

Arfa v Zamir

2008 NY Slip Op 33348(U)

December 8, 2008

Supreme Court, New York County

Docket Number: 603602/05

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: C. E. Ramos
listing

PART 53

Index Number : 603602/2005

ARFA, RAFA

VS.

ZAMIR, GADI

SEQUENCE NUMBER : 043

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.

Dated: 12/8/08

HON. CHARLES E. RAMOS ^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
RACHEL L. ARFA, ALEXANDER SHPIGEL, ARGELT
LLC, on behalf of themselves and on behalf of
HARLEM HOLDINGS, LCC, HARLEM MAINTENANCE
SERVICES, INC. and AMELITE MANAGEMENT
SERVICES, INC.,

Plaintiffs,

-against-

Index No.
603602/05

GADI ZAMIR and ZAMIR PROPERTIES, INC.,

Defendants,

546-522 WEST 146TH STREET LLC, 522-536 WEST
147TH STREET LLC, WEST 162ND STREET AND
ACADEMY STREET LLC, 100-102 EAST 124TH STREET
PACKAGE, LLC, HARLEM I LLC and HARLEM II LLC,

Intervenor-Defendants.

FILED
DEC 15 2008
CLERK'S OFFICE
NEW YORK

-----X

Charles Edward Ramos, J.S.C.:

Defendant Gadi Zamir moves to dismiss the plaintiffs' fourth and fifth causes of action of the second amended complaint (SAC) for breach of fiduciary duty and fraud (CPLR 3211 [a] [3], [7]).

Background

For a full recitation of the factual background in this action, see this Court's decision in motion sequence numbers 039-042, entered on September 16, 2008.

This action was originally commenced by plaintiffs Rachel Arfa, Alexander Shpigel and 552-562 Academy Street, LLC (Academy Street LLC) (together, Plaintiffs) against their former partner, defendant Gadi Zamir, individually, for his alleged misconduct that caused the value of the parties' real estate portfolio to decline.

In the fourth cause of action, Plaintiffs allege that Zamir breached his fiduciary duty by failing to carry out his responsibilities as manager of several entities organized for the purpose of acquiring and managing certain residential real estate properties (Property LLCs). Additionally, Zamir allegedly set out to destroy the functioning of the Property LLCs in order to cause a severe diminution of their value to permit purchasers affiliated with him to acquire them at a substantial discount in exchange for lucrative management contracts. Further, Plaintiffs allege that Zamir withheld financial information, and diverted monies collected from certain Property LLCs for his own benefit. The entities at issue are Harlem Holdings LLC (Holdings), Harlem Maintenance Services, Inc. (HMS), AmElite Management Services, Inc. (AMS) (together, the Controlled Entities), in addition to one or more Property LLCs that Holdings had an ownership interest in.

In the fifth cause of action for fraud, Plaintiffs allege that Zamir misrepresented the physical condition of property located on Academy Street, Manhattan (the Academy Street Property), and the cost of renovating and repairing it, in order to induce Plaintiffs to approve its acquisition.

Discussion

In support of its motion to dismiss the cause of action for breach of fiduciary duty, Zamir asserts that Plaintiffs lack standing to pursue damages on behalf of the Controlled Entities and Property LLCs, which claims, if any, properly belong to these

[* 4]
entities.

Plaintiffs assert that they have also suffered harm as the result of Zamir's actions, and should be permitted to pursue a direct cause of action against him.

Generally, where redress is sought for harm to a corporation, the cause of action belongs to the corporation, and a shareholder has no standing to bring an action in her individual capacity (*Abrams v Donati*, 66 NY2d 951, 953 [1985], *rearg denied* 67 NY2d 758 [1986]). An individual member of a corporation may assert a direct cause of action if the alleged injury harms the shareholder(s), distinct from any harm suffered by the corporation, or otherwise, if the shareholder alleges breach of a duty owed independent of any duty owed to the corporation (*Id.*; see generally *Higgins v New York Stock Exchange, Inc.*, 10 Misc 3d 257, 264-271 [Sup Ct, NY County 2005]). The Court of Appeals' recognition of the right of LLC members to bring derivative actions to redress harm to an LLC preserves the distinction between the availability of a direct and derivative action based upon the nature of the harm alleged (*Tzolis v Wolff*, 10 NY3d 100, 103-106 [2008]).

Plaintiffs allege that the cause of action for breach of fiduciary duty is premised upon injuries allegedly suffered by them individually. However, the allegations contained in the SAC, sounding in mismanagement and diversion of corporate assets causing a diminution in the value of the LLCs (SAC, ¶¶ 145), amount to harm allegedly sustained by the LLCs themselves.

Consequently, Plaintiffs lack standing to directly redress these injuries.

However, to the extent that Plaintiffs allege harm stemming from Zamir's alleged withholding of financial information relating to the Academy Street LLC, Plaintiffs may pursue this claim directly as co-managers of the entity.

Zamir moves to dismiss the cause of action for fraud on the ground that it is barred by a general release (Release) contained in a governance agreement (Governance Agreement), wherein the parties purportedly released "any and all claims" arising from events that occurred prior to the execution of that agreement.

Plaintiffs counter that, to the extent that Zamir owed Plaintiffs a fiduciary duty by virtue of being co-managers, he may not rely upon the Release to insulate himself from liability where he intentionally concealed from Plaintiffs the physical condition of the Academy Street Property, and which misrepresentation was an inducement to enter into the release from the outset.

In the SAC, Plaintiffs allege that Zamir presented them with a recommendation regarding the Academy Street Property (SAC, ¶ 39). Based upon Zamir's recommendation and representations concerning the physical condition of the property, Plaintiffs allege that they approved its acquisition and began looking for investors to finance the acquisition (SAC, ¶ 40).

Plaintiffs additionally allege that Zamir learned that there were significant structural defects and other problems with the

Academy Street Property when he received engineering reports in October 2004 and February 2005. However, Zamir did not disclose these reports or their findings with Plaintiffs (SAC, ¶ 41).

Plaintiffs additionally allege that Zamir executed a violations undertaking (Violations Undertaking) with Citibank, the mortgagee of the Academy Street Property, in which he committed to correcting several hundred violations attached to the title insurance policy within a year of closing. The failure to correct these violations is considered an event of default under the property's mortgage. According to Plaintiffs, Zamir did not disclose to them the existence of the violations or the Violations Undertaking itself, and that they would not have authorized him to execute it on behalf of the Academy Street LLC of which they were co-managers had they been aware of it.

The closing of the transaction to purchase the Academy Street Property occurred in April of 2005. The parties negotiated the terms of the Governance Agreement, including the Release¹, in May 2005, and the effective date of the Governance Agreement is June 9, 2005 (SAC, ¶¶ 60-61). Plaintiffs allege

¹ The Release states,

"Each of the Principals, on behalf of themselves, the Controlled entities and their Related Parties, hereby releases each of the other Principals and their Related Parties from any and all claims, demands, actions, rights, suits, liabilities, interests and causes of action, known or unknown, which they have ever had, have or may now have, which in any way pertain to or arise from any matters, facts, occurrences, actions or omissions which occurred prior to or as of the date hereof [June 9, 2005]" (Governance Agreement, ¶ 6) (emphasis added).

that in executing the Governance Agreement, they hoped to "put their problems with Zamir behind them and that Zamir would be working in good faith to execute on the parties' business plan" (*Id.*).

However, while negotiating the terms of the Governance Agreement that included the Release, Zamir did not correct his misrepresentations concerning the true physical condition of the Academy Street Property. Neither did he disclose to Plaintiffs the existence of the Violations Undertaking and the violations contained therein, that all occurred in the months prior to the negotiation and execution of the Governance Agreement.

A valid release constitutes a complete bar to an action on a claim which is the subject of the release (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). However, a fiduciary cannot, by a general release, insulate itself of its fiduciary obligation of full disclosure by wrongfully withholding the very information that a party requires to make a reasoned judgment on whether to agree to the general release at the outset (*Littman v Magee*, 54 AD3d 14, 17-18 [1st Dept 2008]; *H.W. Collections, Inc. v Kolber*, 256 AD2d 240, 241 [1st Dept 1998]; *see also Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278, 279-80 [1st Dept 2002]).

As a fiduciary, Zamir was under an affirmative duty to disclose any information that could reasonably bear on Plaintiffs' consideration to enter into the general release (*Littman*, 54 AD3d at 18). Accepting the SAC's allegations as

true, as the Court must do at this stage, Zamir failed to disclose to Plaintiffs vital material facts in order to permit them to make a reasoned judgment as to whether to agree to the terms of the Release. In addition to failing to disclose to Plaintiffs, it is alleged that Zamir intentionally concealed from Plaintiffs material facts, including the engineering reports' findings concerning the structural defects in the property, and the Violations Undertaking (SAC, ¶¶ 149-153).

The broad and encompassing language contained in the Release would ordinarily bar such a cause of action because it arises out of events that occurred prior to its execution.² However, premised upon allegations that the Release itself is alleged to have been procured by a breach of fiduciary duty, Plaintiffs are permitted to proceed on their cause of action for fraud.

Accordingly, it is

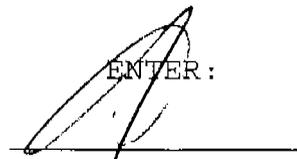
ORDERED that defendant Gadi Zamir's motion to dismiss is granted, in part, to the extent of dismissing the fourth cause of action and the fourth cause of action is dismissed (with the exception of that portion that seeks damages stemming from failure to disclose financial information), and denied, in part, to the extent of the fifth cause of action; and it is further

ORDERED that defendant Gadi Zamir is directed to serve an answer to the second amended complaint within 10 days after

² The Governance Agreement contains a severability clause that expresses the parties' intent to be bound by the remaining provisions contained in the Governance Agreement, in the event any other provision is deemed to be invalid or unenforceable for any reason (Governance Agreement, § 21).

service of a copy of this order with notice of entry.

Dated: December 8, 2008

ENTER:

J.S.C.

CHARLES E. RAMOS

FILED

DEC 15 2008

COUNTY CLERKS OFFICE
NEW YORK