

**Friedlander & Assoc., LLC v Brooklyn Surgical Ctr.  
LLC**

2023 NY Slip Op 30672(U)

February 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 527386/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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FRIEDLANDER & ASSOCIATES, LLC,

Plaintiff, Decision and order

- against -

Index No. 527386/2022

BROOKLYN SURGICAL CENTER LLC and  
ROBERT KODSI,

Defendants, February 22, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the first, second, third and fifth causes of action on the grounds they fail to state any claims. The plaintiff has opposed the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According the complaint, the defendant Brooklyn SC is engaged in running an ambulatory surgical center in Kings County. The defendant Dr. Robert Kodsi is the managing member of Brooklyn SC and the plaintiff is a Class B member of Brooklyn SC. On December 20, 2016 a settlement agreement was reached in an unrelated lawsuit between the parties. The agreement provided that "in the event of a sale of an interest in Brooklyn SC, LLC to a third party, the purchaser shall be entitled to acquire all the interests held by Friedlander & Associates, Charles

Friedlander and his group in Brooklyn SC, LLC upon the same terms and conditions. If said third party declines to purchase said interests held by Friedlander & Associates, and the individual and his group in Brooklyn SC, LLC, then in that event, Brooklyn SC, LLC shall do so, upon the same terms and conditions" (see, Settlement Agreement, ¶ 6 [NYSCEF Doc. No. 6]).

On April 11, 2019 Dr. Ahmed Saleh entered into a purchase agreement with Dr. Mara Karamitopoulos whereby Dr. Karamitopoulos sold a .56705% membership interest she owned in Brooklyn SC for \$10,206.90. On April 9, 2019 Dr. Afshin Razi entered into a purchase agreement with Dr. Mara Karamitopoulos whereby Dr. Karamitopoulos sold a .56705% membership interest she owned in Brooklyn SC for \$10,206.90. On April 9, 2019 Dr. Ramin Sadeghpour entered into a purchase agreement with Dr. Howard Goodman whereby Dr. Goodman sold a 1.1341% membership interest he owned in Brooklyn SC for \$20,413.80. Thus, the complaint asserts, and it is undisputed, that each purchaser paid \$18,000 for a one percent ownership interest (see, Complaint, ¶ 51 [NYSCEF Doc. No. 2]).

Pursuant to the 2016 settlement agreement all three purchasers were notified they had the right to purchase the shares of the plaintiff and all three declined. Whereupon, the defendants informed the plaintiff they sought to purchase the plaintiff's 2.6% share at the price of \$18,000 per each percent

of ownership interest. The plaintiff instituted the within action and has asserted five causes of action, namely breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, two claims for breach of contract and unjust enrichment. The crux of the lawsuit is that the defendants sold the shares to the three purchasers at well below market value to enable the entity to purchase plaintiff's shares below market value as well. The plaintiff asserts the defendants acted intentionally to specifically enable itself to purchase plaintiff's shares at below market value.

#### Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Ripa v. Petrosyants, 203 AD3d 768, 160 NYS3d 658 [2d Dept., 2022]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (BT Holdings, LLC v. Village of Chester, 189 AD3d 754, 137 NYS2d 458 [2d Dept., 2020]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Redwood Property Holdings, LLC v.

Christopher, 211 AD3d 758, 177 NYS3d 895 [2d Dept., 2022]).

Moreover, to succeed on a motion to dismiss based upon documentary evidence such evidence must utterly refute the plaintiff's allegations (Gould v. Decolator, 121 AD3d 845, 994 NYS2d 368 [2d Dept., 2014]).

As noted, the complaint alleges the defendants failed to evaluate the worth of the shares before they were sold which resulted in the shares being sold below market value. However, the defendants did not sell the shares. The shares were sold by Dr. Karamitopoulos and Dr. Goodman as evidenced by the three purchase agreements entered into between them and the three purchasers. It is true that the letter dated February 17, 2020 informing the plaintiff the defendants sought to purchase plaintiff's shares stated that "the company" had recently sold equity (see, Letter, Dated February 17, 2020 [NYSCEF Doc. No. 7]) however, there can be no questions of fact the company did not sell any of the shares at all.

The plaintiff argues the defendants engaged in an elaborate scheme whereby they procured the purchasers to purchase the shares at a reduced rate so the defendants could then purchase the plaintiff's shares at a reduced rate. First, those allegations are not in the complaint. More importantly they are completely speculative. The plaintiff provides no basis

concerning an alternative valuation of the shares and provides no evidence at all that Dr. Karamitopoulos and Dr. Goodman would willingly sell their shares for less than they were worth just to benefit Brooklyn SC. Furthermore, there is also no evidence that the three purchasers were procured by Brooklyn SC who had complete knowledge they would elect not to purchase the plaintiff's shares for a reduced rate allowing the defendant to do so. While it is well settled that all allegations of a complaint are deemed true (Federal National Mortgage Association v. Grossman, 205 AD3d 770, 165 NYS2d 892 [2d Dept., 2022]) in this case the allegations asserted are not in the complaint at all, as noted. The complaint merely accuses the defendants of failing to conduct a proper valuation. However, as noted, the defendants did not sell the shares thus cannot be faulted for the lack of any such valuation.

Thus, the defendants did not initiate or have any involvement in the sale of the shares at all for the price noted and consequently could not have breached any duty or any covenant and did not breach any contract provision. Rather, it is the language of the settlement agreement which permitted the scenario that has unfolded.

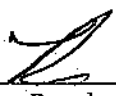
Therefore, based on the foregoing the motion seeking to dismiss the first, second, third and fifth causes of action of

the complaint is granted.

So ordered.

ENTER:

DATED: February 22, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC