

Tobia v Meshechok

2023 NY Slip Op 30773(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 652252/2022

Judge: Barry R. Ostrager

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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WILLIAM C. TOBIA, individually in his own right and derivatively on behalf of 218-220 Park Place, LLC, DENIS MENKE, individually in his own right and derivatively on behalf of 218-220 Park Place, LLC, DARREN GLEEMAN, individually in his own right and derivatively on behalf of 218-220 Park Place, LLC, STEVEN GOLDEN individually in his own right and derivatively on behalf of 218-220 Park Place, LLC, LAWRENCE KAPLAN, individually in his own right and derivatively on behalf of 218-220 Park Place, LLC, PATRICK J. FALLON derivatively on behalf of 218- 220 Park Place, LLC, MARTIN KELLY, individually in his own right and derivatively on behalf of 218-220 Park Place, LLC, WMJ EQUITIES LLC (TRUSTS OF WILLIAM COHEN), individually in its own right and derivatively on behalf of 218-220 Park Place, LLC, EITAN MILSTEIN TTE ACC ADVISORS DEFINED BENEFIT PLAN U/A DTD 11/30/11, individually in its own right and derivatively on behalf of 218-220 Park Place, LLC, SARTABA ADVISORS, INC. 401K PSP, individually in its own right and derivatively on behalf of 218-220 Park Place, LLC, EJS REALTY, LLC, individually in its own right, MESH PARTNERS LLC, individually in its own right, and CSG 401K/PSP FBO LAWRENCE KAPLAN, individually in its own right,

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MOTION DATE	
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DECISION + ORDER ON MOTION

Plaintiffs,

- v -

ALEXANDER MESHECHOK, BKNY DEVELOPMENT PARTNERS, LLC, BKNY 119 CONGRESS, LLC, and DOWNTOWN COMPLETE CONSTRUCTION CORP.,

Defendants,

- and -

218-220 PARK PLACE, LLC,

Nominal Defendant.

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HON. BARRY R. OSTRAGER

On March 9, 2023, the Court held oral argument via Microsoft Teams on defendants’ pre-answer motion to dismiss plaintiffs’ Verified Complaint. During the Transcript of Proceedings of March 9, 2023, the Court reserved decision on the motion. For the reasons set forth below, defendants’ motion to dismiss is granted in part and denied in part.

This case involves a real estate development project involving a property located at 218-22 Park Place, Brooklyn, New York (the “Project”). The plaintiffs are investors in the Project and members of 218-220 Park Place LLC (the “Park Place Company”), an entity created solely for the real estate Project which is a nominal defendant in this case.¹ Defendant Meshechok and an individual named Lawrence Kaplan, a non-party in this action, have a 50-50 split in managerial control of the Park Place Company pursuant to the Amended and Restated Operating Agreement of 218-220 Park Place, LLC (the “Park Place Company Operating Agreement”). NYSCEF Doc. No. 37. Plaintiffs assert against defendants various direct and/or derivative claims for breach of contract, breach of fiduciary duty, fraud, aiding and abetting a fraud, unjust enrichment, constructive trust, an accounting, and a claim to inspect books and records of a separate LLC. The defendants are Alexander Meshechok and other entities owned and/or controlled by Mr. Meshechok who are either directly involved in the Project (BKNY Development Partners, LLC, referred to hereinafter as “BKNY”) or alleged to have interfered with the Project (BKNY 119 Congress, LLC).²

Reduced to pith, the plaintiffs allege that defendant Meshechok made various false representations to plaintiffs regarding the management of the Project. The Verified Complaint alleges that Mr. Meshechok made misrepresentations to plaintiffs and to Mr. Kaplan regarding Mr. Kaplan’s affiliation with BKNY, allegedly in order to induce certain plaintiffs to invest in the Project. Meshechok and Kaplan, who had allegedly worked together on prior deals through their non-party entity CSG RE, agreed to work together on the Project. Allegedly, at some point after Meshechok and Kaplan agreed to work on the Project together, Meshechok suggested creating BKNY to manage the Project, with both Meshechok and Kaplan holding membership in BKNY. Kaplan was allegedly known to plaintiffs as a successful and sophisticated money manager and investor. The Verified Complaint alleges that Meshechok and Kaplan agreed that no formal operating agreement for BKNY would be necessary as the parties had previously worked together through non-party entity CSG RE without the use of a formal operating agreement. In prior dealings with Meshechok, Kaplan had a 60% interest in his ventures with Meshechok and therefore was able to make managerial decisions. However—contrary to the

¹ In their motion papers, the parties made several references to changes regarding the parties involved in this case, without further detail.

² The action against defendant Downtown Complete Construction Corp. (“DCCC”) was discontinued. NYSCEF Doc. No. 59. Accordingly, DCCC is no longer a named party to this case.

discussion between Kaplan and Meshechok—the Verified Complaint alleges that, unbeknownst to Kaplan, Meshechok created a secret operating agreement for BKNY which completely excluded Kaplan and which granted Mr. Meshechok full control of BKNY. *Cmplt.* §§55–56. The allegedly false narrative regarding Kaplan’s affiliation with BKNY was thereafter shared with plaintiffs by both Meshechok and Kaplan. The secret operating agreement is not part of the record on this motion.

In addition to the secret BKNY operating agreement, the Verified Complaint refers to several other agreements relevant to the dispute. The Company Operating Agreement was entered into between the Company, the Investors as Members of the Company, and BKNY as the “Other Member.” NYSCEF Doc. No. 37. The Company Operating Agreement provides that Kaplan and Meshechok form the Company Board. The Company Operating Agreement also provides that Meshechok is the Company’s President and Kaplan, the Company’s Secretary. The Company Operating Agreement allegedly contains misrepresentations regarding management services provided by BKNY and misrepresentations regarding Kaplan’s involvement with BKNY. *Cmplt.* §69–70, 78. The Management and Services Agreement (the “MSA”) was entered into between the Company and BKNY and covered BKNY’s obligations and responsibilities as the sole entity responsible for the management of the Project. NYSCEF Doc. No. 38. The MSA contains a provision permitting the Company Board to audit its records pertaining to the Project. The Verified Complaint alleges that the MSA also contains misrepresentations regarding management services provided by BKNY and the management structure of BKNY. *Cmplt.* §90. In addition, the MSA provides for service fees and compensation that would be ultimately paid exclusively to Meshechok, as the sole individual in control of BKNY. Finally, the Verified Complaint also references a Subscription Agreement entered into between the Company and Investor Members who opted to subscribe to or purchase Investor Units in the Company. NYSCEF Doc. No. 36. It is alleged that the Subscription Agreement also contains misrepresentations regarding Kaplan’s involvement with BKNY, and also provides for compensation to BKNY for its management services. The Verified Complaint alleges that Company Operating Agreement, the MSA, and the Subscription Agreement were all provided to the plaintiffs prior to their investment and the misrepresentations allegedly contained therein were used to induce plaintiffs to believe Kaplan was involved in BKNY.

The Verified Complaint not only alleges fraud, but also alleges breach of the MSA and that the Project was grossly mismanaged, generating significant expenses which were allegedly misappropriated by Meshechok without the Project ever reaching completion.

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Verified Complaint as true, “the facts as alleged fit within any cognizable legal theory ... Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (citations omitted).

As a preliminary matter, the claims asserted by plaintiffs Steven Golden and the Trustee of TTE ACC are dismissed as time-barred.³

The Verified Complaint states a derivative claim for breach of contract against defendant BKNY, the entity charged with management of the Project, which claim is not the subject of defendants’ motion to dismiss. I.e., defendants concede plaintiffs may have stated a derivative claim against BKNY for breach of contract if plaintiffs have made a proper demand upon defendant BKNY or if demand futility was adequately pled. The Court declines to dismiss this derivative claim on the ground that demand and/or demand futility were improperly pled. Plaintiffs sufficiently pled demand futility based on the claim that Meshechok and Kaplan had a 50-50 split in managerial control of the Company. Given plaintiffs’ specific allegations surrounding the alleged steps taken by Meshechok to conceal the existence of the BKNY Operating Agreement from plaintiffs and from Kaplan, and Meshechok’s self-interest in the transactions with the Company as the person with 100% control of BKNY, demand futility was adequately pled. *See, e.g., HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 195 (1st Dept. 2012).

Plaintiffs’ Verified Complaint clearly states both direct and derivative claims for fraud. The motion to dismiss direct plaintiffs’ fraud claim against Meshechok and BKNY is denied in its entirety. All the elements for fraud are adequately pled. The issues of whether plaintiffs’ reliance on alleged misrepresentations was reasonable is a fact-based question that cannot be decided at the pre-answer motion to dismiss stage. While it is true that the plaintiffs were

³ The direct claim for fraud claims asserted by plaintiffs Steven Golden and the Trustee of TTE ACC are dismissed as barred by the Statute of Limitations of California, where both plaintiffs are residents, as conceded in plaintiffs’ opposition to the motion and during oral argument on March 9, 2023. NYSCEF Doc. No. 58, fn. 12.

sophisticated investors, this alone is not sufficient to warrant dismissal of the fraud claim. “The principle that sophisticated parties have ‘a duty to exercise ordinary diligence and conduct and independent appraisal of the risk they are assuming’ has particular application where... the true nature of the risk being assumed could have been ascertained from reviewing market data or other publicly available information.” *HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 195 (1st Dept. 2012). The Verified Complaint alleges that Meshechok took many steps to actively conceal the existence of the BKNY Operating Agreement and the true nature of BKNY’s management structure, including lying to Mr. Kaplan about his involvement and the existence of the Operating Agreement and changing the address of BKNY from Meshechok’s home address to the same address of a non-party entity affiliated with both Kaplan and Meshechok. *Cmplt.* §§61–63. Assuming the allegations regarding Meshechok’s active concealment of the BKNY Operating Agreement are true as the Court must at this pre-answer motion to dismiss stage, the issues of the extent of any due diligence undertaken by plaintiffs and whether the alleged reliance on misrepresentations contained in the various agreements was reasonable is a question of fact that cannot be resolved at the pre-answer motion to dismiss stage. Likewise, the issue of the business judgment rule is also a question of fact that cannot be decided at this time.

The motion to dismiss derivative plaintiffs’ claim for fraud against Meshechok and BKNY is granted in part to the extent provided herein. To the extent the claim is based on misrepresentations made by Meshechok regarding Kaplan’s involvement in BKNY, that claim is dismissed as duplicative of the direct fraud claim. To the extent the claim is based on misrepresentations regarding the Project loans provided by non-party Banco Popular, the motion is granted for two reasons. First, to the extent this prong of the derivative fraud claim relies on alleged misrepresentations made to non-party Banco Popular, the claim is non-actionable as it is an impermissible third-party reliance claim. *See Pasternack v. Lab’y Corp. of Am. Holdings*, 27 N.Y.3d 817, 836 (2016). The remaining prongs of the derivative fraud claim, namely those prongs alleging misrepresentations regarding the use of Company funds and alleged fraudulent drawdowns on the Project loans, are adequately pled for the purposes of a pre-answer motion to dismiss.

All the other claims are substantially duplicative of the fraud and breach of contract claims. The motion to dismiss derivative plaintiffs’ claim for breach of fiduciary duty and aiding and abetting breach of fiduciary duty is granted as duplicative of the breach of contract claim.

The motion to dismiss derivative plaintiffs' claim for unjust enrichment and a constructive trust is granted as duplicative of the fraud and breach of fiduciary duty claims.

The motion to dismiss derivative plaintiffs' claim for an accounting is granted as the claim for an accounting is duplicative of the breach of contract claim.

The motion to dismiss derivative plaintiffs' books and records claim is granted as duplicative of the breach of contract claim. The books and records claim is based on the Company Board's contractual right (contained in the MSA) to inspect the books and records of defendant BKNY Development Partners, LLC related to the Project. Plaintiffs may assert the relief sought here in connection with the breach of contract claim.

The parties are directed to promptly submit a stipulation to amend the caption, reflecting the changes to the named parties, with a request to be So Ordered.

Defendants shall file an Answer to the surviving allegations of the Verified Complaint within thirty days of this Order. A preliminary conference is scheduled for May 18, 2023 at 10:00 a.m. The parties are directed to e-file a letter with dial-in access to this conference no later than May 1, 2023. To that end, the parties are directed to meet and confer and agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of Issue deadline 22 months after the date of the Order and interim deadlines agreed to by the parties. Please e-file the proposed Preliminary Conference Order with a request to So Order by May 1, 2023. If the proposed Preliminary Conference Order is acceptable, it will be So Ordered and no appearance will be necessary on May 18, 2023.

Accordingly, it is hereby


ORDERED that the causes of action asserted by plaintiffs Steven Golden and the Trustee of TTE ACC are severed and dismissed; and it is further

ORDERED that the motion to dismiss by defendants is denied as to the first and fourth causes of action;

ORDERED that the motion to dismiss is granted as to the second, fifth, sixth, and seventh causes of action, and granted in part as to the third cause of action, and those causes of action are dismissed to the extent provided herein; and it is further

ORDERED that the motion to dismiss is in all other respects denied.

Dated: March 10, 2023



 BARRY R. OSTRAGER, 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