

Harari v Jamesman Realty Corp.

2023 NY Slip Op 32300(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 655055/2022

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

-----X

UZI HARARI, POOI FONG LEONG

Plaintiff,

- v -

JAMESMAN REALTY CORP., JAMES MANOLATOS,

Defendant.

-----X

INDEX NO. 655055/2022

MOTION DATE 06/26/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion to dismiss is granted and plaintiffs have leave of the Court to amend their pleadings.

Facts

Plaintiffs are shareholders of the cooperative 334 East 54 Owners Corp. Defendant JAMESMAN REALTY CORP. is the managing agent of the cooperative. JAMES MANOLATOS is the director and officer of the cooperative. Plaintiffs brought both a direct and a derivative suit against defendants, claiming breach of fiduciary duty, breach of the bylaws, and seeking injunctive relief for the defendants' alleged misconduct that occurred during the operation of the cooperative. Defendants filed the motion to dismiss, claiming the complaint should be dismissed because it improperly commingled the direct and derivative actions, and the allegations are rebutted by the documentary evidence.

Motion to dismiss general standard

On a motion to dismiss the court “merely examines the adequacy of the pleadings”, the court “accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff’s claim.” *Davis v Boehm*, 24 N.Y.3d 262, 268 (internal citations omitted).

CPLR § 3211(a)(1)

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, 88 (emphasis added). “[S]uch motion may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff’s factual allegations.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (emphasis added). A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable”. *VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 A.D.3d 189, 193 [1st Dept 2019].

CPLR § 3211(a)(7)

“In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” *Leon v. Martinez*, 84 N.Y.2d 83, 88. “What the Court of Appeals has consistently said is that evidence in an affidavit used by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief [the defendant] seeks unless [such evidence] establish[es] conclusively that plaintiff has no cause of action”. *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 134 [1st Dept 2014]. “[T]he Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim.” *Id.* “Affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.

Affidavits may be received for a limited purpose only, serving normally *to remedy defects in the complaint*. Affidavits submitted by the defendant will *seldom if ever* warrant a dismissal unless the affidavits establish conclusively that plaintiff has no cause of action.” *Rovello v Orofino Realty Co.*, 40 NY2d 633, 633 [1976].

Preliminary Injunction

“A party seeking a preliminary injunction must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant’s favor. The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court.” *Ping Xie v Andrews Bldg. Corp.*, 2012 NY Slip Op 32826[U], *2 [Sup Ct, NY County 2012].

Breach of Contract (The Third Cause of Action)

The indicia for breach of contract includes “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]. Here, the court does not know what is meant by “agreement between Defendants and the Corporation” when plaintiffs vaguely alluded to the “standards required by corporations in the County of New York” were breached by both defendants. NYSCEF Doc. No. 1, ¶¶ 57-58. If the contract refers to the cooperative bylaws, then this claim is duplicative of the second one and should be dismissed. If plaintiffs meant something else, then they should present the disputed contract for the court to see which clause was supposedly breached by defendants. Without knowing which contract was at issue, the court has no choice but to dismiss the claim pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

Breach of the Bylaws and BCL § 720 (The Second and Fourth Causes of Action)

“A condominium’s by-laws constitute a contract with the unit owners.” *Lesal Assoc. v Board of Mgrs. of Downing Ct. Condominium*, 309 A.D.2d 594 [1st Dept 2003]. The defendant Manolatos is the director, secretary and treasurer of the cooperative. NYSCEF Doc. No. 10, ¶ 17. The court is unpersuaded by defendants’ argument that this claim should be dismissed because defendant is not personally liable for breach of the bylaws. NYSCEF Doc. No. 48, page 5. The case law cited by defendants only held that individual directors will typically not be responsible for breach of the bylaws. See *Pomerance v McGrath*, 124 AD3d 481, 482 [1st Dept 2015] (“The violation of a condominium’s bylaws is akin to a breach of contract, and the participation in a breach of contract will typically not give rise to individual *director* liability.”) Ironically, the keyword “director” was conveniently missing from defendants’ reply memo. The absence of the word “director” is remarkable since defendant Manolatos wore two hats when he allegedly breached the bylaws: as the director and the *officer* of the cooperative. Even if he may not be sued in the capacity as a director, he could still be sued as an officer for breach of the bylaws because in New York, “the board may elect or appoint a chair or president, . . . , a secretary and a treasurer, and such other officers as it may determine, or as may be provided in the by-laws” (N-PCL §§ 713(a)). This is exactly the capacity in which defendants were sued.

Article III, Section 5 of the bylaw delineates the treasurer’s duties, which include “have the care and custody of and be responsible for, all funds and securities of the corporation, shall deposit such funds in the name of the corporation in such bank or trust. . . . the treasurer shall furnish each shareholder. . . a statement of the receipts, disbursements and paid-in surplus of the corporation during such year, . . .” NYSCEF Doc. No. 13, pages 181-182. Article II, Section 9 of the bylaw provides that “the Secretary shall mail. . . or deliver. . . to each shareholder. . . a statement of the amount of the cash requirements so determined. . .” NYSCEF Doc. No. 13, page 177. So, the

treasurer and the secretary do have duties to *both* the cooperative and shareholders and thus unlike defendants' argument that this can only be a direct claim, it can actually be both a direct and derivative one, as evidenced by the allegations on which it is based including "failed to keep proper books and records of the Corporation, ..., failed to manage the Corporations' monies properly and failed to account for numerous transfers of monies from the Corporation's bank accounts" and "failed...to provide the shareholders with a statement of such cash requirements" NYSCEF Doc. No. 1, ¶¶ 37 (iii) (iv)

The problem with the claim is that it improperly commingles direct action with derivative one. As explained by the Court of Appeals, "a shareholders' derivative suit seeks to vindicate a wrong done to the corporation through enforcement of a corporate cause of action, any recovery obtained is for the benefit of the injured corporation. Where, however, the plaintiff sues in an individual capacity to recover damages resulting in harm, not to the corporation, but to individual shareholders, the suit is personal, not derivative, and it is appropriate for damages to be awarded directly to those shareholders." *Glenn v Hoteltron Sys., Inc.*, 74 NY2d 386, 390 [1989]. Therefore, the standard to distinguish a derivative claim from direct action lies in who is injured and the recovery goes to whom. Pursuant to this standard, allegations like mismanagement of the corporate funds form the foundation for shareholder derivative suit because it is the corporation that was allegedly injured, and if proven, the recovery goes to the corporation, not plaintiffs. By the same token, allegations like failure to provide shareholders with the statement of cash requirements can only become shareholder direct suit if proven true because it merely concerns shareholders' rights.

"The mingling of derivative claims and individual claims requires dismissal of the causes of action so affected." *Barbour v Knecht*, 296 AD2d 218, 228 [1st Dept 2002]. "A complaint in which the allegations confuse a shareholder's derivative and individual rights will therefore be

dismissed, though *leave to replead* may be granted in an appropriate case.” *Abrams v Donati*, 66 NY2d 951, 953 [1985]. Pursuant to the pleading standard established by the Court of Appeals and followed by the First Department, the court will dismiss the second cause of action but allow plaintiffs to replead.

The same rationale acts to dismiss the third cause of action with leave to replead. In nature, breach of BCL § 720 is a derivative claim that can be brought by shareholders on behalf of the corporation for a relief delineated in BCL §§ 720 (a)(1), (a)(2) or (a)(3) because the law was enacted to remedy unlawful conveyance, assignment or transfer of corporate assets by director or officers. Here, it is the corporation that is allegedly injured and the recovery, if any, would go to the corporation, not the shareholders. BCL §§ 720(b) specifically authorizes shareholders to bring a derivative action against directors or officers: “an action may be brought for the relief provided in this section, . . . , by a corporation, or, under section 626 (Shareholders’ derivative action brought in the right of the corporation to procure a judgment in its favor), by a shareholder, . . .” In this claim, as shareholders plaintiffs have no direct action against Manolatos.

Breach of Fiduciary Duty Against Both Defendants (The First Cause of Action)

The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity (CPLR 3016 (b)); (*Burry v Madison Park Owner, LLC*, 84 AD3d 699 [1st Dept 2011]). “In order to maintain a claim for breach of fiduciary duty, a plaintiff must show that it was *owed* a fiduciary duty.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 418 [1996].

“While it is settled that the Board of directors of a co-operative has a fiduciary duty to the individual shareholders, the *managing agent* has a fiduciary duty to the co-operative corporation, *not* the individual unit owners.” *Plato v Charles*, 2022 NY Slip Op 33605[U], *3 [Sup Ct, NY County 2022]. “The directors of the co-op owe a fiduciary duty to plaintiffs—shareholders, requiring the directors to act *solely* in the best interests of the shareholders.” *Bryan v W. 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992].

Here, defendant Jamesman Realty Corp. is the managing agent of the cooperative to which Jamesman owes a fiduciary duty. NYSCEF Doc. No. 14, page 3. Therefore, opposite to what the complaint claims, any action brought by plaintiffs against Jamesman can only be derivative claims on behalf of the cooperative. NYSCEF Doc. No. 1, ¶ 42.

Defendant Manolatos is the director/officer of the cooperative and he owes a fiduciary duty to plaintiff shareholders, who can bring direct actions against him. NYSCEF Doc. No. 10, ¶ 17.

Alleged misconduct by Jamesman and Manolatos during the condo lawsuit constitutes the major allegations supporting the breach of fiduciary duty claim. NYSCEF Doc. No. 32, ¶¶ 14(b), (d) & (e). NYSCEF Doc. No.1, ¶¶ 30-31. Plaintiffs questioned the necessity of the lawsuit and whether defendants had discharged their duty of care when sanctioning the suit, hence deserve the protection of the business judgment rule. Defendants’ argument that this part of the claim is “misplaced, asserted against the wrong party, and asserted without proper standing” because the suit “was commenced by the Condominium, not the Cooperative.” NYSCEF Doc. No. 9, page 2. The court disagrees.

True, the suit was approved by the Condo board, which happens to be the same as that of the cooperative. But the cooperative is a shareholder of the condo and did pay its share of the legal fees. If the suit was proved unnecessary later, the cooperative does have an action against

defendants for possible waste and breach of duty of care and a relief for compensation. Plaintiffs can bring a derivative action on behalf of the cooperative and it may be the only way that justice can be done because “(a)ny injury to the shareholders of an entity that serves as shareholders of a corporation is derivative, and the entity’s shareholders *cannot* sue the corporation directly, for injuries to the entity.” *Lama* at 418.

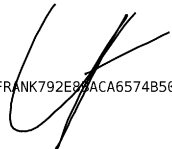
The problem with this claim is the same with the second one, i.e., the improper mix of direct and derivative actions. Most of the allegations surrounding corporate governance impact only the shareholder’s right, e.g., the right to inspect the books and records and the right to demand the holding of the board meeting. See *In re Steinway*, 159 NY 250, 252 [1899] (“A stockholder has the right at common law to inspect the books of his corporation at a proper time and place and for a proper purpose”). They shouldn’t be pled in tandem with the derivative suit advocating for the cooperative’s interest. Therefore, the claim should be dismissed with leave to replead.

Finally, the alleged breach of fiduciary duty in the condo suit is not time-barred, as claimed by defendants. True, plaintiffs only sought monetary judgment in the complaint but “CPLR 213(7) extends the limitations period to six years for ‘an action by or on behalf of a corporation against a present or former director, officer or stockholder ... to recover damages for waste or for an injury to property or for an accounting in conjunction therewith’” *Grika v McGraw*, 55 Misc 3d 1207[A], 2016 NY Slip Op 51878[U], *11 [Sup Ct, NY County 2016]. Here, the derivative suit is about recovering damages for possible waste or injury to the cooperative property, so it is timely filed.

Given that the complaint is dismissed with leave to replead, the court need not address the injunctive relief claim since at this stage the court has not assessed the merits of either party’s argument. Based on the foregoing, it is hereby

ORDERED that the matter is dismissed against defendants without prejudice and plaintiffs may file an amended pleading with the court’s leave consistent with this Decision and Order not more than thirty days following the date of service of this order with notice of entry with defendants being given 20 days to answer or otherwise respond to this complaint not more than twenty days following the filing of such complaint; and it is further

ORDERED that the uploading of such papers to NYSCEF shall constitute proper service of such papers.


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7/5/2023
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE