

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

PRESENT: CE Ramos

PART 53

Index Number : 603602/2005

Justice

ARFA, RAFA

INDEX NO. _____

vs

ZAMIR, GADI

MOTION DATE _____

Sequence Number : 039

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

C

its motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/8/08

[Signature]
HON. CHARLES E. RAMOS
J.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.,
ELI MOR, JACOB PERRY, and ILAN CALIC,

Defendants,

-----X
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,
and 2000 DAVIDSON AVE. LLC,

Intervenors-Defendants/
Counterclaim Plaintiffs/
Cross-Claim Plaintiffs

-against-

RACHEL L. ARFA, ALEXANDER SHPIGEL,

Counterclaim-Defendants

and

GADI ZAMIR, WORLDWIDE MANAGEMENT GROUP, LLC,
HARLEM HOLDINGS, LLC and AMELITE MANAGEMENT
SERVICES, INC.,

Cross-Claim Defendants,

-----X
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO,
P.C.,

Intervenor-Plaintiff

-against-

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

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Intervenor-Defendants,

-----X

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 039, 040, 041 and 042 are consolidated for disposition.

In motion sequence 039, plaintiffs/counterclaim defendants Alexander Shpigel and Rachel L. Arfa move to dismiss the Intervenor-Defendants/Counterclaim Plaintiffs/Cross-Claimants' (Intervenors¹) first, second, fifth, sixth, seventh and eighth amended counterclaims (CPLR 3211 [a] [1], [7]).

In motion sequence 040, cross-claim defendants Gadi Zamir and Worldwide Management Services, Inc. (Zamir Defendants) move to dismiss the Intervenors' amended cross-claims (CPLR 3211 [a] [1], [7]).

In motion sequence 041, plaintiffs/cross-claim defendants Harlem Holdings LLC (Harlem Holdings) and Amelite Management Services, Inc. (AMS) move to dismiss the Intervenor' first, second, fifth, sixth, seventh and eighth amended cross-claims.

In motion sequence 042, defendants Eli Mor, Jacob Perry, and Ilan Calic (together, Investor Defendants) move to dismiss the sixth and eighth causes of action of the second amended complaint (CPLR 3211 [a] [1], [3], [6], [7]).

Background

The underlying action was commenced by Rachel Arfa and her

¹ The Intervenors include 546 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, Harlem II LLC, and 2000 Davidson Ave. LLC (together, Intervenors).

husband, Alexander Shpigel (together, Arfa/Shpigel), against their former business partner, defendant Gadi Zamir.

Prior to the breakdown of their relationship, Arfa/Shpigel and Zamir, directly and through their wholly-owned companies Harlem Holdings, AmElite and Argelt LLC (Argelt), solicited a group of investors in Israel to purchase residential buildings. The parties planned to renovate and manage them, and thereafter, to sell or refinance them for profit. To this end, they organized seven New York limited liability companies (Property LLCs) to acquire seven separate properties (Properties) in and around upper Manhattan, New York.

Until October of 2005, Harlem Holdings served as the co-manager, alongside Shpigel and Zamir (together, the Managers), of each of the Property LLCs. Harlem Holdings was 60 % beneficially owned by Arfa/Shpigel through Argelt, while the remaining 40% interest in Harlem Holdings was beneficially owned by Zamir, through another entity.

Bitter infighting erupted between Arfa/Shpigel and Zamir, causing a management deadlock in the Property LLCs. To break the deadlock, a proxy contest was held, and the members of the Property LLCs voted pursuant to operating agreements (Operating Agreements) in late October of 2005 to transfer management to Zamir. At this time, Zamir and his entity, WMS, assumed management responsibilities for the Property LLCs.

After less than a year at the helm, the Property LLCs removed Zamir amidst allegations of wrongdoing and the

deterioration of the Properties. Thereafter, this Court appointed Lawrence Mandelker, Esq. (Receiver), as temporary receiver of Harlem Holdings, in February of 2006.

In November of 2006, Arfa/Shpigel commenced an action against Zamir, alleging a variety of misconduct, including fraud, breach of fiduciary duty and contract, both before and after the proxy contest. Additionally, Arfa/Shpigel allege that the Investor Defendants made defamatory statements to members of the Property LLCs, and another investor, Eldan-Tech. Ltd. (Eldan) during the period of the proxy contest, and lobbied the investors to remove Shpigel as manager, and otherwise, convinced them not to conduct business with Arfa/Shpigel.

The Intervenors were given leave to intervene in this action as defendants, for the purpose of filing counterclaims against Arfa/Shpigel and Harlem Holdings, and cross-claims against Zamir, arising out of the alleged mismanagement of the Properties occurring before and after the proxy contest. They seek an accounting, and assert causes of action for violation of Real Property Law (RPL) § 440-a, waste and mismanagement, breach of contract, and declaratory judgment.

Discussion

Arfa and the Managers² move to dismiss the Intervenors' first, second, fifth, sixth, seventh and eighth amended

² The Zamir Defendants and the Receiver adopt Arfa/Shpigel's arguments in support of dismissal of the counterclaims and cross-claims (Receiver Memo. of Law, 2; Affirmation of Eric Levine, Esq., ¶ 3).

counterclaims and cross-claims (CPLR 3211 [a] [1], [7]).

The first amended counterclaim seeks an accounting against Arfa/Shpigel, Harlem Holdings and Zamir, from the time period before the Managers were removed in November of 2005, on the ground that they breached their fiduciary duties to the Intervenors in their capacities as promoters, organizers and managers of the Property LLCs.

The fifth and sixth counterclaim allege waste and mismanagement of the Properties by Arfa and the Managers, insofar as they caused the Property LLCs to make commercially unreasonable payments on self interested agreements with their affiliates, made preferential payments to companies affiliated with Arfa and the Managers, commingled funds of the Property LLCs, and engaged counsel to represent the Property LLCs that were conflicted, by virtue of the prior and continuing representation of Arfa and the Managers.

I. First, Fifth, and Six Counterclaim

Arfa and the Managers move to dismiss the counterclaims and cross-claims for an accounting, and for waste and mismanagement, on the ground that an exculpatory clause contained in the Operating Agreements precludes the assertion of any claims that are founded upon a breach of fiduciary duty.

Undoubtedly, where a member of an LLC takes on the role of manager, his conduct is held to a stricter standard of behavior (LLCL § 409 [a]; *Tzolis v Wolff*, 10 NY3d 100, 104-105 [2008]; see also *Meinhard v Salmon*, 249 NY 458, 463-64 [1928]). Consistent

with this principle, this Court has already determined that Shpigel, Zamir and Harlem Holdings are fiduciaries of the Property LLCs in their capacity as managers.

The LLC's operating agreement is the basic document that sets forth the rights and duties of the members and managers among themselves, including setting forth any limitation of liability for acts performed in good faith. Nonetheless, the operating agreement cannot limit or eliminate acts or omissions that constitute bad faith (Limited Liability Corporation Law [LLCL] § 417 [a] [1]; § 420; *TIC Holdings, LLC v HR Software Acquisitions Group, Inc.*, 301 AD2d 414, 415 [1st Dept 2003]).

The clause at issue here³ expressly limits the Managers' liability for acts undertaken in good faith, and in this vein, is consistent with New York's LLC law. Nonetheless, the clause does not limit liability for acts of "gross negligence or willful misconduct" (Operating Agreements, § 6.6). In any event, the duty of good faith does not necessarily embody all fiduciary responsibilities, including the duty of loyalty, that precludes self-interested conduct.

The Intervenors allege in sufficient detail that the Managers acted grossly negligent, and/or willfully and in bad

³ Section 6.6 of the Operating Agreements state,

"The Managers shall perform their duties in good faith ... Any Manager who so performs such duties shall have no liability whatsoever by reason of having being or having been a Manager. No Manager shall be liable ... unless the loss or damage shall have been the result of the gross negligence or willful misconduct of such Manager" (Exhibit 2, annexed to the Aff. of David Katz, Esq.).

faith, by inter alia, entering into self-interested agreements and transactions with their affiliated companies, that caused the Property LLCs to make commercially unreasonable payments. Additionally, the Managers allegedly failed to keep proper books and records for the Property LLCs, and engaged counsel that were conflicted (Intervenors' Amended Counterclaims and Cross-Claims, ¶ 78). These allegations, if proven true, would be sufficient to overcome the exculpatory language of section 6.6 of the Operating Agreements, that otherwise limits the Managers' liability for acts performed in good faith.

Therefore, the Intervenors have sufficiently alleged that Zamir, Shpigel and Harlem Holdings, in their capacity as managers of the Property LLCs, breached fiduciary duties. On this basis, the causes of action seeking an accounting, and for waste and mismanagement are sufficiently pled (*see e.g. Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997]).

Arfa, individually, seeks dismissal of the counterclaims on the ground that she did not owe fiduciary duties because she was never a manager of the Property LLCs.

The Investors rely upon the principle that a fiduciary of a fiduciary is a fiduciary, in order to find that Arfa, while not a direct manager of the Property LLCs, was, nonetheless, a fiduciary. At the time that the facts giving rise to this dispute occurred, Argelt was the 60% majority owner of Harlem Holdings, while ZPI owned the remaining 40 % share. Argelt, in turn, is owned by Arfa and Shpigel, and ZPI is owned by Zamir.

Through her ownership in Argelt, Arfa beneficially owned 30 % of Harlem Holdings.

The Investors contend⁴ that, to the extent that Arfa was a 30 % beneficial owner and manager, alongside Shpigel and Zamir, of Harlem Holdings, that was, in turn, a manager of the Property LLCs, she is a fiduciary of the Property LLCs.

The principle that an entity that controls the fiduciary of another entity may be deemed a fiduciary of the entity, is well-established in partnership and corporate law (see e.g. *In re Treco*, 229 BR 280, 289 [SD NY 1999], *vacated and remanded on other grounds* 240 F 3d 148 [2d Cir 2001]; see also *U.S. West, Inc. v Time Warner Inc.*, 1996 WL 307445, *20 [Del Chan 1996]).

As a hybrid entity that combines elements of both the corporation and partnership form, the principle that a fiduciary of a fiduciary is a fiduciary is equally applicable to the limited liability corporation form (Rich, Practice Commentaries, McKinney's Consolidated Laws of NY, Book 32A, Limited Liability Corporation Law at 175).

Therefore, to the extent that the Intervenors allege that Arfa, through her membership in Argelt, was a co-manager of Harlem Holdings, a fiduciary of the Property LLCs, she too may be deemed a fiduciary of the Property LLCs, even though she did so through the intermediation of another entity.

Finally, notwithstanding Arfa's contention that she was not

⁴ The Zamir Defendants additionally take the position that Arfa owed fiduciary duties to the Property LLCs (Affirmation of Eric Levine, Esq., ¶ 5; Levine Reply Affirmation, ¶ 4).

a controlling member of either Argelt or Harlem Holdings, the Intervenor sufficiently allege facts of control on Arfa's part to survive the pleading stage. Consequently, the Intervenor should be afforded an opportunity to conduct discovery in order to flush out the details of their cause of action.

Accordingly, the Managers' and Arfa's motion to dismiss the first, fifth and six counterclaim is denied.

The remaining counterclaims are disposed of as follows: the second counterclaim for violation of RPL § 440-a is dismissed; the seventh counterclaim for breaches of the Intervenor's Operating Agreements is withdrawn insofar as the alleged breach alleges improper capital calls, and is otherwise dismissed as to breach of the Operating Agreements premised upon the extension of an improper interest-free loan, with leave to replead damages upon good cause shown; and the eighth counterclaim for declaratory judgment is dismissed, for the reasons set forth in this Court's transcript (see Transcripts April 23, 30, 2008).

Finally, the Investor Defendants' motion to dismiss the sixth and eighth causes of action of the second amended complaint for tortious interference with prospective business relations and with contract, is denied.

Arfa/Shpigel sufficiently allege that the Investor Defendants used wrongful means, namely, that they made malicious and disparaging statements to investors of the Property LLCs, and Eldan, in order to induce them not to do business with Arfa/Shpigel, absent justification (*Carvel Corp. v Noonan*, 3 NY3d

182, 190 [2004]).

Moreover, Arfa/Shpigel sufficiently allege that the Investor Defendants tortiously interfered with other Property LLCs' Operating Agreements, by lobbying for the removal of Shpigel as manager of the Property LLCs, in violation of the Operating Agreements' requirement that a 120 day notice of removal be accorded.

Accordingly, it is

ORDERED, that the motions to dismiss (039, 040, 041) are denied, as to the first, fifth and sixth counterclaims, and are otherwise granted, and the second, seventh and eighth counterclaims are dismissed, with leave to replead the seventh counterclaim; and it is further

ORDERED that the motion to dismiss (042) the sixth and eighth causes of action of the second amended complaint, is denied; and it is further

ORDERED that the parties are directed to serve answers within 10 days after service of a copy of this order with notice of entry.

Dated: September 8, 2008

ENTER:



J.S.C.

HON. CHARLES E. RAMOS

FILED
SEP 16 2008
COUNTY CLERK'S OFFICE
NEW YORK