

**Raimondi v Board of Mgrs. of Olympic Tower
Condominium**

2007 NY Slip Op 33725(U)

November 9, 2007

Supreme Court, New York County

Docket Number: 0103108/2007

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 103108/2007
RAIMONDI, JOHN
VS.
OLYMPIC TOWER CONDOMINIUM
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 103108-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

are 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

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

motion (a) and cross-motion (b) decided in accordance with the annexed decision/order of even date.

FILED
NOV 20 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/9/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
JOHN RAIMONDI,

Plaintiff,

-against-

BOARD OF MANAGERS OF OLYMPIC
TOWER CONDOMINIUM,

Defendant.
-----X

Decision/Order

Index No.: 103108/07

Seq. No. : 001

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

Def's motion [SJ] w/FGP affid in support, memo, exhs	1
Pltf's cross motion w/CEB affirm, JR affid, memo, exhs	2
Def's DMS reply affirm in further support, memo, exhs	3

FILED Numbered
 NOV 20 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action arises from an agreement entered into by plaintiff and defendant which requires plaintiff to pay 7.5% of the profit he makes on the sale of the subject unit within the first five years after plaintiff initially purchased it. Defendant now moves for summary judgment dismissing the entire complaint [CPLR § 3212] and entry of a default judgment against plaintiff on its counterclaims [CPLR § 3215]. Plaintiff cross moves for summary judgment on the issue of liability and opposes defendant's motion in its entirety.

Defendant (or "Board") is the statutory representative of the Olympic Tower Condominium (the "Condominium"), which is located at 641 Fifth Avenue in Manhattan.

3]
Plaintiff was a unit owner of Unite 28-E (the "subject unit") in the Condominium.

Summary judgment relief may be considered by the court since issue has been joined, and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

It is undisputed that plaintiff purchased and subsequently sold three units in the Condominium prior to his purchase of the subject unit on December 20, 2006. At the time plaintiff acquired title to the subject unit, the parties executed an undated letter agreement which provided:

"[t]his letter shall confirm that, in consideration for the Board's waiver of its right of first refusal to purchase Unit 28E, I agree to pay to the Olympic Tower Condominium an amount equal to 7.5% of the difference between the gross purchase price for my purchase of Unite 28E, which is reflected in the contract of sale and the gross purchase price in the contract of sale at the time that I sell the Unit, less any broker's commission up to a maximum of 6% and the transfer fee, provided that I sell the unit within five (5) years of the original date of acquisition."

Plaintiff renovated the apartment and entered into a contract to sell it approximately four months after he purchased it. Thus, pursuant to the terms of the letter agreement, plaintiff became obligated to pay the 7.5% fee due thereunder to defendant.

Plaintiff now contends that defendant had no legal right to condition plaintiff's acquisition of the subject unit upon execution of the letter agreement. Plaintiff asserted four causes of action in the complaint. The first and third causes of action seek a declaration that the letter agreement is void and unenforceable because it violates the Condominium's By-Laws and RPL § 339-v, respectively. The second cause of action seeks money damages on the grounds that defendant breached its fiduciary duty to

[* 4]
plaintiff. The fourth cause of action seeks money damages on the ground that the letter agreement violates Gen. Bus. Law § 349.

Defendant interposed an answer dated April 29, 2007 containing four counterclaims. In its first counterclaim, defendant seeks a declaration that the letter agreement does not contravene the By-Laws and is a valid and enforceable contract which requires plaintiff to comply with his obligations thereunder. The second counterclaim seeks specific performance of plaintiff's obligations under the letter agreement. The third counterclaim seeks money damages as a result of plaintiff's anticipatory breach of the letter agreement. In the fourth counterclaim, defendant seeks its attorneys' fees and related costs pursuant to Article 14 of the Eighth Amendment of the By-Laws.

Arguments of the Parties

Defendant, on this motion, argues that it is entitled to summary judgment on the complaint because there are no triable issue of fact and that: [1] the letter agreement does not violate the By-Laws; [2] defendant did not owe a fiduciary duty to plaintiff, and even if it did, no fiduciary duty was breached; [3] RPL § 339-v is inapplicable as a matter of law; [4] the letter agreement does not violate Gen. Bus. Law § 349 as a matter of law; and [5] defendant is protected by the business judgment rule. In support of the portion of its application for entry of a default judgment against plaintiff, defendant claims that plaintiff has failed to reply to the Answer and Counterclaim and, therefore, is in default in pleading.

Plaintiff cross moves for summary judgment on the basis that the letter agreement "was an *ultra vires* act of the Condominium and was solely designed to steal plaintiff's equity in the [subject unit]" (emphasis added). Plaintiff states that the letter agreement he was "compelled to execute" imposed an unauthorized flip tax of 7.5%. Plaintiff contends

* 5]

that Article VIII Sections 4, 5 and 12 of the By-Laws authorize only a 1% transfer fee on the sale of condominium units and that the Condominium has no authority to "single out plaintiff" and impose a higher flip tax than that which is authorized. Plaintiff further argues that by virtue of the letter agreement, defendant has "illegally usurped plaintiff's property rights and unlawfully restricted the alienability of the [subject unit], and for the transgression the Condominium must respond in damages."

Plaintiff also argues that defendant's application for a default judgment on its counterclaims should be denied. Plaintiff contends that this failure was due to defendant's failure to answer the complaint on April 27, 2007. Plaintiff states that it did not receive defendant's answer until May 3, 2007. Plaintiff concedes that he "inadvertently failed to timely reply to the counterclaim" and that he "should not have waited for a response to his May 2, 2007 letter" which indicated that he had not received defendant's answer as of yet. Plaintiff further states that, in any event, a default judgment should be denied because "the counterclaims are inextricably intertwined with [the complaint]" and, therefore, plaintiff should be granted "leave to serve a late reply." Plaintiff cites Melcher v. Apollo Medical Fund Management, LLC, 25 A.D.3d 482 (1st Dept. 2006) in support of this position.

Discussion

The court considers the motion and cross motion for summary judgment first.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then

6]

establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 N.Y.2d 395 (1957).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

A condominium's by-laws constitute a contract with the unit owners. Leşal Assoc. v Board of Mgrs. of Downing Ct. Condominium, 309 A.D.2d 594 (1st Dept 2003). Two fundamental principles of contract construction are that: (1) agreements are to be construed in accordance with the parties' intent; and (2) the best evidence of what the parties intend is what they provide in their writing. Greenfield v. Phillies Records, 98 N.Y.2d 562 (2002); Van Kipnis v. Van Kipnis, 840 N.Y.S.2d 36 (1st Dept. 2007). A written agreement that is complete, clear and unambiguous on its face, must be enforced according to the plain meaning of its terms.

The second cause of action

Plaintiff claims in his second cause of action that the Board breached its fiduciary

[*7]

duty to it by imposing a cost upon plaintiff with respect to the proposed sale of the subject unit that is not imposed upon other unit owners of the Condominium and which violated the By-Laws.

A condominium board owes a fiduciary duty to the condominium and its unit owners. Board of Managers of Fairways at North Hills v. Fairway at North Hills, 193 A.D.2d 322 (2nd Dept. 1993). The decisions and actions taken by the board are, however, protected by the business judgment rule. Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1 (1st Dept. 2006). In order for plaintiff to trigger any further judicial scrutiny, plaintiff must show that the Condominium Board acted: (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith. 40 W. 67th St. v. Pullman, 100 N.Y.2d 147 (2003). "So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's." Levandusky v. One Fifth Avenue, 75 N.Y.2d 530 (1990).

Defendant states that the letter agreement was entered before plaintiff took title to the apartment. Plaintiff concedes that the letter agreement was entered into at the time he entered into a contract to purchase the subject unit. The court finds, therefore, that the Board owed no fiduciary duty to plaintiff at the time he executed the letter agreement, because he was not a unit owner of the subject apartment at the time. The letter agreement was part of an arm's length transaction.

Even if defendant owed a fiduciary duty to plaintiff, defendant's decision to enter into the letter agreement was a proper exercise of its business judgment. Plaintiff has failed to establish that defendant's act of entering into the letter agreement was outside its scope of authority under the By-Laws.

Article VIII of the By-Laws provides in pertinent part:

"Section 1. Selling and Leasing. No Residential Unit Owner... may sell or lease his Residential Unit except by complying with the following provisions:

Any Residential Unit Owner who receives a bona fide offer to purchase his Residential Unit... shall give notice... to the Board of Managers of the receipt of such... offer.

...

The giving of such notice to the Board of Managers shall constitute an offer by such Unit Owner to sell his Residential Unit... to the Board of Managers... upon the same terms and conditions as contained in such Outside Offer."

...

"Section 4. Release by Board of Managers of Right of First Refusal. The right of first refusal contained in Section 1 of this Article VIII may be released or waived by the Board of Managers only in the manner provided in Section 5 of this Article VIII. In the event the Board of Managers shall release or waive its right of first refusal as to any Residential Unit, such Residential Unit, together with the Appurtenant Interests, may be sold, conveyed or leased, free and clear of the provisions of said Section 1.

Section 5. Certificate of Termination of Right of First Refusal. A certificate executed and acknowledged by the Secretary of the Condominium stating that the provisions of Section 1 of this Article VIII have been met by a Unit Owner or stating that the right of first refusal contained therein has been duly released or waived by the Board of Managers, and that as a result thereof the rights of the Board of Managers thereunder have terminated, shall be, conclusive upon the Board of Managers and the Unit Owners in favor of all persons who rely on such certificate in good faith. The Board of Managers shall furnish, without charge, such certificate upon request to any Unit Owner in respect to whom the provisions of such Section have, in fact, terminated.

...

Section 12. Transfer Fee. On the sale, conveyance or other transfer of a Residential Unit in the Condominium, the Residential Section of the Condominium shall be paid a fee by the Purchaser or transferee of the Unit in an amount equal to 1% percent [sic] of the gross sale price ("The Transfer Fee"). The Transfer Fee shall be paid at the closing of the transfer of the Unit and deposited into the Residential Section Condominium's reserve fund. In the event the Transfer Fee is not paid the Board shall have the right to place a lien against the Unit and enforce it in the manner provided in Section 339-aa of the Real Estate Property Law of the State of New York, together with the interest thereon computed as provided in Section 6 of Article VI hereof.

The Transfer Fee shall not be payable for transfers to which the Board does not have the right of first refusal."

Article VIII Section 12 applies a transfer fee which must be paid by the purchasers of all units in the Condominium. The letter agreement at bar does not provide, explicitly or implicitly, for a transfer fee to be paid by the unit purchaser. Rather, it is a negotiated forbearance fee to be paid by plaintiff, as a seller of the apartment, in exchange for defendant's waiver of a valid right of first refusal made when the apartment was originally purchased. The letter agreement constitutes an enforceable mutual exchange of promises executed during an arms length transaction.

The cases cited by plaintiff are factually distinguishable from the instant case. In Lisenenkov v. Kasziner, 13 Misc.3d 1184 (Supreme Court, New York County, 2006), the board had no right of first refusal. Oakley v. Longview Owners, Inc., 165 Misc.2d 192 (N.Y. Sup., Westchester Co. 1995) involved a set floor price that was declared an unreasonable restraint on alienation. Here, there are no price restrictions (or any other restrictions) on selling. Indeed, there is no requirement that the apartment even be sold

at a profit.

The court rejects plaintiff's contention that the letter agreement imposed an unauthorized "flip tax." Article VIII Section 4 is silent as to whether the Condominium may impose conditions on the sale of the subject unit in exchange for defendant's waiver of its right of first refusal [*cf. Fe Bland v. Two Trees Management Co.*, 66 N.Y.2d 556 (N.Y. 1985) (where condominium Board sought to impose fees beyond the three different types of fees (to cover expenses, attorneys' fees, and services of the corporation) specifically authorized to be imposed upon an assignor)].

Similarly, cases cited by plaintiff for the premise that "[c]ourts routinely have rejected attempts by condominium boards to impose unauthorized fees" are inapplicable here. In *Berglund v. 411 East 57th Corp.*, 127 Misc.2d 58 (App. Term 1st Dept. 1985) *aff'd* 118 A.D.2d 431 (1st Dept. 1986), the Board unilaterally imposed a transfer fee of 1% which was not provided for in the By-Laws or Proprietary Lease. However, in that case, unlike the situation at bar, the unit owner did not execute a collateral agreement, with mutual consideration, to pay such fee. In *McIntyre v. Royal Summit Owners, Inc.*, 126 Misc.2d 930 (App. Term 1st Dept. 1984), the court held that "at the time the contract of sale was entered into, neither the cooperative's bylaws nor the proprietary lease gave to the board of directors the broad power to impose fees upon the transfer of ownership."

Here, plaintiff, in the exercise of his own judgment, chose to execute the letter agreement. Plaintiff has offered no evidence in support of his naked allegation that he "was compelled to execute the letter agreement." The court also rejects plaintiff's contention that the letter agreement imposes an "excess profits tax" or that the defendant is attempting to "steal 7.5% of the sales price" of the subject unit. The court cannot

insulate plaintiff from his voluntary decision to execute the letter agreement

Accordingly, defendant is entitled to summary judgment dismissing the second cause of action.

The third cause of action

Plaintiff contends, for his third cause of action, that the letter agreement is an unlawful restraint on the alienation of the subject unit, in violation of RPL § 339-v.

RPL § 339-v provides what must legally be included in any Condominium's bylaws and in pertinent part states:

2. The by-laws may also provide for the following:

(a) Provisions governing the alienation, conveyance, sale, leasing, purchase, ownership and occupancy of units, provided, however, that the by-laws shall contain no provision restricting the alienation, conveyance, sale, leasing, purchase, ownership and occupancy of units because of race, creed, color or national origin

RPL § 339-v does not apply here because the letter agreement is not a by-law provision, but rather, a separate agreement voluntarily entered into by plaintiff based on mutual consideration. Moreover, plaintiff has not alleged any claim that the letter agreement was imposed upon him on the basis of "race, creed, color or national origin," as explicitly required under RPL § 339-v(2)(a). Accordingly, defendant is entitled to summary judgment dismissing the third cause of action.

The fourth cause of action

For his fourth cause of action, plaintiff contends that "defendant's imposition of the letter agreement upon plaintiff in violation of the By-Laws of the Condominium is a deceptive business practice that violates General Business Law § 349."

A private right of action is granted to "any person who has been injured by reason of any violation of this section." Gen. Bus. Law § 349-h. To maintain a cause of action for violation of Gen. Bus. Law § 349, a party must only allege and prove: [1] that defendant was guilty of a material deceptive act or practice in the conduct of a business; and [2] plaintiff was injured by reason thereof. Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, (1999). The injury need not be pecuniary, however, the injury must be caused by the deceptive act or practice. Id. Intent to defraud and justifiable reliance are not elements of the cause of action. Stutman v. Chemical Bank, 95 N.Y.2d 24 (2000).

With respect to real estate sales, the First Department has held that the alleged deceptive acts of a condominium must "have a broad impact on consumers at large" in order to be actionable under Gen. Bus. Law § 349. Thompson v. Parkchester Apartments Co., 271 A.D.2d 311 (1st Dept. 2000). The Thompson court concluded that the alleged misrepresentations in question did not meet this standard since they involved one apartment complex. See also New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308 (1995).

Here, plaintiff has pled that the letter agreement "imposes a cost upon plaintiff... that is not imposed upon other unit owners of [defendant] similarly situated." Private contract disputes unique to the parties do not fall within the ambit of Gen. Bus. Law § 349. Oswego Laborers' Local Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20 (1995). Moreover, plaintiff has not alleged that the letter agreement was misleading in a material way. Accordingly, defendant is entitled to summary judgment dismissing the fourth cause of action.

The first cause of action

In the first cause of action, plaintiff seeks a declaration that the letter agreement is void and unenforceable and a permanent injunction prohibiting defendant from seeking any payment due under the letter agreement. Plaintiff has failed to establish any basis upon which the letter agreement is void and unenforceable. Moreover, plaintiff has failed to raise any issue of fact which would preclude a grant of summary judgment in defendant's favor. Accordingly, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

Defendant's motion for a default judgment on the counterclaims

It is undisputed that plaintiff failed to answer defendant's counterclaims. In opposition, plaintiff seeks an extension of time. There is a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice to defendant. Lirit v. S.H. Laufer World, Inc., 84 A.D.2d 704 (1st Dept 1981). Thus, the issue is whether plaintiff has demonstrated a reasonable excuse for his delay in answering the counterclaims and whether he have a meritorious defense. Eugene Di Lorenzo, Inc. v. Dutton Lbr. Co., 67 N.Y.2d 138 (1986).

Plaintiff has not set forth a justifiable explanation for why he did not timely answer the counterclaims. Plaintiff's time to respond expired on May 25, 2007. At no time prior to this motion did plaintiff seek an extension of time reply. While delay is deminimus, a late reply is unwarranted because plaintiff has not set forth a potentially meritorious defense to the counterclaim. St. Vincent's Hosp. & Medical Center v. Allstate Ins. Co., 838 N.Y.S.2d 917 (2nd dept 2007).

The first and second counterclaims, for a declaration that the letter agreement does

not contravene the By-Laws and is a valid and enforceable contract and for plaintiff's specific performance thereunder, raise issues that have already been determined by the court against plaintiff, as a matter of law, on this motion. Defendant has further established plaintiff's liability for failing to comply with the letter agreement, and is entitled to damages, to be determined at inquest.

In its fourth cause of action, defendant contends it is entitled to attorneys' fees and related costs pursuant to Article 14 of the By-Laws. However, the counterclaims arise out of the letter agreement, which does not contain any provision for the collection of attorneys' fees arising from a breach thereof, defendant has not established a valid basis for this counterclaim. The By-Laws are separate from the letter agreement and plaintiff's breach of the letter agreement does not constitute a breach of the By-Laws.

Accordingly, defendant is granted entry of a default judgment against plaintiff to the following extent: [1] on the first and second counterclaims; and [2] on the third counterclaim on the issue of liability only. The issue of what damages, if any, defendant may recover from plaintiff shall be determined at an inquest. The fourth counterclaim is hereby severed and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant is granted summary judgment against plaintiff dismissing the complaint in its entirety; and it is further

ORDERED that plaintiff's motion for summary judgment is otherwise denied; and it is further

ORDERED that defendant is granted entry of a default judgment against plaintiff to the following extent: [1] on the first and second counterclaims; and [2] on the third counterclaim on the issue of liability only. The issue of what damages, if any, defendant may recover from plaintiff shall be determined at inquest; and it is further

ORDERED that defendant's fourth counterclaim is hereby severed and dismissed.; and it is further

ORDERED that defendant's fourth counterclaim is hereby severed and dismissed; and it is further

ORDERED that defendant is directed to file note of issue on or before December 5, 2007; and it is further


ORDERED that an inquest will be held before the court on January 17, 2008 at 2:30 p.m. at 80 Centre Street, Room 122.

Any requested 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
November 9, 2007

So Ordered:



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

FILED
NOV 20 2007
NEW YORK
COUNTY CLERK'S OFFICE