

**Landes v Provident Realty Partners II, L.P.**

2015 NY Slip Op 32282(U)

December 3, 2015

Supreme Court, New York County

Docket Number: 155096/2014

Judge: Anil C. Singh

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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: PART 45

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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 move pursuant to CPLR 3211 (a) (1) dismissing plaintiff’s amended complaint. Plaintiffs oppose. (Mot. Seq. 003) Defendant Imico also moves pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the amended complaint. Plaintiff’s oppose. (Mot. Seq. 004).

Motion Sequence 003 and 004 are consolidated for disposition.

Defendants previously filed motions to dismiss plaintiff’s original complaint, which this Court denied and “in the interest of judicial economy . . .

further ordered plaintiff to file an amended complaint to striking a portion of plaintiff's original complaint. Plaintiff subsequently filed an amended complaint in accordance with the previous decision.

### Motion Sequence 003

A motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]).

Before the substance of defendant's motion may be considered, defendant must first overcome a procedural hurdle. The single motion rule dictates that no more than one such motion to dismiss a complaint predicated on CPLR 3211 (a) is permitted (CPLR §3211 (e)). In the instant matter, defendants moved to dismiss the original complaint pursuant to 3211 (a). Then a decision was issued denying defendants' motion and instructing plaintiffs to serve an amended complaint clarifying which causes of actions were brought on an individual basis and which were brought derivatively. Plaintiff's amendments were confined to the caption and did not materially alter the claims previously analyzed by the Court.

Defendant's characterization of this Court's previous decision as "the Court effectively dismissed the original complaint with leave to replead" reflects a vast

misunderstanding of the ruling. Defendants' original motion addressed all the existing claims in the amended complaint. "That motion was considered on the merits and denied, but an amended complaint was directed to be served for clarification purposes only. . . Under these circumstances, CPLR 3211 (subd. [e]) effected a waiver of defendants' right to make a second motion pursuant to CPLR 3211" (Ross v Epstein, 26 AD2d 658 [2d Dept 1966]).

Defendants have already had an opportunity to fully brief the existing claims and the amendments did not substantively alter those claims (C.f. Barbarito v Zahavi, 107 AD3d 416, 420 [1st Dept 2013]) ("finding where defendants did not have the opportunity to address the merits of the original cause of action, the single motion rule does not apply"). Additionally, the partnership agreement was annexed to the complaint thus defendants have consistently had in their possession the document in which they base their new defense. Therefore, defendants PRP II Corp., BRG Gramercy Units, LLC and Daniel Benedict motion to dismiss the amended complaint is denied as violative of the single motion rule.

If this Court were to reach the merits of defendant's position, we would nevertheless deny defendants' motion.

Defendants contend that Benedict, as principal of PRP II Corp., the General Partner of the Partnership, was authorized to enter into the subject transaction; and

was not required to offer the Partnership or any of the limited partners the chance to participate in that transaction.

In support of their position, defendant points to the partnership agreement dated April 15, 1993 which stated in pertinent part, that “a general partner . . . [may] engage in other business and investment activities both for their own accounts and for others, and nothing contained herein shall be deemed to prevent any of such parties from continuing such activities, or initiating further such activities . . . even in instances where such activities might be considered within the scope of Partnership operations”. (Article 8.02). On the other hand, plaintiff argues that such authority taken by Benedict is nullified by the carve-out clause which continues to state such authority is limited “except insofar as is expressly provided in this Agreement.”

Assuming the truth of the matter asserted in the amended complaint and which no documentary evidence has been proffered to dispute, the opportunity to engage in the transaction at issue was an asset of the partnership. Therefore, plaintiff points to another section of the partnership agreement that states, Benedict is prohibited as a fiduciary from “tak[ing] or permit[ting] another to take any action with respect to the assets of the Partnership which action is not for the benefit of the Partnership.” (Article 6.03(b)).

Accordingly, the partnership agreement must be read as a whole and no clause may be analyzed in isolation. At this juncture, the issue of Benedict's authority to enter into the transaction is ambiguous and defendants have not established their defense as a matter of law (Premium Coal Co. v New Hampshire Fire Ins. Co., 265 AD 320, 321 [1st Dept 1942]).

Motion Sequence 004

Defendant Imico UN Rental LLC, moved to dismiss plaintiff's amended complaint under the predicate that if defendants PRP II Corp., BRG Gramercy Units, LLC and Daniel Benedict's motion was dismissed then the claims asserted against defendant Imico UN Rental LLC for aiding and abetting would likewise be dismissed. Since this Court has denied defendants PRP II Corp., BRG Gramercy Units, LLC and Daniel Benedict's motion then the claims asserted against Defendant Imico UN Rental LLC will likewise proceed. Defendant Imico UN Rental LLC's motion to dismiss the amended complaint is denied. Accordingly it is,

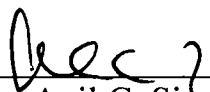
ORDERED that defendants PRP II Corp., BRG Gramercy Units, LLC and Daniel Benedict motion to dismiss the amended complaint is denied (mot. Seq.003); and it is further

ORDERED that Defendant Imico UN Rental LLC's motion to dismiss the amended complaint is denied (mot. Seq. 004); and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 30 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 preliminary conference in Room 218, 60 Centre Street, on January 28, 2015, at 10 AM.

Date: December 3, 2015  
New York, New York

  
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Anil C. Singh