

**Murzinski v 566-568 W. 159th St. Hous.
Dev. Fund Corp.**

2008 NY Slip Op 30266(U)

January 29, 2008

Supreme Court, New York County

Docket Number: 0106097/2007

Judge: Martin Shulman

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

MARTIN SHULMAN

DECENT. Index Number : 106097/2007 J.S.C.

PART 1

MURZINSKI, SARA vs 566-568 WEST 159TH STREET

INDEX NO. 106097/07

Sequence Number : 001

MOTION DATE

SUMMARY JUDGEMENT

MOTION SEQ. NO. 001

MOTION 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 A-K	1
Answering Affidavits — Exhibits 1-2	2, 3
Replying Affidavits + Exhs. A-C	4, 5, 6

Cross-Motion: Yes No

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

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or pro se litigants must appear in person at the Judgment Clerk's Desk (Room 413)

Dated: January 29, 2008

MARTIN SHULMAN J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
SARA MURZINSKI,

Plaintiff,

Index No. 106097/07

-against-

Decision, Order
and Judgment

566-568 WEST 159TH STREET HOUSING
DEVELOPMENT FUND CORPORATION,

Defendant.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
11B)

MARTIN SHULMAN, J.:

Plaintiff Sara Murzinski ("plaintiff" or "Murzinski") commenced this action against defendant 566-568 West 159th Street Housing Development Fund Corporation ("defendant" or "Co-op") *inter alia* for breach of contract, breach of fiduciary duty and tortious interference with contract seeking declaratory, injunctive and monetary relief arising from Plaintiff's attempt to sell certain Co-op shares appurtenant to the premises located at 566-568 West 159th Street, New York, New York (the "building"), Apartment 43 (the "subject apartment") and the Co-op's claimed assessment of and/or right to collect a fifty percent flip tax or transfer tax upon any such transfer. Plaintiff now moves for an order granting her summary judgment on the Verified Complaint by *inter alia* declaring that no resale or transfer fee or flip tax is in effect for the Co-op; enjoining the Co-op from charging Plaintiff any resale or transfer fee or flip tax upon Plaintiff's transfer of the subject apartment; and other related relief.¹

¹ The Co-op was organized for the purpose of low income housing as provided for in the Co-op's offering plan (the "plan"), certificate of incorporation and by-laws (the "by-laws"). See Exhs. E, G, H and I to motion.

BACKGROUND

The Co-op was incorporated in January, 1982 pursuant to Business Corporation Law § 402 and Private Housing Finance Law Article XI in conjunction with the conversion of the building, formerly owned by the City of New York ("NYC"), to co-operative ownership. On or about September 8, 1982 NYC conveyed the building to the Co-op. Plaintiff is a shareholder of defendant and the proprietary lessee of the subject apartment, having purchased said shares on or about June 24, 2002. It is undisputed that the plan provides *inter alia* that all sales or transfers of Co-op shares are subject to the NYC Board of Estimate's Resale Restrictions (the "BOE Restrictions"). See Exh. F to motion. The relevant portions of the BOE Restrictions² are as follows:

A. **For ten years** from the date of the conveyance of title to the building to the co-op Corporation by the City of New York:

1. The building shall provide housing for persons and families of low income as defined in Section 576 of Article XI of the Private Housing Finance Law; . . .

B. **Within the first two years from the date of the original conveyance by the City to the co-op Corporation**, if an individual tenant co-operator sells his or her shares in the co-op Corporation, he or she may retain the following from the sales price:

1. The original purchase price;
2. The amount of special assessments for building-wide capital improvements, if any, that the co-op Corporation has levied upon the selling co-operator;

² The provisions of the BOE Restrictions are included in the Co-op certificate of incorporation.

3. The amount spent for capital improvements to the individual unit that the selling tenant co-operator can document to the satisfaction of the co-op Corporation;
 4. The co-op Corporation will retain the entire balance of the sales price, if any, as a reserve for capital and operating expenses, unless 75 percent of the shareholders approve an allocation of up to 30 percent of the balance to be retained by the selling tenant co-operator. . . .
- C. After two years from the date of the original conveyance by the City, and for the remainder of the ten year period referred to in (A), a selling tenant co-operator may retain the following from the sales price:
1. The original purchase price;
 2. The amount of special assessments for the building-wide capital improvements, if any, that the co-op Corporation has levied upon the selling tenant co-operator;
 3. The amount spent for capital improvements to the individual unit that the selling tenant co-operator can document to the co-op Corporation's satisfaction;
 4. From the balance of the sales price, if any, the selling tenant co-operator may retain up to 50 per cent. The co-op Corporation will retain at least 50 per cent of the balance as a reserve for capital and operating expenses, and may increase its share of the balance by amending its by-laws by vote of 75 per cent of the shareholders and by distributing the amendment in writing to all shareholders;
 5. The co-op Corporation may further limit the portion and amount of the sales price to be retained by selling tenant co-operators as outlined in 3 and 4 by amending its by-laws by vote of 75 per cent of the shareholders and by distributing such amendments in writing to all shareholders. Any other amendments to the by-laws that change the distribution of the portion or the amount of the sales price between selling tenant co-operators and the co-op Corporation which are not set forth herein will require HPD's approval. . . . (Emphasis added)

On or about August 14, 2006, Plaintiff entered into a contract of sale for the subject apartment with non-party purchaser Robert Ochiltree ("Ochiltree"), subject to

among other things Co-op board approval (the "Sale") with a purchase price of \$210,000.00 (Exh. C to motion). Plaintiff contends that sometime in August 2006, Co-op board members advised her that the Sale would be subject to a flip tax or transfer fee equal to one-half or 50% of plaintiff's profit on the Sale (the "flip tax").³ However, plaintiff insisted that no flip tax or resale policy was in effect and demanded that the Co-op provide her with evidence confirming the imposition of same. Ultimately, the Co-op board approved the Sale and two days before the scheduled closing date of February 28, 2007, the Co-op reiterated its position *vis a vis* the flip tax, the Sale was terminated and the instant action ensued.

SUMMARY JUDGMENT

To summarize the applicable case law governing summary judgment, the movant has the initial burden of proving entitlement thereto. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." (CPLR §3212(b)); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); Friends of Animals v. Associated Fur Mfgs., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979); Freedman v. Chemical Const. Corp., 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); Spearmon v. Times Square Stores Corp., 96 A.D.2d 552, 465 N.Y.S.2d 230 (2d Dept. 1983). It is incumbent upon the party opposing summary judgment "to assemble, lay bare and

³ Parenthetically, paragraph 1.15 of the Sale contract states that the Co-op imposes a 30% flip tax upon Plaintiff (Exh. C to motion).

reveal his proof, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Spearmon v. Times Square Stores Corp., supra, at 553. Mere conclusory allegations, expressions of hope, speculation or conjecture is not sufficient to resist summary judgment. Zuckerman, supra. If the opposing party fails to submit evidentiary facts to controvert the allegations set forth in the movant's papers, the movant's allegations may be deemed admitted. Summary judgment may then be granted, as no triable issue of fact exists. Kuehne & Nagel, Inc. v. F.W. Baiden, 36 N.Y.2d 539, 369 N.Y.S.2d 667 (1975).

Succinctly stated, because the Co-op was subject to the BOE Restrictions, resales were subject to a transfer tax: 100% on the shareholder's net profit if the sale took place during the first two years after September 8, 1982, the date upon which NYC conveyed title to the Co-op, or 50% if the sale took place in the third to tenth year after the September 8, 1982 conveyance of title from NYC. Consequently, the only resale restrictions the Co-op was subject to were the BOE Restrictions which expired by their own terms in September 1992. Since this Court has not been apprized that the Co-op adopted or properly promulgated a further flip tax or transfer fee, this court grants plaintiff summary judgment on the first cause of action solely to the extent of declaring that since September 1992 and through at least August 10, 2007 when this motion was submitted, no flip tax or other transfer fee was applicable to any sale of the subject apartment.

CPLR 3212(b) states in relevant part that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." See, e.g., Merit Hill Vineyards, Inc.

v. Windy Heights Vineyard, Inc., 61 N.Y.2d 106, 472 N.Y.S.2d 592 (1984); Mehlman v. 592-600 Union Avenue Corp., ____ A.D.3d ____, 847 N.Y.S.2d 547 (1st Dept., 2007).

Here, upon searching the record, plaintiff's second cause of action for an injunction enjoining the Co-op, its board members and its agents, employees, attorneys and all persons acting in concert with them from demanding the payment of any flip tax or other transfer fee in connection with the sale of the shares appurtenant to the subject apartment and for other relief is dismissed. Plaintiff has not provided any viable argument or supporting documentation which would prevent the Co-op from properly promulgating a resale flip tax or other transfer fee in full compliance with the Business Corporation Law and the Co-op's governing documents. Thus, in the event the Co-op should appropriately impose such a fee the plaintiff, like any other Co-op shareholder, would be responsible for same.

Likewise, plaintiff's motion for summary judgment on her third cause of action (breach of contract), fourth cause of action (breach of fiduciary duty), fifth cause of action (tortious interference with contract), sixth cause of action (indemnification) and seventh cause of action (attorneys' fees and expenses) is denied and, upon further searching the record, these causes of action are dismissed. The third, fourth, fifth and sixth causes of action are premised upon plaintiff's claim that the Sale was terminated because of the Co-op's wrongful insistence on its right to collect the flip tax on the Sale, resulting in damages to plaintiff. Without any documentary support, plaintiff's conclusory affidavit in support of the motion recounts how Ochiltree terminated the contract of sale and recovered damages from plaintiff in a small claims action because of the aborted Sale. One fact must be re-emphasized; the Co-op did approve the Sale.

In reviewing the moving papers containing the contract of sale it appears that it was plaintiff who apparently avoided closing under the contract because of the flip tax issue and it was this delay which ostensibly prompted Ochiltree to allegedly terminate the contract. What is clear, however, is that plaintiff has proffered no evidence to even colorably show that either the Co-op's actions and/or the contract foreclosed plaintiff from consummating the transaction, paying the flip tax "under protest" and seeking appropriate relief against the Co-op thereafter. Instead, plaintiff knowingly allowed the Sale to "slip through her fingers" and her unhappiness with her current circumstances is solely of her own making, thereby vitiating any claim under the foregoing causes of action.

Lastly, Plaintiff's seventh cause of action for attorneys' fees and expenses is also dismissed because under the circumstances presented, Real Property Law §234 is not implicated. Peck v. Wolf, 157 A.D.2d 535, 550 N.Y.S.2d 9 (1st Dept., 1990).

Accordingly, it is

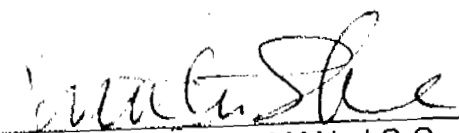
ORDERED that plaintiff's motion for summary judgment is granted with respect to the first cause of action for declaratory relief to the extent set forth herein, and is otherwise denied; and it is further

ORDERED, ADJUDGED and DECLARED that from September 1992 through at least August 10, 2007, no flip tax or other transfer fee was applicable to any sale of plaintiff's subject apartment; and it is further

ORDERED that upon searching the record, summary judgment is granted in defendant's favor dismissing the second through seventh causes of action. The Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
January 29, 2008



HON. MARTIN SHULMAN, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B).