

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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)
 DORINE BORIELLO, individually and)
 derivatively on behalf of CATERINA)
 REALTY, LLC,)
)
 Plaintiff,)
)
 -against-)
)
 MICHAEL LOCONTE, DIANE SCHMIDT)
 and MARIA PENNEY SELIGSON,)
)
 Defendants,)
)
 -and-)
)
 CATERINA REALTY, LLC,)
)
 Nominal Defendant.)
 -----X

Index No. 503180/2013

**FIRST AMENDED
VERIFIED ANSWER AND
COUNTERCLAIM**

Defendants, **Michael Loconte, Diane Schmidt, and Maria Penney Seligson, and**
Nominal Defendant, **Caterina Realty, LLC** (collectively, the "Defendants"), by their attorney
Howard J. Schwartz, Esq., Wolff & Samson PC, by way of their First Amended Verified
Answer to Plaintiff's Verified Complaint, say:

1. Defendants lack knowledge and information sufficient to form a belief as to the allegations in Paragraph 1.
2. Admitted as to Paragraph 2 of the Complaint.
3. Admitted as to Paragraph 3 of the Complaint
4. Denied, but admit that Plaintiff is Trustee of a Trust with a 25% ownership interest.

5. Admitted as to Paragraph 5 of the Complaint.
6. Denied as to Paragraph 6 of the Complaint except state that Defendant, Michael Loconte, is a Trustee of a Trust with a 25% ownership interest.
7. Denied as to Paragraph 7.
8. Denied as to Paragraph 8 of the Complaint except state that Defendant, Diane Schmidt, is a Trustee of a Trust with a 25% ownership interest.
9. Denied as to Paragraph 9 of the Complaint.
10. Denied as to Paragraph 10 of the Complaint except state that Defendant, Maria Penney Seligson, is a Trustee of a Trust with a 25% ownership interest.
11. Admitted as to Paragraph 11 of the Complaint.
12. Admitted as to Paragraph 12 of the Complaint.
13. Admitted as to Paragraph 13 as of the date of the Complaint.
14. Admitted as to Paragraph 14 of the Complaint.
15. Admitted as to Paragraph 15 of the Complaint.
16. Admitted as to Paragraph 16 of the Complaint.
17. Admitted as to Paragraph 17 of the Complaint as to salaries and denied as to Paragraph 17 of the Complaint as to health insurance. Deny the balance of Paragraph 17 because it is unclear as to what "other employee benefits" refers to.
18. Denied as to Paragraph 18 of the Complaint. Plaintiff and Defendants are Trustees of Trusts which are members of Caterina.

19. As to Paragraph 19, Defendants lack knowledge and information sufficient to form a belief as to the allegations. Defendants cannot determine what “have acted in concert with each other” refers to.
20. As to Paragraph 20, Defendants lack knowledge and information sufficient to form a belief as to the allegations. Each of the Trustees acts individually on behalf of their respective 25% ownership share in accord with their rights and duties.
21. Paragraph 21 states legal conclusions or principles which do not constitute proper pleading. As such, no response is required.
22. As to Paragraph 22, Defendants deny any wrongful conduct.
 - a. Denied.
 - b. Denied.
 - c. Denied.
 - d. Admitted except deny that such action is improper in any way.
 - e. Admitted except deny that such action is improper in any way or that Plaintiff was “charged”.
 - f. Denied.
 - g. Denied.
23. Denied as to Paragraph 23 of the Complaint.
24. Denied as to Paragraph 24 of the Complaint.
25. Denied as to Paragraph 25 of the Complaint except admit a letter exists and refers to that letter for its terms and meaning.
26. Denied as to Paragraph 26 that Defendants are under any obligation to comply.
27. Denied as to Paragraph 27.

AFFIRMATIVE DEFENSES

AS FOR THE FIRST AFFIRMATIVE DEFENSE,

1. Plaintiff is collaterally estopped.

AS FOR THE SECOND AFFIRMATIVE DEFENSE.

2. Plaintiff has named the wrong parties as defendants.

AS FOR THE THIRD AFFIRMATIVE DEFENSE,

3. Plaintiff does not have the legal capacity to sue.

AS TO THE FOURTH AFFIRMATIVE DEFENSE,

4. Plaintiff fails to state a cause of action.

AS TO THE FIFTH AFFIRMATIVE DEFENSE,

5. Plaintiff's claims are barred because she failed to provide the requisite pre-litigation notice or pre-litigation demand, and such a demand would not be futile.

AS TO THE SIXTH AFFIRMATIVE DEFENSE,

6. Plaintiff's claims are barred by the business judgment rule.

AS TO THE SEVENTH AFFIRMATIVE DEFENSE,

7. Plaintiff's claims are barred by ¶ 7 of the Separation Agreement and General Release signed in June 2012.

WHEREFORE, the Defendants demand judgment dismissing the Verified Complaint and awarding them attorneys' fees, costs, disbursements, and such other and further relief as the Court deems just and proper.

COUNTERCLAIM

1. On or about June 28, 2012, Plaintiff signed a Separation Agreement and General Release (the "General Release") in connection with the termination of her employment with Jersey Lynne. The General Release is hereby incorporated by reference.

2. Paragraph 7 of the General Release states in pertinent part:

[Plaintiff] . . . knowingly and voluntarily forever releases and discharges [Jersey Lynne] and its past and present affiliates, subsidiaries, parent companies, predecessors, insurers, successors and assigns and its and their current and former partners, members, owners, shareholders, officers, directors, employees, employee benefit plans, attorneys, fiduciaries, representatives and agents both individually and in their business capacities (collectively, the "Releasees"), of and from any and all claims, complaints, demands, lawsuits, causes of action or expense of any kind (including attorney's fees and costs) . . . whether known or unknown, that [Plaintiff] now has or ever had against the Releasees as of the signing of this Agreement, including but not limited to . . . Claims arising under common law; Claims for breach of contract and in tort. . . . It is further expressly agreed and understood by [Plaintiff] that the release contained herein is a GENERAL RELEASE.

3. Paragraph 3(b) of the General Release defines the "Non-Competition Pay" and enumerates how to calculate its monthly disbursement.

4. Paragraph 3(c) of the General Release defines the "Loan" and enumerates how to calculate its monthly disbursement.

5. Paragraph 17 of the General Release provides that the Non-Competition Pay and the Loan are subject to termination, forfeiture, and/or repayment if Plaintiff violates the General Release.

6. Plaintiff filed the instant lawsuit against Michael Loconte, Diane Schmidt, and Maria Penney Seligson.

7. At all relevant times, Michael Loconte, Diane Schmidt, and Maria Penney Seligson have been directors, officers, and employees of Jersey Lynne.

8. The General Release bars claims, complaints, demands, lawsuits, and causes of action that Plaintiff had against Michael Loconte, Diane Schmidt, and Maria Penney Seligson as of June 28, 2012.

9. Plaintiff's Verified Complaint stems from events occurring prior to June 28, 2012, including but not limited to allegations relating to a lease dated December 1, 2011.

10. Therefore, Plaintiff's claims are barred by the General Release.

11. Plaintiff's filing the Verified Complaint in this case is a breach of the terms of ¶ 17 of the General Release.

12. Because Plaintiff violated ¶ 17 of the General Release, the Non-Competition Pay and Loan are subject to termination, forfeiture, and/or repayment.

WHEREFORE, the Defendants demand judgment against Plaintiff in the amount of all of the Non-Competition Pay and Loan disbursed to date, and judgment terminating any obligation to pay Plaintiff any additional Non-Competition Pay and Loan disbursements, together with such other and further relief which the Court deems just and proper.

Dated: September 17, 2013

WOLFF & SAMSON PC

By 

HOWARD J. SCHWARTZ

140 Broadway, 46th Floor
New York, New York 10005
(212) 973-0572

-and-

One Boland Drive
West Orange, New Jersey 07052
(973) 530-2031

ATTORNEY'S VERIFICATION (ANSWER)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HOWARD J. SCHWARTZ, an attorney at law duly admitted to practice in the Courts of the State of New York, affirms under the penalties of perjury as follows:

I am the attorney for the defendants in the above captioned action. I have read the foregoing Answer and know the contents thereof which are true to my own knowledge, except as the matters therein stated to be alleged on information and belief, and as to these matters, I believe them to be true.

The reason this verification is made by me and not by the defendants is that the defendants reside and/or operates its principal place of business in a county other than the one in which I maintain my office.

The source of my information and the grounds of my beliefs are communications with my clients and others, papers, reports, and investigation contained in the file.

Dated: New York, New York
September 17, 2013



HOWARD J. SCHWARTZ