

Miodownik v Elman

2010 NY Slip Op 31056(U)

April 28, 2010

Supreme Court, New York County

Docket Number: 107534/09

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

Index Number : 107534/2009
MIODOWNIK, HELA
vs.
ELMAN, RUSLANA
SEQUENCE NUMBER : 002
AMEND SUPPLEMENT PLEADINGS

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
MAY 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 4/28/10

Ley
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

2]
**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----x
HELA MIODOWNNIK,

Plaintiff,

-against-

RUSLANA ELMAN, STEVEN YALOVITSER, and
MERRILL LYNCH & CO., INC.,

Defendants.
-----x

Index No. 107534/09

DECISION/ORDER

Louis B. York, J.S.C.:

Motion Sequences 001 and 002 are consolidated for decision.

Motion Sequence 001 is a motion for summary judgment brought by Plaintiff Miodownik with a cross-motion for summary judgment by Defendants Elman and Yalovitser. In her Reply Memoranda of Law, Plaintiff has requested the court defer consideration of her motion for summary judgment at this time. Motion Sequence 002 is Plaintiff's Motion to Amend her Complaint.

For the reasons that follow, Defendants' Motion for Summary Judgment is granted.

This dispute arises from the 421-g tax abatement program, which was instituted to promote conversion of non-residential buildings in Lower Manhattan into residential space. In 2006, Plaintiff purchased apartment 3S at 50 Pine Street and Defendants Elman and Yalovitser, a married couple, purchased unit 7N in the same building. All parties purchased these units pursuant to an Offering Plan, which disclosed that 421-g tax abatement was available only for those units on the fourth floor and higher. As such, according to the

Offering Plan, Defendants' unit, on the seventh floor, was eligible for the tax abatement program while Plaintiff's unit on the third floor was not. As a result, the units outside the Abatement Zone sold at lower prices than those units that qualified for the abatement. Plaintiff, a real estate broker, admits she thought she spotted a "deal" in unit 3S because of the preferential pricing as well as her belief that the unit was actually eligible for tax abatement under the 421-g program despite the Offering Plan's contrary disclosures.

In 2006, Defendants were required to pay full property taxes despite their abatement protections. A group of the building's unit owners then convened to decide how to resolve this tax issue. Defendant Elman was asked at the meeting to investigate resolution of the matter through the Department of Finance. As a result, Defendant Elman then contacted the Department of Finance and the Department of Housing Preservation and Development (HPD) to inquire about the Abatement Zone as it pertains to 50 Pine Street.

At the same time, all unit owners began receiving correspondence from Mr. