, and served on defendants on April 14, 2014.

Pursuant to CPLR §§ 3211(a)(5) and 3211(a)(7), defendants move to dismiss the first and fifth causes of action to the extent that such claims assert breach of fiduciary duty on the grounds that such claims are barred by the applicable statute of limitations. They move for pre-joinder dismissal also of the fifth and sixth cause of action on the ground that such claims fail to state a cause of action upon which relief can be granted.

It is academic, as defendants recite that "On a motion to dismiss pursuant to CPLR 3211, [the court] must accept the facts as alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001).

The court shall grant the motion of defendants as to the

sixth cause of action for punitive damages for failure to state a meritorious claim. Defendant is correct that punitive damages cause of action is not a viable claim, but merely a measure of damages. Bunker v Bunker, 73 AD2d 530 (1st Dept 1979).

With respect to the breach of fiduciary duty claims, Arliss, along with Charles, signed the management agreement, as owners of the real properties thereunder. This court concurs with Arliss that B.L. Management, as the owner's (Sarah's and non-party Charles Arliss's) managing agent for the various properties under the management agreement, owed a fiduciary duty to each of the owners. See People ex rel. Rubin v Tax Commn. of State of N.Y., 9 AD2d 47, 49 (1st Dept 1959).

However, with respect to the first and fifth causes of action for breach of fiduciary duty, plaintiffs do not allege that the Francis Lewis property was the subject of the management agreement, and the management agreement attached to the complaint does not so provide. Nor does the complaint allege that B.L. Management was a party to the lease. Therefore, the first and fifth causes of action with respect to the lease fail to state facts sufficient to fit within a cognizable breach of fiduciary claim against Gabriel Management, a mere lessee of the Francis Lewis property (unfavorable lease terms or not), or with respect to the lease against B.L. Management. Moreover, as Dym executed the management agreement as an officer of B.L. Management, and

not in his individual capacity, no cause of action for breach of fiduciary duty is alleged against Dym, with respect to the lease, or the management agreement. See Vitale v Steinberg, 307 AD2d 107, 111 (1st Dept 2003).

The question of the statute of limitations with respect to the breach of fiduciary claims as against Dym or Gabriel Management need not be reached, as no cognizable claim of breach of fiduciary duty lies against them. The allegations of complaint that defendant B.L. Management failed, inter alia, to account for rent and security deposits that it collected from the various properties under the management agreement as of June 21, 2013, the date that such agreement was terminated, defeat any argument that the breach of fiduciary claims against B.L. Management were not made within the applicable statute of limitations.

To the extent that plaintiffs seek to recover funds that they allege were wrongfully withheld by Dym, the unjust enrichment claim does not duplicate the breach of contract cause of action, since the complaint does not allege that Dym signed any agreement with plaintiffs in his individual capacity. Thus, the complaint states a cause of action for unjust enrichment against such defendant. Sergeants Benevolent Assn Annuity Fund v Renck, 19 AD3d 107, 111 (1st Dept 2005). However, the claim of unjust enrichment as against Gabriel Management with respect to

the lease duplicates the breach of lease claim, and thus the fifth cause of action shall be dismissed in its entirety.

Goldman v Metropolitan Life Insurance Company, 5 NY3d 561, 588 (2005).

Accordingly, it is hereby

ORDERED that the motion of the defendants to dismiss pursuant to CPLR 3211(a)(7) is granted as to first cause of action to the extent that such cause of action alleges breach of fiduciary duty against defendant Dym only, and as to the fifth cause of action for breach of fiduciary duty and unjust enrichment against defendants Dym and Gabriel Management and as to the sixth cause of action for punitive damages for failure to state a cause of action, but the motion of defendants to dismiss pursuant to CPLR 3211(a)(5) and (a)(7) is otherwise denied; and it is further

ORDERED that defendants shall serve and file and answer to the complaint pursuant to CPLR 3211(f); and it is further

ORDERED that the parties are directed to appear in IAS Part 59, 71 Thomas Street, New York, New York, for a preliminary conference on August 4, 2015, 9:30 A.M.

This is the decision and order of the court.

Dated: July 13, 2015

ENTER:

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DERRA A. JAMES J.S.C.