

**Gluck v Gross**

2021 NY Slip Op 32500(U)

November 29, 2021

Supreme Court, Kings County

Docket Number: Index No. 526519/19

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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ISSAC GLUCK,

Plaintiff,

Decision and order

- against -

Index No. 526519/19

SHMUEL GROSS, GH REALTY LLC &  
37 WOLCOTT LLC,

Defendants,

November 29, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to reargue a portion of a decision and order dated May 10, 2021 which denied the plaintiff's request for summary judgement on a claim for breach of fiduciary duty. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior decision and order, on January 17, 2017 the plaintiff, Isaac Gluck loaned \$217,000 to the defendant, Shmuel Gross and an entity he owned, defendant GH Gross Realty LLC. The parties signed a document, which pursuant to a certificate of accuracy from a translator states that "I Isaac Gluck, have given 217,000.00 to Shmuel Gross for 37 Wolcott St...when the house will be sold in about 6-8 months, I will receive the profit, 2 times 217.00 [sic], approximately \$400,000.00" (see, Agreement, annexed as Exhibit A to the

Complaint). The plaintiff asserts the property has not been sold and that in any event there are no questions of fact he is entitled to the amount he loaned in addition to approximately another \$200,000 as profit, pursuant to the agreement. The plaintiff sought summary judgement arguing there are no questions of fact the defendant breached a fiduciary duty in failing to endeavor to sell the property pursuant to the agreement. The court denied that request and the plaintiff now seeks to reargue that determination.

#### Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]

stating individuals jointly managing a limited liability corporation creates a fiduciary duty among the members analogous to that of partners). The first element, namely a fiduciary relationship is satisfied as plaintiff adequately establishes, and defendants concede, that they had jointly formed a partnership. It has been well established that "business [and] professional partners, are bound by a fiduciary duty requiring 'the punctilio of an honor the most sensitive'" Graubard Mollen Dannett & Horowitz v. Moskovitz, 86 NY2d 112, 629 NYS2d 1009 [1995], citing Meinhard v. Salmon, 249 NY 458 [1928]).

The second element of misconduct must now be examined. Misconduct by a fiduciary constituting a breach of duty can take one of two forms, either breach of loyalty or breach of care (Higgins v. New York Stock Exch., Inc., 10 Misc3d 257, 806 NYS2d 339 [Supreme Court New York County 2005]). Generally, a breach of loyalty will be established where plaintiff can show that defendant participated on both sides of a transaction. "This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" Birnbaum, supra).

"The duty of care refers to the responsibility of a...fiduciary to exercise, in the performance of his or her

tasks, the care that a reasonably prudent person would use under similar circumstances" (In re Ticketplanet.com, 313 BR 46 (S.D.N.Y. Bankruptcy Court, 2004), citing Norlin Corp. v. Rooney, Pace, Inc., 744 F2d 255, [2d Cir. 1984]). In turn, the fiduciary duty of due care, "obligates [fiduciaries] to act in an informed and 'reasonably diligent' basis in 'considering material information'" (Higgins, supra). Lastly, concerning damages, plaintiffs must demonstrate that they did in fact suffer financial injury caused by defendant's breach of duty (105 East Second St. Assocs. v. Bobrow, 175 AD2d 746, 573 NYS2d 503 [1st Dept., 1991]). To establish the damages component of a claim for a breach of fiduciary duty plaintiff is required to show at a minimum, that the defendant's actions were "a substantial factor" in causing an "identifiable loss" (see, (105 East Second St. Assocs. v. Bobrow, supra)).

The crux of the breach of fiduciary claim is contained in Paragraph 66 of the Amended Complaint which states that "Dafandants [sic] breached his fiduciary duties by failing to sell the Property timely and return the invested amount" (id). However, that claim is entirely duplicative of the breach of contract claim (Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164 AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). Since the breach of contract claim remains pending since the condition


precedent, namely selling the property, has not yet been fulfilled, there can likewise be no summary determination any breach of fiduciary duty occurred.

Again, as recorded in the prior decision and order this cannot go on indefinitely. The defendant has retained new counsel and counsel asked for time to become familiar with the case. Thus, the issues of breach of contract and breach of fiduciary duty are held in abeyance for thirty days pending a review of the case by new counsel. Moreover, during this time the new counsel must comply with outstanding discovery demands. The court will conduct a conference the first week of January 2022. The failure of the defendant to present concrete steps to satisfy its obligations under the contract will result in granting the motion seeking summary judgement on all causes of action.

So ordered.

ENTER:

DATED: November 29, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC