

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

PRESENT: BERNARD J. FRIED

PART 60

Justice

E-FILE

Martin D. Yudell, et. al,

Plaintiffs,

INDEX NO. #600404-2008

- v -

MOTION DATE _____

Jerrold Gilbert, et. al,

MOTION SEQ. NO. #001

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This motion to dismiss is decided in accordance with the attached memorandum decision.

SO ORDERED

RECEIVED
APR 28 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 4/27/2010

J.S.C.

HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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 DIV. PART 60

----- X
MARTIN D. YUDELL & DONALD M. SPANTON, as Trustees of
the JULIUS YUDELL TRUST, Individually, and in the right of
BALDWIN HARBOR ASSOCIATES, and MARTIN D. YUDELL,
Individually

Plaintiffs,

- against -

Index No.
601090/2009

JERROLD GILBERT, Individually, SUSAN W. FINLEY, WENDY
W. CHAYET and STANLEY WEISER, as Trustees of the
WEISER FAMILY TRUST, JERROLD GILBERT &
JERROLD MORGULAS, as Trustees of the IRENE PSATY
TRUST, and BALDWIN HARBOR ASSOCIATES

Defendants.

----- X
APPEARANCES:

For Plaintiffs:

Scheichet & Davis, P.C.
767 Third Avenue, 24th Floor
New York, NY 10017
(William J. Davis, Esq.)

For Defendants:

D'Agostino, Levine & Landesman, L.L.P.
345 Seventh Avenue, 23rd Floor
New York, NY 10001
(George Tzimopoulos, Esq.)
(Eric. R. Garcia, Esq.)

Frydman LLC
18 East 48th Street, 10th Floor
New York, NY 10017
(David S. Frydman, Esq.)
(Yosef Y. Weintraub, Esq.)

FRIED, J.:

Plaintiffs are the trustees of the Julius Yudell Trust ("Yudell Trust"), individually
and in the right of Baldwin Harbor Associates ("BHA"), and Martin D. Yudell

("Yudell"). Defendants are Jerrold Gilbert, individually ("Gilbert"), Jerrold Gilbert and Jerrold Morgulas, the trustees of the Psaty Family Trust ("Psaty Trust"), Susan W. Finley, Wendy W. Chayet and Stanley Weiser, the trustees of the Weiser Family Trust ("Weiser Trust") and BHA. (**Motion Seq. Nos. 1 & 2 are consolidated for disposition.**)

According to the complaint, BHA is a New York joint venture general partnership formed in 1965 to acquire property, build and manage a shopping center in Nassau County ("Shopping Center") (Compl. at ¶ 1). The complaint states that Yudell Trust, the Psaty Trust and the Weiser Trust each have a 1/3 equity interest in BHA (Compl. at ¶ 2), Yudell is a trustee of the Yudell Trust (Compl. at Intro.) and Gilbert is a trustee of the Psaty Trust (Compl. at ¶ 3(b)). In 1991, Gilbert was appointed manager of BHA's shopping center after Yudell suffered a stroke. (Compl. at ¶ 12). The complaint states that Gilbert also assumed responsibility as attorney for BHA in 1991 and is responsible for distributing monthly reports on the financial status of the shopping center (Compl. at ¶12-13). Gilbert disputes his role as attorney for BHA. (Gilbert Aff. in Supp. of Psaty Def. Mot. to Amend. Ans. and Dismiss Compl. at ¶ 30). According to the complaint, the Joint Venture Agreement ("JV Agreement") provides for J. Yudell Realty to receive a 3% commission upon renewal of certain leases. (Compl. at ¶ 11(d)).

Apparently this is a partnership with a long history of disagreement. Tr. Mar. 19, 2010 at 8. This is not the first litigation among these parties, with the impetus to the 1990 Amendment to the JV Agreement being, at least in part, a settlement of prior actions. *Id.* More recently, between September 2006 and March 2007 a series of letters, phone calls and emails were exchanged between Yudell's attorney and Gilbert regarding dissatisfaction with Gilbert's management of the shopping center, Gilbert's alleged

conflict of interest, demands for Yudell to be included in meetings with prospective tenants, questions regarding preservation of potential legal claims for failure to pay rent by tenants and requests for information and reports. (Not. of Psaty Def. Mot. to Amend Ans. and Dismiss Compl. at Exh. H, I.)

The Complaint was filed in February 2008. Plaintiffs claim Gilbert failed to properly bill and collect rent, tax escalation reimbursement and common area maintenance charges (Compl. at ¶ 14), has given rent concessions with the approval of the other 2/3 of joint venture owners over the objection of plaintiffs (Compl. at ¶ 14(c)), has failed to preserve legal claims of BHA (Compl. at ¶ 14(d)), has failed to properly pay commissions due Yudell (Compl. at ¶¶ 14(e), 17) and has failed to send monthly operating statements or year-end compilations to plaintiffs, as required (Compl. at ¶¶ 18-20). Weiser filed its verified answer on April 27, 2009. Plaintiffs, Gilbert, Psaty and Weiser stipulated that the time to respond to the verified complaint for Gilbert and Psaty would be extended to the day twenty days after delivery by plaintiffs' counsel of a full set of exhibits referenced in the verified complaint. (Stipulation Extending Time to Ans. At ¶1, Apr. 29, 2008). The verified answer of Gilbert and Psaty was filed on June 4, 2008.

The complaint contains the following causes of action brought by the Yudell Trust, derivatively in the right of BHA: (1) partnership waste and mismanagement against Gilbert; (2) breach of management agreement against Gilbert; (3) breach of fiduciary duty against Trustees Jerrold Gilbert, Jerrold Morgulas, Susan W. Finley, Wendy W. Chayet and Stanley Weiser; (4) negligence against Gilbert; (5) professional malpractice against Gilbert; and (6) breach of the joint venture agreement against Gilbert.

The seventh cause of action in the complaint is brought by Yudell individually against BHA for breach of the joint venture agreement.

Weiser has moved to dismiss the third cause of action for breach of fiduciary duty pursuant to CPLR 3211(a)(7). Psaty and Gilbert together have moved for leave to amend their verified answer pursuant to CPLR 3025(b), to dismiss the seventh cause of action due to waiver and to dismiss the entire complaint pursuant to CPLR 3013, 3016, and 3211(a)(1) (3), (5), (7) and (10).

I. Causes of Action One To Six

The first six causes of action in the complaint are brought derivatively by Yudell on behalf of BHA. (Tr. Mar. 19, 2010 at 41, 8). A suit on a debt due, the partnership may be brought by one of the partners, but it must be brought on behalf of, and for the benefit of, the partnership. *Varlotta Const. Corp. v. Carla Dev. Corp.*, 886 F.Supp. 315, 317 (E.D.N.Y. 1995)(applying New York law). In bringing such a derivative suit the complaint generally must allege that a demand on the governing body was made to initiate action to pursue the claim. *Bansbach v. Zinn*, 1 N.Y.3d 1, 4 (2003); *Wandel v. Eisenberg*, 60 A.D.3d 77, 79 (1st Dep't 2009); *see, e.g.*, Fed. R. Civ. P. 23.1(b)(3)(A) (“This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce.”). The demand requirement “relieves courts of unduly intruding into matters of corporate governance . . . provides boards with reasonable protection from harassment on matters within their discretion” and discourages strike suits. *Bansbach*, 1 N.Y.3d at 9 (citing *Marx v. Akers*, 88 N.Y.2d 189, 194 (1996)).

But the demand requirement can be excused in some circumstances. *Barr v. Wackman*, 43 A.D.2d 689, 689 (1st Dep't 1973). "Demand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit." *Bansback*, 1 N.Y.3d at 9. Demand futility is shown when (1) a majority of the board is interested in the challenged transaction, (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) that the directors failed to execute their business judgment in approving the transaction. *Id.*; *Marx*, 88 N.Y.2d at 200; see also *Wandel v. Eisenberg*, 60 A.D.3d 77, 80 (1st Dep't 2009)(citing *Marx*).

In addition, CPLR 3013 requires that statements "in a pleading shall be sufficiently particular to give the court and parties notice of the transactions . . . intended to be proved and the material elements of each cause of action or defense." C.P.L.R. § 3013. Under Section 3013, a cause of action cannot be predicated solely on mere conclusory statements unsupported by factual allegations. *Greenberg v. Acme Folding Box. Co.*, 84 Misc.2d 181, 184-85 (Sup. Ct. Kings Co. 1975)(citing *Taylor v. State*, 36 A.D.2d 878, 878 (3d Dep't 1971)). The essential facts required to give notice must be stated but can be supplemented by conclusory allegations. *Foley v. D'Agostino*, 21 A.D.2d 60, 63 (1st Dep't 1964).

In their motion to dismiss, the Defendants claim that the failure of Plaintiffs to make a demand on BHA to bring a suit against Gilbert before bringing the derivative causes of action is fatal to Plaintiffs' case. (Psaty Defs' Mem. in Supp. of Mot. to Dismiss Compl. and Amend Ans. at 18; Tr. Mar. 19, 2010 at 7, 13-15.) Plaintiffs respond that demand would be futile by stating in the complaint that "In view of the acts, practices and courses of conduct on the part of the defendants as alleged herein, a

demand upon the joint venture partners of BHA to take action against the individual defendants would be futile.” (Compl. at ¶ 4). Defendants Gilbert and Psaty counter that the complaint fails to adequately plead demand futility as it fails to allege with particularity that a majority of directors were interested in the transaction. (Psaty Defs. Mem. in Supp. of Mot. to Dismiss Compl. and Amend Ans. at 18-20; Gilbert Aff. in Supp. of Psaty Def. Mot. to Amend. Ans. and Dismiss Compl. at ¶ 37, 40).

The first question is whether the complaint alleges that a demand was made upon BHA. It does not; the complaint instead alleges demand futility. (Compl. at ¶ 4).

The first prong of demand futility is met when the complaint alleges director interest. *Marx*, 88 N.Y.2d at 200. This “interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is 'controlled' by a self-interested director.” *Bansbach*, 1 N.Y.3d at 9. The complaint here does not directly allege any self-interest in any specific transactions, but instead alleges a “de facto alliance with Gilbert in Support of his exclusive management and control of virtually every BHA transaction during the past 17 years, and his opposition to the exercise of the partnership rights of the Yudell Trust.” Compl. at ¶ 3(b). However, there are not allegations of self-interest. The complaint does not allege that the Psaty partners or the Weiser partners benefitted more than, or to the detriment of, Yudell. Nor does the complaint allege that Weiser controlled Psaty, or vice-versa. It merely alleges that Weiser and Psaty each supported Gilbert by voting to approve decisions on rent and other lease concessions suggested by Gilbert and that Yudell did not get the outcome he desired in these votes. Tr. Mar. 19, 2010 at 40; Compl. at ¶ 40. The complaint alleges that plaintiffs have repeatedly requested to remove Gilbert as

manager and that defendants have refused to do so. Compl. at ¶ 12. The complaint details the claimed acts of Gilbert and alleges that Gilbert received unstinting support from the other joint venturers. Compl. at ¶¶ 14, 19, 40. In addition, the complaint notes that Gilbert is a trustee of one of the joint venture partners. Compl. at ¶ 3(a). The complaint also concludes that the other partners “oppressed the Plaintiff holder of minority equity rights,” but does not allege with particularity the details of how this was done or show any instances of self-interest by the Psaty or Weiser partners. Even though Yudell may not like the outcome of the votes on Gilbert's decisions, the complaint does not allege with particularity that any of the other partners were interested in any transactions. I find that the first prong of demand futility has not been met.

The second prong of demand futility is met when the complaint alleges with particularity that the managing board did not fully inform themselves about challenged transactions. *Marx*, 88 N.Y.2d at 200. “The ‘long-standing rule’ is that a director ‘does not exempt himself from liability by failing to do more than passively rubber-stamp the decisions of the active managers.’” *Bansbach*, 1 N.Y.3d at 9 (citing *Marx*, 88 N.Y.2d at 200). Here, the complaint merely states that the other partners showed “unstinting support” of Gilbert's management of the shopping center (Compl. at ¶ 40), but does not allege in any way that the other partners did not fully inform themselves in deciding any of the transactions they supported. I find that the second prong of demand futility has not been met.

The third prong of demand futility is met when the complaint alleges with particularity that challenged transactions were so egregious on their face that they could not have been the product of sound business judgment. *Marx*, 88 N.Y.2d at 200.

However, the submitted documents show that the transactions in question were discussed at meetings with all partners present and it was decided that, in order to keep certain tenants, some items such as common area maintenance and tax charges would be reduced or not collected. *See, e.g.*, Not. of Psaty Def's Mot. to Amend Ans. and Dismiss Compl., Exh. D at 8. The complaint does not allege with particularity that such decisions were so egregious on their face that they could not have been the product of sound business judgment, the complaint merely states that such decisions happened and that Yudell did not agree with all of them. *See* Compl. at ¶¶ 14-17. I find that the third prong of demand futility has not been met.

As the complaint merely states a conclusion regarding demand futility and does not plead any of the demand futility circumstances with particularity, the complaint does not allege demand futility and thus demand was not excused. Since demand was not excused and a demand was not made upon BHA, plaintiffs' first six causes of action are dismissed for failing to meet the particularity requirements of Section 3013 in the complaint, and for lack of standing to bring a derivative action on behalf of BHA.

II. The Seventh Cause of Action - Failure to Pay Commissions

The seventh cause of action is brought by Yudell, individually, against BHA directly, seeking damages caused by failure to pay certain realty commissions apparently due under the JV Agreement. The agreement states:

Except as otherwise agreed in writing, no Joint Venturer shall be entitled to receive any real estate brokerage commission or leasing commission on any new or existing leases or renewal leases for occupancy of space in the Shopping Center except with the unanimous consent of the Joint Venturers. The Joint Venturers may hereafter enter into agreements to pay such real estate brokerage or leasing commissions to third parties subject to unanimous consent of the Joint Venturers . . . Each of J. Yudell, M. Yudell and Realty acknowledges and agrees that he and it are not entitled

to receive any further real estate brokerage, leasing commissions or payments of any kind in connection with leases heretofore made for occupancy of any space in the Shopping Center . . . except that **Realty** shall be entitled to a three (3%) percent commission upon renewal of the current leases for space in the Shopping Center of (A) Waldbaum's extension space as set forth in the Amendment to the Waldbaum's Lease dates April 1, 1971, and (B) American Savings Bank.

(Amendment 1990 at ¶¶ 10, 12)(emphasis added). The documents submitted do not show that payment was made under the contract, do not show that Yudell Realty did not perform his duties under the agreement and do not show that the Waldbaum's or American Savings bank leases were not renewed.

Defendants claim a lack of standing, as Yudell Realty is owed the commission under the agreement but Yudell individually brings this cause of action. (Psaty Def. Mem. in Sup. Of Mot. to Dismiss Compl. and Amend Ans. at 23). The “doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution. *Security Pacific Nat'l Bank v. Evans*, 31 A.D.3d 278, 279 (1st Dep't 2006). The most critical requirement of standing is the presence of an injury in fact, which is an actual legal stake in the matter being adjudicated. *Id.* Separate legal entities of a parent and subsidiary can be disregarded where evidence submitted show complete domination of one by the other. *Gmerek v. Scrivner, Inc.*, 221 A.D.2d 991, 991-92 (4th Dep't 1995).

The documents submitted show that J. Yudell Realty, Inc. is a party and signatory to the amendment to the JV Agreement contained in the Settlement Agreement of 1990 (Amendment 1990 at 1, 12) and also to the 1972 amendment to the JV Agreement. (1972 Amendment, ¶¶ 5, 6). Both times Julius Yudell signed on behalf of Realty. But here

there has not been evidence submitted to show complete domination of one entity by the other. There is also no evidence to show that Yudell has an injury in fact or actual legal stake in this matter; the injury in fact belongs to J. Yudell Realty who is not a party to this complaint.

Accordingly, I find that Yudell does not have standing to bring the cause of action for commissions due J. Yudell Realty.

For the foregoing reasons, it is hereby

ORDERED that Motion Seq. Nos. 1& 2 to dismiss the complaint are granted, with costs and disbursements, as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 27, 2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED