

Community Assn. of the E. Harlem Triangle, Inc. v Butts

2023 NY Slip Op 30026(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 656028/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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COMMUNITY ASSOCIATION OF THE EAST HARLEM
TRIANGLE, INC. and DERRICK TAITT,

Plaintiffs,

- v -

REVEREND DR. CALVIN O. BUTTS III, JAMES
HOWARD, CHARLES SIMPSON, VICTOR SOZIO,
WINDELS MARX LANE & MITTENDORF LLP, ARIEL
PROPERTY ADVISORS, LLC, and ABYSSINIAN
DEVELOPMENT CORPORATION,

Defendants.

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INDEX NO. 656028/2018

MOTION DATE _____

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 192, 193, 194, 195, 198, 199, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 212, 213, 214, 215, 216, 217, 218, 220 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In motion sequence number 009, plaintiffs Community Association of the East Harlem Triangle Inc. (CAEHT) and Derrick Taitt, derivatively on behalf of East Harlem Abyssinian Triangle Corporation (EHAT Corp), move, pursuant to CPLR 3025 and 1001, for leave to amend the first amended complaint¹ and join as defendants East Harlem Abyssinian Triangle Limited Partnership (EHAT LP) and New York Economic Development Corporation (EDC) as necessary parties.²

¹ Plaintiffs filed a motion to amend the complaint in June 2019. (NYSCEF Doc. No. [NYSCEF] 69, Notice of Motion.) This motion was granted in the absence of opposition. (NYSCEF 78, Decision and Order [mot. seq. no 005].)

² Plaintiffs originally sought to add EHAT LP and EDC as plaintiffs but submitted a “corrected” second amended complaint adding them as defendants. (*Compare* NYSCEF 194, Proposed Second Amended Complaint *with* NYSCEF 198, Corrected Proposed Second Amended Complaint.) The opening paragraph of the corrected proposed second amended complaint mistakenly states that EHAT Corp is a defendant not EHAT LP. (NYSCEF 198, Corrected Proposed Second Amended Complaint at 1.)

The following facts are taken from the corrected proposed second amended complaint.

This action arises out of the April 13, 2014, sale of a property located at 160 East 125th Street, New York, New York (Property). In March 1994, defendant Abyssinian Development Corporation (ADC) and CAEHT formed a joint venture for the purpose of developing the Property as a Pathmark supermarket. (NYSCEF 198, Corrected Proposed Second Amended Complaint ¶¶14.) The parties formed EHAT Corp. to conduct the business of the joint venture. (*Id.* ¶ 15.) CAEHT and ADC each held a 50% ownership interest in EHAT Corp. (*Id.* ¶ 17.) CAEHT and ADC also formed EHAT LP to own and develop the Property. (*Id.* ¶ 18.) EHAT Corp. holds a 51% interest in EHAT LP, and EDC holds a 49% interest in EHAT LP. (*Id.* ¶ 20.)

In March 2013, defendant James Howard, Senior VP of ADC and a director of EHAT Corp., initiated discussions with EHAT Corp.'s board of directors (Board) regarding the sale of the Property. (*Id.* ¶ 22.) Thereafter, Howard and defendant Reverend Dr. Calvin O. Butts III,³ Chairman of ADC, started managing the sale of the Property on behalf of EHAT Corp., assisted by defendant Victor Sozio of Ariel Property Advisors, LLC, a commercial real estate broker, and defendant Charles Simpson, a partner in defendant law firm, Windels, Marx, Lane & Mittendorf LLP. (*Id.* ¶¶ 4, 6, 7, 27.) In November 2013, Howard informed the Board that he had identified seven potential buyers of the Property, including nonparties Peebles Corp. and Extell Development Company (Extell). (*Id.* ¶ 25.)

³ This action is stayed against Reverend Dr. Calvin O. Butts III due to his passing on October 28, 2022. (See NYSCEF 240, CPLR 1015 Letter to the Court.)

In January 2014, Peebles Corp. and nonparty Integrated Urban Holdings, LLC (together, Peebles/Integrated) jointly submitted a written offer to purchase the Property for \$40 million to Butts, and mailed copies of the offer to Sozio and Simpson. (*Id.* ¶¶ 32-33.) Thereafter, Sozio informed Peebles/Integrated that EHAT Corp. would accept an offer of \$42 million; Peebles/Integrated informed Sozio that they would increase their offer to that amount. (*Id.* ¶ 37.) On February 12, 2014, Sozio sent Peebles/Integrated a term sheet containing the terms that EHAT Corp. would agree to accept the \$42 million offer.⁴ (*Id.* ¶ 38.) Sozio told Peebles/Integrated that the offer had been forwarded to Simpson, who would follow up with Johnson to memorialize the offer in a formal contract but Simpson never followed up. (*Id.* ¶¶ 39, 40.)

On March 24, 2014, the Board held a meeting to consider an offer from Extell for \$39 million. (*Id.* ¶ 43.) During the meeting, a CAEHT representative asked Howard whether there were any other offers to purchase the Property aside from that of Extell; however, before Howard could answer, Simpson stated that Extell was the only party to show an interest in purchasing the Property. (*Id.* ¶ 47.) No one disclosed the higher Peebles/Integrated offer. (*Id.* ¶¶ 50-51.) Plaintiffs allege that the Peebles/Integrated offer was deliberately concealed from it because Simpson, WM, ADC, Butts, Howard, Sozio and Ariel had previously agreed upon a scheme to steer the Property to Extell. (*Id.* ¶¶ 74-75.)

The Board met again on April 3, 2014 to discuss the sale, at which time Howard denied that there were any other offers besides Extell's. (*Id.* ¶ 57.) On April 10, 2014

⁴ As EHAT Corp. is EHAT LP's managing general partner, the Board's vote was required in order to approve any sale of the Property. (*Id.* ¶ 42.)

meeting, a majority of the Board approved the sale to Extell. (*Id.* ¶¶ 60, 62.) Plaintiffs allege that, as a direct and proximate consequence of the fraudulent concealment of the Peebles/Integrated offer, EHAT Corp. was damaged in the amount of \$3 million, or the difference between the amount paid by Extell to purchase the Property and the market value of the Property.

Plaintiffs now seek to amend the first amended complaint by adding EHAT LP and EDC as defendants. Plaintiffs do not allege any new claims in the corrected proposed second amended complaint and do not allege any claims against the two newly proposed defendants. Instead, plaintiffs assert that EHAT LP and EDC must be joined as necessary parties because they have an interest in this action and may be inequitably affected by a judgment.

CPLR 1001(a) provides that “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.” The decision to add or not to add a party is discretionary. (*See Oleh v Anlovi Corp.*, 106 AD3d 445, 445 [1st Dept 2013].)

In a derivative action, a shareholder or shareholders sue on behalf the corporation. The alleged injury is to the corporation and not to the corporation’s shareholders directly. (*Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012] [“A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually.”].)

This is a derivative action wherein plaintiffs allege claims on behalf of EHAT Corp.⁵ Plaintiffs, on behalf of EHAT Corp., allege defendants concealed the existence of a higher sales price offer for the Property, and without the full Board's knowledge of the higher offer, they voted to accept the lower offer of \$39 million. Plaintiffs further allege that, as a 51% shareholder of EHAT LP⁶, it suffered damages as a result of the lower purchase price. Thus, any damages recovered are EHAT Corp.'s damages, not CAEHT nor ADC. The court notes this because one of plaintiffs' arguments is that EDC must be joined in order for the court to equitably adjudicate "CAEHT's damages" without assessing what is owed to EDC based on EDC 49% interest in EHAT LP.

Putting aside the fact that CAEHT has no direct claims, and thus, no claim for damages here, plaintiffs fail to explain why the court needs to assess what money is owed to EDC prior to adjudicating EHAT Corp.'s damages or why the portion of damages that EHAT Corp. seeks, i.e., the sales price difference or the difference between the value of the Property at the time of the sale and the \$39 million purchase price, is not simply based on its 51% interest in EHAT LP. If plaintiffs, on behalf of EHAT Corp., prevail and are awarded the damages sought, it is unclear how the judgment would have an inequitable effect on EDC so as to require EDC to join this litigation over EDC's objection. Further, EDC is not an indispensable party to this action

⁵ On June 29, 2020, the court dismissed plaintiff Taitt's claims pursuant to Business Corporation Law (BCL) § 720. (NYSCEF 85, Decision and Order [mot. seq. no. 004].) The dismissal of these claims was affirmed by the First Department. (NYSCEF 219, First Department Decision.) Despite the First Department's decision, the BCL § 720 claims and others dismissed by this court and First Department are replead in the proposed corrected second amended complaint. (See NYSCEF 198, Proposed Corrected Second Amended Complaint.)

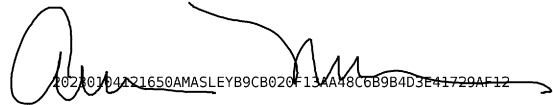
⁶ EHAT LP was the record title holder of the Property. (NYSCEF 205, Deed and Transfer Documents.)

“since full relief will be available to the plaintiff in the event [it] prevails on [its] claim[s] against the defendant[s].” (*Montgomery v Altier, Wayne & Klein*, 122 AD2d 256, 256 [2d Dept 1986] [citations omitted].)

The same is true as to EHAT LP. Plaintiffs fail to explain how EHAT LP would be inequitably affected by a judgment in favor of EHAT Corp. as EHAT Corp. is only entitled to recover its own share if successful. Further, requiring the addition of EHAT LP as a defendant does nothing to advance EHAT Corp.’s alleged entitlement to recovery against the current defendants, especially where no claims are alleged against EHAT LP. If the current defendants are found liable, EHAT Corp. will “be accorded complete relief.” (*Oleh v Anlovi Corp.*, 106 AD3d at 445 [internal quotation marks and citation omitted].)

Accordingly, it is

ORDERED that plaintiffs’ motion to amend the first amended complaint is denied.



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1/4/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE