

Gutnick v Jacobson

2024 NY Slip Op 32481(U)

July 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 518404/2020

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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MEYER GUTNICK, BEDFORD REALTY MANAGEMENT,
LLC, 1704 OCEAN AVENUE, LLC,

Plaintiffs, Decision and order

- against -

Index No. 518404/2020

YERACHMEAL JACOBSON, MARC JACOBOWITZ,
BLUEJAY MANAGEMENT, LLC, BLUEJAY
CAPITAL, LLC, SKY HIGH REALTY GROUP LLC,
1704 OCEAN AVENUE, LLC,

July 11, 2024

Defendants,
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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #6

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the amended complaint. The plaintiff opposes the motion. Papers were considered by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in prior orders this matter has been consolidated with three other actions, namely, *Gutnick et al v. Jacobson et al*, Index Number 520075/2020, *Gutnick et al v. Jacobson et al*, Index Number 520471/2020 and *Jacobowitz et al v. Gutnick et al*, Index No. 511754/2020.

In the main action, Index No. 518404/2020, the plaintiffs have sued the defendants alleging the defendants violated an operating agreement executed between the parties concerning an entity, 1704 Ocean Avenue LLC, created to buy, develop and sell property in Kings County by diluting his share of the entity by failing to abide by a right of first refusal permitting him to invest additional capital. Further, the complaint alleged the defendants

failed to distribute a cash flow and failed to respond to a request to review the books and records of the entity. Lastly, the complaint alleged the defendants removed him as member of the entity without authority.

520075/2020 concerns claims the defendants violated an operating agreement executed between the parties concerning an entity, Eastern Parkway Investors LLC, created to buy, develop and sell property in Kings County wherein the defendants unlawfully paid themselves a brokerage fee at the expense of the entity of which the plaintiff was a member. Further, the complaint also alleged the managing members failed to offer the plaintiff the right to invest additional sums which diluted his share of the entity and the defendants engaged in self dealing. Moreover, the complaint alleged the defendants denied the plaintiff the right to his share of an acquisition fee and refused to accommodate a tax deferral program request.

520471/2020 concerned claims the defendants violated operating agreements executed between the parties concerning an entity, Arlington Partners LLC, and other entities, created to buy, develop and sell property in Kings County whereby the defendants unlawfully paid themselves brokerage fees at the expense of the entities of which the plaintiff was a member and also misrepresented the sale of properties to the detriment of the plaintiff. Moreover, the complaint alleges the defendants failed to provide books and

records of the entities.

511754/2020 is a defamation action instituted by the defendants against plaintiff for statements he made about the defendants. Upon consolidation the court dismissed many of the causes of action on various grounds. The plaintiff amended the complaint seeking to add causes of action and to correct infirmities outlined in the prior court decision. The defendants have moved seeking to dismiss the amended complaint on various grounds. 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 (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). 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, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

First, an amended complaint supersedes the original complaint rendering the original complaint no longer viable (Golia v. Viera, 162 AD3d 863, 80 NYS3d 297 [2d Dept., 2018]). Further, the amended complaint becomes the only complaint in the case (R&G Brenner Income Tax Consultants v. Gilmartin, 166 AD3d 685, 89 NYS3d 85 [2d Dept., 2018]). Therefore, the amended complaint cannot "incorporate by reference" the prior complaints since they are superceded they no longer contain any pertinent allegations (Lombardo v. Mastec North America Inc., 25 Misc3d 1242(A), 901 NYS2d 907 [Supreme Court Kings County 2009], Baldwin v. Hegeman Farms Corp., 154 Misc 285, 277 NYS 705 [Supreme Court Albany County 1934]). It may be the plaintiff sought to simply the amended pleading by referring to the original complaints for any facts or causes of action for which an amendment is not necessary. However, as noted, the original complaints are now rendered moot and no references can be made to them. Moreover, in 2012 CPLR §3025(b) was amended and states that "any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" (id). The practice commentaries accompanying the new rule state that "this new provision does not prescribe exactly how the changes are to be shown, but any document marked with "track changes," or some similar program, will likely suffice. Clarity should be the touchstone for any disputes on this


front, and there are many ways in which the movant can achieve this legislative goal" (Patrick M. Connors, McKinney's Cons Law of NY, Book 7B, CPLR Practice Commentaries C3025:9A [2012]). While the pleading in this case was amended without the need to file a motion, the aims of track changes or redlines to provide an easy reference to such changes should have been provided. Therefore, the court must examine the amended complaint without regard to the original complaints. Such an examination reveals that there are no facts at all underlying any of the amended causes of action since all the underlying facts are contained in the prior complaints. Thus, the amended complaint cannot support any of the allegations.

Therefore, the motion seeking to dismiss the amended complaint is granted.

So ordered.

ENTER:

DATED: July 11, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC