

**Matthew Adam Props. Inc. v United House of Prayer
for all People of the Church on the Rock of the
Apostolic Faith**

2010 NY Slip Op 32324(U)

August 25, 2010

Supreme Court, New York County

Docket Number: 116510/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. Justice

PART 10

Index Number : 116510/2009
MATTHEW ADAM PROPERTIES INC.
VS.
UNITED HOUSE OF PRAYER
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

PC scheduled for 10/28/10 @ 9:30am.

Dated: AUG 25 2010

HON. JUDITH J. GISCHE J.S.C.
JSG

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: PART 10**

-----X
MATTHEW ADAM PROPERTIES, INC.,

Plaintiff,

-against-

THE UNITED HOUSE OF PRAYER FOR ALL
PEOPLE OF THE CHURCH ON THE ROCK OF
THE APOSTOLIC FAITH and BISHOP C.M.
BAILEY, as TRUSTEE,

Defendants.
-----X

DECISION/ORDER

Index No.: 116510/09
Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED
AUG 27 2010
CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (dismiss cc's) w/ IM affid, exhs	1
Defs' x/m (amend ans) w/ATM affirm, exhs	2
Pltf's reply w/ IM affid, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by Matthew Adam Properties, Inc., ("plaintiff") against defendants, the United House of Prayer for All People of the Church on the Rock of the Apostolic Faith and Bishop C.M. Bailey, as Trustee (collectively, "defendants"), for breach of contract, unjust enrichment, and account stated. Defendants have answered the complaint and asserted various counterclaims against plaintiff for breach of contract, accounting, conversion, breach of fiduciary duty, and attorney's fees. Presently before the court is plaintiff's motion to dismiss defendants' counterclaims based on CPLR §§ 3013, 3014, 3016(b), 3211(a)(1) and 3211(a)(7). Defendants oppose plaintiff's motion to dismiss and cross-move to amend its answer with counterclaims.

Facts Alleged and Arguments Raised

Plaintiff is a real estate property management company. Pursuant to a Property Management Agreement (the "Agreement") dated April 16, 2004, plaintiff agreed to manage five properties (collectively, the "Properties") owned by defendants, beginning May 1, 2004, for a period of 2 years. The Agreement provides that plaintiff is responsible for the "operation, direction, management and supervision" of the Properties. The Agreement was extended for an additional 2 years, and, thereafter, it continued on a month-to-month basis. In a letter dated May 14, 2009, defendants notified plaintiff of its decision to hire a new property manager and to terminate its Agreement with plaintiff, effective June 1, 2009.

Plaintiff alleges that as it was preparing a final accounting for defendants, it discovered a billing error, whereby plaintiff seeks \$228,259.86¹ from defendants for breach of contract, unjust enrichment, and account stated.

Defendants originally answered the complaint and asserted eight counterclaims against plaintiff for breach of contract (COA's 1, 2, 3, and 4), accounting (COA 5), conversion (COA 6), breach of fiduciary duty (COA 7), and attorney's fees (COA 8). Defendants allege, *inter alia*, that plaintiff breached the Agreement by permitting, and failing to notify defendants of, various violations from the Department of Buildings and Environmental Control Board; plaintiff entered into service contracts with third parties that did not comply with the terms of the Agreement; plaintiff permitted a tenant to wrongfully sublet a portion of the premises; plaintiff failed to provide defendants with a full accounting of records, books, and accounts; plaintiff failed to provide defendants with the interest that

¹Plaintiff states in its complaint that it under-billed defendants in the amount of \$228,259.86, however, in its motion to dismiss, plaintiff states that it under-billed defendants in the amount of \$203,782.90.

accumulated in its operating account; plaintiff breached its fiduciary duty by mismanaging the properties; and defendants are entitled to attorney's fees pursuant to the Agreement.

Defendants oppose plaintiff's motion to dismiss and cross-move to amend the answer with counterclaims, pursuant to CPLR § 2035(b). Defendants' proposed amended answer sets forth the same eight counterclaims as the original answer with counterclaims, but includes more allegations of a factual nature.

