

Kefalas v Valiotis

2018 NY Slip Op 34154(U)

February 13, 2018

Supreme Court, Nassau County

Docket Number: Index No. 603816/2013

Judge: Stephen A. Bucaria

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

VASSILIOS KEFALAS and K-SHER CORP.,

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No: 603816/2013

MOTION DATE: 12/22/17
Motion Sequence 005, 006

-against-

EFSTATHIOS VALIOTIS, SUN VALLEY
TOWERS, LLC f/k/a 363 ROCKAWAY
ASSOCIATES, LLC, ALMA REALTY CORP.,
VORDONIA CONTRACTING & SUPPLIES
CORP., VALCO BUILDING & MAINTENANCE
SUPPLIES CORP., and JOHN MAVROUDIS,

Defendant.

The following papers read on this motion:

- Notice of Motion.....XX
- Affirmation in Support.....XX
- Memorandum of Law in Opposition.....X
- Reply Affirmation.....XX

Motion by defendants for leave to renew and reargue their motion for summary judgment dismissing the complaint is **granted**. Cross-motion by plaintiffs for leave to renew and reargue their motion for summary judgment is **granted**. Upon renewal, plaintiffs' motion for summary judgment is granted to the extent indicated below.

This is an action which arises from an urban renewal project. Plaintiff Vassilios Kefalas is the principal of plaintiff K-Sher Corp. K-Sher was the owner of a parcel of real

KEFALAS v VALIOTIS**Index No. 603816/13**

property located at 14 Brooklyn Avenue in Valley Stream, which was improved with a commercial office building.

Defendant Efstathios Valiotis is the principal of defendant Sun Valley Towers, LLC. Sun Valley is the owner of adjoining real property located at 363-381 Rockaway Avenue in Valley Stream, which was in need of renovation.

On December 2, 2005, Kefalas and Valiotis entered into a letter agreement (Dkt no. 75). The agreement provides that Kefalas would attempt to obtain approval from the Village of Valley Stream for the development of the "Sunrise and Rockaway Ave." property into a mixed-use (residential and commercial) building with underground parking. Expenses and profits were to be shared on a 50-50 basis. Valiotis agreed not to sell the Rockaway property to a third party for at least one year from the date of the agreement.

On December 4, 2008, Kefalas and Valiotis entered into a construction agreement (Dkt no. 76). The agreement recites that the Brooklyn Avenue property was valued at \$3 million, less a mortgage of \$800,000. The agreement recites that the Rockaway Avenue property was valued at \$3 million, less a mortgage of \$870,000. The agreement provides that the properties would be transferred to a new limited liability company which would be held on a 50-50 basis. The members were to be responsible for the mortgages on their properties. Valiotis was to obtain a construction loan to cover at least 65% of the construction cost. The proceeds of the loan would be used first to repay the existing mortgages. Kefalas alleges that Valiotis failed to pursue the construction loan in good faith.

On July 15, 2010, the Empire State Development Corporation granted the Village of Valley Stream \$2,500,000 for demolition and reconstruction of the "Sun Valley Towers" project. The project's locations included "16(14) Brooklyn Avenue" and "381 Rockaway Avenue." The project was to be complete by December 2011. The grant was contingent upon the holding of a public hearing and the approval of the Public Authorities Control Board (Dkt no. 96).

Kefalas alleges that in October 2010 Valiotis commenced the demolition of the vacant buildings on his property. Kefalas alleges that in the course of the demolition Valiotis damaged the roof of the Brooklyn Avenue property and deposited asbestos and debris on the property.

On January 26, 2011, the Village entered into a Grant Disbursement Agreement with the Empire State Development Corporation (Dkt no. 97). The amount of the grant was \$2,500,000, and the expiration date was December 31, 2016. Exhibit E to the Grant Disbursement Agreement provides for an "initial disbursement" of \$750,000 (referred to as

KEFALAS v VALIOTIS**Index No. 603816/13**

“one third of the grant”), upon documentation of eligible project costs totaling \$5,000,000 (Dkt 96). Exhibit E provides for a second disbursement of \$1,750,000 (referred to as “two-thirds of the grant”), upon documentation of an additional \$11,286,000 in eligible project costs (Id).

On March 23, 2012, Kefalas and Valiotis entered into an agreement whereby K-Sher agreed to sell the Brooklyn Avenue property to Valiotis’ company, 363 Rockaway Associates LLC, for \$2,600,000 (Dkt no. 92). The agreement provides that, in addition to the purchase price, buyer will pay the seller one-half of the grant received from the Empire State Development Corporation, provided the project receives a total grant consisting of an initial disbursement of \$750,000 and a second disbursement of \$1,750,000. In the event that the project is eligible only for the initial disbursement, the buyer shall pay a sum equal to two-thirds of the initial disbursement. However, the additional purchase price was not to exceed \$1,250,000.

