

Moyal v Tripost Capital Partners, LLC

2019 NY Slip Op 30947(U)

April 4, 2019

Supreme Court, New York County

Docket Number: 650824/2017

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM

Justice

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DAVID MOYAL, 1 800 POSTCARDS, INC., ONE 2 ONE ON
VARICK, LLC, NEXT PRINTING & DESIGN, INC.,

Plaintiff,

- v -

TRIPOST CAPITAL PARTNERS, LLC, 121 PROP OWNER
LLC, 121 PROP LEASE OWNER LLC, 121 RETAIL OWNER
LLC, 121 RETAIL LEASE OWNER LLC, 121 VARICK STREET
GROUP, LLC, TP VARICK LLC, BRADLEY CARROLL, TODD
SILVERMAN, BCDC HOLDINGS, LLC, TSBC LLC, DWKI ASSET I,
LLC, TS VARICK, LLC, BC VARICK, LLC, CKR HOLDINGS,
LLC, LONDON VARICK LLC, SOUTH OCEAN, OF AN UNKNOWN
ENTITY TYPE, TRIPOST INVESTMENTS LLC, TP VARICK MM
LLC, TP-F VARICK LLC, 121 VARICK STREET CORP.,
JONATHAN NOTARO, JOHN DOE 1, JOHN DOE 2,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 167, 168, 169, 170,
171, 172, 173, 174, 175, 176, 177, 181, 182, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236,
239, 241

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action for, inter alia, breach of fiduciary duty, defendants 121 Varick Street Corp. (“the Coop”) and Jonathan Notaro (“Notaro”) (together “Defendants”) move to dismiss the verified amended complaint by plaintiff David Moyal (“Moyal”), 1 800 Postcards Inc. (“Postcards”), One 2 One On Varick LLC (“One 2”), and Next Printing and Design, Inc. (“Next”) (collectively, “Plaintiffs”) pursuant to CPLR § (a)(1) and (7).

Moyal is the owner of Postcards, One 2 and Next, entities which, prior to the joint venture described below, owned shares in or leased retail and other commercial space in a commercial cooperative building located at 121 Varick Street, New York, New York

(the “Building”). Moyal, through other corporate entities, also had an ownership interest in the fourth, seventh, eighth and twelfth floors of the Building (the “Target Floors”). The Coop owns the building, and Notaro is a member of the Coop’s Board of Directors.

Moyal and TP Varick formed a limited liability company known as 121 Varick Street Group LLC (the “Company”). On August 27, 2015, Moyal and TP Varick executed a Limited Liability Company Agreement (“Agreement”) to govern the management and operations of the Company. TP Varick is a subsidiary of defendant TriPost Capital Partners, LLC (“TriPost”), the sole shareholder of TP Varick, and defendants Bradley H. Carroll (“Carroll”) and Todd D. Silverman (“Silverman”) are partners in TriPost.

The Agreement, among other things, provided that the Company “shall endeavor to acquire, operate, lease, redevelop, and finance” shares and appurtenant proprietary leases to the Target Floors. Moyal states that his intent in partnering with TP Varick was to leverage his shares and appurtenant proprietary leases and interest in the retail leases to acquire additional interests in the Building. Moyal alleges that he would not have entered into the Agreement without the requirement that TP Varick would make commercially reasonable efforts to acquire the Target floors.

TP Varick was designated the Managing Member of the Company, with “sole authority to authorize and approve all material matters pertaining to the business of the Company.” However, “major decisions” – such as liquidation or dissolution of the Company, any act in contravention of the Agreement, acquiring assets other than those

contemplated in the Agreement and acquiring the Target Floors for a purchase price exceeding a specified amount – required approval by unanimous vote of all members. Moyal’s approval for major decisions would not be required if he engaged in a “bad act,” defined in the Agreement to include a “breach of any provisions of this Agreement or any lease.”

In December 2015, TP Varick notified Moyal that he had committed bad acts by not making rent payments and not transferring a security deposit. According to Moyal, no bad acts occurred because he had an agreement with Carroll that Moyal “could leverage his membership interest against any rent obligations.” Plaintiffs allege that Carroll and Silverman acted in bad faith, wrongly claiming that Moyal engaged in bad acts, in order to use the Agreement’s “cram down” provision to reduce Moyal’s interests in the Company.

Plaintiffs further allege that, despite representations by Carroll and Silverman that they intended to “acquire, hold, own and manage” the assets, and would work to acquire additional floors in the Building and find tenants for the third and sixth floors, TP Varick’s “actual purpose in partnering with Moyal was to improperly dilute his interests and dilute his assets, without properly compensating Moyal.” The complaint alleges that TP Varick misrepresented the objectives and goals of the Company, refused to comply with the terms of the Agreement, and worked to deprive Moyal of his interest in the Building.

Plaintiffs allege that TP Varick, through its principals Carroll and Silverman, engaged in secret negotiations with Notaro to sell the Building's retail spaces to the Coop and the sixth floor space to a business associate of Notaro, for far less than market value.

The causes of action against the Coop and Notaro arise out of those negotiations. Plaintiffs allege that Notaro sought to personally benefit himself and a friend by negotiating a deal with TP Varick to purchase the retail leases at below market rate prices, by threatening to prohibit the sale of the third and sixth floors unless the retail leases were terminated or transferred to the Coop, and by prohibiting Plaintiffs' access to the retail spaces.

By stipulation dated April 24, 2018, Plaintiffs discontinued with prejudice their claims against all defendants (the "Discontinued Defendants") except the Coop and Notaro.¹ Defendants now move to dismiss the two causes of action against them, for aiding and abetting a breach of fiduciary duty and tortious interference with contract, on the basis of documentary evidence (*i.e.* the Agreement) and for failure to state a cause of action.

Discussion

On a CPLR 3211 motion to dismiss, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs

¹ The verified amended complaint asserted the following causes of action: breach of contract/rescission, fraud, fraudulent inducement, promissory estoppel, breach of fiduciary duty, breach of the duty of loyalty, breach of implied covenant of good faith and fair dealing, an accounting, aiding and abetting a breach of fiduciary duty, tortious interference with contract, and injunctive relief.

the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). “The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (citation omitted). However, “‘bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence’ are not presumed to be true and accorded every favorable inference.” *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept. 1999) (citation omitted),

Dismissal under CPLR 3211 (a) (1) is warranted “where documentary evidence and undisputed facts negate or dispose of claims in the complaint or conclusively establish a defense.” *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dept. 2006). In addition, dismissal is appropriate “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-142 (2017).

1. Aiding and Abetting Breach of Fiduciary Duty

“A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.” *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003). Further, to be

deemed a knowing participant in a breach of fiduciary duty, one must provide “substantial assistance” to the primary violator and “affirmatively assist[], help[] conceal or fail[] to act when required to do so, thereby enabling the breach to occur.” *Id.* at 126 (internal citations omitted).

Here, Plaintiffs discontinued their breach of fiduciary duty claim against TP Varick and the other Discontinued Defendants and offer no authority for continuing a claim for aiding and abetting a breach of fiduciary duty under these circumstances. In the absence of a viable claim for breach of fiduciary duty, there can be no claim for aiding and abetting a breach of fiduciary duty. *See Kaufman*, 307 A.D.2d 113 at 125.

Even if the aiding and abetting claim survives the settlement of the breach of fiduciary duty claim, and assuming without deciding the sufficiency of the claim, Plaintiffs’ allegations insufficiently allege that the Coop and Notaro knowingly induced or participated in such a breach. As explained by Plaintiffs’ counsel at oral argument, the alleged breach of fiduciary duty by TP Varick, as it relates to the Coop and Notaro, was that it engaged in secret negotiations with the Coop to sell retail leases at below-market value. Plaintiffs’ cause of action for aiding and abetting breach of a fiduciary duty alleges that Notaro and the Coop, “upon information and belief,” “funded, assisted, coordinated and directed Carroll and Silverman” in their fraudulent scheme “by agreeing with and attempting to purchase the retail leases in violation of the Company Agreement

and for below market value.” They thereby “substantially assisted, aided and abetted [Carroll and Silverman’s] fraud and breach of fiduciary duty.”²

Plaintiffs, however, fail to adequately allege that the Coop and Notaro had actual knowledge of a breach of fiduciary duty by TP Varick. *See Epiphany Community Nursery Sch. v. Levey*, __ AD3d __, 94 NYS3d 1, *6, 2019 NY Slip Op 00842 (1st Dept. Feb. 5, 2019) (holding that to establish a claim for aiding and abetting a breach of fiduciary duty, the defendant “must have actual knowledge, and not constructive knowledge of the breach of fiduciary duty.”). Moreover, Plaintiffs’ allegations are merely conclusory as they allege no facts to support their claim that Defendants “funded, assisted, coordinated and directed” Carroll and Silverman. *See Schroeder v. Pinterest*, 133 A.D.3d 12, 25 (1st Dept. 2015) (stating that a plaintiff asserting a claim for aiding and abetting a breach of fiduciary duty “must plead this cause of action with particularity; conclusory allegations are insufficient.”).

Even giving Plaintiffs every favorable inference, Plaintiffs allegations simply do not show that the Coop and Notaro engaged in conduct amounting to anything more than common business practice. *See generally Baron v. Galasso*, 83 A.D.3d 626, 629 (2d Dept. 2011). Accordingly, I find that Plaintiffs fail to state a cause of action for aiding and abetting breach of fiduciary duty and dismiss this cause of action.

² Notably, Plaintiffs did not assert that Carroll and Silverman owed them a fiduciary duty but rather stated that TP Varick owed them a fiduciary duty.

2. Tortious interference with contract

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third-party’s breach of the contract without justification, actual breach of the contract, and damages resulting therefrom.” *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). Significantly, liability “is limited to improper inducement of a third party to breach its contract” and “will depend on a showing that the inducement exceeded ‘a minimum level of ethical behavior in the marketplace.’” *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 427 (2007).

In this case, Plaintiffs no longer have a breach of contract claim against the Discontinued Defendants. Assuming again that Plaintiffs’ tortious interference with contract claim survives discontinuance of the breach of contract claim,³ Plaintiffs fail to adequately plead the cause of action for tortious interference. Specifically, Plaintiffs’ verified amended complaint lacks any facts which would establish that Notaro and the Coop, in negotiating with TP Varick, knew the terms of the Agreement that were allegedly violated. Nor do Plaintiffs allege that Notaro and the Coop intentionally and improperly procured TP Varick’s breach of the Agreement, rather than having simply acted in the customary course of real estate negotiations to achieve the best deal for

³ Without determining the sufficiency of the underlying claim.

themselves. *See White Plains Coat & Apron Co.*, 8 N.Y.3d at 427 (“[S]oliciting business in the normal course does not constitute inducement of breach of contract.”).

Finally, Plaintiffs do not allege that TP Varick would not have breached the Agreement but for the actions of Notaro and the Coop which is an “essential” element of the tortious interference claim. *Cantor Fitzgerald Assocs., L.P. v. Tradition N. Am., Inc.*, 299 A.D.2d 204, 204 (1st Dept. 2002); *see also BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 160 A.D.3d 407, 407 (1st Dept. 2018) (affirming lower court’s dismissal of cause of action for tortious interference “since plaintiffs’ allegation of ‘but for’ causation is conclusory”).

To the contrary, Plaintiffs allege that TP Varick, beginning early in its partnership with Moyal, intended to and did breach the Agreement in numerous ways that had nothing to do with the conduct of Notaro and the Coop, and predated any negotiations with them about the retail leases. *See JBCHoldings NY, LLC v. Pakter*, 931 F. Supp. 2d 514, 534-535 (S.D.N.Y. 2013) (applying New York law and holding that “[w]here a third party acts in concert with someone who already intends to breach their contractual obligations, the third party cannot be said to be the ‘but for’ cause of that breach.”). Consequently, Plaintiffs did not adequately allege a tortious interference with contract claim and the Defendants’ motion to dismiss this claim is granted.

To the extent that Plaintiffs request leave to replead, that request is denied. Plaintiffs have not submitted a proposed amended pleading or otherwise demonstrated

“good ground to support the cause of action.” *Mehlman v. Gold*, 183 A.D.2d 634, 635 (1st Dept. 1992); *see also Hornstein v. Wolf*, 67 N.Y.2d 721, 723 (1986).

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants 121 Varick Street Corp. and Jonathan Notaro to dismiss the verified amended complaint of plaintiffs David Moyal, 1 800 Postcards, Inc., One 2 One on Varick, LLC and Next Printing and Design, Inc. is granted, and the complaint is dismissed in its entirety as against 121 Varick Street Corp. and Jonathan Notaro; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants 121 Varick Street Corp. and Jonathan Notaro.

This constitutes the decision and order of the Court.

4/4/2019
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE