

**Benjamin v Madison Medical Building Condominium  
Board of Managers**

2008 NY Slip Op 33482(U)

December 24, 2008

Supreme Court, New York County

Docket Number: 602220/06

Judge: Judith J. Gische

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

PRESENT: \_\_\_\_\_

PART 10

Index Number : 602220/2006

**BENJAMIN, MAURICE J.**

VS.

**MADISON MEDICAL BUILDING**

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**FILED**

JAN 02 2009

COUNTY CLERK'S OFFICE  
NEW YORK

*These motions are decided  
in accordance with  
the accompanying  
decision/order of even date*

Dated: December 24, 2008

*JG*  
JUDITH J. GISCHE, 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 : IAS PART 10

-----x

MAURICE J. BENJAMIN,

Plaintiff,

- against -

MADISON MEDICAL BUILDING  
CONDOMINIUM BOARD OF  
MANAGERS and MITCHELL ESSIG,

Defendants.

-----x

**Decision/Order**

Index No. 602220/06

Seq No.: 003

Present:

Hon. Judith J. Gischo

J.S.C.

**FILED**  
JAN 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK COUNTY

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m (§3212) w/RAF affirm, MJB affid, exhs . . . . .	1
Board's x/m (§3212) w/RBG affirm, exhs . . . . .	2
Essig's x/m (§3212) w/MAL affirm, ME affid, exhs . . . . .	3
Pltf's opp Board's and Essie's x/m and in reply w/MJB affid, exhs . . . . .	4
Board's reply w/RBG affirm . . . . .	5
Transcript OA 10/30/08 . . . . .	6

*Upon the foregoing papers, the court's decision and order is as follows:*

**GISCHE, J.:**

This is an action by plaintiff Maurice J. Benjamin ("plaintiff" or "Benjamin") for specific performance of the right of first refusal provisions set forth in the By-Laws of the Madison Medical Building Condominium ("by-laws"). Plaintiff contends defendants were required, but failed, to offer him the right of first refusal to purchase space located in the basement of the building where he has a dental practice. The defendants are the condominium board of managers and Mitchell Essig, the owner of a condominium unit

located on the 4<sup>th</sup> floor of the building (respectively "board" and "Essig"). Essig has a contract to purchase the basement space that is the subject of this dispute.

Plaintiff now moves for summary judgment: (i) declaring the sale of the basement space to Essig was in violation of plaintiff's rights under the by-laws; (ii) directing the board to offer plaintiff the right of first refusal to purchase the basement space; and (iii) summary judgment dismissing the counterclaim asserted against him by Essig for tortious interference with contract.

The board has cross moved to dismiss the complaint and all cross claims against it. Essig has separately cross moved for summary judgment dismissing the complaint and all cross claims against him. He has cross moved for summary judgment on his tortious interference with contract counterclaim against Benjamin.

A prior motion for the preanswer dismissal of the complaint was denied. Order, Gische J., 3/13/07 ("prior order"). Issue has been joined, discovery is complete and the note of issue was filed on April 3, 2008. These motions were brought timely and will be considered on their merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

### **Arguments**

Benjamin, a dentist, is the managing member of Aline Realty, LLC ("Aline")<sup>1</sup>, the owner of condominium unit 1EWR on the first floor of the building located at 161 Madison Avenue, New York, New York ("building"). The building is a twelve story condominium consisting of 30 units, primarily occupied by health care practitioners/

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<sup>1</sup> The parties have agreed Aline assigned its right to bring this lawsuit to Benjamin and therefore, he has standing to bring this action.

medical providers ("the building"). There are also two commercial units on the first floor; one is a pharmacy and the other a rug store. Essig, a medical doctor, is the sole shareholder of Essig Properties, the owner of unit "4SW" on the 4<sup>th</sup> floor of the building. Essig presently has a contract with the board to purchase space in the basement of the building. The condominium is the owner of the basement area ("basement") which is presently undivided.

The By-Laws of the condominium contain a right of first refusal provision. Article XI, Section 1 of the By-Laws ("ROFR") which is the subject matter of the dispute among the parties. The ROFR provides as follows:

"ARTICLE XI, SELLING AND LEASING UNITS

Section 1. Right of Prior Refusal on Sale or Lease of Units by Immediately Contiguous Unit Owners and the Board of Mangers. A Unit Owner has the right to sell or lease his Unit providing he gives notice of the bona fide terms of any proposed sale or lease to the immediately contiguous Unit owners and to the Board of Managers and obtains their approval for the sale or lease. The failure of the immediately contiguous Unit Owners and the Board of Managers to approve or disapprove such proposed sale or lease within thirty (30) days after notice thereof shall be deemed to constitute approval. The exercise of the right of prior approval shall first belong to the immediately contiguous Unit Owners and then to the Board. If an immediately contiguous Unit Owner (s) disapproves of the transaction, such Unit Owner (s) must give the selling or leasing Unit Owner and the Board of Managers written notice thirty (30) days after notice of the proposed sale or lease, of his intention to purchase or lease the Unit on the same terms, or other terms more favorable to the Owner of the Unit proposed for sale or lease. In the event more than one of the immediately contiguous Unit Owners agrees to undertake such purchase or lease within the aforementioned thirty (30) day period, the sale or lease shall be made to the immediately contiguous Unit Owner who has been the owner of an immediately contiguous Unit for the longest period of time. . . . "

Section 3 of Article XI requires all notices pursuant to that section be sent by certified mail, return receipt requested and contains the following additional requirements:

"A Unit Owner intending to make a transfer, sale or lease of the Unit or any part thereof, or interest therein, shall give notice to all immediately contiguous Unit Owners and to the Board of Managers of such intention. He shall furnish at that time, for the information of the immediately contiguous Unit Owners and the Board: (i) the name and address of the intended grantee or lessee; (ii) a statement of all the terms of the transaction; (iii) financial and professional references of the transferee or lessee; (iv) the specific occupation of the transferee or lessee, including any area of specialization; (v) an executed copy of the proposed contract to sell or lease; and (vi) such other information as the immediately contiguous Unit Owners or the Board of Managers may reasonably require . . ."

Benjamin claims the defendants did not comply with the ROFR because they agreed to sell a part of the basement space to Essig, a non-contiguous unit owner, but they did not offer the same space to him on the same or better terms. Benjamin seeks specific performance of the by-laws (1<sup>st</sup> cause of action), damages (2<sup>nd</sup> cause of action), he has asserted a breach of fiduciary duty claim against the board (3<sup>rd</sup> cause of action ), also a breach of contract claim against the board for its failure to comply with the by-laws (5<sup>th</sup> cause of action), and he also seeks a declaration that the contract of sale between the board and Essig is void (6<sup>th</sup> cause of action). His motion for summary judgment is, therefore, only as to his 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> causes of action.

The defendants deposed Benjamin ("EBT"). He testified at his EBT that he learned at the annual (2004) unit owners' meeting that the board was interested in selling the basement space it had acquired at a foreclosure sale in November 2001.

The basement was empty, had some problems with flooding, and was being used by the building occupants for storage on an ad hoc basis. Benjamin testified that after that meeting, he received the following letter from the building's management company. That letter, dated April 28, 2005 was signed by the property manager ("April 2005 letter"). Blaustein, then the board president, testified that the letter or "notice" was sent at the board's direction. The April 2005 letter states as follows:

"At the Annual Meeting of Unit Owners, your Board of Managers reported that we investigated subdividing the basement for the purpose of selling a portion for Medical use.

The basement was purchased by Madison Medical Building in 2001. Since then, we have been paying approximately \$37,000 per year for Real Estate Taxes. Additionally, since the Condominium owns the basement unit, we do not pay common charges for the basement. These two items combined, have substantially decreased the building's cash flow.

A unit owner has made an offer to purchase a portion of the basement unit (approximately 2,000 sq. ft.) for the sum of \$218,000.00. The Purchaser will also be responsible for all costs relating to the subdivision of the basement.

The sale proceeds will allow us to recover funds used to purchase the basement and the balance will be put into our reserve account. By eliminating the annual real estate tax obligation for the basement unit, we will also be able to avoid an increase in common charges in the immediate future.

If you would like to purchase the basement unit for a sum in excess of that being offered, please do so within 10 days of the date of this letter, since we do not want to delay the sale of the unit."

According to Benjamin, although he was immediately interested in the basement space being offered, he waited for more information. He acknowledges that he did not notify the board or do anything else after the April 2005 to let anyone know

he was interested in the space. Benjamin testified he did not know what the terms of sale were nor did the letter identify who the prospective purchaser was: "I waited for the contract to be drawn [up] with somebody and [to receive] my Right of First Refusal . . ."

Benjamin EBT p. 69. Benjamin claims he did not want to engage in a bidding war for the basement space and so he waited to see what terms were ultimately negotiated and reduced to a contract so he could then decide whether he wanted to exercise his right of first refusal by putting in a better offer.

Benjamin states that only after he brought this action did he learn that the property manager had sent a follow up letter to the unit owners. According to Benjamin, he never received that follow up letter dated May 11, 2005 ("May 2005 letter"). The May 2005 letter sent to the unit owners states as follows:

"Re: Subdivision and Sale of Basement Unit

Dear Unit Owners:

This is to inform you that Madison Medical Building has received no offers in response to my letter inviting such offers. Therefore, we intend to proceed with the offer that has been made."

Benjamin alleges that after April 2005, the next time he heard about the proposed sale of the basement was in another letter from the property manager dated November 23, 2005 ("November 2005 letter"). The November 2005 letter notified all the unit owners of a special meeting of the board scheduled for December 7, 2005 so that the unit owners could (among other things) vote on a resolution to amend the by-laws as follows:

"III. For the adoption of the following amendment to Article VIII of the By-Laws entitled, Use of Units which prohibits the sale, conveyance, lease or sublease of a

portion of a unit other than the entire unit and for the adoption of an Amendment to Article Twentieth of the Declaration of Madison Medical Building Associates to approve a subdivision as follows: to allow a subdivision of the Basement Unit approximately in accordance with the proposed floor plan annexed hereto and to allow the amendment of the certificate of occupancy for the Basement Unit to conform to the proposed floor plan and subdivision in order to enable the Board of Managers to enter into a contract of sale with Dr. Mitchell Essig or an entity owned by him for use as medical related offices, under such terms and conditions and price as is acceptable to the Board of Managers in their sole and absolute discretion provided all necessary costs, expenses and fees related to said subdivision, construction and amendment to the certificate of occupancy with respect thereto shall be borne by Dr. Mitchell Essig.”

Benjamin testified at his EBT that he although he attended this meeting and voted in favor of the resolution, he believed the amendment to the by-laws was a precursor to the negotiation of a contract with Essig, and he (Benjamin) expected the board would then comply with the formalities of the ROFR, which included providing him with a copy of the executed contract with Essig.

Benjamin claims that once he learned informally from Blaustein that the condominium was not going to honor his ROFR by letting him see the Essig contract, he sent the board a letter dated February 14, 2006. In the letter he notified the board that he wanted to see a copy of the condominium’s signed contract with Essig and other information about the proposed sale. The contract was signed January 20, 2006. The board did not comply with Essig’s demands. Benjamin commenced this action a short time after. Benjamin alleges that Essig engaged in self-dealing because Essig was elected to the board shortly before plaintiff sent the board his February 2006 letter.

Although there is no definition in the by-laws of what an "immediately contiguous unit" is, Benjamin argues his unit, which is on the first or ground floor of the building, is directly above the basement, and therefore, "immediately contiguous," within the meaning of the by-laws. Plaintiff provides certain legal authority in support of this argument, including a section of the New York City Building Code and cases in New York and other states that have defined "contiguous" to include vertical, not just horizontal contact, between things.

In further support of his motion for summary judgment, Benjamin argues that the unit owners specifically protected the right of vertically contiguous owners by rejecting a board proposal to in 2002 that would have limited the protections of the ROFR to only "adjacent" and "horizontal" unit owners. The rejected 2002 proposal would have modified the ROFR as follows:

"Section 1. Sales and Leases. Any Unit Owner who receives a bona fide offer for the sale or lease of his Unit (hereinafter an "Outside Offer"), which he intends to accept, shall give notice [\*\*\*] to the adjacent Unit Owners (on the same floor as the offered Unit) (hereinafter referred to as "immediately contiguous unit owners") . . ."

In support of its cross motion and in opposition to Benjamin's motion, the board argues that the ROFR is inapplicable because the basement was not a "unit" within the meaning of the declaration and by-laws when it was offered for sale, but an undeveloped, uninhabitable, raw space. Moreover, Essig only agreed to buy part of the space, not the entire basement. Blaustein testified at his EBT that when the condominium bought the space in November 2001 it considered whether to hire an architect who then prepare plans to subdivide the basement into separate lots or make

"cubbies" that would be rented out as storage space. For some time the condo carried the tax expense of the basement, but then decided to offer it for sale and make the purchaser for its subdivision. Although the board offered the basement for sale to all unit owners, only Essig expressed an interest in buying it.

The board argues that even if Benjamin proves the basement space Essig agreed to purchase is a "unit" within the meaning of the declaration and by-laws, Benjamin's unit is not "immediately contiguous" to the basement because it is on a different floor. Blaustein testified at his EBT that he understood the term "immediately contiguous" to mean horizontally adjacent "not up and down." Blaustein EBT p. 38-9. He also testified that when one of the other unit owners on the 1<sup>st</sup> floor (Mr. Ahuja) expressed an interest in exercising his ROFR to buy the basement, Mr. Ahuja was dissuaded by the board's president from pursuing the matter because the basement was not "immediately contiguous" to Mr. Ahuja's because his unit was above the basement ("vertical") not horizontal to it. Blaustein EBT p. 97. Mr. Ahuja did not apparently pursue his interest in the unit after that.

The board highlights certain EBT testimony by plaintiff that he did not believe he could pursue his interest in a unit (the rug store) located next door to his office, although on the same (1<sup>st</sup>) floor. He testified that this was because there was a stairs (a stairwell) between the two units: "our two offices were not really connected. . . like we're not really contiguous to each other." Benjamin EBT p. 57-8.

The board alternatively argues that even if Benjamin can prove that he is the owner of an immediately contiguous unit, and he had a ROFR, the board complied with the requirements set forth in by-law because it notified him of the availability of the

basement "unit" for purchase, the price of the pending offer, and that he had the opportunity to buy the unit. Despite such actual notice of the sale, Benjamin took no action to exercise his ROFR, or show any interest in the space. Benjamin and Essig each testified at their respective EBTs that Essig asked Benjamin for permission to bring an architect, engineer and hydrologist into his unit because of how the two units are set up. Benjamin testified he allowed the professionals access because he knew Essig was investigating the space and trying to determine whether it was worth the expense.

The board argues that Benjamin waived his ROFR because he did not object to the sale to Essig within 30 days after the letters were sent to him in April and May 2005. Alternatively, the board urges the court to apply the doctrine of equitable estoppel because the board and Essig had a reasonable belief that Benjamin was not interested in the basement space. The board argues that Benjamin acted in a manner wholly inconsistent with someone who wanted to exercise his ROFR by voting in favor of the amendment allowing for the sub-division of the basement so it could be sold to Essig, letting Essig access plaintiff's unit for an inspection, and not responding to the notices of sale.

In his cross-motion, Essig adopts many of the board's arguments. Essig testified at his EBT that although the unit was first offered for sale in December 2004 at the unit owners' annual meeting, and the unit owners -included plaintiff - voted in favor of the sale at the December 7, 2005 meeting - Benjamin took no action until after Essig signed a contract with the board dated January 12, 2006. Essig argues that because the resolution was duly adopted by the unit owners in conformance with the by-laws,

the approval is binding on all the unit owners, including Benjamin.

Essig states in his supporting affidavit that he has invested tens of thousands of dollars in fees in preparing to subdivide the basement space. He urges the court to apply the doctrine of equitable estoppel. Essig argues that if his cross motion for summary judgment is not granted, plaintiff's motion for summary judgment must be denied because there are triable issues of fact whether a vertical unit is "immediately contiguous" and whether the board's notice to Benjamin was sufficiently compliant with the ROFR. Essig also opposes Benjamin's motion to dismiss his counterclaim for tortious interference with contract. Essig claims that Benjamin filed a Notice of Pendency which has halted the sale of the basement.

### **Discussion**

In connection with the motion and cross motions, each proponent seeking summary judgment in his/its favor bears the burden of proving that he/it is entitled to summary judgment as a matter of law. Only if each one meets its initial burden, will it then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). The disputed issues must be real and not just shadowy semblances, which is why summary judgment requires parties to lay bare its proof. SJ Capelin v. Globe, 34 NY2d 338 (1974). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957).

Before reaching the overarching issue of whether the defendants complied with the requirements of the ROFR set forth in the by-laws, the court must first decide whether the basement space is a "unit" and Benjamin the owner of an "immediately

contiguous unit," within the meaning of the by-laws and declaration.

Although none of the movants have provided the court with a copy of the condominium's declaration, the by-laws (Article VIII) state that "[n]o portion of a Unit (other than the entire Unit) may be sold . . ." Section 3 of Article XI (the ROFR) expressly provides that "[a] Unit Owner intending to make a transfer, sale or lease of the Unit or any part thereof, or interest therein, shall give notice to all immediately contiguous Unit Owners . . ." (*emphasis added*).

The basement space has its own, separate, block and lot numbers (Block 862 Lot 1001); it is against this block and lot that the plaintiff filed and recorded his Notice of Pendency. The basement is also a separate unit for tax purposes and each of the letters that management sent on behalf of the board identifies the basement space as the "basement unit."

The proposed amendment which the unit owners considered and approved in December 2005 amended Article VIII of the by-laws to "allow a subdivision of the Basement Unit [\* \* \*] and to allow the amendment of the certificate of occupancy for the Basement Unit . . ." Thus, any argument by the board that the basement is not a "unit" because it is in poor physical condition, or Essig only agreed to buy part of the basement, not the entire basement, does not defeat Benjamin's motion for summary judgment. Although the entire basement unit was offered for sale, even an offer of "any part thereof, or interest therein" requires the board to notify all immediately contiguous unit owners . . ." Thus, not only is the basement a "unit" within the meaning of the by-laws and subject to the ROFR, neither defendant has raised a triable issue of fact to that it is not a unit or that the sale of only a portion of the basement is not subject to the

ROFR.

The by-laws do not define what an "immediately contiguous" unit is for purposes of a ROFR. Although Benjamin argues that the plain meaning of the term "immediately contiguous" is that the two units have a common border, either horizontally or vertically, and therefore the basement is immediately contiguous to his unit, the board disagrees. According to the board, since the basement is below Benjamin's unit, it is not contiguous because the two units are on different floors. Thus, the board (and Essig) essentially argue that "immediately" contiguous can only mean "horizontally" contiguous or "adjacent."

A condominium's by-laws constitute a contract with the unit owners. Mishkin v. 155 Condominiums, 2 Misc.3d 1001(A) (Sup. Ct., NY County 2004). In interpreting a contract, the intent of the parties governs and the contract should be construed so as to give full meaning and effect to all of its provisions. Trump-Equitable Fifth Ave. Co. v. H.R.H. Construction Corp., 106 A.D.2d 242, 244 aff'd., 66 N.Y.2d 779 (1985). If referral to extrinsic facts is necessary to determine the parties' intent, then there is question of fact and summary judgment should be denied. American Exp. Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275 (1<sup>st</sup> Dept 1990). However, if the intent of the parties can be determined from the face of the agreement, then interpretation is a matter of law and the case is ripe for summary judgment. American Exp. Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d at 277.

Benjamin's argument is consistent with the by-laws. The ordinary definition of "contiguous" is "sharing an edge or boundary; touching. Neighboring; adjacent." *The American Heritage Dictionary of the English Language*, 4<sup>th</sup> Edition;

<http://dictionary.reference.com/browse/contiguous>. The ordinary definition of "immediately" is "without delay. without an intermediary; directly." *The American Heritage Dictionary of the English Language, 4<sup>th</sup> Edition*.

<http://dictionary.reference.com/browse/immediately>. Although in a different context (lands) the New York Court of Appeals defined "contiguous" as meaning "territory touching, adjoining and connected, as distinguished from territory separated by other territory," this simple definition is helpful in deciding, and provides insight on whether, Benjamin's unit is "immediately contiguous," within the meaning of the by-laws. Schneider v. Rockefeller, 31 NY2d 420, 429 (1972).

Affording "immediately contiguous" its ordinary meaning, Benjamin's unit is "immediately contiguous" to the basement unit because the two units have a common border. The common border is the floor of Benjamin's unit and the ceiling of the basement. There is nothing in the by-laws of this particular condominium prohibiting vertically situated units from being joined nor do the defendants argue that any ordinance, statute, etc., would proscribe their joinder. Although the defendants argue the two levels are separated by stairs, two adjacent units are separated by walls and doors.

Were the court to embrace the board's more limited definition of "immediately contiguous," only "horizontally adjacent" unit owners would have a ROFR. This would impose a significant limitation or restriction on the ROFR that is not found within the four corners of that document. It would also impermissibly change the by-laws from how they are presently written. The unit owners previously considered, but rejected, a prior proposal by the board to restrict the ROFR to only include unit owners who owned a

unit "adjacent to" another unit being offered for sale or rent. Regardless of why that proposal was presented or rejected, the language of the proposal illustrates the difference between a unit owner owning a unit that is "immediately contiguous" to a unit for sale or rent, as opposed to a unit owner owning an "immediately adjacent" or "horizontally contiguous unit."

Having decided that Benjamin's unit is "immediately contiguous" to the basement space which is also a "unit," the issue is whether the defendants complied with the requirements of the ROFR or they present valid defenses that would require a trial of this action.

A right of first refusal is a preemptive right that requires the owner, when and if s/he or it decides to sell his/her or its property, to offer the property to the holder so that the holder may meet the offer by a third party or buy the property at some other price set by a previously stipulated method. Jeremy's Ale House Also, Inc. v. Jocelyn Luchnick Irrevocable Trust, et al., 22 AD3d 6, 10 (1<sup>st</sup> Dept 2005) (citing LIN Broadcasting Corp. v. Metromedia, Inc., 74 N.Y.2d 54 [1989] and other cases). The right of first refusal, however, is contingent upon the existence of a valid, outstanding contract to a third-party. If there is no such contract, then there is nothing to accept or refuse. LIN Broadcasting Corp. v. Metromedia, Inc., 139 AD2d 124 at 124 affirmed 74 NY2d 54 (1989).

Article XI of the by-laws (the ROFR) identifies the steps that a unit owner must follow, and the information the unit owner must provide, when undertaking to sell his or her unit to a third party. The April 2005 letter that management sent out on behalf of the board to all the unit owners did not meet these requirements. It did not identify the

prospective purchaser of the basement unit by name, it did not state all the financial or material terms of the transaction being considered, nor was an executed copy of the proposed contract to sell the basement space included. The letter merely stated that "[a] unit owner has made an offer to purchase a portion of the basement unit (approximately 2,000 sq. ft.) for the sum of \$218,000.00. The Purchaser will also be responsible for all costs relating to the subdivision of the basement . . ." The letter only provided ten (10) days' notice to exercise a ROFR rather than thirty (30) days as the by-laws allow. Therefore, the April 2005 letter did not comply with the notice provisions of the ROFR.

Since Benjamin, the holder of a right of first refusal, was not advised of all the material terms of Essig's agreement with the condominium, Benjamin lacked the information he needed to meet or exceed Essig's offer to buy the basement space.

Jeremy's Ale House Also, Inc. v. Jocelyn Luchnick Irrevocable Trust, et al., supra.

There is no factual dispute that Essig signed a contract to buy the basement space until January 20, 2006. The steps Essig took to investigate the basement space before January 2006 were preparatory or exploratory, but there was no signed contract. Since, a right of first refusal is contingent upon the existence of a valid, outstanding contract to a third-party, and there was no signed contract until January 20, 2006, Benjamin was under no obligation to act because there was nothing for Benjamin to accept or refuse.

LIN Broadcasting Corp. v. Metromedia, Inc., supra.

The board and Essig each raise the defense of equitable estoppel. This doctrine is imposed by law "in the interest of fairness to prevent the enforcement of rights which would work a fraud or injustice upon the person against whom enforcement

is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought. . ." Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 184 (1982). A party asserting estoppel must allege (1) lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position. Holm v. CMP Sheet Metal, Inc., 89 A.D.2d 229, 235 (4<sup>th</sup> Dept 1982). The doctrine of equitable estoppel is to be invoked "sparingly and only under exceptional circumstances." Gross v. New York City Health & Hospitals Corp. 122 A.D.2d 793, 794 (2<sup>nd</sup> Dept 1986).

The core of the board and Essig's argument is that by not declaring an interest in the basement space in April 2005, voting in favor of amending the by-laws, and even letting Essig bring professionals into his unit to see the condition of the basement below, Benjamin misled them into believing he did not intend to exercise his right of first refusal. Thus, according to defendants, Benjamin was obligated to respond to the April 2005 letter, even if it was defective, and it was addressed to all the unit owners, not just plaintiff. This argument, however, shifts the own defendants' obligation to notify Benjamin properly under the ROFR, by requiring Benjamin to be protective of his rights.

Benjamin, however, did take steps to protect his rights immediately after he learned that the condominium and Essig had a signed agreement for the space. Leaving aside the issues of notice, Benjamin's right to object to the sale of the basement space to Essig did not ripen until there was a signed contract between Essig and the condominium to make the purchase.

Even assuming that Essig has sustained monetary damages because he expended funds to have professionals inspect the basement space and see whether it

was worth the expense of having it subdivided, etc., these are claims more properly asserted against the board. Apparently the contract of sale was not made contingent upon another unit owner exercising their ROFR. Balancing Benjamin's contractual rights under the by-laws against Essig's rights under an entirely separate contract with the building to buy the space, Benjamin's claims outweigh Essig's claims in equity.

The defendants' argument that Benjamin waived his ROFR under the by-laws also fails. Although a valid waiver requires "no more than the voluntary and intentional abandonment of a known right" there must be "an express agreement . . . conduct or a failure to act [so] as to evince an intent not to claim the purported advantage." Golfo v. Kycia Associates, Inc., 45 AD3d 531, 533 (2<sup>nd</sup> Dept 2007) (*internal citations omitted*). A waiver is not "created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence . . . there must be proof that there was a voluntary and intentional relinquishment of a known and otherwise enforceable right. Golfo v. Kycia Associates, Inc., *supra* at 533 (*citing* Peck v. Peck, 232 A.D.2d 540, 540 [2<sup>nd</sup> Dept 1996]). There is no evidence, nor do defendants raise a factual dispute, that Benjamin ever told anyone on the board or Essig himself that he had no interest in buying space in the basement. Voting in favor of the December 2005 amendment was not an act by Benjamin that was inconsistent with his rights under the ROFR. The amendment cleared the way for the board to enter into a contract for a subdivided part of the basement to Essig. He did not waive his right to approve/reject the Essig contract, as the ROFR allows Benjamin to do, by voting in favor of the amendment.

Other defenses raised by the defendants (laches and unclean hands) each rest on the same fundamentally flawed theory that Benjamin had to be "pro-active" or

assertive in exercising his ROFR, even if there was no signed contract for him to approve or reject. The doctrine of unclean hands requires that the party seeking equity come to court with clean hands. Pecorella v. Greater Buffalo Press, Inc., 107 AD2d 1064 (4<sup>th</sup> Dept 1985). Benjamin's claims against the board are contract based and the board has failed to prove they complied with the requirements set forth in the ROFR. Therefore, the affirmative defenses based upon laches and unclean hands are completely without merit. Bruno v. Sant'elia, 52 A.D.3d 556 (2<sup>nd</sup> Dept 2008)

Essig's tortious interference with contract counterclaim against Benjamin rests on two separate arguments, neither of which is successful. First, Essig argues that Benjamin knew once he filed the Notice of Pendency Essig would not be able to proceed with the subdivision of the basement and therefore Essig would be "forced" to breach his contract with the condominium. The other basis for Essig's claim is that Benjamin, by keeping silent about his interest in the basement, and waiting quietly until Essig signed the to notify anyone he was interested in the space, committed a tort. Both arguments are easily dismantled.

The purpose of the notice of pendency is to afford any person who records a conveyance or encumbrance after that time that s/he is bound by all of the proceedings taken in the action. 2386 Creston Ave. Realty, LLC v. M-P-M Management Corp., \_\_AD3d\_\_, 867 N.Y.S.2d 416 (1<sup>st</sup> Dept 2008). Benjamin has a right of first refusal, but the board did not comply with its obligations under the by-laws. Therefore, the notice Benjamin filed against the block and lot serves its statutory purpose.

There are four elements to a tortious interference with contract claim, they are:

1) the existence of a contract between the plaintiff party and a third party; 2)

defendant's knowledge of the contract; 3) defendant's intentional procurement of a breach of contract without economic justification; and 4) resulting damages. Bernberg v. Health Management Systems, Inc., 303 AD2d 348 (2<sup>nd</sup> Dept 2003). Since there was no executed contract until January 2006, Essig cannot prove the third prong of his claim.

After careful consideration, and for the reasons addressed in the foregoing decision, the court finds that Benjamin has proved he is entitled to summary judgment on his 1<sup>st</sup> (specific performance) and 5<sup>th</sup> (breach of contract claim against the board for its failure to comply with the by-laws) only. Benjamin's motion for summary judgment on his 6<sup>th</sup> cause of action is denied because whether Essig's contract is void/voidable cannot be decided at this time. Application of the by-laws require that defendants provide notice to "all immediately contiguous unit owners," in the manner provided in the ROFR, not just Benjamin. Benjamin is not the only immediately contiguous unit owner; there are others. Thus, the relief of specific performance requires that the Board provide all the immediately contiguous unit owners written notice of Essig's contract, in the manner provided in the ROFR.

Plaintiff's motion for summary judgment dismissing Essig's counterclaim is also granted; Essig's counterclaim against Benjamin is hereby severed and dismissed.

Since Benjamin, nor the defendants did not move for summary judgment on the other cause of action in the complaint (2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>), they will also have to be tried.

Each of the defendant's cross motion for summary judgment dismissing the complaint is denied.

## Conclusion

In accordance with the foregoing decision,

It is hereby

**ORDERED** that plaintiff's motion for summary judgment on his 1<sup>st</sup> (specific performance) and 5<sup>th</sup> (breach of contract) claims is granted; and it is further

**ORDERED** that the clerk shall enter judgment in favor of plaintiff against defendants on plaintiff's 1<sup>st</sup> (specific performance) in accordance herewith and 5<sup>th</sup> (breach of contract) causes of action; and it is further

**ORDERED** that the defendant board shall comply with the requirements set forth in the by-laws applicable to the ROFR by notifying each unit owner who owns a unit that is "immediately contiguous" to the basement (including Benjamin) of Essig's contract to purchase the basement space and obtain those immediately contiguous unit owners' approval; and it is further

**ORDERED** that the notice by the board shall be delivered in the manner provided, and shall comport with the requirements set forth, in Article XI of the by-laws and all other applicable provisions therefore; and it is further

**ORDERED** that the notification shall be made by the board within Ten (10) Days of being served with a copy of the judgment with notice of its entry; and it is further

**ORDERED** that plaintiff and the each immediately contiguous unit owners' time to exercise their rights regarding the proposed sale to Essig shall be within the time frame and in the manner provided in Article XI and all other applicable provisions of the by-laws; and it is further

ORDERED that plaintiff's motion for the dismissal of Essig's counterclaim against him is granted and that counterclaim (tortious interference with contract) is severed and dismissed; the Clerk shall enter judgment in favor of plaintiff, against defendant Essig on that counterclaim; and it is further

ORDERED that each defendant's cross motion for summary judgment is denied for the reasons stated; and it is further

ORDERED that the remaining causes of action in plaintiff's complaint as well as any cross claims between the defendants, none of which were directly addressed in any of the motions before the court, remain to be decided at trial; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon the Clerk in the Office of Trial Support so this case can be scheduled for trial; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
December 24, 2008

So Ordered  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JAN 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK