

PH-105 Realty Corp. v Elayaan
2019 NY Slip Op 31060(U)
April 9, 2019
Supreme Court, New York County
Docket Number: 656160/2016
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 656160/2016

PH-105 REALTY CORP, 12 WHITWELL PLACE, LLC,181 EDGEWATER LLC, FARHOUD JABER,

MOTION DATE 10/31/2018

Plaintiff,

MOTION SEQ. NO. 011

- v -

MUNZER ELAYAAN, PH-FULTON CORP., JOHN AND JANE DOES 1-20, XYZ CORPORATION/LLCS 1-20,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374

were read on this motion to/for

SUMMARY JUDGMENT

The Aboushi Law Firm, PLLC (Aymen A. Aboushi, Esq.), for plaintiffs PH 105 Realty Corp, 12 Whitwell Realty Corp., 181 Edgewater LLC and Farhoud Jaber.

McKool Smith, PC (James Smith, Esq., Virginia I. Weber, Esq., Elisa Lee, Esq.), for defendants Munzer Elayaan and PH-Fulton Corp.

Gerald Lebovits, J.

This case involves a dispute between two parties over the ownership of closely held corporations and the underlying real estate purchased by these entities.

Plaintiffs Farhoud Jaber, 181 Edgewater LLC, and PH-105 Realty Corp. (collectively, Jaber) asserts that Jaber personally holds a 75% interest in plaintiff 181 Edgewater LLC, which holds title to a waterfront property located at 181 Edgewater Street in Staten Island. Jaber claims that defendant Munzer Elayaan improperly stripped him of that 75% ownership interest, and was thereby unjustly enriched. Jaber also asserts that he owns a penthouse apartment located at 111 Fulton Street in Manhattan. According to Jaber, title to the penthouse apartment was previously held by plaintiff PH-105 Realty Corp., owned by Jaber. He claims that Elayaan improperly transferred title from PH-105 to defendant PH-Fulton Corp., unjustly enriching Elayaan.

Jaber seeks a declaratory judgment that he owns 75% of 181 Edgewater LLC; or, in the alternative, compensation for the alleged deprivation of his ownership rights. Jaber also seeks a declaratory judgment (or alternatively compensation) for his alleged loss of title to the 111 Fulton apartment.

Jaber now moves for summary judgment under CPLR 3212 on his claim for a declaratory judgment regarding 181 Edgewater LLC or in the alternative compensatory damages for unjust enrichment. Elayaan and PH-Fulton Corp. (collectively, Elayaan) cross-moves for summary judgment on Jaber's claims regarding 181 Edgewater LLC. Elayaan also cross-moves for summary judgment on Jaber's declaratory judgment and unjust enrichment claim regarding PH-105 and the underlying penthouse apartment.

DISCUSSION

The moving party is entitled to summary judgment under CPLR 3212 if the court finds that the movant has sufficiently established his cause of action or defense to warrant judgment in his favor as a matter of law. (*See* CPLR 3212 [b].)

A. The Parties' Motions for Summary Judgment Regarding Jaber's 181 Edgewater LLC Claims.

The court holds that Elayaan has established as a matter of law that Jaber lacks a 75% ownership interest in 181 Edgewater LLC (and thus in the waterfront property owned by the LLC). The court therefore grants Elayaan's cross-motion for summary judgment on Jaber's declaratory judgment claim regarding 181 Edgewater. Jaber's motion for summary judgment is denied as academic.

Absent an ownership interest in 181 Edgewater, Jaber cannot have been injured by a putative deprivation of that interest. The court therefore also grants Elayaan's cross-motion for summary judgment on Jaber's unjust enrichment claim regarding 181 Edgewater.

1. The motions for summary judgment regarding Jaber's declaratory judgment claim.

Elayaan has met his initial burden in moving for summary judgment to come forward with evidence that Jaber is not the 75% owner of 181 Edgewater LLC. This evidence includes the fact that the 2004 operating agreement creating 181 Edgewater does not list Jaber as a member, that Jaber has made no capital contributions to the LLC or contributed to the LLC's business expenses such as taxes and insurance, and that Jaber did not provide funds toward the purchase of the waterfront property owned by 181 Edgewater or pay the property's carrying costs.

In opposing summary judgment, Jaber has failed to provide evidence that he ever gave consideration for any shares of 181 Edgewater (let alone 75% of the shares), or evidence that might indicate when such a supposed share purchase occurred. (*See LaRosa v. Arbusman*, 74 AD3d 601, 603 [1st Dept 2010] ["To obtain shareholder rights, a shareholder must provide some kind of consideration"]; *Matter of Pappas*, 22 Misc.3d 1113(A) [Sup Ct, Kings County 2009, Battaglia, J.] ["In the first instance... a court should look for evidence that consideration has been paid for a stock interest"].)

Jaber offers the affidavit of his brother Juber, who states in conclusory terms that “[m]y family and I funded the purchase of Edgewater by providing funds and services to Defendant Elayaan,” and that Juber gave consideration for Farhoud’s interest in 181 Edgewater in the form of “services and mon[ie]s” provided “to the Elayaan family” “[t]hroughout the years.” Juber gives little detail and no documentation regarding these alleged services and funds, however. And bald, conclusory allegations, even if believable, are insufficient to defeat a summary judgment motion. (*S. J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, 34 NY2d 338, 341-342 [1974]); accord *Samuel B. Hamilton, et al. v. Charles Touseull, etc., et al.*, 48 AD3d 520 [2008].)

Jaber’s submission of an affidavit of Vadem Brodsky is similarly unavailing. The affidavit conclusorily states that Jaber holds an ownership interest in 181 Edgewater LLC and has held that interest since 181 Edgewater was formed. But the affidavit gives no details regarding these statements — not even the extent of Jaber’s putative ownership interest — and lacks any supporting documentation.¹

Jaber also strenuously argues that Elayaan is estopped from arguing that Jaber lacks a 75% ownership interest in 181 Edgewater because for tax years 2010-2014 Elayaan signed tax returns for 181 Edgewater that listed Jaber as a 75% owner of the LLC, entitled to 75% of its profits and responsible for 75% of its losses. This court disagrees.

As this court has previously noted (*see* NYSCEF No. 84, at 3), the doctrine of tax estoppel does not extend as far as Jaber would have it. The First Department and other courts instead have made clear that the characterization of ownership of a company on tax returns is not necessarily dispositive on the question of ownership in other contexts. (*See Bhanji v. Baluch*, 99 AD3d 587, 587-88 [1st Dept. 2012]); *Matter of Sunburst Associates, Inc.*, 106 AD3d 1224, 1226-27 [3d Dept 2013]; *Friedman v Markowits*, Index No. 601153/2015, 2016 NY Slip Op 32804(U), at *3 [Sup Ct Nassau County May 25, 2016]; *Noryb Ventures, Inc. v Mankovsky*, Index No. 650378/2009, 2015 NY Slip Op 50715(U), at *7-8 [Sup Ct, New York County May 7, 2015].)

In any event, “the application of such estoppel” requires a “highly fact-specific” inquiry. *New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, Index No. 49320/2001, 2012 N.Y. Slip Op. 50595(U), at *7 [Sup Ct New York County Feb. 22, 2012].) And on the particular facts presented here, Elayaan would not be estopped from contesting Jaber’s ownership.

The logic of this form of estoppel is that a party may not “receiv[e] the benefits of a transaction or statute, and then subsequently tak[e] an inconsistent position to avoid the corresponding effects.” (*Zemel v Horowitz*, Index No. 601703/2003, 2006 NY Slip Op 50276(U), at *5 [Sup Ct New York County March 2, 2006].) The tax returns on which Jaber relies were those of 181 Edgewater LLC. Jaber has not explained how having listed him as an owner of 181 Edgewater on the LLC’s 2010-2014 tax returns affected the taxes of the LLC or Elayaan — let alone conferred a tax advantage on either party. Absent evidence of such an effect, Elayaan

¹ Jaber also proffers a 2017 affidavit executed in another action by Mazen Abdelbyem, then a managing member of 181 Edgewater LLC. This affidavit does not appear to address Jaber’s alleged ownership interest in 181 Edgewater at all.

should not be estopped from contesting Jaber's ownership of the LLC in the distinct context of the present litigation.

To be sure, the fact that Jaber was described as a 75% owner of 181 Edgewater on several years of the LLC's tax returns is not meaningless. But the probative value of that description is undermined by the fact that Jaber was *not* listed as an owner of the LLC from its formation in 2005 through tax year 2009, and that Jaber has provided no explanation or evidence for why he began appearing on the LLC's returns only in tax year 2010. Nor, for that matter, has Jaber provided any evidence to show that the removal of his name from 181 Edgewater's tax returns in tax year 2014 was connected to the *loss* of any ownership interest he held in the LLC. And Jaber has not provided copies of his own tax returns for in camera review to corroborate his claims of ownership. (*See Bhanji*, 99 AD3d at 588.)

In these circumstances, that the LLC's tax returns from 2010 to 2014 listed Jaber as having a 75% ownership interest in the LLC are not enough to create a genuine dispute of fact.²

Elayaan's cross-motion for summary judgment against plaintiff's declaratory judgment claim regarding his alleged ownership interest in 181 Edgewater LLC is granted. Jaber's own motion for summary judgment on his declaratory judgment claim is denied as academic.

2. The motions for summary judgment regarding Jaber's unjust enrichment claim.

Jaber and Elayaan have also each sought summary judgment on Jaber's unjust enrichment claim regarding 181 Edgewater LLC and the underlying waterfront property. As with the declaratory judgment claim, Elayaan's cross-motion for summary judgment is granted and Jaber's motion for summary judgment is accordingly denied as academic.

