

<b>Katsam Holdings, LLC v 419 W. 55th St. Corp.</b>
2007 NY Slip Op 32095(U)
June 28, 2007
Supreme Court, New York County
Docket Number: 0117297/2006
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN  
*Justice*

PART 1

Katsam Holdings LLC

INDEX NO. 117297/07

- v -

419 West 55th Street Corp.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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

~~Notice of Motion~~ / Order to Show Cause — Affidavits — Exhibits A-Y  
~~Cross-Motion~~ +  
Answering Affidavits — Exhibits A-K  
Replying Affidavits with Exh. 2-4 / ~~Sub-Reply~~ aff. with Exh. 2

PAPERS NUMBERED	
<u>1, 2</u>	_____
<u>3</u>	_____
<u>4, 5</u>	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED  
JUL 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: June 28, 2007

MARTIN SHULMAN  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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: PART 1

----- x  
KATSAM HOLDINGS, L.L.C.,

Plaintiff,

Index No.: 117297/06

-against-

**Decision and Order**

419 WEST 55<sup>TH</sup> STREET CORPORATION and  
419 WEST 55<sup>TH</sup> STREET, L.L.C.,  
Defendants.

**FILED**

JUL 05 2007

NEW YORK  
COUNTY CLERK'S OFFICE

----- x  
HON. MARTIN SHULMAN, J.S.C.:

By order to show cause ("OSC"), plaintiff Katsam Holdings, L.L.C. ("Katsam" or "plaintiff") moves to enjoin defendant 419 West 55 Street Corporation, the cooperative apartment corporation ("co-defendant" or "Coop") and owner of the premises located at 419 West 55<sup>th</sup> Street, New York, New York (the "premises"), from interfering with defendant 419 West 55<sup>th</sup> Street, L.L.C.'s ("co-defendant" or "Sponsor" of the offering plan for the premises) efforts to complete the necessary work to obtain a permanent certificate of occupancy for the premises. The Coop cross-moves for an order dismissing the verified complaint resorting to claimed defenses based upon CPLR 3211(a)(1) (documentary evidence), 3211(a)(2) (lack of subject matter jurisdiction) and 3211(a)(7)(failure to state a cause of action).<sup>1</sup> The OSC and cross-motion are consolidated for disposition.

\_\_\_\_\_  
<sup>1</sup> Thwarting the development of a proper factual record, the Sponsor has not weighed in on this round of motion practice and has not submitted any opposition or supportive papers to either the OSC or the cross-motion.

### Factual Background and Plaintiff's OSC

On July 29, 2005, Jeffrey Fisch ('Fisch') signed a contract of sale with Sponsor to buy Unit B-1 at the premises (the "Retail Space") and 300 shares allocated to this Retail Space (the "Contract" as Exhibit AA to Karlsson Reply Aff.). Fisch agreed to pay \$1 million dollars, claimed to have made a down payment of \$100,000 and agreed to finance the balance of the purchase price with a sponsor loan subject to Fisch's personal guarantee. The Contract required the purchaser to obtain the Coop's consent to complete the proposed alterations to the Retail Space to make it a functioning veterinary clinic.

Section 27 [b][ii] of the Contract had this unusual provision which states, in relevant part:

If consent [of the Coop] is not granted within sixty (60) days of the date hereof, for any reason other than Purchaser's bad faith conduct, neither Purchaser nor Sponsor shall be entitled to cancel this Agreement; rather, Sponsor shall designate Purchaser a "holder of unsold shares" and Purchaser shall be obligated to close on this purchase on the Unit Closing Date. . .

What this means is if the Coop refused to provide the requisite consent to the necessary alternations to the Retail Space within the prescribed period, then the Sponsor would designate Katsam as Holder of Unsold Shares ("HUS") which would, *inter alia*, permit plaintiff to use the Retail Space for commercial purposes without the Coop's consent (see relevant section of the Plan captioned "Unsold Shares" at Exhibit S to OSC).

At the closing on December 15, 2005, Fisch assigned his interest to Katsam and acquired the shares allocated to the Retail Space in accordance with the Contract and

terms of the Cooperative Offering Plan captioned "Loft 55" (the "Plan"; see Exhibit B to Coop's Cross-Motion). Among Sponsor's obligations to Katsam under the Contract and Plan was/is the completion of the re-construction of the premises in which the Retail Space is located and obtaining an Amended (permanent) Certificate of Occupancy ("ACO") which would permit the Retail Space to be used as a veterinary clinic. Sponsor did obtain a series of temporary Certificates of Occupancy, the latest of which contained a "use description" of the Retail Space as a veterinary office and which expired by its own terms on June 7, 2006 (Exhibit H to OSC).

Plaintiff claims that the Coop, since the signing of the Contract, to date, has not allowed the Sponsor to obtain an ACO and has persistently thwarted plaintiff from completing the renovation work necessary to get the clinic "up and running."<sup>2</sup> Fisch further claims he executed a loan agreement with National Bank of New York City at the closing to obtain \$1.2 million dollars to finance the purchase of the shares allocated to the Retail Space and complete the renovations and in addition to paying the monthly maintenance of \$1612.00 is making monthly loan payments of \$8,173.49 (principal and interest) (Fisch Aff. in support of OSC at ¶¶ 14 and 16). Fisch also alleges that at the

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<sup>2</sup> Among other "road blocks," plaintiff contends that prior and subsequent to the December 15, 2005 closing, the Coop has made unreasonable requests and objections concerning the scope of the Retail Space alterations; imposed unreasonable and oppressive conditions vis a vis the renovation work; demanded, *inter alia*, reimbursement for legal fees and architectural expenses, certain license fees, payments for increased real estate taxes for commercial use of the Retail Space, payment of the entire annual increase in ground rent for the Coop's ground lease, indemnification for claims from dog bites, etc., a limitation on the number of animals sheltered over night, a limitation on the number of associate veterinarians working at the clinic and relinquishment of Katsam's status as an HUS (see Fisch Aff. in support of OSC at ¶¶ 25, 28, 31, 33-36 and 40).

closing, he never saw a complete copy of plaintiff's proprietary lease for the Retail Space and still does not know its contents.

Katsam also claims: (1) the Sponsor filed a Tenth Amendment to the Plan designating plaintiff as an HUS (Exhibit E to OSC); (2) the Plan denominated the Cellar Unit as Retail Space for commercial usage (*see also*, Schedule A to Plan at Exhibit P to OSC) and only restricted its use as an "adult" establishment; (3) the floor plan for the Retail Space includes a bathroom, eliminating any need for a licensing agreement and fee for use therefor (Exhibit V to OSC); and (4) the proprietary lease (Exhibit C to cross-motion) is solely referable to a residential apartment and misapplied to the [commercial] Retail Space.

Based on the Coop's alleged bad faith conduct as well as "very little work. . ." (Fisch Aff. in support of OSC) left, Katsam seeks a preliminary injunction against the Coop to enjoin it from interfering with the Sponsor's efforts to obtain the ACO.

In its cross-motion, the Coop contends as follows:

- the documentary evidence establishes no justiciable controversy, therefore, the court lacks subject matter jurisdiction to grant declaratory relief to plaintiff;
- Specifically, plaintiff's first cause of action for a declaration that it has the unfettered right to complete certain alterations and eventually operate a veterinary clinic in the Retail Space is vitiated

by Section 5.1 of the proprietary lease<sup>3</sup> (Exhibit C to cross-motion at p. 130);

- The purported amendment to the Plan is neither probative of Katsam's HUS status allegedly bestowed weeks before the closing, nor would plaintiff's HUS status, *arguendo*, be legally effective because Katsam became a "purchaser" of the shares under the Plan at the closing vitiating plaintiff's deemed HUS status;
- Katsam waited a year before commencing this lawsuit and seeking injunctive relief, thus, plaintiff has not shown any irreparable harm as a result of the Coop's alleged actions;
- Katsam has not proffered any evidence of mistake or fraud to warrant reformation of the proprietary lease; and
- Plaintiff has not alleged any facts of the Coop's breach of any contractual obligation giving rise to any money damages.

In reply, plaintiff argues that the Coop does not squarely oppose the injunction and conclusorily claims Katsam has not shown irreparable harm to warrant a preliminary injunction; the Coop breached its proprietary lease with Katsam not to unreasonably withhold consent to the alterations to the Retail Space unless plaintiff accepts its unreasonable conditions; the Retail Space can only be used legally for commercial purposes and has been denominated as such in plaintiff's supporting documents (i.e., Exhibit H to OSC [the temporary certificate of occupancy], Exhibit J to OSC [the front cover of the Plan], Exhibit M to OSC [p. 8 of the Plan], Exhibit P to OSC [Schedule A of

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<sup>3</sup> Section 5.1 of the Plan states, in relevant part: "The Tenant-Shareholder [i.e., Katsam] shall not, without prior written consent of the . . . [Coop] on such conditions as the . . . [Coop] may prescribe, occupy or use the . . . [Retail Space]. . . to be occupied or used for any purpose other than as a private dwelling or for any home occupation use permitted under applicable zoning law. . . ." (bracketed matter added). The Coop finds further support in the Sponsor's tax counsel's June 13, 2003 Opinion Letter predicating the premises' cooperative status, among other requirements, upon the purported restrictive use of the Retail Space for residential usage (see Exhibit G to cross-motion).

the Plan], and Exhibit V to OSC [floor plan of cellar comprising the Retail Space]); plaintiff is otherwise entitled to reformation of the proprietary lease because the Coop made a mistake, viz., "the mistake is that shares and a lease were issued for the commercial unit [Retail Space] which can only be used commercially and cannot be used residentially causing what may be tax problems for the building. . ." (Karlsson Reply Aff. at ¶14); the Plan expressly directed the Sponsor and/or its designees to hold Unsold Shares (see Exhibit S to OSC), thus, Sponsor was legally allowed to contractually designate plaintiff as an HUS and regardless of the fact that Katsam was a "purchaser" of the 300 shares allocated to the Retail Space; and without any meaningful opposition to the OSC, the court should grant the preliminary injunction to effectuate the immediate issuance of the ACO.

In its sur-reply,<sup>4</sup> the Coop alerts the court to ¶ 22 of the Contract (Exhibit AA to Karlsson Reply Aff.) which states:

Purchaser [Katsam] understands that the . . . [Coop] is not a party to this Agreement or the sale contemplated hereby and that no representations, warranties, or promises of any kind have been made to . . . [Katsam] by the . . . [Coop]. . . [Katsam] agrees that no claim will be made against the . . . [Coop] by . . . [Katsam] in respect of, or arising out of, the purchase of shares and Proprietary Lease. The provisions of this paragraph shall survive the closing. (Bracketed matter added).

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<sup>4</sup> In its sur-reply which this court has considered, the Coop had the opportunity to respond and address new information not previously annexed to the OSC. (See *Hayden v. County of Nassau*, 16 A.D.3d 415, 790 N.Y.S.2d 404 [2<sup>nd</sup> Dept., 2005]). Specifically, plaintiff's reply papers, for the first time, included a copy of the Contract repeatedly referred to in the complaint and the OSC's supporting papers, but which was never previously disclosed.

The Coop, *inter alia*, argues that: (1) this Contract provision essentially bars this declaratory judgment action against the Coop; (2) the Contract expressly requires plaintiff to obtain the Coop's consent to any proposed alterations to the Retail Space; and (3) the "zoning use group 2 (i.e., residential use) applies to the Cellar Unit. . ." (Juneau Sur-Reply Aff. at ¶ 9) and Katsam's claim concerning the Retail Space's exclusive use for commercial purposes is groundless.

### **Discussion**

To establish entitlement to a preliminary injunction in this action, Katsam must demonstrate: (1) a likelihood of ultimate success on the merits; (2) irreparable injury if no preliminary injunction issues; and (3) a balancing of the equities in favor of plaintiff. CPLR § 6301; *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990). It is a drastic remedy which may only be granted to a party with a clear legal right to such relief grounded on undisputed facts as to the harm sought to be enjoined. *First Nat. Bank of Downsville v. Highland Hardwoods, Inc.*, 98 A.D.2d 924, 926, 471 N.Y.S.2d 360, 363 (3<sup>rd</sup> Dept., 1983).

Preliminarily, none of plaintiff's papers contain any proof of Katsam's security loan note agreement to purchase the shares allocated to the Retail Space or document its expenses, to date, for any architect services and alterations. In addition, Katsam has neither proffered a properly dated copy of the Tenth Amendment to the Plan (Exhibit E to OSC) which declared Katsam a HUS and proof of its acceptance by the New York State Attorney General's office in or about June 2006, nor corroborated Sponsor's designation of plaintiff as a HUS at the closing (see Fisch Aff. in support of OSC at ¶17).

Notably, it strains credulity to believe Fisch was wholly unaware that he executed a proprietary lease requiring residential use of the Retail Space (see Fisch Aff. at ¶ 19). In paragraph 1 of the Contract Fisch executed in July 2005 (Exhibit AA to Karlsson Reply Aff.), plaintiff, as the purchaser, represented that "prior to signing this Agreement, . . . [he] received and read the Cooperative Offering Plan. . . which includes a copy of the Proprietary Lease and Bylaws of the [Coop], all of which documents are made part of this Agreement." Further, while plaintiff claims that since the December 2005 closing he is experiencing monthly losses by paying maintenance and making loan payments without having any beneficial use of the Retail Space, nonetheless, Katsam did wait a year before seeking this drastic relief.

Based on the foregoing, this court is not convinced plaintiff will be irreparably harmed if the Coop is not enjoined from interfering with co-defendant Sponsor's efforts to obtain the ACO as the latter is required to do under the Plan. This is so because Katsam otherwise has an adequate remedy at law for money damages for the Sponsor's alleged breach of the Contract and the Coop's alleged breach of the proprietary lease. *White Bay Enterprises, Ltd. v. Newsday, Inc.*, 258 A.D.2d 520, 685 N.Y.S.2d 257 (2<sup>nd</sup> Dept., 1999). Accordingly the OSC for a preliminary injunction is denied.

Generally on a motion to dismiss the complaint, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory. *Morone v. Morone*, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980). However, if the court considers extrinsic evidence on a CPLR 3211 motion such as affidavits and exhibits the complaint's allegations should not be deemed true. *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 80-81, 692 N.Y.S.2d 304 (1<sup>st</sup> Dept. 1999), *affd*, 94

N.Y.2d 659, 709 N.Y.S.2d 861 (2000). “[A]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference [citations omitted].” *Id.* “Where, as here, the moving party offers evidentiary material, the court must determine whether the proponent of the pleading has a cause of action, not whether she has stated one [citations omitted].” *Kantrowitz & Goldhamer, P.C. v. Geller*, 265 A.D.2d 529, 697 N.Y.S.2d 137 (2<sup>nd</sup> Dept., 1999).

After a review of the verified complaint and the respective parties’ supporting documentation on this round of motion practice, this court finds that the Coop’s pre-answer motion to dismiss is groundless. At the outset, it should be noted that the Plan clearly denominated the Retail Space (i.e., the Cellar Unit) as a “retail space” or a “commercial unit” and it was never contemplated that the Retail Space would be use for residential purposes. At this juncture and at the very least, this court finds that plaintiff has causes of action for declaratory relief, vis a vis the Coop’s alleged breach of the proprietary lease requiring residential use of the Retail Space which appears to be illegal. *See Measom v. Greenwich and Perry Street Housing Corp.*, 268 A.D.2d 156, 712 N.Y.S.2d 1 (1<sup>st</sup> Dept., 2000). Given the Sponsor’s unfettered right under the Plan to designate a financially responsible person as a HUS, and a July 2005 Contract provision between the Sponsor and Katsam mandating the latter’s status as a HUS if the Coop’s consent to the alterations to the Retail Space for a veterinary clinic was not forthcoming within sixty (60) days thereof and which continues not to be granted, to date, there exists a justiciable controversy whether the Coop’s actions (i.e., withholding its consent,

baseless objections, unfair and improper imposition of costs and expenses, etc.) are unreasonable under the Plan and the parties' proprietary lease.

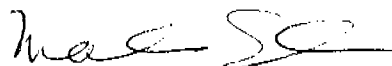
Finally, ¶ 22 of the Contract does not bar plaintiff's action against the Coop here. True, the Coop appears to be a third-party beneficiary of the Contract which set the stage for the eventual sale of shares allocated to the Retail Space. This in fact occurred which enabled the Coop to achieve the viable use of the Retail Space previously used as storage space and gain a tenant-shareholder to jointly share in the common charges necessary to maintain the premises in which the Retail Space is located. Thus, a fair reading of this provision would bar any of plaintiff's claims against the Coop arising from the sale of the shares allocable to the Retail Space which occurred with the Coop's approval and consent. This court cannot discern any purported transactional issue which could be implicated in this lawsuit. Based on the foregoing, the Coop's pre-answer motion to dismiss is denied.

Parenthetically, the Sponsor's silence during this round of motion practice is telling. The Sponsor has chosen not to explain a perceived indifference to its obligations to plaintiff to ensure its designation of Katsam as a HUS which would benefit from such designation. This would also have presumably resolved much of the dispute between plaintiff and the Coop. Nor has this co-defendant affirmatively sought to remove the Coop's alleged "roadblocks" to its efforts to obtain the ACO. At this juncture, the Sponsor has much to answer for.

The parties are directed to appear on July 9, 2007 at 9:30 a.m. at I.A.S. Part 1, in Room 1127B, 111 Centre Street, New York, New York, for a preliminary conference to address any discovery and other related issues.

This constitutes this court's decision and order. Courtesy copies of the decision and order have been faxed to counsel for the respective parties.

DATED: New York, New York  
June 28, 2007



HON. MARTIN SHULMAN, J.S.C.

**HON MARTIN SHULMAN, J.S.C.**

**FILED**

JUL 05 2007

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