

<b>Great Jones St. Realty Corp. v Chimsanthia</b>
2022 NY Slip Op 31704(U)
May 25, 2022
Supreme Court, New York County
Docket Number: Index No. 155115/2019
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

GREAT JONES ST. REALTY CORP.,

Plaintiff,

- v -

NITTAYA CHIMSANTHIA, AND AS TRUSTEE OF THE
NITTAYA CHIMSANTHIA MARITAL TRUST

Defendant.

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INDEX NO. 155115/2019

MOTION DATE 03/03/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 206, 211 were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this family dispute over real property, plaintiff Great Jones St. Realty Corp. is the owner of a commercial building located at 35 Great Jones Street, New York, New York (the building). Plaintiff sues defendant Nittaya Chimsanthia, individually and as Trustee of the Nittaya Chimsanthia Marital Trust, for usurpation of corporate opportunity and related causes of action alleging that defendant is preventing plaintiff from renting unit 3-B (the unit) in the building to a commercial tenant. Defendant resides in the unit and pays no rent or other charges.

Plaintiff moves for partial summary judgment on the issue of liability on its first cause of action for usurpation of corporate opportunity and third cause of action for unjust enrichment.<sup>1</sup> Defendant cross-moves for partial summary judgment dismissing plaintiff's first and third causes of action.

<sup>1</sup> Plaintiff withdrew its second cause of action for an accounting and fifth cause of action for money had and received. Plaintiff's fourth cause of action seeks punitive damages.

### BACKGROUND

There is no dispute that plaintiff is a close corporation and that the building is a commercial office and/or industrial type property, consisting of eleven units. The unit occupied by defendant is commercial space with a fair market rental value of approximately \$10,000 a month (NYSCEF 1, complaint ¶¶ 4, 5, 6). Plaintiff seeks lost rental income of at least \$10,000 a month from January 1, 2018. Plaintiff alleges that defendant has been collecting rent from persons that she allows to live in the unit (NYSCEF 1, ¶ 23, 24).

In support of its motion, plaintiff submits an affidavit from Lawrence Scott, vice president of plaintiff. Plaintiff was previously owned by Lawrence's brother, Joseph Scott, Jr., and their parents, Joseph Scott, Sr., and Theresa Scott, both officers of plaintiff (NYSCEF 121, ¶ 4, 28). Defendant was married to Joseph, Jr. from 2005 until his death in November 2017. Defendant and Joseph, Jr. had a child in 2012 (NYSCEF 121, ¶ 8, NYSCEF 188, ¶¶ 1, 5). Joseph, Sr. and Theresa died in 2020 (NYSCEF 121, ¶ 28). Joseph, Jr. owned 9.09% of plaintiff's stock and his parents owned the rest (NYSCEF 1, ¶ 4, NYSCEF 121, ¶¶ 7, 28). Joseph, Jr. worked as the building manager and, as an incident of his employment, he, defendant, and their child were allowed to reside in the unit without paying rent, use and occupancy, or any other charges and without a written or oral lease (NYSCEF 1, ¶¶ 8, 9, NYSCEF 121, ¶ 4). Upon Joseph, Jr.'s death, defendant succeeded to his shares in plaintiff and continued to live in the unit (NYSCEF 1, ¶¶ 11, 13, 14). Plaintiff demanded that defendant vacate the unit by January 1, 2018, but defendant refused (NYSCEF 1, ¶ 13). Defendant continues to reside in the unit and still pays no rent or use and occupancy and has no lease (NYSCEF 121, ¶¶ 9, 17).

Defendant was never an employee, officer, or director of plaintiff (NYSCEF 188, ¶ 3). Defendant alleges that Theresa told Joseph, Jr. and defendant that the unit would be their home

forever (NYSCEF 188, ¶ 8). She alleges that, on several occasions before Joseph, Jr. died, either Theresa or Joseph, Sr. told defendant that she could stay in the unit and that if something happened to Joseph, Jr., she could stay there with her child without paying any money (NYSCEF 121, ¶ 18). Defendant further alleges that, three days after Joseph, Jr. died, his parents both told defendant that she could stay in the unit (NYSCEF 121, ¶ 18). Lawrence states that, twice in his presence, Joseph, Sr. and Theresa told defendant that she could no longer remain in the unit after Joseph, Jr. passed away (NYSCEF 121, ¶ 33).

There are currently two holdover proceedings pending in Housing Court brought by plaintiff against defendant. On January 22, 2022, one case was the subject of an Appellate Term First Department decision (*Great Jones St. Realty Corp. v Chimsanthia*, 74 Misc 3d 126[A], 2022 NY Slip Op 50035[U] [App Term, 1<sup>st</sup> Dept 2022]).

### DISCUSSION

“It is well settled that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi*

*Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

*Usurpation of Corporate Opportunity*

The doctrine of corporate opportunity provides that a corporate fiduciary cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation (*Ackerman v 305 E. 40<sup>th</sup> Owners Corp.*, 189 AD2d 665, 666 [1<sup>st</sup> Dept 1993]; *Commodities Research Unit, Ltd. v Chemical Work Assoc.*, 174 AD2d 476, 477 [1<sup>st</sup> Dept 1991]). Plaintiff alleges that even if defendant’s husband’s parents told her that she could remain in the unit forever, the promise is unenforceable since it violates the statutes of frauds, General Obligations Law § § 5-701 (a) (1) (e) and 5-703, and is barred by CPLR 4519 (the dead man’s statute). Plaintiff alleges that defendant owes a fiduciary duty to the other shareholders and that defendant’s refusal to vacate the unit constitutes a breach of the duty, a taking of a corporate opportunity from the corporation, and unjust enrichment. Because of defendant’s actions, the corporation cannot rent the unit to a commercial tenant for a fair market price.

Defendant responds that mere shareholders do not owe a fiduciary duty to their corporation. Defendant acknowledges that shareholders can owe other shareholders a fiduciary duty; however, plaintiff, as a corporation, has no standing to bring claims on behalf of

shareholders. Moreover, defendant argues that as a minority shareholder with no power or position in plaintiff she does not owe a fiduciary duty to the other shareholders.

Majority shareholders and directors of a closely held corporation have a fiduciary duty to the corporation and to the minority shareholders (*see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [1<sup>st</sup> Dept 2013]; *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 98 [1<sup>st</sup> Dept 2006]; *Barbour v Knecht*, 296 AD2d 218, 227 [1<sup>st</sup> Dept 2002]). A shareholder who is not a majority shareholder nor has control over corporate affairs does not owe a fiduciary duty to the corporation or to the other shareholders (*Kocak v Dargin*, 199 AD3d 456, 457 [1<sup>st</sup> Dept 2021] [holding minority shareholder entitled to summary judgment on majority shareholder's breach of fiduciary duty claim against the minority shareholder]). Here, the undisputed facts show that defendant had no authority or control over the affairs of plaintiff and that she is a minority shareholder in plaintiff; therefore, she does not owe a fiduciary duty to plaintiff.

Accordingly, plaintiff's motion for summary judgment on its usurpation of a corporate opportunity cause of action will be denied and defendant's motion to dismiss the claim will be granted.

#### Unjust Enrichment

Plaintiff also seeks summary judgment on liability on its unjust enrichment claim. Plaintiff's claim is based on defendant's use and occupancy of the unit (*see Hudson-Spring Partnership, L.P. v P + M Design Consultants, Inc.*, 112 AD3d 419, 420 [1<sup>st</sup> Dept 2013] [holding plaintiff adequately pled a cause of action for unjust enrichment in a landlord-tenant action]). Defendant, citing CPLR 3211 (a) (4), moves to dismiss plaintiff's unjust enrichment claim on the ground that the actions pending in Housing Court will resolve all questions

pertaining to defendant's residency, including use and occupancy. The Housing Court petitions seek use and occupancy.

In one of the Housing Court proceedings, defendant also moved to dismiss pursuant to CPLR 3211 (a) (4). Housing Court denied the motion to dismiss on the grounds that parties and causes of action in the Supreme Court action and Housing Court proceeding are different (*Great Jones St. Realty Corp. v Nittaya Chimsanthia*, Civ Court, NY County, Housing Part, March 6, 2020, Nembhard, J., L&T index No. 68357/19 [NYSCEF 50, 201]).

Plaintiff contends that the law of the case doctrine dictates that this court must follow the decision of the Housing Court and deny defendant's motion to dismiss based on CPLR 3211 (a) (4). The law of the case doctrine addresses the potential preclusive effect of judicial determinations made by courts of coordinate jurisdiction before final judgment and in the course of a single litigation (*People v. Evans*, 94 N.Y.2d 499, 502 [2000]). "Accordingly, law of the case has been aptly characterized as a kind of intra-action res judicata" (*id.* [internal citation and quotations omitted]). Here, the doctrine is inapplicable because the Housing Court proceeding and this action are separate (*see BDCM Fund Adviser, L.L.C. v Zenni*, 106 AD3d 596, 597 [1<sup>st</sup> Dept 2013]).

Nevertheless, Housing Court is the appropriate forum to litigate defendant's liability for use and occupancy. Although Housing Court has concurrent jurisdiction with Supreme Court for issues such as use and occupancy and who is entitled to possession, these issues are typically resolved in Housing Court. Indeed, Housing Court is the strongly preferred forum for resolving landlord-tenant disputes (*Brecker v 295 Central Park West, Inc.*, 71 AD3d 564, 565 [1<sup>st</sup> Dept 2010]; *Langotsky v 537 Greenwich LLC*, 45 AD3d 405 [1<sup>st</sup> Dept 2007]; *Solovieff Gallery Co. v Langston*, 167 AD2d 325 [1<sup>st</sup> Dept 1990]), "particularly where complete relief is available in that

court” (*L.B. v Stahl York Ave. Co.*, 188 AD3d 421, 422 [1<sup>st</sup> Dept 2020]) and there are “no special circumstances or novel issues requiring Supreme Court involvement” (*Brecker*, 71 AD3d at 565). When there are simultaneous cases pending in Supreme Court and Housing Court, it is not an abuse of discretion for Supreme Court to stay the case before it pending resolution of the Housing Court proceeding (*Langotsky*, 45 AD3d at 405; *see also Britt v International Bus Servs.*, 255 AD2d 143, 144 [1<sup>st</sup> Dept 1998]), and is warranted where, as here, there is “a substantial identity of parties” and “both actions arose out of the same subject matter or series of alleged wrongs” (*PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436 [1<sup>st</sup> Dept 2016] [internal citation and quotation marks omitted]).

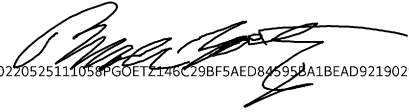
Accordingly, Plaintiff’s motion for summary judgment on its unjust enrichment claim will be denied. Defendant’s motion to dismiss plaintiff’s unjust enrichment claim will also be denied since issues may be presented that should be addressed in this court, instead of Housing Court in light of plaintiff’s allegations that defendant has been collecting money for use and occupancy from individuals she is allowing to reside in the unit. And the case will be stayed pursuant to CPLR 2201 pending resolution of the two Housing Court proceedings.

### **CONCLUSION**

ORDERED that plaintiff’s motion for partial summary judgment on liability on its first and third causes of action is denied; and it is further

ORDERED that defendant’s cross motion for partial summary judgment dismissing the first and third causes of action is granted as to the first cause of action for usurpation of a corporate opportunity and this cause of action is dismissed; and the motion is otherwise denied; and it is further

ORDERED that this action is STAYED pending the resolution of the Housing Court proceedings.

  
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5/25/2022  
DATE

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PAUL A. GOETZ, 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