

**Board of Directors of Windsor Owners Corp. v Platt**

2018 NY Slip Op 31600(U)

July 10, 2018

Supreme Court, New York County

Docket Number: 155985/2014

Judge: Jennifer G. Schechter

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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BOARD OF DIRECTORS OF WINDSOR OWNERS CORP.,

Index No.155985/2014

Plaintiff,

-against-

ELAINE PLATT,

Defendant.

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JENNIFER G. SCHECTER, J.:

Defendant Elaine Platt (Platt) moves to renew her cross motion for summary judgment, which sought dismissal of plaintiff's only remaining claim--its third cause of action, alleging breach of fiduciary duty--because the Board of Directors of Windsor Owners Corp. (Windsor) had not established that it suffered damages (Affirmation in Opposition [Opp], Ex 17 [Prior Order]). Windsor opposes the motion.

The motion is granted and the third cause of action is dismissed.

Background

Familiarity with the underlying facts of this action is presumed.

In motion sequence number 025, Platt cross moved, in relevant part, for summary judgment dismissing plaintiff's breach of fiduciary duty claim "without prejudice as premature" because the damages were too speculative (NYSCEF Doc. Nos. 916 at 13, 664 at 2-3). That motion was submitted

over a year and a half ago in November 2016 while discovery was still ongoing. Platt's cross motion was denied because, at that stage and on that "bare record," the court could not conclude "as a matter of law that any and all potential damages [were] speculative" (Prior Order at 14).

Platt appealed and the Appellate Division affirmed the 2016 determination based on Platt's failure to carry her burden. The Court, moreover, stated that Windsor "will likely incur damages in defending the action by [Mazzocchi] brought against the board and potentially if there is an award in [Mazzocchi's] favor" (161 AD3d 637 [1st Dept 2018]).

Meanwhile, however, on November 7, 2017--a year after Platt's cross-motion had been submitted, Windsor filed a note of issue [NOI] (NYSCEF Doc No 1244). Based on plaintiff's announcement that it was now ready for trial, the court authorized this motion to renew because it had not yet seen proof of any actual damages. The court wanted to be sure that there was a cause of action to be tried (Opp, Ex A at 1).

Plaintiff has taken the position that its damages are: "attorneys fees incurred in defending against Platt's action and the attorneys' fees incurred in prosecuting this action and responding to multiple frivolous motions and appeals made by Platt that resulted in about 17 orders against her, as documented in the . . . motion for attorneys' fees incurred

related to the contempt finding" (Opp, Ex A at 2 [quoting Affirmation in Support of Motion Sequence Number 032 at ¶ 20(c)].<sup>1</sup>

In support of her post-NOI motion, Platt urges that damages is an element of breach of fiduciary duty and that Windsor has failed to show any actual damages resulting from her disclosure (Affidavit in Support [Supp] at 2, 4-6). She points out that Windsor's attorneys' fees in this case are not recoverable as damages (*id.* at ¶¶ 60-78). In opposition, plaintiff explains that it has incurred "hundreds of thousands of dollars in attorneys' fees with respect to the entirely frivolous motion and appellate practice engaged in by Platt; and her impermissible, improper, and willful disclosure of confidential communications has assisted an existing adversary of the Cooperative and plaintiff, and has also led to the incurring of additional attorneys' fees" (Opp at ¶ 5).

#### Analysis

Damages is an essential element of breach of fiduciary duty and a plaintiff must establish that the misconduct alleged was the direct and proximate cause of the losses

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<sup>1</sup> Concerned about whether plaintiff has recoverable damages, the court specifically directed plaintiff's counsel to e-file an affirmation related to damages it claims within 10 days of March 30, 2018 (Opp, Ex A). Plaintiff failed to do so.

claimed (*Laub v Faessel*, 297 AD2d 28, 30-31 [1st Dept 2002]). In fact, a breach of fiduciary duty claim is not enforceable until the aggrieved party sustains actual damage (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]).

Plaintiff maintains that its damages fall into two categories:

- a. "the attorneys' fees incurred in having to defend against a new state court action that in part is based upon Platt's improper disclosure of confidential communications. That same disclosure can also be used by the same plaintiff [Mazzocchi] in a pre-existing federal discrimination action. Plaintiff has already incurred attorneys' fees directly related to the improper disclosure. While the full amount of the damages plaintiff may suffer is dependent upon the trial of that federal action, as this court has repeatedly held, and panels of the Appellate Division have also held, that is a viable claim not dismissible on summary judgment; and
- b. "Plaintiff's right to seek sanctions against Platt for her entirely frivolous and baseless more than four year litigation onslaught in this court and on appeal" (Opp at ¶ 6).

The second purported category of "damages" for breach of fiduciary duty can easily be dispensed with. This court already dismissed plaintiff's independent cause of action for sanctions and, to the extent that plaintiff moved for sanctions, its motions have been addressed on a motion by motion basis (Opp, Ex 17 at 7). Sanctions for frivolous

litigation, which are available by motion, are not recoverable under the guise of damages for breach of fiduciary duty.

Though in theory it is plausible that plaintiff could sustain damage as a result of Platt's disclosure (which explains how the cause of action has survived to date), despite certifying its readiness for trial, Windsor has not shown that it actually sustained any monetary damages resulting from Platt's revelation of privileged information. Significantly, Windsor has not demonstrated that it incurred extra attorneys' fees as a consequence of the disclosure that it would not have incurred in the absence of the disclosure. Nor has it shown that it is actually any worse off in the federal or state-court litigations because of what Platt revealed.<sup>2</sup> Though plaintiff is certainly not required to show the full extent of its damages if they are ongoing, it has to show some actual damage that it sustained as a result of Platt's alleged breach as opposed to costs that it would have expended anyway defending Mazzocchi's cases even in the absence of Platt's disclosures. This is particularly true

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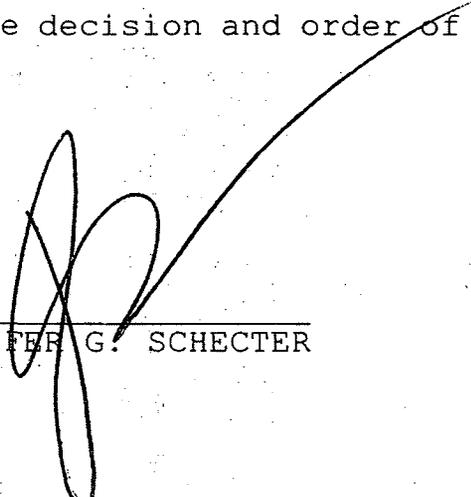
<sup>2</sup> The state-court action has been marked disposed for over a year and the "parties may move to reinstate the action when or if necessary" (NYSCEF Doc No 891).

where, as here, Windsor completed discovery, filed its NOI and certified that it is ready for trial.<sup>3</sup>

This decision in no way minimizes that Platt revealed privileged information to third parties. An injunction has been issued against her, she has been held in contempt for violating it and she has been sanctioned. That, however, does not change the fact that plaintiff had the burden--albeit a minimal one--to come forward and establish that it suffered actual damage. It failed to do so in opposition to this motion.

Accordingly, it is ORDERED that defendant's motion to renew is granted and, on renewal, summary judgment is awarded to defendant on plaintiff's third (and only remaining) cause of action and the Clerk is directed to enter judgment accordingly without costs. This is the decision and order of the court.

Dated: July 10, 2018



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HON. JENNIFER G. SCHECTER

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<sup>3</sup> The trial did not proceed in June, as planned, specifically so that the court could ascertain whether there are any provable damages in the first place.