

Tsui v Chou

2020 NY Slip Op 32158(U)

July 1, 2020

Supreme Court, New York County

Docket Number: 652840/2013

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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WINNIE TSUI, GINYEE CHU, DARREN JACKSON,
DIMPLE BHATT, TANVA NANTAKWANG, LILA
HEYMANN, LIN CHEUNG, JEANNIE CHEUNG, KIM LAM,
SALMA ABDELNOUR, JING TUN, CHONG TUN,
HAROLD KIM, JESSICA ROSENRAICH, MARIE-HELENE
ATTWOOD, ALL DERIVATIVELY ON BEHALF OF ALL
UNIT OWNERS OF THE EMPIRE CONDOMINIUM

Plaintiffs,

- v -

KATHERINE CHOU, ROBERT CHOU, RITA CHOU,
CHOU MANAGEMENT CO. INC.,

Defendants,

- and -

THE BOARD OF MANAGERS OF EMPIRE
CONDOMINIUM, IRENE TAM, YUH HU CHEN,

Necessary-Party
Defendants.

INDEX NO.	652840/2013
MOTION DATE	10/31/2019
MOTION SEQ. NO.	007
DECISION + ORDER ON MOTION	

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241

were read on this motion for SUMMARY JUDGMENT.

This is a derivative action brought by condominium unit owners on behalf of the condominium against the original sponsor of the condominium (Katherine Chou, “Katherine”), her husband (Robert Chou, “Robert”), Robert’s wholly-owned management company (Chou Management Co., Inc., “CM”), and the couple’s daughter (Rita Chou, “Rita”) for breach of fiduciary duty and breach of contract. Defendants Katherine, Robert, and Rita (together, the “Chou Family”), and CM (collectively, the “Defendants”) move for summary judgment

dismissing the Second Amended Complaint (“SAC”) for failure to state legally viable claims for relief and for failure to assert the breach of contract claim within the applicable statute of limitations period.¹ Plaintiffs oppose the motion and cross-move for summary judgment on their claims for breach of contract.

For the following reasons, Defendants’ motion for summary judgment is denied. Plaintiffs’ cross motion for summary judgment is granted in part and denied in part.

FACTUAL BACKGROUND

Empire and the Chou Family

Empire Condominium (“Empire”) was established in 1986 pursuant to an Offering Plan (the “Plan”) converting the building at 259 Elizabeth Street, New York City, New York, 10012 (the “Building”) into a condominium complex (*see* NYSCEF 196 [“Declaration”]; *see also* NYSCEF 215 at ¶ 1 [“Plaintiffs’ Rule 19-a Statement”]). Empire’s business and affairs are overseen by a Board of Managers (the “Board”)² elected by the owners (“Unit Owners”) of Empire’s condominium units (“Units”). Plaintiffs are Unit Owners.

Katherine is Empire’s Sponsor. In that role, she oversaw the initial offering and sales of Empire’s Units. The Plan states that the “Sponsor is not obligated to offer or sell any of the Units and may, if she chooses and amends this Plan to so indicate, withhold one or more Units for future sale” (*see* NYSCEF 219 at 63 [“Plan”]; Plaintiffs’ Rule 19-a Statement at ¶ 5).

Katherine never amended the Plan to reflect that she withheld one or more Units for future sale

¹ Defendants also move for summary judgment denying Plaintiffs’ claim for attorneys’ fees in this action. That motion is premature. Plaintiffs will be statutorily entitled to attorneys’ fees *if* they eventually prevail on their derivative claims in this lawsuit (*see* N.Y. B.C.L. § 626(e)).

² One of the Board’s responsibilities is to facilitate the preparation and distribution of financial statements “verified by an independent public accountant” (NYSCEF 220 at Art. 3, § 1 [“By-Laws”]; Plaintiffs’ Rule 19-a Statement at ¶ 107). Since 2014, Schreck & Co. has prepared Empire’s financial statements (Plaintiffs’ Rule 19-a Statement at ¶ 117).

(Plaintiffs' Rule 19-a Statement at ¶ 6). Since Empire's inception, Katherine has retained title ownership to four Units: 7A, 7B, 7C, 7D (*id.* at ¶ 7). Katherine previously transferred ownership of two Units to each of her daughters, Rita and Regina Chou (*id.* at ¶ 8).

The Units designated as Professional A, C, and D, as well as Commercial A and D, have also been owned by Katherine and/or her husband, Robert (*id.* at ¶ 9). Robert has been described as the sponsor's "principal" (*id.* at ¶ 23).³ Katherine, Robert, and Rita each have a seat on the Board (*id.* at ¶¶ 79 – 81).

The Board of Managers

The Board is comprised of five residential managers (owners of residential Units) and one professional manager (owner of a commercial Unit) (*see* By-Laws at Art. 3, § 1; Plaintiffs' Rule 19-a Statement at ¶ 11). After the election of the initial Board, all Board members were to be elected for three-year terms (*see* By-Laws at Art. 3, § 1; Plaintiffs' Rule 19-a Statement at ¶ 13). The Board was set up so that at least one-third of its members' terms expired each year (*id.*).

Under the Plan, "Sponsor [*i.e.*, Katherine] will control the Board until the sooner to occur of (a) the fifth anniversary of the first closing or (b) the closing of title to 75% of the Units in number and in aggregate Common Interests" (Plan at 1, §1). Katherine was permitted to designate a majority of the Board members, until one the above conditions were satisfied (*see* By-Laws at Art. 3, §1; Plaintiffs' Rule 19-a Statement at ¶ 16).

Katherine and Robert have been members of the Board since Empire's inception (Plaintiffs' Rule 19-a Statement at ¶ 8). They were last re-elected to the Board in 2010 (*id.* at ¶

³ Robert is also referred to as "one of the sponsors" in the Sixth Amendment to the Plan (*see* Plaintiffs' Rule 19-a Statement at ¶ 3(f); *see also* Plan, Sixth Amend., §12).

33), and the Board extended their terms by a year in 2011 (*id.* at ¶ 41). Rita has been a Board member since 2009 (*id.* at ¶ 28). She was last re-elected to the Board in 2017, after serving for 6 years without facing an election (*id.* at ¶¶ 48, 61, 66, 71, 77, 79). The Board did not hold elections from 2012 through 2015 (*id.* at ¶¶ 52, 56, 62, 67). At every election for the Board, Katherine has cast her votes for each open seat (*id.* at ¶ 17).

Chou Management Co. Inc.

After Empire was formed, the Board entered into a management agreement with CM (*id.* at ¶ 83). Robert is the sole member and owner of CM (*id.* at ¶ 84). In 2000, the Board contracted with CM for one year, with automatic renewals unless either party cancelled the contract in advance (*id.* at ¶¶ 86, 88). The Board's contract with CM automatically renewed each year from 2000 to 2014 (*id.* at ¶ 89).

In 2014, and again in 2017, the Board entered into new written contracts with CM (*id.* at ¶¶ 90, 95). In each instance, Katherine, Robert, and Rita voted to approve CM's contract (*id.* at ¶¶ 91, 96). Occasionally, CM has used the services of Leehi Construction, another company owned by Robert, to perform maintenance and repairs at the Building (*id.* at ¶¶ 100-01).

Relief Sought by Plaintiffs

Plaintiffs seek the following relief as part of their breach of fiduciary duty claim: (1) a money judgment against Robert and CM consisting of all Empire funds paid to CM or any of Robert's other businesses; (2) a rescission of CM's 2017 Management Contract with Empire; (3) a permanent injunction banning the Chou Family from being Board members or approving any contract with CM; and (4) an award of costs, disbursements and attorneys' fees (*see* NYSCEF 217 at 35 ["SAC"]).

As part of their breach of contract claims, Plaintiffs seek the following relief: (1) a permanent injunction banning the Chou Family from being Board members or voting for Board positions; (2) a temporary injunction prohibiting the Board from acting on any matters until a new Board is elected; (3) a mandatory injunction requiring a new Board election with varying fixed term lengths for Board members; (4) a declaration that Empire's financial statements need to be verified by independent public accountants; and (5) an award of costs, disbursements and attorneys' fees (*id.* at 35-36).

LEGAL ANALYSIS

A party moving for summary judgment must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If such a showing has been made, the burden shifts to the opposing party to "produce evidentiary proof in admissible form" sufficient to establish the existence of material issues of fact which require a trial in the action (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). When deciding the motion, the Court must view the evidence in the light most favorable to the non-movant (*Prine v. Santee*, 21 NY3d 923, 925 [2013]). Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 [1978]).

A. Plaintiffs' Breach of Fiduciary Duty Claim Raises Triable Issues of Fact

Defendants argue that their decision to retain CM is, as a matter of law, protected by the business judgment rule. Under the business judgment rule, a court's inquiry "is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the

condominium” (*Perl binder v. Board of Managers of 411 East 53rd Street Condominium*, 65 AD3d 985, 989 [1st Dept 2009] [internal citation omitted]). The business judgment rule is applicable to the board of directors of cooperative and condominium corporations (*see Levandusky v. One Fifth Ave.*, 75 NY2d 530, 537 [1990]).

The business judgment rule does not immunize board decisions that are infected by alleged self-dealing (*see id.*). The Chou Family, as Board members, owe fiduciary duties to Empire and its unit owners (*see Levandusky*, 75 NY2d at 537; *Bowery 263 Condominium Inc. v. D.N.P. 336 Covenant Avenue LLC*, 169 AD3d 541, 542 [1st Dept 2019]). As fiduciaries, Board members owe undivided loyalty to Empire (*see Tzolis v. Wolff*, 39 AD3d 138, 146 [1st Dept 2007], *aff’d* 10 NY3d 100 [2008]). Therefore, they must avoid situations “in which a fiduciary’s personal interest possibly conflicts with the interest of those owed a fiduciary duty” (*Pokoik v. Pokoik*, 115 AD3d 428, 430 [1st Dept 2014] [internal citation omitted]).

Based on the parties’ submissions, there are triable fact issues over whether the Chou Family improperly steered the Board to hire (and re-hire) CM based on a conflict of interest rather than a legitimate exercise of business judgment. Therefore, Defendants’ motion for summary judgement dismissing Plaintiffs’ breach of fiduciary duty claim on the merits is denied.

The parties’ debate as to whether Plaintiffs have established entitlement to “damages” on this claim is irrelevant to deciding the present motion. Plaintiffs do not seek damages (that is, compensation for an economic injury caused by Defendants’ allegedly improper conduct) in the traditional sense. Instead, Plaintiffs seek “monetary relief” in the form of the return of *all* funds paid to CM, which would be an equitable remedy. If Plaintiffs prevail on their claim for breach of fiduciary duty, the Court will consider whether one or more forms of equitable relief sought by Plaintiffs are appropriate remedies, potentially including rescission of the CM contract and

disgorgement of profits (*see Excelsior 57th Corp. v. Lerner*, 160 AD2d 407, 408-09 [1st Dept 1990] [“where claims of self-dealing and divided loyalty are presented, a fiduciary may be required to disgorge any ill-gotten gain even where the plaintiff has sustained no direct economic loss”]).

B. Plaintiffs Have Established Breach of Contract as to Certain Provisions of the Plan and By-Laws, But Not Others

To be successful on a breach of contract cause of action, Plaintiffs must prove that (1) an enforceable agreement existed between the parties, (2) Plaintiffs performed in accordance with the agreement, (3) Defendants breached the agreement, and (4) Plaintiffs sustained damages as a direct result of Defendants’ breach (*see Harris v. Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Neither party disputes that the Empire Plan and By-Laws are enforceable agreements that set forth the contractual rights and obligations of the parties in this case.

Statute of Limitations

As a threshold matter, Defendants argue that Plaintiffs’ breach of contract claims are untimely. The applicable statute of limitations for a breach of contract claim is six years (*see* CPLR § 213(2)). Defendants contend that Plaintiffs’ breach of contract claims accrued when Katherine and Robert first failed to offer unsold Units for sale and amend the Plan, on December 16, 1987. Therefore, Defendants argue, the statute of limitations expired in 1993.

The Court disagrees. In contract actions, the continuing wrong doctrine is applied to extend the statute of limitations when a contract imposes a continuing duty on the breaching party (*see Henry v. Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]). The continuing wrong doctrine “may only be predicated on continuing unlawful acts and not on the continuing effects of unlawful conduct. The distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs” (*Henry*, 147 AD3d at 600). Katherine and Robert have,

each year, refused to offer up the unsold Units for sale and/or subsequently amend the Plan to represent their Unit ownership. Thus, Plaintiffs have presented sufficient evidence to demonstrate a series of independent, distinct wrongs committed by Katherine and Robert. Plaintiffs' breach of contract claims are not barred by the statute of limitations.

Breach of Obligation to sell Units and Amend Plan to Reflect "Sponsor" Ownership

Proceeding to the merits, the evidence establishes as a matter of law that Katherine breached the provisions of the Plan by failing to sell Units and by failing to amend the Plan to reflect her Unit ownership (*see* NYSCEF 199 at 14 ["Defendants' Memorandum of Law in Support of Motion for Summary Judgment"]) ["Plainly, it is Katherine, not Robert, who is required to sell Units and surrender control of the Board"].

In addition, the evidence establishes that Katherine breached the provision of the By-Laws that prohibited her from voting to elect a Board majority (*see* By-Laws at Art. 3, §1). The Plan states that "Sponsor shall in no event cast its votes in favor of more than a bare majority of the Board members to be elected" (Plan at 37). Every year, two seats of the Board are up for reelection (*see* By-Laws at Art. 3, § 1; Plaintiffs' Rule 19-a Statement at ¶ 13), and Katherine voted for every available seat during each election (Plaintiffs' Rule 19-a Statement at ¶ 17). By voting for each available seat per year, Katherine violated the Plan and By-Laws.⁴

⁴ Katherine's rights as a shareholder are not impaired by the By-Laws. Sponsors "effectively constitute a separate class of shareholders, and coop plans that treat them differently from other shareholders have been held not to impair the equality of voting rights of shares" (*Tiemann Place Realty, LLC v. 55 Tiemann Owners Corp.*, 141 AD3d 56, 63 [2016] [internal quotation marks and citation omitted]). Moreover, Katherine has the right to elect one residential member of the Board by herself (By-Laws at 38) – a right that Katherine has repeatedly exercised – designating herself as a member of the Board (*see* NYSCEF 241 at ¶¶ 33, 58, 60, 63, 64, 68, 69, 75, 76, 80 ["Defendants' Response to Statement of Material Facts"]).

However, triable issues of fact exist as to whether Robert and Rita can be held liable for Katherine's breaches of contract. In *Board of Managers of 184 Thompson Street Condominium v. 184 Thompson Street Owner LLC*, 106 AD3d 542 [1st Dept 2013], the court held that as a general matter, non-sponsors could not be held individually liable for a sponsor's breach of the offering plan. That case does not, however, hold that a non-sponsor can *never* be held liable. A sponsor cannot evade obligations under an offering plan by transferring units to a related entity who will act in coordination with the sponsor (*see Matter of Tiemann Place Realty, LLC v. 55 Tiemann Owners Corp.*, 141 AD3d 56, 58 [1st Dept 2016]). In this case, Plaintiffs claim that Katherine's transfer of Units to family members was part of a scheme with Robert (as "principal" of the sponsor) to act *in concert* to maintain control of Empire and its Board in breach of Katherine's contractual obligations. In those circumstances, and given the conflicting evidence on this point, summary judgment on these claims (for either side) is inappropriate.

Remaining Claims for Breach of Contract

Plaintiffs also claim that the Chou Family members improperly entrenched their positions on the Board by failing to hold elections and by improperly preventing Unit Owners from receiving verified financial statements for Empire. Defendants argue that the Board, not the Chou Family, had the obligation to uphold the By-Laws' Election Provisions and to provide financial statements.

There are triable issues of fact as to whether the Chou Family are liable for these alleged breaches of contract. Although Katherine, Robert, and Rita retained their Board seats beyond the expiration of their terms, the Plaintiffs do not provide evidence clearly demonstrating that they prevented the Board from submitting their seats for reelection. Further, questions of fact remain as to how the Board determined which seats were up for reelection, why elections were not held

for several years, whether the Chou Family directed the issuing of unverified financial statements, and whether the Chou Family breached their fiduciary duties to Unit Owners.⁵ In view of those material disputes of fact, both parties' motions for summary judgment are denied with respect to these alleged breaches of contract.⁶

CONCLUSION

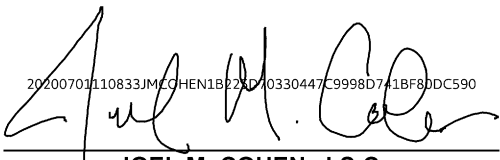
In accordance with the foregoing, it is

ORDERED that Defendants' motion for summary judgment is **denied**; it is further

ORDERED that Plaintiffs' Motion for Summary Judgment is **granted** as to Katherine Chou's breach of contract for failure to sell Units, failure to amend the Plan, and for voting for a majority of the Board, but is otherwise **denied**; and it is further

ORDERED that the parties are to appear for a status teleconference with respect to the trial schedule on July 6, 2020 at 10:00 am.

This constitutes the Decision and Order of the Court.


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JOEL M. COHEN, J.S.C.

7/1/2020
DATE

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

⁵ See *Fletcher v. Dakota, Inc.*, 99 AD3d 43, 47 [1st Dept 2012] [“although participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation’s tort is sufficient to give rise to individual liability”].

⁶ The Court defers to trial whether, and to what extent, Plaintiffs are entitled to the relief they seek, which includes proposed limitations on Defendants’ right to exercise voting rights.