The March 23 agreement provides that the closing was to be on March 23, 2012 and time was of the essence. The agreement contains a provision that in the event of “any litigation” the “successful party” shall be entitled to reimbursement of legal expenses. The closing of the Brooklyn Avenue transaction occurred on March 24, 2012. After buying out Kefalas, Valiotis completed construction of the project (Dkt no. 29 at ¶ 11)

On June 26, 2012, Valiotis obtained final site development approval from the Village of Valley Stream for the project. On October 2, 2013, Sun Valley Towers, LLC received a check from the Village of Valley Stream in the amount of \$712,500 (Dkt no. 101). According to defendants, the check represented the \$750,000 initial disbursement to the Village, minus retainage held by the Village of \$37,500. On November 5, 2013, K-Sher demanded one-half of the grant (Dkt no. 162).

This action was commenced on December 20, 2013. In the first cause of action, plaintiffs assert a claim for fraud. In the second cause of action, plaintiffs assert a claim for breach of fiduciary duty. In the third cause of action, plaintiffs assert a claim for negligence. In the fourth cause of action, plaintiffs assert claims for breach of the December 2005 letter agreement and the December 2008 construction agreement. Read broadly, the fourth cause of action also asserts a claim for breach of the March 2012 purchase agreement by failing to pay plaintiffs their share of the grant disbursements.

In the fifth cause of action, plaintiffs assert a claim for unjust enrichment. In the sixth cause of action, plaintiffs assert a claim against defendant John Mavroudis, who is Valiotis’ project manager, for aiding and abetting Valiotis’ fraud. In the seventh cause of action,

KEFALAS v VALIOTIS**Index No. 603816/13**

plaintiffs assert a claim against defendant Mavroudis for aiding and abetting Valiotis' breach of fiduciary duty. In the eighth cause of action, plaintiffs seek a declaratory judgment as to their rights deriving from the project.

On December 30, 2016, while motions for summary judgment were pending, defendants tendered to plaintiffs a check in the amount of \$392,433.33, on account of plaintiffs' claimed proportionate share of the grant money (Dkt no. 212, e-filed September 22, 2017). The parties stipulated that the payment was without prejudice to the parties' respective claims and defenses (Dkt no. 233, e-filed November 3, 2017).

By order dated January 23, 2017, the court granted defendants summary judgment dismissing the complaint, except as to plaintiffs' fourth and eighth causes of action. The court determined that the 2012 purchase agreement was a substituted agreement which discharged both the 2005 letter agreement and the 2008 construction agreement. (**Denburg v Parker Chapin**, 82 NY2d 375, 383 [1993]).

The court determined that plaintiffs were entitled to two-thirds of the \$712,500 grant, or \$475,000. Thus, plaintiffs' cross-motion for summary judgment was **granted** to the extent of declaring that plaintiff was entitled to \$475,000, with interest from January 1, 2017. The matter was referred to the Calendar Control Part (CCP), for a hearing on the issue of attorney fees, which was however not conducted.

On January 31, 2017, defendants notified plaintiffs that the deadline to apply for the second grant disbursement had been extended to January 31, 2017, and an application for the second disbursement was pending (Dkt no. 229, e-filed November 3, 2017). It is unclear why defendants did not withdraw their summary judgment motion once the deadline to apply for the second disbursement was extended.

Nevertheless, by notice of motion dated September 22, 2017, defendants move for leave to renew and reargue their summary judgment motion. The motion is based upon the "new facts" that on May 31, 2017, Sun Valley Towers received a second grant disbursement from the Village of Valley Stream in the amount of \$1,737,500 (\$1,750,000, plus \$37,500 retainage from the initial disbursement, minus the Village's 2% administrative fee of \$50,000).

Additionally, on June 26, 2017 defendants tendered to plaintiffs a check in the amount of \$714,866.67 (Dkt no. 28, e-filed September 22, 2017). This figure is based upon an accounting provided by defendants, deducting various expenses, and awarding plaintiffs 50% of the net proceeds of the initial and final disbursements (Dkt no. 207). The expenses include legal fees of \$113,250 paid to Michael Sullivan Esq., and \$10,600 paid to expediter

KEFALAS v VALIOTIS**Index No. 603816/13**

Michael Oddo, both in connection with the initial disbursement. With regard to the second disbursement, defendants deducted a \$20,000 processing fee to Alma Realty Corp., a legal fee to Michael Sullivan of \$87,500, and a \$4,050 fee to expediter Michael Oddo. Based upon the two payments and the accounting, defendants request that plaintiffs' fourth and eighth causes of action be dismissed and plaintiffs' request for attorney fees be denied.

By notice of cross-motion dated November 3, 2017, plaintiffs move for leave to renew and reargue their summary judgment motion. Plaintiffs object to the expense deductions in defendants' accounting on the ground that defendants knew of these expenses at the time of the prior motions. Plaintiffs object to the \$20,000 processing fee to Alma Realty on the ground that it is controlled by defendant Valiotis. The March 2012 purchase agreement defines "project costs" as specifically including "consultant fees, including any amounts due Michael T. Sullivan, Esq." The agreement further provides that buyer releases seller from such expenses and agrees to indemnify and hold seller harmless from such expenses. Plaintiffs argue that, based upon the release and indemnity provision, defendants may not deduct legal fees paid to Sullivan. Upon renewal, plaintiffs request additional consideration of \$1,225,000, with interest calculated from various dates starting May 31, 2017.

A court will not find a duty to indemnify, unless the contract manifests a clear and unmistakable intent to indemnify for particular liabilities (**Millennium Holdings v Glidden Co.**, 146 AD3d 539, 545 [1st Dept. 2017]). The indemnity obligation will be strictly construed, and additional obligations may not be imposed beyond the explicit and unambiguous terms of the agreement.

Reading the indemnity for consultant expenses provision strictly, the court determines that it was intended to apply only if no grant disbursements were received. Since grant disbursements were received, Sullivan's legal fee is a proper expense.

A fiduciary shall not engage in self-dealing (**Birnbaum v Birnbaum**, 117 AD2d 409, 417 [4th Dept. 1986]). When a fiduciary engages in self-dealing, his actions will be "scrutinized most carefully" (Id). The transaction will be voidable by the beneficiaries, unless they have consented after disclosure of the material facts (Id).

Even after buying out Kefalas' interest, Valiotis was under a fiduciary duty to Kefalas with regard to the grant disbursements. Because Alma Realty is under defendants' control, the use of Alma in the "processing" of the transaction was self-dealing on the part of defendant Valiotis. The involvement of Alma Realty has not been sufficiently explained. Thus, the court disallows the \$20,000 processing fee expense to Alma Realty. However, because there is no evidence that the fees for expediter Michael Oddo are improper, they are allowed by the court.

KEFALAS v VALIOTIS

Index No. 603816/13

Accordingly, defendants' and plaintiffs' motions for leave to renew and reargue their motions for summary judgment are **granted**. Upon renewal, plaintiffs' motion for summary judgment is **granted** to the extent of declaring that plaintiffs are entitled to all sums previously paid, as their proportionate share of the grant disbursements, as well as 50% of the \$20,000 processing fee to Alma Realty, or \$10,000. Since plaintiffs' claim is in the nature of an equitable claim for an accounting, interest is not awarded.

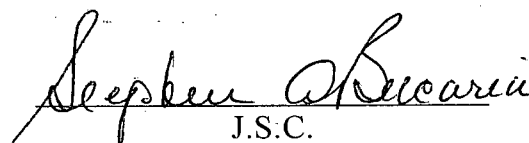
The factors to be considered in determining whether a legal fee is reasonable may include the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly; the likelihood that other employment will be precluded; the fee customarily charged in the locality; the amount involved and the results obtained; time limitations imposed by the client or the circumstances; the nature and length of the professional relationship; the experience, reputation, and ability of the lawyer; and whether the fee is fixed or contingent (**Matter of Martha O.J.**, 22 AD3d 756 [2d Dept. 2005]; Professional Conduct Rule 1.5).

While defendants moved for summary judgment dismissing all of plaintiffs' causes of action "with prejudice," defendants did not repudiate their obligation to account for the grant proceeds once they were determined. In his affidavit in support of defendants' original summary judgment motion, Valiotis argued only that he was not required to advance any portion of the grant money to Kefalas, until the total amount of grant monies which the project received had been "fully and finally determined" (Dlt no. 29 at ¶ 84). Valiotis acknowledged that Kefalas would be entitled to his share of the grant money when the second disbursement was made; or the deadline for applying for the second disbursement expired (Id). If only the initial disbursement were received, Kefalas would be entitled to 2/3 of the grant. If the second disbursement was also received, Kefalas would be entitled to 50% of the total grant monies, less properly charged expenses (Id). Thus, it could be argued that the "result obtained" was simply the disallowance of the Alma processing fee, as defendants conceded that plaintiffs were entitled to their proportionate share of the grant money. Nevertheless, in view of all the circumstances, including the amount involved, the novelty of the questions presented, and the reputation and ability of counsel, plaintiffs are awarded an attorney fee of \$50,000.

Settle judgment on notice.

So ordered.

Date: FEB 13 2018


J.S.C.

XXX

ENTERED

FEB 16 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE