SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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AARON SELIGSON, ANITA E.L. SELIGSON, MARTIN S. ROTHMAN, SIGMUND A. ROLAT, and AARON SELIGSON, MARTIN S. ROTHMAN and PATRICIA ROTHMAN, AS EXECUTORS OF THE ESTATE OF HERBERT A. ROTHMAN, Deceased,

Plaintiffs,

-against- Index No. 601608/99

ALBERT RUSSO, LENA RUSSO, ALBERT RUSSO, AS A TRUSTEE OF THE TRUST FOR THE BENEFIT OF LENA RUSSO, CLIFTON RUSSO and LAWRENCE RUSSO,

Defendants.

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Herman Cahn, J.:

Plaintiff-counterclaim defendant Sigmund A. Rolat moves for an order dismissing the fourth counterclaim asserted by defendant-counterclaim plaintiff Albert Russo and the third, fourth and seventh counterclaims asserted by defendants-counterclaim plaintiffs Lena Russo and Albert Russo, as trustee of the trust for the benefit of Lena Russo, Clifton Russo and Lawrence Russo, all with prejudice CPLR 3211(a)(1)(7).

Plaintiff Aaron Seligson and defendant Albert Russo are general partners in 401 Broadway Realty Co., a limited partnership which owns a 26-story commercial building located at 401 Broadway in Manhattan. The partnership agreement divides the limited

partners' interests into two groups: Group A is headed by Albert Russo and consists of the limited partnership interests held by defendants, while Group B is headed by Seligson and consists of the limited partnership interests held by plaintiffs, including Rolat. Rolat is also a director, officer and sole shareholder of nonparties Oxford International Corp. and Rockford Funding Corp. (collectively, the "Rolat companies"). Seligson is also an Oxford International director. The Rolat companies are month-to-month tenants in 401 Broadway.

The record includes evidence which suggests that the Rolat companies' tenancy and Rolat himself are involved in the dispute between Albert Russo and Seligson.[1]

In December 1998, Rolat initiated discussions with the partnership regarding the amount of monthly rent owed by his companies. By letter dated December 21, 1998, Rolat reminded Aaron Seligson and Albert Russo that "all partners agreed . . . that the rent Oxford/Rockford paid for over ten years was grossly inflated" and advised that the amount of the overpayment was more than $250,000. Rolat proposed a six-month rent abatement as a first step toward rectifying the claimed inequity. Seligson agreed. The Rolat companies ceased paying rent with the payment due in December 1998.

Seligson and Rolat raised the subject of the rent abatement during a partnership

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[1]In addition to this action, the various disputes among the partners have also given rise to these actions: Russo, Individually & as General Partner of 401 B'way Realty Co. v Seligson Rothman & Rothman, Oxford Intl. Corp. & Rockford Funding Corp., Sup Ct, NY County, index No. 603925/99; 401 B'way Realty Co. v Seligson, Rothman & Rothman, Civ Ct, NY County, Holdover L&T index No. (not supplied by the parties).

meeting held on January 26, 1999. The meeting transcript contains Albert Russo's statement that the abatement had previously been discussed in the context of additional compensation to be paid to Albert Russo in recognition of his prior management of the building for a period of years (Jan. 26, 1999, meeting tr. at 120 [li 6] - 121 [li 18]).

By letter dated March 4, 1999, Albert Russo, on behalf of the partnership, advised Rolat that his companies were in default under the lease. By letter dated March 9, 1999, Rolat rejected the arrears notice and reminded Russo that the partnership had issued a rent abatement.

By letter dated March 22, 1999, Seligson, in his capacity as general partner, advised Rolat that he and Albert Russo had previously agreed that Oxford was due a "considerable" rent adjustment. In the letter, Seligson also advised, in relevant part:

> You will further recall that in December of last year I, as General Partner of 401 Broadway Realty Co. [sic] agreed to begin to effectuate this partnership decision and instructed Oxford . . . to begin to withhold rental payments as an abatement for a period of six months and that, in the interim, the partners would meet again to decide on what, if any, additional adjustment may still be due Oxford . . . as a result of the significant period of rental overcharges. . . .
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> Accordingly, Oxford . . . is in compliance with our agreement and is current in its rental obligations. Please be advised that the notice sent to you regarding purported overdue rent was not sent with my knowledge or agreement and that same is plainly not consonant with my earlier action as General Partner. Accordingly, please disregard said notice.

Subsequently, Seligson commenced this action for dissolution of the partnership

and an accounting and defendants asserted a variety of counterclaims sounding in contract and tort against plaintiffs. In the counterclaims asserted against Rolat, defendants allege that Rolat improperly requested a rent abatement from the partnership, conspired with Seligson to defraud the partnership, and directed the Rolat companies to cease rent payments for a six-month period, beginning December 1998, despite certain knowledge that Seligson did not have the authority to issue a rent abatement. On these factual allegations, defendants assert counterclaims against Rolat for: tortious interference with the landlord/tenant relationship between the partnership and the Rolat companies, breach of the fiduciary duty owed by Rolat as a limited partner, and placing "the Partnership in a position whereby it has potentially breached" a collateral assignment of rents and leases agreement between the partnership and nonparty Israel Discount Bank, the holder of a mortgage on the building (Lena Russo, Albert Russo, as trustee, verified answer at ¶ 53).

Rolat now seeks dismissal with prejudice of defendants' counterclaims for tortious interference with the landlord/tenant relationship as fatally defective. Rolat argues that no breach occurred inasmuch as Seligson, in his capacity as a general partner, bound the partnership to a six-month rent abatement.

In opposition, defendants argue that the counterclaims are legally viable and contain sufficient factual allegations regarding Seligson's lack of actual or apparent authority to issue the rent abatement, Rolat's knowledge that Seligson did not have the

requisite authority, and Rolat's conspiracy with Seligson to defraud the partnership out of some $35,000 in rent owing by the Rolat companies during the relevant period.

The tortious interference counterclaims are fatally defective, as a matter of law.

The documentary evidence, consisting primarily of the limited partnership agreement and the correspondence cited above, conclusively demonstrates that Seligson had actual authority to issue the rent abatement and did, in fact, grant such abatement. On a motion to dismiss for failure to state a cause of action, the Court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; see, CPLR 3211[a][7]). However, " 'allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration,' " (WFB Telecommunications, Inc. v NYNEX Corp., 188 AD2d 257, 259 [1st Dept 1992], leave denied 81 NY2d 709 [1993], quoting Mark Hampton, Inc. v Bergreen, 173 AD2d 220, 220 [1st Dept 1991], leave denied 80 NY2d 788 [1992]; see, CPLR 3211[a][1]). "The tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff," (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]; KSL Recreation Corp. v

Boca Raton Hotel & Club Ltd. Partnership, 168 Misc 2d 18 [Sup Ct, NY County 1995]). The interference "must be intentional, not merely negligent or incidental to some other, lawful purpose," (Alvord & Swift v Muller Constr. Co., 46 NY2d 276, 281 [1978]; KSL Recreation Corp. v Boca Raton Hotel & Club Ltd. Partnership, supra). Further, the alleged wrongdoer's acts must be without reasonable justification, although actual malice is not required (Alvord & Swift v Muller Constr. Co., 46 NY2d 276, supra; KSL Recreation Corp. v Boca Raton Hotel & Club Ltd. Partnership, 168 Misc 2d 18, supra).

At the time he issued the rent abatement, Seligson was expressly authorized by the partnership agreement to do so unilaterally. In relevant part, the agreement provides that:

> The General Partner is hereby authorized and vested with the power on behalf of the partnership . . . to execute and/or modify leases and subleases of, and to execute and/or modify options, concessions, licenses or other occupancy agreements with respect to, any real property or leasehold or other interest therein owned by the partnership; . . .
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> In addition to the specific rights and powers herein granted to the General Partner, the General Partner shall, except as otherwise provided in this Agreement, possess and may enjoy and exercise all of the rights and powers of partners in partnership without Limited Partners as provided in the partnership law of the State of New York.

(Limited partnership agreement §§ 12.1, 12.2; see, Partnership Law § 98.)

The partnership agreement further provides, in relevant part, that:

> The business of the partnership shall be conducted and managed by the General Partners in accordance with the provisions of the Partnership Act of the State of New York. The General Partner is authorized and shall have the authority

> to execute all instruments and documents on behalf of the Partnership.

(Limited partnership agreement § 13.1.)

Seligson is similarly authorized by the Partnership Law to bind the partnership to a rent abatement. "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority," (Partnership Law § 20). The Partnership Law also provides that "[a]n admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership," (Partnership Law § 22).

Here, the business of the partnership is the operation and management of the building, including the leasing of the building space. The partnership agreement authorizes the general partners to make all decisions in connection with the leasing of the building. Significantly, the agreement does not require that decisions must be made unanimously to be binding upon the partnership. In practice, the general partners initially delegated most issues relating to the leasing of the building space to a building manager and, in more recent years, the majority of such matters were handled directly by the other general partner, Albert Russo. However, Seligson's verbal issuance of the

abatement in December 1998 and Seligson's March 22, 1999, letter later memorializing the specific terms of the abatement are effective to bind the partnership, whether or not Albert Russo expressly consented to the abatement.

For these reasons, Albert Russo's fourth counterclaim and the third counterclaim asserted by Lena Russo and Albert Russo, as trustee, for tortious interference are dismissed.

Rolat next seeks dismissal of the fourth counterclaim in which Lena Russo and Albert Russo, as trustee, allege that Rolat's conduct in requesting the rent abatement and then directing his companies to withhold rent constitutes self-dealing and a breach of the fiduciary duty which Rolat, as a limited partner, owes to the partnership. Rolat contends that this counterclaim may only be asserted derivatively, on behalf of the partnership.

In opposition, these defendants contend that they have standing to assert the counterclaims in their individual capacities.

The breach of fiduciary duty counterclaim is dismissed. Lena Russo and Albert Russo, as trustee, lack legal capacity to assert a direct claim for breach of a fiduciary duty owed to the partnership (see, Partnership Law § 115-a).

Defendants' reliance on May v Flowers (106 AD2d 873 [4th Dept 1984], appeal dismissed 64 NY2d 611 [1985]) in support of its contention that a direct action is permissible is misplaced. In May (supra), the court permitted the former stockholders of a corporation to directly sue the corporation's former management to recover the full

value of their shares after the corporation had been sold in a transaction tainted by deception and fraud. Here, the partnership's affairs have not yet been wound up and the partnership has not yet been dissolved.

For this reason as well, Albert Russo's fourth counterclaim, to the extent that it includes a claim for breach of fiduciary duty to the partnership, is fatally defective.

Defendants' contention that the breach of fiduciary duty counterclaim includes a legally viable claim for prima facie tort is without merit. The elements of a claim for prima facie tort are: "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful," (Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 332 [1983]). "Central to the cause of action for prima facie tort is that the defendant's intent have been solely to injure plaintiff," (WFB Telecommunications, Inc. v NYNEX Corp., supra, at 258; KSL Recreation Corp. v Boca Raton Hotel & Club Ltd. Partnership, supra). Here, defendants have failed to allege that Rolat's conduct was solely motivated by a desire to injure the partnership or themselves directly.

Similarly without merit is defendants' contention that the counterclaim includes a legally viable claim for conspiracy. It is well settled that conspiracy to commit a tort, by itself, is not a cause of action. "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort," (Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d 968, 969 [1986]). Here, no underlying

tort exists.

For these reasons, the fourth and fifth counterclaims asserted by Lena Russo and Albert Russo, as trustee, and Albert Russo's fourth counterclaim, to the extent that it includes a claim of breach of fiduciary duty, are dismissed.

Next, Rolat seeks dismissal of the seventh counterclaim in which Lena Russo and Albert Russo, as trustee, allege that, by requesting and complying with the rent abatement, Rolat placed "the Partnership in a position whereby it has potentially breached" a collateral assignment of rents and leases agreement executed by the partnership in favor of Israel Discount Bank, the holder of a mortgage on the building (Lena Russo, Albert Russo, as trustee, verified answer ¶ 53). In relevant part, the assignment agreement contains a representation that the "Assignor [partnership] will use its best efforts to keep the Mortgaged Premises fully rented at the highest rentals obtainable," (Nov. 20, 1997, assignment agreement at ¶ 5). Therefore, this counterclaim is more properly asserted derivatively on behalf of the partnership and, therefore, is dismissed.

Defendants' requests for permission to amend their respective answers and counterclaims to assert derivative claims against Rolat are denied. Although leave to amend shall be freely granted upon such terms as may be just, leave is properly denied where the amendment is totally devoid of merit (Norman v Ferrara, 107 AD2d 739 [2d Dept 1985]; see, CPLR 3025[b]). The objective documentary evidence and the

undisputed factual allegations establish that Rolat did not issue the rent abatement and did not unilaterally refuse to pay rent legitimately owed to the partnership, but, instead, duly requested a rent abatement which was then issued within the scope of Seligman's contractual and statutory authority as a general partner. Neither the mere request for an abatement nor the cessation of rent payments during the abatement period constitutes a breach of Rolat's fiduciary duty to the partnership.

That branch of the motion for sanctions against Albert Russo for asserting frivolous counterclaims against Rolat is denied.

Last, the Court notes that it has considered defendants' remaining contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the motion is granted and the fourth counterclaim asserted by Albert Russo and the third, fourth and seventh counterclaims asserted by Lena Russo and Albert Russo, as trustee, are dismissed.

This constitutes the decision and order of the Court.

Dated: June 7, 2000

ENTER:

J.S.C.