

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

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MARC BEZNICKI, etc.,      : Index
                          : Number 8230 2005
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                          : Motion
- against -              : Date February 22, 2006
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                          : Motion
                          : Cal. Number 3
ANDRE FETAYA, et al.    :
-----x

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The following papers numbered 1 to 5 read on this motion by defendant Andre Fetaya, defendant Jay Parker, and defendant Norman Dicker for summary judgment dismissing the complaint against them.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Other (Memoranda of Law)	4-5

Upon the foregoing papers it is ordered that the motion is granted. (See the accompanying memorandum.)

Dated:

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

MARC BEZNICKI, etc., x

INDEX NO. 8230/05

- against -

BY: WEISS, J.

DATED: April 18, 2006

ANDRE FETAYA, et al. x

Defendant Andre Fetaya, defendant Jay Parker, and defendant Norman Dicker have moved for summary judgment dismissing the complaint against them.

The complaint alleges the following: Plaintiff Marc Beznicki, defendant Jay Parker, and defendant Andre Fetaya served as members of the Board of Trustees of the Rego Park Jewish Center, Inc. ("RPJC"), a not-for-profit religious corporation located at 97-30 Queens Boulevard, Rego Park, New York. Defendant Norman Dicker served as the executive director of RPJC. In or about December 2003, defendant Fetaya and defendant Parker informed the Board of Trustees that they had received an offer from Ilya Mikhailov to purchase the real property owned by RPJC for approximately \$8,000,000. Mikhailov proposed to pay \$50,000 as a down payment upon the signing of a contract of sale, \$3,000,000 at the closing, \$1,000,000 plus 5% interest one year after the

closing, and \$4,000,000 without interest ten years after the closing or at such earlier time as the congregation vacated the premises. Fetaya and Parker urged Board members to vote in favor of accepting the offer. However, the plaintiff objected to the offer at the Board meeting, and defendants Fetaya and Parker gave him twenty-four hours to produce a better offer from another party. The plaintiff arranged a meeting attended by Board members, including himself, Fetaya, and Parker, and a prospective purchaser, Moshe Aksholomo, who made an offer of \$8,500,000. At a meeting of the Board of Trustees held in January 2004, Fetaya and Parker induced the other trustees to vote against the sale to Aksholomo and in favor of a sale to Mikhailov. In or about January 2004, defendant Fetaya and another board member met with Ramin Zakarya and Elizabeth Zarkarya, principals of Best Homes Realty Company, and they offered to buy the real property of RPJC on substantially similar terms to the Mikhailov proposal, but at a price of \$8,500,000 to \$10,000,000. On December 26, 2003, Marvin Kagen and Rolen Sabat, owners of R.S. Property Company, made an offer to Fetaya and Parker for the purchase of the real property at a price of \$10,000,000. Defendant Fetaya and defendant Parker did not inform other members of the Board of Trustees of the higher offers from Best Homes Realty Company and R.S. Property Company. Defendants Fetaya and Parker stated to other board members that the Mikhailov offer was the best deal that could be hoped for. The

trustees voted to accept Mikhailov's offer at a meeting held in May 2004. However, in or about July, 2004, the congregation of RPJC voted to reject Mikhailov's offer by a three to one margin.

Defendant Fetaya and defendant Parker allege that for many years they have volunteered to serve as trustees of RPJC, and defendant Dicker alleges that RPJC has employed him for over 45 years. By 2003, the congregation faced problems of declining membership and rising expenses. The minutes of the Board of Trustees meeting for November 24, 2003 read in relevant part: "Andre [Fetaya] has found a Bucharian gentleman who would buy both buildings—that is the only solution. *** The deal that Andre A. Fetaya & Jay Parker worked out [is] that we can remain in the front building (that is, sanctuary, ballroom, etc.) for ten years, rent free. ***" A motion to authorize the Chairman of the Board and the President "to go ahead with the proposed sale" carried twelve to three with one abstention. The minutes of the Board of Trustees meeting for January 6, 2004 read in relevant part: "Mr. Fetaya then apprised the board that he receive[d] another proposal from a Russian man who is interested in both buildings—offered \$10 million and same conditions as Ilya [Mikhailov] (the first buyer) as outlined in last month's minutes. However, Mr. Fetaya was not quite sure that he would honor the agreement and allow us to remain for 10 years. *** We went around the table and the majority consensus was to go with the first proposal from Ilya ***."

Defendant Dicker swears: "[All] written proposals to purchase the RPJC property were presented to the Board for consideration. I personally brought the \$10 million proposal of R.S. Property Company ('RS Property') to the Board. The Board rejected this offer because, among other reasons, RS Property intended to take over the first floor of the main building for its own use and require the membership to relocate to the second floor of the building. This was deemed unacceptable, given the age and infirmity of several RPJC members. As for the alleged January 2004 offer by Best Homes Realty Company to purchase the RPJC property 'for a price of between \$8,500,000 and \$10,000,000,' while informal offers were discussed verbally over time, no written proposal was ever received from Best Homes, its purported principals, or a 'Mr. Zar' ***." (Emphasis in original.)

Despite the rejection of Mikhailov's offer by the congregation, plaintiff Beznicki brought this action against Fetaya, Parker, Dicker, and the Attorney General of the State of New York on April 13, 2005. The first cause of action is for actual and constructive fraud based on, inter alia, the alleged failure of Fetaya and Parker to disclose the offers of Best Homes Realty Company and R. S. Property Company to the Board of Trustees and the congregation of RPJC. The second, third, fourth, fifth, and sixth causes of action are for breach of fiduciary duty based on, inter alia, the alleged failure of Fetaya, Parker, and Dicker

to disclose the allegedly better offers to the Board of Trustees and congregation of RPJC.

On August 10, 2005, the defendants submitted a motion for an order pursuant to CPLR 3211(a)(1), (3), and (7) dismissing the complaint against them. By order dated September 30, 2005, this court directed that the motion would be treated as one for summary judgment.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (Alvarez v Prospect Hospital, 68 NY2d 320, 324.) In the case at bar, the defendants successfully carried this burden.

In the first place, plaintiff Beznicki did not comply with Not For Profit Corporation Law § 623 which controls derivative actions brought against not for profit corporations. (See, Tomczak v Trepel, 283 AD2d 229.) This action was not brought by five percent or more of any class of members of RPJC (see, NFPCL §623[a]; Segal v Powers, 180 Misc2d 57), and the complaint does not "set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of [legal] action by the board of [sic: or] the reason for not making such effort." (NFPCL §623[c]; see, Segal v Powers, supra.) In any event, the defendants otherwise made a prima facie showing of entitlement to judgment as

a matter of law.

The first cause of action, which asserts fraud, rests on allegations that the defendants concealed from other board members and the congregation better purchase offers made by Best Homes Realty Company and R.S. Property Company. In order to prove a cause of action for fraud, a plaintiff must show (1) that the defendant made material representations that were false or concealed a material existing fact, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff was deceived, (4) that the plaintiff justifiably relied on the defendant's representations, and (5) that the plaintiff was injured as a result of the defendant's representations. (See, Lama Holding Co. v Smith Barney, 88 NY2d 413; New York Univ. v Continental Ins. Co., 87 NY2d 308; Watson v Pascal, -AD3d-, -NYS2d-, 2006WL 548048; Cerabono v Price, 7 AD3d 479; New York City Transit Authority v Morris J. Eisen, P.C., 276 AD2d 78; American Home Assur. Co. v Gemma Const. Co., Inc., 275 AD2d 616; Swersky v. Dreyer & Traub, 219 AD2d 321.) In regard to the \$10,000,000 offer from R.S. Property Company, the affidavit of defendant Norman Dicker and the minutes of the Board of Trustees meeting for January 6, 2004 show that the offer was made known to the Board. The defendants showed prima facie that the plaintiff cannot establish the first element of fraud in regard to the offer from R.S. Property Company. Concerning the alleged

offer from Best Homes Realty Company, the defendants asserted that they did not present the offer to the Board because it was not in writing. The defendants thereby showed prima facie that they did not have the intent to deceive other members of the Board, intent being a requisite element of a cause of action for fraud. (See, Watson v Pascal, supra; Cerabono v Price, supra.) The defendants have also shown that the plaintiff cannot prove injury, the fifth element, in this case based on the alleged loss of possible sales to R.S. Property Company and Best Homes Realty Company. "The damages plaintiff seeks are not recoverable under the out-of-pocket rule, which bars recovery of profits that would have been realized in the absence of fraud, including the loss of an alternative bargain overlooked in favor of the fraudulent one, as inherently speculative and undeterminable ***." (Geary v Hunton & Williams, 257 AD2d 482; see, Barrett v Huff, 6 AD3d 1164; Bernstein v Kelso & Co., Inc., 231 AD2d 314.)

The second, third, fourth, fifth, and sixth causes of action are for breach of fiduciary duty based on, inter alia, the alleged failure of Fetaya, Parker, and Dicker to disclose the allegedly better offers to the Board of Trustees and congregation of RPJC. A fiduciary must disclose to his principal information that is material and germane to a contemplated transaction. (See, Botti v Russell, 180 AD2d 947.) In the case at bar, the \$10,000,000 offer from R.S. Property Company was made known to the

Board. In regard to the alleged offer from Best Homes Realty Company, the defendants assert that they did not present the matter to the Board because there was no offer in writing. Since Best Homes did not offer a specific sum for the property, but merely expressed an interest in the broad range of \$8,500,000 to \$10,000,000 and did not make a binding offer in writing, the defendants showed prima facie that they did not conceal material facts from the Board. The defendants also showed prima facie that the business judgment rule protects their actions in this matter. The business judgment rule limits judicial review of actions of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (Auerbach v Bennett, 47 NY2d 619, 629; see, Levandusky v One Fifth Ave. Apartment Corp., 75 NY2d 530.) Absent claims of fraud, self-dealing, unconscionability or other misconduct, the business judgment rule limits judicial inquiry into the actions of corporate managers to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the corporation. (See, Shapiro v Rockville Country Club, Inc., 22 AD3d 657; Gillman v Pebble Cove Home Owners Assn., 154 AD2d 508.) In the case at bar, the defendants showed prima facie that they acted in good faith and in furtherance of the legitimate interests of the congregation.

The burden on this motion shifted to plaintiff Beznicki

to produce evidence showing that there is an issue of fact which must be tried. (See, Alvarez v Prospect Hospital, supra.) The plaintiff failed to carry this burden. The plaintiff expressed a hope that discovery might reveal a written offer from Best Homes. A party cannot have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action or defense. (See, Keeley v Tracy, 301 AD2d 502; Baron v Newman, 300 AD2d 267; Hampton Living, Inc. v Carltun on the Park, Ltd., 286 AD2d 664; Romeo v City of New York, 261 AD2d 379.) In order to successfully oppose a motion for summary judgment on the ground that further discovery is needed, "a party claiming ignorance of critical facts must first demonstrate that his or her ignorance is unavoidable, and that reasonable attempts were made to discover facts which would give rise to a triable issue ***." (Lumbsy v Gershwin Theater, 282 AD2d 578; see, Gillinder v Hemmes, 298 AD2d 493; Cruz v Otis Elevator Co., 238 AD2d 540; Rothbort v S.L.S. Mgt. Corp., 185 AD2d 806.) This action has been pending for over one year. The court notes that there is no evidence in this case of self-dealing which would prevent the application of the business judgment rule.

Accordingly, the motion is granted.

Short form order signed herewith.

J.S.C.