The Point 128 LLC v Choi
2020 NY Slip Op 30017(U)
January 3, 2020
Supreme Court, New York County
Docket Number: 652887/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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THE POINT 128 LLC,

Plaintiff,

- v -

JOANNE CHOI, WILLIAM CHOI, KENNETH TAM, MZ GLOBAL LLC, AND 8TH AVE ENT LLC.

Defendants.

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INDEX NO. 652887/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 51
were read on this motion to/for DISMISS.

In Motion Sequence Number (Motion) 001, defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing plaintiff's complaint in its entirety. Defendants move, in the alternative, pursuant to CPLR 602 (b), to consolidate this action with the 2018 related case, *Choi v Wu* (Index No. 651716/2018) (Related Action).

This action arises from defendants' attempt to dispose of their membership interests in plaintiff (Point 128), a New York limited liability company (LLC), which owns real property in Queens, New York. Simultaneously, defendants sought to also dispose of their interest in a nonparty hotel business (Hotel) that operates on Point 128's property (*see generally* NYSCEF 8 [complaint]). At least two of the defendants began looking to sell their interests in Point 128 and the Hotel as early as 2013, and discussions regarding defendants' sale of their membership interests continued until the Related Action was commenced (*see id.*). The Related Action was initiated by this action's defendants directly and derivatively on behalf of Point 128 against certain individual managing members, the Point 128 board, and a related entity (*see* NYSCEF 7 [Related Action, amended summons and complaint]). The Related Action

involves, among other things, various breach of fiduciary duty claims (self-dealing, corporate waste, and other breaches of care/loyalty) and a claim for breach of the operating agreement (*see generally id.*). In the Related Action, Point 128 raises, as its eighth affirmative defense, violation of Point 128's OA (Index No. 651716/2018, NYSCEF 49 [Point 128's answer, Related Action] [asserting that the Related Action plaintiffs' claims are precluded under the OA for "failure to satisfy the conditions precedent" required to raise their claims against Point 128, "including properly raising objections"]).

The complaint in this action, dated May 9, 2019 (NYSCEF 8), asserts two causes of action: breach of contract against all defendants for violating the operating agreement in seeking, among other things, to dispose of their membership interest in Point 128, in violation of Point 128's operating agreement (OA) (NYSCEF 8, ¶¶ 30-43; NYSCEF 18 [OA]); and breach of fiduciary duty against defendant Joanne Choi for certain actions she took while serving as a managing board member of Point 128 between November 22, 2015 and November 22, 2016 (NYSCEF 8, ¶¶ 44-49).

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

Defendants argue that this action must be dismissed under CPLR 3211 on the basis that: (1) the complaint is barred by the doctrine of res judicata in that Point 128 seeks to relitigate its decided motion to dismiss in the ongoing Related Action; (2) the complaint fails to

adequately state a claim for breach of contract or breach of fiduciary duty; and (3) the claims are refuted by documentary evidence.

As the court held in its January 3, 2020 decision and order granting in part defendants' motion to strike certain documents (Motion 002), exhibits D and E to Point 128's papers in opposition to Motion 001 are excluded from the court's consideration pursuant to CPLR 4547.

1. Res Judicata

Relying on *Greaves v Ortiz* (65 AD3d 1085, 1085 [2d Dept 2009]) and *Henry Modell and Co., Inc. v Minister, Elders and Deacons of Ref. Prot. Dutch Church of City of N.Y.* (68 NY2d 456, 456 [1986]), defendants assert that the complaint is barred by res judicata as the contract and fiduciary duty claims should have been, but were not, raised as counterclaims by Point 128 in the Related Action. These cases are distinguishable and do not necessitate dismissal of the complaint here.

In *Greaves*, the Second Department stated:

> "[u]nder the transactional analysis approach, the doctrine of res judicata precludes relitigation of matters that could have or should have been raised in a prior proceeding arising from the same factual grouping or transaction. Where the same foundational facts serve as a predicate for each proceeding, differences in legal theory or relief sought do not create a separate cause of action"

(65 AD3d at 1085-1086 [internal citations omitted]).

The Second Department, however, affirmed dismissal under the doctrine of res judicata on the basis that "the plaintiffs' claim for specific performance in a previously-dismissed action arises out of the same transaction as the various claims to recover damages" in the latter action, and "the causes of action asserted in the two actions were grounded on the same alleged wrong" (*id.* [citations omitted]). Likewise, the Court of Appeals affirmed dismissal of a plaintiff's subsequent action under the doctrine of res judicata where that plaintiff-subtenant was "the losing defendant in a prior summary holdover proceeding" (*Henry Modell and Co., Inc*, 68 NY2d at 456).

Unlike those cases, the Related Action has not resulted in a final judgment of any kind. Defendants here argue that Point 128 seeks to relitigate its motion to dismiss in the Related Action, which remains pending in the discovery phase. In the Related Action, Point 128 moved to dismiss the operative pleading pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7), and (a) (8), as well as CPLR 1001 and 1003, on the basis that the Related Action plaintiffs had failed to state a claim and lacked standing under several theories. That motion was denied (*see* Index No. 651716/2018, NYSCEF 50 [notice of motion], 139 [decision and order]).

> "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again. Additionally, under New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"

(*Matter of Hunter*, 4 NY3d 260, 269-270 [2005] [internal quotation marks and citations omitted]).

Here, as the Related Action has not been tried to completion and the particular claims asserted here, which could have been but were not asserted as counterclaims in the Related Action, have not previously been decided on the merits, the doctrine of res judicata does not bar Point 128's complaint. Further, while the two actions arise from the same or substantially similar transactions, there is no inordinate prejudice or harm to plaintiff in permitting these two actions to coexist as, to the extent that this action survives this motion to dismiss, the matters are consolidated for the purposes of joint discovery and joint trial, only.

2. Breach of the Operating Agreement Against All Defendants

Issues of fact preclude dismissal of Point 128's breach of contract claim. Affording the complaint its most liberal construction, Point 128 adequately asserts a claim for breach of the OA in that it alleges that defendants impermissibly sought to circumvent and breached the OA in attempting to use the Related Action to dispose of their membership interests in Point 128.

> The OA provides:
>
> "3.3. Withdrawal of a Member.
>
> (a) Except with the consent of a majority of the Members, the interest of a Member may not be withdrawn from the Company in whole or in part except in the event of the death or declaration of legal incompetency of such Member . . .
>
> (b) In the event of the withdrawal of any Member pursuant hereto, the withdrawing Member shall be entitled to receive a sum equal to the Percentage Interests and Capital Accounts of the withdrawing Member times the then current fair market value of the total assets of the Company which shall be determined by a real estate appraisal conducted by an appraiser mutually appointed by the withdrawing Member and the Company"

(NYSCEF 18).

The OA further provides that, "[e]xcept with the consent of the Managing Agent or as otherwise specifically permitted by this Agreement, no Member shall . . . pledge or otherwise dispose of his or her interest in the Company or in the Company's assets or property or enter into any agreement as a result of which any other person shall have rights as a Member of the Company" (*id.* § 4.4 [a]), and "[n]o Member shall do any act in contravention of [the OA]" (*id.* § 4.4 [b]). Like § 3.3, the OA provides, in Article VIII, that"[n]o Member may sell, pledge, mortgage or otherwise dispose of all or any portion of his [or her] interest in the Company without the consent of the other Members" (*id.* § 8.1), and "any purported transfer or other disposition of any Member's interest in the Company" without the other members' consent will be treated as a withdrawal of membership, the transferor/disposer of interest will be deemed "terminated," and the remaining members will have the option to purchase the interest as set forth in § 3.3 (*id.* § 8.2). Finally, "[e]ach of the Members agrees with all other Members that he, she or it will not make any disposition of his, her or its interest in the company except as permitted by the provisions of . . . Article VIII" (*id.* § 8.3).

Defendants' argument that § 3.3 is inapplicable as "withdrawing" membership interests and selling interests are wholly separate matters is unavailing. While the term "withdraw" is not defined in the OA, it is only feasible for a member to withdraw its membership interest from

Point 128 in certain limited ways: by relinquishing its interest in whole by transfer, sale, or other disposition; or through death or incapacity. While the court deems § 3.3 unambiguous on its face, the lack of a definition for the term "withdraw" would otherwise create an ambiguity and render this prong of defendants' motion unfit for disposition on a motion to dismiss.

Affording the complaint its most liberal construction, Point 128 sufficiently asserts at least a claim for breach of the OA against defendants in that they violated § 4.4 (b) in seeking to circumvent §§ 3.3, 4.4 (a), 8.1, and/or 8.3 by disposing of their membership interests without the consent of all members in commencing the Related Action to force a buy out on favorable terms. Defendants' argument that the Related Action is derivative and, therefore, cannot be construed as a means by which to extract a buyout and dispose of their membership interests is, on this motion to dismiss, unpersuasive as the Related Action is both direct and derivative and seeks, among other things, damages for claims other than simply breach of fiduciary duty and breach of contract. Further, defendants' documentary evidence does not irrefutably demonstrate that all defendants sought consent to dispose of their membership interests or obtained the consent of all members to dispose of their interests (*e.g.* NYSCEF 11 [10/01/2013 email regarding the offer of only defendants William Choi and Joanne Choi to sell their interests in Point 128 and the Hotel])

Accordingly, defendants' motion is denied as to plaintiff's breach of contract claim.

3. Breach of Fiduciary Duty Against Joanne Choi

The portion of defendants' motion to dismiss the claim of breach of fiduciary duty against Joanne Choi (Choi), however, is granted. The breaches of fiduciary duty against Choi that Point 128 asserts in its complaint are as follows: (1) voting against business decisions that were necessary to avoid defaulting on the loan from nonparty Bank of China; and (2) commencing the Related Action "solely in an effort to force a buyout higher than market value" (NYSCEF 8, ¶ 47).

Defendants' documentary evidence demonstrates that Choi "disapprove[d]" of Point 128 accepting a loan from three then-current board members as it "will be deeper in debt as a result of this loan," could constitute an event of default under Point 128's mortgage agreement,

and other reasons relating to board members' conflicting interests as both lenders and borrowers (NYSCEF 13). While the email implies an absence of misconduct on the part of Choi, Point 128 has failed to state a viable cause of action with particularity as to that purported breach of fiduciary duty as it has not identified any "damages directly caused" by the alleged misconduct (*see Napoli v Bern*, 60 Misc 3d 1221(A) [Sup Ct 2018] [reciting elements of a fiduciary claim], *affd sub nom. Napoli v New York Post*, 175 AD3d 433 [1st Dept 2019]; *Stang LLC v Hudson Sq. Hotel, LLC*, 158 AD3d 446 [1st Dept 2018] [requiring claim to be pleaded with particularity under CPLR 3016 (b)]).

Even assuming that Choi had a fiduciary duty to Point 128 when the Related Action was commenced, despite the fact that she was no longer a board member at that time, the remaining portion of Point 128's breach of fiduciary duty claim is dismissed as duplicative of the breach of contract claim "as it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages" (*Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]).

The court has considered the parties' remaining arguments and, to the extent that they are properly before the court, finds them unpersuasive, without merit, or otherwise not requiring an alternative result.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted in part; and it is further

ORDERED that the second cause of action for breach of fiduciary duty is dismissed; and it is further

ORDERED that defendants shall answer the complaint within 20 days of the court's entry of this decision and order on NYSCEF; and it is further

ORDERED that this action is consolidated for the purposes of only joint discovery and joint trial with the Related Action, *Choi v Wu*, Index No. 651716/2018, without altering or extending any existing deadline in either action; and it is further

ORDERED that the parties shall appear for a status conference on January 14, 2020 at 11:30 AM in Part 48.

1/3/2020
DATE

ANDREA MASLEY, J.S.C.
HON. ANDREA MASLEY

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE