

Polizzi v Maxwell-Kates, Inc.

2008 NY Slip Op 32919(U)

October 23, 2008

Supreme Court, Richmond County

Docket Number: 101025/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

JOANNE POLIZZI,

**Index No: 101025/08
Calendar No: 1711-001**

Plaintiff,

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

MAXWELL-KATES, INC., CHATEAU VILLA CORP.,
and THE BOARD OF DIRECTORS OF CHATEAU
VILLA CORP.,

Defendants.

The following papers numbered 1 to 3 were marked fully submitted on the 25th day of July, 2008:

	Pages Numbered
Defendants' Notice of Motion to Dismiss the Amended Complaint Pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), with Supporting Papers and Memorandum of Law.....	1
Plaintiff's Affirmation in Opposition.....	2
Defendants' Reply Affirmation.....	3

Upon the foregoing papers, defendants' motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) is granted, in part, and denied, in part, in accordance with the following.

Plaintiff in this action is a resident/tenant of a certain cooperative unit known as Unit 2C located at 416 Maryland Avenue in Staten Island, New York. In or about December of 2005, she purchased the shares of stock assigned to that unit from defendant Chateau Villa Corp. (hereinafter, "Chateau Villa"), a cooperative housing corporation. Pertinently, plaintiff was an existing shareholder of the cooperative who sold her prior unit in order to purchase Unit 2C. Defendant Maxwell-Kates, Inc. (hereinafter, "Maxwell-Kates") is the managing agent for Chateau Villa. In her amended complaint, plaintiff alleges that the

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named defendants acted collusively, improperly and for their own economic benefit by, e.g., purchasing and reselling Chateau Villa shares of stock for six other units to family members, friends and board members at below market prices, and to plaintiff's financial detriment by selling her Unit 2C at an inflated price. Plaintiff has asserted seven causes of action, including (1) violation of General Business Law §349(h), known as the Deceptive Practices Act, (2) breach of fiduciary duty pursuant to Business Corporation Law §717, (3) fraudulent misrepresentation, (4) conversion, (5) unjust enrichment, (6) unconscionability, and (7) an accounting and the imposition of a constructive trust.

In moving to dismiss the amended complaint pursuant to CPLR 3211 (a)(1), defendants maintain that the documentary evidence establishes that the factual allegations upon which the complaint is predicated are false. In this regard, defendants maintain that, as evidenced by the affidavit of Maxwell-Kates' vice president and certain public records from the New York City Department of Finance, the "grantor/seller" of the six units in question was a nonparty entity named Chateau Villas Company, which is separate and distinct from the named defendant, Chateau Villa Corp. Defendants further argue that additional documentary evidence in the form of the affidavit of Maxwell-Kates' vice president and certain New York State and New York City Transfer Tax Returns, establishes that plaintiff did not pay an "exaggerated" purchase price for her unit (416-2C) as compared to a similar unit (406-2D) in the complex that was sold during the same time period to a third party for \$123,000.00.

In the alternative, defendants maintain that the factual allegations in the amended complaint fail to state any cause of action against them, and must be dismissed pursuant to CPLR 3211(a)(7). In this regard, relying solely upon Carper v Nussbaum (36 AD3d 176 [an action brought by a *condominium* unit owner against, *inter alia*, the sponsor, its

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principals and the managing agents]), defendants argue that (1) plaintiff lacks standing to prosecute the claims concerning alleged sales of cooperative units to defendants' family and friends, and (2) Maxwell-Kates, as the managing agent, owed plaintiff, as an individual unit owner, no legal duty.

Defendants further maintain that since the actions, practices or conduct alleged to be improper were not "consumer-oriented" and did not cause injury to the public generally, plaintiff's claim under General Business Law §349(h) may not proceed. It is further argued that the second cause of action must be dismissed because Business Corporation Law §717 only applies to the directors of a corporation and not to corporate entities such as defendants Maxwell-Kates and Chateau Villa. Additionally, defendants contend that the "business judgment rule" insulates its Board of Directors from liability for its conduct. Dismissal of the remaining causes of action is sought on the grounds that the pleading requirements of CPLR 3016(b) regarding the particularity of the elements of a fraudulent misrepresentation claim have not been satisfied and that, in view of the existence of a valid and enforceable written contract of sale, any recovery on the theory of unjust enrichment is precluded.

In order to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues as a matter of law, and conclusively dispose of each of plaintiff's claims (*see Leon v. Martinez*, 84 NY2d 83, 87-88). Here, it is the opinion of this Court that the documentary evidence upon which defendants purport to rely is not of this caliber. In particular, the documentary evidence fails to establish as a matter of law whether the holder of title to the six units at issue, nonparty Chateau Villas Company, or the Board of Directors of Chateau Villa (the entity which sold plaintiff her unit) exercised dominion and control over the sales

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of those units in terms of, e.g., pricing and the selection of buyers.

As for the balance of the motion to dismiss based on the alleged failure to state a cause of action (CPLR 3211[a][7]), it is well settled that the pleadings must be liberally construed (CPLR 3026), and the sole criterion is whether “from [the complaint’s] four corners factual allegation are discerned which taken together manifest any cause of action cognizable at law” (Guggenheimer v Ginzburg, 43 NY2d 268, 275; *see* Doria v Masucci, 230 AD2d 764, *lv denied* 89 NY2d 811). In any such inquiry, the facts pleaded are presumed to be true and are accorded every favorable inference. Nevertheless, bare legal conclusions and factual claims that are flatly contradicted by the record are not entitled to any such consideration (*see* Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414; Morone v Morone, 50 NY2d 481; Doria v Masucci, 230 AD2d at 765).

Construing the factual averments of the amended complaint liberally in favor of the plaintiff/shareholder, it is the Court’s opinion that they are legally sufficient to support causes of action sounding in (1) deceptive practices under General Business Law §349(h), (2) breach of fiduciary duty under Business Corporation Law §717 as against defendant Board of Directors of Chateau Villa, (3) fraudulent misrepresentation, (4) unconscionability and (5) for an accounting. Dismissal under the business judgment rule would be inappropriate at this early stage of the litigation where, as here, the Board’s good faith in its business dealings with its unit owners has been drawn into serious question (*see* Barbour v Knecht, 296 AD2d 218; Bryan v West 81 St. Owners Corp., 186 AD2d 514, 515). Moreover, it is well settled that the directors of a cooperative owe a fiduciary duty to act solely in the best interest of the shareholders (*see* Bernheim v 136 East 64th St. Corp. 128 AD2d 434), and that allegations of the unequal treatment among them will suffice to state a cause of action for its breach (*see* Bryan v West 81 St. Owners Corp., 186 AD2d at 515;

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Aronson v Crane, 145 AD2d 455; *see also* Brinckerhoff v JAC Holding Corp., 10 AD3d 520, 521).

Turning to plaintiff's General Business Law cause of action, the alleged below-market sales of shares in a residential cooperative may be held to constitute a "consumer-oriented" transaction within the meaning of General Business Law §349 (*see* B.S.L. One Owners Corp. v Key Intl. Mfg., 225 AD2d 643,644). Accordingly, given that the probative facts lie peculiarly within the knowledge of the moving defendants, dismissal of plaintiff's cause of action for violating General Business Law §349(h) is unwarranted at this juncture (*see* CPLR 3211[e]).

With reference to the fourth cause of action, however, plaintiff has virtually conceded the absence of any controlling authority supportive of her claim for conversion. Additionally, her written contract of sale precludes her maintenance of her fifth cause of action for unjust enrichment (*see* Universal/MMEC, Ltd. v Dormitory Auth. of the State of NY, 50 AD3d 352, 353; Cornhusker Farms v Hunts Point Coop. Mkt., 2 AD3d 201, 206), while no factual basis has been pleaded in support so much of her second cause of action as is against defendants Maxwell-Kates and Chateau Villa for breach of fiduciary duty (*see* Bullmore v Ernst & Young Cayman Is., 45 AD3d 461, 464) and so much of her seventh cause of action which seeks to impose a constructive trust. Nor do plaintiff's opposition papers remedy these pleading defects (*see* Rovello v Orofino Realty Co., 40 NY2d 633, 636).

Accordingly, it is hereby:

ORDERED, that defendants' motion to dismiss the complaint is granted solely to the extent of severing and dismissing the second cause of action as against Maxwell-Kates, Inc. and Chateau Villa Corp., the fourth cause of action for conversion, the fifth cause of action

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for unjust enrichment, and so much of the seventh cause of action as seeks to impose a constructive trust; and it is further

ORDERED, that plaintiff is granted leave to re-plead her second cause of action as against defendants Maxwell-Kates, Inc. and Chateau Villa Corp. as a cause of action for aiding and abetting a breach of fiduciary duty, provided that any such amended complaint be served and filed within twenty days of the service upon her of a copy of this order with notice of entry; and it is further

ORDERED, that the balance of defendants' motion is denied; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: Oct 23, 2008

Joseph J. Maltese
Justice of the Supreme Court