

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 12

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BENJAMIN OF FOREST HILLS REALTY,
INC.

INDEX NO. 28032/98

BY: DORSA, J.

- against -

DATED: NOVEMBER 23, 2004

AUSTIN SHEPPARD REALTY, INC.,
et al.

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Defendant Austin Sheppard Realty, Inc. ("Austin") has moved for summary judgment dismissing the complaint against it. Defendant Alan Shapiro, defendant Centre Realty/Bravdey Management Corp., defendant 108-46 70th Road Owners, Inc., defendant Joan Helzer, defendant Kenneth Seng, defendant Mark Benton, defendant Karl Newmann, defendant Amy Brown, defendant George Yedvarb, defendant Steven Yedvarb, and defendant Martin Yedvarb have also moved for summary judgment dismissing the complaint against them.

The complaint alleges the following: Plaintiff Benjamin of Forest Hills Realty, Inc. ("Benjamin"), located at 108-16 72nd Avenue, Forest Hills, New York, is a licensed real estate brokerage. Defendant Austin, whose principal is defendant Alan M. Shapiro, is also a licensed real estate brokerage. Defendant 108-46 70th Road Owners, Inc. is a cooperative corporation which owns a building located at 108-46 70th Road, Forest Hills, New York. Defendants Shapiro, Holzer, Seng, Benton, Newmann, and Brown serve as members of the Board of Directors of the cooperative. Gary B.

Davis, a shareholder of the cooperative and the holder of the proprietary lease on Apartment 6J, hired plaintiff Benjamin to find a purchaser for his interest in the cooperative. The plaintiff found Carol H. Kahn who was ready, willing, and able to purchase the shares, but the Board of Directors first had to approve of the sale. The managing agent of the cooperative directed Kahn to transmit her application for approval to defendant Shapiro, but he refused to submit it to the Board of Directors. Defendant Shapiro will not allow the Board of Directors to approve a transaction unless his brokerage, defendant Austin, is the agent. Defendant Shapiro and defendant Austin introduced Davis to another prospective purchaser, who upon receiving the approval of the Board of Director, purchased Davis' interest.

The plaintiff began this action on December 24, 1998, asserting two causes of action, the first for tortious interference with contract and the second for violation of General Business Law § 340, New York State's antitrust law.

Disclosure has revealed that in order for a shareholder to sell his interest in the cooperative, he must obtain an application package, printed under defendant Austin's letterhead, from defendant Shapiro. The seller must then return the application to defendant Austin's office, which then distributes copies to members of the Board of Directors who allegedly may have been selected by defendant Shapiro. A screening committee of the

board, which meets in the office of defendant Austin, then reviews the application and decides whether to accept the potential purchaser. The applications are divided into "outside sales," which involve brokers other than defendant Shapiro, and "inside sales," which involve only defendant Shapiro. The screening committee reviews an application package involving an outside broker during a formal meeting held only two or three times a year, while application packages submitted by defendant Shapiro may be reviewed more informally and more frequently. The board has never rejected an application submitted by defendant Austin, while, on the other hand, one board member testified at his deposition that he could not recall a single instance where defendant Austin was not the broker on a sale of a cooperative apartment.

That branch of the motion by defendant Austin which is for summary judgment dismissing the first cause of action asserted against it is granted. That branch of the motion by defendant Alan Shapiro, defendant Centre Realty/Bravdey Management Corp., defendant 108-46 70th Road Owners, Inc., defendant Joan Helzer, defendant Kenneth Seng, defendant Mark Benton, defendant Karl Newmann, defendant Amy Brown, defendant George Yedvarb, defendant Steven Yedvarb, and defendant Martin Yedvarb which is for summary judgment dismissing the first cause of action asserted against them is granted. Paragraph 34 of the complaint reads: "As a third party beneficiary to the transaction between Davis and Kahn,

plaintiff Benjamin was entitled to a real estate commission." Paragraph 43 of the complaint reads: "By reason of the tortious interference of contractual relations *** Plaintiff Benjamin, as a third party beneficiary to the transaction, did not receive its duly earned real estate brokerage commission." The plaintiff has attempted to sue for tortious interference with the contract between Davis, the holder of a proprietary interest in a unit of the cooperative, and Kahn, a prospective purchaser of that interest. (See, Lama Holding Co. v. Smith Barney, 88 NY2d 413; Beecher v. Feldstein, 8 AD3d 597.) The plaintiff, not a party to that contract, bases its claim on its alleged status as a third-party beneficiary of the contract. (See, Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc., 66 NY2d 38.) However, paragraph 12.2 of the contract between Davis and Kahn expressly states: "Seller shall pay the broker's commission pursuant to a separate agreement. The broker shall not be deemed to be a third party beneficiary of this provision."

That branch of the motion by defendant Austin which is for summary judgment dismissing the second cause of action asserted against it is denied. That branch of the motion by defendant Alan Shapiro, defendant Centre Realty/Bravdey Management Corp., defendant 108-46 70th Road Owners, Inc., defendant Joan Helzer, defendant Kenneth Seng, defendant Mark Benton, defendant Karl Newmann, defendant Amy Brown, defendant George Yedvarb, defendant

Steven Yedvarb, and defendant Martin Yedvarb which is for summary judgment dismissing the second cause of action asserted against them is denied. The opponent of a motion for summary judgment has the burden of submitting proof in admissible form sufficient to show that there is an issue of fact which must be tried. (See, Alvarez v. Prospect Hospital, 68 NY2d 320.) Plaintiff Benjamin successfully carried this burden in regard to its second cause of action. The Donnelly Act (General Business Law § 340) provides that "[e]very contract, agreement, arrangement or combination whereby a monopoly *** is or may be established or maintained, or whereby competition **** may be restrained" is illegal." (See, Yankees Entertainment and Sports Network, LLC v. Cablevision Systems Corp., 224 F Supp 2d 657.) "A party asserting a violation of the Donnelly Act must 1) identify the relevant product market; 2) describe the nature and effects of the purported conspiracy; 3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and 4) show a conspiracy or reciprocal relationship between two or more entities ***." (Great Atlantic & Pacific Tea Co., Inc. v. Town of East Hampton, 997 F Supp 340, 352; see, Newsday, Inc. v. Fantastic Mind, Inc., 237 AD2d 497; Watts v. Clark Associates Funeral Home, Inc., 234 AD2d 538; Yankees Entertainment and Sports Network, LLC v. Cablevision Systems Corp., supra.) In the case at bar, there is sufficient evidence in the record to create an issue of fact concerning

whether defendant Austin and the other defendants conspired to limit the sales of cooperative units to those sales arranged by defendant Austin.

Short form order signed herewith,


J.S.C.