

**Sinensky v Rokowsky**

2004 NY Slip Op 30085(U)

December 9, 2004

Supreme Court, Kings County

Docket Number: 0011250/2502

Judge: David I. Schmidt

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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9<sup>th</sup> day of *DECEMBER*, 2004

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

-----X

GARY SINENSKY, ET AL.,

Index No. 11250/04

Plaintiffs,

- against -

SOLOMON ROKOWSKY, et al.,

Defendants.

-----X

The following papers numbered 1 to 26 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-4 9-18 20-25</u>
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	<u>5-6 19 26</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Transcripts of hearings dated April 30, 2004 &amp; May 3, 2004</u>	<u>7-8</u>

Upon the foregoing papers in this action alleging unlawful discrimination, breach of fiduciary duty, and tortious interference with contract, and seeking declaratory and injunctive relief and compensatory and punitive damages, plaintiffs Gary Sinensky, Chaim Indig, and Sara Indig (collectively, plaintiffs) move, by order to show cause, for a preliminary injunction, enjoining defendant Solomon Rokowsky (Rokowsky) and those working with and for him, from entering into a contract of sale for the shares of stock allocated to apartment

8D at 1401 Ocean Avenue, in Brooklyn, New York, or from conveying said shares of stock to anyone or any party other than plaintiff Gary Sinensky, and from renting the apartment or placing into occupancy an individual or individuals during the pendency of this action. Defendant Rokowsky cross-moves for an order, dismissing plaintiffs' complaint, pursuant to CPLR 3211 (a) (1), based upon documentary evidence and, pursuant to CPLR 3211 (a) (7), for failure to state a cognizable cause of action for which relief can be granted. Defendants Victor Fein (Fein), Dr. Stanley Weiss (Weiss), the Board of Directors of Premier House, Inc., and Premier House, Inc. (collectively, the Premier House defendants) also cross-move for dismissal of plaintiffs' complaint based upon these same grounds.

Premier House, Inc. is a residential cooperative corporation, which owns an apartment building located at 1401 Ocean Avenue, in Brooklyn, New York. Rokowsky and Fein are members of the nine-member board of directors of Premier House, Inc.. Rokowsky is also a representative of the sponsor. In 2003, Elisheva Sinensky contacted Rokowsky at Rokowsky Management, the building's agent, to inquire about purchasing an apartment in Premier House, Inc.'s building for her parents, Chaim Indig and Sara Indig. Chaim Indig is 81 years old, afflicted with Parkinson's disease, and confined to a wheelchair. He requires the assistance of a home attendant. Upon Elisheva Sinensky's inquiry, Rokowsky offered Elisheva Sinensky apartment 9E for the purchase price of \$325,000, and then for the purchase price of \$315,000, but she declined to pay this price. Elisheva Sinensky then sought to obtain a different apartment, apartment 8G, directly from the cooperative apartment's owner, but the offer to sell it to plaintiffs was withdrawn. Elisheva Sinensky

later learned about the availability of apartment 8D and sought to purchase it directly (without the involvement of Rokowsky or Rokowsky Management) from that cooperative apartment's owner, Dorothy Strauss, through her real estate broker, Judith Friedman.

In March 2004, a contract of sale for that cooperative apartment was executed by Gary Sinensky, who is the husband of Elisheva Sinensky and the son-in-law of Chaim Indig and Sara Indig, as purchaser, and by Dorothy Strauss, by her attorney-in-fact, as seller, for the purchase price of \$301,000. Paragraph 6.1 of the contract of sale provided that the sale was subject to the approval of the cooperative cooperation and required submission by the purchaser of an application for approval of the sale. Gary Sinensky mailed an application for such approval to Rokowsky Management. The application submitted by Gary Sinensky included a letter, dated March 17, 2004, wherein he informed the board members of Premier House, Inc. that Chaim Indig and Sara Indig currently receive a Section 8 housing subsidy due to Chaim Indig's disability and subsequent illness, and that Section 8 would supplement approximately \$975 per month to the Indigs' monthly rent payment. Gary Sinensky, in that letter, stated that it would be psychologically beneficial to the Indigs if they continued to receive Section 8, and expressed his "hope [that] the board w[ould] approve [his] request to allow Section 8 to subsidize [his] in-laws' monthly rents." He further stated that his financial obligation to the cooperative would remain unchanged if Section 8 ever declined to make monthly payments.

On March 23, 2004, an interview with respect to Gary Sinensky's application was held, at which Rokowsky, Fein, five other resident board members, Gary Sinensky, Elisheva

Sinensky, and Sara Indig attended. (Chaim Indig did not attend due to his medical condition.) At the meeting, Sara Indig made several attempts to insist upon having a washer/dryer in the apartment, despite the fact that several board members explained to her that this was against the House Rules. The interview lasted 15 minutes, after which the seven board members discussed the application, and, with the exception of Fein (who abstained from voting), the board members unanimously voted to deny the application. Several days later, the broker for the sale of apartment 8D contacted Rokowsky, and he offered \$305,000 to purchase it. Thereafter, the board of directors approved the sale of apartment 8D from Dorothy Strauss to Rokowsky, and Rokowsky is presently the owner of apartment 8D.

Consequently, plaintiffs brought this action against defendants, alleging that they unlawfully discriminated against Chaim Indig in violation of various federal and state statutes due to his disability, that they breached their fiduciary duty to Gary Sinensky, and that they tortiously interfered with Gary Sinensky's contract to purchase apartment 8D from Dorothy Strauss. The complaint seeks declaratory relief, damages, and a mandatory injunction, directing Rokowsky to deliver the shares of stock allocated to apartment 8D to Gary Sinensky in consideration of the agreed-upon purchase price recited in Gary Sinensky's contract of sale with Dorothy Strauss, and directing the board of directors of Premier House, Inc. to approve the conveyance of such shares. Plaintiffs have now moved for a preliminary injunction to restrain Rokowsky from conveying these shares to someone else during the pendency of this action. Rokowsky and the Premier House defendants have separately cross-moved to dismiss plaintiffs' complaint.

The court first addresses Rokowsky's cross motion and the Premier House defendants' cross motion insofar as they seek dismissal of the discrimination claims stated in plaintiffs' complaint, which assert that Rokowsky and the Premier House defendants violated the Federal Housing Amendment Act of 1988 (42 USC §§ 3601 et seq.), the Americans with Disabilities Act (42 USC §§ 12101 et seq.), Title VII of the Civil Rights Act of 1963 (42 USC §§ 2000e-2[a][1]), the Rehabilitation Act of 1973 (29 USC §§ 621 et seq.), New York Human Rights Law, and New York City Administrative Code § 8-107 (5). Plaintiffs argue that under all of these provisions, decision-making, when based upon a disability, is an unlawful discriminatory practice, and that Rokowsky's and the Premier House defendants' rejection of Chaim Indig, an 81-year-old man who suffers from Parkinson's disease, constituted such unlawful discrimination.

It is well settled that once a defendant articulates a reason for alleged housing discrimination, the burden shifts to the plaintiff to demonstrate that the articulated reason was a pretext for discrimination (*Robinson v 12 Lofts Realty*, 610 F2d 1032, 1040 n13 [2d Cir 1979]; *Broome v Biondi*, 17 F Supp 2d 211 [SD NY 1997]). Here, Rokowsky and the Premier House defendants articulate their reason for the denial of Gary Sinensky's application was because of the Section 8 subsidy, the fact that Elisheva Sinensky called a board member at home several times, and Sara Indig's conduct at the interview, including her repeated requests to have a washer/dryer in the apartment. Plaintiffs claim that these reasons are a mere pretext for unlawful discrimination against Chaim Indig due to his disability.

It has been expressly held, however, that “the voluntariness provision of Section 8 reflects a congressional intent that the burdens of Section 8 participation are substantial enough that participation should not be forced on landlords, either as an accommodation to handicap or otherwise” (*Salute v Stratford Greens Garden Apartments*, 136 F3d 293, 300 [2d Cir. 1998]). Thus, a landlord “is not required to articulate any justification for a policy of refusing Section 8 certificates,” and “that refusal is a landlord’s prerogative” (*id.* at 301).

Therefore, here, Rokowsky and the Premier House defendants have rebutted the inference of housing discrimination by proffering a legitimate and non-discriminatory reason for denying Gary Sinensky’s application to purchase the cooperative apartment, i.e., that they did not wish to accept a Section 8 tenant due to a general reluctance to become involved with the federal government and its rules and regulations. There are presently no tenants residing in the building which receive Section 8 benefits. As noted above, Rokowsky and the Premier House defendants have also stated other legitimate business reasons for their rejection of Gary Sinensky’s application, including the fact that Sara Indig persistently stated her need for a washer/dryer at the interview (which was against the House Rules), and their concern over the annoying conduct of Elisheva Sinensky due to her several phone calls to a board member at his home. Such conduct by Sara Indig and Elisheva Sinensky is not disputed by plaintiffs.

Plaintiffs further argue that an alleged statement by Sander Srulowitz, an attorney, who they claim represented Premier House, Inc., that the board of directors “does not like occupants who are ill because of its concern that the building will begin to resemble a

nursing home,” and that those tenants “who later became ill were found to be disruptive by their neighbors,” supports their discrimination claims. Such argument is rejected. Michael Berglas, Bernard Dach, Stanley Weiss, and Gail Duke, who are members of the board of directors of Premier House, Inc., have each submitted their sworn affidavits, wherein they attest that Sander Srulowitz has not represented the cooperative in any matter since the year 2000, and that prior to that time, he represented the cooperative only in the drafting of three commercial leases and in connection with non-payment proceedings against two shareholders and in the refinance of a mortgage. They state that Sander Srulowitz is not and was not counsel for the cooperative and had no authority to represent the position of the cooperative on any matter or to act or speak on behalf of the board.

Thus, while the making of the statement at issue is vehemently denied by Sander Srulowitz, in his affidavit, even assuming, arguendo, that Sander Srulowitz had made this statement, the making of such statement, alone, is insufficient to support plaintiffs’ discrimination claim since there is no showing that Sander Srulowitz represented Premier House, Inc. at the time he made this statement or that his statement was in any way binding upon or represented the practices of Premier House, Inc. In fact, plaintiffs admit that Elisheva Sinensky had negotiated with Rokowsky, a board member, to buy an apartment in the building, and that he was willing to sell plaintiffs an apartment, albeit at a higher price; such admission militates against plaintiffs’ discrimination claims.

Plaintiffs’ complaint further alleges a claim that the members of the board of directors of Premier House, Inc. breached their fiduciary duty to Gary Sinensky when it rejected his

application, so as to benefit Rokowsky, who also desired to purchase apartment 8D. While the board of directors of a cooperative owe a fiduciary duty to its shareholders (*see Board of Managers of Whispering Pines at Colonial Woods Condominium II v Whispering Pines Assocs.*, 204 AD2d 376, 377 [1994]; *Board of Manager of Fairways at North Hills Condominium v Fairway at North Hills*, 193 AD2d 322, 324-325 [1993]; *Ackerman v East 40<sup>th</sup> Owners Corp.*, 189 AD2d 665, 667 [1993]; *Bryan v West 81<sup>st</sup> St. Owners Corp.*, 186 AD2d 514, 515 [1992]), here, Gary Sinensky was not a shareholder or a tenant of the cooperative. Rather, Gary Sinensky, as the contract vendee of shares in the defendant residential cooperative corporation, was a stranger to the lease between the seller and the cooperative, and, as such, no fiduciary duty was owed to him (*see Leist v Goldstein*, 305 AD2d 468, 469 [2003]; *Pober v Columbia 160 Apartments Corp.*, 266 AD2d 6, 6 [1999]; *Pesochinsky v 77 Bleecker Street Corp.*, 250 AD2d 494, 494 [1998]). Indeed, Gary Sinensky lacked standing to enforce the terms of the proprietary lease with respect to the transfer of shares as against the cooperative (*see Leist*, 305 AD2d at 469; *Aridas v 244 E. 60<sup>th</sup> Street Owners Corp.*, 292 AD2d 325, 326 [2002]; *Woo v Irving Tenants Corp.*, 276 AD2d 380, 380 [2000]; *Pober*, 266 AD2d at 6). Thus, dismissal of plaintiffs' breach of fiduciary claim is required (*see CPLR 3211 [a] [7]*; *Leist*, 305 AD2d at 469; *Aridas*, 292 AD2d at 326; *Woo*, 276 AD2d at 380; *Pober*, 266 AD2d at 6; *Pesochinsky*, 250 AD2d at 494).

Plaintiffs' complaint also asserts a claim for tortious interference with contract. "The essential elements of tortious interference with contract or agreement include the existence of an agreement, knowledge of that agreement on the part of the tortfeasor, and intentional

and unjustified interference therewith, causing damage” (*Rossi v Twinbogo Co.*, 193 AD2d 481, 484 [1993]). Here, the contractual relationship between Gary Sinensky and Dorothy Strauss was known to Rokowsky and the Premier House defendants, and plaintiffs have otherwise alleged the requisite elements of this cause of action.

Rokowsky and the Premier House defendants claim that the cooperative’s challenged actions were protected by the business judgment rule, rendering plaintiffs’ claim that said actions constituted tortious interference with the subject contract for the sale of cooperative shares of apartment 8D to Gary Sinensky not tenable (*see Woo*, 276 AD2d at 380). The business judgment rule, however, “permits inquiry into claims of fraud or self-dealing by board members . . . where such claims have a basis” (*Simpson v Berkley Owner’s Corp.*, 213 AD2d 207, 207 [1995]). Where there is evidence of fraud, self-dealing, or bad faith by a board member, the protection of the business judgment rule may be overcome (*Boisson v 4 East Housing Corp.*, 129 AD2d 523, 524 [1987]; *Bernheim v 136 East 64<sup>th</sup> St. Corp.*, 128 AD2d 434, 434-435 [1987]).

In *Aridas v 244 East 60<sup>th</sup> Street Owners Corp.* (292 AD2d at 326), summary judgment dismissing a plaintiff-contract vendee’s complaint was granted where after the application to purchase a cooperative was rejected, the apartment was sold to the cooperative board’s president. These facts are similar to those in the case at bar, where, following the rejection of Gary Sinensky’s application, Rokowsky purchased apartment 8D. In granting summary judgment, the Appellate Division, First Department, in *Aridas* (292 AD2d at 326), held that the plaintiff therein did not “have a cause of action for tortious interference with contract

absent a showing of fraud or self-dealing by a board member such as would overcome the business judgment shielding the board's rejection of her.”

The procedural posture of the case of *Aridas* (292 AD2d at 326), however, unlike the present case, involved a summary judgment motion rather than a motion to dismiss. The standards in determining a CPLR 3211 (a) (7) motion differ from those for determining a summary judgment motion, and such a motion to dismiss should be denied if from the pleading's four corners, factual allegations are discerned which taken together manifest a cognizable cause of action (*Rovello v Ornofino Realty Co.*, 40 NY2d 633, 635 [1976]). Here, no discovery has yet been conducted herein, and, thus, plaintiffs must be afforded the opportunity, through discovery, to attempt to make a showing of fraud or self-dealing by Rokowsky (which would show intentional and unjustified interference with contract) so as to sustain their tortious interference with contract cause of action. Therefore, at this juncture, the cross motions by Rokowsky and the Premier House defendants, insofar as they seek dismissal of the tortious interference with contract cause of action, must be denied.

In turning to plaintiffs' motion for a preliminary injunction, it is noted that a preliminary injunction is a drastic remedy, which should be used sparingly (*see Town of Smithtown v Carlson*, 204 AD2d 537, 537 [1994]). On a motion for a preliminary injunction, the movant has the burden of demonstrating a likelihood of ultimate success on the merits, that the movant will suffer irreparable injury unless the injunctive relief sought is granted, and that the balancing of the equities lies in favor of the movant (*see CPLR 6301, 6312 [a]; W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]; *Matter of Merscorp, Inc. v Romaine*, 295

AD2d 431, 432 [2002]; *Clarion Assoc. v D.J. Colby Co.*, 276 AD2d 461, 462 [2000]). To sustain its burden of demonstrating a likelihood of ultimate success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*Sumiko Enters. v Town Realty Co., L.L.C.*, 259 AD2d 483, 483 [1999]; *Holdsworth v Doherty*, 231 AD2d 930, 930 [1996]). If key facts are in dispute, the relief will be denied, and proof resting solely on speculation and conjecture is insufficient (*Faberge Intl., Inc. v Di Pino*, 109 AD2d 235, 240 [1985]).

Here, in view of the affidavits submitted by each of the board members, which sharply dispute the allegations made by plaintiffs, the court finds that plaintiffs have failed to sustain their burden of showing a likelihood of ultimate success on the merits. Thus, plaintiffs' motion for a preliminary injunction must be denied.

Accordingly, plaintiffs' motion for a preliminary injunction is denied and the temporary restraining order heretofore granted is vacated. The cross motions by Rokowsky and the Premier House defendants are granted insofar as they seek dismissal of plaintiffs' discrimination and breach of fiduciary duty claims, and are denied insofar as they seek dismissal of plaintiffs' tortious interference with contract claim.

This constitutes the decision and order of the court.

ENTER



J. S. C.

HON. DAVID I. SCHMIDT