

Great Jones St. Realty Corp. v Chimsanthia
2020 NY Slip Op 33421(U)
October 16, 2020
Supreme Court, New York County
Docket Number: 155115/2019
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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INDEX NO. 155115/2019

GREAT JONES ST. REALTY CORP.,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002

- v -

NITTAYA CHIMSANTHIA, AND AS TRUSTEE OF THE
NITTAYA CHIMSANTHIA MARITAL TRUST

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for DISMISS DEFENSE

In this action, plaintiff Great Jones St. Realty Corp., the owner of certain real estate in New York including real property located at 35 Great Jones Street, Unit 3-B, seeks to recover damages against defendant Nittaya Chimsanthia, individually and as trustee of the Nittaya Chimsanthia Marital Trust, for usurpation of corporate opportunity. Plaintiff alleges that defendant Nittaya Chimsanthia continued to improperly reside in the unit after the death of her husband, Joseph Scott Jr. on November 26, 2017. Plaintiff now moves to dismiss defendants' first, second, third, fourth and fifth counterclaims pursuant to CPLR 3211 (a) (1), (7) and (10); and to dismiss defendants' first, second, third, fourth, fifth, sixth, seventh and eighth affirmative defenses pursuant to CPLR 3211 (b). Defendants oppose and cross move to amend their answer pursuant to CPLR 3025 (b); have the documents and information sought in their fifth counterclaim be deemed a formal discovery request pursuant to CPLR 3120 and 3130; and obtain discovery pursuant to CPLR 3211 (d) in order to address the motion to dismiss. In response to defendants' cross-motion, plaintiff, rather than oppose the motion, seeks to have its motion to dismiss

considered as against the proposed amended complaint. Therefore, defendants' motion to amend their answer will be granted and the motion to dismiss will be considered as against the amended answer (*49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243 [1st Dept 2004]).

In support of its argument that the counter-claims should be dismissed based on documentary evidence (CPLR 3211 [a] [1]), plaintiff attaches purported stock certificates to Joseph D. Scott, Jr., Joseph Scott, and Theresa Scott¹ for shares of stock in plaintiff, and a stock register for plaintiff. However, plaintiff's attorney affirmation is insufficient to authenticate these documents (*Wells Fargo bank, NA v Sesev*, 183 AD3d 780, 782 [2nd Dept May, 2020]; *Qureshi v Vital Trans., Inc.*, 173 AD3d 1076, 1078 [2nd Dept 2019]). Accordingly, that branch of plaintiff's motion seeking dismissal of defendants' counterclaims pursuant to CPLR 3211 (a) (1) must be denied.

Plaintiff argues that the counterclaims should be dismissed because they fail to state a cause of action (CPLR 3211 [a] [7]), suggesting that the allegations made "upon information and belief" are belied by the plaintiff's documentary evidence. However, as shown above plaintiff's attorney affirmation is insufficient to establish an evidentiary basis to consider the documentary evidence (*id.*). Nor are the allegations in support of the counterclaims insufficient at this stage of the litigation because they are made "upon information and belief" (*accord State of NY v Post Integrations, Inc.* 162 AD3d 592 [1st Dept 2018]). Accordingly, that branch of plaintiff's motion seeking dismissal of defendants' counterclaims pursuant to CPLR 3211 (a) (7) must be denied.

Plaintiff next argues that the counterclaims should be dismissed because defendants failed to join the other shareholders in this closely held corporation (CPLR 3211 [a] [10]). There is no dispute that Theresa Scott and Joseph Scott, Sr. (now deceased) gifted 5 shares of stock each in plaintiff

¹ Joseph and Theresa Scott are Joseph D. Scott, Jr.'s parents.

that Theresa Scott and Joseph Scott, Sr. (now deceased) gifted 5 shares of stock each in plaintiff to their son Joseph Scott, Jr. The dispute is whether the 10 shares of stock represents 10% ownership in plaintiff as defendants contend or 9.090909% as plaintiff contends.

According to plaintiff and without citation to any authority, if it is determined that defendants are entitled to 10% of the stock in plaintiff the additional stock would have to come from the other two shareholders and any judgement would have a collateral estoppel effect on them.

Defendants respond that their counterclaims are predicated upon the allegation that Mr. Scott, Jr.'s parents gifted their son 10 shares of stock in plaintiff which at all times represented a 10% ownership interest in plaintiff and the amended answer alleges that Theresa and Joseph Scott Sr., each held a 45% interest in plaintiff. Defendants aver that it is plaintiff's actions that have reduced the ownership percentage in plaintiff not the other shareholders' actions. Even if the court determined that defendants failed to join a necessary party, that finding does not necessitate dismissal of the counterclaims (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 10 [1st Dept 2007]). Rather, pursuant to CPLR 1001 (b) the court is required to order that the necessary party be summoned to appear; however, summoning the other shareholders is not necessary here. Taking defendants' allegations as true and affording defendants the benefit of every possible favorable inference (*accord Charles Schwab Corp. v Goldman Sachs Grp., Inc.*, 186 AD3d 431 [1st Dept Aug 13, 2020]) the allegations that Joseph D. Scott, Jr. owned 10% of plaintiff and that Theresa and Joseph Scott each held 45% of plaintiff is sufficient to support defendants' counterclaims and a determination at this juncture that defendants have not failed to name a necessary party. Accordingly, that branch of plaintiff's motion seeking to dismiss the counterclaims for failure to name a necessary party must be denied.

As to that branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses, it too must be denied. Again, taking defendants' allegations as true and affording defendants the benefit of every possible inference, the affirmative defenses raise issues of fact (*accord id.*).

That branch of defendants' cross-motion seeking to deem defendants' fifth counterclaim a formal discovery request under CPLR 3120 and 3130 must be denied because defendants' amended answer does include a fifth counterclaim; it only includes four counterclaims.

Finally, that branch of defendants' cross-motion seeking discovery in order to address the motion to dismiss will be denied as moot.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' counterclaims and affirmative defenses is denied in its entirety; and it is further

ORDERED that that branch of defendants' cross-motion seeking to serve an amended answer is granted and the amended answer annexed to defendants' cross-motion as Exhibit 15 is deemed served on plaintiff; and it is further

ORDERED that plaintiff shall reply to the amended answer within 20 days of notice of entry of this order; and it is further

ORDERED that that branch of defendants' cross-motion seeking to deem defendants' fifth counterclaim a discovery request is denied; and it is further

ORDERED that that branch of defendants' cross-motion seeking discovery to address the

motion to dismiss is denied.

10/16/2020

DATE


PAUL A. GOETZ, 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