

**58 W. 105th St. Hous. Dev. Fund
Corp. v Milton**

2008 NY Slip Op 32742(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 102724/07

Judge: Walter B. Tolub

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PRESENT: **WALTER B. TOLUB** Justice

PART _____

Index Number : 102724/2007
58W. 105TH ST. HSG DEVELOPMENT
vs
MILTON, ALEC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

IN ACCORDANCE

WITH A WRITING MEMORANDUM DECISION

IS DECIDED

FILED

OCT 07 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/6/08

WALTER B. TOLUB 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: IAS PART 15

-----X
58 WEST 105TH STREET HOUSING DEVELOPMENT
FUND CORPORATION,

Plaintiff,

Index No. 102724/07

-against-

ALEC MILTON,

Defendant.

FILED

OCT 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Tolub, J.:

Plaintiff 58 West 105th Street Housing Development Fund Corporation moves, pursuant to CPLR 3211, to dismiss the defenses set forth in defendant Alec Milton's answer and for summary judgment in its favor pursuant to CPLR 3212. Defendant cross-moves for summary judgment in his favor.

Background

Plaintiff is a residential housing co-operative formed pursuant to the New York State Business Corporation Law Section 402 and Article XI of the New York State Private Housing Finance Law (PHFL). Defendant alleges that he purchased an apartment in a building owned by plaintiff, and is a shareholder of plaintiff.

In 1992, plaintiff purchased a building located at 58 West 105th Street, New York, New York from the City of New York (the Building) to convert it into co-operative status. All incoming occupants of apartments in the Building, at the relevant times, had to be income eligible as defined by PHFL § 576.

In 1996, defendant was looking for an apartment in New York City. Defendant contacted an acquaintance from a former job, Donna Gibbons. Ms. Gibbons was employed by Manhattan Valley Management Company, Inc. (Manhattan Valley), the management company for plaintiff at the time. Plaintiff had entered into a management agreement with Manhattan Valley in March 1992 (the Management Agreement), which as discussed below, was subsequently terminated in 2005.

Ms. Gibbons advised defendant that an apartment was available in the Building. Defendant entered into a two-year lease for apartment 5A commencing June 1, 1996. The lease was signed by both Ms. Gibbons and defendant. Defendant alleges that he was advised by Manhattan Valley that the plaintiff's Board of Directors required residency for a probationary period to establish that defendant was creditworthy, and if that proved true, the apartment would then be sold to the defendant. Defendant alleges that, at the time he entered into occupancy of the building, he submitted an application and "check stub." Affidavit of Alec Milton, ¶ 8. These documents are not included with the motion. Defendant also alleges that he was advised that the then-sitting Board of Directors would have to approve his purchase. However, sometime after 1996, it appears that the Board of Directors stopped meeting, and a new Board was not elected until 2005. Defendant alleges that during this time

period, Manhattan Valley acted as a de facto Board of Directors, selling and leasing apartments in the Building.

In June 1998, defendant entered into a Letter of Intent, outlining the defendant's intention to purchase rights, title, and interest in Apartment 5A for \$5,000.00, and plaintiff's intention to sell such interest. The Letter of Intent specifically states that it is "not intended to be, and shall not constitute in any way, a binding legal agreement, or impose any legal obligation or duty on either Buyer or Seller." (Defendant's Notice of Cross Motion, Exhibit D). The Letter of Intent was signed by defendant and Ms. Gibbons, as agent for plaintiff. The Letter contains plaintiff's seal.

On June 12, 1998, defendant signed a Proprietary Lease for Apartment 5A, which designated defendant as shareholder of 250 shares of plaintiff. The Proprietary Lease is again signed by defendant and Ms. Gibbons. It also contains the plaintiff's seal. (Defendant's Notice of Cross Motion, Exhibit F). Also, a Certificate of Shares, dated June 12, 1998, was allegedly issued to defendant. The Certificate of Shares is signed by Ms. Gibbons as agent for plaintiff. It also contains plaintiff's seal. (Defendant's Notice of Cross Motion, Exhibit E).

Although defendant was allegedly a shareholder, he continued to enter into lease renewals for Apartment 5A for June 1998 to May 2000, June 2000 to May 2002, June 2002 to May 2004, and June

2004 to May 2006. (Plaintiff's Notice of Motion, Exhibit M).

In 2005, a new Board of Directors was elected. On October 5, 2005, the newly elected Board held a meeting at which defendant allegedly presented the Letter of Intent. He was allegedly advised by the new Board that the plaintiff would not enter into an agreement to sell Apartment 5A to him. On October 21, 2005, the new Board wrote a letter to Manhattan Valley terminating the Management Agreement, effective that date. Manhattan Valley responded that same day by letter, in which it informed the Board that, under the Management Agreement, Manhattan Valley was entitled to thirty days written notice of termination of the Agreement.

On November 2, 2005, the Board held another meeting, attended by shareholders and tenants. There were separate attendance sheets for shareholders and tenants. Defendant only signed the tenant sheet. At the meeting, the Board advised that Manhattan Valley had been terminated as building agent and lacked authority to act on behalf of the plaintiff. Defendant recalls a meeting where the attendees were advised that the Board might not honor representations previously made by Manhattan Valley. However, it is not clear if defendant is recalling the October 5th or the November 2nd meeting. Defendant also recalls that, around the time of the meeting, he spoke with Manhattan Valley and had them release copies of his shares and proprietary lease,

which they allegedly held. Defendant alleges that Manhattan Valley advised that the consideration agreed upon in the Letter of Intent, \$5,000.00, was required. Defendant allegedly requested a Contract of Sale, which was signed by Ms. Gibbons and defendant on November 1, 2005. The contract also contained plaintiff's seal. Defendant wrote a check to plaintiff, dated November 10, 2005, for the \$5,000.00. The check was deposited by Manhattan Valley into plaintiff's Chase banking account on November 14, 2005. The check was returned to defendant in December 2005 by the plaintiff, but defendant allegedly mailed the check back to plaintiff's new agent.

In the meantime, on November 3, 2005, plaintiff allegedly placed signs throughout the common areas of the Building notifying residents that "no one could move in and out" of the Building and that "Manhattan Valley Management Company has no authority to do any leasing or sale in any apartment" in the Building. (Plaintiff's Notice of Motion, Exhibit H).

Plaintiff brings this action for (1) a declaratory judgment that defendant lacks an ownership interest and any other rights of occupancy and that any agreement executed by Manhattan Valley conveying such is void; (2) unpaid rents; (3) judgment of possession; (4) judgment of fair market value of Apartment 5A; (5) an interim order directing defendant to pay plaintiff at least \$2000 a month as of March 1, 2007, and until actual

possession is obtained; and (6) damages and legal fees and costs.

Analysis

In order to grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. The movant must make an initial prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*Santiago v Filstein*, 35 AD3d 184, 185 [1st Dept 2006]; *Pirrelli v Long Island R.R.*, 226 AD2d 166 [1st Dept 1996]). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient enough to establish the existence of material issues of fact that require a trial. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The court will address defendant's cross motion for summary judgment first. Defendant argues that he is entitled to summary judgment because he has proven that he is a valid shareholder of plaintiff vis a vis Apartment 5A. This court disagrees. Defendant presents the signed and sealed Proprietary Lease, Letter of Intent, Certificate of Shares, and Contract of Sale in support of his claim. However, defendant's evidence is conflicting, and therefore, is insufficient to eliminate any material issues of fact from the case.

The evidence presented is conflicting in that defendant allegedly purchased an interest in Apartment 5A in 1998, as

evidenced by the Certificate of Shares issued on June 12, 1998, but it was not until November 2005 that defendant entered into a Contract of Sale, and paid consideration for that Contract. This evidence does not add up and presents questions of fact.

Further, during this time, when defendant allegedly owned the shares and had a Proprietary Lease, he was still signing renewal leases, every two years, covering the period of 1998 through 2006. Defendant alleges that he gave a check stub to Manhattan Valley in 1998, but does not submit proof. Further, there is a question as to why defendant "purchased" those shares again in 2005, when he gave Manhattan Valley a check for \$5,000.00. The conflicting evidence, and the unresolved questions it creates, warrants denial of defendant's cross motion for summary judgment.

Plaintiff also moves for summary judgment. Plaintiff argues that the Letter of Intent, the Certificate of Shares, and the Contract of Sale, signed by Manhattan Valley, allegedly on behalf of plaintiff, are void ab initio and unenforceable, because Manhattan Valley did not have actual or apparent authority to sell ownership interests in the Building. Plaintiff contends this was outside the scope of Manhattan Valley's duties as plaintiff's agent. Plaintiff relies on General Obligations Law §§ 5-703 and 5-1111.

It is the law in New York that a contract for the leasing

for a period of longer than one year, or the sale of any real property, or an interest therein, is void unless the contract is in writing, subscribed by the party to be charged or by his lawful agent who is authorized by writing. (General Obligations Law § 5-703 (2)).

"Although the written authorization required to establish the authority of the agent 'need not be in any special form; ... it must contain a sufficient expression of intent to confer authority, and it must confer authority to execute the very contract which the agent undertakes to execute. The writing must contain express language conferring authority to execute a contract of sale.'" *Bowling v Pedzik*, 302 AD2d 343, 344 (2nd Dept 2003) citing *Commission on Ecumenical Mission & Relations of United Presbyt. Church in U.S.A. v Roger Gray, Ltd.*, 27 NY2d 457, 465 (1971).

In the case at bar, no writing has been presented that expressly confers authority on Manhattan Valley to execute sales contracts on behalf of the plaintiff. The Management Agreement entered into by Manhattan Valley and the plaintiff does not contain any provision conferring this authority. Therefore, plaintiff has made a prima facie showing of entitlement to judgment as a matter of law. The burden now shifts to the defendant to produce evidentiary proof sufficient to establish the existence of material issues of fact.

Defendant argues that Manhattan Valley did have actual, or at the very least, apparent authority to enter into the sales transaction. Defendant asserts that after 1996, when the old Board ceased to meet, up until the new Board was elected in 2005,

Manhattan Valley operated as a de facto Board of Directors and conducted the business of the Building, including leasing and selling during those years. Although plaintiff argues that defendant has no proof to support his allegation, the Sales Contract, executed on November 1, 2005, contained the plaintiff's seal.¹ The presence of a corporate seal is prima facie evidence that the document was duly authorized. (*Gause v Commonwealth Trust of New York*, 124 AD 438 [1st Dept 1908]; *Rakosi v General Electric Credit Corp.*, 59 AD2d 553, 555 [2nd Dept 1977]; See also NY Business Corporation Law § 107 ([t]he presence of the corporate seal on a written instrument purporting to be executed by authority of a domestic or foreign corporation shall be prima facie evidence that the instrument was so executed)). This raises an issue of fact as to whether Manhattan Valley's role changed from agent to a de facto board after the old Board disbanded.

Plaintiff also argues that the Building is subject to PHFL § 576, and defendant was not income eligible in November 2005, based on his submitted Social Security statements. PHFL § 576 (1) (b) provides that dwellings, such as the Building, shall be available for persons whose probable aggregate annual income does not exceed six times the rental (including the value or cost to

¹ The Letter of Intent and Certificate of Shares issued in 1998 also contained the plaintiff's seal.

them of heat, light, water and cooking fuel) of the dwellings. To show defendant made too much money in 2005, plaintiff relies on calculations by Melba Carrasco, the plaintiff's treasurer, who estimates the monthly utilities for her apartment and states the maintenance in 2005 was \$500. This is not sufficient to establish a prima facie case. Plaintiff does not submit any documents, besides a share and maintenance schedule for 1992, to support these calculations.

This motion and cross motion were made pre-discovery. Any evidence of change in Manhattan Valley's designation as agent would be in the possession of the plaintiff, and not defendant. This also presents a problem to the court.

CPLR 3212 (f) states, in part, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion ...". Therefore, to best resolve the issues presented, discovery needs to be conducted.

The court has considered all remaining arguments by both parties, and finds that there are issues of fact that must be resolved and that discovery must be conducted.

Plaintiff also moves to dismiss defendant's affirmative defenses. Defendant's first affirmative defense alleges failure to state a claim. It is established in the Appellate Division, First Department, that alleging such a defense is harmless

surplusage. (*Citi Mgt. Group, Ltd. v Highbridge House Ogden, LLC*, 45 AD3d 487 [1st Dept 2007]; *Riland v Todman & Co.*, 56 AD2d 350 [1st Dept 1977]). Therefore, the court need not dismiss this defense.

Defendant's second and third affirmative defenses are based on the theories of actual and apparent authority. Therefore, based on the court's decision above, these defenses will not be stricken.

The fourth and seventh affirmative defenses interposed in defendant's answer will be considered together. The fourth affirmative defense alleges that plaintiff's claims are barred or reduced to the extent that any injury was caused by the acts or omissions of a third party. The seventh affirmative defense alleges that plaintiff's claims are barred because plaintiff has not sustained an injury caused by the act or omission of defendant. Plaintiff seeks to dismiss these defenses on the grounds that sales documents violated the Statute of Frauds. Therefore, based on the above decision, the court is not inclined to strike these defenses.

The fifth affirmative defense alleges that plaintiff's claims are barred by the doctrines of waiver and estoppel, because plaintiff did not take action to challenge defendant's ownership interest until the filing of this action. "It is well settled that waiver is the voluntary abandonment or

relinquishment of a known right, which, except for such waiver, the party would have enjoyed'" (*Bono v Cucinella*, 298 AD2d 483, 484 [2nd Dept 2002] citing *Dice v Inwood Hills Condominium*, 237 AD2d 403, 404 [2nd Dept 1997])). Waiver may be accomplished by conduct or failure to act as to evince an intent not to claim the purported advantage. (*Id.*) There must be an intention to waive the right or benefit. This defense is dismissed. There are no allegations that plaintiff delayed in asserting its claim for relief or otherwise relinquished its claim.

"The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position." *Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 (2006).

Based on defendant's allegations that Manhattan Valley acted as plaintiff's de facto board, who rightfully sold defendant shares in plaintiff, the court declines to strike this defense. If Manhattan Valley was found to be a de facto board with the authority to sell shares, equitable estoppel may apply.

Defendant's sixth affirmative defense alleges unclean hands. Defendant asserts that plaintiff is estopped by its own wrongdoing of making representations that defendant could purchase shares in plaintiff after a probationary period. "To

charge a party with unclean hands, it must be shown that said party was guilty of immoral or unconscionable conduct directly related to the subject matter [internal quotation marks and citation omitted]." (*Citibank, N.A. v American Banana Co., Inc.*, 50 AD3d 593 [1st Dept 2008]). Defendant has not alleged conduct that arises to this level. Therefore, this defense is dismissed.

Defendant's eight affirmative defense, alleging that plaintiff owed defendant some type of duty, is also dismissed. There are no allegations that plaintiff owed defendant a duty under statutory or common law. Defendant's ninth affirmative defense, alleging that plaintiff's claims are barred because they lack a basis in law or fact, is dismissed. This is duplicative of the affirmative defense for failure to state a cause of action.

Defendant's tenth affirmative defense alleges that plaintiff's claims are barred by the doctrine of accord and satisfaction. "An accord is an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim. Execution of the agreement is a satisfaction [internal citations omitted]." (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]).

"The distinctive feature of an accord and satisfaction is that the obligee does not intend to discharge the existing claim merely upon the making of the accord; what is bargained for is the performance, or satisfaction. If the satisfaction is not tendered, the obligee may sue under the original claim or for breach of the accord [internal

citations omitted].” (*Id.*)

This doctrine allows contracting parties to make a new contract discharging their obligations under the old contract, in full or in part. Defendant makes no allegations of a new contract discharging obligations under an old contract. This defense is dismissed.

Defendant’s eleventh affirmative defense, barring plaintiff’s claims for failure to allege fraud with the specificity required under CPLR 3016 (b), is also dismissed. Plaintiff has sufficiently alleged a cognizable claim for fraud in its complaint.

Finally, defendant’s twelfth affirmative defense reserving the right to amend his answer is dismissed, as such is not a defense. This is a reservation of rights.

Accordingly, it is

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

ORDERED that plaintiff’s motion to dismiss is granted only as to the fifth affirmative defense, limited to waiver, and the sixth, eighth, ninth, tenth, and twelfth affirmative defenses; and it is further

ORDERED that defendant's cross motion for summary judgment is denied.

Counsel for the parties are to appear for a Preliminary Conference on December 19, 2008 at 11:00 am in room 335 at 60 Centre Street.

Dated: October 6th, 2008



WALTER B. TOLUB J.S.C.

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