

Benjamin v Madison Med. Bldg. Condominium Bd. of Mgrs.
2007 NY Slip Op 30292(U)
March 25, 2007
Supreme Court, New York County
Docket Number: 0602220
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. **HON. JUDITH J. GISCHE** Justice

PART _____

Index Number : 602220/2006-186

BENJAMIN, MAURICE J.

vs
MADISON MEDICAL BUILDING

Sequence Number : 001

DISMISS

NO. _____
ON DATE _____
ON SEQ. NO. _____
ON CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 13, 2007


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 10

-----X
MAURICE J. BENJAMIN,

Plaintiff,

- against -

MADISON MEDICAL BUILDING
CONDOMINIUM BOARD OF
MANAGERS and MITCHELL ESSIG,

Defendants.
-----X

Decision/Order

Index No. 602220/06
Seq No.: 001, 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
<i>Motion Seq. No. 1</i>	
Def Essig's motion (§3211) w/MAL affirm, ME affid	1
Pltf opp w/RAF affirm, MJB affid, exhs	2
Reply w/MAL affirm, exhs	3
Pltf sur-reply w/RAF affirm	4
Affirm in opp to sur-reply w/MAL affirm	5
 <i>Motion Seq. No. 2</i>	
Def Madison Medical's motion (§3211) w/ KGF affirm, exhs	1
Pltf opp w/RAF affirm, MJB affid, exhs	2
Reply w/ KGF affirm, HK affid (as exhibit)	3
Stip "so-ordered" 1/25/07	4
Supp affirm in opp w/RAF affirm, MJB affid, exhs	5
Supp Reply w/KGF affirm	6

FILED
MAR 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Upon the foregoing papers, the court's decision and order is as follows:

GISCHE, J.:

Plaintiff Maurice J. Benjamin ("plaintiff" or "Benjamin") is a condominium unit

owner in the Madison Medical Building, located at 161 Madison Avenue in New York County ("the building"). Defendants are the condominium board of managers and Mitchell Essig, the owner of another condominium unit in the building (respectively "condo board" and "Essig").

The condo board and Essig have each separately moved for the pre-answer dismissal of the entire complaint pursuant to CPLR § 3211 (a) (1) and (7). Essig also seeks the imposition of costs and attorneys' fees against plaintiff pursuant to 22 NYCRR § 130-1.1. Since both motions involve similar and directly related legal arguments, they are hereby consolidated for consideration and disposition in a single decision/order.

Background

The building in question consists of condominium units owned by various medical care professionals. Benjamin, a dentist, owns unit "1NE and 1SE" on the first floor. Essig, a physician, owns unit "4SW" on the 4th floor. The condo board acquired the basement area in 2001, and is the owner of that area ("basement"). The condo board intends to physically subdivide the basement and then sell the subdivided areas. At issue is whether a contract between Essig and the condo board for the purchase of a subdivided basement unit, located directly below Benjamin's unit, is a void or voidable agreement because, as plaintiff claims, the terms and conditions set forth in the condo by-laws, requiring notice to immediately contiguous unit owners have been violated. The provision that plaintiff claims defendants have violated provides as follows:

"ARTICLE XI, SELLING AND LEASING UNITS

Section 1. Right of Prior Refusal on Sale or Lease of Units by Immediately Contiguous Unit Owners and the Board of Managers. A Unit Owner has the right to sell or lease his Unit providing he gives notice of the bona fides terms of any proposed sale or lease to the immediately contiguous Unit owners and to the Board of Managers and obtains their approval for the sale or lease. The failure of the immediately contiguous Unit Owners and the Board of Managers to approve or disapprove such proposed sale or lease within thirty (30) days after notice thereof shall be deemed to constitute approval. The exercise of the right of prior approval shall first belong to the immediately contiguous Unit Owners and then to the Board. If an immediately contiguous Unit Owner (s) disapproves of the transaction, such Unit Owner (s) must give the selling or leasing Unit Owner and the Board of Managers written notice thirty (30) days after notice of the proposed sale or lease, of his intention to purchase or lease the Unit on the same terms, or other terms more favorable to the Owner of the Unit proposes for sale or lease. In the event more than one of the immediately contiguous Unit Owners agrees to undertake such purchase or lease within the aforementioned thirty (30) day period, the sale or lease shall be made to the immediately contiguous Unit Owner who has been the owner of an immediately contiguous Unit for the longest period of time . . . "

* * *

"In the event a contiguous Unit Owner or the Board shall notify the selling Unit Owner of its disapproval of the sale or lease of the Unit, then, within fifteen days of such notification the contiguous Unit Owner or the Purchaser or Lessee supplied by the Board shall execute a contract to sell or lease pertaining to such Unit at the purchase price and other terms set forth in the contract to sell or lease supplied with the notice of transfer or on such terms more favorable to the Owner of the Unit. The closing of sale of "the Unit of date of the commencement of the term of lease shall be the same as set forth in the contract to sell or lease included in the notice of intention to sell or lease the Unit."

Although the underlying facts of this case are in sharp dispute, on a motion to dismiss the complaint is to liberally construed. Moreover, the facts as alleged by

plaintiff will be accepted as true, and afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by moving parties in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). In that regard, where, as in this case, the parties submit affidavits and other evidentiary materials in support of their respective motions, the courts are free to consider the affidavits and documents submitted to remedy any defects in the pleading. Leon v Martinez, 84 NY2d 83, 88 [1994].

Plaintiff states the following causes of action in his complaint: specific performance (1st cause of action- against both defendants), damages (2nd cause of action- against both defendants), breach of fiduciary duty (3rd cause of action - the condo board only), self dealing (4th cause of action - against Essig only), breach of contract (5th cause of action- against both defendants), and voiding of conveyance documents (6th cause of action- against both defendants). He alleges the following fact to support such claims:

The basement is a "unit" within the meaning of the bylaws and the condo board is the owner of the basement, having acquired it in 2001. The subdivided basement unit below his is "contiguous," also within the meaning of the bylaws, and he would like to know the terms of the sale so he can decide whether to exercise his right of first refusal. The board has not complied with the term of Article XI (printed above), yet they have entered into a secret contract for the sale of the basement unit to Essig which is

either void or voidable, and the basis for plaintiff's specific performance and voiding of conveyance documents (1st and 6th) causes of action against both defendants. Since Essig was elected to the board, but the terms of the contract are still secret because proper notice of the sale has not been published to the contiguous unit owners, Essig has acted in bad faith and engaged in self dealing (4th cause of action). Benjamin has been damaged because the defendants have not complied with the proper notice requirements (2nd and 5th causes of action). The board has also breached its fiduciary duty to plaintiff as a unit owner (3rd cause of action).

In his sworn affidavits, plaintiff states that while he did receive a letter dated April 28, 2005 from the property manager (Harriet Kyrous), this letter was not a pinpointed notice to the owners of contiguous units, but an invitation for bids from all unit owners in the building, to precipitate a bidding "war." The letter states, in relevant part, that the board has "investigated subdividing the basement unit" for financial reasons and that a unit owner "has made an offer to purchase a portion of the basement unit (approximately 2,000 sq. ft.) for the sum of \$218,000 . . ." The letter states further that "[i]f you would like to make an offer to purchase the basement unit for a sum in excess of that being offered, please do so within 10 days of this letter, since we do not want to delay the sale of the unit."

Plaintiff states that he had no obligation to engage in such bidding because of his protected status as a contiguous unit owner, but was within his rights to wait and see what the best offer was and decide whether to match it. Benjamin also states that while there may have been other correspondence from the property manager, they were not "notice" within the meaning of Article XI, and therefore did not trigger his

obligation to disprove or approve of the proposed sale.

One letter dated May 11, 2005, sent to all the unit owners, states that the condo has "received no offers in response to my letter inviting such offers. Therefore we intend to proceed with the offer that has been made." In another letter dated November 23, 2005 to the unit owners, the property manager states that a special meeting of the unit owners is scheduled for December 7, 2005 at which time a vote will be held on whether to amend the declaration and bylaws.

