

People v Austin

2021 NY Slip Op 30275(U)

January 29, 2021

Supreme Court, New York County

Docket Number: 451533/2019

Judge: O. Peter Sherwood

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

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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

INDEX No.: 451533/2019

MOT. DATE: 4/21/2020

Plaintiff,

MOT. SEQ. No.: 001

-against-

**DECISION + ORDER ON
MOTION**

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD
M. PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL,
ANTHONY R. MORDENTE, and VERA PRINCIOTTA,

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24,
25, 26, 27, 28, 74, 79
were read on this motion to/for MOTION TO DISMISS

Defendant Michael F. Michel (“Michel”) moves to dismiss the complaint as against him pursuant to CPLR 3211(a)(1) and 3211(a)(7). For the following reasons, the motion is denied.

I. BACKGROUND

As this is a motion to dismiss, the following facts are taken from the complaint. In 2014, the New York State Attorney General’s office (the “AG”) began an investigation of the Lutheran All Faiths Cemetery (the “Cemetery”) with a targeted review of a payment made to Daniel Austin, Sr. (“Austin Sr.”) (Compl. ¶ 34 [Doc. No. 2]). In May 2014, Austin, Sr., resigned from his positions as President and CEO of the Cemetery after 24 years (*id.* ¶ 35). Upon his resignation, the Cemetery paid Austin, Sr. a \$900,000 award characterized in the Cemetery’s 2014 Financial Statement as full liquidation of a retirement rabbi trust created for Austin, Sr.’s benefit. However, the terms of the trust agreement provided only an annual retirement pension supplement in monthly installments (*id.* ¶¶ 35, 46). Defendant Anthony Mordente authorized the payment as the “duly authorized trustee” of the account despite ceasing to serve as a trustee for the account years earlier (*id.* ¶ 46). Further, no Board vote was held to approve the award and no

defendant reviewed or sought legal review of the award despite their roles as the Cemetery's fiduciaries (*id.* ¶¶ 43, 47, 49). Although Austin, Sr. claimed a right to receive the 2014 lump sum payout upon his retirement, he continued to serve in a full-time paid role as Board Chairman until 2019, enjoying various employee benefits while personally reinvesting the entire balance of the rabbi trust under his own name (*id.* ¶¶ 53-55).

Beyond the \$900,000 payment, the AG's investigation uncovered further evidence of misconduct among the Board defendants. For example, despite reminders from the Cemetery's auditor and investment advisor about defendants' fiduciary obligations to the Cemetery, defendants exercised minimal oversight of the Cemetery's finances, including routinely violating the Cemetery's conflict of interest policy (*id.* ¶ 57). Specifically, persons in senior level positions did not have formal compensation agreements, Board meeting minutes rarely recorded compensation award authorization and there was no program to determine executive bonuses, retirement plans, severance and more (*id.* ¶ 58). Further, no defendant challenged Austin, Sr. or Daniel Austin, Jr.'s ("Austin, Jr.") Board positions despite Austin, Jr.'s diversion of over \$60,000 from the Cemetery's operating funds, Austin, Sr.'s attempt to conceal discussion of Austin, Jr.'s theft in meeting minutes, Austin, Sr. and Jr.'s attempt to initiate merger talks on the Cemetery's behalf without Board knowledge, and a physical altercation involving a firearm between Austin, Jr. and other Board members (*id.* ¶ 59).

Although the Cemetery maintained an internal conflict of interest policy which each defendant endorsed annually pursuant to New York Non-Profit Law, defendants conducted no periodic review of compensation, benefits, or potential conflicts between 2014 and 2018 (*id.* ¶¶ 60-61). In that time, the Board appointed members without relevant qualifications to paid executive roles and paid professional fees to defendants Donald Pfail ("Pfail") and Mordente without taking steps to evaluate the amounts paid or quality of services rendered while they both continued to enjoy annual salaries (*id.* ¶¶ 61-62). Further, despite Cemetery by-laws authorizing the Board to invest in property, and warnings from Board members and an outside auditor that the Cemetery should establish a standard to calculate a borrower's creditworthiness and maintain a sufficient debt to equity ratio, the Cemetery used restricted assets to provide private mortgage loans to individual borrowers without Board review of loan terms, collateral, or relative investment value between 2014 and 2018 (*id.* ¶¶ 63-66). These included a July 2015 \$400,000 interest-only loan to defendant Michel's daughters with a March 2015 commitment letter

executed by Mordente that disclosed the property to be developed belonged to Michel and a July 2017 \$500,000 loan to defendant Joseph Lodato's ("Lodato") brother at Lodato's request (*id.* ¶¶ 67, 69). These loans were not mentioned in meeting minutes at the time the commitments were made. Instead, they were discussed months later with no substantive inquiry into the borrowers' identities or relationship to sitting Board members (*id.* ¶¶ 67-70). In August 2018, defendants also failed to conduct a conflict review when they permitted Austin, Sr. to personally repay money stolen by his son without interest, admission of wrongdoing, or examination of Austin, Sr.'s role as Chairman (*id.* ¶ 71).

Despite an outside auditor's 2013 recommendation that the Cemetery take steps to reduce administrative spending, expenses driven by salaries, fees, and miscellaneous expenses rose without intervention between 2014 and 2019 (*id.* ¶¶ 72-74). In an effort to save money, the Board terminated Pfail in August 2016 without naming a successor but authorized compensation increases for Austin, Sr., Austin, Jr., and Mordente (*id.* ¶ 75). In March 2017, an auditor reiterated that the Cemetery's overhead should be carefully moderated. A year later, the same auditor reported that the Cemetery's payroll costs consisted of nearly 80% of its operating expenses (*id.* ¶ 76-77). Defendants took no action to reduce payroll costs and fired the auditor in September 2018 without explanation (*id.*). Defendants' overspending was supported with regular incursions into the Cemetery's restricted Perpetual Care Fund, a fund to be used "solely for the perpetual care and maintenance of the lots" (*id.* ¶¶ 78-79). Despite the Cemetery's annual recitation of the restrictions that apply to the Perpetual Care Fund, defendants regularly permitted withdrawals from the account to fund general Cemetery operating expenses (*id.* ¶¶ 80-81). Cemetery financial statements for the years of 2014 to 2017 recorded annual inter-fund receivables owed to the Perpetual Care Fund of \$962,000 (2013), \$1.3 million (2014), \$977,363 (2015), \$1.19 million (2019), and \$960,021 (2017) (*id.* ¶ 86).

As against defendant Michel, the Attorney General brings four causes of action: (i) breach of fiduciary duty and waste pursuant to N-PCL §§ 717 & 720, (ii) failure to properly administer charitable assets and waste pursuant to EPTL §§ 8-1.4 & 8-1.5, (iii) failure to properly administer charitable assets and waste pursuant to N-PCL § 1507, and (iv) wrongful related party transactions pursuant to N-PCL § 715(f) & EPTL § 8-1.9.

II. ARGUMENTS

A. Defendant's Affirmation in Support

Defendant Michel only submits an affirmation of attorney Victor A. Carr in support of his motion and moves pursuant to CPLR § 3211(a)(1) and (a)(7) (Carr Aff. ¶I [NYSCEF Doc. No. 21]). He argues that the complaint refers to him by name only five times in paragraphs 4, 18, 67, 71, and 108 (*id.* ¶ 15; He argues that none of these allegations support any claim that he exploited his position or ignored his fiduciary obligations (*id.*, ¶¶16-17). Defendant argues the allegation that defendants failed to observe a reasonable standard of conflict review is insufficient to support a breach of fiduciary duty claim (*id.* ¶ 18). He also maintains that, because the complaint does not mention him specifically in the Prayer for Relief section and because the body of the complaint fails to set forth sufficiently particular allegations as against him, it ultimately fails to state a claim against him (*id.*, ¶¶ 9, 19, 22; and *see Basis Yield Alpha Fund v Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014]; *Kalmanash v Smith*, 291 NY 142 [1943]; *Dominski v Frank Williams and Son, LLC*, 46 AD3d 1443 [4th Dept 2007]; *Mid-Hudson Valley Fed. Credit Union v Quartararo & Lois, PLLC*, 155 AD3d 1218 [3d Dept 2017]; *see also* John R. Higgett, Practice Commentaries to CPLR 3211, 3211:22).

Michel next asserts that the only factual allegation the complaint makes against him is the mortgage loan made to daughters (Carr Aff. ¶ 25; Compl. ¶¶ 67, 108). He argues the Cemetery obtained a “very favorable return on that legitimate investment” as the loan was a two-year balloon mortgage for \$400,000, payable in interest only payments of \$2,083.33 a month at a 6.25% interest rate, and secured by property at 445 Beach 130th Street in Far Rockaway, New York (*id.*, ¶ 26; Carr Aff., Ex. 4 [NYSCEF Doc. No. 25] [hereinafter, “Mortgage Note”]). He argues the AG cannot demonstrate that the loan carried any risk when it was made because the property had a fair market value in excess of \$400,000 at the time the mortgage was issued and currently has a value of nearly \$1 million (Carr. Aff. ¶ 27). He further argues that the AG cannot show the loan had a less favorable rate of return than any other low risk investment because the note provided a favorable 6.25% interest return for two years (*id.*). The Cemetery sustained no damages from this investment because the interest payments were made each month in a timely manner for the full term of the mortgage and, at the end of the term, the principal was repaid in full (*id.* ¶¶ 28-29; Carr Aff. Ex. 5 [NYSCEF Doc. No. 26] [hereinafter “Michel Aff.”]; Carr Aff. Ex. 6 [NYSCEF Doc. No. 27] [hereinafter “Satisfaction of Mortgage”]). Because the loan

generated a \$60,000 return and the entire principal was paid, there was nothing inappropriate about the loan and plaintiff's claim that approval of the mortgage was a breach of fiduciary duty has no merit (Carr Aff. ¶¶ 31-33; *Sunset Café, Inc. v Mell's Surf & Sports Corp.*, 103 AD3d 707 [2d Dept 2013]).

B. Plaintiff's Memorandum in Opposition

The AG begins by arguing that New York law establishes clear standards of conduct for directors of non-profits, imposing a heightened standard of care, and that Michel consistently failed to meet them (Pl. Br. at 2 [NYSCEF Doc. No. 74]). Michel's affirmation in support of dismissal identifies no valid legal basis for such relief and ignores the detailed allegations in the complaint regarding the Board's collective failure to properly administer charitable assets and the relief sought from Michel along with his co-defendants (*id.* at 3). Plaintiff further argues that Michel's motion based on CPLR 3211(a)(1) is without merit as the documents he submits merely confirm that the Cemetery used restricted trust assets to provide an insider benefit to Michel in the form of the 2015 mortgage loan to his daughters (*id.*).

The AG argues the Cemetery is required to operate pursuant to New York non-profit law's regulatory regime, in accordance with N-PCL, Article 8 of the EPTL, the Cemetery's Certificate of Incorporation and its Bylaws as adopted. This compliance represents the primary fiduciary obligation of the Cemetery's Board (Pl. Br. at 5; Compl. ¶ 10). The N-PCL and EPTL require directors of a cemetery corporation to act in good faith and with ordinary care (Pl. Br. at 5-6; Compl. ¶¶ 20, 21; N-PCL § 717; EPTL § 8-1.4). The N-PCL also (i) subjects directors who receive compensation for their roles to higher standards of care than volunteer directors, (ii) states that directors voting on distribution of the Cemetery's assets to members or officers may be held jointly and severally for injury suffered by the Cemetery corporation, (iii) requires the Board undertake special review of any institutional transaction in which a related party has a substantial financial interest and consider alternative transactions where available, and (iv) outlines requirements for the management of institutional funds at the cemetery in three separate funds dedicated to the cemetery's current and long-term maintenance (Compl. ¶¶ 21, 23, 26; N-PCL §§ 715, 719). The AG argues defendant Michel does not dispute that he was subject to these legal standards, requiring prudent management of the Cemetery's institutional funds, as a director of the Cemetery (Pl. Br. at 6-7).

The AG argues that defendant's performance as a member of the Cemetery Board between 2014 and 2018, fell short of what New York law requires and that his affirmation in support of his motion does not address this conduct (Pl. Br. at 7; Carr Aff. ¶¶ 15, 19). The suggestion that there are no allegations of impropriety by Michel because his name is mentioned specifically only five times lacks merit. Each reference to "defendants" in the complaint includes Michel and there are a host of allegations of wrongdoing, including: (i) the \$900,000 payment to Austin, Sr. at the time of his retirement from the positions of President and CEO in 2014 which went unreviewed by the full Board¹, (ii) the Board's failure to question or object to continuing payments made to Austin, Sr., and (iii) the Board's failure to conduct periodic reviews of compensation, benefits, or conflicts, and more (Pl. Br. 7-9; Compl. ¶¶ 48-49, 55, 58-59, 61, 70, 78, 81-82). Defendant may not avoid these allegations by simply claiming insufficient notice of his status as a named defendant (Pl. Br. at 9). The AG similarly debunks Michel's claim that he is not included specifically in the Prayer for Relief by arguing that the complaint seeks to bar all director defendants, including Michel, from future service as a non-profit fiduciary in New York and asks for an accounting of Michel's conduct as a director that would enable restitution to the Cemetery (*id.*; Carr Aff. ¶ 19).

The AG argues that Michel also fails to challenge the factual allegations in the complaint and must accepted as true in a motion to dismiss (Pl. Br. at 9-10). Michel's affirmation contains assertions with no factual basis or support for the claim that there was "nothing inappropriate" about the Cemetery's mortgage loan to his daughters or that the Cemetery "suffered no loss as a result" (*id.*; Carr Aff. ¶¶ 25, 27). Michel's attorney, Victor Carr, is not a competent witness to the conduct and events alleged in the complaint and the factual questions his affirmation purports to raise are not properly before the court on a CPLR § 3211(a)(7) motion to dismiss (Pl. Br. at 10). Plaintiff argues that Michel's documentary evidence is also inadequate to dispose of the allegations in the complaint because Michel cannot establish the reasonableness of an insider loan through a copy of the agreements recording that loan under N-PCL § 715 (Pl. Br. at 10; Carr Aff. Ex. 5; N-PCL § 715(f)). Plaintiff further argues that Michel cannot conclusively establish absence of any plausible claim against him for breach of fiduciary duty through his own opinion

¹ In his reply memorandum, Michel argues that the allegation that he considered or ratified the terms of a \$900,000 payment to Austin, Sr., is untrue as he swore under oath that he did not become a member of the Cemetery's Board of Directors until after the award had been approved and paid to Austin, Sr., (*id.* ¶¶ 5-6; Michel Aff. ¶ 7 [Doc. No. 26]).

that “any claim of financial mismanagement by me . . . has no merit” (Pl. Br. at 10-11; Car Aff. Ex. 5 ¶ 8).

III. DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff’s claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

On a motion to dismiss a plaintiff’s claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander’s, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court’s role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2^d Dept 2010]).

Michel makes three principal arguments: (i) he is mentioned by name only five times in the complaint and, therefore, is somehow not included whenever the complaint refers to all defendants, (ii) he is not specifically mentioned in the Prayer for Relief and, therefore, is not included when the Prayer for Relief refers to all defendants, and (iii) possession of the mortgage

loan note, along with a brief affidavit, is proof that, because the mortgage loan was re-paid in full, making the loan proper. Defendant fails to argue substantively how the complaint fails to state a claim or how the mortgage note excuses his conduct. He also cites no relevant source or case law to support his position.

Michel has failed to meet his burden under CPLR 3211(a)(7) to show that the complaint fails to state causes of action against him. As to defendant's proffered documentary evidence, the AG correctly argues that copies of the agreements recording an insider loan "do not demonstrate that the transaction complied with clear requirements for procedural and substantive Board review under N-PCL 715" (Pl. Br. at 10; N-PCL § 715(f) [permitting demand for an accounting of any profits made from the transaction, payment to the corporation for the value of the assets in the transaction, and penalties double the amount of any benefit improperly obtained for willful conduct in connection with such a transaction]). Defendant's barebones motion is denied.

It is hereby

ORDERED that defendant Michael Michel's motion to dismiss the complaint (Motion Sequence Number 001) is DENIED.

1/29/2021
DATE

A. P. Sherwood

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
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