

**People v Prottas**

2020 NY Slip Op 32190(U)

July 7, 2020

Supreme Court, New York County

Docket Number: 450135/2019

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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THE PEOPLE OF THE STATE OF NEW YORK, BY  
LETITIA JAMES, ATTORNEY GENERAL OF THE STATE  
OF NEW YORK,

INDEX NO. 450135/2019

MOTION DATE 04/10/2019

MOTION SEQ. NO. 001

Plaintiff,

- v -

JOSHUA PROTTAS, WORKING REALTY, LTD.,  
MIDWOOD COOPERATIVE GROUP, LLC, NINA  
PLATZER-ROSEN

**DECISION + ORDER ON  
MOTION**

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to DISMISS.

The People of the State of New York by Letitia James, Attorney General of the State of New York, bring this action pursuant to Executive Law § 63 (12), which empowers the Attorney General (AG) to bring an action for restitution, damages, and certain other forms of relief, “[w]hensoever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of any business.”

The AG’s Complaint paints a grim picture. Midwood Cooperative (Cooperative) is a cooperatively owned apartment building in Brooklyn whose residents and board members are “predominantly elderly.” The AG alleges that Defendant Joshua Prottas (Prottas), the longtime managing agent of the Co-Op, “repeatedly took advantage of the Cooperative’s precarious financial condition and the elderly board members’ reliance on him to benefit himself financially.” (NYSCEF Doc. No. 1 (Complaint) ¶ 2.) Specifically, the AG alleges that: “Prottas

persuaded the Cooperative's board to sell seven apartments to him at below market rate[s] by misrepresenting details about the transaction and withholding other material information. Prottas also hid from the Cooperative Board that he collected a \$100,000 commission from the sale. Prottas then attempted to conceal his fraud by manufacturing false documents, which he passed off as legitimate to the Cooperative's accountant and filed knowingly false documents with governmental entities. In other transactions, Prottas loaned money to the Cooperative from entities in which he had an interest at predatory interest rates." (*Id.*)

The Complaint asserts nine causes of action pursuant Executive Law § 63 (12): (1) Repeated and Persistent Fraudulent Conduct (First Cause of Action); (2) Forgery (Second Cause of Action); (3) Falsifying Business Records (Third Cause of Action); (4) Larceny (Fourth Cause of Action); (5) Criminal Usury (Fifth Cause of Action); (6) Offering a False Instrument for Filing (Sixth Cause of Action); (7) Violations of Real Property Tax Law § 467-a and 19 RCNY §§ 50-03 and 60.06, partial tax abatement for residential real property held in the cooperative form of ownership (Seventh Cause of Action); (8) Violation of Real Property Tax Law § 42 School Tax Relief (STAR) exemption (Eighth Cause of Action); and (9) Real Property Tax Law §§ 458 and 458-a, veterans' exemption (Ninth Cause of Action). For relief, the AG seeks restitution and damages to the Cooperative as well as disgorgement and injunctive and equitable relief "to redress the Defendants' fraudulent and illegal conduct."

Defendants move to dismiss the Complaint based on documentary evidence (CPLR 3211(a)(1) and failure to state a claim (CPLR 3211(a)(7)). For the following reason, their motion is denied.

**BACKGROUND FACTS AS ALLEGED IN THE COMPLAINT**

Prottas is the longtime managing agent of the Coop, a cooperatively owned apartment building located at 1075 Ocean Parkway in Brooklyn. Working Group Realty, Ltd (Realty) is a company created by Prottas to act as managing agent for the Cooperative and other buildings. Midwood Cooperative Group, LLC (Midwood) is a corporation that Prottas created to purchase apartments in the Cooperative. Prottas and “relief defendant” Nina Platzer-Rosen (Platzer-Rosen) are the members of Midwood.

For many years, the Cooperative operated at a deficit. In 2012 or 2013, Prottas worked with the Cooperative’s attorneys to amend the Cooperative by-laws, so that shareholders would be allowed to sell their shares to outsiders, rather than only selling them back to the Coop, and purchasers would have to pay the Cooperative both a \$25,000 transfer fee and a \$25,000 per bedroom “flip” tax.

By 2014, the Cooperative still owed the City of New York some \$555,000 in unpaid real estate taxes and water bills, both accruing interest at 9% per annum. In late 2014, the Cooperative’s board of directors (Board) directed Prottas to try to arrange the sale of seven apartments which were owned by the Cooperative and rented to tenants. After one investor whom Prottas approached declined to purchase the apartments, because he considered the transfer fees and flip taxes too large an expense, Prottas approached Platzer-Rosen, who had been consulting him for about 20 years on real estate investments. He told her that he would be able to buy the apartments at below market value, and that he would not need to pay transfer fees or flip taxes. Platzer-Rosen agreed to the proposed deal. Prottas, thereupon, formed Midwood for the purpose of buying the apartments.

Platzer-Rosen contributed approximately \$500,000 to Midwood, and Prottas contributed \$200,000, which he borrowed from Platzer-Rosen. At about this time, Yehezkel Fishbach (Fishbach), who had been elected to the Board in 2014, offered to buy the seven apartments for \$750,000. Prottas informed the then-president of the Board, Hilma Fuchs (Fuchs), that Fishbach wished to buy the apartments, but he failed to tell her how much Fishbach had offered and persuaded her that selling to a resident of the Cooperative was a poor idea. He then falsely told Fishbach that the Board had rejected his offer, because it did not want one shareholder to own so many apartments. None of the members of the Board, other than Fuchs, learned about Fishbach's offer until after the apartments were sold. On February 11, 2015, Prottas told a meeting of the Board that he had formed a group that was willing to buy the apartments for \$600,000, the amount that the Cooperative owed at that time in real estate taxes. The Board voted to allow him to go forward. (In this action, Prottas asserts that he *did* pay \$700,000 for the apartments, in the form of \$600,000 in cash plus \$100,000 in improvements.)

On May 20, 2015, Prottas distributed a document (the Term Sheet) describing the terms which would govern the purchase of the seven apartments. Prottas failed to disclose that he did not intend to pay transfer fees or flip taxes upon reselling the apartments, and that he did not intend to pay maintenance fees for the first three months after purchasing the apartments. Prottas argues that the statement in the Term Sheet that "Josh's group is stepping into the board's shoes" should have alerted the Board to both of his unstated plans. However, the minutes of Board meetings held on December 6, 2016 and February 1, 2017 both mention the Board's expectation that it would receive the benefit of the flip taxes upon the resale of any of the apartments. See NYSCEF Doc. No. 6, ¶ A (2) and NYSCEF Doc. No. 7, ¶ A.

Prottas conveyed the apartments to Midwood on June 18, 2015. The preceding day, he created a purchase agreement that provides, among other terms, that Midwood would not be required to pay transfer fees and flip taxes upon the resale of any unit. *See* NYSCEF Doc. No. 9. That agreement was not presented at any Board meeting prior to the conveyance of the apartments to Midwood. The transfer fees and flip taxes at issue amount to \$425,000.

The Term Sheet stated that, instead of the \$7,050 per month that the Cooperative was then getting in rent, upon the sale of the apartments to Midwood the Cooperative would receive approximately \$3,000 per month in maintenance charges, and Prottas and Midwood would keep approximately \$4,000 per month as a return on investment. The \$7,050 number was based on the rents from only six of the seven apartments. Moreover, the complaint alleges, Prottas knew, but failed to inform the Board, that rents on the seven apartments could be and would be substantially raised.

In papers filed with both the New York City Department of Finance and the New York State Department of Taxation and Finance, Prottas represented that the total price that the Cooperative received for the seven apartments was \$700,000, rather than the \$600,000 that Midwood actually paid. Prottas caused those same figures to be filed with the New York City Register's Office, and the proprietary leases that he caused to be created from the Cooperative to Midwood, purported to show a total payment to the Cooperative of \$700,000.

On June 24, 2015, Prottas signed a check for \$550,000 from Midwood to the Cooperative. On July 8, 2015, Prottas signed a check for \$150,000 from Midwood to the Cooperative. The memo field on that check states, "balance due [on] apartment purchase." Then, on July 10, 2015, Prottas wrote and signed a check from the Cooperative to Midwood for \$100,000. The memo field on the check states "commission apts." Prottas told neither Platzer-

Rosen, nor the Board that he had taken a commission, much less one of that magnitude. By having Midwood pay the Cooperative \$700,000, and then having the Cooperative return \$100,000 to Midwood, Prottas simultaneously raised the cost basis of the seven apartments and (allegedly) stole from Platzer-Rosen.

The complaint further alleges that, in June 2016, in connection with an audit commissioned by Realty for calendar 2015, Prottas altered the copy of the June 24, 2015 shareholders meeting minutes to delete a reference to the sale of the seven apartments for \$600,000. *Compare* NYSCEF Doc. No. 19, third bullet point with NYSCEF Doc. No. 12, third bullet point. In response to a question about attorneys' fees that the Cooperative had paid, in connection with the sale of the seven apartments, Prottas created a document on Realty's lawyer's letterhead, showing a fictitious invoice in the amount of \$3,000.00 and, again, stating the purchase price to be \$700,000. *See* NYSCEF Doc. No. 54, affidavit of Jared Rich and exhibit A thereto.

The Cooperative's auditor also asked why no maintenance charges appeared for the seven sold apartments, and for confirmation that Realty's management fee had been increased to \$2,500 per month, as of January 15, 2015. In August 2016, Prottas sent the accountant a letter, apparently bearing Fuchs's signature, that addressed the accountant's concerns. The Complaint alleges that Prottas forged Fuchs's signature on that letter.

In August 2016, the accountant issued audited financial statements to the Cooperative for calendar year 2015. Note 6 of those statements incorrectly stated that, in 2015, the Cooperative sold treasury shares representing seven units for the sales price of \$700,000. The following year, the accountant issued audited financial statements for calendar 2016. Those statements showed the Cooperative's balance sheets as of December 31, 2015 and 2016. Again, note 6 stated that

the price of the seven apartments was \$700,000. Prottas corrected neither the 2015 nor the 2016 balance sheets.

In September 2017 Prottas received a subpoena from the Attorney General, demanding information about the sale of the seven apartments. Thereupon, Prottas asked the accountant to change note 6 to state that \$100,000 of the sale price was used for renovation of the apartments, rather than, as previously stated, for a commission. The accountant refused to make the change, absent instructions from the Board.

### **Defendants' Position**

Defendants vehemently deny the AG's allegations.

With respect to core allegations of fraud, Defendants' overarching contention is that the challenged conduct was fully disclosed to and approved by the Cooperative's Board. In support of that contention, Defendants have submitted two affidavits by the former Board President (until 2016) Hilma Fuchs, which they contend is conclusive "documentary evidence" that refutes the AG's claims. As Defendants put it: "[T]here is a fatal flaw in the State's Complaint: it is entirely wrong." (Br. in Support, NYSCEF 38 at 1.)

Ms. Fuchs's first affidavit (NYSCEF 41), dated July 6, 2019, states that she signed three purportedly exculpatory documents and understood what she was signed when she signed them. First, she avers that she signed a document confirming, inter alia, that Midwood would not be subject to a transfer fee or flip tax upon the sale of any unit and that "[t]he \$600,000 Net Proceeds received by the Co-Op will be used to pay the Real Estate Tax Arrears currently owed." Second, she avers that she signed a letter (dated February 6, 2015) stating that the Coop *two years earlier* had authorized Prottas to borrow \$40,000 to pay operating expenses and that, upon the sale of an apartment, the loan was repaid within the year plus \$4,000 interest. Third,

she avers that she signed a letter (dated October 15, 2015) confirming that on May 8, 2014 (i.e., 19 months earlier) the Board authorized Prottas to lend the Cooperative \$60,000 for a fixed fee of \$3,000 to make a payment of the Cooperative's real estate taxes, and that the funds were repaid the following month.

Ms. Fuchs's second affidavit (NYSCEF 42), dated April 4, 2019, avers that she authorized Prottas to sign her name on an undated "To Whom It May Concern" letter purportedly confirming "the building's policy for over 20 years that whenever the co-op board sells an apartment that is being 'Gut Renovated', the maintenance is forgiven for three months to allow the necessary time for the renovation to be completed," and that this policy "was extended to [Midwood] when the seven units were purchased." The letter further states that the Board decided in 2014 "to increase the monthly management fee from \$1900/month to \$2500/month beginning January 2015."

In response, the AG argues that the Fuchs Affidavits do not constitute irrefutable "documentary evidence" sufficient to support a motion to dismiss. Among other things, the AG argues that the affidavits conflict with documents and statements from Ms. Fuchs and other Board members made during the AG's investigation, and that in any Ms. Fuchs could not speak for the Board.

### ANALYSIS

The standard for assessing a motion to dismiss under CPLR 3211 is a familiar one. The Court must afford the Complaint a liberal construction, accept the factual allegations as true, and accord the plaintiff the benefit of every favorable inference. The job is to determine whether the facts, as alleged, fit within any cognizable legal theory (*see, e.g., Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Grassi & Co. v*

*Honka*, 180 AD3d 564, 564 [1st Dept 2020]). Allegations that are “bare legal conclusions,” or that are inherently incredible or flatly contradicted by documentary evidence, are not sufficient to withstand a motion to dismiss (*see, e.g., Myers v Schneiderman*, 30 NY3d 1, 11 [2017]; *Doe v Bloomberg, L.P.*, 178 AD3d 44, 47 [1st Dept 2019]; *JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]).

Dismissal under CPLR 3211(a)(1) is warranted when the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88; *see also Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [motion to dismiss based on documentary evidence appropriately granted only when evidence “utterly refutes” plaintiff’s factual allegations, conclusively establishing a defense as a matter of law]). “Judicial records[] . . . would qualify as ‘documentary,’ as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence. To qualify as ‘documentary,’ the paper’s content must be ‘essentially undeniable and . . . , assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432-433 [1st Dept 2014] [quotation marks and citation omitted]).

### **The Fuchs Affidavits Do Not Support Dismissal of the Complaint**

The Fuchs Affidavits, upon which Defendants heavily rely,” do not constitute the type of “undeniable” evidence that conclusively establishes a defense to the AG’s claims. It is certainly possible that Ms. Fuchs accurately recalls the details of documents she purportedly signed several years ago, or that she permitted Prottas to sign her name to a document that exculpates Prottas, which in turn reference events that occurred one to three years earlier than that. It is also possible, as the AG alleges, that these post hoc confirmations were the product of an inaccurate

recollection (conflicting with Ms. Fuchs's prior testimony, as well as contemporaneous documents and other witnesses) or, more darkly, Prottas's influence.<sup>1</sup> Either way, the affidavits do not constitute irrefutable evidence that would warrant dismissal of *any* of the AG's claims.

**The AG's Allegations Support the Claims Stated in the Complaint**

Without the benefit of Ms. Fuchs's affidavits, Defendants' arguments in support of dismissal readily collapse into a denial of the AG's factual allegations, which does not provide grounds for dismissing a Complaint under CPLR 3211.

The AG's Complaint recites in detail a scheme by Prottas (through his wholly owned entities) to take advantage of the elderly residents of the Cooperative and their Board for his personal benefit. Among other things, the AG alleges with sufficient specificity that he charged the Cooperative exorbitant interest rates for loans (which he characterizes as a flat fee); falsified documents attesting that his transactions were authorized by the Board; increased his management fee without authorization; exploited his inside knowledge to acquire Units for less than fair value; failed to disclose a higher offer for the same units; misrepresented that he had Board approval to forego payment of required flip taxes and maintenance fees; and misrepresented the sales price and paid himself an unauthorized and undisclosed commission. To be sure, the AG may not be able to prove the above allegations. But at this stage, they are assumed to be true.

Based on those allegations, the AG has sufficiently pleaded a disturbing pattern of fraud; forgery of letters and Board documents; falsifying business records (including Board minutes); larceny (for example, purportedly looting the Cooperative for unauthorized loans and

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<sup>1</sup> In opposition to Defendants' motion, the AG cites testimony to the effect that Prottas was able to exert undue influence over Ms. Fuchs. (Br. in Opp. at 12.)

management fees); usury (for accepting \$3,000 for one month's interest on a \$60,000 loan); offering a false instrument for filing (including by misrepresenting the purchase price of the Units), as well as various tax-related wrongdoing.

Again, the burden will be on the AG to prove its allegations. But the AG has alleged more than enough to state claims sufficient to withstand a motion to dismiss.

The Court has considered Defendants' remaining arguments and finds them to be unavailing.

Accordingly, it is hereby

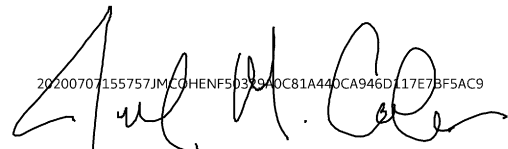
**ORDERED** that Defendants' motion to dismiss is **denied**; it is further

**ORDERED** that Defendants may interpose an answer to the complaint within 20 days of the entry of this Decision and Order; and it is further

**ORDERED** that the parties are to appear for a Preliminary Conference, via telephone, on August 11, 2020 at 10 a.m.

This constitutes the decision and order of the Court.

7/7/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE