

**67-69 St. Nicholas Ave. Hous. Dev. Fund Corp. v
Green**

2023 NY Slip Op 34394(U)

December 14, 2023

Supreme Court, New York County

Docket Number: Index No. 155502/2019

Judge: David B. Cohen

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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. DAVID B. COHEN **PART** **58**

Justice

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67-69 ST. NICHOLAS AVENUE HOUSING
DEVELOPMENT FUND CORPORATION,

Plaintiff,

INDEX NO. 155502/2019

MOTION DATE 08/14/2023

MOTION SEQ. NO. 006

- v -

SIWANA GREEN, THOMAS GREEN, A CUP OF HARLEM,
ANTONIO CONTRERAS,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144, 150

were read on this motion to/for

SUMMARY JUDGMENT

In this real property action, plaintiff moves, pursuant to CPLR 3212, for summary judgment on its fifth cause of action seeking money damages against defendants. Defendants oppose the motion.

UNDISPUTED FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a low-income residential housing cooperative located at 67-69 St. Nicholas Avenue in Manhattan. On or about April 1, 2004, while defendant Siwana Green was a member of plaintiff's board of directors, plaintiff leased a commercial space at the premises to her husband, defendant Thomas Green, and to defendant A Cup of Harlem, a partnership between the Greens, which was to operate a coffee shop. The lease was for a 99-year term with a monthly rent of \$700, and an option to extend the lease term for ten years at a monthly rent of \$800 (NYSCEF 138).

In or about March 2009, Thomas Green sublet the premises to defendant Contreras for a 10-year term at a monthly rent of \$2,500, during which time Contreras operated a salon at the premises. Although the lease was renewed until July 31, 2024 at a monthly rent of \$2,800, the salon ceased operations at the end of 2020 due to the Covid-19 pandemic (*id.*).

In 2019, plaintiff commenced the captioned action against defendants seeking, inter alia, a declaration that the lease was void or invalid on its face. After this court denied plaintiff's motion for summary judgment on the declaratory judgment claim, the Appellate Division, First Department, reversed the decision, and granted the motion and declared the lease to be void (*id.*).

In its decision, the Court observed that defendants did not establish that the lease had been voted on by a majority of disinterested directors, and it was therefore voidable, and they failed to show that the lease was otherwise fair and reasonable to plaintiff. In sum, the "record demonstrates that Siwana Green breached her fiduciary duty to plaintiff by diverting a corporate opportunity without plaintiff's knowledge or consent and admittedly receiving more than \$200,000 profit from the sublessee . . ." (206 AD3d 521 [2022]).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on its fifth cause of action against the Greens for a money judgment based on their breach of fiduciary duty. It alleges that, since the Greens charged their subtenant \$2,500 per month from April 1, 2009 through May 30, 2019, which was \$1,800 more than the lease rent of \$700 for 122 months, the Greens owe plaintiff \$219,600 for that period. Additionally, the Greens charged the subtenant \$2,800 per month from June 1, 2019 through December 31, 2020, when the salon vacated the premises, a profit of \$2,100 per month over the \$700 lease rent, for 19 months, for a total of \$39,900. Thus, maintains plaintiff, it is entitled to damages of \$259,500 (NYSCEF 124).

Plaintiff asserts that it is limiting its damages to \$259,500 “in order to avoid contested issues of fact,” and relies on the affidavit of plaintiff’s board member Alberto Cristancho, which reflects that sometimes the Greens did not pay the \$700 rent due under their lease with plaintiff (NYSCEF 124 [emphasis in original]). Plaintiff also submits a ledger reflecting that the Greens’ rent of \$700 per month had been paid only eight times during the 18 months from March 2017 until August 2018 (NYSCEF 137).

In their opposition, defendants argue, in effect, that plaintiff is not entitled to summary judgment given the numerous issues of fact remaining (NYSCEF 141).

LEGAL CONCLUSIONS

It is well-settled that a party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). A motion for summary judgment must be supported by an affidavit of a person having knowledge of the facts (*Muslar v Hall*, 214 AD3d 77 [1st Dept 2023] citing CPLR 3212). In considering such a motion, the court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the movant fails to meet this burden, the motion must be denied despite the sufficiency of the opposing papers. If the movant meets its burden, it becomes incumbent on the non-moving party to raise a material issue of fact (*See, Vega, supra*).

In its order, the Appellate Division, quoting *105 East Second Street Assoc. v Bobrow*, 175 AD2d 746, 746-747 (1st Dept 1991), stated that “[t]he measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit on the propert[y] by reason of the faithless fiduciary’s conduct.”

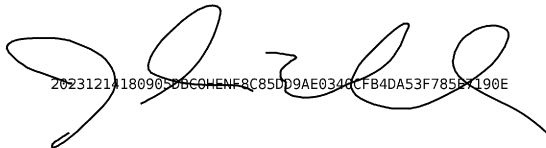
Here, plaintiff relies on the lease between it and the Greens and the sublease between the Greens and Contreras, which no party disputes as being authentic and admissible, to establish that its damages may be calculated as the profit it lost from the denial of an opportunity to rent the building’s commercial space. Thus, it demonstrates as a matter of law that, at a minimum, its damages consist of the rent agreed to be paid by the subtenant to the Greens, less any rent amounts agreed to be paid by the Greens to plaintiff during the duration of the sublease.¹

Defendants submit no evidence in opposition to the motion raising any triable issue of fact that refutes plaintiff’s calculation, based upon the lease and sublease rental amounts, of the value of plaintiff’s lost opportunities for profit. Profit which should have inured to the benefit of plaintiff -- not the Greens. Accordingly, it is hereby

ORDERED that the motion is granted and plaintiff is granted a judgment against defendants Siwana Green, Thomas Green, and A Cup of Harlem, jointly and severally, in the sum of \$259,000, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that as this was the sole remaining issue in this action, the clerk is directed to mark the action as “disposed.”

12/14/2023
DATE


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DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

¹ Plaintiff certainly could have sought a higher damages award, but in order to avoid issues of fact on the calculation of damages plaintiff has chosen not to seek additional damages for periods of the sublease during which it contends that defendants did not pay their \$700 rent. For the same reasons, plaintiff has also chosen to forgo any claim for damages for losses incurred during the nearly five-year period of the lease prior to the commencement of the sublease.