SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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DAVID LANDES, NAOMI S. LANDES, HOWARD N. GILBERT, STEPHEN J. LANDES, RAANANAH KATZ and AVIVAH LITAN individually and derivatively on behalf of PROVIDENT REALTY PARTNERS II, L.P.,

Plaintiff,

-against-

PROVIDENT REALTY PARTNERS II, L.P., PRP II CORP., BRG GRAMERCY UNITS LLC, DANIEL BENEDICT, IMICO UN RENTAL LLC, and JOHN DOES 1-50,

Defendants.

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DECISION AND ORDER

Index No. 155096/2014

Mot. Seq. 005

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, breach of contract, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, misappropriation of a business opportunity, unjust enrichment and disgorgement, constructive trust, and an accounting, plaintiffs, who are all limited partners of Provident Realty Partners II, L.P. ("PRP II LP") move pursuant to CPLR 3212(b) for summary judgment. Defendants IMICO UN Rental LLC ("Imico"), PRP II Corp. ("PRP II Corp."), BRG Gramercy Units LLC ("BRG"), and Daniel Benedict ("Benedict") oppose. Imico cross-moves for summary judgment, which plaintiffs oppose. Plaintiff also moves for a protective order. Defendants' oppose.

FACTS

PRP II Corp. is the general partner of PRP II LP, and pursuant to the Limited Partnership Agreement, dated April 15, 1993 (the "LPA") owed a fiduciary responsibility to PRP II LP. PRP II Corp. was prohibited from "taking or permitting another to take any action with respect to the assets of the Partnership which action is not for the benefit of the Partnership." LPA, §6.03(b). On March 28, 2007, Imico and PRP II LP entered into the Operating Agreement of 303 BRG-IMICO LLC (the "Operating Agreement"), with each receiving a 50% interest in 303 BRG-IMICO LLC ("303 LLC"), the purpose of which is to acquire, manage and operate certain property located in Manhattan. Under the agreement, Imico was prohibited from

> assigning, pledging, hypothecating, transferring or otherwise disposing of all or any part of his interest in the Company, including, without limitation the capital, profits or distributions of the Company without the prior written consent of the Managing Member, as well as Members holding at least sixty-five (65%) of the Member's Percentage Interest, in each instance.

Operating Agreement, §14.1.

Subsequently, Imico sold 49.9% of its interest in 303 LLC to BRG, of which Benedict is the managing member, for $499,900 (the "Transaction"). This Transaction was allegedly consummated without the consent of PRP II LP. Additionally, the Transaction amount was premised upon a valuation of the property of $2.8 million, which plaintiff alleges is well below the actual value of the property, which is purportedly in excess of $4 million. Plaintiff alleges that the Transaction

constituted a business opportunity that rightfully belonged to PRP II LP. This action was commenced shortly thereafter.

ANALYSIS

Legal Standard

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. See id. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986).

Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The

court's role is "issue-finding, rather than issue-determination." Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

Plaintiffs' Causes of Action Against Benedict and PRP II Corp.

Plaintiffs' motion for summary judgment for breach of contract against Benedict and PRP II Corp. is denied. To determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing. Ashwood Capital, Inc. v OTG Mgt., Inc., 99 A.D.3d 1 (1st Dept 2012); Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s, 243 A.D.2d 1, 6 (1st Dept 1998). A clear, complete document will be enforced according to its terms. Ashwood Capital, 99 A.D.3d at 7.

When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide. Id. Whether there is ambiguity "is determined by looking within the four corners of the document, not to outside sources." Kass v Kass, 91 N.Y.2d 554, 566 (1998). The court examines the parties' obligations and intentions as manifested in the entire agreement and seeks to afford the language an interpretation that is sensible, practical, fair, and reasonable. Riverside S. Planning Corp. v CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404 (2009); Abiele Contr. v New York City School Constr. Auth., 91 N.Y.2d 1, 9-10 (1997); Brown Bros. Elec. Contr. v Beam Constr. Corp., 41 N.Y.2d 397, 400 (1977).

A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning. White v Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v Philles Records, 98 N.Y.2d 562, 569 (2002). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v Paul, 66 N.Y.2d 570, 573 (1986).

This court has already determined at the motion to dismiss phase, that the contract is ambiguous. See Landes v. Provident Realty Partners II, L.P., 2015 WL 7849908 (Sup. Ct. N.Y. Cnty. Dec. 3, 2015). Plaintiffs' have not proffered any further evidence during the discovery phase that shows that they are entitled to summary judgment as a matter of law. Instead, plaintiffs' continuously, and erroneously rely upon the First Department's holding in an appeal of this court's decision denying defendants motion to dismiss. See Landes v. Provident Realty Partners II, L.P., 137 A.D.3d 694 (1st Dept 2016) ("the purchase of the Imico interest was a corporate opportunity.") Id. at 694. This statement is dicta as defendants' motion to dismiss was denied as violating the single motion rule. The court went on to state that "[w]ere we to read the merits" the documentary evidence must dispositively refute plaintiffs' allegations. Defendants failed to meet this standard.

As plaintiffs' have itself admitted, a motion to dismiss and a motion for summary judgment are distinct in that a motion to dismiss addresses the sufficiency of the pleadings, while a motion for summary judgment searches the record and

looks to the sufficiency of the underlying evidence. See Plaintiffs' Reply Memo, p. 9; see also Tenzer, Greenblatt, Fallon & Kapln v. Capri Jewelry, Inc., 128 A.D.2d 467, 469 (1st Dept 1987); Moses v. Savedoff, 96 A.D.3d 466, 468 (1st Dept 2012) ("As a threshold matter, we note that the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion.").

The First Department in RXR WWP Owner LLC v. WWP Sponsor, LLC, 145 A.D.3d 494 (1st Dept 2016), held that "our earlier holding, on a motion to dismiss, brought pursuant to CPLR 3211...does not constitute 'law of the case' barring [a party] from moving for summary judgment, which is subject to a different standard of review." Id. Therefore, the First Department's holding in Landes is not the law of the case and this court is not bound by that ruling, as it was made on a motion to dismiss.

The contract at issue is ambiguous and therefore, plaintiffs' motion for summary judgment is denied. The LPA states that a

> general partner...[may] engage in other business and investment activities both for their own accounts and for others, and nothing contained herein shall be deemed to prevent any of such parties from continuing such activities, or initiating further such activities...even in instances where such activities might be considered within the scope of Partnership operations.

§8.02. However, a carve out clause also states that any such authority taken by Benedict is nullified as such authority is limited "except insofar as is expressly

provided in this Agreement." Additionally, plaintiffs' point to §6.03(b) of the LPA, which allegedly prohibits Benedict from "taking or permitting another to take any action with respect to the assets or property of the Partnership which action is not for the benefit of the Partnership."

Neither party, for purposes of this motion for summary judgment, has adequately shown whether the Transaction was an asset of the partnership. Therefore, the LPA is still ambiguous. The construction of an ambiguous contract is a matter for the fact finder and summary judgment is inappropriate. China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd., 95 A.D.3d 769, 770 (1st Dept 2012). As plaintiffs' have failed to adequately proffer evidence that the opportunity to engage in the Transaction was an asset of the Partnership, plaintiffs' motion for summary judgment of the first cause of action for breach of contract and the second cause of action for a breach of fiduciary duty are denied.

Plaintiffs' motion for summary judgment for its fourth cause of action for misappropriation of a business opportunity is denied. Summary judgment will be granted when a party has shown the misappropriation of corporate assets. See Kurtzman v. Bergstol, 40 A.D.3d 588 (2d Dept 2007). As discussed *supra*, plaintiffs' reliance on the First Department's holding in Landes that this was a corporate opportunity belonging to plaintiffs' is misplaced. As plaintiffs' have not given any

further evidence showing that this was a corporate opportunity, their motion for summary judgment is denied.

Plaintiffs' motion for summary judgment for its fifth cause of action for unjust enrichment and disgorgement is denied. As discussed immediately above, plaintiffs' have failed to adequately allege that this was a misappropriated asset and mistakenly rely on Landes. See Mobarak v. Mowad, 117 A.D.3d 998 (2d Dept 2014) (allowing for a claim of unjust enrichment where a member of an LLC improperly and personally obtains a benefit as a result of any benefits conferred through an improper transaction.)

For the same reasons as cited above, plaintiffs' motion for summary judgment for its sixth cause of action for a constructive trust, is denied. Once a plaintiff has established a diversion of corporate opportunity, the law will impress a constructive trust in favor of the corporation upon the property acquired. See Poling Transp. Corp. v. A&P Tanker Corp., 84 A.D.2d 796 (2d Dept 1981). As plaintiffs' have not established a diversion of a corporate opportunity, their motion for summary judgment is denied.

Plaintiffs' Motion for Summary Judgment Against BRG Gramercy and Imico

Likewise, plaintiffs' motion for summary judgment as against BRG and Imico are denied. In order to succeed on its third cause of action for aiding and abetting a

breach of fiduciary duty, plaintiff must establish a fiduciary duty owed to plaintiff, a breach of that duty, that the defendant knowingly induced or participated in the breach, and defendant's substantial assistance in effecting the breach, with resulting damages. Ito v. Suzuki, 57 A.D.3d 205 (1st Dept 2008); Kaufman v. Cohen, 307 A.D.2d 113, 125 (1st Dept 2003). Plaintiffs' argument for aiding and abetting a breach of fiduciary duty are predicated on its ability to establish a fiduciary duty and subsequent breach by Benedict and PRP II LP. See Plaintiff's Reply Memo, pp. 11-12. Plaintiff has not adequately established a fiduciary duty and subsequent breach. See *supra*. Therefore, it cannot show a cause of action for aiding and abetting a breach of fiduciary duty. Subsequently, plaintiffs' motion for summary judgment is denied.

Imico's Cross-Motions for Summary Judgment

As to the Aiding and Abetting Claim

Imico's cross-motion for summary judgment as to plaintiffs' cause of action for aiding and abetting is granted. Even if plaintiff is able to show that they were owed a fiduciary duty by Imico, plaintiff cannot show that Imico knowingly induced or participated in the breach and substantially assisting in effecting the breach. See Ito, 57 A.D.3d 205; Kaufman, 307 A.D.2d at 125.

Plaintiff mistakenly relies upon Cromer Fin. Ltd. v. Berger, 2003 WL 21436164, at *9 (S.D.N.Y. Jun 23, 2003) and Fraternity Fund Ltd. v. Beacon Hill Asset Agmt., LLC, 479 F.Supp.2d 349, 368 (S.D.N.Y. 2007) for the proposition that in New York a willful blindness test would be an appropriate substitute for actual knowledge when determining an aiding and abetting claim. However, not only is this court not bound by federal law, but the First Department has made it clear that in New York, in order to survive a motion for summary judgment on a claim for aiding and abetting a breach of fiduciary duty, plaintiff must establish that Imico had actual knowledge of any breach of fiduciary duty. See Schroeder v. Pinterest, Inc., 133 A.D.3d 12, 25 ("actual knowledge of the breach of the duty is required."); Oster v. Kirschner, 77 A.D.3d 51, 56 (1st Dept 2010); Kaufman, 307 A.D.2d at 125.

Similarly, plaintiffs' reliance on the First Department's holding in AIG Fin. Prods. Corp. v. ICP Asset Mgt., LLC, 108 A.D.3d 444 (1st Dept 2013) is also misguided. The First Department held that "actual knowledge need only be pleaded generally, cognizant, *particularly at the prediscovery stage*, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind." Id. at 446 (emphasis added). "All that is needed to overcome a motion to dismiss a fraud claim is a rational inference of actual knowledge." Id. In AIG, the court limited its analysis to the requirements for pleading a cause of action for aiding

and abetting at the pre-discovery phase of litigation. At the summary judgment stage, as is the case here, actual knowledge is required. See *supra*.

Plaintiffs' allege that Imico engaged in the Transaction without offering its shares of 303 LLC to PRP II LP, without obtaining assurances that PRP II LP was authorized to engage in the Transaction and without obtaining PRP II LP's prior written consent to the Transaction. See Plaintiffs' Reply Memo, p. 12. Plaintiff has not made any allegations in its complaint or motion papers that Imico had the requisite actual knowledge required for an aiding and abetting claim. Furthermore, even if this court were to accept plaintiffs' allegation that the proper standard in New York is a willful blindness test, Imico's motion for summary judgment should be granted. Plaintiffs' allegations do not support a claim for aiding and abetting because plaintiffs' cannot establish that Imico had a duty to investigate whether PRP II LP was in breach of its own fiduciary duty.

