

**Robins v Wenn Ltd**

2021 NY Slip Op 32422(U)

November 22, 2021

Supreme Court, New York County

Docket Number: 654927/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DEBRA JAMES**

**PART 59**

*Justice*

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**INDEX NO. 654927/2019**

STEVEN ROBINS and ROCKWELLS WOLFS LANE LLC,

**MOTION DATE 10/05/2021**

Plaintiffs,

**MOTION SEQ. NO. 001**

- v -

WENN LTD,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant to dismiss is granted to the extent that the first, second, third, and fourth (latter as to only breach of fiduciary duty) causes of action of the complaint are dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the notice of pendency filed in the office of the County Clerk of the County of New York on August 28, 2019 affecting real property located at Borough of Manhattan, County of New York, City of New York and State of New York, known as number 166 William Street (Block 93, Lot 24) (NYSCEF Document No. 2) is

hereby cancelled, stricken and vacated from the records of such Clerk, and the Clerk shall mark shall records accordingly; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that plaintiffs shall reimburse defendant Wenn Ltd for the costs and expenses, including reasonable attorneys' fees, occasioned by the filing and cancellation of the foregoing notice of pendency, together with the regular costs of the action, to be determined by a referee as described further below; and it is further

ORDERED that such service upon the County Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that this matter having come before this court on October 5, 2021 on motion of the defendant to dismiss the complaint, and the plaintiffs having been represented in connection therewith by Max D. Leifer, Esq., Max D. Leifer, P.C., and the defendant having been represented by Janine T. Lynam, Esq., Joseph, Terracciano & Lynam, LLP, and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, it appearing to the court that a reference to determine on consent is proper and appropriate pursuant to CPLR 4317 (b) in that an issue of damages, including reasonable attorneys' fees, separately triable and not requiring a trial by jury, is involved, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the amount of costs and expenses defendant Wenn Ltd may recover from plaintiffs occasioned by the filing and cancellation of the notice of pendency, together with the regular costs of the action;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant Wenn Ltd shall, within thirty (30) days from service of notice of entry of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that defendant Wenn Ltd shall serve a pre-hearing memorandum within forty-five (45) days from service of this Order and plaintiffs shall serve objections to the pre-hearing memorandum within thirty (30) days from service of defendant's papers and the foregoing papers shall be filed with the Special

Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary conference order or proposed competing preliminary conference orders on January 21, 2022.

DECISION

The complaint that defendant seeks to dismiss, states, in pertinent part:

"The property known as 166 Williams Street also known as 41-43 Beekman Street herein after referred to as (Property) is owned by Wenn and the basis of this legal action.

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On or about, in 2016 the parties entered into an agreement to convert the property into a 7-story building with occupancy for short-term rentals on floors 2-7 with the existing restaurant to remain on the 1st floor. The parties agreed to form an operating company that would not pay rent to the building and would not pay the Plaintiffs for the design of the building, supervision of construction, including but not limited to the management of the intended business.

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The operating company was to issue 25% interest to the Plaintiffs and the Defendant a 75% interest. Upon which, Plaintiffs would receive yearly 25% of the net income and the Defendant 75% of the net income.

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The Plaintiffs for the past 3 years have undertaken the conversion which included but not limited to design, layout of the building, retention of attorneys, architects, engineers, asbestos testing, building expeditors, code consult, elevator consult, contractors, insurance brokers, preparation of financial projection, securing of a mortgage for conversion, and has complied with the initial agreement of the parties.

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On August 21, 2019, the Defendant wrongfully terminated the agreement causing irreparable damage to the Plaintiffs."

To the extent that the plaintiffs allege breach of an oral agreement between the parties, wherein defendant promised to convey an interest in land, i.e., to lease the Property for a term

of more than one year to a yet to be formed operating company, such promise is unenforceable under the Statute of Frauds (General Obligations Law § 5-703). See McGrath v Hilding, 41 NY2d 625, 628 (1977). In addition, as plaintiffs do not allege the formation of any operating corporation, the oral agreement to convey a lease to such entity is likewise unenforceable as an "agreement to agree". See Dragon Head LLC v Elkman, 118 AD3d 424 (1<sup>st</sup> Dept 2014). Moreover, plaintiffs admit to delays of the New York City Building Departments, which were out of their control, and thusly make no factual allegations that the contract could be performed within one year. Therefore, the court agrees with defendant that such agreement is unenforceable under Statute of Frauds provision General Obligations Law § 5-701, as well.

The second cause of action for "breach of implied covenant of good faith and fair dealing" lacks merit as such claim is "'intrinsically tied to the damages allegedly resulting from a breach of contract'" (Smile Train, Inc. v Ferris Consulting Corp., 117 AD3d 629, 630 [1<sup>st</sup> Dept 2014]). As plaintiffs' cause of action for breach of contract fails, the breach of implied covenant claim falls as well.

Plaintiffs' complaint adequately pleads, as its fourth cause of action, unjust enrichment. Plaintiffs have alleged the elements of such claim, to wit:

“(1) the [defendant] was enriched, (2) at [plaintiffs’] expense, and (3) that “it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered””

Anesthesia Associates of Mount Kisco, LLP v Northern Westchester Hospital Center, 59 AD3d 473, 481 (2<sup>nd</sup> Dept 2009) (citations omitted).

However, such fourth cause of action does not state a meritorious claim for breach of fiduciary duty. As argued by defendant, “such relationship, necessarily fact specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions”, Northeast Gen. Corp. v Wellington Adv., 82 NY2d 158, 162 (1993).

Finally, plaintiffs have not adequately pled a cause of action sounding in tort, as the complaint fails to allege any violation of a legal duty independent, i.e., “separate and apart”, from any contractual obligation. Plaintiffs merely duplicate the inadequately pled breach of contract claim. See Moustakis v Christie’s, Inc., 68 AD3d 637 (1<sup>st</sup> Dept. 2009) and Board of Managers of Chelsea 19 Condominium v Chelsea Associates, 73 AD3d 581 (1<sup>st</sup> Dept. 2010). As there is no enforceable oral agreement for defendant to perform, plaintiffs have not and cannot allege that defendant misrepresented its intention to perform. Thus, the equitable estoppel cause of action does not sufficiently state a

claim sounding in misrepresentation. Cf De Angelis v American Capital Access, 280 AD2d 409 (1<sup>st</sup> Dept 2001).

As neither plaintiff has any legitimate claim to an interest in the Property, neither is entitled to the notice of pendency. See Gross v Neiman, 147 AD3d 505, 507 (1<sup>st</sup> Dept 2017). Indeed, plaintiffs allege in their complaint that defendant owned the Property. Thus, plaintiffs' filing of the lis pendens was baseless, and defendant is entitled to recover costs pursuant to CPLR § 6514(c). A showing of bad faith on the part of plaintiffs is not a prerequisite for such an award. See Knopf v Sanford, 132 AD3d 416, 418 (1<sup>st</sup> Dept 2015).

*Debra A. James*  
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<u>11/22/2021</u> DATE					<hr/> DEBRA JAMES, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
					<input checked="" type="checkbox"/>	REFERENCE