

**3130 Brighton 6th St. Owners, Inc. v Pesochinsky**

2020 NY Slip Op 30542(U)

February 24, 2020

Supreme Court, Kings County

Docket Number: 517804/2019

Judge: Loren Baily-Schiffman

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This opinion is uncorrected and not selected for official publication.

At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 24<sup>th</sup> day of February, 2020.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

3130 BRIGHTON 6<sup>TH</sup> STREET OWNERS, INC.,  
Plaintiff,

- against -

YAKOV PESOCHINSKY and BAY SHORE GARDENS  
OWNERS, INC.,  
Defendants.

Index No.:517804/2019

Motion Seq. # 1 & 2

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Pesochinsky's Notice of Motion, Affirmation & Exhibits	1
Memorandum of Law in Support	2
Bay Shore's Notice of Motion, Affirmation & Exhibits	3
Memorandum of Law in Support	4
Plaintiff's Memorandum of law in Opposition MS # 1	5
Plaintiff's Memorandum of law in Opposition MS # 2	6
Pesochinsky's Reply Memorandum	7
Bay Shore's Reply Memorandum	8

Upon the foregoing papers Defendant, YAKOV PESOCHINSKY (Pesochinsky), moves this Court for an Order pursuant to CPLR §3211(a)(7) dismissing the second, third fourth and eighth causes of action and Plaintiff's request for attorneys' fees. Defendant, BAY SHORE GARDENS OWNERS (Bay Shore), moves this Court for an Order pursuant to CPLR § 3211(a) (5), § 3211(a)(7), and § 3016(b) dismissing Plaintiff's complaint with prejudice.

Background

Plaintiff, 3130 BRIGHTON 6<sup>TH</sup> STREET OWNERS, INC. (3130), a cooperative housing corporation located in Brooklyn, commenced the instant action on or about August 13, 2019. Defendant, Bay Shore is also a residential cooperative located in Brooklyn. According to Plaintiff,

Pesochinsky served as a director and/or officer of the Board of Directors of both co-ops, simultaneously. Additionally, Plaintiff alleges that while Pesochinsky served as President of the Board of Directors for 3130 he was responsible for "egregious corporate waste, mismanagement, and apparent fraud." The complaint alleges that from July 11, 2014 to January 10, 2017 Pesochinsky transferred \$960,000 from 3130's operating account into a Bay Shore account. Further, 3130 alleges that \$180,000 of the monies transferred is still outstanding.

Defendant Pesochinsky, in lieu of answering the complaint, moves for an Order dismissing the 2<sup>nd</sup> cause of action for Breach of Duty of Loyalty, the 3<sup>rd</sup> cause of action for Corporate Waste, the 4<sup>th</sup> cause of action for Fraud and Deceit as duplicative of the 1<sup>st</sup> cause of action for Breach of Fiduciary Duty, and the 8<sup>th</sup> cause of action for Unjust Enrichment<sup>1</sup>. The law is well established that a court considering a motion to dismiss must both accept as true the allegations in the complaint and afford the plaintiff the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Great Eagle Intl. Trade, Ltd. v. Corporate Funding Partners, LLC*, 104 AD3d 731 (2d Dept 2013). If from the four corners of the complaint "factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977).

Plaintiff's complaint reiterates that each cause of action is brought pursuant to BCL § 720. BCL § 720 (a)(1)(B) that states in relevant part, that an action may be maintained against an officer or director of a corporation to compel the defendant to account for the neglect or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his/her charge, whether by loss or waste, transfer to him/herself

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<sup>1</sup> Defendant Pesochinsky also requests dismissal of Plaintiff's request for attorneys' fees.

or others. Defendant Pesochinsky contends that Plaintiff's 2<sup>nd</sup> cause of action, Breach of Duty of Loyalty, is duplicative of the 1<sup>st</sup> cause of action for Breach of Fiduciary Duty. This Court notes that the cases cited by both Pesochinsky and Plaintiff referring to the Duty of Loyalty as a separate cause of action all involve an employer/employee or agent/principal relationship where the employee/agent demonstrated greater loyalty to the employer/principal's competitor. *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 (2001); *G.K. Alan Assoc. Inc. v Lazzari*, 66 AD3d 830 (2d Dept 2009); *Foley v. D'Agostino*, 21 A.D.2d 60, 66-67 (1st Dept.1964).

A fiduciary relationship is "necessarily fact-specific" and is grounded in a higher level of trust than normally present in the marketplace between those involved in arms-length business transactions. *Oddo Asset Management v Barclays Bank PLC*, 19 NY3d 584, (2012). However, under the facts and circumstances of the case at bar, the Duty of Loyalty is subsumed in the 1<sup>st</sup> cause of action for Breach of Fiduciary Duty. Similarly, the 3<sup>rd</sup> cause of action for Corporate Waste is also subsumed by the Breach of Fiduciary Duty cause of action. Courts have consistently held that the statutory language of BCL § 720 (a)(1)(B) includes corporate waste as a component of Breach of Fiduciary Duty. *Yuan San Shih v Ji Yong Kim*, 54 Misc3d 1223 (A) (S. Ct., Queens County, 2017), citing *770 Owners Corp. v Spitzer*, 25 Misc3d 1204(A), (S. Ct., Kings County, 2008).

Pesochinsky contends that the 4<sup>th</sup> cause of action for fraud and deceit is also duplicative of the first cause of action. To properly plead a cause of action to recover damages for fraud, a plaintiff must allege that (1) the defendant made a false representation of fact; (2) the defendant had knowledge of the falsity; (3) the misrepresentation was made in order to induce the plaintiff's

reliance; and (4) there was justifiable reliance on the part of the plaintiff resulting in an injury for which compensable damages are sought. *Ambac Assurance Corporation v Countrywide Home Loans, Inc.*, 31 NY3d 569, 81 (2018); *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, (2017).

CPLR 3016(b) requires that each element of a cause of action be supported by factual allegations containing the details constituting the wrong. *Cadet-Duval v Gursim Holding, Inc.*, 147 AD3d 718, 719–20 (2d Dept 2017), citing *Stortini v. Pollis*, 138 A.D.3d 977, 978 (2d Dept 2016); *Morgan Chase Bank, N.A. v. Hall*, 122 A.D.3d 576, 579, (2d Dept 2014). The law is well settled that conclusory allegations are insufficient to establish elements of a cause of action, as required by the statute, and are insufficient to defeat a motion for judgment as a matter of law. *Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595 (2015); *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 476-477 (2d Dept 2009). CPLR § 3016 (b) is satisfied when the facts suffice to permit a “reasonable inference” of the alleged misconduct. The strength of the requisite inference will vary based on the facts and context of each case. *Eurycleia Partners, LP v Seward & Kissel, LLP supra at 560-61*. Plaintiff has failed to set forth the facts supporting the elements of a cause of action for fraud. Moreover, Pesochinsky is correct that the allegations set forth in Plaintiff’s complaint for its 4<sup>th</sup> cause of action are more akin to a Breach of Fiduciary Duty and to that extent are duplicative of the 1<sup>st</sup> cause of action.

Pesochinsky also seeks dismissal of the 8<sup>th</sup> cause of action for unjust enrichment as duplicative of the Breach of Fiduciary Duty cause of action. The elements of a cause of action to recover for unjust enrichment are “(1) the defendant was enriched; (2) at the plaintiff’s expense; and (3) that it is against equity and good conscience to permit the defendant to retain what is

sought to be recovered." *GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570 (2d Dept 2015). While the complaint states that the 8<sup>th</sup> cause of action is alleged against both Defendants, it actually only refers to Defendant Bayshore and not Pesochinsky. Moreover, while Plaintiff alleges that \$180,000 is still missing from its operating account, it does not specify any facts in this regard and therefore does not meet the pleading requirements of CPLR §§ 3013, 3014 and 3016. *Lebovits v Bassman*, 120 AD3d 1198, 1199 (2d Dept 2014).

The 9<sup>th</sup> cause of action for an Accounting and Constructive Trust is alleged only against Pesochinsky. While Pesochinsky has not moved for dismissal of the 9<sup>th</sup> cause of action, the law clearly establishes, that Unjust Enrichment is a necessary component of a cause of action for a Constructive Trust. *Marini v Lombardo*, 79 AD3d 932, 933 (2d Dept 2010). Accordingly, since the claim for Unjust Enrichment is dismissed, that part of the 9<sup>th</sup> cause of action seeking a Constructive Trust is also dismissed. Pesochinsky also seeks dismissal of the demand for attorneys' fees included as part of the requested relief within the "Wherefore" clause of the complaint. Pesochinsky's request for this relief is not properly raised at this juncture.

Plaintiff 3130 alleges Aiding and Abetting Fraud (5<sup>th</sup> cause of action), Aiding and Abetting Breach of Fiduciary Duties (6<sup>th</sup> cause of action) and Fraud/Constructive Fraud<sup>2</sup> (7<sup>th</sup> cause of action) as against Bayshore. The complaint in the instant action fails to allege any facts indiating what Bayshore did or did not do in support of the elements of the 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> causes of action. While each of the aforementioned causes of action has distinct elements that must be plead, a simple review of the complaint as against Bayshore reveals that Plaintiff failed to sufficiently

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<sup>2</sup> The 8<sup>th</sup> cause of action for Unjust Enrichment was also alleged against Bayshore but fails for the reasons previously discussed herein as against Defendant Pesochinsky.

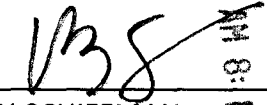
plead each one. The complaint as to Bayshore "...is not just sparse on factual details--rather, it is wholly devoid of them." *Mid-Hudson Valley Federal Credit Union v Quartararo & Lois PLLC, 155 A.D.3d 1218, 1220-21 (3d Dept 2017), affd, 31 NY3d 1090 (2018)*. Dismissal of a complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 142 (2017)*.

Bare legal conclusions with no factual specificity will not suffice to withstand a motion to dismiss. *Godfrey v. Spano, 13 N.Y.3d 358, 373, 892 N.Y.S.2d 272 (2009); Rodriguez v. Jacoby & Meyers, LLP, 126 A.D.3d 1183, 1185, (2d Dept 2015), lv. denied 25 N.Y.3d 912 (2015)*. In the case at bar, the allegations against Bayshore are vague and conclusory and are insufficient to withstand the instant motion to dismiss. The parties' remaining contentions are without merit. Accordingly, it is

ORDERED, that Defendant Pesochinsky's motion is granted to the extent that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 8<sup>th</sup> causes of action are dismissed and that portion of the 9<sup>th</sup> cause of action seeking a Constructive Trust is also dismissed; and it is further

ORDERED, that Defendant Bayshore's motion to dismiss the complaint is granted in entirety.

ENTER,

  
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LOREN BAILY-SCHIFFMAN  
JSC

KINGS COUNTY CLERK  
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