SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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GOOD DEEDS DEVELOPMENT, LLC,

Plaintiff,

-against-

ISRAEL COMMUNITY CENTER OF LEVITTOWN, a Religious Corporation, and IRVING GERLACK,

Defendants.

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TRIAL/IAS PART: 25
NASSAU COUNTY

Index No: 17906-08
Motion Seq. No: 1
Submission Date: 5/19/09

Papers Read on this Motion:

Notice of Motion (Amended), Affirmation in Support, Affidavits in Support (2) and Exhibits.....x
Affidavit in Opposition and Exhibits.....x
Plaintiff's Memorandum of Law.....x
Reply Affirmation, Reply Affidavits (2) and Exhibits.....x
Defendants' Reply Memorandum of Law in Support.....x

This matter is before the court on the motion by Defendants Israel Community Center of Levittown ("ICC") and Irving Gerlack ("Gerlack") (collectively "Defendants"), filed on January 7, 2009 and submitted May 19, 2009. [1] For the reasons set forth below, the Court grants Defendants' motion in part and denies it in part. Specifically, the Court 1) denies Defendants' motion to dismiss the verified complaint ("Complaint"), based on Plaintiff's failure to name the Attorney General as a necessary party; 2) denies Defendants' motion to dismiss the Complaint based on Plaintiff's failure to state a cause of action; 3) grants Defendants' motion to dismiss the third cause of action against Defendant Gerlack; and 4) denies Defendants' motion to vacate the

[1] This Court assumed responsibility for this case, and this motion, on May 8, 2009, and held oral argument on the motion on May 19, 2009, after which the motion was submitted.

Notice of Pendency.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) dismissing the third cause of action against Defendant Gerlack, pursuant to CPLR §§ 3016(h) and 3211(a)(11), RCL § 2 and N-PCL § 720-a; 2) dismissing the Complaint based on Plaintiff's failure to name the Office of the Attorney General of the State of New York ("Attorney General") as a party, pursuant to CPLR § 3211(a)(10); [2] 3) dismissing the Complaint based on Plaintiff's failure to state a cause of action, pursuant to CPLR § 3211(a)(7); and 4) cancelling or vacating the Notice of Pendency, pursuant to CPLR § 6514. Plaintiff opposes Defendant's motion.

B. The Parties' History

This action involves a dispute over a contract of sale ("Contract") dated April 13, 2006, between Good Deeds and ICC, pursuant to which Good Deeds would purchase from ICC the real property, consisting of land and a building, on which ICC is located. The purchase price of that property ("Premises"), located at 3235 Hempstead Turnpike, Levittown, New York, is $2,000,000 ($2 million). In the Complaint, Good Deeds alleges that ICC has breached the terms of the Contract by failing to cooperate with Good Deeds in obtaining all approvals required under the Contract.

The Contract, which refers to ICC as the "Seller" and to Good Deeds as the "Purchaser," contains several provisions that are relevant to the Court's consideration of this motion. Paragraph 24 provides as follows:

> All money paid on account of this contract are [sic] hereby made liens on the Premises, but such liens shall not continue after default by Purchaser under this contract.

Paragraph 30 provides in pertinent part:

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[2] In their Notice of Motion, Defendants move to dismiss the Complaint, pursuant to CPLR § 3211(a)(4), based on Plaintiff's alleged failure to name the Attorney General as a necessary party. The Court concludes that Defendants intended to cite CPLR § 3211(a)(10), which permits a party to move for dismissal on the ground that the court should not proceed in the absence of a person who should be a party.

> The closing herein shall be subject to, Purchaser at its sole cost and expense, obtaining the Approvals (hereinafter defined) with such governmental and/or municipal agencies in order for the subject premises to be partitioned so that Purchaser may convey to Seller the parcel described in paragraph 29(a) hereof [a subdivided parcel of .4 acres], and permitting the development by Purchaser on the balance of the Premises of a residential or commercial and/or retail use. For purposes of this Contract the term Approvals shall mean: (i) approval for the partition of the property into two (2) parcels..., (ii) site plan approval for the construction of the new Congregational building referred to in paragraph 29(b) above [referring to a two story building] including, but not limited to the grant of any variances..., (iii) a re-zoning of the balance of the Premises from its current use to a residential or commercial/retail use; and (iv) approval of a site plan for the development of the balance of the Premises being retained by Purchaser for such residential or commercial/retail use.
>
> Seller agrees to cooperate with the Purchaser in obtaining all such Approvals, including, but not limited to consenting to any applications for such Approvals and if required by such municipality submitting the petition for such Approvals in the Seller's name.

Paragraph 34 provides in pertinent part:

> [I]f the Purchaser's lien shall include Related Costs, such lien shall include, but not be limited to, the money expended by the purchaser in order to perform paragraphs "29a" and "29b" of the rider, including, but not limited to, all hard and soft costs in connection with the partition of the Premises, obtaining any variances or other municipal approvals for the new Congregational site and building, reasonable fees of attorneys including all legal fees and expenses paid by purchaser to seller's attorneys pursuant to paragraphs 47 and 48, engineers, architects, consultants and experts therefore, and the hard costs of constructing the new building and related site improvements (collectively "**Related Costs**").

Finally, Paragraph 37 provides:

> Seller and Purchaser acknowledge that this contract of sale is subject to the Court's approval pursuant to N-PCL §§ 510, 511. Seller will promptly submit the necessary application to the Supreme Court of New York, County of Nassau on notice to the New York State Attorney General, as required by the Court, for approval of the sale to Purchaser.

The Complaint contains three causes of action. In the first cause of action, Good Deeds alleges that ICC has breached the Contract, by, *inter alia*, 1) failing to cooperate with Good

Deeds in obtaining all Approvals required under the Contract; and 2) refusing to convey marketable title to the Premises to Good Deeds in accordance with the Contract. Good Deeds seeks an Order requiring ICC to specifically perform its obligations under the Contract.

In the second cause of action, Good Deeds repeats the allegations in the first cause of action, and seeks, alternatively, an Order 1) awarding Good Deeds a judgment against ICC, pursuant to which Good Deeds has a lien on the Premises in a sum equal to the down payment plus the Related Costs that Good Deeds expended; 2) directing the sale of ICC's interest in the Premises by a Court-appointed Referee and the payment of those monies into Court; 3) directing the payment to Good Deeds, from the proceeds of that sale, the sum secured by its lien securing Good Deeds' down payment and Related Costs, plus interest and costs, 4) directing ICC to pay any deficiency remaining after payment of the sale proceeds to Good Deeds, and 5) foreclosing Good Deeds and other claimants, subsequent to the filing of a Notice of Pendency, from asserting any claim to the Premises.

Good Deeds asserts the third cause of action solely against Defendant Gerlack, in his capacity as Chairman of the Board of Directors of ICC. Good Deeds alleges that Gerlack wrongfully induced ICC to breach the Contract, and seeks damages in the sum of at least $10 million. Good Deeds alleges, *inter alia*, that Gerlack 1) induced the ICC not to consummate the transaction with Good Deeds because a competing offer of consolidation offered him certain perquisites, including free membership with the merged congregation and a strong Gerlack familial presence in the competing congregation; 2) made false representations to the Attorney General about the attorney representing ICC to influence the Attorney General's decision whether to approve the Contract; and 3) without authorization from the ICC Board of Directors, executed a listing agreement with a real estate broker to market the Premises to prospective purchasers, notwithstanding the existence of the Contract.

In support of their motion to dismiss, Defendants provide affidavits of Angela List ("List") and Gerlack. List affirms that 1) she is the treasurer and chief financial offer of ICC; 2) ICC is a religious corporation organized under the RCL and is, therefore, tax exempt pursuant to Internal Revenue Service ("IRS") Code § 501(c)(3); and 3) Gerlack is the Chairman of the Board of Trustees of ICC and serves in that position without compensation.

In his affidavit, Gerlack denies acting with gross negligence, or the intent to harm Good

Deeds. Thus, he submits, he is protected by N-PCL § 720-a which grants him immunity from lawsuits, absent gross negligence or an intent to harm.

Gerlack affirms that 1) Good Deeds failed to obtain the approval required by paragraph 30 of the Contract; 2) ICC cooperated with Good Deeds by approving Good Deed's plans but, on information and belief, the Town Board did not approve those plans, but granted Good Deeds an extension of time to obtain approval; 3) ICC attempted to comply with paragraph 37 of the Contract, related to obtaining court approval, by preparing a petition and submitting it to the Attorney General for approval; 4) the Attorney General would not waive its objections to the petition because it was not satisfied that the sale was in ICC's best interest; 5) when Good Deeds failed to obtain governmental approval of the plans, the Board of Trustees voted to terminate the Contract; and 6) Good Deeds never obtained approval of the plans from the Town Board.

In opposition, Good Deeds provides an affidavit of Richard Blau ("Blau"), a member of Good Deeds. Blau submits that ICC's conduct caused Good Deeds' failure to obtain court approval of the Contract and that ICC thereby waived the applicable provision in the Contract. Blau also submits that Gerlack is not entitled to immunity pursuant to N-PCL § 720-a because he engaged in a course of conduct calculated to induce ICC to breach its Contract with Good Deeds.

Blau affirms that 1) ICC was in a difficult financial situation in 2006 which included debts for a federal tax lien and delinquency in paying certain utilities; 2) as further evidence of ICC's precarious financial situation, the congregation of ICC ("Congregation"), believing that it would have to sell the Premises and disband, petitioned Nassau County Supreme Court in 2005 to request an Order extinguishing the covenant that limited the use of the Premises to religious purposes; 3) Good Deeds, aware of the Congregation's "despondence" over a prospective sale of the Premises, approached ICC's Board of Directors and suggested that Good Deeds would build a smaller facility for the Congregation and purchase the balance of the Premises; 4) Good Deeds proposed that it would, at its own expense, take the measures necessary to obtain a zoning variance so that the Premises could be partitioned and a portion could be developed commercially; 5) Good Deeds furnished 10% of the $2 million purchase price as "earnest money" and agreed to release that money for ICC which was "strapped for cash;" 6) ICC drew down $125,000, and then $50,000 which it used for its operating expenses; 7) pursuant to paragraph 24 of the Contract, the money Good Deeds paid towards the Contract constitutes a lien

on the Premises; 8) Good Deeds did not delay the plan approval process, as demonstrated by the facts that they, *inter alia*, a) prepared and submitted variance applications to numerous planning boards and agencies; b) prepared a new tax map for the Premises; c) prepared and submitted architectural site plans; and d) commissioned traffic studies; and 9) ICC interfered with Good Deeds' ability to perform by, *inter alia*, a) expressing equivocation about the Contract, causing reluctance on the part of the Town of Hempstead to approve the zoning application; b) not providing feedback to the Town of Hempstead regarding proposed revisions; and c) continuing to seek modifications to the Contract.

Blau affirms, further, that in February 2008, ICC proposed a new contract whereby Good Deeds would purchase the Premises for a $4 million cash-only consideration. Negotiations between the parties continued and, in April 2008, the parties agreed to extend to May 25, 2008 the deadline to obtain the necessary approvals, pending the negotiation and execution of the newly-proposed contract.

In early May 2008, ICC continued to express reservations about proceeding with the Contract. Nevertheless, Good Deeds signed the new contract and awaited ICC's decision. By letter dated August 15, 2008, ICC notified Good Deeds that it was exercising its option to cancel the Contract.

In its Reply Affirmation, ICC provides affidavits from Gerlack and Eileen Buchalter ("Buchalter"), the acting president of ICC. Gerlack 1) disputes Blau's allegations that ICC was in substantial arrears; 2) agrees that he voted against the Contract, but affirms that he accepted the Congregation's approval of the Contract and acted to enforce it; 3) denies speaking with anyone at the Town of Hempstead regarding Good Deeds' application; 4) submits that the Levittown Property Owner's Associations expressed concerns about who the new tenants at the premises would be and demonstrated concerns about Blau's credibility on this topic; 5) notes that for two years after the parties executed the Contract, Good Deeds never expressed concerns that ICC was not being cooperative; 6) affirms that he was candid when speaking with the Attorney General, notifying that agency that the Congregation approved the Contract, but that he ("Gerlack") had personal objections to it; and 7) states that ICC retained a real estate broker after Good Deeds failed to comply with the Contract by obtaining governmental approval.

Buchalter affirms that 1) although Gerlack disagreed with the Congregation's approval of

the Contract, he acted in accordance with the Congregation's wishes; 2) neither she nor Gerlack ever asked the Attorney General to disapprove the Contract; 3) although the majority of the Congregation initially favored the Contract, they voted to terminate it after Good Deeds' numerous delays; and 4) ICC cooperated in every respect in obtaining governmental approval for the Contract.

C. The Parties' Positions

ICC and Gerlack argue that 1) the third cause of action, against Gerlack, must be dismissed because Gerlack is immune from liability as Good Deeds has not alleged facts demonstrating that Gerlack acted with gross negligence or an intent to harm; 2) the Complaint should be dismissed because it is not verified, in violation of CPLR § 3016(h); 3) the Contract is voidable because it has not been approved by the Court, and, therefore, Gerlack cannot be liable for inducing the breach of a void contract; 4) given the absence of a petition by ICC, Good Deeds does not have standing to seek Court approval of the Contract; 5) even assuming, *arguendo*, that the Court approved the Contract, Good Deeds' breach of the Contract by failing to obtain governmental approvals would bar the purchase contemplated by the Contract; 6) the action may not proceed in the absence of the Attorney General as a named party; and 7) the Notice of Pendency should be cancelled or vacated because Good Deeds did not commence this action in good faith.

Good Deeds opposes ICC and Gerlack's motion, submitting that 1) Good Deeds has properly pled a cause of action for specific performance by alleging facts a) tending to show Good Deeds' performance and/or that ICC prevented Good Deeds from performing certain conditions; b) demonstrating that Good Deeds is ready, willing and able to perform; c) specifying the provision(s) of the Contract that ICC has breached; and d) establishing that there is no adequate remedy available at law; 2) the Attorney General is not a necessary party; 3) Gerlack is not entitled to the immunity provided in N-PCL § 720-a because the facts alleged demonstrate that Gerlack acted intentionally and deliberately to harm Good Deeds; and 4) the lack of a verification in the Complaint is not a basis for dismissal because Defendants failed to give notice to Plaintiff pursuant to the applicable statute.

RULING OF THE COURT

A. Verification of Complaint

With respect to Defendants' motion to dismiss because the Complaint is not verified, CPLR§ 3016 provides, in pertinent part, that in an action or proceeding based upon the conduct of a director, officer or trustee described in N-PCL § 720-a, the complaint shall be verified and shall state whether or not said complaint is based upon gross negligence or intentional infliction of harm. CPLR § 3022, titled "Remedy for defective verification," provides:

> A defectively verified pleading shall be treated as an unverified pleading. Where a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.

The Court denies Defendants' motion to dismiss the Complaint for lack of a verification. The Court concludes that Defendants failed to provide the required notice with due diligence, as required by CPLR § 3022, and thereby waived their right to treat the Complaint as a nullity.

B. Attorney General as a Necessary Party

N-PCL § 511(a) requires ICC, as a corporation required by law to obtain leave of court to dispose of all or substantially all its assets, to present a verified petition to the supreme court of the judicial district, or the county court of the county, where the corporation has its office or principal place of business. N-PCL § 511(a)(9) provides in pertinent part that, upon presentation of the petition, the court shall direct that a minimum of fifteen days notice be given by mail or in person to the Attorney General. In addition, paragraph 37 of the Contract reflects that ICC agreed to notify the Attorney General of its application for court approval.

CPLR § 3211(a)(10) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the court should not proceed in the absence of a person who should be a party. In turn, CPLR § 1001(a) provides as follows:

> Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

The Court concludes that the Attorney General is not a necessary party, and denies Defendants' motion to dismiss on that basis. The applicable statutes require the Attorney General to be given

notice of the sale at issue, so that the Attorney General may advise the Court of its position regarding the proposed sale. The statutes, however, make no provision for naming the Attorney General as a party to any action concerning such a sale and the Court declines to impose such a requirement here.

C. Gerlack's Immunity

CPLR § 3211(a)(11) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the party is immune from liability pursuant to N-PCL § 720-a. That statute applies to Religious Corporations such as ICC. *See* RCL § 2-b. In turn, N-PCL § 720-a provides, in pertinent part:

> [N]o person serving without compensation as a director, officer or trustee of a corporation, association, organization or trust described in section 501(c)(3) of the [U.S. IRS] code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability.

Good Deeds implicitly concedes that Gerlack is generally entitled to immunity under CPLR § 3211(a)(11) and N-PCL § 720-a, but nevertheless claims that Gerlack acted with gross negligence or intent to harm. The Complaint, however, fails to allege sufficient facts to support this claim. Indeed, the Complaint does not contain sufficient allegations that Gerlack acted in a grossly negligently or intentionally damaging manner in his role on the Board of Directors by considering the proposed sale, conducting the required votes by the Congregation and/or taking steps to obtain the necessary governmental authorization for the sale.

Good Deeds relies, at least in part, on the fact that Gerlack objected personally to the proposed sale as proof that he intended to interfere with its completion. However, the facts before the Court establish, without dispute, that although Gerlack did not believe the sale was in ICC's best interest, he still took appropriate steps to effectuate the sale contemplated by the Contract. Accordingly, the Court grants Defendants' motion to dismiss the third cause of action against Gerlack.

D. Sufficiency of First and Second Causes of Action

CPLR § 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of

action. It is well-settled that the Court must deny a motion pursuant to CPLR § 3211(a)(7) if the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally accept the pleading, and accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

The Court concludes that Plaintiff has stated a cause of action with respect to counts one and two of the Complaint. Plaintiff has alleged facts demonstrating that ICC breached the Contract by failing to obtain the necessary governmental approval for the sale, and the sale, in fact, has not been consummated. Moreover, ICC does not dispute that it has not obtained the necessary governmental approval, although it takes the position that its failure to do so is attributable to Plaintiff's own conduct. In light of the foregoing, the Court denies Defendants' motion to dismiss counts one and two of the Complaint.

E. Notice of Pendency

CPLR § 6514(b) provides that the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith. In light of the Court's denial of Defendants' motion to dismiss counts one and two of the Complaint, based on the Court's conclusion that Plaintiff has stated a cause of action as to those counts, the Court denies Defendants' application to cancel or vacate the notice of pendency.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for a conference on August 25, 2009 at 9:30 a.m.

ENTER

DATED: Mineola, NY

July 14, 2009

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HON. TIMOTHY S. DRISCOLL

J.S.C.