

Board of Mgrs. of the York River House Condominium v Kinney York Ave., Inc.
2008 NY Slip Op 33222(U)
December 7, 2008
Supreme Court, New York County
Docket Number: 603575/03
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BERNARD J. FRIED

PRESENT.

J.S.C.

FDEM

PART leo

0603575/2003

BOARD OF MANAGERS

VS

KINNEY YORK AVENUE, INC. *C*

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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JAN 20 2006
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This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 1/20/06

Bernard J. Fried
BERNARD J. FRIED J.S.C.
J.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: PART 60

FBEM

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BOARD OF MANAGERS OF THE YORK RIVER
HOUSE CONDOMINIUM

Index No. 603575/03

Plaintiff,

- against -

KINNEY YORK AVENUE, INC., CENTRAL
PARKING CORPORATION and CENTRAL
PARKING SYSTEM REALTY OF NEW YORK, INC.,

Defendants.

APPEARANCES:

For Plaintiff:

Marcus Rosenberg & Diamond LLP
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New York, New York 10022
Pamela D. Evans, Esq.

For Defendants:

Tannenbaum Helpern Syracuse
& Hirschtritt LLP
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New York, New York 10022
Gregory O. Koerner, Esq.
Vincent J. Syracuse, Esq.

FILED
JAN 20 2015

NEW YORK
COUNTY OF NEW YORK OFFICE

FRIED, J.:

Plaintiff Board of Managers of the York River House Condominium (the Board) commenced this action in order to enforce a "right of first refusal" in connection with the transfer of ownership of the parking garage located at the condominium (Garage Unit). Defendants move to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a] [7]), claiming that the right of first refusal does not apply to the transactions at issue. Plaintiff has cross-moved for summary

judgment. CPLR 3212.

The plaintiff alleges the following relevant facts: York River House Condominium (the condominium) is located at 1175 York Avenue, New York City, and consists of residential and commercial units. The condominium was formed on July 27, 1989. Defendant Kinney York Avenue, Inc. (Kinney) purchased the Garage Unit of the condominium on April 20, 1995. On November 7, 1997, Central Parking Corporation (Central Parking) agreed to purchase the parking facilities operated by Kinney System Holding Corporation (KSHC), the parent of Kinney, including the Garage Unit. Central Parking completed its purchase of the Garage Unit on February 12, 1998, by merging KSIIC Parallel Parking, Inc., a wholly owned subsidiary of Central Parking, into KSHC. On September 25, 1998, defendant Central Parking executed and recorded a deed which conveyed the Garage Unit at the condominium from Kinney to defendant Central Parking System Realty of New York, Inc. (Central NY). For the next five years, Kinney continued to hold itself out as the owner of the Garage Unit. Plaintiff commenced the present action upon learning of the transfer, and after defendants refused to honor plaintiff's claimed right of first refusal.

Plaintiff claims that the deed with which Kinney originally took possession of the Garage Unit, in 1995, was expressly subject to the condominium's declaration and bylaws. The declaration and bylaws state that its terms are covenants that run with the land; that any unit owner must notify the condominium board of any transfer of

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its ownership interest, by sale or otherwise, at least 10 days prior to the closing date of such transfer; that all present and future unit owners are subject to these bylaws, the declaration and the condominium rules and regulations; and, that any act which violates these documents constitutes an act of default.

Article X, Section 2 of the condominium's bylaws contains the disputed "right of first refusal." That section states:

(a) Any Unit Owner who receives a bona fide offer (hereinafter called an "outside Offer") for the sale of his or her Unit which he or she intends to accept shall give written notice to the Board of Managers of such offer and of such intention, ... and shall offer to sell such unit to the Board of Managers ... on the same terms and conditions as such outside offer....

The only exceptions to the right of first refusal are mentioned in Article X, Section 2 (d), which states that the right of first refusal is not applicable to certain transfers of the stock of the apartment corporation.

In addition, plaintiff cites Article XIII, Section 13.1 of the Declaration, which states that any unit owner shall notify the Board of any transfer, by sale or otherwise, of its ownership interest, or any portion thereof, at least 10 days prior to the closing date of the transfer.

Defendants claim that the conveyance of the Garage Unit was a relatively small part of the larger merger of Central Parking, KSHC and Kinney System, and that this

merger and the subsequent transfer of the deed between the merged corporations did not give rise to plaintiff's claimed right of first refusal since the conveyance from Kinney to Central Parking, after the merger, was not an "outside offer" within the meaning of Article X, Section 2 of the condominium's bylaws.

The parties have submitted a chart to the court, which chart, both sides agree, accurately depicts the events surrounding the merger of Central's subsidiary, KSHC Parallel Parking, Inc., into KSHC, and the subsequent transfer of the deed to the Garage Unit from Kinney to Central.

Defendants rely on the holding in *Torrey Delivery, Inc. v Chautauqua Truck Sales and Service, Inc.* [47 AD2d 279 (4th Dept 1975)] to support their claim that the merger did not constitute a sale, or trigger plaintiff's right of first refusal. *Torrey* held that sale of the corporate stock of one company to another did not constitute a proposed sale of the demised premises, within the meaning of *Torrey's* lease option. In *Torrey*, plaintiff *Torrey Delivery, Inc.* had entered into a two-year lease with defendant *Chautauqua White Service, Inc.*, which lease contained an option to purchase the premises at any time during the term of the lease. A further provision specified that notification was to be given to *Torrey* of any planned sale of the property, with time for *Torrey* to exercise its option to purchase the premises. After the owner of *Chautauqua White* died, the estate sold all of the stock in the company to *Chautauqua Truck Sales and Service, Inc.*, another company that had been wholly

owned by the deceased, and was now owned by a former officer of Torrey. The court held that the sale of corporate stock is not a sale of corporate property. The fact that ownership of Chautauqua White passed from decedent, to his estate, and eventually to Chautauqua Truck, did not change ownership of the subject property, which remained the property of Chautauqua White throughout. Thus, the transfer of the stock did not constitute a proposed sale of the demised premises within the meaning of Torrey's lease option.

Nor did the corporate merger in *Torrey* constitute a sale. The court found that a merger is, technically, a corporate reorganization which affects the corporate form, but not the corporate property, citing Business Corporation Law §§ 901, 902 and 905. The change in corporate structure brought about by the merger of Chautauqua White into Chautauqua Truck did not entail any separation or divestment of corporate assets from Chautauqua White, and was therefore found not to have affected the corporate property.

It was further held that title to the real property vested in Chautauqua Truck by operation of law, on the effective date of the merger, pursuant to Business Corporation Law §906(b)(2). The deed of conveyance, executed after the effective date of the merger, did not evidence a divestiture of corporate property. "The deed of conveyance was but an explicit recording of what already had happened by operation of law at the effective date of the merger." *Torrey Delivery, Inc. v*

Chautauqua Truck Sales and Service, Inc. (47 AD2d 279), *supra*, at 282.

On a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2^d Dept 1999). A complaint should not be dismissed so long as a cause of action exists. *Id.*

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728 (1968).

Viewing the evidence in the light most favorable to plaintiff, and in reliance on the holding in *Torrey*, I find that defendant has established a prima facie case of entitlement to summary judgment through evidence of the merger of Central Parking, KSHC and Kinney System, and the subsequent transfer of the deed between the merged corporations (CPLR 3212 [b]). The sale of the stock of one corporation to another, and the subsequent merger of the corporations, did not constitute an "outside offer" for sale of the Garage Unit. Once the merger of the corporations was complete, ownership of the Garage Unit was transferred by operation of law to the newly formed corporation. The subsequent execution and filing of the deed merely recorded a transfer that had already been completed by operation of law.

Plaintiff argues that the lease in *Torrey* did not involve a right of first refusal and that the post-merger conveyance here at issue occurred between subsidiaries of distinct parent corporations, unlike the merger in *Torrey*. However plaintiff has failed to come forward with evidence or authorities which would distinguish this case from *Torrey*.

Accordingly it is

ORDERED that the defendants' motion to dismiss the complaint is granted, and the complaint is hereby dismissed; and it is further

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

Dated: 1/24/06

ENTER:



J.S.C. **BERNARD J. FRIED**
J.S.C.

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JAN 20 2006
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