

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

PRESENT: BERNARD J. FRIED
Justice

E-FILE

PART 60

EMPIRE 33RD LLC,

Plaintiff(s),

- v -

THE FORWARD ASS'N INC., ET AL.,

Defendant(s).

INDEX NO. 602074/2009

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits **RECEIVED**

Answering Affidavits — Exhibits APR 01 2010

Replying Affidavits _____

PAPERS NUMBERED

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Cross-Motion: Yes No

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Before me is a motion by defendants The Forward Association Inc. and the Workmen's Circle/Arbeter Ring, Inc. ("WC/AR") to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and 3211 (a)(7). Upon consideration of all the papers submitted in connection with this motion by both sides, and after hearing oral argument, I now render this decision.

Defendants move to dismiss the first cause of action for declaratory judgment based on documentary evidence, and the breach of contract and fraud counts for failure to state a claim.

A motion to dismiss based on the documentary evidence, under CPLR § 3211(a)(1), "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

"The test on a motion directed at the sufficiency of the complaint is not whether a cause of action is artfully drafted but whether, accepting the allegations of the complaint as true and according them the benefit of every favorable inference, a legally cognizable cause of action is made out." *Banc of America Securities LLC v. Solow Bldg. Co. II, L.L.C.*, 47 A.D.3d 239, 242 (1st Dept. 2007).

The complaint alleges that plaintiff entered into an agreement dated March 19, 2007 to buy certain real property from defendants for \$34,900,000. The real property was the primary asset of defendants, which are charitable organizations. Plaintiff paid defendants a good-faith initial deposit of \$100,000, as well as the first two downpayments required under the agreement: \$3.5 million on March 19, 2007, and \$1.75 million on May 19, 2007.

Two verified petitions were submitted before the Supreme Court, seeking the court's leave to sell the property. The first petition, dated August 30, 2007, attached an Affidavit, also dated August 30, 2007, by Robert Kestenbaum, WC/AR Executive Officer for Strategic Projects and Organization, averring that no membership vote was held by WC/AR on the proposed sale of its property, though WC/AR's plan to sell the property was reported at WC/AR's most recent biennial convention on in June 2006. A revised second petition, dated September 24, 2007, was later filed, stating that "no members [of WC/AR] are entitled to vote on such sale." (Sept. 24, 2007 Pet'n ¶ 14.)

The sale was authorized by an Order dated September 25, 2007, signed by the Honorable Martin Schoenfeld, J.S.C.

Almost a year later, in a letter dated September 19, 2008, plaintiff demanded the return of its payments, totaling \$5.35 million, with interest, alleging that defendants lacked the "required approvals and consents required by law" to agree to sell the property and were "in material breach" of their representations and warranties in the agreement.

On September 25, 2008, plaintiff executed a First Amendment to the agreement, agreeing to pay the third downpayment of \$1.75 million by September 30, 2008, and acknowledging that "the Agreement as modified hereby remains in full force and effect."

Plaintiff did not make the third downpayment. In a letter dated March 11, 2009, defendants informed plaintiff that, because plaintiff had breached the agreement by failing to make its third downpayment, which was due September 30, 2008, defendants were terminating the agreement and retaining the \$5.25 million in downpayments already paid as liquidated damages. (The letter does not mention the fate of the \$100,000 initial deposit.)

The WC/AR National Executive Board approved the sale of the property on

February 26, 2007. At the WC/AR biennial convention on June 13, 2008, the delegates approved the sale by a vote of 71 to 0, with 5 abstaining.

In its complaint, plaintiff has brought four causes of action. First, it seeks a declaration that the agreement is "null and void *ab initio* with no force and effect," because defendants failed to comply with Not-for-Profit Corp. Law §§ 510-11, chiefly by failing to obtain the required member approval from WC/AR's members to enter into the agreement with plaintiff. Second, the complaint alleges that defendants violated the terms of the agreement and "knowingly made material false and/or fraudulent warranties and representations in the Agreement." In both Counts I and II, plaintiff seeks \$5.35 million in damages—the amount of its deposit and downpayments—plus interest.

For a third count, the complaint alleges that defendants fraudulently "induced the plaintiff to enter into the Agreement" by making false representations in their agreement, which induced plaintiff to enter into it and to make the \$5.35 million in payments, and in reliance on which plaintiff also incurred the costs of purchasing a nearby property, including air rights. Count III seeks damages of \$20 million.

Fourth, plaintiff seeks an injunction directing the foreclosure and sale of the property to satisfy plaintiff's alleged lien of \$5.35 million on the premises.

Defendants contend that, whether or not plaintiff has labeled it as such, its allegation that defendants violated Not-for-Profit Corp. Law §§ 510-11 is tantamount to a claim that defendants acted without corporate authority when they entered into the agreement, and that they had no corporate authority to sell the property.

I agree. It makes no difference whether or not the complaint actually invokes the phrase: "ultra vires"; the allegations in the complaint are governed by N-PCL § 203, which provides:

No act of a corporation and no transfer of real or personal property to or by a corporation, otherwise lawful, shall, if duly approved or authorized by a judge, court or administrative department or agency as required, be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such transfer....

Not-for-Profit Corp. Law § 203(a). The section goes on to list three circumstances in which such a lack of capacity or power may be asserted: by a shareholder of the corporation, by the corporation itself, and by the attorney general.

Although there is some confusion in the caselaw on this subject, section 203 makes clear that it overrules the older common law rule that the ultra vires defense does not apply to executory contracts. Not-for-Profit Corp. Law § 203 is "taken from" Bus. Corp. Law §

203, which eliminated the common law defense of ultra vires in cases of contracts wholly executory on both sides, other than for the three statutory exceptions. (See Not-for-Profit Corp. Law § 203 cmt.; Bus. Corp. Law § 203 cmt.) See also *711 Kings Highway Corp. v. F.I.M.'s Marine Repair Service Inc.*, 51 Misc.2d 373, 375 (Sup. Ct. 1966) (under Bus. Corp. Law § 203, ultra vires doctrine may not be invoked even though the contract which is claimed to be ultra vires is executory). Thus, the contrary holdings in some of the late-19th-century and early-20th-century caselaw relied upon by plaintiff, which were decided before section 203 was enacted, even assuming that they otherwise applied to the facts of this case, were overruled by statute. Cf., e.g., *Reconstruction Finance Corp. v. Eastern Terra Cotta Realty Corp.*, 48 N.Y.S.2d 920, 926 (Sup. Ct. 1944) (quoting *Vought v. Eastern Building & Loan Ass'n*, 172 N.Y. 508 (1902)) (applying ultra vires common law).

The proposed sale in this case was duly authorized by the Supreme Court, as section 203 requires, and none of the three exceptions under § 203(a) applies: this is an action by a party to an arms-length contract with defendants, not with a shareholder, the corporation itself, or the Attorney General.

The four allegedly fraudulent misrepresentations described in paragraph 34 of the complaint boil down to an allegation that defendants told plaintiffs that they had the power and authorization to enter into and to execute the agreement, although they did not. Although each of the four (unlabeled) causes of action ostensibly seeks slightly different relief—Count I is framed as seeking a declaratory judgment; Count II alleges breach of contract and fraud; Count III alleges fraudulent inducement; and Count IV seeks return of downpayments based on an alleged lien on the premises at issue—all of them are based on the assertion that the agreement is ultra vires and therefore void. See *Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 219 A.D.2d 186, 190 (2d Dept. 1996) (refusing to set aside transfers and mortgages of property as ultra vires, under Not-for-Profit Corp. Law 203, despite allegations that they were procured by false and fraudulent representations, where transfers of property were duly authorized by a judge and otherwise lawful).

Under Not-for-Profit Corp. Law § 203, the agreement was not, in fact, void, as alleged in the complaint, since the sale was authorized by order of the Court on September 25, 2007. Therefore, Count I is dismissed, based on the uncontroverted documentary evidence, and there is also no legal basis for plaintiff's claims of breach of contract or fraud in Counts II and III. While plaintiff claims that it has a lien on the premises at issue in the sum of \$5.35 million, the basis of its claimed lien is the alleged false and fraudulent

representations and breach of the agreement. Since the agreement cannot be invalidated based on the complaint's allegations of fraud, breach of contract, or violations of Not-for-Profit Corp. Law §§ 510-11, the complaint also does not state a legal basis for plaintiff's claimed lien in Count IV.

Therefore, the entire complaint is dismissed, and I do not reach the other issues raised by the parties.

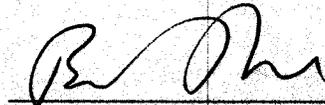
Finally, plaintiff's counsel improperly filed an affirmation instead of a memorandum of law, in support of its position on this motion. As counsel surely knows, an affirmation may be filed, under penalties of perjury, not in place of a brief but in place of an affidavit, by an attorney admitted to practice in New York. CPLR § 2106. Affirmations, like affidavits, are reserved for a statement of the relevant facts; a statement of the relevant law and arguments belongs in a brief (i.e., a memorandum of law). 22 NYCRR § 202.8(c). While I will not strike the improperly-filed affirmation on this occasion, as I stated at oral argument, counsel is admonished not to repeat this error.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/1/2010



HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE