

KPP III CCT LLC v Douglas Dev. Corp.

2022 NY Slip Op 32997(U)

September 7, 2022

Supreme Court, New York County

Docket Number: Index No. 653945/2021

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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KPP III CCT LLC,

Plaintiff,

- v -

DOUGLAS DEVELOPMENT CORPORATION, JEMAL'S
 CENTRE CITY, WELLS FARGO BANK, NATIONAL
 ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY
 CAPITAL I TRUST 2016-USB 11, COMMERCIAL
 MORTGAGE PASS-THROUGH CERTIFICATE, SERIES
 2016-UBS11, CWCAPITAL ASSET MANAGEMENT LLC,
 MATTHEW JEMAL

Defendants.

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INDEX NO. 653945/2021

MOTION DATE 07/07/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
 MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to AMEND CAPTION/PLEADINGS.

Plaintiff KPP III CCT LLC (“Plaintiff”) moves for leave to file a supplemental summons and amended verified complaint, removing Defendants’ Wells Fargo Bank, National Association, As Trustee For Morgan Stanley Capital I Trust 2016-Ubs 11, Commercial Mortgage Pass-Through Certificate, Series 2016-Ubs11 (“Wells”) and CWCapital Asset Management LLC from this action, amending the verified complaint to add a new cause of action of tortious interference, as well as expanding upon Plaintiff’s other causes of action as alleged against Defendants Douglas Development Corporation (“Douglas Development”), Jemal’s Centre City, LLC (“Centre City”), and Matthew Jemal (“Jemal”).

On March 28, 2022, this Court dismissed the Complaint in its entirety because (i) Plaintiff failed to adequately plead that Douglas Development and Centre City were subject to

personal jurisdiction in New York; and (ii) Plaintiff failed to state a claim (*see* NYSCEF 112 at 27:8–31:23 [“Mar 28, 2022 Tr.”]).

The Court gave Plaintiff an opportunity to make a motion for leave to amend the Complaint (NYSCEF 102), which it has done. Because Plaintiff still has not adequately pleaded that this Court has personal jurisdiction over Douglas Development and Centre City, and therefore the proposed amendment is futile, Plaintiff’s motion is denied.

DISCUSSION

CPLR 3025(b) provides that “[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court” “Motions for leave to amend should be freely granted, absent prejudice or surprise . . . unless the proposed amendment is palpably insufficient or patently devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]). “A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, ‘palpably insufficient or clearly devoid of merit’ and thus should not be permitted under CPLR 3025” (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], 3–4 [Sup Ct, NY County 2021]; *see also Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]).

Plaintiff attempts to revive its assertion of personal jurisdiction over Douglas Development and Centre City through an “alter ego” theory of general jurisdiction. According to the proposed amended complaint (NYSCEF 118), Douglas Development transacts and conducts business in New York through several alter ego limited liability companies including, but not limited to, Jemal’s Police LLC, Jemal’s Seneca LLC, Jemal’s Boulevard, LLC, and Jemal’s Weg, LLC (the “Alter Ego LLCs”), and that this Court has jurisdiction over Douglas

Development pursuant to CPLR § 301 based upon the Alter Ego LLCs which were utilized to cause harm to Plaintiff (NYSCEF 118 ¶ 14).

First, it appears from Plaintiff's allegations that the Alter Ego LLCs are subsidiaries of Douglas Development. This cannot suffice for alter-ego jurisdiction as "the 'mere department' analysis applies only if the parent company is subject to general jurisdiction in the forum" (*SPV OSUS Ltd. v UBS AG*, 114 F Supp 3d 161, 169 [SDNY 2015], *aff'd*, 882 F3d 333 [2d Cir 2018]). Plaintiff has not demonstrated that the Court has personal jurisdiction over these Alter Ego LLCs.

Further, the factors for establishing alter ego jurisdiction mentioned in *Volkswagenwerk AG. v Beech Aircraft Corp.* (751 F2d 117 [2d Cir 1984]), which the First Department has adopted (*see e.g. Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 468-69 [1st Dept 2018]; *FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 493 [1st Dept 2017]), do not show that Douglas Development and Centre City are subject to personal jurisdiction in New York. While Douglas Development may have common ownership with the Alter Ego LLCs, "common ownership is 'intrinsic to the parent-subsidary relationship and, by [itself], not determinative'" (*Wolberg v IAI N. Am., Inc.*, 161 AD3d 468-69, quoting *Porter v LSB Indus.*, 192 AD2d 205, 213-14 [4th Dept 1993]). And although Plaintiff contends that Douglas Development has paid property taxes for the buildings owned by an alleged separate legal entity, amounting to the commingling of funds (*see* NYSCEF 126, 128 [*Reply Aff* at Exhibit 2]), this is insufficient where there are no allegations that Douglas Development interferes in the selection and assignment of Alter Ego's executive personnel, fails to observe the corporate formalities, or exercises control over the Alter Ego LLC's finances (*see Wolberg v IAI N. Am., Inc.*, 161 AD3d 468-69; *FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d 602, 602-03 [1st Dept 2013]).

Finally, the Court is not persuaded that Plaintiff has demonstrated specific jurisdiction over Douglas Development and Centre City through the actions of their alleged agent, Matthew Jemal, pursuant to CPLR § 302(a)(2). The proposed amended Complaint only alleges that Mr. Jemal improperly denied a third-party access to the Pennsylvania Property while he was allegedly in New York (NYSCEF 118 ¶¶ 46–48). These allegations are insufficient to show that Mr. Jemal “engaged in purposeful activities in this State in relation to [the] transaction [sued upon] for the benefit of and with the knowledge and consent of [these other] defendants and that they exercised some control over [him] in the matter” (*FIA Leveraged Fund*, 150 AD3d at 494). Even if this Court were to accept this agency theory, the required New York nexus is still not present (*Walden v Fiore*, 571 US 277 [2014]). This lawsuit arises from the Pennsylvania Property, a foreclosure that occurred in Pennsylvania state court, and an NDA that was electronically signed in Washington, D.C. (NYSCEF 14).

In light of the above, the Court declines to further address the sufficiency of the amended claims in Plaintiff’s proposed amended complaint as it relates to Douglas Development and Centre City.

Although Plaintiff adds allegations against Mr. Jemal, nothing in the amended complaint cures the pleading deficiencies that the Court previously found. Specifically, Plaintiff’s claim of fraudulent inducement against Mr. Jemal still alleges that Mr. Jemal did not intend to meet his contractual obligations when he entered the contract (*Gordon v Dino De Laurentiis Corp.* 141 AD2d 435, 436 [1st Dept 1988] [Plaintiff’s fraud claim “merely restates the breach of contract claim in terms of fraud and misrepresentation. It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract”]). Additionally, Plaintiff adds a claim against Mr. Jemal for tortious interference with prospective economic

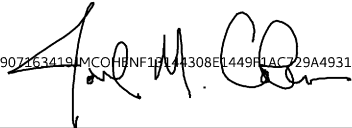
advantage, but fails to include any specific allegations against Mr. Jemal in this cause of action (*RTW Retailwinds, Inc. v Colucci*, 2021 WL 3624933, at *10 [Sup Ct, New York County 2021] [“Such ‘group pleading,’ which fails to give each defendant fair notice of the claims against it, is improper”]). Finally, adding Mr. Jemal to Plaintiff’s breach of fiduciary duty claim also fails because Plaintiff has failed to allege the existence of a fiduciary duty. As the Court previously noted, the only agreement between the parties was an NDA, which created a contractual duty but not a fiduciary duty (NYSCEF 112 at 23-24 [“Tr. of March 28, 2022 Proceedings”]). Plaintiffs’ assertion that Defendant was in possession of Plaintiffs’ confidential information is insufficient, by itself, to create a fiduciary relationship.

Accordingly, it is

ORDERED that Plaintiff’s motion for leave to file a supplemental summons and amended verified complaint is **denied**; and it is further

ORDERED that the Clerk of the Court shall enter judgment dismissing this action and mark this case disposed.

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

9/7/2022

DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE