

Silverstein v Westminster House Owners, Inc.

2007 NY Slip Op 33898(U)

November 30, 2007

Supreme Court, New York County

Docket Number: 0601706/2007

Judge: Walter Tolub

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

PRESENT: **WALTER B. TOLLIB**

PART _____

Index Number : 601706/2007

SILVERSTEIN, KEITH D.

vs

WESTMINSTER HOUSE OWNERS, INC.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

DEC 03 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/30/07

W
WALTER B. TOLLIB^{cc}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

-----X
KEITH D. SILVERSTEIN,

Plaintiff,

Index No. 601706/07
Mtn. Seqs. 001

-against-

WESTMINSTER HOUSE OWNERS, INC., ELLIOT
SCHRAGER, DAVID KAUFMAN, JUDY KLEINBERGER,

Defendants.

FILED

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-----X
WALTER TOLUB, J.:

By this motion Plaintiff seeks an order (1) dismissing Defendants' counterclaim for failure to state a cause of action; (2) striking Defendants' Second and Fourth affirmative defenses; and (3) attorneys fees and expenses. Defendants Westminister House Owners, Inc. ("Westminister"), Elliot Schrager and David Kaufman, cross-move for summary judgment dismissing the Complaint in its entirety.

Facts

Plaintiff is a former shareholder of Westminister House Owners, Inc. (The "Cooperative"). Plaintiff owned the shares allocated to apartment 11 NB. Defendants Elliot Schrager and David Kaufman¹ are both corporate directors of the Cooperative.

Pursuant to the terms of the proprietary lease, in the event that a shareholder wants to assign the shares allocated to an apartment or to lease the apartment, the consent of the

¹Westminister House Owners, Inc., Elliot Schrager and David Kaufman are the only remaining Defendants in this action.

Cooperative must be obtained first. (Defendants Ex. A, Lease p. 8). Prospective purchasers are required to submit a purchase application including detailed personal and financial information, copies of financial statements, at least two years of income filings and letters of financial and social reference to the Cooperative and have an interview with the entire Board of Directors or with certain members of the Board prior to the Cooperative rendering a decision as to whether it will approve a transfer of its stock and lease.

Plaintiff wanted to sell his shares to apartment 11NB. Plaintiff hired Warburg Realty Partnership ("Warburg") to market the apartment on an exclusive basis from March 7, 2006 through June 7, 2006. Specifically, Plaintiff retained Harriet Kaufman and Dorothy Schrage, the wives of the two remaining Defendants in this action. Since the Warburg Realtors were unable to procure a satisfactory offer for the Unit within the ninety day exclusive period, Plaintiff hired Halstead Property LLC ("Halstead") to market the Unit for sale.

In or about November, 2006, Plaintiff entered into a contract of sale for the stock associated with apartment 11 NB with Mark and Maria Alvarez ("First Prospective Purchasers") for \$735,000. Consistent with the proprietary lease, that contract provided that the sale is subject to the unconditional consent of the Cooperative. The Cooperative reviewed the application and

[*4]
determined to reject the application made by Alvarez.

The rejection of the First Prospective Purchasers was communicated to the Plaintiff. Plaintiff then entered into another contract to sell the apartment to John Immundo for \$745,000. (Defendants Ex. D). The Cooperative received an application package from Mr. Immundo on February 16, 2007. The board reviewed the application at its meeting on March 20, 2007. The Board was concerned with Mr. Immundo's financial wherewithal. The Board and Mr. Immundo entered into negotiations which culminated in an agreement. Upon the agreement being reached, the Cooperative approved Mr. Immundo as a prospective purchaser on April 26, 2007. The closing on apartment 11NB took place on May 22, 2007.

Discussion

Plaintiff asserts two causes of action on three theories: Breach of fiduciary duty and breach of contract/breach of the implied covenant of good faith and fair dealing.

The elements of a cause of action for breach of fiduciary duty are: (1) breach by a fiduciary of a duty owed to Plaintiff; (2) defendant's knowing participation in the breach; and (3) damages. (Manhattan Motorcars, Inc., v. Automobili Lamborghini, 2007 WL 1988144 at *5 [SDNY 2007] quoting SCS Commc'ns, Inc., v. Herrick Co., 360 F3d 329 [2d Cir 2004]).

The elements of a cause of action for breach of contract

[* 5]

are: (1) the existence of a binding contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) resulting damages. (Id. at *4). A breach of the implied covenant of good faith and fair dealing is considered a breach of the underlying contract. (Id.)

It follows that for each of the causes of action that Plaintiff asserts he must demonstrate damages in order to make out his cause of action. In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint. (Gordan v. Dino De Laurentis Corp., 141 AD2d 435 [1st Dept 1988]). Here Plaintiff is unable to demonstrate that he suffered any damages. In fact, Plaintiff made a profit as a result of the Cooperative's rejection of the Alvarez application.

Furthermore, there is no factual basis for this court to sustain a cause of action for breach of fiduciary duty. Plaintiff claims that Mr. Kaufman and Mr. Schragger conspired with the Board to deny Alvarez's application, placed unreasonable conditions upon the sale to Immundo and failed to recuse themselves from any discussion that concerned Plaintiff's sale of the apartment in order to enhance the reputation of their respective spouses. Plaintiff alleges that this amounts to self dealing in breach of their fiduciary duty to Plaintiff and that the actions were committed with malice because they were for a

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personal benefit as opposed to a legitimate corporate purpose.

Claiming a breach of fiduciary duty is insufficient to sustain a cause of action. The business judgment rule permits judicial inquiry into claims of fraud or self dealing by Board members only where such claims have a basis. (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 NY2d 530 [1990]; Simpson v. Berkley Owner's Corp., 213 AD2d 207 [1st Dept 1995]). Plaintiff's claim that Mr. Kaufman and Mr. Schragger acted improperly because they wanted their wives to get gain the commissions of the sale is not supported by the evidence.

Accordingly, it is

ORDERED that Plaintiff's motion is denied; and it is further

ORDERED that Defendants' motion for summary judgment is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision of the court.

Dated: 11/30/07

ENTER:


WALTER B. TOLUB J. S. C.

FILED
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