

Madan v 57th & 6th Ground LLC

2023 NY Slip Op 31002(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 154931/2022

Judge: Arthur F. Engoron

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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. ARTHUR F. ENGORON PART 37

Justice

-----X	INDEX NO.	<u>154931/2022</u>
BIRINDER S. MADAN,	MOTION DATE	<u>09/06/2022, 10/17/2022</u>
Plaintiff,	MOTION SEQ. NO.	<u>001 002</u>
- v -		

57TH & 6TH GROUND LLC, THE BOARD OF DIRECTORS OF THE CARNEGIE HOUSE TENANTS CORPORATION, THE CARNEGIE HOUSE TENANTS CORPORATION, WAYNE SENVILLE, RONALD COOK, JASON GALLEA, DIANE GOLDSTEIN, RICHARD HIRSCH, JOSEPH MAFFIA, DARREN WALKER, CHRISTOPHER KELLY, JOSEPH FALANGA, MONICA SIMON, JM ZELL PARTNERS LTD.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 51, 52, 54, 56
were read on this motion for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 53, 55, 57, 58
were read on this motion for DISMISSAL

Upon the foregoing documents and for the reasons stated hereinbelow, the motions of defendants, pursuant to CPLR 3211, to dismiss plaintiff's second, third, fourth, fifth, and sixth causes of action are granted.

Background

Plaintiff, Birindir S. Madan ("Madan"), is a shareholder and resident of defendant The Carnegie House Tenants Corporation ("Co-op" or "Carnegie House"), a 324-unit cooperative apartment complex which holds a ground lease ("Lease") at 100 West 57th Street, New York, New York ("Premises"). NYSCEF Doc. No. 21 and 32. The Lease, entered into by the Co-op's predecessor-in-interest in 1959, has been amended twice, once in 1974 and again in 2004, and entitles Carnegie House to three 21-year renewal options. NYSCEF Doc. Nos. 33 and 34.

The current Lease term expires March 14, 2025. NYSCEF Doc. No. 34.

Pursuant to the second Lease amendment, “the annual net rent payable during each renewal term shall be in an amount equal to 8.1667% of the fair market value of the demised land considered as vacant, unimproved and free of this Lease as of a date six (6) months prior to the commencement date of the particular renewal term.” NYSCEF Doc. No. 33. Accordingly, at the start of the current term in 2004 the Co-op’s annual rent was roughly \$3.8 million and at the end of the term it will be roughly \$4.4 million (estimating the value of vacant land beneath the Co-op at roughly \$54 million in 2025).

In 2014 defendant 57th & 6th Ground LLC (“Ground”), whom plaintiff identifies as the Werner Group, purchased the land under Carnegie House for an amount purported to be roughly \$270 million (the exact amount is not clear). NYSCEF Doc. No. 21 ¶ 8.

After purchasing the land, Ground started discussions with defendant The Board of Directors of the Carnegie House Tenants Corporation (“Board”) about the possibility of selling it to Co-op. NYSCEF Doc. Nos. 21 ¶ 9 and 50 ¶ 9.

At some point after Ground purchased the land, the Board retained a real estate consultant, defendant JM Zell Partners, Ltd. (“Zell”), to assist with the negotiations. NYSCEF Doc. No. 21 ¶¶ 14-16.

In a letter dated June 4, 2019, the Board informed the shareholders that the Board was in receipt of a formal, written offer to purchase the residential portion of the land and building at the Premises (the Premises also include a commercial tenant and a parking garage). NYSCEF Doc. No. 47. According to the complaint, the “Board expressed the *opinion* that the Werner Group’s purchase price (\$286 million according to the letter) had to be accepted as the new value of the land for purposes of calculating the [Co-op’s] annual rent upon renewal of the Lease.” NYSCEF Doc. No. 21 ¶ 49 (emphasis added).

On June 18, 2019, the Board presented Ground’s offer to the Co-op (per the amended complaint: \$280 million, plus closing costs, for the residential portion of the building only). NYSCEF Doc. No. 21 ¶ 53.

In July of 2019 the Co-op voted to reject Ground’s offer. NYSCEF Doc. No. 21 ¶ 55.

Since the Co-op rejected Ground’s initial offer, the Board and Zell have continued to negotiate with Ground as the end of the Lease term approaches, allegedly using more than \$1 million in Co-op funds to do so. NYSCEF Doc. No. 21 ¶ 67.

Procedural History

On June 10, 2022, plaintiff, individually and derivatively on behalf of the Co-op, commenced this action by filing a verified complaint asserting six causes of action. NYSCEF Doc. No. 1. On August 19, 2022, plaintiff filed an amended verified complaint asserting the same six causes of action: (1) for declaratory judgment and contract reformation; (2) equitable fraud as against the Board and Zell; (3) breach of fiduciary duty as against the Board; (4) aiding and abetting breach

of fiduciary duty as against Ground and Zell; (5) accounting as against the Board; and (6) breach of duty of good faith and fair dealing as against the Board and Ground. NYSCEF Doc. No. 21.

Also on August 19, 2022, Ground answered the initial complaint with various denials and 14 affirmative defenses. NYSCEF Doc. No. 20. On September 8, 2022, Ground answered the amended complaint. NYSCEF Doc. No. 50.

On August 31, 2022, Zell moved, pursuant to CPLR 3211(a)(7), to dismiss the second and fourth causes of action as asserted against it. NYSCEF Doc. No. 22.

On September 8, 2022, Board moved, pursuant to CPLR 3211(a)(1) and (7), 3013, and 3016(b), to dismiss the second, third, fifth and sixth causes of action as asserted against it. NYSCEF Doc. No. 28.

On November 16, 2022, Ground filed an affirmation in support of Board and Zell's motions, arguing, inter alia, that if this Court were to dismiss plaintiffs fourth and sixth causes of action against Board and Zell, it should also dismiss the fourth and sixth causes of action as against it. NYSCEF Doc. No 56.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211(a)(7) is warranted when, "afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference," the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Equitable Fraud as Against Zell

Equitable fraud is a relatively uncommon cause of action in New York; the few New York cases plaintiff cites asserting it arise from Surrogate's Court or securities fraud cases. Essentially, however, equitable fraud is fraud (i.e., "false representations knowingly made and acted on, resulting in damage") sans scienter, which the Court of Appeals has articulated in the context of investigations arising from powers arising out of the 1921 Martin Act. See People v Federated Radio Corp., 244 NY 33, 41 (1926) (finding allegations of "[m]aterial misrepresentations," though innocent or unintentional, "on which an action might be maintained in equity to rescind a consummated transaction, are enough" to support equitable fraud).

Whatever its elements, equitable fraud is a form of fraud and, therefore, pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." See Blumenstyk v Singer, 2014 N.Y. Slip Op. 32124[U] at 12 (NY Sup Ct, New York County 2014)

In support of its motion, Zell argues that plaintiff has failed to plead his cause of action with requisite specificity as no actual facts are alleged to support the allegation that Zell "conspired"

with Ground and Board. Further, Zell argues that plaintiff's second cause of action is entirely based on misrepresentations made by the Board, not by Zell, and, in any event, all that Zell, a real estate consultant and not a law firm in a position to give legal opinions, has done was acknowledge and opine on the plain terms of the Lease and what they might mean.

In opposition, plaintiff argues that it sufficiently pled a cause of action for equitable fraud against Zell because Zell was one of the Board's professional consultants which, according to plaintiff's preliminary statement, "conspired with [Ground] and the Board to promote [Ground's] proposal that the residents of Carnegie House pay a lump sum ... to remain in their homes." And "[k]nowing the consequences and repercussions of the proposed transaction, Zell has nonetheless aggressively advocated in favor of it, advising the shareholders of Co-op that the payment to Ground is the only viable path forward." Plaintiff also reiterates his allegations against the Board in his second cause of action and attributes them to Zell.

Even viewing the instant allegations in the light most favorable to plaintiff, his cause of action against Zell should be dismissed. Plaintiff has failed to plead with requisite particularity that Zell has done anything except what it was hired to do: give real estate, not legal, advice to the Board and the Co-op. Zell's opinions on the plain language of the Lease terms are not material misrepresentations and, further, no transaction between the Co-op and Ground has even occurred (in fact, the Co-op explicitly rejected such a transaction). Thomas v McLaughlin, 276 AD2d 440, 440-41 (1st Dept 2000) ("A representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud").

Equitable Fraud as against the Board

The Board, meanwhile, argues that plaintiff's "equitable fraud" cause of action is a defectively pled "regular" fraud cause of action, as it seeks monetary damages only, not equitable relief, and moves against it by arguing that plaintiff fails to allege: material misrepresentations, only representations of opinion, expectations, and predictions; reasonable reliance; and actual damages, only speculative and undeterminable damages, as the Co-op has not authorized any transaction and has until March 2024 to do so.

In opposition, plaintiff alleges that he "need only plead misrepresentation or concealment of material facts, and is not required to plead intention to defraud or any other culpable state of mind," and that the Board made false representations to the Co-op by, inter alia: "exaggerating" the fair market value of the residential space and the amount the rent would increase if "renewal were to be negotiated at arms-length;" failing to state that its interpretation of the situation is "based on an unconscionable and thus unenforceable interpretation of the Lease;" and "ignoring" the "fact" that if the Lease were to expire Ground would be "encumbered by the de facto individual tenancies ... entitled to protection" under rent stabilization laws. Plaintiff also argues it need not allege damages under "equitable fraud" but that "the dots are not difficult to connect ... the members of the Board benefit from a deal with [Ground] in various ways both financially and through a consolidation of their power."

Plaintiff goes on to argue that its pleadings of equitable fraud satisfy CPLR 3016(b) as that provision's requirements "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." Pludeman v N. Leasing Sys., Inc. 10 NY3d 486, 492 (2008).

Here, plaintiff's equitable fraud cause of action against the Board must be dismissed as the plaintiff has failed to plead that the Board made any actual material misrepresentations or concealments. Alleged "exaggerations" of values and rents that *might* occur in the future, as well as what kinds of rental tenancies Ground might or might not be encumbered with were the Lease to expire, are neither misrepresentations nor concealments, they are opinions and cannot sustain an action for fraud, equitable or not. McLaughlin at 440-41. And, in any event, despite the Board expressing its opinions in support, the Co-op rejected Ground's 2019 offer.

Breach of Fiduciary Duty as against the Board

A breach of fiduciary duty claim requires that a plaintiff allege that: "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." Besen v Farhadian, 195 AD3d 548, 549-50 (1st Dept 2021).

The Court of Appeals has found that in the context of cooperative and condominium boards, as is the case here, the business judgment rule "balances the individual and collective interests at stake." Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 537 (1990). That rule "prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." Id. at 537-538 (internal quotation omitted).

Here there is no question a fiduciary duty is owed, but Board argues plaintiff's cause of action for breach of that duty should be dismissed pursuant to the business judgment rule. In support, Board argues documentary evidence shows the Board has for years "in good faith and in furtherance of the Co-op's and shareholders' best interests" been collecting and disseminating information amongst the Co-op information regarding the Lease, Ground's purchase, and the available options. Board further argues that plaintiff's allegations of bad faith are "rampant speculation" and addresses in depth the various "measures" which plaintiff alleges Board "refused to consider."

In opposition, plaintiff argues, inter alia, that Board clearly acted in bad faith by allegedly committing equitable fraud and, in any event, that plaintiff satisfactorily pled ten specific examples of the Board's breaches at Paragraph 96 of the amended complaint, which he claims Board failed to refute. Those examples include allegations that the Board: acted "out of self-interest, without any regard for the collective best interests" of the Co-op; "grossly mishandle[ed] and mismang[ed]" the Co-op's negotiations with Ground; was "complicit" in Ground's "scheme and organized conspiracy to obtain an unjust windfall by advancing the 2014 acquisition price for the land under Carnegie House as the basis for calculating the applicable rent if the Lease is renewed in 2025;" acted "with complete and utter disregard for the financial well-being" of plaintiff and other shareholders; "refus[ed] to consider or explore measures for maintaining rent at affordable levels;" and "misrepresent[ed], or fail[ed] to keep Madan and the other shareholders apprised of, the details, facts, and circumstances surrounding [Ground's] 2014

purchase of the land underneath Carnegie House and the Board's negotiations with [Ground] that are ongoing regarding the proposed purchase even after a 'no' vote."

In reply, Board argues, inter alia, that it *did* address the allegations of Paragraph 96 in its moving brief, arguing that each is either too speculative or conclusory to state a cause of action and/or is refuted by submitted documentary evidence. For example, despite plaintiff's allegations, the Board claims it regularly updated the Co-op of the details, facts, and circumstances of Ground's purchase of the land and subsequent negotiations and cites to various letters, presentations, and information packets distributed to the Co-op shareholders between 2014 and the present.
NYSCEF Doc. Nos. 35-48.

Plaintiff's cause of action for breach of fiduciary duty should be dismissed, as plaintiff's equitable fraud claim, which plaintiff uses to prove bad faith, is defective, and plaintiff's additional allegations of the Board's specific breaches of its fiduciary duty are conclusory and/or refuted by documentary evidence.

Aiding and Abetting Breach of Fiduciary Duty as against Ground and Zell

As plaintiff's breach of fiduciary duty cause of action must be dismissed, so too must his aiding and abetting breach of fiduciary duty.

Accounting as against the Board

Plaintiff's cause of action asserting an accounting must be dismissed for failure to state a cause of action, as plaintiff fails to show that an accounting was ever demanded and refused.

Plaintiff asserts that he did make such a demand and pled it, at paragraph 73 of the complaint, but that paragraph (stating that before an annual "meeting concluded, the Board 'opened the floor' for a Question and Answer session, but refused to permit Plaintiff to ask any questions") is insufficient to sustain the cause of action asserted, even in the posture of a motion to dismiss.

Breach of Duty of Good Faith and Fair Dealing as against the Board and Ground

Plaintiff's purported cause of action for breach of the covenant of good faith and fair dealing must also be dismissed as, in this Court's considered opinion there is no such cause of action. Rather, the covenant of good faith and fair dealing is implied in every contract, but the action would be for breach of contract.

This Court has considered plaintiff's other arguments and finds them unavailing and/or non-dispositive.

In the final analysis, everything that plaintiff pleads the Board did falls within the protections of the business judgment rule; and fraud causes of action cannot be based on statements of opinion.

Conclusion

Therefore, the motions of defendants, JM Zell Partners, Ltd., The Board of Directors of The Carnegie House Tenants Corporation, Wayne Senville, Ronald Cook, Jason Galca, Diane Goldstein, Richard Hirsch, Joseph Maffia, Darren Walker, Christopher Kelly, Joseph Falanga and Monica Simon, are hereby granted; the second, third, fourth, fifth, and sixth causes of action asserted by plaintiff, Birinder S. Madan, individually and derivatively on behalf of the Carnegie House Tenants Corporation, are dismissed; and the Clerk is directed to enter judgment accordingly.



3/31/2023
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE