

**Alpha Phi Alpha Senior Citizens Ctr., Inc. v
Zeta Zeta Lambda Co., Inc.**

2021 NY Slip Op 34195(U)

December 1, 2021

Supreme Court, Queens County

Docket Number: Index No. 710037/2014

Judge: Leonard Livote

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Leonard Livote IA Part 33
Justice

ALPHA PHI ALPHA SENIOR CITIZENS x Index
CENTER, INC. and PRESIDENT OF ZETA Number 710037 2014
ZETA LAMBDA CHAPTER OF ALPHA PHI
ALPHA FRATERNITY INC.

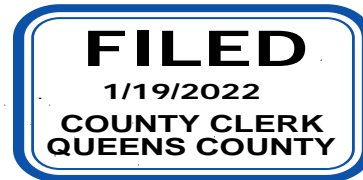
Plaintiff,

-- against --

Motion
Date June 22, 2021

ZETA ZETA LAMBDA COMPANY, INC.,
(now known as The 1906 Project, Inc.) JEAN
DUCHARELLIER RAYMOND GAMBLE,
DAVID BLUFORD, JEFFERY TERRY,
EVERETT HOPKINS, ESQ, EGON BROWN,
ALDRIN INNIS,

Motion Seq. No. 14



Defendants.

X

The following papers EF numbered below read on this motion by the defendants for summary judgment dismissing the complaint against them and on this cross motion by the plaintiffs for, an order pursuant to CPLR § 3212 (i) imposing a constructive trust on defendants; (ii) ejecting defendant Zeta Zeta Lambda Company, Inc. (“Company”) as the owner of the building and awarding ownership to Wesley Parrott Youth Programs, Inc. (“Wesley Parrott”); (iii) ejecting the Company as the landlord of the building and reforming its lease with the Senior Citizens Center to name Wesley Parrott as the landlord of the building; (iii) amending the caption to remove David Bluford, to correct the name of Aldrin Enis and to include the initial former name of the Company; (iv) directing Bailey & Bailey, LLC, attorneys for the defendants, to release funds

being held in escrow on behalf of the Company to Wesley Parrott; (v) awarding, upon a search of the record, summary judgment on plaintiffs' claims and dismissing defendants' counterclaim with prejudice or, in the alternative, directing a trial to determine plaintiffs' remaining claims and to determine damages owed to plaintiffs.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	317-321
Notice of Cross Motion - Affidavits - Exhibits	325-386
Answering Affidavits - Exhibits	
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Upon the foregoing papers it is ordered that the defendants' motion for summary judgment dismissing the complaint against them is granted.

I. The Allegations of the Parties

The defendants allege the following:

Defendant Zeta Zeta Lambda Company, Inc., now known as The 1906 Project, Inc., (the Company), owns premises located at 220-01 Linden Boulevard, St. Albans, NY. The Company was formed by members of Zeta Zeta Lambda Chapter (the Chapter) of Alpha Phi Alpha Fraternity, Inc. for the purpose of acting as a holding company for a building housing an adult day care center operated by plaintiff Alpha Phi Alpha Senior Citizens Center, Inc. (the Center). The Center rents part of the premises pursuant to a lease dated December 1, 2006. The Company's original certificate of incorporation required it to turn over all of its net income to the Center.

The Company was originally incorporated by a certificate of incorporation dated June 14, 1995 as a New York not for profit corporation with an IRS 501(c)(2) non-charitable tax exempt status. A certificate dated June 3, 1997 amended the certificate of incorporation for the purpose of changing the name and corporate purposes. The purpose of the amendment was to aid in the obtaining of 501(c)(3) charitable status, and the Company succeeded in obtaining that status.

Over the years, the directors of the Company amended the certificate of incorporation further in various ways, including the elimination of the provision requiring the Company to turn over its net income to the Center. From its incorporation in 1995 to after the Company executed the lease with the Center, the former had no net income.

The plaintiffs allege the following: The Department for the Aging (“DFTA”) provided the funds for the Center’s rent over a period of years while the Center operated in the basement of a church. In the mid-1990s, the Center notified DFTA of an opportunity to buy a building owned by the Salvation Army located at 220-01 Linden Boulevard, Cambria Heights, New York (the “building”). In 1994, the Chapter and the Center agreed to both provide funds for the purpose of the Company’s acquiring the building. The Center promised to contribute \$20,000 toward the purchase of the building by the Company and then to become the tenant in the building. The Company promised to collect rent from tenants in the building, to pay expenses, and to pay the net income to the Center in the form of capital contributions. The Company breached an agreement embodied in its original bylaws that its board of directors shall be composed of members three fourths of whom are members in good standing of the Chapter and breached an agreement embodied in its original certificate of incorporation requiring the Company to turn over its net income to the Center.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is

arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York, supra*).

By Decision & Order dated February 5, 2020, the Appellate Division, Second Department, affirmed the decision of this court (Martin E. Ritholtz, J.), which denied denied the motion of the plaintiff and the cross claim plaintiff, inter alia, for summary judgment on the second, fifth, and sixth causes of action and the second, fifth, and sixth cross claims.

II. Discussion

A. The Plaintiffs' First Cause of Action

The first cause of action alleges a breach of contract. The alleged contract was that the Company would "hold property, collect income therefrom, and to turn over the entire amount less expenses to the Alpha Phi Alpha Senior Citizens Center, Inc." Plaintiffs allege that the "Director defendants and Company defendant have breached the agreement by willfully failing to turn over funds to the Senior Citizens Center after it demanded the money to which it is entitled."

The only evidence of any such agreement was the language in the Company's original certificate of incorporation. That language was removed when the certificate of incorporation was amended in 1997. Although the movants have the initial burden on a summary judgment motion, "our jurisprudence does not 'require a defendant [moving for summary judgment] to prove a negative on an issue as to which [it] does not bear the burden of proof'" (*Martinez v Hunts Point Co-op. Mkt., Inc.*, 79 AD3d 569, 570 [1st Dept 2010], quoting, *Strowman v. Great Atl. & Pac. Tea Co.*, 252 A.D.2d 384, 385[1998]). In the instant case, plaintiff has proffered no evidence other than the original certificate of incorporation. The Appellate Division has ruled that this provision was not a valid and binding contract between the Chapter and the Company (*Alpha Phi Alpha Senior Citizens Ctr., Inc. v Zeta Zeta Lambda Co., Inc.*, 180 AD3d 630, 633 [2d Dept 2020]). Thus, the plaintiffs have failed to submit evidence sufficient to raise a genuine issue of fact concerning whether a net income agreement arose in any other manner. Accordingly, the defendant's summary judgment motion is granted with respect to the first cause of action.

B. The Plaintiffs' Second Cause of Action

The second causes of action for breach of contract alleges: "The Senior Citizens Center, the Chapter and the Company defendant entered into a governance agreement which stated that the "Board of Directors [of the Company] shall be composed of not less than seven...individuals of whom at least Three Fourths (3/4) shall be members in good standing of [the Chapter]." The original by-laws of the defendant Company provided: "The Board of Directors shall be composed of not less than seven *** individuals of whom at least three fourths (3/4) shall be members in good standing of Alpha Phi Alpha Fraternity, Inc., Zeta Zeta Lambda Chapter." The second cause of action further alleges: "Director defendants and Company defendant breached the Company's governance agreement with the Plaintiffs by amending the bylaws of the Company to remove the good standing requirement without the Plaintiffs' consent."

The Company made a prima facie showing of entitlement to judgment as a matter of law through the submission of the Appellate Division decision holding that the Center did not have a cause of action for breach of contract arising from provisions in the original certificate of incorporation or from provisions in the by-laws. The Company also made a showing that no governance agreement arose in any other way. The Company produced deposition testimony that there was no oral or written governance agreement between the Chapter and the Company. The Company also alleged without contradiction: "During their depositions, plaintiffs' agents were asked about the existence of a written governance agreement between the Chapter and the Company. None could testify to any existence."

The Center failed to submit evidence showing that summary judgment is precluded by a genuine issue of fact pertaining to the second cause of action. Accordingly, the defendant's summary judgment motion is granted with respect to the second cause of action.

C. The Plaintiffs' Third Cause of Action

The third cause of action is for breach of fiduciary duty. The third cause of action alleges: "By entering the governance agreement, Company defendant agreed to serve as an agent of the Chapter. ***By accepting their appointment as directors of the Company while they were members in good standing with the Chapter, the director defendants agreed to serve as agents of the Plaintiffs on the board of the Company."

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." (*Rut v. Young Adult Inst., Inc.*, 74 AD3d 776 776 [2nd Dept 2010]; *Deblinger v. Sani-Pine Prod. Co.*, 107 AD3d 659 [2nd Dept 2013].) In the case at bar, the Center failed to raise a triable issue of fact concerning whether a fiduciary relationship existed between itself and the Company or its directors. The Appellate Division held that there was no governance agreement arising from the by-laws to which the Center was a party, and the Center failed to

produce evidence showing that the intent of the by-laws was to make the Company the agent or other fiduciary of the Center or Chapter. The Center also failed to raise a genuine issue of fact concerning whether a change in the by-laws of the Company amounted to misconduct. Accordingly, the defendant's summary judgment motion is granted with respect to the third cause of action.

D. The Plaintiffs' Fourth Cause of Action

The fourth cause of action, which is for tortious interference with contract, alleges: "the director defendants were aware of the Company's governance agreement as provided in its bylaws ***the director defendants voted to amend the Company's bylaws to procure a breach of the Company's agreements with the Plaintiffs. The elements of a cause of action for tortious interference with contract include " the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom ***." (*Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 424 [1996]; *O'Connor v. Shultz*, 166 AD3d 1104 [3rd Dept . 2018].) The Center cannot prove that it or the Chapter had a valid contract arising from the Company's by-laws. The Appellate Division has already determined: "Contrary to the appellants' contention, the provision of the original bylaws which imposed that requirement [the three fourth's requirement] is not enforceable by the Chapter as a contract." (*Alpha Phi Alpha Senior Citizens Ctr., Inc. v. Zeta Zeta Lambda Co., Inc.*, *supra*, 632.) Neither the Center nor the Chapter were members of the Company from which status a contractual relationship could arise based on the by-laws. (See, *Alpha Phi Alpha Senior Citizens Ctr., Inc. v. Zeta Zeta Lambda Co., Inc.*, *supra*.)

In any event, the Center did not oppose the dismissal of the fourth cause of action, and it is deemed abandoned. (See, *Priebe v. Colacino*, 189 AD3d 2076 [4th Dept 2020]; *Kronick v. L.P. Thebault Co.*, 70 AD3d 648 [2nd Dept 2010].) Accordingly, the defendant's summary judgment motion is granted with respect to the fourth cause of action.

E. The Plaintiffs' Fifth Cause of Action

The fifth cause of action seeks a declaratory judgment that “the present bylaws of the Company are null and void” and “that the original bylaws remain in effect” because the Center “did not approve or consent to the amendment of the Company’s bylaws to remove the governance agreement.” The fifth cause of action is without merit because the Center is not a member of the Company having contractual rights arising from the by-laws. (*See, Alpha Phi Alpha Senior Citizens Ctr., Inc. v. Zeta Zeta Lambda Co., Inc., supra.*) Accordingly, the defendant’s summary judgment motion is granted with respect to the fifth cause of action.

F. The Plaintiffs' Sixth Cause of Action

The sixth cause of action seeks a permanent injunction prohibiting the director defendants from acting for the Company. The Center, which is not a member of the Company, did not show that it has any legal right to bring the sixth cause of action. Accordingly, the defendant’s summary judgment motion is granted with respect to the sixth cause of action.

G. The Plaintiffs' Seventh Cause of Action

The Company conducted a charitable foreclosure prevention program that benefitted homeowners in the community. The seventh cause of action seeks a judgment declaring that: “By operating a foreclosure program, the director defendants engaged in an ultra vires activity that is not specifically included in the Company’s certificate of incorporation.” The Center did not show that the Company impermissibly amended its certificate of incorporation to permit the charitable action of operating the foreclosure program. The court notes that the Appellate Division determined: “Contrary to the appellants’ contention, the provision of the original certificate of incorporation which stated that the Company’s purpose was to turn over excess rents to the Senior Center is not enforceable by the Senior Center as a third-party beneficiary agreement.” (*Alpha Phi Alpha Senior Citizens Ctr., Inc. v. Zeta Zeta Lambda Co., Inc.,*

supra, 633.) Accordingly, the defendant's summary judgment motion is granted with respect to the seventh cause of action.

H. The Plaintiffs' Eighth Cause of Action

The eighth cause of action seeks an accounting from the director defendants and the Company. The Center did not show that it has standing to bring the eighth cause of action. Accordingly, the defendant's summary judgment motion is granted with respect to the eighth cause of action.

I. The Plaintiffs' Ninth Cause of Action

The ninth cause of action alleges that the director defendants and the Company breached an implied covenant of good faith and fair dealing. The Center did not demonstrate that it is a party to a contract from which the covenant of good faith and fair dealing can be implied. Accordingly, the defendant's summary judgment motion is granted with respect to the ninth cause of action.

J. The Plaintiffs' Tenth Cause of Action

The tenth cause of action, which is asserted against the director defendants, is for punitive damages. "A separate cause of action for punitive damages is not legally cognizable ***." (*Jean v. Chinitz*, 163 AD3d 497, 498 [1st Dept 2018].) Accordingly, the defendant's summary judgment motion is granted with respect to the tenth cause of action.

K. The Plaintiffs' Eleventh Cause of Action

The eleventh cause of action is for fraud. The plaintiffs allege that statements made by defendant Jean Duchatellier "induced the Chapter and the members of the Chapter to continue to lend or donate money to the Company on the basis of the Company providing capital contributions to the Senior Citizens Center when the building became operational."

In order to prove a cause of action for fraud, a plaintiff must show (1) that the defendant made material representations that were false or concealed a material existing fact, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the defendant's representations, and (5) that the plaintiff was injured as a result of the defendant's representations. (*See, Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 NY3d 569 [2018].) *Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]; *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995]; *Tsinias Enterprises Ltd. v. Taza Grocery, Inc.*, 172 AD3d 1271 [2nd Dept. 2019].) In regard to the first element, statements concerning future expectations and future intentions do not constitute material misstatements of present fact and are not actionable. (*Kato Int'l LLC v. Gerard Fox L., P.C.*, 195 AD3d 516 [1st Dept 2021]; *Streit v. Bombart*, 187 AD3d 529, [1st Dept (2020.)] Moreover, a cause of action for fraud must be pleaded with particularity (*see*, CPLR 3016; *Alpha/Omega Concrete Corp. v. Ovation Risk Planners, Inc.*, - AD3d-, -NYS3d- 2021 WL 4448015 [2nd Dept 2021]). The eleventh cause of action is not pleaded with sufficient particularity in regard to intent, and the plaintiffs failed to submit evidence showing that there is a triable issue of fact in regard to intent to deceive. Accordingly, the defendant's summary judgment motion is granted with respect to the eleventh cause of action.

L. The Plaintiffs' Twelfth Cause of Action

The twelfth cause of action, asserted against Everette Hopkins, Esq. for aiding and abetting breach of fiduciary duty, alleges that he “ served as a director and counsel of the Company, and that he “ used his dual position as a director and counsel to the Company to advise the defendants to participate in the foreclosure program.” The plaintiffs failed to raise a genuine issue of fact concerning whether the Company and/or its directors owed a fiduciary duty to the Center. Accordingly, the defendant's summary judgment motion is granted with respect to the twelfth cause of action.

M. The Plaintiffs' Thirteenth Cause of Action

The thirteenth cause of action is for the imposition of a constructive trust. Although the complaint is not clear on the point, the plaintiffs are apparently seeking the imposition of a constructive trust over the building and/or the rents generated by the tenants.

“Generally, a constructive trust may be imposed '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' ***.” (*Sharp v. Kosmalski*, 40 NY2d 119, 121 [1976], quoting *Beatty v. Guggenheim Exploration Co.*, 225 NY 380, 386 [1919]; *Clark v. Locey*, 196 AD3d 794 [3rd Dept 2021].) In order to have a constructive trust imposed, a plaintiff generally must “plead and prove four essential elements: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment caused by the breach of the promise ***.” (*Valvo v. Spitale*, 305 AD2d 668, 669 [2nd Dept 2003; *Sharp v. Kosmalski, supra*; *Clark v. Locey, supra*; *Baker v. Harrison*, 180 AD3d 1210 [3rd Dept. 2020].) “These factors, or elements, serve only as a guideline, and a constructive trust may still be imposed even if all four elements are not established ***.” (*Tyree v. Henn*, 109 AD3d 906, 907–08 [2nd Dept 2013].)

“As a constructive trust is an equitable remedy, courts do not rigidly apply the elements but use them as flexible guidelines ***. In this flexible spirit, the promise need not be express, but may be implied based on the circumstances of the relationship and the nature of the transaction ***.” Similarly, courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer actually occurred ***.” (*Moak v. Raynor*, 28 AD3d 900, 902[3rd Dept 2006]; *Baker v. Harrison, supra*.) The doctrine of constructive trust “is available to prevent unjust enrichment in a wide range of circumstances” and “[t]he factors are not rigidly applied but are flexible, and a constructive trust will be imposed to satisfy the demands of justice ***.” (*Lipton v. Donnenfeld* 5 AD3d 356 [2nd Dept 2004]; see, *Keane v. Keane*, 193 AD3d 838 [2nd Dept 2021].)

In the instant case, there was no fiduciary relationship between the Company and the Center. Although there was an interlocking fraternity relationship between the directors of the Company and the directors or operators of the Center, the friendship among fraternity members does not amount to a confidential or fiduciary relationship. (*See, Bontecou v. Goldman*, 103 AD2d 732 [2nd Dept 1984].) Any transfer of funds was not in reliance on a confidential or fiduciary relationship, but was in reliance on the Company's certificate of incorporation that required its net income be turned over to the Center and the requirement that its board of directors shall be composed of members three fourths of whom were members in good standing of the Chapter.

Thus, defendants have established that there was no fiduciary relationship and no transfer in reliance of a promise. Accordingly, the defendant's summary judgment motion is granted with respect to the thirteenth cause of action.

N. The Plaintiffs' Cross Motion

The plaintiffs seeks in their cross motion an "order pursuant to CPLR § 3212 (i) imposing a constructive trust on defendants; (ii) ejecting defendant Zeta Zeta Lambda Company, Inc. ("Company") as the owner of the building and awarding ownership to Wesley Parrott Youth Programs, Inc. ("Wesley Parrott"); (iii) ejecting the Company as the landlord of the building and reforming its lease with the Senior Citizens Center to name Wesley Parrott as the landlord of the building; (iii) amending the caption to remove David Bluford, to correct the name of Aldrin Enis and to include the initial former name of the Company; (iv) directing Bailey & Bailey, LLC, attorneys for the defendants, to release funds being held in escrow on behalf of the Company to Wesley Parrott; (v) awarding, upon a search of the record, summary judgment on plaintiffs' claims and dismissing defendants' counterclaim with prejudice or, in the alternative, directing a trial to determine plaintiffs' remaining claims and to determine damages owed to plaintiffs ***."

1. Plaintiffs' Cross Motion Summary Judgment Dismissing the Counterclaim

The defendants allege in their counterclaim: "That pursuant to the terms of said Lease, Plaintiff tenant is liable to all Defendants for their attorney's fees, disbursements, costs and expenses for the defense of the within action." The plaintiffs did not address the merits of the counterclaim in their memorandum of law, and they did not make a prima facie showing that they are entitled to summary judgment dismissing the counterclaim.

2. Plaintiffs' Cross Motion for Summary Judgment on the Complaint

Plaintiffs cross-move for summary judgment on the constructive trust cause of action. For the reasons discussed above, the defendants' motion to dismiss the constructive trust cause of action is granted. Accordingly, the plaintiffs' cross-motion for summary judgment on this ground is denied.

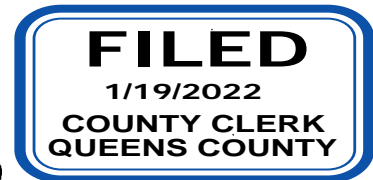
3. The Remaining Branches of the Plaintiffs' Cross Motion

The remaining branches of the cross motion are dependant on the cross-motion constructive trust claim. Plaintiffs are not entitled to summary judgment on the cause of action for the imposition of a constructive trust (or on any other cause of action). Accordingly, the remaining branches of the cross-motion are denied.

Any other or further relief requested and not specifically addressed is denied.

This constitutes the Order of the Court.

Dated: December 1, 2021





J.S.C.