

Sidorick v Brilliant Holdings, LLC
2021 NY Slip Op 30370(U)
February 8, 2021
Supreme Court, New York County
Docket Number: 651809/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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STEPHEN SIDORICK, MARIAN SIDORICK,

Plaintiff,

- v -

BRILLIANT HOLDINGS, LLC, PARK 7 GROUP, LLC, PAR REAL ESTATE INVESTMENTS, LLC, RONALD GATEHOUSE, PAUL LEVINE, CHERYL LEVINE, BEEJAN SAVABI, PHILIP SMITH, KELLEY SMITH, BVS STUDENT DCH, LLC, JEFF DUNNE

Defendant.

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INDEX NO. 651809/2020
MOTION DATE 05/20/2020, 05/22/2020
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 19, 20, 26

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 21, 22, 23, 24, 25, 27

were read on this motion to/for DISMISSAL

Upon the foregoing documents, Brilliant Holdings, LLC and Ronald Gatehouse, PAR Real Estate Investments, LLC, Paul Levine, Cheryl Levine, Beejan Savabi, Philip Smith and Kelley Smith's (collectively, the Defendants) motions to dismiss (Seq. Nos. 001, 002) are granted and the claims for breach of fiduciary duty (second cause of action) and breach of the duty of good faith and fair dealing (third cause of action) are dismissed as impermissibly duplicative of their breach of contract claim (first cause of action). Inasmuch as the Plaintiffs (hereinafter defined) consent to the dismissal of their claims for tortious interference with contract (fourth cause of action) and conversion (fifth cause of action), these causes of action are also dismissed.

The Relevant Facts and Circumstances

Stephen Sidorick and Marian Sidorick (collectively, the **Plaintiffs**) allege that they are members of Brilliant Holdings, LLC (the **LLC**) pursuant to a Limited Liability Company Agreement (the **Agreement**; NYSCEF Doc. No. 2), dated May __, 2013, by and between BVS Student DCH LLC, PAR Real Estate Investments LLC, Paul Levine, Cheryl Levine, Beejan Savabi, Stephen Sidorick, Marian Sidorick, Phillip Smith, Kelley Smith, and Jeff Dunne. The parties agreed that the Agreement would be governed by Delaware law (*id.*, § 10.8). Section 4 of the Agreement provides for distributions of distributable cash, capital transaction distributable cash, payment of tax, and certain allocations (*id.*, § 4).

On or about November 30, 2017, Ronald Gatehouse allegedly notified Stephen Sidorick that the Plaintiffs' membership in the LLC was terminated (NYSCEF Doc. No. 1, ¶¶ 34-38). The Plaintiffs claim that this purported termination was improper and that they remain members of the LLC because the notice was only sent to Mr. Sidorick, rather than to both Plaintiffs. In addition, the Plaintiffs allege that their termination was ineffective because they were not allowed to cure any alleged defects and that Mr. Gatehouse acted outside the scope of his contractual authority (*id.*, ¶¶ 39-43).

The gravamen of the complaint is that the Defendants failed to make certain distributions and allocations to the Plaintiffs from 2017 to the present, which the Plaintiffs now seek to recover.

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint must be accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Pursuant to CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal pursuant to CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

A. Breach of Fiduciary Duty (Second Cause of Action)

A claim for breach of fiduciary duty that arises from the same facts as the parties' contract obligations is duplicative and must be dismissed (*Nemec v Shrader*, 991 A2d 1120, 1129 [Del 2010]). Here, the Plaintiffs allege that the Defendants had a "fiduciary duty to ensure that all distributions and allocations, as well as rights duties, and obligations, were properly paid to Plaintiffs" (NYSCEF Doc. No. 1, ¶ 81). This is duplicative of the Plaintiffs' claim breach of contract, which is based on the Defendants' alleged failure to make distributions and allocations under the Agreement (NYSCEF Doc. No. 2, §§ 4.1, 4.2, 4.3, 4.4, 4.5). In other words, the Defendants' alleged breach of fiduciary duty is based on their failure to make contractual distributions and, thus, merely reiterates their contractual obligation to make such distributions. The Plaintiffs do not allege any breach of a fiduciary duty that is independent of the Agreement or collateral thereto (NYSCEF Doc. No. 1, ¶¶ 80-84). Accordingly, the second cause of action for breach of fiduciary duty must be dismissed without prejudice as duplicative of the breach of contract claim (*see Nemec, supra*).

B. Breach of the Implied Covenant of Good Faith and Fair Dealing (Third Cause of Action)

To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege: (i) a specific implied contractual obligation, (ii) breach of that obligation by the defendant, and (iii) resulting damage to the plaintiff (*Fitzgerald v Cantor*, 1998 Del. Ch. LEXIS 212, at *4 [Ch Nov. 10, 1998]). If a contract expressly addresses a particular matter, the implied covenant claim regarding that matter is duplicative and unviable (*Edinburgh Holdings, Inc. v Educ. Affiliates, Inc.*, 2018 Del. Ch. LEXIS 182, at *18 [Ch June 6, 2018]). This claim as pled also fails because the sum and substance of the allegations amount to the Defendants' failure to make distributions to which the Plaintiffs were allegedly entitled. This is impermissibly duplicative of the breach of contract claim because the Agreement expressly addresses the Defendants' obligations to make distributions (*see Edinburgh Holdings, supra*). Accordingly, the third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed without prejudice.

C. Tortious Interference with Contract and Conversion (Fourth and Fifth Causes of Action)

The Plaintiffs consent to dismissal of the fourth (tortious interference with contract) and fifth (conversion) causes of action (NYSCEF Doc. No. 19 at 7; NYSCEF Doc. No. 21 at 6).

Therefore, the fourth and fifth cause of action are dismissed.

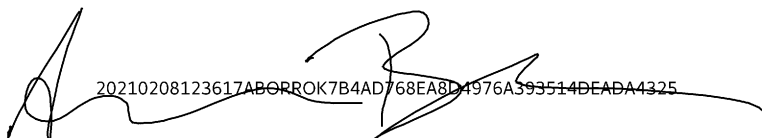
Accordingly, it is

ORDERED that Brilliant Holdings, LLC and Ronald Gatehouse's motion (Seq. No. 001) to dismiss is granted; and it is further

ORDERED that PAR Real Estate Investments, LLC, Paul Levine, Cheryl Levine, Beejan Savabi, Philip Smith and Kelley Smith’s motion (Seq. No. 002) to dismiss is granted; and it is further

ORDERED that the Defendants shall file an answer within 20 days of this decision and order; and it is further

ORDERED that the parties shall attend a remote preliminary conference on March 2, 2021 at 11:30 am.


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2/8/2021
DATE

ANDREW BORROK, 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