

East 51st St. Dev. Co., LLC v HFZ E. 51, LLC

2019 NY Slip Op 32084(U)

July 17, 2019

Supreme Court, New York County

Docket Number: 652135/2016

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

INDEX NO. 652135/2016

EAST 51ST STREET DEVELOPMENT COMPANY, LLC, 968
KINGSMEN, LLC, and JAMES KENNELLEY,

MOTION DATE 05/16/2017

Plaintiffs,

MOTION SEQ. NO. 002 004

- v -

HFZ EAST 51, LLC, HFZ CAPITAL GROUP, LLC, 51ST STREET
MAIN LOT OWNER, LLC, HFZ CORNER LOT OWNER, LLC, 51ST
STREET CORNER LOT OWNER, LLC, ZIEL FELDMAN, JOHN
DOES 1-10, and XYZ COMPANIES 1-10,

DECISION AND ORDER

Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17,
18, 19, 26, 27, 28, 29, 41, 42

were read on this motion to/for DISMISS

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss of defendants is granted to the extent that the second, third and fourth causes of action as against defendant Ziel Feldman; the second cause of action as against defendants HFZ East 51, LLC, 51st Street Main Lot Owner, LLC and 51st Street Corner Lot Owner; the third cause of action as against defendants HFZ Capital Group, LLC, 51st Street Main Lot Owner, LLC, HFZ Corner Lot Owner LLC, and 51st Street Corner Lot Owner, LLC; the fourth cause of action as against defendants HFZ East 51, LLC, and HFZ Capital Group, LLC; and the fifth and sixth causes of action as against defendants HFZ East 51st St, LLC, HFZ Capital Group, LLC, 51st Street Main Street Owner, LLC, HFZ Corner

Lot Owner LLC, and 51st Street Corner Lot Owner, LLC, are dismissed; and it is further

ORDERED that such claims are severed, and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Ziel Feldman dismissing the claims against him in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of cost; and it is further;

ORDERED that the remaining defendants are directed to serve their answer(s) to the verified first amended complaint within 20 days after entry of this order; and it is further

ORDERED that the motion to vacate the CPLR 3214 stay (Motion Sequence Number 004) is denied as moot; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 331, 60 Centre Street, New York, New York, on August 13, 2019, at 2:30 PM.

DECISION

Notwithstanding that defendant Ziel Feldman was not a signatory to the Cooperation and Deed in Lieu of Foreclosure Agreement (Cooperative Agreement), such Cooperation Agreement bars the unjust enrichment (second) cause of action against such individual defendant. Vitale v Steinberg, 307 AD2d 107 (1st Dept. 2003).

This court also agrees that the complaint insufficiently pleads a fraudulent conveyance claim (fourth cause of action) as against individual defendant Ziel Feldman, as there are only allegations that such defendant acted in his capacity as owner or manager of the corporate entities in question and there are no allegations that such individual defendant exercised complete domination and control over such corporate entities or that he abused the privilege of doing business in the corporate form to perpetrate such fraudulent transfer. See D'Mel & Associates v Athco, Inc., 105 AD3d 451, 452 (1st Dept. 2013).

With respect to HFZ East, the second cause of action for unjust enrichment must be dismissed because the "existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." Clark-Fitzpatrick, Inc. v Long Is. R. Co., 70 NY2d 382, 388 (1987); Loreley Financing (Jersey) No. 3 Ltd. v Citigroup Global Markets, Inc., 110 AD3d 136, 148 (1st Dept. 2014).

As to the other defendants, the Court has held that "in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. . . [W]hile a plaintiff need not be in privity

with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not 'too attenuated.'" Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511, 516 (2012) (citations and internal quotation marks omitted). In Paragraph 21 of the Complaint, it is alleged that pursuant to the Agreement, "the Corner Lot was conveyed to Defendant HFZ Corner, the entity designated by Defendant HFZ 51, to Defendant HFZ Capital, to receive the conveyance." Thus the allegation is that as part of their performance under the Agreement, plaintiffs were required at the direction of defendant and contract signatory HFZ East, to cause property to be transferred to non-signatory HFZ Corner. It is also alleged that defendant non-signatory Capital Group LLC (HFZ Capital) directed the plaintiffs to transfer the property in satisfaction of plaintiffs' obligations under the Agreement.

The court finds that as to defendants HFZ Corner and HFZ Capital, the plaintiffs have sufficiently stated, for pleading purposes, a claim for unjust enrichment. Assuming the allegation of the plaintiff are true, HFZ Corner was a non-signatory to the Agreement that received a benefit, the property, under the Agreement on behalf of signatory HFZ East. As to defendants HFZ Capital, it directed the performance under the contract although it is not alleged to be a party to the contract. Thus assuming the allegations to be true, the

plaintiffs have established a requisite nexus between the contractual performance and these non-signatory defendants for the purposes of pleading an unjust enrichment cause of action. This is because it is alleged that the transfer to non-signatory HFZ Corner took place at the behest of these defendants. See Georgia Malone & Co., Inc. v Ralph Rieder, 86 AD3d 406, 408 (1st Dept 2011), affd sub nom. Georgia Malone & Co., Inc. v Rieder, 19 NY3d 511 (2012) ("cases from this Court and the other Departments have held that an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest").

However, as to the other defendants, 51st Street Main Lot Owner, LLC, and 51st Street Corner Lot Owner, who were allegedly subsequent transferees of property from the other defendants, the unjust enrichment claim is too attenuated to be sustained against those defendants and is properly dismissed.

With respect to the standard for pleading a cause of action for tortious interference with contract, the Court has held that

To state a cause of action alleging tortious interference with contract, the plaintiff must allege: the existence of a valid contract between it and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages. The plaintiff must specifically allege that the contract would not have been breached but for the defendant's conduct.

Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC, 82 AD3d 1035, 1036 (2d Dept 2011).

In this case, plaintiffs allege in their third cause of action that the defendants intentionally procured HFZ's alleged breach of its obligation to make payment to the plaintiffs under the Agreement. However, plaintiffs' conclusory allegations fail to set forth facts in support of their contention from which any inference could be drawn of defendants' culpable conduct on this theory. Id. ("although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation").

Additionally, plaintiffs fail to allege that "but for" the defendants' actions, HFZ East would have made payment under the Agreement. Furthermore, defendants are correct that the allegations of the amended complaint that the defendants are related or affiliated undermine the tortious interference claim, which does not lie against any entity affiliated with the alleged breaching party. See Koret, Inc. v Christian Dior, S.A., 161 AD2d 156, 157 (1st Dept. 1990) and MTI Image Group, Inc. v Fox Studios E., Inc., 262 AD2d 20, 23-24 (1st Dept. 1999). Thus the Court shall dismiss the third cause of action.

The court shall also grant dismissal of plaintiffs' constructive fraudulent conveyance claims (the fourth cause of

action) under the Debtor and Creditor Law 273, 274 and 275 except as against defendants 51st Main Lot Owner, LLC, and 51st Street Corner Lot Owner. It is alleged that the property conveyed by plaintiffs under the Agreements was subsequently transferred to 51st Main Lot Owner, LLC, and 51st Street Corner Lot Owner for the inadequate consideration of \$1 apiece given the obligations of the transferor defendants to the plaintiffs and the lack of other assets of the transferor defendants. See 172 Van Duzer Realty Corp. v 878 Educ., LLC, 142 AD3d 814, 817 (1st Dept 2016). However, a cause of action for fraudulent conveyance claims is limited to transferees or beneficiaries of the conveyance and therefore these claims must be dismissed against the other defendants. See Fed. Deposit Ins. Corp. v Porco, 75 NY2d 840, 842 (1990).

With respect to plaintiffs' claims of an actual fraudulent conveyance under Debtor and Creditor Law 276, the court finds that plaintiffs' fifth cause of action is insufficiently plead as the statute requires an allegation of an actual intent to defraud and the plaintiffs' complaint fails to allege facts, beyond the occurrence of the transactions themselves, to satisfy the particularity requirement of CPLR 3016(b). See Menaker v Alstaedter, 134 AD2d 412, 413 (2d Dept 1987).

With respect to the sixth cause of action for an equitable lien/constructive trust, it has been held that "[i]n the

development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." Sharp v Kosmalski, 40 NY2d 119, 121 (1976) (citations omitted). Here, the plaintiffs have failed to allege any confidential or fiduciary relation between themselves and the defendants. The Court has further stated that "[t]he existence of an equitable lien requires an express or implied contract concerning specific property wherein there is a clear intent between the parties that such property be held, given or transferred as security for an obligation." Ryan v Cover, 75 AD3d 502(2d Dept 2010). The plaintiffs fail to allege that there is any express or implied agreement that the property at issue here was to be held as security for the obligations defendants allegedly owed to plaintiffs. Therefore, the sixth cause of action is properly dismissed.

7/17/2019
DATE

[Signature]
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
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"/>
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					REFERENCE