[* 1]

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

PRESENT: _____ **PART** 55

Justice

Index Number : 109670/2006

TELEMAQUE, ADRIENNE

VS

ALEKSA, TATIANA

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 7/6/09

MOTION SEQ. NO. _____

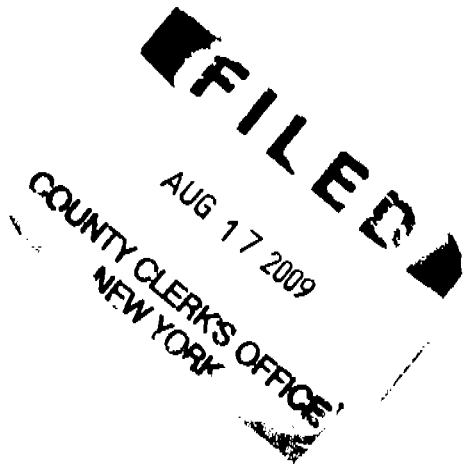
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Motion & Annexed	1-4
Answering Affidavits — Exhibits	5-17
Replying Affidavits	18-25

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.



Dated: 8/14/09

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: I.A.S. PART 55

----------X

ADRIENNE TELEMAQUE,

Plaintiff,

-against-

Index No. 109670/06

TATIANA ALEKSA and ANDREY ZHUKOV-KHOVANSKIY,

DECISION AND ORDER

Defendants and Third-Party Plaintiffs,

-against-

GREEN TURTLE REALTY CORP.,

Third-Party Defendants.

----------X

JANE SOLOMON, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment dismissing the counterclaims and awarding plaintiff judgment in the amount of $101,799. Defendants/third-party plaintiffs cross-move for summary judgment as to liability on their second counterclaim and to amend their third-party complaint. Third-party defendant cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

This is an action for breach of a real estate contract. Plaintiff, Adrienne Telemaque, is the owner of a cooperative apartment, known as Unit # 2 at 36 West 22nd Street, New York, New York (the Premises). In November 2005, she entered into a Contract of Sale with the defendants, Tatiana Aleksa and Andrey Zhukov-Khovanskiy, for the sale of the Premises (the Contract). Telemaque contends that Aleksa and Zhukov-Khovanskiy breached the contract by not proceeding with the closing. Telemaque brings this action in order to retain the down payment

tendered by Aleksa and Zhukov-Khovanskiy and to recover attorneys' fees.

Defendants counter that Telemaque did not have the legal authority to sell the Premises because the cooperative corporation had never obtained a "No Action Letter" from the Attorney General, which is required for all co-op transfers where no offering plan has been filed. Defendants assert that Telemaque knew, or should have known, that she was legally unable to transfer her shares. Defendants further assert that the cooperative corporation, Green Turtle Realty Corp. (Green Turtle), also knew that it could not legally sell shares and that it acted in bad faith in denying their application.

The relevant facts regarding this controversy are not in dispute. On November 22, 2005, Telemaque, as "Seller," and defendants Tatiana Aleksa and Andrey Zhukov-Khovanskiy, as "Purchaser," entered into the Contract. The purchase price, as set forth in the Contract, was $998,000. Upon executing the Contract, Aleksa and Zhuov-Khovanskiy tendered a down payment of $101,799 to Telemaque's attorney. The Contract was contingent on two factors: first, that the Purchaser obtain "a loan of $799,999.20 for a term of 30 years or such lesser amount or shorter term as applied for or acceptable to Purchaser . . ." (Aleksa Aff., Ex. A, ¶ 1.21), and second, that the cooperative corporation consent to the sale (*id.*, ¶ 6.1). It is noteworthy that the loan amount of $799,999.20, specified in the Contract, was equivalent to approximately 80% of the purchase price.[1]

Thereafter, on December 20, 2005, Aleksa and Zhukov-Khovanskiy submitted an

[1] 80% of the $998,000 purchase price is $798,400. $799.999.20 is 80% of $999,999, which amount is typed in the Contract as the purchase price and crossed out replaced in handwriting with $998,000 (¶ 1.16). The amount of the loan commitment was not revised to reflect the lower purchase price (¶ 1.21).

application to the cooperative corporation, Green Turtle. On that same day, they submitted a Uniform Residential Loan Application to their broker. That application, a copy of which is annexed to defendants' papers, requested a fixed-rate, 30-year mortgage in the amount of $798,400 (Aleksa Aff., Ex. D).

On January 9, 2006, Aleksa and Zhukov-Khovanskiy were interviewed by the members of Green Turtle's Board. According to Aleksa, at the time of the interview, the Board members requested that the defendants submit their intended renovation plans by a certified architect, as well as a loan commitment letter in accordance with the Contract. Aleksa states that, at no point during the interview, did any member of the Board indicate that the Contract terms, or the terms of defendants' application, both of which called for 80% financing, were not acceptable.

On January 20, 2006, the defendants' mortgage broker received a commitment letter from Hemisphere National Bank (HNB). However, HNB was only willing to loan the defendants $748,500, or 75% of the purchase price. Further, the loan commitment was at a fixed rate for only five years, with subsequent years at an adjustable rate. Although the commitment was not for the amount requested by Aleksa and Zhukov-Khovanskiy, their mortgage broker forwarded the letter to the Green Turtle Board.

On February 6, 2006, the defendants obtained a second commitment letter, this one from Washington Mutual Bank (WaMu). WaMu also offered a loan amount of only $748,500, or 75%, for 30 years, and also at a fixed rate for only five years, and thereafter adjustable. Defendants' mortgage broker forwarded this letter to the Green Turtle Board as well.

In mid-February 2006, defendants submitted their renovation plans to the Green Turtle Board. On February 17, 2006, defendants were informed, through their lawyer, that the Board

had verbally approved their application.

Thereafter, on March 26, 2006, the defendants received a commitment letter from Bank of America, for a loan amount of $798,400, which was 80% of the purchase price, with a 30-year term at a fixed rate. The letter was promptly submitted to the Green Turtle Board.

Five days later, on March 31, 2006, Aleksa and Zhukov-Khovanskiy received a written notice from the Green Turtle Board stating that: "The Board of Directors of Green Turtle Realty Corp. met on March 30, 2006 to review the amended application submitted by Tatiana Aleksa and Andrey Zhukov-Khovansky [*sic*] (the "Prospective Purchasers"). The Board of Green Turtle Realty Corp. has voted to deny the application of the Prospective Purchasers" (Aleksa Aff., Ex. H). In communications with defendants' counsel, the Board stated that they rejected the application because they deemed the financing amount of 80% to be too high.

Aleksa and Zhukov-Khovanskiy then went back to Bank of America and requested 75% financing. On April 11, 2006, they obtained a second commitment letter from Bank of America for 75% of the purchase price. Defendants forwarded that letter to the Green Turtle Board.

On April 26, 2006 the Green Turtle Board responded as follows: "The Board of Directors of Green Turtle Realty Corp. has reviewed and has voted to withhold its approval of the second amended application. Please be advised that no additional applications from the above-referenced prospective purchasers will be considered" *(id.*, Ex. J).

Thereafter, plaintiff refused to return defendants' down payment, claiming that the Green Turtle Board had approved defendants' application based upon the HNB and the WaMu commitment letters, and that defendants were therefore required to close based upon that approval.

Plaintiff's Motion for Summary Judgment

Based upon her contention that the two contingencies in the Contract were met, Telemaque brings the within action to retain the defendants' down payment as liquidated damages. Accordingly, she alleges causes of action for liquidated damages in the amount of $101,799 plus interest (first cause of action), and attorney's fees (second cause of action). Aleksa and Zhukov-Khovanskiy counterclaim for fraud (first counterclaim), breach of contract (second counterclaim), rescission based upon fraud (third counterclaim), rescission based upon mutual mistake (fourth counterclaim), judgment declaring the Contract of Sale void (fifth counterclaim), unjust enrichment (sixth counterclaim), and judgment declaring the failure of a condition precedent (seventh counterclaim).

It is well settled that where a real estate contract is conditioned upon the purchaser(s) obtaining mortgage financing, and fails to do so through no fault of his or her own, the purchaser has the right to terminate the contract and is entitled to recover the down payment (91 NY Jur 2d Real Property Sales and Exchanges §§ 47, 219; *Ruggeri v Brenner*, 186 AD2d 441 [1st Dept 1992]). Further, where the contract of sale specifies a particular type of mortgage or lender, and the purchaser has made diligent and good faith efforts to obtain financing, he or she is not required to accept an alternative method of financing to that specified in the contract (*Super v Lux,* 159 AD2d 203 [1st Dept 1990]; *Macho Assets, Inc. v Spring Corp.*, 128 AD2d 680 [2d Dept 1987]).

Here, the Contract was specifically contingent upon two factors: first, that the defendants obtain financing in the amount of $799,999.20 "*or such lesser amount . . as applied for or acceptable to Purchasers*" (Contract of Sale, ¶ 1.21) (emphasis added), and "the unconditional

consent of the [cooperative] Corporation" (*id*, ¶ 6.1). Despite the obvious efforts of the defendants, the first condition was not met by either of the first two mortgage commitment letters, which each offered defendants only $748,500. Plaintiff's contention that the defendants were required to accept either of the first two mortgage commitment letters is contrary to the terms of the Contract. Further, when the defendants finally did obtain mortgage financing that was acceptable to them, the Green Turtle Board rejected their application; thus the second contingency of Board approval was not met. Plaintiff was therefore required to return the defendants' down payment no later than April 26, 2006, the date when the Green Turtle Board determined that it would not further consider the defendants' application.

Defendants seek return of the down payment on a breach of contract theory in their second counterclaim (although their specific theory for why there was a breach is erroneous, *infra)*. Defendants are therefore awarded summary judgment on the amount of their down payment, plus interest from April 26, 2006. Defendants' third, fourth, fifth, sixth and seventh counterclaims are dismissed as repetitive, since they also seek the return of the down payment but on different legal theories.

Defendants' counterclaims for fraud (first counterclaim) and breach of contract (second counterclaim) are based upon the allegation that Telemaque knew, or should have known, that she could not transfer ownership of her shares because Green Turtle had never obtained a "No Action Letter" from the Attorney General. Defendants contend that they would never have entered into the Contract and given up other opportunities had Telemaque not defrauded them. Each of these counterclaims requires that the defendants suffered damages which are related to the absence of a "No Action Letter." However, since the Green Turtle Board rejected

defendants' application, the absence of the "No Action Letter" is irrelevant. Defendants' damages were the result of Telemaque's refusal to return their down payment, not her failure to tell them of the "No Action Letter." Defendants' further speculation that Telemaque conspired with the Green Turtle Board to lure defendants into placing a down payment on the apartment makes no sense, since she would have been required to return the down payment had defendants been approved, but been unable to acquire her shares. The first counterclaim therefore is dismissed, and the second counterclaim is dismissed to the extent that it seeks recovery in connection with Telemaque's failure to disclose the status of the "No Action Letter". In light of the foregoing, there is no basis upon which Telemaque could succeed in this action as a matter of law, so the complaint is dismissed upon a search of the record (CPLR 3212[b]).

Green Turtle's Cross Motion for Summary Judgment and The Cross Motion To Amend

Aleksa and Zhukov-Khovanskiy (the Aleksa plaintiffs) assert third-party claims against Green Turtle for fraud (first cause of action), conspiracy to defraud (second cause of action), and an injunction requiring the cooperative to approve their application (third cause of action). In their proposed amended third-party complaint, defendants seek to add a cause of action for tortious interference with prospective economic advantage.

The Aleksa plaintiffs allege that the Green Turtle Board acted in bad faith in that they knew, as early as December 2005, that the Contract provided for 80% financing. At their interview with the Board in January 2006, the defendants/third-party plaintiffs indicated that they were working diligently to obtain a fixed rate loan for 80% of the purchase price, and that those terms were important to them. Nonetheless, the Board did not indicate their opposition to that

level of financing until they rejected defendants/third-party plaintiffs' application on March 31, 2006. Further, when the Aleksa plaintiffs then agreed to obtain a 75% loan from Bank of America, they were again rejected.

The Aleksa plaintiffs also contend that there is an issue of fact as to whether the Green Turtle Board knew that it had not complied with New York securities laws in obtaining the "No Action Letter," and that if they did know, then they had acted in bad faith in not informing the Aleksa plaintiffs, and are therefore liable for damages.

The board of directors of a cooperative corporation has broad discretion in determining who may purchase shares to the co-op. New York courts take the position that "there is no reason why the owners of [a] co-operative apartment house [can] not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes" (*Weisner v 791 Park Ave. Corp.*, 6 NY2d 426, 434 [1959]). Thus, as a rule, the board of directors of a cooperative may withhold consent to the transfer of shares and the assignment of a proprietary lease so long as they do not discriminate on the basis of race, creed, national origin, or sex of the purchaser (*id.*; *see also* New York Civil Rights Law, section 19-a).

In addition, the Court of Appeals has held that the business judgment rule protects a corporate board from judicial inquiry into the actions of its directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (*Matter of Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530, 538 [1990]). The Court extended this standard of review to all categories of issues that come before cooperative boards (*id.* at 541; *40 West 67th Street v Pullman*, 296 AD2d 120 [1st Dept 2002], *affd* 100 NY2d

147 [2003]). This includes challenges by contract-vendees who are denied cooperative board approval (*Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]). "Under the business judgment rule . . . absent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting 'in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (*Jones v Surrey Co-op. Apartments, Inc.*, 263 AD2d 33, 36 [1st Dept 1999] quoting *Auerbach v Bennett*, 47 NY2d 619, 629 [1979]).

Here, the Aleksa plaintiffs allege that the Green Turtle Board did not act in good faith in denying their application and in failing to disclose that the corporation was legally barred from approving any transfer of its shares. They further contend that the Green Turtle Board cannot seek dismissal of the pleadings at this stage merely by invoking the business judgment rule, since whether a corporate board acted in good faith in rejecting prospective buyers is always a question of fact.

Under the business judgment rule, the actions of a cooperative's directors are presumed to have been taken in good faith and in the exercise of honest judgment (*see 40 West 67th Street v Pullman,* 296 AD2d 120, *supra*). It is therefore incumbent upon a party challenging a board's denial of his or her application to present evidence that the board acted either outside the scope of its authority, in a way that did not legitimately further the corporate purpose, or in bad faith (*del Puerto v Royal Owner's Corp.*, 54 AD3d 977 [2d Dept 2008]; *see also Jones v Surrey Cooperative Apartments, Inc.,* 263 AD2d 33, *supra.* [1st Dept 1999]). Mere speculation will not suffice (*see Park Royal Owners, Inc. v Glasgow,* 19 AD3d 246 [1st Dept 2005]). The Aleksa plaintiffs have not presented any such evidence. Nor have they demonstrated that discovery will

yield evidence supporting their case. "Mere hope that somehow the plaintiffs will uncover evidence that will prove their case, provides no basis, pursuant to CPLR 3212 (f), for postponing a decision on a summary judgment motion" (*Kennerly v Campbell Chain Co.*, 133 AD2d 669 [2d Dept 1987]).

In support of their causes of action for fraud and conspiracy to defraud, the Aleksa plaintiffs allege that at the time of the second rejection, the Green Turtle Board knew that it was barred from approving the transfer of shares due to the lack of a "No Action Letter." However, instead of being honest, and denying the application on these grounds, the Board decided to contend that the reason for the rejection was that the Aleksa plaintiffs had amended their application. In this way, they were allegedly protecting Telemanque from having to return the deposit. This makes no sense in several ways: first, the Board never indicated that it was rejecting the Aleksa plaintiffs' application because it had been amended, and second, Telemaque was required to return the down payment under the terms of the Contract regardless of why the Board denied the application. In any event, a cause of action for fraud requires that the claimant suffer damages (*see Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553 [2009]). Having suffered no damages as a result of the Board's alleged failure of honesty, these causes of action are dismissed.

Finally, the Aleksa plaintiffs' cross-motion, for leave to serve an amended complaint alleging tortious interference with prospective economic advantage, is denied. Having determined that the Green Turtle Board's determination to reject the Aleksa plaintiffs' application is protected by the business judgment rule, the Aleksa plaintiffs cannot seek to overcome this by simply suggesting a different legal theory.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by plaintiff Adrienne Telemaque for summary judgment is denied; and it is further

ORDERED that the cross motion by defendants Tatiana Aleska and Andrey Zhukov-Khovanskiy for partial summary judgment on their second counterclaim against plaintiff is granted, and defendants shall have judgment against plaintiff in the amount of $101,799 plus interest from April 26, 2006; and it is further

ORDERED that upon searching the record, plaintiff's complaint is dismissed; and it further is

ORDERED that defendants' first, third, fourth, fifth, sixth and seventh counterclaims are dismissed; and it is further

ORDERED that the cross motion by third-party defendant Green Turtle Realty Corp. for summary judgment dismissing the third-party complaint is granted, and the third-party complaint is dismissed; and it is further

ORDERED that the cross motion by third-party plaintiffs Tatiana Aleska and Andrey Zhukov-Khovanskiy for leave to serve an amended third-party complaint is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 14, 2009

ENTER:

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C

JANE S. SOLOMON
J.S.C.

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