While plaintiff agrees that the special meeting was held and that he voted to approve the amendments, he states that the amendment was not to Article XI, but to Article VIII. This amendment (hereinafter "Amendment III") provides as follows:

"III. For the adoption of the following amendment to Article VIII of the By-Laws entitled, Use of Units which prohibits the sale, conveyance, lease or sublease of a portion of a unit other than the entire unit and for the adoption of an Amendment to Article Twentieth of the Declaration of Madison Medical Building Associates to approve a subdivision as follows: to allow a subdivision of the Basement Unit [. . .] and to allow the amendment of the certificate of occupancy for the Basement Unit to conform to the proposed floor plan and subdivision in order to enable the Board of Managers to enter into a contract of sale with Dr. Mitchell Essig or an entity owned by him for use as medical related offices, under such terms and conditions and price as is acceptable to the Board of Managers in their sole and absolute discretion provided all necessary costs, expenses and fees related to said subdivision, construction and amendment to the certificate of occupancy with respect thereto shall be borne by Dr. Mitchell Essig."

Benjamin acknowledges that he voted in favor of Amendment III which modified Article VIII pertaining to subdivisions and the "Selling and Leasing of Units," generally. Plaintiff contends that Article III did not circumscribe his rights, however,

under Article XI pertaining to contiguous unit owners and their unique right of first refusal. Plaintiff states that his vote in favor of Amendment III is not inconsistent with his cause of action against the board because there was no point in having a basement that could not be subdivided for sale by the board and therefore un-purchasable by him.

Thereafter, plaintiff learned that Essig had signed a contract of sale for the subdivided basement unit, and made a down payment. Essig was elected to the board on February 2, 2006. By letter dated February 14, 2006, Benjamin demanded to know the terms of the sale to Essig. The board refused his request. In June 2006, plaintiff commenced this action against the board and Essig individually for failure to properly notify him of the sale of the Basement Unit in accordance with Article XI, Section (1) of the Bylaws.

Both defendants separately move to dismiss the complaint in its entirety on the basis that plaintiff has failed to state a cause of action. CPLR § 3211 [a] [7]. Alternatively, the defendants contend that the documentary evidence they have provided definitively disposes of plaintiff's claims against them. Essig separately claims that plaintiff has no right of action against him for breach of fiduciary duty because he was not a board member when the special meeting or the vote was held.

In support of these claims, defendants make several arguments. First, the board argues that the subdivided basement unit contemplated is not, by definition, contiguous with plaintiff's unit because his unit is on the first floor and contiguous does not include a unit which is vertical to (e.g. above or below) another. In support, the board offers proof that at one time the unit owners vetoed a proposed amendment to the bylaws which would have expressly provided that owners of vertical units were

contiguous, within the meaning of Article XI, and therefore had the right of first refusal when the sale or lease of a contiguous unit was contemplated. They next argue that the contemplated subdivided basement area is not a "unit" at all, but only part of a unit, and therefore not subject to the terms of Article XI. Along the same lines, the board argues that Article XI only applies to existing units, not units to be created.

The board contends that even if plaintiff overcomes these hurdles, and the area below his unit is indeed a contiguous unit that entitles him to an attendant right of first refusal, he was properly notified of the board's intention to sell it and the board substantially complied with the notice provisions of Article XI, and that even if it did not comply completely, any defect was rendered moot because plaintiff voted in favor of Amendment III which allowed for the basement to be subdivided, gave the board the sole discretion to decide whether the sale terms were acceptable, and approved the sale to Essig.

Discussion

Where the basis for the motion to dismiss is the purported failure to state a cause of action [CPLR § 3211 (a) (7)] the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976). Where the motion is premised upon the existence of documentary evidence, such evidence must definitively dispose of plaintiff's claims. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995). For the reasons that follow, the complaint withstands defendants' pre-answer motion to dismiss.

A right of first refusal provides that, before an owner sells, he or she will first

give the other party (in this case a contiguous unit owner) a chance to buy the property at the price contained in the first bona fide offer which is acceptable to the owner. See: LIN Broadcasting Corp. v. Metromedia, Inc., 74 N.Y.2d 54 (1989). The right of first refusal, however, is contingent upon the existence of a valid, outstanding contract to a third-party. If there is no such contract, then there is nothing to accept or refuse. LIN Broadcasting Corp. v. Metromedia, Inc., 139 A.D.2d 124 at 124 *affirmed* 74 N.Y.2d 54 (1989). Benjamin's facts support the claims set forth in the complaint whereas the documentary evidence the board relies upon does not unequivocally disprove plaintiff's claims, that the literal requirements of Article XI were complied with.

Although the board contends that Article XI does not apply to partial units, there is no such express exclusion within that section. Moreover, this argument glosses over both sides' contention that the basement is to be sold in subdivided units. The separate contention, that Benjamin's unit on the first floor is not contiguous to the basement because it is not adjacent or next to the unit in dispute is simply a legal argument, but does not defeat the claims made by plaintiff. The bylaws do not define "contiguous," therefore there is no documentary evidence dispositive of plaintiff's claims. CPLR § 3211 (a) (1).

The board's other argument, that the basement is not really a "unit" at all, but an anomaly not contemplated by the bylaws when they were drafted, does not mandate the dismissal of the complaint either. There is nothing in the bylaws that supports defendants' argument, that the basement does not come within the purview of Article XI, thus the bylaws are not documentary evidence dispositive of plaintiff's claims on this point.

Article XI lays out the steps that a unit owner must undertake before it can sell his/her/its unit; it is well established in our jurisprudence that the right of first refusal will be enforced when it is found to exist. Anderson v. 50 East 72nd Street Condominium, 119 A.D.2d 73 (1st Dept. 1986). Plaintiff has provided a sample notice showing how at least one other unit owner (and the board) handled the notice provisions of Article XI when that unit owner intended to lease his unit. The proposed sale of the subdivided basement unit was not handled the same way. The property manager's letters of April 28, 2005 and May 11, 2005 were sent to all unit owners, not just those having contiguous units. This is also true of the subsequent letter dated November 23, 2005 which appears to provide other information. Arguments about whether plaintiff waived his rights under Article XI or whether the restrictions were modified at the December 2005 meeting and election [see Demchick v. 90 East End Ave. Condominium, 18 A.D.3d 383 (1st Dept. 2005)] remain to be decided after issue is joined.

Since the bylaws provide that any contract that is not compliant with the terms of Article XI is void or voidable, and the contract is between Essig and the board, Essig is a necessary party and the specific performance claim and void contract claims (1st and 6th causes of action) against him cannot be dismissed at this juncture, if at all. See: Anasae Realty Corp. v. Firestone, 103 A.D.2d 707 (1st Dept. 1984). Essig would be a necessary party for plaintiff to get complete relief were he ultimately to prevail in this action. CPLR § 1001; see, for example: Meisner v. Crane, 131 A.D.2d (3rd Dept 1987); In the matter of Red Hook v. NYC Board of Standards, 11 Misc.3d 1081 (A) (Sup Ct Kings Co., 2006).

The 2nd and 5th causes of action against Essig in his individual capacity fail,

however. Even accepting plaintiff's facts, which is that the unit owner (e.g. board) failed to comply with Article XI, this section of the bylaws imposes no affirmative obligation on Essig - the prospective buyer - to notify a contiguous owner of his intent to buy the unit in question. Therefore, plaintiff's factual statement that Essig should have known about the Article XI requirements is of no moment. The 2nd and 5th causes of action against Essig, individually, are severed and dismissed.

The separate claim, that Essig has engaged in self dealing and acted in bad faith (4th cause of action), is also not supported by the facts as alleged by plaintiff, and there is no basis to impose individual liability upon Essig. Pelton v. 77 Park Ave. Condo., ___AD3d___, 2006 N.Y. Slip Op. 08674 (1st Dept 2007). Therefore the 4th cause of action against Essig is hereby severed and dismissed.

Essig's motion, for the imposition of sanctions is denied in its entirety; this is not a frivolous action within the meaning of Part 130.

Defendants' time to answer the complaint is extended for an additional twenty (20) days hereof. Plaintiff may reply within the time provided under the CPLR.

This case is scheduled for a prelliminary conference on April 26, 2007 at 9:30 a.m. in Part 10, 80 Centre Street.

Conclusion

The motion by the condo board for the dismissal of the complaint against it is denied. The motion by Essig for dismissal of the complaint against him is denied as to the specific performance (1st) and void document (6th) cause of action. The claims against Essig in his capacity as a board member also remain.

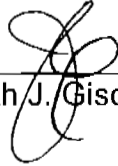
Defendants' time to answer has been extended and a preliminary conference scheduled.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 13, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

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