

Wilkinson v Community Preserv. Corp.
2009 NY Slip Op 30647(U)
March 10, 2009
Supreme Court, New York County
Docket Number: 110445/04
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER

PART 19

Index Number : 110445/2004
WILKINSON, ANDREA
 VS.
CPC AND ANDERS TOMSON
 SEQUENCE NUMBER : 001
 DISMISS ACTION

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


~~with~~

motion is decided in accordance

with accompanying memorandum decision

FILED
 MAR 11 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: MAR 10 2009



 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 19

-----X
ANDREA WILKINSON and DAN DONZELLI,

Plaintiffs,

Index No.
110445/04

- against -

COMMUNITY PRESERVATION CORPORATION
and ANDERS TOMSON, in his Individual and
official capacity,

Defendants.

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

EDWARD H. LEHNER, J.;

Before the court is a motion by defendants Community Preservation Corporation ("CPC")¹ and Anders Tomson ("Tomson") for summary judgment dismissing plaintiffs' complaint.²

Plaintiffs Andrea Wilkinson ("Wilkinson") and Dan Donzelli ("Donzelli") allege: that Wilkinson is president of Ace Holding, LLC ("Ace") (tr. p. 17), a company in bankruptcy proceedings (tr. p. 19); that through Ace, she purchased the Pastures Townhouses (the "Townhouses") in Albany County (Wilkinson EBT, p. 68-

¹ While the complaint lists the defendant as "CPC," at oral argument it was stipulated that the correct name of the intended defendant was "Community Preservation Corporation," which was substituted as defendant (tr. p.2).

² With respect to the dispute as to whether this motion was timely, the court notes that on a court web site the note of issue filing date is shown to be April 29, 2008, and the note of issue itself shows the filing fee paid on that date. Hence, the service of the instant motion on August 26, 2008 was within the 120-month period provided in CPLR 3212(a), and thus timely.

69); that Ace sought financing from CPC to renovate the Townhouses (Id., p. 80); that as part of the application process, she met with Tomson, who was regional director and senior vice president of CPC (Id., p. 82); that Tomson had authority to review Ace's loan and made recommendations to CPC's mortgage committee; that she felt that Tomson was demeaning and condescending towards her (Id., p. 226); that Donzelli was hired in September 2001 as a contractor for interior and exterior rehabilitation (Donzelli, EBT, pp. 5-6, 33-34); that the loan process was delayed (tr. p. 23); that this delay increased costs (Wilkinson EBT, p. 163); that in December 2002 Wilkinson told Tomson she would be seeking financing for another development project (the "Fish Fry Project") in Albany (Id., p. 246); that Tomson said it was unlikely that CPC would lend her additional funds (Id.); that Ace received the permanent loan on February 12, 2003 (Id., p. 150); that in March 2003, Wilkinson sought financing for the Fish Fry Project (Id., p. 300); that the Fish Fry Project financing was rejected on March 27, 2003 (Id.); that CPC ultimately accelerated the loan and commenced foreclosure proceeding; that there were delays in paying Donzelli (Donzelli EBT, p. 71); and that the reasons for delays in financing was racial animus (tr., pp. 23-24).

Defendants allege: that CPC lent money to Ace not Wilkinson (Wilkinson EBT, p. 98); that Donzelli's company Copperstone Construction contracted with Ace

and did not borrow from CPC (Donzelli EBT, pp. 5, 63); that all activity took place in Albany; that the construction loan was modified due to change orders (Wilkinson EBT, p. 151); that construction costs rose (Id., pp. 97-100); that the Townhouse renovation was ultimately completed (Id., pp. 253-254); that CPC reviewed Wilkinson's application for the Fish Fry Project but rejected it (Jack Greene email dated April 1, 2003); that there was no racial animus, but rather the decision was based upon the problems dealing with Wilkinson in the Townhouses Project (Id.); that Donzelli stated there was no discrimination against him (Donzelli EBT, p. 98); that Tomson had no role in rejecting the loan application for the Fish Fry Project (Tomson EBT, pp. 160-161); that the determination not to make that loan was based upon a legitimate non-discriminatory basis, and therefore plaintiffs' complaint should be dismissed.

The complaint alleges in one cause of action discrimination under various statutes, breach of contract, breach of fiduciary duty and tortious interference with contract against CPC, with a second cause of action against Tomson.

42 USC § 1981 provides as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

* * *

15 USC § 1691 provides in part as follows:

"It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex, or marital status"

* * *

The Fair Housing Act ("FHA") [42 USC § 3604(b)] provides that:

"[i]t shall be unlawful(b) to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, handicap, familial status, or national origin."

* * *

New York City Administrative Code § 8-107(5) states:

"(d) Lending practices. It shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company, or other financial institution or lender doing business in the city ... or any officer, agent or employee thereof to whom application is made for a loan, mortgage or other form of financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space or an interest therein:

(1) To discriminate against such applicant or applicants because of the actual or perceived race, creed, color, national origin, gender, disability, sexual orientation, age, marital status, partnership status, or alienage or citizenship status of such applicant or applicants ... in the granting, withholding, extending or renewing, or in the fixing of rates, terms or conditions of any such financial assistance or in the appraisal of any housing accommodation, land or commercial space or an interest therein."

In *Ferrante v. American Lung Association*, 90 NY2d 623, 629-630 (1997), the court, in an employment discrimination case, wrote:

"The standard for recovery under section 296 of the Executive Law are in accord with Federal Standards under title VII of the Civil Rights Act of 1964. ... On a claim of discrimination, plaintiff has the initial burden to prove by a preponderance of the evidence a prima facie case of discrimination. The burden then shifts to the (defendant) 'to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and non-discriminatory reasons to support its ... decision' (I)f the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff, then the presumption raised by the prima facie case is rebutted and 'drops from the case' (Next), plaintiff is still entitled to prove that the legitimate reasons offered by defendant were merely a pretext for discrimination (E)ven if the (defendant's reason is 'unpersuasive or even obviously contrived' plaintiff always has the ultimate burden of proof to show that intentional discrimination has occurred under a consideration of all the evidence."

See also, *Stephenson v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 6 NY3d 265 (2006). Claims of housing discrimination are evaluated under a similar burden-shifting framework [*Mitchell v. Shane*, 350 F3d 39, 47 (2nd Cir. 2003)].

Here, Wilkinson, who individually was not an applicant for a loan, has failed to raise a triable issue as to whether any of the problems Ace was having in financing the development of the Townhouses was the result of any actionable racial or gender discrimination by defendants. The alleged comments of Tomson on which the discrimination claims are premised do not demonstrate such discriminatory animus as to state a claim under the pleaded statutes. Any damages sustained by Ace caused by improper actions by defendants are claims of Ace, which should be handled in its bankruptcy proceeding.

Defendants have set forth evidence of a legitimate non-discriminatory basis for the decision not to approve a loan for the Fish Fry Project based upon delays and cost overruns in the Townhouses project. Since Wilkinson has not shown evidence that this was a pretext, she has not met her burden of showing that intentional discrimination has occurred. Therefore, her claims under 42 USC §1981, 15 USC § 1691, the FHA and New York State Executive Law § 296 are all dismissed.

Plaintiffs' claim under the New York City Administrative Code is not viable for the additional reason that the alleged discriminatory conduct took place in Albany and "(u)nder both New York State law and the New York City Administrative Code, applicability of the (New York City Human Rights Law) is limited to acts occurring within the boundaries of New York City" [Shah v. Wilco Systems, Inc., 27 AD3d 169, 175 (1st Dept. 2005). See also, Iwankow v. Mobil Corp., 150 AD2d 272 (1st Dept. 989).

Donzelli's claims under 42 USC § 1981, 15 USC § 1691, the Fair Housing Act and New York Executive Law § 296 are dismissed since he stated that he is not alleging that either Tomson or CPC discriminated against him based upon his race or any other prohibited basis (Donzelli EBT, p. 98).

Plaintiffs' claim for breach of fiduciary duty is dismissed since "an arms' length lender-borrower or creditor-debtor contractual relationship may not give rise to a fiduciary obligation on the part of the lender or creditor" [Wiener v. Lazard Freres &

Co., 241 AD2d 114, 122 (1st Dept. 1998)]. See also, *Banque Nationale de Paris v. 1567 Broadway Ownership Associates*, 214 AD2d 359 (1st Dept. 1995).

Plaintiffs' claim for tortious interference is dismissed since "(a) claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of that breach, and (4) damages ... (but) economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality" [*Foster v. Churchill*, 87 NY2d 744, 749-750 (1996)]. See also, *Williamson, Picket, Gross, Inc. v. 400 Park Avenue Company*, 47 NY2d 769 (1979). Defendants have shown an economic basis for declining to lend to plaintiffs for the Fish Fry Project and plaintiffs have not presented evidence of malice or illegality. Further, plaintiffs have not shown a contract to which they were a party with which defendants improperly interfered. Similarly, plaintiffs' claims for breach of contract are dismissed since they were not parties to any contract with defendants. See, *Caprer v. Nussbaum*, 36 AD3d 176, 200 (2nd Dept. 2006); *Lipton v. Unumprovident Corp.*, 10 AD3d 703 (2nd Dept. 2004).

In sum, defendants' motion for summary judgment dismissing plaintiffs' complaint is granted and the Clerk is directed to enter judgment accordingly.

Dated: March 10, 2009

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