Even if this court accepted plaintiffs' claim and found that there was actual knowledge, plaintiffs' cannot establish the next prong for an aiding and abetting claim, substantial assistance to the breach of duty. A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator. See Kaufman, 307 A.D.2d at 126; King v. George Schonberg & Co., 233 A.D.2d 242 (1st Dept 1996); National Westminster Bank USA v. Weksel, 124 A.D.2d 144 (1st Dept 1987). Substantial assistance "occurs when a

defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." Kaufman, 307 A.D.2d at 126 (internal citations omitted).

Under New York law, "a fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005), quoting Restatement [Second] of Torts § 874, Comment a). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" Id. "It is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466 (1989).

A non-managing member of an LLC who has a 50% interest in the LLC, such as Imico does not owe a fiduciary duty to a managing member of the LLC or directly to the LLC. Although not binding, the court's ruling in Kalikow v. Shalik, 43 Misc.3d 817 (Sup. Ct. Nass. Cnty. Feb. 26, 2014), is persuasive. In Kalikow, two sole members of an LLC had a 50% interest, with only one of the members identified as the managing member. The court held that based upon the language of New York

Limited Liability Company Law, §409, and the absence of language related to the duty of good faith or loyalty on behalf of a non-managing member of an LLC, that non-managing members do not owe a fiduciary duty to managing members of the LLC or to the LLC itself. Id. at 825-26.

"A member who is not a manager does not owe a duty to the LLC or its members except to the extent he or it participates in the management of the LLC." 1 N.Y. Prac., New York Limited Liability Companies and Partnerships §1:8; see also 51 AmJur. 2d Limited Liability Companies §11 ("members of a limited liability company are like shareholders in a corporation in that they do not owe a fiduciary duty to each other or to the company, and that as long as members of a limited liability company are not acting in a managerial capacity, they do not have fiduciary duties to one another unless such fiduciary duties are set forth in the operating agreement.") There is no question that 303 LLC is manager-managed and that Imico is a non-managing member.

Plaintiffs' reliance on case law that stands for the proposition that non-managing members owe fiduciary duties to the LLC are unavailing. In Parr v. Ronkonkoma Realty Venture I, LLC, 65 A.D.3d 1199 (2d Dept 2009), the court found that the fiduciary relationship was established with a "promise, a transfer of [the] title to the properties as beneficial owner of those properties." Id. at 1202). In A.G. Homes, LLC v. Gerstein, 52 A.D.3d 546 (2d Dept 2008), the fiduciary duty

was established when title was transferred to a member of the LLC who promised to reconvey the property back to the LLC. Id. at 547. In any event, it is unclear in either of these cases whether the defendants at issue were members or managers of the LLC. Therefore, plaintiff cannot adequately show that Imico gave substantial assistance to a breach of duty and Imico's motion for summary judgment is granted.

As to the Breach of Fiduciary Duty Claim

Imico's motion for summary judgment dismissing the unpleaded breach of fiduciary duty claim is granted. In order to establish a breach of fiduciary duty, plaintiff must show that Imico owed a fiduciary duty, Imico committed misconduct and plaintiff suffered damages caused by that misconduct. Bury v. Madison Park Owner LLC, 84 A.D.3d 699 (1st Dept 2011). As discussed, supra, plaintiffs' cannot establish that they were owed a fiduciary duty by Imico.

However, even if plaintiffs' could establish that they were owed a fiduciary duty, Imico's motion for summary judgment would still be granted as plaintiffs' cannot establish that Imico breached its duty. Plaintiffs' allege that Imico did not obtain assurances that PRP II LP was authorized to engage in the Transaction, did not obtain PRP II LP's prior written consent to the Transaction and that 303 LLC consented to the Assignment of Membership Interest and not PRP II LP. See Plaintiffs' Reply Memo, p. 21-22.

However, the 303 LLC Agreement states that "the prior written consent of the Managing Member, as well as Members holding at least sixty-five (65%) of the Members' percentage interest" is all that is required for a transfer of ownership interests. Benedict was authorized to sign documents on behalf of PRP LP, as the General Partner. See LPA §6.02(b) (the General Partner [Benedict] shall have the right in "the making of all decisions relating to the acquisition, sale, exchange…for cash, other property, or on terms, of all or any part of, or interest in, the Property…")

In rebuttal, plaintiffs' claim that Benedict was an interested party in the Transaction and therefore prohibited from consenting to the Transaction and that PRP LP was owed a right of first refusal, to wit that Imico should have offered its shares of 303 LLC to PRP LP. Plaintiffs' have not offered any case law or point to any provision in any of the agreements that Benedict, who was authorized to act on behalf of PRP could not sign documents that he had an alleged interest in. As to plaintiffs' claims regarding PRP LP's right of first refusal, the 303 Agreement does not mention any rights of first refusal.

The Agreement "sets forth the entire agreement of the parties hereto with respect to the subject matter…and shall be the sole source of agreement of the parties." See Operating Agreement §27.5. Plaintiffs' have not proffered any evidence that they were owed a right of first refusal. As to the possible related claim that §14.1 of the Operating Agreement states that Imico is prohibited from

"assigning, pledging, hypothecating, transferring or otherwise disposing of all or any part of his interest in the Company", Benedict, as the General Partner, clearly has the authority to enter into the Transaction. Therefore, plaintiffs' argument regarding the 303 LLC Agreement is without merit.

Plaintiffs' argument that Imico was required to obtain PRP II LP's authorization or prior written consent to engage in the transaction is also meritless. The LPA states that

> No person dealing with the General Partner [Benedict] shall be required to determine its authority to make any commitment or undertaking on behalf of the Partnership, nor to determine any fact or circumstances bearing upon the existence of its authority.

LPA, §6.05. Imico relied upon Benedict's actual authority to enter into the Transaction. By the very language of the LPA, Imico is not required to investigate Benedict's authority to enter into the Transaction. As a result, Imico's motion for summary judgment dismissing the unpleaded breach of fiduciary duty claim is granted.

Plaintiffs' Motion for a Protective Order

Plaintiffs' order for a protective order is granted. "The court may at any time on its own initiative...make a protective order denying, limiting, condition or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice

to any person or the courts." CPLR §3101(a). As per the order of the court, plaintiffs' have provided adequate affidavits as to the unavailability or unreasonableness of the requested deponents.

Specifically, Mr. Gilbert has advanced stage Parkinson's disease and is unable to safely ambulate alone. See Aff. of Dr. Cornella. Additionally, he has cognitive difficulties with his working memory and is therefore precluded from being deposed. Id. Raananah Katz, and Avivah Litan were not original investors in PRP II LP, inherited their interest from their mother and have no knowledge of the organization or of the partnership agreement. See Aff. of Ira Tokayer. Furthermore, Ms. Katz and Ms. Litan have no knowledge of Imico's transfer of its interest in 303 BRG-Imico LLC. Id. Taken together with Mr. Tokayer's representation that he has no intention to call Ms. Katz, Ms. Litan or Mr. Gilbert as witnesses during trial, they are precluded from being deposed in this action. Therefore, plaintiffs' protective order is granted.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment for its first cause of action for breach of contract as against Benedict and PRP II Corp., is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment for its second cause of action for breach of fiduciary duty as against Benedict and PRP II Corp., is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment for its third cause of action for aiding and abetting a breach of fiduciary duty as against BRG Gramercy and Imico, is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment for its fourth cause of action of misappropriation of a business opportunity as against all defendants, is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment for its fifth cause of action for unjust enrichment and disgorgement as against Benedict and PRP II Corp., is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment for its sixth cause of action for a constructive trust, is denied; and it is further

ORDERED that Imico's cross-motion for summary judgment as to plaintiffs' third cause of action for aiding and abetting a breach of fiduciary duty, is granted; and it is further

ORDERED that Imico's cross-motion for summary judgment as to the unpleaded breach of fiduciary duty claim, is granted; and it is further

ORDERED that plaintiffs' motion for a protective order is granted; and it is further

ORDERED that parties are to appear for a status conference on April 6, 2017 at 2:30 P.M. at 60 Centre Street, Room 218.[1]

Date: January 31, 2017
New York, New York

Anil C. Singh

[1] By separate order, parties are ordered to mediation.