

Gellman v River Terrace Apts., Inc.

2009 NY Slip Op 31990(U)

August 28, 2009

Supreme Court, New York County

Docket Number: 106639/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 76

Index Number : 106639/2007

GELLMAN, DAVID

vs.

RIVER TERRACE APARTMENTS

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1, 2

5

3, 4

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 + cross motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED
SEP - 2 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: _____

8/28/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----x
DAVID GELLMAN,

Plaintiff,

Index No.: 106639/07

-against-

DECISION

RIVER TERRACE APARTMENTS, INC.,
GARTHCHESTER REALTY, LTD., RACHELLE BAKER,
TARA VARMA, LEWIS FEIN, IRWIN SANDLER,
and BETH SMITH,

Motion Seq. No.
002

Defendants.

-----x
DORIS LING-COHAN, J.:

BACKGROUND

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the fourth cause of action in his amended complaint, seeking a declaration and injunction directing defendants to approve the combination of the two apartments plaintiff owns in the subject building. Defendants cross-move, pursuant to CPLR 3212, for partial summary judgment, dismissing the entire complaint as against Rachelle Baker, Tara Varma, Lewis Fein, Irwin Sandler, Beth Smith (collectively, board members) and Garthchester Realty, Ltd. (managing agent), and dismissing the third cause of action as against River Terrace Apartments, Inc. (River Terrace), alleging a breach of the implied covenant of good faith and fair dealing.

Plaintiff is the owner of two adjoining units in the subject

co-operative apartment building. He purchased the first unit in 1999, paying cash, and the second unit in 2005, also paying cash. In a rider to the contract of sale for the second unit, the parties stated that the

"contract of sale is also contingent upon consent by the Board of Directors of the cooperative corporation, allowing purchaser to combine this unit, 17E, with his currently owned unit, 17D. In the event such consent is not given, this contract shall be null and void, and the down payment shall be returned to purchaser."

Ex. I.

In the purchase package submitted to the board for approval of the purchase of the second unit, this rider was attached to the documents, but there is no indication that a specific request was made to the board regarding approval for the combining of the two units. None of the documents submitted to the board, except for this rider, indicated that plaintiff intended to combine the unit.

According to defendant Kanakatara Varma, sued herein as Tara Varma (Varma), in her affidavit appearing in the cross motion, prior to plaintiff's purchase of the second unit, the board had become concerned about combining units in the building, and the board decided that any applications to combine units would warrant thorough consideration. Varma stated that although plaintiff's application was silent on his intention to combine the two units, because they were adjacent, the board raised a

concern regarding plaintiff's intentions. Another board member and neighbor of plaintiff, allegedly indicated that he had been told by plaintiff that the second unit would be used as an office and that plaintiff had not intention to combine the apartments. However, in an affidavit submitted in opposition to the cross motion, this board member denies that he made any such statement to the board.

Varma further states that the board had additional concerns about plaintiff's ability to pay maintenance on two units. According to the tax returns supplied with the package, plaintiff's income for 2003 was \$6,475, and for 2004 was \$44,859. Although the board eventually approved the purchase by plaintiff, it required plaintiff to place 12 months of maintenance payments for the two units in escrow, which he did. Varma further stated that, based on the financials alone, an outside purchaser would have been rejected by the board.

Subsequent to the board's approval of plaintiff's purchase of the second unit, in or around June of 2006, another unit owner approached the board about buying a second unit, with the intention of combining both units. This owner was told that the board would not approve the combination, and he did not acquire the second unit.

In September, 2006, plaintiff, allegedly for the first time, specifically requested permission from the board to combine the

two units. This request was eventually denied, and the instant lawsuit ensued.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's motion for partial summary judgment on his fourth cause of action, seeking a declaration and injunction that the board permit him to combine his two units, is denied. Material questions of fact exist as to whether the board was properly informed of plaintiff's intentions prior to his purchase of the second unit so as to allow the board to make a reasoned determination, prior to the purchase, as to whether a combination of the two units would be permitted.

Defendant board members' and managing agent's cross motion for partial summary judgment, dismissing the complaint against them, is granted.

The individual members of a cooperative's board of directors are protected from the court's review of their actions under the business judgment rule. Under the business judgment rule, "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, ... judicial review is not available." *Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530, 538 (1990). Furthermore, the authority to approve or disapprove structural changes or alterations to cooperative units is within the purview of the cooperative board. *Konrad v 136 E. 64th Street Corp.*, 254 AD2d 110 (1st Dept 1998).

In addition, the managing agent is not personally liable for his or her actions performed within the scope of his or her authority, unless there is clear and explicit evidence of the agent's intention to personally assume authority and responsibility through affirmative acts of negligence or other wrong doing. See *Pelton v 77 Park Avenue Condominium*, 38 AD3d 1 (1st Dept 2006); *Caldwell v Gumley-Haft L.L.C.*, 55 AD3d 408 (1st Dept 2008).

That portion of defendants' motion to dismiss the third cause of action for breach of the covenant of good faith and fair

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dealing against River Terrace is granted.

As stated by the Court in *The Hawthorne Group, LLC v RRE Ventures* (7 AD3d 320, 323 [1st Dept 2004]),

"[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' [citations omitted]."

In the instant matter, the complaint alleges that River Terrace failed to carry out its obligations as delineated in the proprietary lease. The proprietary lease forms the contract between plaintiff and River Terrace, and, consequently, this cause of action is intrinsically tied to an alleged breach of contract. Thus, this cause of action cannot be maintained.

CONCLUSION

Based on the foregoing, it is hereby


ORDERED that plaintiff's motion for partial summary judgment on the fourth cause of action seeking declaratory and injunctive relief is denied; and it is further

ORDERED that the part of defendants' cross motion which seeks partial summary judgment dismissing the complaint against Garthchester Realty, Ltd., Rachelle Baker, Tara Varma, Lewis Fein, Irwin Sandler and Beth Smith is granted, and the complaint is dismissed as against those defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the part of defendant's cross motion which seeks partial summary judgment dismissing the third cause of action against River Terrace Apartments, Inc. is granted; it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry.

Dated: 8/28/09



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Gellman.river terrace.wpd

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