

Hieber Astoria, LLC v Taverna
2023 NY Slip Op 30310(U)
January 31, 2023
Supreme Court, New York County
Docket Number: Index No. 650793/2022
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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HIEBER ASTORIA, LLC, HIEBER BROADWAY,
LLC, HIEBER PLAINFIELD, LLC

Plaintiff,

- v -

FRED TAVERNA, THE MANAGEMENT GROUP INC., NY
INTERIOR CONSTRUCTION OF NY, INC.,

Defendant.

INDEX NO. 650793/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 26, 32, 34, 35, 37, 38, 39, 41

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for SANCTIONS.

The Defendants' motion (Mtn. Seq. No. 001) to dismiss and for sanctions is granted solely to the extent of dismissing (i) the breach of contract and breach of fiduciary duty claims as against Fred Taverna personally, (ii) the negligence claims, and (iii) the conversion claims that fall outside of the statute of limitations. The breach of contract and the breach of fiduciary duty claims against Mr. Taverna personally sound in aiding and abetting and leave is granted to file an amended pleading reflecting the same. The conversion claim against Mr. Taverna is predicated on Mr. Taverna's transfers from Hieber Astoria in which he is not an owner to Hieber Reade Street, LLC, in which he is a part owner and over which his company, The Management Group Inc. exercises dominion and control. Simply put, as alleged, he has attempted to divest the Hiebers of some of their rights in these funds by virtue of looting Hieber Astoria. It does not matter that the

Hiebers have taken the position that either the funds are converted or that the funds must solely be their (and not his) capital contributions in Hieber Reade Street because Mr. Taverna disputes that these transferred funds constitute capital contributions by the Hiebers and has in the other litigation (in which he claims he was not properly terminated) disputed that these amounts should be considered part of the Hiebers' capital account. Lastly, the Hiebers are not judicially estopped from arguing that this constitutes a conversion because how to characterize these transfers is and was disputed by the parties and the Court did not rely on the Hiebers' argument that this constituted a capital contribution by them in denying their motion that Mr. Taverna was properly terminated from the Hieber Reade Street partnership.

The Plaintiffs motion (Mtn. Seq. No. 002) to compel discovery and for sanctions is granted and the Defendants shall pay the Plaintiffs' costs and expenses incurred in bringing the motion.

The Relevant Facts and Circumstances

Reference is made to a certain Management Agreement (the **Management Agreement**; NYSCEF Doc. No. 2) dated September 23, 2003, by and between Jean Hieber as Owner and Mr. Taverna's company, The Management Group, Inc. (**TMG**) as Agent, pursuant to which the parties agreed that TMG would manage certain property owned by Ms. Hieber. Mr. Taverna controls TMG and signed the Management Agreement on its behalf. As compensation, Ms. Hieber agreed to pay to TMG 5% of the gross rent and additional rent and late fees (*id.*, at 2). TMG's duties pursuant to the Management Agreement included, among other things:

2. Will deposit all owner funds in a Special Custodial Account. Agent will pay Real Estate. Taxes, utilities and service contractors on a timely basis and will notify owner if there are not sufficient funds to make said timely payments.

...

5. Will inform Owner of any repairs and replacements necessary to preserve the integrity of the premises. Will secure the approval of the Owner prior to authorizing trades people to make such repairs or replacements. Agent shall make a conscientious effort to obtain and use the services of reliable trades people known to the agent and whose charges are fair and reasonable. Agent will not enter into any new service contract without written approval of the owner

(*id.*, ¶¶ 2, 5).

The Plaintiffs allege that Ms. Hieber's rights under the Management Agreement were subsequently assigned to them (NYSCEF Doc. No. 1, ¶ 1).

The Plaintiffs further allege that instead of competitively bidding work, Mr. Taverna and TMG hired NY Interior Construction of NY, Inc. (NYIC), another company controlled by Mr. Taverna, to provide repair and construction services (*id.*, ¶ 4). The Plaintiffs allege that this both allowed (i) the Defendants to collect management fees and construction fees and constituted improper self-dealing whereby the Defendants were enriched at the Plaintiffs' expense and to the detriment of the property (*id.*, ¶¶ 4-5) and (ii) gave Mr. Taverna the opportunity to have one of his companies, TMG, make improper payments to another of his companies, NYIC, including for work that had not been completed or even begun (*id.*, ¶ 6). The Plaintiffs also allege that, because the Defendants had control over the bank accounts for the properties, they converted funds by transferring them without authorization into the bank accounts of Hieber Reade Street LLC (*id.*, ¶ 7) -- *i.e.*, from the entity in which he had no interest into the entity in which he has an interest. They allege that Mr. Taverna would then use these funds to pay NYIC for work that it supposedly did on a redevelopment project for Hieber Reade Street (*id.*). Stated differently, the Plaintiffs allege that Mr. Taverna looted their entity by transferring money to an entity jointly

owned so that he could pay his own company for “improvements” made on the jointly owned entity and for overcharging the jointly owned entity for work not competitively bid or properly completed.

The Plaintiffs allege that, in early 2020, they began to learn of the Defendants’ wrongdoings and requested access to their bank accounts along with reports of each property’s rent rolls and expenses (*id.*, ¶ 8). They allege that, upon inspection of the records, they discovered the Defendants’ self-dealing (*id.*, ¶ 9). Upon a walkthrough inspection of the properties, the Plaintiffs also allegedly discovered that the Defendants had failed to maintain the properties and to make necessary repairs, all while misrepresenting the status of renovations to the Plaintiffs (*id.*). The Plaintiffs subsequently terminated the Management Agreement with TMG (*id.*) and sued.

In this lawsuit, the Plaintiffs assert the following causes of action: (i) breach of contract as against TMG and Mr. Taverna (first cause of action), (ii) breach of fiduciary duty as against TMG and Mr. Tavera (second cause of action), (iii) breach of contract as against NYIC (third cause of action), (iv) negligence as against all Defendants (fourth cause of action), (v) conversion as against all Defendants (fifth cause of action), and (vi) accounting as against TMG and Mr. Taverna (sixth cause of action).

The Defendants now move to dismiss the Complaint, arguing that (i) the transfers of funds that form the basis of the causes of action for conversion and breach of fiduciary duty were made with the Plaintiffs’ knowledge and were counted by Christina Hieber and Jennifer Hieber as

capital contributions into Hieber Reade Street pursuant to a separate Operating Agreement¹, (ii) the breach of contract claims against Mr. Taverna must be dismissed because he is not a party to the Management Agreement, (iii) the cause of action for breach of fiduciary duty must be dismissed because the failure to seek bids for construction work does not constitute a breach of fiduciary duty and is duplicative of the breach of contract claim, (iv) the breach of contract claims against NYIC are based on a speculative agreement between TMG and NYIC to which the Plaintiffs claim they are third party beneficiaries but there is no showing that such an agreement exists, (v) the negligence claims should be dismissed as against Mr. Taverna because he did not have any duties with respect to the work performed at the property and as against TMG as duplicative of the breach of contract claims, (vi) the claim for an accounting should be dismissed because the Plaintiffs controlled the bank accounts for the properties, and (vii) the claims should be dismissed as time barred. The Defendants also move for sanctions for filing a frivolous lawsuit.

Discussion

On a motion to dismiss, the Court must afford the complaint a liberal construction and accept the facts as alleged as true, accord the plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

- I. ***The Defendants' motion to dismiss is granted to the extent of dismissing (i) the claims against Mr. Tavera except for the conversion claims, (ii) the negligence claims, and (iii) the conversion claims that fall outside of the statute of limitations (Mtn. Seq. No. 001)***

¹ This Operating Agreement is at issue in a related case brought by Hieber Reade Street, Christina Hieber, and Jennifer Hieber, Index No. 655454/2021.

A. Breach of contract claims

The breach of contract claims as against Mr. Taverna must be dismissed. Mr. Taverna signed the Management Agreement on behalf of TMG -- not in his personal capacity. The Plaintiffs' argument that Mr. Taverna is a party to the Management Agreement is simply not correct. It does not matter that Mr. Taverna's name is handwritten above TMG at the top of the Management Agreement. It is only signed as between Ms. Hieber and TMG. To the extent that the complaint sets forth Mr. Taverna's conduct in causing the alleged breach, the claim sounds in aiding and abetting breach of contract. Leave is granted to the plaintiffs to file an amended pleading asserting the same.

The breach of contract claims against NYIC are predicated on a construction contract between NYIC and TMG to which the Plaintiffs are third party beneficiaries because the contract is for work on the properties. It is not clear whether there was ever a written contract between TMG and NYIC, and there may not have been given that they are both controlled by Mr. Taverna. However, the Complaint alleges that there was a deal between NYIC and TMG whereby NYIC performed work on the properties and TMG paid NYIC for such work. This is sufficient to evidence a contract between the parties for which the Plaintiffs would be third-party beneficiaries. The claims against NYIC for breach of contract are therefore not dismissed.

B. Negligence claims

The negligence claims must also be dismissed. They are based on the alleged failure to maintain the property and ensure that construction work was properly performed. This claim mirrors the breach of contract claims against TMG and must be dismissed as duplicative. To the extent

these claims are asserted as against Mr. Taverna, they must be dismissed because he is not a party to the Management Agreement.

C. Conversion claims

The Defendants' argument that the allegedly converted funds were counted as capital contributions into Hieber Reade Street by Christina Hieber and Jennifer Hieber, such that they can not form the basis of conversion claims is unavailing. As discussed above, the Plaintiffs allege that Mr. Taverna looted their wholly owned entity to supply an entity in which he had an ownership interest with money so that he could overpay himself for work that was not done or done improperly. "Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights" (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]). To the extent that the transfers were made outside of the three-year statute of limitations, however, the claims with respect to those transfers must be dismissed because conversion claims are not subject to a discovery rule (*Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016]).

D. Breach of fiduciary duty claims

The breach of fiduciary duty claims are not dismissed against TMG. As discussed above, the looting of the plaintiff constituted a breach of fiduciary duties by TMG. Additionally, to the extent that the complaint alleges that one of Mr. Taverna's companies hired another of Mr. Taverna's companies NYIC, and that NYIC overcharged for work and charged for work not done or not done properly, this states a cause of action for breach of the duty of care and loyalty. However, Mr. Taverna was not a member of Hieber Astoria and may not have owed fiduciary

duties to these plaintiffs. The claims sound in aiding and abetting breach of fiduciary duty and the Plaintiffs may file an amended pleading asserting the same.

E. Accounting claims

For the reasons set forth above, the cause of action for an accounting is also not properly dismissed against TMG.

II. *The Plaintiffs' motion to compel is granted (Mtn. Seq. No. 002)*

The papers submitted by the Defendants in opposition to this motion are inconsistent as to what discovery was done, how it was conducted, and when it was conducted. It is apparent that the Defendants have not searched all of the sources and terms that they agreed to search, and that their failure to do so has caused significant delay and significant expense. The Plaintiffs are entitled to the discovery that the parties agreed on and which the Plaintiff has already produced. The Defendants shall therefore retain a vendor within two weeks of today's order to collect emails from all accounts which the Defendants previously agreed to search and such vendor will apply the full set of search terms that the parties agreed upon and provide such production to counsel for the Defendants for their review. Fred, Liam and Delores Taverna shall also submit their mobile devices to a vendor for forensic imaging and the vendor shall apply the agreed upon search parameters for those devices and provide such production to counsel for Defendants for their review and production. The Defendants shall also produce electronic documents with the relevant metadata of the documents previously produced in hardcopy. The Defendants conduct in discovery has been willful and contumacious and as a result they shall bear the Plaintiffs' reasonable costs and expenses in connection with bringing this motion.

It is hereby ORDERED that the negligence claims are dismissed; and it is further

ORDERED that the breach of contract and breach of fiduciary duty claims against Mr. Taverna are dismissed without prejudice to the Plaintiffs' right to replead these claims as aiding and abetting claims; and it is further

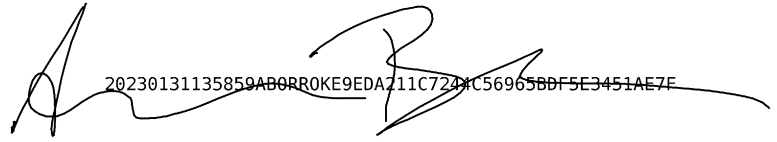
ORDERED that the conversion claims that fall outside of the statute of limitations are dismissed; and it is further

ORDERED that the Defendants shall retain a vendor within two weeks of today's order to conduct the discovery ordered above; and it is further

ORDERED that the electronic documents that the Defendants are ordered to produce shall be produced within two weeks of today's order; and it is further

ORDERED that the Plaintiffs shall provide to the Defendants an accounting of the costs incurred in connection with bringing the motion to compel; and it is further

ORDERED that if the parties cannot agree as to the amount of reasonable costs and expenses incurred in connection with bringing the motion to compel that the Defendants shall pay to the Plaintiffs, the parties shall promptly notify the Court (sfc-part53@nycourts.gov) and the matter shall be referred to a JHO or Special Referee.



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1/31/2023

DATE

ANDREW BORROK, 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