

Fishman v. Charles H. Greenthal Mgt. Corp.

2010 NY Slip Op 30115(U)

January 13, 2010

Supreme Court, New York County

Docket Number: 0100985/2009

Judge: Joan A. Madden

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

PRESENT: **HON. JOAN A. MADDEN**

PART _____

J.S.C. Justice

Index Number : 100985/2009

FISHMAN, CRAIG

VS.

CHARLES H. GREENTHAL MANAGEMENT

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 100985-09

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

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

is determined in accordance with the annexed decision and order.

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

FILED
JAN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 13, 2010

J.S.C.

HON. JOAN A. MADDEN
NON-FINAL DISPOSITION
J.S.C.

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
CRAIG FISHMAN,

INDEX NO. 100985/09

Plaintiff,

-against-

CHARLES H. GREENTHAL MANAGEMENT CORP.,
30 E. 9th ST. OWNERS CORP., and JOHN DOES
NUMBERS 1 THROUGH 10 TRUE NAMES UNKNOWN,
INTENDED TO BE THE BOARD OF DIRECTORS OF
30 E. 9th ST. OWNERS CORP.,

Defendants.

JOAN A. MADDEN, J.:

In this action by the former shareholder of an apartment in a cooperative building, against the cooperative corporation which owns the building, 30 E.9th Street Owners Corp. (the "Coop"), its managing agent, Charles H. Greenthal Management Corp. ("Greenthal"), and its Board of Directors (the "Board"), defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint. Plaintiff opposes the motion.

The following facts are based on the allegations in the complaint, documents in the record, and the parties' affidavits; for the purposes of the instant motion the facts are undisputed, unless otherwise indicated.¹ On July 3, 2002, plaintiff Craig Fishman purchased cooperative apartment Unit 5JJ at the building located at 30 East 9th Street in Manhattan. On April 21, 2008, Fishman signed an exclusive brokerage agreement with Halstead Property, LLC ("Halstead") as the real estate broker for the sale of his apartment. In or about April 2008, Halstead contacted

¹Defendants are moving for summary judgment prior to discovery.

FILED
JAN 22 2010
NEW YORK
COUNTY CLERK'S OFFICE

Greenthal to inquire whether the Coop permitted parents to purchase an apartment for their children. The complaint alleges that Barbara Aiosa of Greenthal, "stated in writing that 'it must be a co-purchase' in order for parents to acquire an apartment for, or with, their child(ren)."

On or about July 12, 2008, Matthew Melton offered \$775,000 for Fishman's apartment. Around the same time, an offer of \$780,000 was submitted by Howard and Laurie Taylor, who wanted to purchase the apartment for their two daughters.² The complaint alleges that before accepting the Taylors' offer, Fishman contacted Greenthal and "reconfirmed the fact that a purchase for children was acceptable" to the Coop.

On July 15, 2008, Fishman executed a contract of sale with "Howard, Laurie, Alison and Lindsay Taylor," as "purchasers." On September 22, 2008, Greenthal wrote a letter of transmittal to the Board members, regarding Fishman's sale to the Taylors, and enclosed their contract of sale, application and supporting documents, including a mortgage commitment from ISB Mortgage Co, LLC, for a loan of \$450,000 to "Howard, Laurie, Alison and Lindsay Taylor," as "Lcssec." Plaintiff alleges that on or about September 24, 2008, he was informed that the Board President, Joshua Shapiro, "had rejected the Taylors' application because the Co-Op Corp. does not permit parents to 'purchase for their children.'" Plaintiff alleges that on the afternoon of September 25, 2008, he received a call from Shapiro, and after some discussion, Shapiro agreed that he would have the Board review the Taylors' application at the Board meeting scheduled for that evening. The next day, Shapiro called Fishman and advised that the Board had rejected the Taylors' application.

²Fishman alleges that he was "inclined" to accept the Taylors' offer since it was \$5,000 more than Melton's, and the brokerage commission for the sale to the Taylors was 3%, as opposed to 6% for the sale to Melton.

Fishman thereafter contacted Melton, who was still interested in purchasing the apartment, but reduced his original offer of \$775,000 and ultimately agreed to a purchase price of \$740,000. Fishman and Melton executed a contract of sale for \$740,000, the Board subsequently approved Melton's application, and the sale closed on December 12, 2008.

On January 26, 2009, Fishman commenced the instant action against the Coop, Greenthal and the Board, seeking compensatory damages, interest, costs and attorney's fees.³ The complaint asserts a first cause of action against the Coop and the Board for fraudulent and negligent misrepresentation, alleging that plaintiff relied on Greenthal's "false and misleading representations" that "the Board would approve purchases by parents for their children; a second cause of action against the Coop and the Board for estoppel, alleging that plaintiff changed his position to his detriment by accepting the Taylors' contract and rejecting Melton's offer, and that the Coop and the Board "were barred and estopped from changing their position that purchasers like the Taylors were acceptable"; a third cause of action against Greenthal for misrepresentation, alleging that in the event Greenthal was not authorized to make representations on the Coop's behalf, Greenthal "is independently responsible for the consequences of the misrepresentations" and Greenthal "was negligent and otherwise acted wrongfully"; and a fourth cause of action against the Coop and the Board for "arbitrarily and capriciously act[ing] in rejecting" the

³Although the complaint does not specify an amount of damages, plaintiff states in his affidavit that his acceptance of Melton's original offer of \$775,000 would have resulted in a net of \$728,500 after payment of brokerage commissions; and that Melton's reduced offer resulted a net of \$695,600, which after payment of brokerage commission, constitutes a loss of \$32,900. The court notes that the complaint includes a request for attorney's fees, but plaintiff fails to allege the existence of a contractual or statutory basis to support such an award.

Taylor's application, alleging that "the President submitted, or claimed that he had submitted, The Taylor's application to the Board as 'window dressing' and to hide the fact that he had unilaterally acted."

Defendants are now moving for summary judgment dismissing the complaint in its entirety. In support of the motion, defendants submit affidavits of the Board President, Joshua Shapiro, the pleadings, and numerous documents including letters and e-mail correspondence, the Taylor's and the Melton's contracts of sale, the Coop's offering plan, the Coop's proprietary lease and bylaws, the minutes of the September 25, 2008 Board meeting, and the Taylor's purchase application. In opposition to the motion, plaintiff submits his own affidavit and an affidavit of his-father-in-law Lawrence Seidman, Esq., e-mail correspondence, and transcripts of portions of his telephone conversations with Jennifer McNally of Greenthal on September 24, 2008 and Board President Joshua Shapiro on September 25, 2008.⁴

The Board's decision to reject the Taylor's purchase application is protected by the business judgment rule, which provides that the court should defer to a cooperative board's determination "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith." Levandusky v. One Fifth Avenue Apartment Corp., 75 NY2d 530, 538 (1990); accord 40 West 67th Street v. Pullman, 100 NY2d 147, 153 (2003); Del Puerto v. Port Royal Owner's Corp., 54 AD3d 977 (2nd Dept 2008); Barbour v. Knecht, 296 AD2d 218, 224 (1st Dept 2002); Woo v. Irving Tenants Corp., 276 AD2d 380 (1st Dept 2000). Under the

⁴Fishman explains that these conversations were taped "since I was on the trading desk at the brokerage firm where I am employed at the time, and it was my company's policy to tape record all telephone conversations."

business judgment rule, the court will not inquire as to the reasonableness of the Board's determination, and under the express terms of the proprietary lease, the Board had the right to withhold its approval of the Taylors as prospective purchasers of plaintiff's apartment, "for any reason or no reason." See DeSoignies v. Cornasesk House Tenants' Corp., 21 AD3d 715, 716-717 (1st Dept 2005); DeGall v. 201 West 21st Street Tenants Corp., 251 AD2d 238 (1st Dept 1998); Simpson v. Berkley Owner's Corp., 213 AD2d 207 (1st Dept 1995). The business judgment rule, however, "is not an insuperable barrier," Barbour v. Knecht, *supra* at 224, as further judicial scrutiny is triggered in instances of breach of fiduciary duty, as evidenced by fraud, self-dealing, unlawful discrimination, bad faith or other misconduct by the Board, see 40 West 67th Street v. Pullman, *supra* at 155-157; Perlbinder v. Board of Managers of 411 East 53rd Street Condominium, 65 AD3d 985 (1st Dept 2009); Walden Woods Homeowner's Ass'n v. Friedman, 36 AD3d 691, 692 (2nd Dept 2007); DeSoignies v. Cornasesk House Tenants' Corp., *supra* at 718; Hochman v. 35 Park West Corp., 293 AD2d 650, 651 (2nd Dept 2002); Woo v. Irving Tenants Corp., *supra*; Simpson v. Berkley Owner's Corp., *supra* at 207.

Plaintiff's first cause of action against the Coop and the Board and his third cause of action against Greenthal rely on theories of fraudulent and negligent misrepresentation, which consist of similar elements. To establish a claim of fraud, plaintiff must allege and prove the following elements: 1) a representation of material fact; 2) the falsity of that representation; 3) knowledge by the party who made the representation that it was false when made; 4) justifiable reliance by plaintiff; and 5) resulting injury. See Global Minerals & Metals Corp v. Holme, 35 AD3d 93 (1st Dept 2006), app den 8 NY3d 804 (2007); Pope v. Saget, 29 AD3d 437, 441 (1st

Dept 2006), lv app den 8 NY3d 803 (2007). A claim for negligent misrepresentation requires plaintiff to demonstrate: 1) the existence of a special or privity-like relationship imposing a duty on defendant to impart correct information to the plaintiff; 2) the information was incorrect; and 3) reasonable reliance on the information. See J.A.O. Acquisition Corp v. Stavitsky, 8 NY3d 144, 148 (2007); Silvers v. State of New York, ___ AD2d ___, 2009 WL 512560 (1st Dept 2009).

While plaintiff alleges that he relied on the representations by Greenthal’s employees that the Coop permitted parents to purchase an apartment for their children, such reliance was not justifiable in light of the clear and express terms of the proprietary lease which require the Board to approve all purchase applications, and permit the Board to withhold its approval “for any reason or no reason.”⁵ As the Appellate Division First Department holds, the phrase “for any reason or no reason” affords the Board “unfettered rights” with respect to consideration of a sublet, and in this instance a purchase, application. DeSoignies v. Comascak House Tenants’ Corp, supra at 718. Where, as here, plaintiff as a shareholder had knowledge of the terms of his

⁵Paragraph 16 of the proprietary lease is entitled “assignments,” and states that the “lessee shall not assign this lease or transfer the shares to which it is appurtenant or any interest therein, and no such assignment or transfer shall take effect as against the Lessor for any purpose until . . . consent to such assignment shall have been authorized by resolution of the Directors, or given in writing by a majority of the Directors.”

Paragraph 16(c) is entitled “Consents Generally: Stockholders’ and Directors’ Obligations to Consent” and states as follows: “There shall be no limitation, except as above specifically provided, on the rights of Directors or lessees to grant to withhold consent, *for any reason or for no reason*, to an assignment [emphasis added].”

The Coop Offering Plan states that “[t]he shares may not be sold or the proprietary lease assigned, nor the Apartment sublet, without first obtaining the consent of the Board of Directors. . . Such consent may be arbitrarily refused, provided such refusal is not based upon race, color, creed or other ground proscribed by law.”

own proprietary lease requiring board approval for all purchase applications and giving the board the unfettered right to withhold such approval “for any reason or no reason,” plaintiff cannot be heard to complain that he was induced to enter into the transaction with the Taylors by misrepresentations. See e.g., Woods v. 126 Riverside Drive Corp, 64 AD3d 422, 423 (1st Dept 2009) (where party has means of discovering by the exercise of ordinary intelligence, the true nature of a transaction he is about to enter into, he must make use of those means or he cannot be heard to complain that he was induced to enter into the transaction by misrepresentations).

The record further reveals the absence of a materially false statement of fact, as the undisputed documentary evidence shows that the Coop did in fact permit parents to purchase an apartment for their children, if the children satisfied certain income requirements.

Plaintiff alleges that Greenthal, as the managing agent, made misrepresentations that the Coop permitted parents to purchase for children, based on an April 4, 2008 e-mail from Barbara Aiosa of Greenthal. The record shows that Aiosa’s e-mail responded to an April 3, 2008 inquiry from Kathi Jacob of Halstead, who was representing the seller of another apartment in plaintiff’s building. Jacob requested clarification as to a list of questions, including “can parents co-purchase, with or for, and/or guarantor [sic] a purchase?” Aiosa’s reply, in its entirety, states as follows: “It must be a copurchase. The child should be able to afford housing and living expenses on their own. If not, they may be asked to put up to 12 months maintenance in escrow. The unit cannot be used as an office and they do not allow pied a terres under any circumstances.” While plaintiff cites to and quotes the first sentence of Aiosa’s e-mail, he neglects to mention the second sentence which explicitly states that Coop limits such

“copurchases” to instances where the children are “able to afford housing and living expenses on their own.”

In support of their motion, defendants submit an affidavit of the Board President Joshua Shapiro, stating that the “Board in reviewing the financials of the [Taylors’] children, determined that they could not afford the mortgage and maintenance payments.” Specifically, Shapiro explains that the children had a combined yearly gross income of \$90,700, and after deducting federal, state and city taxes, they had take-home income of approximately \$65,000 a year. Taking the monthly maintenance of \$1,022.28 and the monthly mortgage payments of \$2,661.92, the “carry charges on the Unit would come to \$53,500.00 per year,” which “means that the siblings were required to tender of 82% of their yearly income to cover their housing expenses – with only 18% to cover their living expenses such as utilities, food and other necessities. Simply put, the Board determined that they were unable to meet the income requirements as they were unable to show that they could ‘afford housing and living expenses on their own.’”⁶

Plaintiff also cites to his July 15, 2008 e-mail to Jennifer McNally of Greenthal, asking: “If a parent buys for a child I assume they don’t have to pay the sublet fees but please just clarify

⁶In opposition to the motion, plaintiff submits an affidavit of Lawrence B. Seidman, his father-in-law and his attorney as listed on the contracts of sale. Seidman states that Shapiro’s calculations as quoted above, are “inaccurate,” without identifying the specific inaccuracy.

In reply, Shapiro agrees his calculations are incorrect, but only to the extent the children’s 2007 tax returns show that their 2007 take-home pay actually totaled \$61,714.84, which is less than the \$65,000 sum on which he originally relied.

According to the court’s calculations, the \$53,500 amount that Shapiro relies on for the annual mortgage and maintenance payments, appears to be incorrect. The monthly maintenance (\$1,022.28) and mortgage payments (\$2,661.92), total \$3,684.20, which on an annual basis totals \$44,210.40, as opposed to \$53,500. The difference, however, is not significant in terms of the children not being able to afford the housing and living expenses, as the \$44,210.40 amount constitutes approximately 68% or 71% of their annual income of either \$65,000 or \$61,714, respectively.

for me.” McNally responded: “Yes they do the Board considers that a sublet. I have a couple of shareholders who are getting charges a sublet fee if the shareholder does not live there and their kids do.”

Based on the foregoing, it cannot be disputed that the statements on which plaintiff alleges he relied were neither false nor incorrect. The uncontroverted record shows that the Coop permitted parents to co-purchase an apartment for their children, and that plaintiff knew, from Aiosa’s e-mail, that the Coop permitted such co-purchase only if the children satisfied specific income requirements that they have sufficient income to afford the housing and living expenses on their own.

Thus, absent the elements of justifiable reliance and a false statement of fact, plaintiff’s claims of fraudulent and negligent misrepresentation fail as matter of law. See J.A.Q. Acquisition Corp v. Stavitsky, supra; Pope v. Saget, supra.

For the same reasons, the second cause of action for estoppel fails as a matter of law. A party seeking estoppel must demonstrate a lack of knowledge of the true facts, justifiable reliance upon the conduct of the party estopped, and a prejudicial change in position. See River Seafoods, Inc. v. JP Morgan Chase Bank, 19 AD3d 120 (1st Dept), lv app granted 5 NY3d 715, app withdrawn 6 NY3d 751 (2005). As determined above, plaintiff cannot establish justifiable reliance, or a lack of knowledge of the true facts.

As to the fourth cause of action, plaintiff’s assertion that Board acted “arbitrarily and capriciously” in rejecting the Taylor’s application, based on Board President Shapiro’s allegedly “unilateral” consideration, is insufficient to demonstrate bad faith. As noted above, Shapiro

submits an affidavit explaining the reason for the Board's rejection of the Taylors. Shapiro states that the Board reviewed the financials of the Taylors' two daughters who intended to occupy the apartment, and determined that they did not satisfy the income requirement, since the daughters on their own, could not afford the mortgage and maintenance payments. Specifically, Shapiro shows that the daughters would have needed to spend more than 80% of their income on the mortgage and maintenance payments alone. Shapiro's explanation is consistent with the statement in the April 4, 2008 e-mail from Barbara Aiosa of Greenthal, that children "should be able to afford housing and living expenses on their own." Plaintiff neither shows nor alleges that the Taylors' daughters in fact had adequate income on their own to cover such expenses. Thus, in view of the unrefuted evidence that the Taylors' children failed to meet the financial requirement, no basis exists for concluding that Board was not acting in good faith when it rejected the Taylors' application. See 40 West 67th Street v. Pullman, supra at 155-157; Levandusky v. One Fifth Avenue Apartment Corp, supra at 537-538; Hochman v. 35 Park West Corp, supra at 651-652; Woo v. Irving Tenants Corp, supra; Cooper v. Greenbriar Owners Corp, 239 AD2d 311, 311-312 (2nd Dept 1997); Simpson v. Berkley Owner's Corp, supra at 207-208;

Finally, in opposing the motion, plaintiff argues that summary judgment is premature since defendants have not provided any discovery. Plaintiff's argument is without merit, as he fails to show that facts essential to oppose the motion are in defendants' exclusive knowledge, or that discovery might lead to facts relevant to the issues. See Silverstein v. Westminster House Owners, Inc., 50 AD3d 257 (1st Dept 2008); Woods v. 126 Riverside Drive Corp, supra at 424. Notably, since plaintiff relies on statements he alleges were made to him by defendants'


representatives, such facts are not within defendants' exclusive knowledge. See id.

Accordingly, is hereby

ORDERED that defendants' motion for summary judgment is granted and defendants are awarded judgment dismissing the complaint in its entirety, and the Clerk is directed to enter judgment accordingly.

DATED: January 13 2010

ENTER:



J.S.C.

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