To recover on a claim for unjust enrichment, a party must show (1) that the other party was enriched, (2) at the moving party's expense, and (3) it is against equity and good conscience to permit the other party to retain what is sought to be recovered. (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182-83 [2011].) Notably, a claim for unjust enrichment cannot survive when the alleged benefit bestowed on the defendant was not at the expense of the plaintiff. (*See Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 121 [1st Dept 1998].) Unsupported conclusory allegations that the defendant was unjustly enriched at the expense of the plaintiff are not sufficient. (*See Mandarin*, 16 NY3d at 183.)

Jaber asserts that Elayaan was unjustly enriched at Jaber's expense when Elayaan (supposedly) stripped Jaber of his 75% ownership interest in 181 Edgewater, thus enriching Elayaan improperly. But as discussed above, Jaber has failed to establish a factual dispute even as to whether he had that 75% ownership interest at all. Jaber thus cannot demonstrate that a

² Similarly, the mere fact that Elayaan acknowledged in a deposition that the 181 Edgewater's tax returns had listed Jaber as having an ownership interest in the LLC, and that Elayaan had later stopped listing Jaber as an owner of the LLC, does not create a genuine dispute of fact either.

factual dispute exists as to whether Elayaan unjustly enriched himself by taking the 75% ownership interest.

In any event, even if one were to conclude that Elayaan had unjustly enriched himself by taking a 75% ownership interest in 181 Edgewater LLC, Jaber has failed to demonstrate that Elayaan was unjustly enriched at Jaber's expense, as Jaber's claim requires. Counsel for Elayaan asked Jaber specifically at his deposition how he had been harmed "by his alleged removal as a managing member of 181 Edgewater LLC." Jaber's only response was that his *brother Juber*, not himself, had been harmed. But Juber Jaber is not a party to the action. And plaintiff Farhoud Jaber may not assert an unjust enrichment claim here solely on his brother's behalf. (*See Aymes v Gateway Demolition, Inc.*, 30 AD3d 196, 197 [1st Dept 2006]; *Lefkowitz v Kay, Scholer, Fierman, Hays & Handler*, 271 AD2d 576, 577-58 [2d Dept 2000].)

B. Elayaan's Cross-Motion for Summary Judgment Regarding Jaber's PH-105 Claims.

Elayaan cross-moves for summary judgment on Jaber's declaratory judgment and unjust enrichment claims regarding his alleged ownership interest in PH-105 and the underlying penthouse apartment. The cross-motion is granted.

Elayaan has submitted evidence that he is an owner of PH-105 and the penthouse apartment at 111 Fulton Street — including stock certificates in PH-105, minutes from a meeting of the Board of Directors for PH-105 that describe him as an owner of the corporation, and receipts and other documents showing that he has paid property taxes and carrying costs of the penthouse. (*See Matter of Parveen*, 259 AD2d 389, 390 [1st Dept 1999]; *Hunt v Hunt*, 222 AD2d 759, 761 [3d Dept 1995]; *see also Matter of Estate of Purnell v LH Radiologists, P.C.*, 90 NY2d 524, 532 [1997].)

It is undisputed that Jaber, on the other hand, owns no shares of PH-105, does not know who *does* own PH-105, does not know where the funds to purchase the penthouse apartment came from, and does not pay taxes and other costs related to the penthouse.

At most, Jaber has provided evidence that he acted on behalf of PH-105 at the closing of PH-105's purchase of the penthouse. But that evidence alone does not create a dispute of fact as to whether Jaber *owns* an interest either in PH-105 or in the penthouse.

Jaber also relies on the affidavit of his brother Juber, which states in general terms that Juber had provided funds and services for the purchase and renovation of the penthouse apartment, and that Elayaan and his family had agreed that Farhoud Jaber would have an ownership interest in the penthouse in consideration for that money and work. But as with 181 Edgewater, the portion of Juber's affidavit dealing with PH-105 supplies no details or evidence to support its statements. And unsupported conclusory statements in an affidavit are not sufficient to create a dispute of fact warranting trial. (*See S. J. Capelin Assocs.*, 34 NY2d at 341-42; *Hamilton* 48 AD3d at 521.)

Since Jaber has not provided evidence creating a dispute of fact regarding the ownership of PH-105 or the penthouse apartment at 111 Fulton Street, Elayaan's cross-motion for summary judgment on Jaber's declaratory judgment claim regarding PH-105 is granted.

With regard to Jaber's claim that Elayaan was unjustly enriched by depriving Jaber of an ownership interest in the penthouse apartment, Jaber has failed to show even that he had such an interest at all. In any event, Jaber has failed to present any evidence that Elayaan was unjustly enriched at Jaber's expense. Indeed, when counsel for Elayaan asked Jaber at his deposition how he was harmed by "the penthouse being transferred from PH 105 to PH Fulton," Jaber said, "I don't have an answer." Elayaan's cross-motion for summary judgment on Jaber's unjust enrichment claim regarding PH-105 (and the underlying penthouse apartment) therefore also is granted.


Accordingly, it is hereby

ORDERED that defendants' cross-motion for summary judgment on the remaining causes of action of plaintiffs' complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' motion for summary judgment is denied as academic; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

4/9/2019
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE