

**56 East 87th Units Corp. v The Kingsland Group,
Inc.**

2005 NY Slip Op 30339(U)

March 8, 2005

Supreme Court, New York County

Docket Number: 600540/2003

Judge: Walter B. Tolub

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

PR----- ~~WALTER B. TOLUB~~
0600540/2003

PART 15

— 56 EAST 87TH UNITS
VS
KINGSLAND GROUP

SEQ 2

SUMMARY JUDGMENT

| | |
|----------------|-------|
| DEX NO. | _____ |
| OTION DATE | _____ |
| OTION SEQ. NO. | _____ |
| OTION 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 denied in accordance*

with the accompanying memorandum given.

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

Dated: 2/21/05

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

WALTER B. TOLUB J.S.C.
NON-FINAL DISPOSITION

W B TOLUB

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
56 EAST 87TH UNITS CORP.

Index No. 600540/2003
Mtn Seq.

Plaintiffs,

-against-

THE KINGSLAND GROUP, INC., et al.

Defendants.

{and a third-party action.}

-----X

WALTER B. TOLUB, J.:

Plaintiff 56 East 87th Units Corp. ("Units Corp.") moves for summary judgment on its first, second and seventh causes of against defendant The Kingsland Group, Inc. ("Kingsland") and certain defendants (collectively, the "Lenders")¹.

Units Corp. owns shares of stock in a nonparty cooperative corporation known as East 87th Owners Corp. (the "Cooperative") and the concomitant interests in five apartments in the building owned by the Cooperative. Nonparty Westminster Associates, Ltd owns all of the shares of Units Corp. and is wholly owned by nonparty Ted Kalborg. Kingsland acted as agent for the Lenders in the transaction that is the subject of this action. The

¹The following lenders pooled money that was distributed through Kingsland as servicing agent: Black & White Investment Company; Suffolk County National Bank; Cohen Properties of Central Florida, Ltd.; The D.A. Haas Family Trust; Donald S. Harmelin Money Purchase Pension Plan; Elizabeth E. Edwards; Elizabeth Frost Knappman; Lois P. Samuels Revocable Trust; Margaret Salivoli Trust dated March 28, 1988; Michael and Barbara Cutler; Navran-Haas Trust; Philip Cutler; Roland Edelstein; Sally Beninati; Stuart Hersch (sic); Zev and Gail Cohen; and Zev Cohen & Associates, Inc. Pension Plan & Trust.

Lenders provided the money that was distributed pursuant to the transaction. Robert K. Marceca, now deceased, was the president of Units Corp. at all times relevant to this action and apparently arranged the transaction in dispute.

Pursuant to a promissory note dated February 25, 2000, Units Corp. and nonparty 14 Horatio Units, LLC received \$555,000 from certain defendants through Kingsland as servicing agent. The note was secured, inter alia, by a pledge and security agreement issued by Units Corp. only. The pledge and security agreement created a security interest in the share of stock and proprietary lease allocated to apartment 2A located at the building owned by the Cooperative. A promissory note, a statement of undertaking, a settlement statement, a pledge and security agreement, an assignment of lease and rent, UCC-1 form (collectively the "transaction documents"), and an opinion letter were executed by defendant Sonja Telesnik, an attorney and, according to the executed documents, a second vice president of Units Corp. The closing documents also contain an affidavit from Marceca that makes certain representations about "Unit 12A" of the subject building, which is not the unit subject to the transaction documents.

Plaintiff received no payments at the closing of the transaction. Kingsland received a fee of \$66,600.00. After deduction of various fees and administrative costs paid to third

parties, Kingsland issued a check for the balance of the proceeds in the amount of \$483,001.67 to a company named "Del Plata Ltd." It appears undisputed that this company was controlled by Marceca but wholly owned by his wife, Nini Marceca, who claims to have no knowledge of the corporation or its operation.

The by-laws of Units Corp. provide for the election or appointment of officers by the board of directors at a meeting following the annual meeting of shareholders. The by-laws authorize the creation of one or more vice presidents as officers of the corporation. The officers of the corporation have the powers "incident" to their respective offices and other duties as assigned by the board of directors. The by-laws expressly delegate to the president the duty to sign and execute in the name of the corporation all deeds, mortgages contracts or other instruments authorized by the Board of Directors, except in cases where the Board of Directors expressly delegates the signing and execution to some other officer or agent. The powers of a vice president or a second vice president are not specified in the by-laws.

There is no evidence that Units Corp. ever voted on, authorized or issued resolutions that approved the subject transaction; that the board of directors ever authorized Marceca to execute the transaction documents in the name of the corporation; that the board of directors ever authorized Talesnik

to execute the transaction documents; or that Sonja Telesnik was ever duly appointed an officer of Units Corp. by the board of directors. There is no evidence that the board of directors ever authorized payment to Del Plata Ltd. of the funds provided by Kingsland under the note.

Plaintiff commenced this action to rescind the note on the basis that it was never authorized by the corporation. The complaint seeks relief based upon the alleged invalidity of the transaction documents. Plaintiff now moves for summary judgment on its first, second and seventh causes of action against Kingsland and the Lenders and their two counterclaims. Plaintiff's first cause of action seeks rescission of the transaction documents. Plaintiff's second cause of action seeks a declaration that Kingsland and the Lenders have no security or other interests in the collateral pledged and secured by the transaction documents and no rights to collect any amounts owed under the note. Plaintiff's seventh cause of action seeks to enjoin Kingsland and the Lenders from proceeding against the collateral or pursuing any remedies against plaintiff based on the transaction documents and to require Kingsland and the Lenders to execute all documents necessary to release any interests purportedly given under the transaction documents. Kingsland and the Lenders seek by their first counterclaim to collect principal, interest and attorneys' fees due under the

note. Their second counterclaim alleges that the complaint constitutes a fraud and that they are entitled to damages.

It is undisputed that under plaintiff's by-laws, its president had authority only to execute contracts authorized by the board of directors. Kingsland and the Lenders apparently concede that plaintiff never expressly authorized the transaction. Defendants argue in opposition to the motion that Marseca and Talesnik had apparent authority as officers of the plaintiff to execute the transaction documents on behalf of plaintiff.

There is a general presumption that the president of a corporation possesses the powers which inhere to the position of chief executive (*Odell v. 704 Broadway Condo.*, 284 AD2d 52, 56 [1st Dept. 2001]). The test for authority of a president to bind a corporation is whether at the time in question the president is engaged in the general duties of his office and in the business of the corporation (*id.* at 56-57). "[A] president of a corporation has the apparent authority to act within the general scope of his office and such acts are binding on the corporation against one who does not know of any limitation or the president's true authority" (*id.* at 57). Thus a corporation's president, in the absence of restrictions, may make any ordinary contracts as is customary and necessary to engage in the business of the corporation (*Hardin v. Morgan Lithograph Co.*, 247 NY 332

[1928]]. However, a president of a corporation does not have the power to bind a corporation to contracts that are not customary or necessary in the corporation's business (*Liebermann v. Princeway Realty Corp.*, 17 AD2d 258, 260 [1st Dept. 1962]). In the absence of express authority of a board of directors, a president may not bind a corporation to unusual and extraordinary agreements (*id.*).

Assuming arguendo that Marceca, as president, could bind the corporation, it is undisputed that Marceca did not execute the documents on behalf of plaintiff; the documents were executed by Talesnik. There is no proof in the record, and plaintiff denies, that Talesnik was ever duly elected an officer of the corporation or that the corporation ever authorized her to execute the documents. Thus Kingsland and the Lenders relied upon the apparent authority of a person who was not even an officer of the corporation and who purportedly held a position that did not have authority to execute the documents.

Even if the court were to assume that Kingsland and the Lenders established an issue of fact as to whether Marceca had apparent authority to authorize Talesnik to execute documents that would bind the plaintiff to a note in the amount of \$555,000 and to pledge its assets as collateral, there is no support in the record or case law for the proposition that Marceca or Talesnik had the apparent authority to bind plaintiff to repay

money that was disbursed to a third-party without any proof that plaintiff actually received any benefit from the transaction.

At closing, the balance of the money at issue was paid to Del Plata Ltd., not to plaintiff. There is no written documentation that the directors, or indeed even Marceca or Talesnik, approved payment of the proceeds to Del Plata Ltd. There is no evidence that plaintiff benefitted by the transaction in any manner. Nor have Kingsland or the Lenders submitted any evidence that would suggest that such a substantial transaction, which does not appear to have benefitted the plaintiff in any way, was within the ordinary course of plaintiff's business.

Assuming arguendo that it may have been within the ordinary course of business for Marceca to obtain a loan for plaintiff and pledge plaintiff's property as collateral, that is not what occurred in the subject transaction. Indeed, Kingsland and the Lenders have failed to establish that the transaction at issue could be described as a "loan" to plaintiff. In the absence of any proof that the transaction benefited the plaintiff in anyway, the money was tantamount to a \$483,001.67 gift to Del Plata Ltd. Such a transaction, as a matter of law, cannot be considered ordinary or customary in the course of business (see *Rodkind v. Khosrovshai Co.*, 279 AD 467 [1st Dept. 1952]). Plaintiff's motion therefore must be granted. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its

first, second and seventh causes of action is granted; and it is further

ORDERED that the remaining causes of action are hereby severed and shall continue.

Settle order and judgment on notice.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/21/55



HON. WALTER B. TOLUB, J.S.C.