

**Jones v Gottlieb**

2019 NY Slip Op 31196(U)

April 29, 2019

Supreme Court, New York County

Docket Number: 652849/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 652849/2016

MICHAEL JONES., both individually and derivatively as a member of 771 ST. NICHOLAS AVENUE LLC,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 009

- v -

ADRIAN GOTTLIEB a/k/a ARTY GOTTLIEB, both as EXECUTOR OF THE ESTATE OF MARTIN GOTTLIEB a/k/a MARTIN O. GOTTLIEB, and individually, DOROTHY GOTTLIEB, NACRA LLC, STUART SHAW, JOHN DOE, JANE DOE,

DECISION AND ORDER

Defendant.

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ARTY GOTTLIEB, as EXECUTOR OF THE ESTATE OF MARTIN GOTTLIEB,

Third-Party Plaintiff,

-v-

MICHAEL E. JONES, LEXINGTON AVENUE PLASTIC SURGEONS, CATHLEEN TRIGG-JONES,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 009) 168, 169, 170, 171, 172, 173, 174, 175, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 216, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

The motion for a preliminary injunction by plaintiff to take immediate control of the operations of 771 St. Nicholas Avenue LLC (the "LLC") is denied. The cross-motion to dismiss by the defendants is denied.

Background

This real estate dispute arises out of a property located at 771 St. Nicholas Avenue in Manhattan. Plaintiff and Dr. Martin Gottlieb purchased the building with the intention to convert

it into a medical facility. In November 2007, plaintiff and Dr. Gottlieb transferred their ownership interests to the LLC. At the time of the transfer, the property had a \$750,000 mortgage. In 2009, plaintiff alleges that he had a dispute with Dr. Gottlieb and both refused to fund the LLC's mortgage payments which caused the property fall into arrears. Eventually, the mortgagee filed a foreclosure action.

Plaintiff contends that he reached an agreement with Dr. Gottlieb to resolve their differences, but Dr. Gottlieb never followed through and deposited the money he was supposed to contribute into a trust account held by his attorney, defendant Stuart Shaw. In 2014, Dr. Gottlieb passed away. Defendants claim that Dr. Gottlieb contributed \$750,000 to acquire the property while Dr. Jones put in \$250,000. Defendants claim that building turned out to be unsuitable for a surgical center because it was too narrow, and that Dr. Gottlieb eventually lost faith in plaintiff over plaintiff's management decisions with the LLC.

Plaintiff alleges that he discovered in March 2015 that the note and the judgment of foreclosure and sale on the property had been assigned to Nautilus Capital, LLC ("Nautilus"). Plaintiff asked for a pay-off letter from Nautilus only to learn that Nautilus had assigned the note and the mortgage to defendant Nacra LLC ("Nacra"). Nacra is allegedly an entity in which defendant Adrian Gottlieb (Martin Gottlieb's sole heir, twin brother and executor of Martin's estate) is a member or stakeholder.

Plaintiff claims that Adrian Gottlieb ignored his fiduciary responsibility to the LLC by purchasing the mortgage note through Nacra. Plaintiff claims that this purchase was completed at a discount, which resulted in a profit of thousands of dollars for Adrian. Plaintiff insists that Adrian has usurped control over the LLC and the premises.

### Preliminary Injunction

As an initial matter, the Court observes that plaintiff already moved for a preliminary injunction for essentially the same relief under Motion Sequence 007. The Court denied that motion and asserted that plaintiff was seeking the ultimate relief sought in the litigation (NSYCEF Doc. No. 149 at 3). The Court added that allowing plaintiff to take control over the LLC would not “maintain the status quo; instead it seeks to drastically change the current circumstances and have this Court require defendants to take certain actions” (*id.* at 5).

Plaintiff claims that there are new facts that support this motion despite the fact that it seeks similar relief. Plaintiff contends that he spoke with counsel for defendants in February 2019 and learned that defendant Stuart Shaw had received a \$400,000 check from an insurance company covering the LLC and that Shaw returned the check because he didn’t find it sufficient to cover the settlement amount. Plaintiff expresses dismay that Shaw is still involved in managing the property given that he is a party defendant here.

Plaintiff claims that Shaw has breached a fiduciary duty to the LLC by retuning the check and defendants should be restrained from negotiating the insurance proceeds issue behind plaintiff’s back.

Defendants claim that Shaw has a legitimate reason for returning the check: that the check does not fully compensate the insured for the fire damage to the building and the insurance policy is in Nacra’s name rather than for the benefit of the LLC.

While the Court is troubled by plaintiff’s accusation, plaintiff has not met its prima facie burden for a preliminary injunction. The wrong it complains about (returning or rejecting insurance proceeds and negotiating those proceeds without plaintiff) is compensable by money damages and, therefore is not a basis for a preliminary injunction (*Chiagkouris v 201 West 16*

*Owners Corp.*, 150 AD3d 442, 54 NYS3d 5 [1st Dept 2017]). And defendants have offered a reasonable justification for returning the check, although the Court makes no credibility finding as to whether it believes defendants' assertions.

### **Defendants' Cross-Motion to Dismiss**

"[W]e first assume as true the facts alleged in the amended complaint because, on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The Court may consider affidavits submitted by plaintiffs to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one" (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 327, 45 NYS3d 276 [2016] [internal quotations and citations omitted]).

Defendants cross-move to dismiss the claims against Adrian Gottlieb, Dorothy Gottlieb, Stuart Shaw and Nacra. Defendants claims that the records it received from Nautilus show that Dr. Jones did not show up for the closing with Nautilus in May 2015 after Dr. Jones had agreed to pay approximately \$938,000 for the judgment of foreclosure, note and mortgage (hereinafter, "Judgment") held by Nautilus. Defendants contend that on that same day, Nautilus reached out to Mr. Shaw to see if his client had an interest in buying the Judgment and Nacra purportedly paid \$985,000 for the Judgment on May 20, 2015. Defendants conclude that the records show plaintiff is pursuing a false theory that the individual defendants usurped a corporate opportunity to obtain the Judgment under the face value. Defendants question how plaintiff can maintain a cause of action for usurping a corporate opportunity when Nacra paid well over face value for the Judgment held by Nautilus.

In opposition, plaintiff contends *inter alia*, that the price of the Judgment is immaterial to whether a corporate opportunity was usurped. Plaintiff argues that he was seeking to purchase the Judgment for the LLC while defendants purchased the Judgment for Nacra. Plaintiff also claims that the alleged improper use of monies to repay the LLC's mortgage is part of his claims against the individual defendants and this has nothing to do with the price allegedly paid for the Judgment.

As an initial matter, in a previous decision, the Court denied defendants' cross-motion to dismiss "with leave to bring another motion for that relief after the conclusion of discovery. The fact is that defendants have refused to cooperate and have failed to share any meaningful information with the plaintiffs. It may be that claims against certain defendants should be dismissed, but documents and depositions are necessary and appropriate before such a decision can be made" (NYSCEF Doc. No. 163). Regardless of whether discovery is actually complete, the Court will consider the cross-motion to dismiss on the merits because there has been substantial discovery conducted in this matter, including numerous depositions.

"The corporate opportunity doctrine provides that a corporate fiduciary may not, without consent, divert and exploit for his own benefit any opportunity that should be deemed an asset of the corporation" (*Commodities Research Unit (Holdings) Ltd. v Chemical Week Assocs.*, 174 AD2d 476 [1st Dept 1991]).

The Court denies the cross-motion to dismiss because, as plaintiff argues, the fact that the Judgment was purchased for more than face value is besides the point. Plaintiff submits an affidavit in which he claims that he told Shaw about the intended purchase of the Judgment from Nautilus by the LLC (NYSCEF Doc. No. 220, ¶ 49). Plaintiff asserts that Shaw did not object on behalf of the defendants and plaintiff found out five days later that Nacra (the entity owned by

the Gottliebs) acquired the Judgment (*id.* ¶¶ 50-51). Plaintiff argues that defendants used this Judgment to oust him from managing the LLC (*id.* ¶ 59).

Clearly, there are issues of fact that require the Court to deny the cross-motion. The fact that the Judgment was purchased for \$985,000 (above the judgment of foreclosure amount, which purportedly totaled about \$980,000) redounds in defendants' favor, but it is not dispositive. The Court cannot ignore that another entity purportedly controlled by the individual defendants swooped in, allegedly behind plaintiff's back, to purchase the Judgment instead of helping the LLC in which plaintiff and Dr. Gottlieb's estate shared an interest. On a motion to dismiss, plaintiff has stated cognizable causes of action against the individual defendants.

**Summary**

In this case, there are numerous accusations lodged by both sides. The reply by defendants illustrates this point (*see* NYSCEF Doc. No. 245). Defendants make many claims about plaintiff's ability to pay off the judgment amount and plaintiff's allegedly unscrupulous acts over the last decade in connection with this property. These are all disputed facts that cannot form the basis of a successful motion to dismiss.

Accordingly, it is hereby

ORDERED that the motion for a preliminary injunction by plaintiff is denied and the cross-motion to dismiss by the individual defendants is denied.

Next Conference: July 16, 2019 @ 2:15 p.m.

4.29.19  
DATE

ARLENE P. BLUTH, J.S.C.

**HON. ARLENE P. BLUTH**

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE