

85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC

2007 NY Slip Op 30328(U)

March 16, 2007

Supreme Court, New York County

Docket Number: 0601082

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Emily Jane Goodman
Justice

PART 17

85 Fifth Ave

INDEX NO. 601082/06

- v -

DA Seleg, LLC

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided per

attached

FILED
MAR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/16/07

Emily Jane Goodman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION [* 1]

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

-----X
85 FIFTH AVE. 4TH FLOOR, LLC,

Plaintiff,

-against-

I.A. SELIG, LLC, THE OLD GLORY REAL
ESTATE CORPORATION, MICHAEL SALZHAUER,
IAN SELIG, ROBERT MANNHEIMER, JAIME
INCLAN, CLAUDIA CATANIA, D. NARDONE,
JOHN DOES "1" through "10" being and
intended to be those unknown persons on
the Board of The Directors of The Old
Glory Real Estate Corporation,

Index No. 601082/06

Defendants.

-----X
EMILY JANE GOODMAN, J.

This action involves a contract between plaintiff 85 Fifth Ave. 4th Floor, LLC and defendant I.A. Selig, LLC (the seller), for the purchase and sale of a commercial cooperative space, the fourth floor of a building located at 85 Fifth Avenue, New York, New York (the property). On October 3, 2006, this court denied plaintiff's motion for a preliminary injunction prohibiting defendants from selling, transferring or assigning the shares and propriety lease relating to the property, and granted defendants' cross motion to dismiss. Plaintiff moves for renewal and reargument of its motion for a preliminary injunction and defendants' cross motion to dismiss, and upon renewal and reargument, for an order reinstating five of the six causes of action in its complaint and entering the requested preliminary injunction. Defendants The Old Glory Real Estate Corporation,

Michael Salzhauer, Robert Mannheimer, Jaime Inclan, Claudia Catania and D. Nardone (the co-op defendants) cross-move for sanctions, pursuant to 22 NYCRR 130-1.1.

Plaintiff bases its motion on what it claims is newly discovered evidence that defendant Ian Selig made false and misleading representations in three affidavits that he submitted in support of defendants' cross motion to dismiss.

The statements on which plaintiff relies essentially relate to whether the cooperative corporation (the co-op) was planning for a conversion from commercial to residential uses. The primary statement on which plaintiff focuses is in Selig's reply affidavit, submitted in support of defendants' cross motion to dismiss, in which he stated:

I suspect that the Plaintiff will argue at oral argument that there is a proposed residential conversion in the Building, and that must be the "real" reason that the Plaintiff's Board application was denied, to confer a benefit on me so I could participate in a residential conversion. First and foremost, I know of no plan being in place for a residential conversion of the Building.

Reply Affidavit of Ian Selig, dated May 31, 2006, ¶ 15.

Plaintiff also points to other statements by Selig denying rumors of possible residential conversion, as well as Selig's characterization of plaintiff's complaint as frivolous and malicious.

Plaintiff submits evidence that, in April 2006, two months after plaintiff's offer to purchase the property was rejected by

the co-op's board of directors, the co-op approved a change in the by-laws and proprietary lease making residential conversion possible in the future, as well as evidence that the fifth floor of the building (here the fourth floor is at issue) was advertised for sale with the possibility of residential conversion at a price substantially higher than the contract price for the fourth floor (\$7,900,000 as compared with \$3,150,000). In opposition, defendants submit an e-mail from Michael Salzhauer, then president of the co-op board, to the company that advertised the apartment, correcting errors in the advertisement regarding whether board approval was necessary and whether the space was convertible to residential use. The Salzhauer e-mail states:

I believe that these issues come about from a misreading of some new coop documents, which by the way are not yet in effect, and may indeed never come to be in effect if certain transactions are not consummated. These documents include some mention of residential conversion of the building, that conversion would require substantial capital improvements, a vote of the shareholders, and is (in my opinion) almost entirely unlikely to happen within any time horizon that could be considered "near term"....

E-mail from Michael Salzhauer to Cirfaulo, John; Waggner, Craig, dated June 2, 2006. The court notes that, according to the more recent advertisement for the fifth floor space submitted by both plaintiff and co-op defendants, the asking price for the fifth floor has since dropped more than \$1 million and the previous statement in the advertisement that "co-op board approval not

necessary, the unit has the ability to convert to residential" has been changed to state "[a] new proprietary lease has been approved and will not require board approval for most common uses of the commercial space and may allow future residential conversion." Defendants further note that, according to Diane Nardone, current president of the co-op, despite the April 2006 changes in the by-laws and proprietary lease, which would permit a possible conversion from commercial to residential uses, as of seven months after those changes, such a conversion had not been implemented, nor even been seriously discussed. Affidavit of Diane Nardone, dated November 29, 2006, ¶ 20.

A motion to renew may be granted based upon new facts not offered on the prior motion, but only where those new facts would change the prior determination. CPLR 2221 (e) (2).

Plaintiff asserted six causes of action in the complaint: 1) breach of contract against the seller; 2) breach of contract against the corporation;¹ 3) breach of duty of good faith and fair dealing against the seller and the corporation; 4) tortious interference with contract against the corporation and board members; 5) civil conspiracy to breach and tortiously interfere with the contract against all defendants; and 6) permanent injunction against the seller. The question of whether the

¹ Plaintiff is not seeking renewal or reargument with respect to the second cause of action.

building might at some time in the future convert to residential uses was not germane to, and is not mentioned, in this court's October 3, 2006 decision.

Even assuming plaintiff's allegations are true, and seller lied about knowing of the existence of a plan for conversion from commercial to residential uses, plaintiff offers no evidence to indicate that the co-op defendants colluded with the seller to reject the sale for purposes other than those legitimately held by a cooperative corporation. Such evidence would be necessary to support plaintiff's request for renewal and is lacking (see Woo v Irving Tenants Corp., 276 AD2d 380 [1st Dept 2000] [motion for summary judgment properly granted where plaintiff made no showing that cooperative board's decision to reject purchaser was rendered in bad faith or for purposes other than those legitimately held by a cooperative corporation]).

Plaintiff merely speculates in its memorandum of law, that the members of the board did not act in good faith when they denied his application for purchase, stating that

the elimination in the new Proprietary Lease of the requirement of Board approval for assignment of shares demonstrates that, contrary to the claim in the affidavits submitted by Selig, Salzauer, and Claudia Catania, the Board had no continuing interest in vetting prospective purchasers, and belies the claim by all defendants that the Board's refusal to permit the sale to the Plaintiff was in good faith.

Plaintiff's Memorandum In Support Of Motion For Leave To Renew And Reargue, at 14. However, the board provided a reason for its

rejection of plaintiff's application based upon its conclusion that the application was financially weak and the buyer was, therefore, an "unsuitable candidate." Whether board review might not have been necessary in the future does not alter the fact that it was necessary at the time that plaintiff sought to purchase the property, and that the board was entitled, in the exercise of its business judgment, to reject an application it concluded was financially inadequate (see Woo v Irving Tenants Corp., 276 AD2d 380, supra).

Plaintiff's breach of contract claim against the seller was dismissed on the basis that 1) plaintiff was not entitled to written notice from the board of rejection of his purchase application as a third-party beneficiary under the proprietary lease entitling tenant (seller) to such notice, and 2) the seller did not breach the contract because the board rejected plaintiff's application, and therefore, the seller was entitled, under the contract, to terminate it. Even assuming that Selig knew of, and lied about, a plan for residential conversion, that fact does not create third-party beneficiary rights for plaintiff under the proprietary lease where none existed, nor change the fact that the board rejected plaintiff's application to purchase. Seller's purported lies do not create any duty by the board to approve plaintiff's application if it was inadequate, nor impose a duty by Selig to persuade the board to do so. The flaw in

plaintiff's argument is that plaintiff asks the Court to assume that based on evidence that seller lied, it would be reasonable to assume that the board colluded with seller to reject plaintiff's application for an improper purpose. However, no evidence, other than speculation, is proffered to support this assumption, especially given the board's legitimate reasons for rejecting the application (see Woo, supra). Therefore, absent new evidence indicating that the board colluded with the seller to reject the application, the court finds no reason to reverse its determination dismissing plaintiff's cause of action for breach of contract against the seller.

With respect to the third cause of action for breach of good faith and fair dealing against the seller and the corporation, having found that there was no breach of contract by seller (and no contract between the buyer and the co-op corporation which could be breached), the court properly dismissed the third cause of action for lack of an independent basis for a duty of good faith and fair dealing.

Nor does the purported new evidence alter the court's dismissal of the fourth and fifth causes of action, since those causes of action also depended on whether a breach of contract had occurred. The dismissal of the sixth cause of action for injunctive relief is, therefore, also unaffected.

With respect to the co-op defendants' cross motion for

sanctions, while the court has denied plaintiff's motion to renew and reargue, it is not prepared to conclude that the motion is frivolous. Therefore, the co-op defendants' cross motion is denied.

Accordingly, since the newly discovered evidence would not change the court's October 3, 2006 determination, it is hereby ORDERED that the motion to renew and reargue is denied; and it is further

ORDERED that the cross motion for sanctions is also denied.

This Constitutes the Decision and Order of the Court.

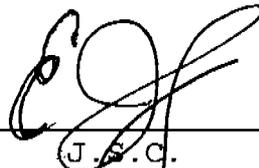
Dated: March 16, 2007

ENTER:

FILED

MAR 26 2007

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.
EMILY JANE GOODMAN