

Benjamin v Yeroushalmi
2019 NY Slip Op 33880(U)
January 2, 2019
Supreme Court, Nassau County
Docket Number: 003563-14
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

**JIM BENJAMIN and BEHROUZ
BENYAMINPOUR,**

Plaintiffs,

Decision and Order

-against-

**MOTION SEQUENCE: 07
INDEX NO.:003563-14**

**MOUSSA YEROUSHALMI, FARZANEH
YEROUSHALMI, DAVID POUR and
DAVID POUR & ASSOCIATES, LLP,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on the motions:

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Defendants Moussa Yeroushalmi and Farzaneh Yeroushalmi move for an order pursuant to: CPLR 2304 quashing the subpoenas served upon non-parties Robert Kahen and Kevin Lalezarian dated August 13, 2018; and CPLR 3103 issuing a protective order relieving Khan and

Lalezarian of any obligation to comply with the subpoenas.¹

Background

Plaintiff Jim Benjamin entered into a joint venture agreement with Moussa Yeroushalmi (“Moussa”) in connection with property located at 242 and 250 Old Country Road in Mineola, New York (the “Mineola Property”).² The Mineola Property was being offered for sale by the Metropolitan Transportation Authority (“MTA”) through a closed bid procedure. Pursuant to the Mineola Partnership Agreement, the parties agreed that profits earned in connection with the Mineola Property would be divided as follows: 30% to Jim Benjamin; 65% to Moussa Yeroushalmi; and 5% to non-party Morad Yeroushalmi.

Following the formation of the Mineola Partnership, the Mineola joint venturers submitted the winning bid at auction to purchase the Mineola Property for \$12,222,000. They subsequently assigned their purchase rights to Robert Kahen (“Kahen”) for \$13,500,000 with the \$1,278,000 difference between the purchase price and the price of the assignment to Kahen to be distributed as profits to the parties in accordance with the Mineola Partnership Agreement.

On May 18, 2007, and allegedly unbeknownst to Jim, Kahen and Moussa entered into a separate agreement (the “Kahen/Moussa Agreement”) with respect to the Mineola Property whereby Kahen remitted a check in amount of \$550,000 to Moussa to be applied toward the acquisition price and that, at the time of closing with the MTA, Kahen and Moussa were to “take title, under their respective newly formed entities, as tenants in common, with each having a fifty (50%) percent undivided interest.”

The following year, on July 2, 2008, the parties to the Mineola Partnership entered into a subsequent agreement (the “Second Partnership Agreement”), which “*supersedes the previous agreement [Mineola Partnership Agreement] made and signed on April 18, 2007*” between Jim Benjamin, Morad Yeroushalmi, and Moussa Yeroushalmi and wherein Jim “decided not to continue with the Partnership”, that he would receive the money he initially invested in the deal (\$750.00) and the partnership would continue with Morad Yeroushalmi having a 5% interest and Moussa having a 95% interest. According to the Plaintiffs, at the time Jim relinquished his 30% interest in the Mineola Partnership, he was not aware of the Kahen/Moussa Agreement entered

¹ Defendants David Pour and David Pour & Associates, LLP (collectively referred to as “Pour”) do not separately move to quash the subpoenas, although they submit an affirmation “join[ing] in the application” of the Yeroushalmi Defendants.

² The joint venture is referred to herein as the “Mineola Partnership” and the joint venture agreement is referred to herein as the “Mineola Partnership Agreement.”

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into one year earlier.

On July 26, 2013, Kahen, who had previously been assigned the purchase rights to the Mineola Property, closed on the sale of the Mineola Property with the MTA and “paid or otherwise credited the Yeroushalmis with the \$1,278,000.” According to the Plaintiffs, however, the Yeroushalmis failed to distribute Jim’s share of profits pursuant to the Mineola Partnership Agreement.

Procedural History

On April 10, 2014, Plaintiffs Jim Benjamin and Bruce Benjamin commenced the instant action.³

In an order dated May 3, 2016, this court dismissed the first cause of action, sounding in breach of contract, wherein the Plaintiffs alleged that the Yeroushalmis breached the terms of the Mineola Partnership Agreement by failing to pay Jim the \$383,400 due him as his share of profits when the Yeroushalmis assigned the right to purchase the Mineola Property to Kahen. According to the amended complaint, Moussa “repeatedly represented to [Jim] that the [profits] payment [Jim’s 30% share of the \$1,278,000] would be made when the transaction with the MTA closed.” The closing between Kahen and the MTA closed on July 26, 2013.

In support of their motion to dismiss, the Yeroushalmis argued that, in view of the Second Partnership Agreement: the Benjamins “cannot assert claims arising out of an agreement that essentially never existed”; “Jim Benjamin expressly and unequivocally relinquished any interest he had in the [Mineola Partnership]”; and, further, by “relinquishing his interest in the [Mineola Partnership], Jim has no right to assert any claims in connection with interests he once had in the [Mineola Partnership].”⁴

³ The action was initially commenced against Moussa Yeroushalmi and Farzaneh Yeroushalmi and asserted causes of action for: breach of contract; contribution; fraud in fact and in the inducement; conversion; unjust enrichment; and quantum meruit. These six causes of action allegedly arose from three separate transactions: 1) the acquisition of the Mineola Property; 2) the purchase of other property located in Syracuse, New York; and 3) an investment by Plaintiffs in a business proposal made by Defendants. The instant motion concerns only the Mineola Property.

⁴ In opposition to the motion to dismiss, the Benjamins argued that they did “not seek any portion of profits from the joint venture going forward, only the profit that was already realized by the joint venture by virtue of the ‘flip’” to Kahen. This argument did not warrant a different conclusion by the court “inasmuch as Plaintiffs’ claim to their share of the “profits”, which they alleged arose under the Mineola Partnership Agreement, fails by virtue of the fact that Jim relinquished the interests he originally had in the Mineola Partnership, including any entitlement to profits in connection with it.

According to the court:

Notably, the Benjamins do not deny the existence or authenticity of the [Second Partnership] Agreement. Because the [Second Partnership] Agreement, by its express terms, superseded the original [Mineola Partnership] Agreement], the law treats the former agreement as if it never existed and states that the only recourse the parties would have arise under the superseding contract. Accordingly, by entering into the [Second Partnership] Agreement, a novation occurred by which the prior [Mineola Partnership] Agreement, and any interests Jim may have had pursuant to that agreement, were extinguished.

* * *

Given the [Second Partnership] Agreement, the branch of the Yeroushalmi Defendants' motion to dismiss the first cause of action for breach of the Mineola [Partnership] agreement is granted inasmuch as the documentary evidence herein, the authenticity of which is not disputed, utterly refutes the Benjamins' factual allegations that the Yeroushalmis owe them profits with respect to the Mineola Property (Ex. "D" to Motion at pp 10-11 [internal citations omitted]).

In the same order, the court also dismissed the seventh cause of cause of action for breach of fiduciary duty as not being pleaded with the requisite particularity and the twelfth cause of action, also sounding in breach of fiduciary duty, on the grounds that Plaintiffs' allegations were conclusory and insufficient.

On April 25, 2018, this court granted the Plaintiffs' motion which sought, *inter alia*, leave to amend the amended complaint and assert two additional causes of action, namely, fraud-based breach of fiduciary duty and unjust enrichment/constructive trust.

With respect to the fraud-based breach of fiduciary duty claim, the Benjamins allege the following against the Pours and the Yeroushalmis: as joint-venturers and partners, the Yeroushalmis owed Jim a fiduciary duty; Pour, as the attorney and agent for the joint venture, owed Jim a fiduciary duty; on May 18, 2007, Moussa "secretly and without disclosing it to [Jim], entered into a written agreement with Kahen [the Kahen/Moussa Agreement] and received at least \$550,000 from Kahen as compensation for assigning the [Mineola] Partnership's interest"; the Kahen/Moussa Agreement was drafted by Pour who was acting simultaneously as attorney for Moussa and Kahen and acted as agent for the Mineola Partnership in bringing Kahen into the deal; neither Moussa nor Pour disclosed to Jim that Moussa had entered into the Kahen/Moussa Agreement or that Moussa had received \$550,000 from Kahen; Moussa "not only failed to

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disclose the receipt of funds to [Jim] but actually misrepresented to [Jim] that he had not yet received the funds”; and that Pour owed Jim a fiduciary duty as attorney for the Mineola Partnership and actively aided and abetted Moussa’s fraud and breach of fiduciary duty to Jim by “concealing” from Jim that Moussa and Kahen had entered into the Kahen/Moussa Agreement (Second Amended Complaint at ¶¶ 97-110).

In allowing the amendment to add the fraud-based breach of fiduciary duty claim, the court noted that, contrary to the Yeroushalmis’ contention, the breach in that claim was twofold. In addition to being predicated upon Moussa’s failure to pay Jim his share of profits associated with the Mineola Property, there was also an alleged breach based upon Pour and Moussa’s failure to disclose the Kahen/Moussa Agreement. According to the court, “[p]arties to a joint venture owe each other a duty of ‘undivided and undiluted loyalty’, which includes the duty to disclose material information” (Ex. “C” to Motion at p 11).

The court also permitted Plaintiffs to amend the amended complaint by asserting the following cause of action for unjust enrichment/constructive trust:

[Moussa] represented to [Jim] that the [Mineola] Partnership would not receive compensation for the sale of an interest in the purchase contract with the MTA to Kahen until the closing with the MTA.

In fact, [Moussa] had already been paid by Kahen in an amount no less than \$550,000.

In order to continue with the joint venture with Kahen’s revised plan to build a new apartment building, [Moussa] required [Jim] to fund his share of the architect’s fees.

[Jim] was unwilling to invest additional funds in the [Mineola Property], however, had [Moussa] distributed [Jim’s] share of the funds [Moussa] received from Kahen, [Jim] would have had a source of funds with which to pay for his share of the architects’ fees and would have continued in the [Mineola] Partnership.⁵

[Jim’s] transfer of his interest in the [Mineola] Partnership was made in reliance on

⁵ Plaintiffs state that Moussa never informed Jim that he had received the \$550,000 but that, had Moussa disclosed that he had received the \$550,000 from Kahen and, had Jim received his 30% of the amount to which he was entitled, he would have used that money to fund his proportionate share to continue with the project and pay for the cost of the architect and not have entered into the subsequent agreement terminating his interests in the Mineola Partnership (Second Amended Complaint at ¶¶ 28-30; Affirmation in Opposition at ¶¶ 6-9).

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[Moussa's] representation that no monies had been paid to the [Mineola] Partnership and thus no monies were currently available to [Jim], which representation was untrue.

[Jim's] transfer of his interest in the [Mineola Property] to [Moussa] unjustly enriched [Moussa].

Based on the foregoing, [Jim] is entitled to the imposition of a constructive trust on [Moussa's] interests in the [Mineola Property] or any entity having an ownership interest in the [Mineola Property] or on any proceeds that [Moussa] received by reason of his interest in the [Mineola Property] or any entity having an ownership interest in the [Mineola Property] (Second Amended Complaint at ¶¶ 137-142).

The Instant Motion

Basis for the Subpoenas

In August 2018, Plaintiffs served subpoenas on nonparties Robert Kahen and Kevin Lalezarian. The subpoenas seek the production of documents relating to Defendants' ownership in the Mineola Property and the value of their interest as well as profits and other financial benefits received by Defendants as a result of their interests in the Mineola Partnership/Property.

According to Plaintiffs, Kevin Lalezarian developed the Mineola Property with an apartment complex, now known as One Third Avenue. One of Lalezarian's companies is the majority member of the limited liability company that own One Third Avenue. As such, Lalezarian would likely have documents identifying other members of the company that own One Third Avenue and the extent of their ownership interests in the property as well as any other financial benefits received by Moussa and others who have an interest in the property.

Kahen was subpoenaed in light of the Kahen/Moussa Agreement entered into in May 2007, his involvement with Moussa with respect to the acquisition and development of the Mineola Property, and his current financial interests in One Third Avenue.

According to Plaintiffs, to the extent Moussa has an interest in One Third Avenue, whether directly or indirectly through another entity, Jim is entitled to 30% of that interest because it would still belong to the Mineola Partnership and Jim would still be a partner except

for Moussa's wrongful conduct.⁶ "As a result, documents relating to [Moussa's] interest in One Third Avenue, how the interest came about including its relationship to the [Mineola] Partnership, and the financial benefits that have flowed therefrom are relevant" to Plaintiffs' causes of action and the damages Plaintiffs have sustained (Affirmation in Opposition at ¶¶ 12-14).⁷

Defendants Move to Quash Subpoenas

The Defendants move for an order pursuant to: CPLR 2304 quashing the subpoenas served upon non-parties Robert Kahen and Kevin Lalezarian dated August 13, 2018; and CPLR 3103 issuing a protective order relieving Khan and Lalezarian of any obligation to comply with the subpoenas.

According to the Defendants, the Second Partnership Agreement and this court's May 3, 2016 order make it clear that Jim retained no right to any profits earned from the Mineola Property or the Partnership because the Second Partnership Agreement extinguished Jim's partnership interests. Many of the documents sought in the subpoenas concern details as to the business relationship between the joint venturers to develop the Mineola Property *subsequent* to the termination of Jim's interest and, thus, Plaintiffs are not entitled to any documents related to the purchase and development of the Mineola Property or the details of any venture created *after the termination* of Jim's interest (Memorandum of Law in Support at p 8).

⁶ Plaintiffs argue that their claims in the sixth and eleventh cause of action are not limited to the profit resulting from Moussa's flip of the Mineola Property to Kahen or the \$550,000 payment Kahen made to him pursuant to the Kahen/Moussa Agreement. Rather, Jim would not have conveyed his interest in the Mineola property and would thus still be a 30% partner in the Mineola Partnership had it not been for Moussa breaching his fiduciary duty he owed to Jim. As a result, Jim is entitled to 30% of the Mineola Partnership in whatever form that partnership has evolved into. To the extent that Mineola Partnership interest in the Mineola Property has evolved into an interest in One Third Avenue, Jim is also entitled to 30% of that interest (Memorandum of Law in Opposition at p 8).

⁷ Jim also seeks a constructive trust with regard to his interest in whatever belongs to the Mineola Partnership (i.e., Mineola Partnership's interest in the Mineola Property which has evolved into an interest in One Third Avenue). As a result, Plaintiffs seek documents reflecting the interests Moussa and others currently have in the Mineola Property, how those interests have evolved, whether Moussa or the Partnership directly or indirectly have an ownership interest in the entity that owns and operates One Third Avenue, and what financial benefits Moussa has received as a result of that interest (Affirmation in Opposition at ¶ 15).

Specifically, Defendants argue:

So the Court's May 3, 2016 Decision - which it adhered to on reargument - along with the Plaintiffs' own admission, precludes the Plaintiffs from recovering profits with respect to the Mineola Property and joint venture under theories of breach of contract or breach of fiduciary duty. The Court recognized that any claim for profits would be utterly inconsistent with Jim Benjamins's voluntary termination of his interest in the Mineola Property and joint venture memorialized in the [Second Partnership] Agreement. Since the Subpoenas seek documents relevant only to Plaintiffs' dismissed claims to recover profits from the Mineola Property and joint venture, it is obvious that they do not constitute any legitimate attempt to uncover relevant evidence (Reply Memorandum of Law at p 4).

For the reasons that follow, the motion is denied.

The Court's Determination

Initially, the court notes two well-settled principles of law. First, CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*Yoshida v Hsueh-Chih Chin*, 111 AD3d 704, 705 [2d Dept 2013]). The words material and necessary are to be interpreted "liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]).

Second, the measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit by reason of the defendant's conduct (*Duane Jones Co. v Burke*, 306 NY 172 [1954]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180 [1st Dept 2000]).

Although the breach of contract and breach of fiduciary duty claims were dismissed in the prior order, the court permitted Plaintiffs to amend the complaint, a second time, by adding two causes of action based upon Moussa's entering into a separate contract with Kahen without disclosing such contract to Jim. Importantly, the allegations and damages sought in the recently added causes of action concern Moussa's breach of fiduciary duty owed to Jim, a duty arising out of their relationship as joint venturers. Specifically, Jim alleges in the second amended complaint that he would not have entered into the Second Partnership Agreement extinguishing his rights in the Mineola Partnership (and indirectly the Mineola Property) had he been aware of

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the Kahen/Moussa Agreement and, had he not terminated his interest in the Mineola Partnership, he would still have a 30% interest in the Mineola Partnership.

Having considered the allegations in the pleadings, the parties' arguments, and the liberal standard for disclosure in New York, the motion to quash is denied inasmuch as the documents sought in the subpoenas concern the value and interests in the Mineola Property (now One Third Avenue), and arguably Jim's interest in same, had Moussa not breached his fiduciary duty.

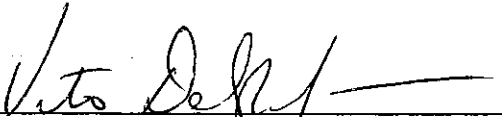
Conclusion

Based on the foregoing, it is hereby

Ordered that the motion of Defendants Moussa Yeroushalmi and Farzaneh Yeroushalmi to quash the subpoenas served upon Robert Kahen and Levin Lalezarian is denied and Kahen and Lalezarian are directed to respond to the subpoenas served upon them, except to the extent any responsive documents contain privileged information.

This constitutes the decision and order of the court.

DATE: January 2, 2019


Hon. Vito M. DeStefano, J.S.C.

ENTERED

JAN 04 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE