

Woodhill Green Condominium, Inc. v Northeastern Dev. Corp.

2020 NY Slip Op 31284(U)

April 22, 2020

Supreme Court, Dutchess County

Docket Number: 2019-52904

Judge: Christi J. Acker

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X
WOODHILL GREEN CONDOMINIUM, INC.,

Plaintiff,

-against-

NORTHEASTERN DEVELOPMENT CORP.,
D/B/A NORTH EASTERN CONTRACTING
(NEC) and RIVER MANAGEMENT,
DEVELOPMENT AND REALTY, INC. D/B/A
ASSOCIA,

Defendant.

-----X
ACKER, J.S.C.

DECISION AND ORDER

Index No.: 2019-52904

Motion Seq. 1

The following papers, numbered 1 to 25, were read on Defendant River Management, Development and Realty, Inc. d/b/a Associa’s (hereinafter “Defendant Associa”) motion pursuant to CPLR 3211(a)(1) and (7) seeking dismissal of Plaintiff Woodhill Green Condominium, Inc.’s (hereinafter “Plaintiff”) Third, Fourth and Fifth Causes of Action and for an award of costs and attorney’s fees:

Notice of Motion-Affidavit of Joseph Manfredi-Exhibits 1-6- Memorandum of Law in Support	1-9
Memorandum of Law in Opposition- Affidavit of Lisa Kelly in Opposition- Exhibits 1-12-Affidavit of Paul Lehman in Opposition	10-22
Reply Affidavit of Joseph Manfredi-Affidavit of James Maloney- Reply Memorandum of Law	23-25

Plaintiff commenced the instant action against Defendant Northeastern Development Corp., d/b/a North Eastern Contracting (NEC) (hereinafter “Defendant NEC”) and Defendant

Associa on or about July 24, 2019. The first two causes of action are asserted against Defendant NEC, alleging breach of contract and conversion. The Third, Fourth and Fifth Causes of Action are asserted against Defendant Associa, asserting claims of breach of fiduciary duty, breach of contract and conversion.

Plaintiff and Defendant Associa entered into a management agreement on or about September 4, 2018 (hereinafter “Management Agreement”), under which Associa was appointed as the sole and exclusive managing agent of Plaintiff, commencing on December 1, 2018. According to the Complaint, on or about December 19, 2018, Plaintiff entered into a contract with Defendant NEC to perform certain work at a complex owned by Plaintiff at 1668 Route 9, Wappingers Falls, New York. Plaintiff agreed to pay \$186,407.50 for the work and deposited \$40,000.00 as a down payment before the work began. Plaintiff alleges that Defendant Associa released a payment of \$146,407.50 to Defendant NEC on March 27, 2019, despite Plaintiff’s directive not to release said payment pending inspection of the work. The Complaint further alleges that upon examination of the work after delivery of the payment, Plaintiff found that the work performed by Defendant NEC materially failed to conform to the agreed upon specifications.

Based upon these allegations, Plaintiff asserts that Defendant Associa breached its fiduciary duty to Plaintiff due to Associa’s failure to inspect the property prior to releasing the payment to NEC, despite having been directed otherwise. Plaintiff also asserts a cause of action against Defendant Associa for breach of contract, as the contract required Associa to ensure the cleanliness and working condition of all common buildings and equipment and to perform periodic inspections of all ground areas to determine whether such are receiving adequate care and maintenance. Alleging that the work performed by Defendant NEC showed a visible lack of

adequate care, Plaintiff asserts that Defendant Associa breached the Management Agreement in failing to appropriately inspect the property prior to paying NEC. Finally, Plaintiff's Fifth Cause of Action sounds in breach of contract and conversion, based upon Defendant Associa's withdrawal of management fees from Plaintiff's account upon the termination of the parties' Management Agreement.

Defendant Associa moves to dismiss the three causes of action asserted against it based upon documentary evidence (CPLR 3211(a)(1)) and failure to state a cause of action (CPLR 3211(a)(7)). In support of its motion, Defendant submits the Affidavit of Joseph Manfredi, an employee of Defendant Associa and the property manager that was assigned to Plaintiff. That affidavit annexes the Complaint, the Management Agreement and documentation related to the \$146,407.50 payment to Defendant NEC, including screenshots, the check at issue and e-mail correspondence.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *DeMarzo v. DeMarzo*, 150 AD3d 1202 [2d Dept. 2017]; *Rodriguez v. Daily News, L.P.*, 142 AD3d 1062 [2d Dept. 2016]. That is, such a motion to dismiss should be granted only where, even viewing the allegations as true, the plaintiff cannot establish a cause of action. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Anderson v Armentano*, 139 AD3d 769 [2d Dept. 2016].

Defendant Associa first argues that Plaintiff fails to state a cause of action for a breach of fiduciary duty. “The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct’ [citations omitted].” *SCE Assoc., Inc. v. Coglianese*, 179 AD3d 730, 730–31 [2d Dept. 2020]. In addition, a cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b). *Id.* Contrary to Defendant Associa’s arguments, Plaintiff has sufficiently alleged a cause of action sounding in breach of fiduciary duty. Defendant Associa appears to concede that Plaintiff has established the first and third prongs of the cause of action as to the existence of a fiduciary duty and resultant damages. Memorandum of Law, Point I(A). Defendant’s argument instead focuses on the second prong - Plaintiff’s alleged failure to set forth the requisite detail as to Associa’s purported misconduct. It seems that Associa’s position is that the heightened pleading required by CPLR 3016(a) means that Plaintiff must allege “Who? What? When? Where? Why? How?” as to the misconduct. Memorandum of Law, p. 8. However, Defendant Associa does not provide any case law to support this contention.

In fact, the Complaint alleges that the parties entered into an agreement whereby Defendant Associa agreed to provide Plaintiff with efficient business and financial administration, supervision and/or oversight and advisory service, consistent with the best interests of Plaintiff and the standard industry portfolio management practice. Complaint, ¶9. Further, Plaintiff alleges that said Defendant exceeded its authority when it paid NEC in full after receiving instructions from Plaintiff to not pay NEC until the completion of an inspection of NEC’s work. Complaint, ¶¶ 3 11 and 20. As a result, the Complaint states that Plaintiff has

been damaged in the amount of \$120,850 to cover the cost of the breach. Complaint, ¶21. These allegations are sufficient to allege a cause of action for breach of fiduciary duty.¹

Defendant Associa also seeks dismissal of the Third Cause of Action based upon its submission of documentary evidence. To succeed on a motion to dismiss premised on documentary evidence pursuant to CPLR 3211(a)(1), it must be shown that the documentary evidence utterly refutes the Plaintiff's factual allegations and conclusively establishes a defense as a matter of law. *XXXX, L.P. v. 363 Prospect Place, LLC*, 153 AD3d 588 [2d Dept. 2017]; *Torres v. City of New York*, 153 AD3d 647 [2d Dept. 2017]; *Wilson v. Poughkeepsie City School Dist.*, 147 AD3d 1112 [2d Dept. 2017]. If the evidence submitted in support of the motion is not "documentary," the motion must be denied. *Phillips v. Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept. 2017]. To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable", such as judicial records and documents reflecting out of court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. Conversely, letters, emails and affidavits do not meet the requirements of documentary evidence. *Id.* "An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit." *Id.*, citing *J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652 [2d Dept. 2014]; see also *Porat v. Rybina*, 177 AD3d 632, 633 [2d Dept. 2019] (Affidavits, deposition testimony, and letters are not documentary evidence; if the evidence submitted in support of the motion is not documentary, the motion must be denied).

¹ Notably, Defendant Associa cites a case in its reply in which the Fourth Department found that the breach of fiduciary duty causes of action were pleaded with sufficient particularity to survive the motion to dismiss. See, *Cohen & Lombardo, P.C. v. Connors*, 169 AD3d 1399, 1401 [4th Dept. 2019].

Defendant Associa asserts that its documentary evidence conclusively bars Plaintiff's breach of fiduciary duty claim. Notably, all of this alleged "documentary evidence" is submitted to the Court through the Manfredi Affidavit. As indicated herein, however, an affidavit is not documentary evidence. *Phillips, supra*. Moreover, other than the Complaint and the Management Agreement, the remainder of the documents rely upon the Manfredi Affidavit for explanation. For example, Exhibit 3 is reported to be a document that shows that Plaintiff's Treasurer approved the disputed payment to NEC. However, said document requires lengthy introduction and interpretation from Manfredi before its relevance is made clear. *See* Manfredi Affidavit, ¶¶12-21. As the import of the exhibit is only established through the Manfredi Affidavit, the exhibit cannot be documentary evidence because the Manfredi Affidavit can be controverted by other evidence. *Id.* Indeed, in opposition, Plaintiff submits the affidavit of Paul Lehman, the Treasurer at issue, who contests much of Manfredi's Affidavit as to whether he approved the payment.

For the same reason, the e-mails annexed as Exhibit 5 and the letter annexed as Exhibit 6 to the Manfredi Affidavit do not qualify as documentary evidence pursuant to CPLR 3211(a)(1). *Id; see also Porat, supra*. Therefore, the only documents appropriate for consideration on Defendant Associa's motion are the Complaint, the Management Agreement and the check attached as Exhibit 4. Significantly, none of these documents utterly refute Plaintiff's factual allegations and conclusively establish a defense as a matter of law as to the breach of fiduciary duty cause of action. *XXXX, L.P., supra*. Accordingly, Defendant Associa's motion to dismiss the Third Cause of Action pursuant to CPLR 3211(a)(1) is denied.

Defendant Associa also seeks to dismiss the breach of fiduciary duty cause of action as

duplicative of Plaintiff's breach of contract claim. A breach of fiduciary duty claim can be dismissed as duplicative of a breach of contract claim when the claims are based on the same facts and seek identical damages. *Federico v. Brancato*, 144 AD3d 965, 967 [2d Dept. 2016]. Here, comparison of the allegations in the Third and Fourth Causes of Action reveals enough distinction to deny Defendant's motion. The Third Cause of Action, sounding in breach of fiduciary duty, alleges that Defendant Associa violated its fiduciary duty when it exceeded its actual authority by releasing the payment to Defendant NEC without inspecting the property and having been instructed not to release the funds pending an inspection. Complaint, ¶20. The Fourth Cause of Action, sounding in breach of contract, relies only upon Associa's alleged failure to inspect the property. Complaint, ¶23.

Next, Defendant Associa moves to dismiss the Fourth Cause of Action for breach of contract because Plaintiff fails to point to a specific provision of the management agreement that required said Defendant to inspect Defendant NEC's work. "The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach." *Arnell Const. Corp. v. New York City Sch. Const. Auth.*, 144 AD3d 714, 715 [2d Dept. 2016]. Notably, the cases upon which Defendant Associa relies for its argument are based upon motions for summary judgment, not motions to dismiss. *See, e.g. Arnell; Legum v. Russo*, 133 AD3d 638 [2d Dept. 2015]. Accepting the facts as alleged in the Complaint as true, as the Court must do, Plaintiff has alleged the existence of a contract, its performance under the contract, Defendant Associa's breach of its contractual obligations and damages resulting from the breach. *DeMarzo, supra*.

These allegations are sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7) and Defendant's moving papers are devoid of any applicable case law.²

Further, to the extent that Defendant Associa attempts to use purported documentary evidence to demonstrate that it did not breach any provision of the Management Agreement, this Court has already found that the submitted evidence is not documentary evidence within the meaning of CPLR 3211(a)(1). See *Prott v. Lewin & Baglio, LLP*, 150 AD3d 908, 909 [2d Dept. 2017] (evidence submitted in support of a motion pursuant to CPLR 3211(a)(1) must be "documentary" or the motion must be denied). Defendant Associa's motion to dismiss the Fourth Cause of Action is denied.

Finally, Defendant Associa argues that the Fifth Cause of Action fails as a matter of law. This cause of action is based upon Defendant Associa's withdrawal of two months of management fees after the Management Agreement was terminated. Plaintiff alleges in the Complaint that as a "defaulting party" under the management agreement, Associa was not entitled to such fees under paragraph 15(c) of said agreement. Defendant Associa counters that this cause of action must be dismissed as a "matter of law" because it has shown that it did not breach the management agreement. As the Court is denying the defense motion to dismiss the breach of contract claim, the Court rejects this argument.³

² Although Defendant Associa cites *Harmit Realities LLC v. 835 Ave. of the Americas, L.P.*, 135 AD3d 564 [1st Dept. 2016] in its reply, that case does not state that a complaint must be dismissed if a plaintiff fails to allege how a defendant's conduct breached the contract.

³ Defendant Associa does not move to dismiss the Fifth Cause of Action to the extent that it alleged a cause of action for conversion in its moving papers. Instead, it improperly seeks dismissal of this claim in its reply. "The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for the requested relief." *Castro v. Durban*, 161 AD3d 939, 941 [2d Dept. 2018]. As the Complaint clearly states that it seeks to recover damages from Defendant for the withdrawal of the funds based upon both breach of contract and conversion (Complaint, ¶¶ 5 and 27), Defendant's argument that it was raised for the first time in opposition is inaccurate.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that Defendant Associa's motion pursuant to CPLR 3211(a)(1) and (7) is denied in its entirety; and it is further

ORDERED that the Preliminary Conference Stipulation Order will be uploaded and the attorneys shall confer and fill out said Order and return to the clerk via e-mail at rkiggins@nycourts.gov on or before **May 22, 2020**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 22, 2020

CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF