

2017 WL 128918 (N.Y.Sup.), 2017 N.Y. Slip Op. 30063(U) (Trial Order)
Supreme Court of New York.
New York County

****1** Michael **KOBYLECKYJ**, Plaintiff,
v.
Stephan **KOBYLECKYJ**, Lisa **Kobyleckyj**, Azbok, LLC, Defendants.

No. 153740/2015.
January 11, 2017.

Decision/Order

Hon. Cynthia Kern, J.

***1** Plaintiff Michael **Kobyleckyj** now moves for an Order granting him leave to renew and reargue a portion of this court's decision dated September 15, 2016, and thereafter amended on September 28, 2016, which denied plaintiff's motion to dismiss defendants Stephan **Kobyleckyj** and Lisa **Kobyleckyj's** (the "individual defendants") counterclaim for breach of fiduciary duty and, upon renewal and reargument, dismissing the counterclaim for breach of fiduciary duty. For the reasons set forth below, plaintiff's motion to reargue is granted and upon reargument, the court dismisses the counterclaim for breach of fiduciary duty.

The relevant facts are as follows. This action arises out of real property located at 101 First Avenue, New York, New York (the "property"), a mixed-use five story building with ground-floor commercial space and four residential apartments. Plaintiff is a tenant in common of the property, holding a thirty-four percent undivided interest therein together with his siblings, defendant Stephan **Kobyleckyj**, who owns a thirty-two percent undivided interest and defendant Lisa **Kobyleckyj**, who owns the remaining thirty-four percent undivided interest. Defendant Azbok, LLC ("Azbok") is a company formed by the individual defendants for the purpose of managing the property of which plaintiff is not a member.

****2** Plaintiff alleges that beginning in early 2012 and without plaintiff's consent, defendants began collecting all of the rents of the property and paying its expenses; that defendants mismanaged the property by overpaying for certain expenses of maintaining, repairing, renovating and operating the property; that defendants failed to timely renovate and re-let vacant units in the building resulting in a substantial loss of revenue; and that defendants have used the proceeds from the property, without plaintiff's consent, to pay their own personal expenses completely unrelated to the maintenance and operation of the property. Plaintiff further alleges that defendants have failed and refused to provide plaintiff with a complete accounting so that he is unable to determine the exact amount that has allegedly been misappropriated by defendants but he estimates that defendants have misappropriated funds in excess of \$100,000.00. Plaintiff also alleges that beginning in 2013, defendants have made substantial distributions to themselves and to their late mother and have completely excluded plaintiff who last received a distribution from the funds collected from the property in 2012.

Thus, in or around 2015, plaintiff commenced the instant action asserting claims for partition and sale of the property pursuant to Real Property Actions and Proceedings Law ("RPAPL") § 901, an accounting, violation of RPAPL § 817, breach of fiduciary duty and injunctive relief. Defendants then interposed an answer in which they asserted affirmative defenses of unclean hands, waiver, statute of limitations and failure to state a cause of action and two counterclaims for breach of fiduciary duty and waste.

***2** Plaintiff then moved for summary judgment on his causes of action for partition and sale of the property and an accounting and also moved to dismiss defendants' affirmative defenses and counterclaims. In a decision dated September 15, 2016, this court granted plaintiff's motion for summary judgment, granted plaintiff's motion to dismiss defendants' affirmative defenses, granted plaintiff's motion to dismiss defendants' counterclaim for waste and granted plaintiff's motion to dismiss defendants' counterclaim for breach of fiduciary duty to the extent it was asserted by defendant Azbok on the

ground that there is no fiduciary relationship between plaintiff and Azbok. However, this court denied plaintiff's motion to dismiss defendants' counterclaim for breach of fiduciary duty to the extent it was asserted by the individual **3 defendants on the ground that the "counterclaim sufficiently states a claim for breach of fiduciary duty" as it alleges that "plaintiff, as a tenant in common with defendants with respect to the property, breached the fiduciary duty he owed to defendants by failing to participate in Azbok...and failing to respond to defendants' inquiries regarding his participation in Azbok...that as a result of said breach, defendants have been unable to obtain refinancing for the property and have been unable to make renovations to the property so that it is not providing the amount of income it is capable of providing." Further, the court held that "[t]o the extent plaintiff asserts that the counterclaim for breach of fiduciary duty must be dismissed because the misconduct alleged by defendants is not sufficient to constitute a breach of fiduciary duty, such assertion is without merit as plaintiff has failed to cite to any authority for such proposition." Plaintiff now moves for leave to renew and reargue that portion of the Decision which denied plaintiff's motion to dismiss the individual defendants' counterclaim for breach of fiduciary duty and upon renewal and reargument, granting plaintiff's motion to dismiss the individual defendants' counterclaim for breach of fiduciary duty.

On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. See CPLR § 2221(d)(2). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2)-(3).

In support of plaintiff's motion to renew and reargue, plaintiff submits a decision issued by New York State Supreme Court Justice Nancy Bannon in an unrelated action entitled *Pichler v. Jackson*, 2016 WL 5630907 *3 (Sup. Ct. N.Y. County 2016) holding that, in the absence of a partnership or a joint venture agreement between the parties, "tenants in common do not owe each other a fiduciary duty." In coming to such determination, Justice Bannon relied on *Scaturro v. Sutura*, 57 A.D.3d 1283, 1284 (3d Dept 2008) in which the Third Department held that a claim for breach of fiduciary duty between tenants in common cannot be supported "in the absence of any evidence of a partnership agreement between the parties." As *Pichler* and *Scaturro* make clear that there is no fiduciary duty between tenants in common unless there is a **4 partnership or joint venture agreement between the parties, plaintiff's motion for leave to reargue is granted as the court finds that it misapprehended the law regarding whether a fiduciary duty exists between tenants in common. Upon reargument, this court reverses its decision and finds that plaintiff's motion to dismiss the individual defendants' counterclaim for breach of fiduciary duty must be granted. The individual defendants' counterclaim for breach of fiduciary duty does not allege any partnership or joint venture agreement between the parties. Rather, the counterclaim merely alleges that plaintiff owed the individual defendants a fiduciary duty solely on the basis of the parties' relationship as tenants in common. Indeed, nowhere in the answer do the individual defendants allege that they and plaintiff were "partners" or "joint venturers." Moreover, the individual defendants fail to submit, as amplification of their pleading, an affidavit from either of them affirming that the parties were "partners" or "joint venturers."

Accordingly, plaintiff's motion is granted to the extent that plaintiff is granted leave to reargue this court's Decision and, upon reargument, the individual defendants' first counterclaim for breach of fiduciary duty is dismissed in its entirety. This constitutes the decision and order of the court.

DATE: 1/11/17

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KERN, CYNTHIA S., JSC