

<b>Kirby v Midtown Prop. Mgt.</b>
2016 NY Slip Op 30964(U)
May 25, 2016
Supreme Court, New York County
Docket Number: 159162/13
Judge: Jennifer G. Schechter
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**HON. JENNIFER G. SCHECTER**  
**J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

-----x  
JAMES KIRBY,

Plaintiff,

-against-

MIDTOWN PROPERTY MANAGEMENT, 234 EAST  
84TH STREET BUILDER LLC, 234 EAST 84TH  
STREET LLC, DOMINION MANAGEMENT COMPANY, LLC,  
DOMINION FINANCIAL CORPORATION,  
JAMES RINZLER and BRADLEY RINZLER,

Defendant.

-----x  
JENNIFER G. SCHECTER, J.:

DECISION AND ORDER

Index No. 159162/13

Pursuant to CPLR 3212, defendants 234 East 84th Street Builder LLC, 234 East 84th Street LLC, Dominion Management Company, LLC, Dominion Financial Corporation, James Rinzler and Bradley Rinzler (Developer Defendants) move for summary judgment and sanctions. Plaintiff James Kirby (Kirby) cross-moves for discovery. The motion is granted to the extent that the Developer Defendants are awarded summary judgment. The cross-motion for discovery is denied as moot.

Background

In 2013, Kirby commenced this action against the Developer Defendants and "Midtown Property Management" (Midtown) (Affirmation in Support [Supp], Ex A [Complaint]).

In his complaint, Kirby alleges:

"In 2007, the Defendants, through their servants, agents and/or employees approached [him] to obtain financing for the condominium units to be constructed at the property known and designated as 234-236 East 84th Street, New York, New York.

"In 2007, [he] and the Defendants entered into an agreement to finance the condominium units to be constructed at the property known and designated as 234-236 East 84th Street, New York, New York.

"Pursuant to the terms of the agreement, [upon the sale of all of the condominium units constructed at the property, he] was to be paid the sum of Five Hundred Thousand Dollars (\$500,000) plus Twelve percent (12%) interest per annum from 2007 in consideration of the [\$500,000] financing he provided for the condominium units to be constructed at the property known and designated as 234-236 East 84th Street, New York, New York . . ." (Complaint at ¶¶ 42-43, 45-46).

Kirby asserts causes of action for (1) breach of contract based on failure to pay him pursuant to the agreement and (2) unjust enrichment because "Defendants have received the benefit of the [\$500,000] at [Kirby's] expense" (Complaint at ¶ 58).

In July 2015, Kirby's motion for a default judgment against Midtown was denied because it was not clear that it had been properly named, what type of entity it was and whether it was properly served (Supp, Ex D).

The Developer Defendants now move for summary judgment. They urge that the evidence establishes as a matter of law that Kirby cannot maintain a breach-of-contract or unjust-enrichment claim against any of them. Kirby's own submissions prove that the Developer Defendants are right.

Significantly, the agreement "is an agreement between James Kirby . . . and Midtown Property Management"

(Affirmation in Opposition [Opp], Ex A). Gino Capolino (Capolino) signed the agreement purportedly on behalf of Midtown. None of the Developer Defendants is alleged to have entered into the agreement with Kirby in any capacity. It is undisputed, moreover, that in making the agreement and tendering the \$500,000 Kirby only dealt with Capolino (see generally Kirby Affidavit [Kirby Aff]). Kirby swears:

"I told [Capolino] that I would lend him \$500,000.00 to help finance the construction of the project. The \$500,000.00 was to be repaid upon the sale of all three condominium units together with interest of 12% interest per annum.

"[In October 2007 . . . Capolino] produced an agreement.

"[Capolino] stated that his 25% interest in the project was owned through a company named [Midtown]. According to [Capolino], Midtown was an existing company which he had formed. . . . I played no part in forming Midtown. I presently question if Midtown ever existed because there is no evidence that [Capolino] ever formed this company"

"Pursuant to the terms of the Agreement, I was to provide \$500,000.00 to Midtown. As consideration, I was to receive the return of the \$500,000.00 plus interest of 12% per annum. [Capolino and I] both signed the Agreement . . . .

. . . .

"On October 20, 2007, I provided two checks to [Capolino] in the total amount of \$460,000 made payable to 'Dominion Financial Corp.' [Capolino] stated that the checks were made payable to that entity because it was James Rinzler's company and he was handling the money for the project. [Capolino] never informed me that he owed any money to Dominion

Financial Corp. for the purchase of an interest in the project. On November, 2, 2007, I provided a third check to [Capolino] in the amount of \$40,000.00 made payable to 'Charles Cortes Inc. [Cortes Inc.]' [Capolino] told me to make the check to that entity because it represented money which was owed to his construction company for services rendered in relation to the project.

"When I signed the Agreement, I relied upon [Capolino's] representations to me that Midtown was a viable company which he had created. I relied on [Capolino's] representation that Midtown owned 25% of 234 East 84th Street Builder LLC, which in turn owned 80% of 234 East 84th Street LLC, which owned 234 East 84th Street. I further relied upon [Capolino's] representation that the \$500,000.00 would be used toward construction costs. If I had known that Midtown was not a legal entity, did not own a 25% interest in the project and that the loan was to be used to pay off [Capolino's] existing debt to the Rinzlers, I never would have signed the Agreement and never would have made the loan.

.....

"On or about February, 2012, the three condominium units were sold. Upon learning that the three units had sold, I contacted [Capolino] via telephone regarding the satisfaction of the \$500,000.00 loan and the outstanding interest. [Capolino] stated that I would have to contact James Rinzler regarding the money. After that conversation, [Capolino] never answered or returned another one of my calls. Finally, after numerous unanswered phone calls, in June 2012, James Rinzler stated in an email . . . . that there was not enough money from the sale of the units to cover the debts on the project. That email further stated that 'the project was largely underwater when the bank stopped funding.' I relied on [Capolino's] representation that it was a viable project and never would have made a loan if I knew the project was underwater as James Rinzler stated in his email.

". . . I made a loan to Midtown which was to be repaid with interest. . . .

". . . I made a loan to a company which appears as if it never existed. As a result of that loan, the Defendant Dominion Financial Corporation unjustly received \$460,000.00 of my money. The Defendants received a benefit of the \$40,000, which was paid to [Cortes Inc.] I am entitled to the return of the \$500,000.00 which the Defendants unjustly obtained.

"Issues of fact exist as to whether Midtown exists and ever obtained a 25% interest in the project."

(Kirby Aff at ¶¶ 6, 7, 8, 9, 12, 13, 16-19).

Although there may be questions as to whether Midtown exists, whether Capolino made accurate representations, whether Capolino can be personally liable for the \$500,000 and whether the \$500,000 was a loan or an investment, regardless of the answers to those questions the Developer Defendants cannot be liable to Kirby.\* Based on Kirby's own account, he did not have any agreement with any of the Developer Defendants. Based on Kirby's own account, the Developer Defendants cannot have been unjustly enriched at Kirby's expense. Kirby gave his money to Midtown/Capolino based on promises that Midtown/Capolino made to him and the agreement he had. He issued checks to Dominion Financial Corp. at Midtown/Capolino's request and for Midtown/Capolino's benefit and his own benefit pursuant to his signed agreement.

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\* The Court appreciates that Kirby wants discovery because there is "glaring uncertainty as to what type of business entity, if any, the Defendant Midtown was created as or whether the Defendant Midtown even exists or ever existed as an entity" (see Affirmation in Support of Cross-Motion at ¶ 18). That the Developer Defendants may have useful information about the potential liability of others, however, does not justify keeping them in this case. Kirby did not sue Capolino in this action.

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In fact, other than a June 2012 email from James Rinzler directing Kirby to Capolino, which in no way supports liability as to the Developer Defendants, Kirby does not allege that any of the Developer Defendants ever even had any interaction with him much less that any of them made any actionable representations or promises.

Because in response to the Developer Defendants' motion for summary judgment, there are no allegations that would support liability as to the Developer Defendants and every shred of proof submitted by Kirby undermines the allegations asserted against the Developer Defendants in the complaint, summary judgment must be granted to the Developer Defendants.

Kirby's cross-motion is denied as moot.

Accordingly, it is ORDERED that the motion by defendants 234 East 84th Street Builder LLC, 234 East 84th Street LLC, Dominion Management Company, LLC, Dominion Financial Corporation, James Rinzler and Bradley Rinzler for summary judgment is GRANTED and the complaint against these defendants is dismissed with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs. In all other respects the motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion is denied as moot.

This constitutes the Decision and Judgment of the Court.

Dated: May 25, 2016

  
HON. OF JENNIFER G. SCHECTER