

**Ocean Park Apts., Inc. v Maxem Realty LLC**

2023 NY Slip Op 31412(U)

April 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 523732/2022

Judge: Leon Ruchelsman

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

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OCEAN PARK APARTMENTS, INC. and 430 OCEAN  
PARKWAY TOWER LLC,

Plaintiff, Decision and order

- against -

Index No. 523732/2022

MAXEM REALTY LLC, ERIC MARKEL, SHEIK SADDICK,  
ALMARC REALTY CORP., ANATOLY FINGERMAN, and  
GETTRY MARCUS CPA, P.C.,

Defendants, April 27, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The remaining defendants move pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds the complaint fails to allege any cause of action. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the Complaint, on June 23, 2022 the defendants Maxem Realty LLC and Sheik Saddick sold 100% of the shares of a cooperative as well as the proprietary leases regarding property located at 420/430 Ocean Avenue in Kings County to the plaintiffs. The Complaint alleges the defendants failed to furnish various financial documents that were required to closing and that the plaintiffs agreed to close simply to secure the agreement. Further, following the closing the plaintiffs again sought "the financial, banking, hazard and liability insurance policies, and the payroll information required to pay employees and otherwise properly manage the Building and the Cooperative's

affairs" (see, Complaint, ¶31 [NYSCEF Doc. No. 2]). This request was likewise denied. Moreover, the Complaint alleges the defendants have failed to furnish various bank accounts and have withheld funds that belong to the plaintiffs. This lawsuit followed and the plaintiffs have asserted various causes of action including breaches of fiduciary duties, breach of contract, breach of implied covenant of good faith and fair dealing, an accounting, conversion, replevin, constructive trust and an injunction and a declaratory judgment. Further, the Complaint alleges causes of action for breach of contract, aiding and abetting breach of fiduciary duty and malpractice against defendant Gettry Marcus CPA. The claims against Gettry Marcus have since been discontinued. The remaining defendants have now moved seeking to dismiss the complaint on the grounds they fail to allege any cause of action. As noted the motion is opposed.

#### 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]).

The plaintiff asserts that as of December 31, 2020 "the Cooperative owned (i) a receivable in the amount of \$105,162 due from (majority shareholder and sponsor) Maxem; (ii) a \$700,000 Note due from Maxem (the "Note"); and (iii) \$387,547 held in the Cooperative's bank account(s)" (see, Memorandum in Opposition, pages 2,3 [NYSCEF Doc. No. 19]). Moreover, as of March 2022 the cooperative maintained a reserve fund of over one million dollars. The defendants do not dispute the cooperative maintained those assets but insist they do not belong to the plaintiff since they were not included within the Purchase and Sale Agreements.

While the Purchase and Sale Agreements do not explicitly indicate that the assets of the cooperative were sold there are surely questions of fact whether the sale of the shares included the assets as well. According to the Purchase and Sale Agreement with Maxem Realty LLC, Maxem is the owner of 39,156 shares of Ocean Park Apartments Inc., "a cooperative housing corporation" (see, Purchase and Sale Agreement, Recitals A [NYSCEF Doc. No.

10])). According to the Purchase and Sale Agreement with Sheik Saddick, Saddick is the owner of 948 shares of Ocean Park Apartments Inc., "a cooperative housing corporation" (see, Purchase and Sale Agreement, Recitals A [NYSCEF Doc. No. 11]). The defendants assert that the "property" sold is defined narrowly and only includes the "shares" of the cooperative and nothing more. However, the plaintiffs purchased all the shares of the cooperative. There are surely questions whether those shares included all assets and liabilities as well. Indeed, it is generally well settled that the purchase of the shares of a corporation include the assets and liabilities (see, In re Brooke Corp., 2012 WL 161828 [U.S. Bankruptcy Court, District of Kansas 2012], SCI Minnesota Funeral Services Inc., v. Washburn-McReavy Funeral Corp., 779 NW2d 865 [Court of Appeals of Minnesota 2010]). New York cases are in accord. Thus, in Farley v. Davis, 1994 WL 167944 [S.D.N.Y. 1994] the court explained that purchasing all the stock of a corporation necessarily means the purchaser has also purchased the entire business including its assets (see, also, Fruchtman v. First Edition Composite Holdings Inc., 1991 WL 238273 [S.D.N.Y. 1991]). Therefore, at this juncture there is no basis dismissing the lawsuit on the grounds the plaintiffs are not entitled to the assets of the cooperative. Thus, the individual causes of action must now be examined. It is well settled that to succeed upon a claim of breach of

contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The fourteenth cause of action of the Complaint provides the actual provisions that were allegedly violated by the defendants. These include the failure to furnish the outstanding documents as well as the disputed funds and assets which the defendants claim were never intended to be part of the transfer. As noted, at this juncture there are surely questions whether, upon the sale of all the shares of the cooperative, the defendants may withhold any of the necessary documents or assets of the cooperative. Therefore, the motion seeking to dismiss the breach of contract claim is denied.

Turning to the fifteenth cause of action alleging a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). However, that cause of action is not applicable when it is duplicative of a breach of

contract claim (P.S. Finance LLC v. Eureka Woodworks Inc.,  
\_AD3d\_, 184 AD3d 114 [2d Dept., 2023]). While pled in the  
alternative the claim of any breach of any implied covenant is  
based upon the same facts as the breach of contract claim, namely  
the failure to furnish the assets and records of the cooperative.  
That is duplicative of the breach of contract and consequently,  
the motion seeking to dismiss the fifteenth count is granted.

Concerning the first two causes of action alleging breaches  
of fiduciary duty, it is well settled that when a claim for  
breach of a fiduciary duty is merely duplicative of a breach of  
contract claim where they are based on the same facts and seek  
the same damage then the breach of fiduciary claim cannot stand  
(Pacella v. Town of Newburgh Volunteer Ambulance Corps. Inc., 164  
AD3d 809, 83 NYS3d 246 [2d Dept., 2018]). In this case the  
causes of action alleging any breach of a fiduciary duty are  
identical to the breach of contract claim, namely that the  
defendants failed to honor the terms of the purchase and sale  
agreements entered into between the parties. Consequently, the  
motion seeking to dismiss the first two causes of action is  
granted.

Next, it is well settled that "the right to an accounting  
is premised upon the existence of a confidential or fiduciary  
relationship and a breach of the duty imposed by that  
relationship respecting property in which the party seeking the

accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). Thus, no such relationship exists upon the termination of a purchase agreement (CSI Group LLP v. Harper, 153 AD3d 1314, 61 NYS3d 592 [2d Dept., 2017]). Therefore, the motion seeking to dismiss the third and fourth causes of action is granted.

The next cause of action seeks setting aside an unlawful conveyance pursuant to BCL §720(a)(2). However, that statute can only be asserted either by the corporation itself or derivatively on behalf of the corporation. It cannot be asserted by plaintiff here who is not a member of defendant corporation (Bank of America Corp., v. Lemgruber, 385 F.Supp2d 200 [S.D.N.Y. 2005]). Therefore, the motion seeking to dismiss the fifth cause of action is granted.

The next causes of action are for conversion and replevin. It is well settled that to establish a claim for conversion the party must show the legal right to an identifiable item or items and that the other party has exercised unauthorized control and ownership over the items (Florenti v. Central Emergency Physicians, PLLC, 305 AD2d 453, 762 NYS2d 402 [2d Dept., 2003]). Likewise, to establish a claim for replevin "a party must show (1) that it has a superior possessory right to the chattel, and (2) that it made a demand for possession of the chattel from the defendant" (see, Douglas v. Harry N. Abrams Inc., 2018 WL 1406616).

[S.D.N.Y. 2018]). However, both conversion and replevin are duplicative of a breach of contract cause of action where these claims are based upon contractual violations (see, Sea Tow Services International Inc., v. Tampa Bay Marine Recovery Inc., 2022 WL 5122728 [E.D.N.Y. 2022]). The allegations of conversion relate to the funds to which the plaintiff asserts they are entitled. The replevin claim relates to the books and records to which they are entitled. Both those claims are adequately addressed by the breach of contract claim. Consequently, the motion seeking to dismiss the sixth and seventh causes of action is granted.

The next cause of action seeks a constructive trust. Again, the constructive trust claim arises from the same facts as the breach of contract claim and is therefore, duplicative (Northern Shipping I Funds LLC v. Icon Capital Corp., 921 F.Supp2d 94 [S.D.N.Y. 2013]). Thus, the motion seeking to dismiss the eighth cause of action is granted.

The next cause of action seeks a permanent injunction, however, it is really a mandatory injunction ordering the defendants to turn over the books and records to the plaintiff. That issue will be adequately resolved by the breach of action cause of action and thus the motion seeking to dismiss the ninth cause of action is granted.

The next cause of action seeks a declaratory judgement. It

is well settled that "a motion to dismiss the complaint in an action for a declaratory judgment "presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (DiGiorgio v. 1109-1113 Manhattan Avenue Partners LLC, 102 AD3d 725, 958 NYS2d 417 [2d Dept., 2013]). The basis for this cause of action is in part an allegation the defendants breached the provisions of the contract regarding the assets and books and records of the cooperative. Since the breach of contract cause of action survives, there are likewise questions whether the plaintiffs may be entitled to such relief. Consequently, the motion seeking to dismiss the tenth count is denied (see, Tilcon New York Inc., v. Town of Poughkeepsie, 87 AD3d 1148, 930 NYS2d 34 [2d Dept., 2011]).


The eleventh, twelfth and thirteenth causes of action have been withdrawn.

Thus, the motion seeking to dismiss is granted as to all causes of action except the tenth and fourteenth causes of action.

So ordered.

ENTER:

DATED: April 27, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC