

**Board of Mgrs. of Kings Hwy. Luxury
Condominium v Gershkovich**

2008 NY Slip Op 31128(U)

April 10, 2008

Supreme Court, Kings County

Docket Number: 0030390/2006

Judge: Bruce M. Balter

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of April, 2008.

P R E S E N T:

HON. BRUCE M. BALTER,
Justice.

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THE BOARD OF MANAGERS OF THE KINGS
HIGHWAY LUXURY CONDOMINIUM, SUING ON
BEHALF OF THE UNIT OWNERS,

Index No. 30390/06

Plaintiffs,

- against -

TIBOR GERSHKOVICH and
GALINA GERSHKOVICH,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1, 2 3, 4
Opposing Affidavits (Affirmations)_____	5
Reply Affidavits (Affirmations)_____	6
Further Affidavit (Affirmation)_____	7
Other Papers_____	_____

Upon the foregoing papers, the motion by defendants Tibor Gershkovich and Galina Gershkovich for an order, pursuant to CPLR 3212, dismissing the complaint herein is denied and the cross motion by plaintiff Board of Managers of the Kings Highway Luxury

Condominium, suing on behalf of the unit owners, for an order “granting plaintiff summary judgment to the extent not already granted in this Court’s June 4, 2007 order” is granted.

Plaintiff sues on behalf of the unit owners of a condominium building (the Condominium) at 105 Kings Highway in Brooklyn. Defendants are the owners of commercial units designated as M-1 and M-2 at the Condominium. Unit M-1 has been leased by defendants to a child care facility and Unit M-2 has been leased to a medical testing establishment. According to the complaint herein, defendants violated the Condominium’s Bylaws by, among other things, leasing the commercial units without first giving notice to the Board of Managers of their intent to do so. In December 2006, plaintiff moved for a preliminary injunction directing defendants to cease operation of any business at the premises. In opposition to the motion, defendants contended that the Bylaws did not restrict their right to lease the commercial units. In its order of June 4, 2007, the Court found that, according to the Condominium’s Declaration and Bylaws, owners of commercial units were “Unit Owners” and, as such, subject to the Bylaws’ provisions relating to leasing, including Article VII, Section 1(b) thereof, which gave plaintiff a right of first refusal with respect to the leasing of the commercial units. Because defendants were subject to the Bylaws’ provisions and did not comply with them, the motion was granted to the extent, as pertinent here, of permitting plaintiff to lease one or both of the commercial units or to produce a lessee or lessees on substantially similar terms and conditions as set forth in defendants’ leases¹.

¹ In its order, this Court found, among other things, that plaintiff had established the likelihood of its success on the merits because the Bylaws applied to commercial units and defendants had not complied with them.

In their motion, defendants explain that, prior to their purchase of the subject units, the Condominium's sponsor furnished a copy of the Condominium Offering Plan, Bylaws and Declaration to them. According to the Offering Plan, commercial unit owners, unlike owners of residential units, were not required to offer the Board of Managers a right of first refusal prior to leasing out the commercial units.² Defendants also point out that the Purchase Agreement for the sale of the Condominium's units incorporates by reference the terms of the Offering Plan. Defendants fault plaintiff for failing to submit any portion of the Offering Plan to the Court when plaintiff previously sought injunctive relief. Since defendants were not allegedly required to notify plaintiff of their intention to lease or alter the subject units, they assert that summary judgment in their favor is warranted and that the complaint should be dismissed.

In its cross motion and in opposition to the motion, plaintiff maintains that defendants are prohibited from relitigating the issue of whether there was a right of first refusal since this Court, in its order of June 4, 2007, found that plaintiff had such right. Plaintiff notes that the prior order was not appealed, nor did defendants seek reargument. It also notes that it had requested that the Court convert the prior motion to one for summary judgment since "there were no disputed issues of fact." Should the Court consider the merits of defendants' motion, plaintiff argues that Part 1, Section T(1) of the Offering Plan was considered by the Court before it granted injunctive relief to plaintiff, that the commercial units were not sold pursuant

² Defendants cite paragraph 6, sub iii(iv) and Part 1, Section T, sub 1 of the Offering Plan.

to the Offering Plan³ and that the deed and contract of sale for the commercial units provided that the Bylaws bound such units.⁴

Initially, the Court notes that “the granting or denial of a motion for a preliminary injunction does not constitute the law of the case or an adjudication on the merits of the claim for a permanent injunction” (*Ratner v Fountains Clove Rd. Apts.*, 118 AD2d 843, 843 [1986]; see also *Kaplan v Queens Optometric Associates, P.C.*, 293 AD2d 449 [2002]). Thus, to the extent that plaintiff’s application for a preliminary injunction was granted, such relief cannot serve as a basis for summary judgment in favor of plaintiff or for denial of defendants’ motion seeking dismissal of the complaint⁵. Moreover (and contrary to plaintiff’s contention), the motion was not converted to one for summary judgment. Accordingly, the instant motion by defendant will be considered on its merits, as will the cross motion⁶.

³ Plaintiff cites an affidavit of Tibor Gershkovich to that effect, as well as page 1 of the Offering Plan, to support is contention.

⁴ According to the deed, the grantees (defendants) are receiving Units 1 and 2 “[s]ubject to the rights, obligations...and other provisions set forth in the Declaration and the By-Laws.” Plaintiff also relies upon the contract of sale wherein (at paragraph “13”) the purchaser acknowledges that the subject units are not part of the Offering Plan.

⁵ Plaintiff sought an injunction prohibiting defendants from operating any businesses in the subject units. The order of June 4, 2007 did not grant such relief; rather, it directed, among other things, that plaintiff indicate if it wished to lease the subject units or produce lessees for them. The order did not discuss the first and third causes of action of the complaint (for money damages and attorneys’ fees), nor do the instant motion and cross motion. Consequently, consideration of such matters is unnecessary at this time. The Court is essentially being asked to consider plaintiff’s request for a permanent injunction or dismissal of the second cause of action.

⁶ In its prior order, this Court directed that plaintiff seek leave to add the tenants as defendants herein if it intended to lease the subject units and seek injunctive relief as to them. By order dated January 16, 2008, this Court granted plaintiff’s motion to add the tenants as defendants. Plaintiff’s instant cross motion was served upon EDAS Management, the tenant in

In New York, the creation and administration of condominiums are governed by the provisions of the Condominium Act (Real Property Law Article 9-B, § 339-d *et seq.*). A parcel of real property becomes a condominium and is, thus, subject to the jurisdiction of the Condominium Act, by the filing of a declaration of condominium (RPL § 339-n). Once created, the condominium's affairs are governed principally by its by-laws, which are essentially, an agreement among the individual unit owners as to the manner in which the condominium will operate and the respective rights and obligations of unit owners (*see Murphy v State of New York*, 14 AD3d 127 [2004]). Defendants assert that, according to the Offering Plan, Commercial Unit Owners are not required to offer the Board of Managers a right of first refusal prior to leasing the commercial units and, further, that the Offering Plan must be read in conjunction with the Declaration and Bylaws. Unlike the documents in *Residential Comm. of the Bd. of Mgrs. of the Sycamore v 250 E. 30th St. Owners, LLC* (17 Misc 3d 1139[A] [2007]), which is cited by defendants, a reading of the Offering Plan, the Declaration and the Bylaws indicates some conflict between these documents regarding the leasing of the subject units. As such, the Bylaws and Declaration control and, therefore, as this court has held previously, the owners of commercial units are "Unit Owners" and bound to offer a right of first refusal to the Board of Managers.

Despite some ambiguity in the relevant documents herein, there are references to the Offering Plan and its applicability to the commercial units. The Offering Plan provides (at

unit M-2 (the medical facility), such that plaintiff intends to bind all parties to the judgment it seeks (save for the child care center to which it apparently has no objection).

page iv, paragraph "1") that the first floor of the building (i.e., the commercial units) are not subject to the offering. Further, within the contract of sale for the commercial units, is an acknowledgment by the purchasers that the subject units are not part of the Offering Plan. Under the circumstances, defendants were required to notify the Board of Managers of their intention to lease the commercial units and to offer the Board a right of first refusal. This they did not do, either initially or in response to the Board's letter of August 28, 2007 in which it exercised its right of first refusal with respect to unit M-2. Accordingly, the motion by defendants is denied and the cross motion by plaintiff is granted with respect to the second cause of action for a permanent injunction and only insofar as it relates to unit M-2. Plaintiff's first and third causes of action are severed and continued. Defendants and their tenant are directed to cease operation of the medical facility within 60 days after service of a copy of this order with notice of entry. In the event they fail to do so, plaintiff may take whatever means or commence whatever proceedings it deems advisable to oust them from possession.

The foregoing constitutes the decision, order and judgment of this court.

ENTER



J. S. C.

Bruce M. Balter