In opposition to defendants' motion, plaintiff has provided the court with a large file box, which it claims contains copies of the monthly management reports, for May 1, 2004 through July 31, 2009, that were sent to defendants each month. Plaintiff contends that defendants' counterclaims are not plausible, based on this documentary evidence. Plaintiff further contends that defendants' allegations are false, vague, and bolstering.

Discussion

Defendants' Cross-motion to Amend

It is well established law that permission to serve an amended complaint should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise. CPLR § 3025 (b); Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 (1st Dept. 1990). This is true particularly when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 N.Y.2d 400 (1977). Leave, however, may not be granted where the amended pleading fails to state a cause of action. Stroock & Stroock & Lavan, supra.

Affording the pleadings a liberal construction, taking the allegations in the proposed

counterclaims as true, and providing the defendants with the benefit of every possible inference, the facts alleged support defendants' newly proposed 1st, 2nd, 3rd, 4th, 6th and 8th counterclaims, but not the proposed 5th and 7th counterclaims, for the reasons that follow.

At the outset, the court finds that there is no prejudice to plaintiff if the motion to amend is granted, since the proposed counterclaims are the same as the counterclaims in the original answer, except, they set forth more detail and provide specific provisions of the contract that plaintiff allegedly breached.

Breach of Contract

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance; (3) failure to perform by one of the parties; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2d Dept. 1990).

Defendants specifically allege, *inter alia*, that plaintiff failed to collect rent and other sums from tenants and subtenants pursuant to Article 3.1 of the Agreement; plaintiff permitted and failed to notify defendants of various violations from the Department of Buildings and Environmental Control Board, pursuant to Article 3.1 of the Agreement; plaintiff entered into un-permitted service contracts with third-parties, in violation of Article 3.7 of the Agreement; and plaintiff wrongfully sublet a portion of its premises to a subtenant, in violation of Article 3.2 of the Agreement.

Defendants' proposed counterclaims for breach of contract are, therefore, based on facts that plaintiff and defendant formed an agreement, defendants performed, and plaintiff failed to perform, resulting in damage. Furia, supra. The alleged facts thus support

defendants' proposed 1st, 2nd, 3rd, and 4th counterclaims for breach of contract.

Conversion

In order to establish conversion, the defendants must establish that they owned an identifiable piece of property and that plaintiff exercised dominion over or interfered with the property in defiance of defendants' rights. See State v. Seventh Regiment Fund, Inc., 98 N.Y.2d 249 (2002); Ahles v. Aztec Enterprises, Inc., 120 A.D.2d 903 (1986). Conversion can be established even where one comes into lawful possession of the property, but then wrongfully detains or uses the property. A refusal to return the property can form the basis for a claim of conversion. Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102 (1927).

Defendants' counterclaim alleges that, pursuant to the Agreement, plaintiff was to establish and maintain an operating account, from which plaintiff was to withdraw money to pay for the management and operation of the Properties. Defendants allege that, when the Agreement was terminated, plaintiff failed to return the interest that accrued on the money in the account.

The alleged facts thus support defendants' proposed 6th counterclaim for conversion.

Attorney's Fees

In general, each party to a litigation is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986). Here, Article 10.7 of the Agreement

states that a party losing in any final judgment “agrees to pay the prevailing party all reasonable costs, charges and expenses, including attorney’s fees . . .”.

Accordingly, Defendants’ 8th proposed counterclaim for attorney’s fees is supported by the facts alleged.

Breach of Fiduciary Duty

To establish a breach of fiduciary duty, the pleader must show the existence of a fiduciary relationship, misconduct that induced the pleader to engage in the transaction in question, and damages directly caused by that misconduct. Barrett v. Freifeld, 64 A.D.3d 736, 739 (2d Dept. 2009).

A breach of fiduciary duty claim will not stand when there is an agreement covering the precise subject matter of the alleged fiduciary duty. Hylan Elec. Contracting, Inc. v. MasTec North America, Inc., 74 A.D.3d 1148 (2d Dept. 2010); Celle v. Barclays Bank P.L.C., 48 A.D.3d 301 (1st Dept. 2008). In any event, in order to properly allege a breach of fiduciary duty, defendants must particularize the duty they claim exists. Barrett, supra.

Here, defendants’ allege that plaintiff breached a fiduciary duty by mismanaging the Properties. The obligation to properly manage the properties, however, arises directly from the parties’ Agreement. To the extent defendants’ counterclaim for breach of a fiduciary duty merely restates its breach of contract counterclaim, it cannot stand. Stripping away the allegations regarding the contractual obligations, no independent duty giving rise to a fiduciary obligation is plead. Accordingly, defendants’ 7th counterclaim for breach of a fiduciary duty is not allowed.

Accounting

Common law provides for the right to an equitable accounting where a fiduciary relationship or some other special circumstance exists. Gottlieb v. Northriver Trading Co. LLC, 58 A.D.3d 550 (1st dept. 2009); Palazzo v. Palazzo, 121 A.D.2d 261 (2d Dept. 1986); Gottlieb v. Northriver Trading Co. LLC, 58 A.D.3d 550 (1st Dept. 2009).

Since the court finds that no fiduciary relationship between the parties has been properly plead, defendants are not entitled to an equitable accounting. Accordingly, defendants' 5th counterclaim for an accounting cannot proceed.

Plaintiff's Motion to Dismiss

Under CPLR § 3013, a pleading must give "notice" to the other side of the "transactions" or "occurrences" as seen by the pleader. CPLR § 3014 requires that pleadings shall consist of "plain and concise statements" in "consecutively numbered paragraphs." CPLR § 3016(b) provides that "where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."

The court finds that defendants' proposed counterclaims, as otherwise allowed by the court, meet the requirements of CPLR §§ 3013 and 3014, as they are in consecutively numbered paragraphs, consist of plain and concise statements, and give notice to the other side. CPLR § 3016(b) is inapplicable to the facts of this case, as defendants' do not allege a counterclaim based in fraud, misrepresentation, undue influence, etc. The breach of trust (breach of fiduciary duty) counterclaim has already been disallowed by the court,

since no duty was plead.

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings (here, counterclaims) a liberal construction, take the allegations as true, and provide the [defendants] with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). In deciding plaintiff's motion to dismiss the counterclaims, the court must consider whether, accepting all the defendants' facts, they support the causes of action asserted (Rovello v. Qrofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 [2005]). Whether defendants can ultimately establish its' allegations is not part of the calculus in determining a motion to dismiss (Goshen v. Mutual Life Ins. Co. of N.Y., *supra* at 326).

For the reasons stated above, plaintiff's motion to dismiss is granted as to defendants' 5th and 7th counterclaim for accounting and breach of fiduciary duty, and is denied as to defendants' remaining counterclaims. In this regard, the box of documents provided by defendants, while they may constitute evidence, they do not defeat a pleading. *See* Reiver v. Burkhart Wexler & Hirschberg, LLP, 73 A.D.3d 1149 (2d Dept. 2010). Defendants' cross-motion pursuant to CPLR § 3025 is hereby granted for the reasons stated and defendants may serve the proposed answer in conformance with this court's order.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff, MATTHEW ADAM PROPERTIES, INC.'s motion to dismiss is granted only as to defendants' THE UNITED HOUSE OF PRAYER FOR A PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH and BISHOP C.M. BAILEY, as TRUSTEE, 5th and 7th counterclaim for accounting and breach of fiduciary duty, which are hereby severed and dismissed; and it is further

ORDERED that plaintiff's motion to dismiss is denied as to defendants' 1st, 2nd, 3rd, 4th, 6th and 8th counterclaims; and it is further

ORDERED that defendants' cross-motion to amend the answer with counterclaims is granted and defendants shall serve the proposed answer, as permitted in accordance with this decision, no later than September 16, 2010 ; and it is further

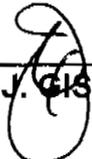
ORDERED that a **preliminary conference** is scheduled for **October 28, 2010** at **9:30 a.m.** in Part 10, 60 Centre Street, Room 232; and it is further

ORDERED that any relief requested but not expressly addressed herein is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
 August 25, 2010

So Ordered:


 HON. JUDITH J. GISCHE, J.S.C.

FILED
AUG 27 2010
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