

*Joint Trial
604 591/2014*

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 12

X
THE BOARD OF DIRECTORS OF THE
SEASONS AT MASSAPEQUA
HOMEOWNERS ASSOCIATION, INC. and
THE BOARD OF DIRECTORS OF THE
SEASONS AT MASSAPEQUA CONDOMINIUM,

Index No.: 604947/14
Motion Sequence...01
Motion Date...12/22/14

Plaintiffs,

-against-

ARMA MANAGEMENT, LLC, JORDAN ARMA,
MICHELE MARCHESE-RUSSELL, WILLIAM
MUEGER and CHAD PATCHINGER,

Defendant.

X
Papers Submitted:
Notice of Motion.....X
Affirmation in Support.....X
Memorandum of Law in Support.....X
Affirmation in Opposition.....X
Memorandum of Law in Opposition.....X
Affirmation in Partial Opposition.....X
Reply Brief.....X

Upon the foregoing papers, the Defendants, Arma Management, LLC (“Arma”), Jordan Arma (“Jordan”), Michele Marchese-Russell, William Mueger and Chad Patchinger’s motion seeking an order, (i) consolidating the instant action with an action currently pending in this Court, pursuant to CPLR § 602 (a); (ii) dismissing the Plaintiffs,

The Board of Directors of the Seasons at Massapequa Homeowners Association, Inc. and the Board of Directors of the Seasons at Massapequa Condominium's causes of action, except the breach of contract claim against Arma Management, LLC, pursuant to CPLR § 3211 (a) (7); (iii) dismissing all of the individual Defendants from the action; and, (iv) pursuant to CPLR § 3211 (b) dismissing the affirmative defenses that sound in fraud asserted by the Plaintiffs in the related action, is determined as hereinafter provided.

In the instant action, commenced by the Plaintiffs upon electronically filing the Summons and Verified Complaint in the Office of the Nassau County Clerk on September 19, 2014, the Plaintiffs seek a declaratory judgment and also seek to recover monetary damages. The Complaint asserts causes of action for fraud, fraudulent misrepresentation, breach of fiduciary duty, breach of contract and breach of Implied Covenant of Good Faith and Fair Dealing.

The Plaintiffs are also the Defendants in a civil action (Index No. 604591/2014) (hereinafter referred to as the "Related Action") brought against them in this Court by the Defendants in this action, which seeks monetary damages based on claims for breach of contract and defamation. The Related Action was commenced on September 4, 2014, prior to the instant action being filed.

The Defendants now seek to consolidate this action with the Related Action pending in this Court based on the fact that they involve identical questions of law and fact. Specifically, the Defendants assert that both actions involve questions regarding Arma

Management's performance of its contractual obligations to the Plaintiffs and the Plaintiffs' allegations of fraud, which they also assert as affirmative defenses in the Related Action. The Defendants contend that consolidation is appropriate in the interest of judicial economy and to avoid inconsistent judgments. The Plaintiffs' opposition to the instant motion provides no arguments opposing consolidation.

CPLR § 602 (a) provides "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of . . . all matters in issue, may order the matters consolidated, and may make such other orders concerning the proceedings . . . to avoid unnecessary costs or delay." An order granting a joint trial provides that the separate characters of each action are maintained but provides that the actions be tried together, so that the issues that are common between them are heard at the same time. (*Mars Assocs. v. New York City Educ. Constr. Fund*, 126 A.D.2d 178 [1st Dept. 1987]) There is a preference for joint trials over consolidations in the interests of justice and judicial economy. (*Megyesi v. Automobile Rentals*, 115 A.D.2d 596 [2d Dept. 1985]; *Mideal Homes Corp. v. L & C Concrete Work*, 90 A.D.2d 789 [2d Dept. 1985]) In the absence of any demonstration that a substantial right would be prejudiced by a joint trial and given the possibility of inconsistent verdicts if separate trials ensued, the interest of justice and judicial economy will best be served by a joint trial. (*Millington v. Williams*, 250 A.D.2d 977 [3rd Dept. 1998])

The Court agrees with counsel for the Defendants that the two actions do

involve common questions of law and fact. Additionally, the court finds that the parties will not be prejudiced by the joint trial of the two actions. It appears that discovery in both actions has not yet commenced.

Although the Defendants seek to consolidate both actions, due to the fact that the Defendants are the Plaintiffs in the Related Action, consolidation is not possible. One party may not be a Plaintiff and a Defendant in the same action. Had the Plaintiffs interposed a counterclaim in the Related Action for the amount they are claiming they are owed in this action, this motion would not have been necessary and the claims of both parties could have been litigated in one action.

With regard to the branch of the Defendants' motion, pursuant to CPLR § 3211 (b), seeking dismissal of the Plaintiffs' affirmative defenses in the Related Action, the Court finds that because the cases cannot be consolidated, the Defendants' application to dismiss the affirmative defenses is not properly asserted in the instant action. The Defendants would have to move for such relief in the Related Action where the affirmative defenses are asserted.

The Court now turns to the branch of the Defendants' motion seeking dismissal, pursuant to CPLR § 3211 (a) (7), of the causes of action sounding in fraud. In support of their motion, the Defendants contend that the Plaintiffs failed to meet the heightened pleading standard for fraud required by CPLR § 3016 (a). The Defendants contend that while the complaint alleges that Arma Management misrepresented their

abilities to induce the Plaintiffs to enter into the agreement, it fails to specify the nature of the misrepresentations; when and to whom they were made; whether the Board's reliance was justified and Arma Management's scientor. The Defendants argue that the claim against the Individual Defendants relies on group-pleading allegations that fail to allege particularized allegations. The Defendants also argue that the fraud causes of action should be dismissed because they are pled upon information and belief and fail to plead the source of their information.

The Defendants argue that the fraud claims should be dismissed as duplicative of the breach of contract claim because the Plaintiffs' fraud claim is based upon the Defendant, Arma's alleged breach of the agreement. The Defendants argue that the breach of fiduciary duty claim should be dismissed because the claim is essentially another claim of fraud that is not pled sufficiently. Finally, the Defendants argue that the breach of implied covenant of good faith and fair dealing claim should be dismissed because it is not an independent cause of action. The Defendants contend that although every contract contains an implied covenant, it does not impose any obligation on a party to a contract beyond the explicit terms of the contract.

In opposition to the Defendants' motion to dismiss, the Plaintiffs argue that they sufficiently pled their claims for fraud and fraudulent misrepresentation to meet the requirements of CPLR § 3016 (b). Specifically, the Plaintiffs rely on the Complaint to support their opposition. In the Complaint, the Plaintiffs allege that within five months the

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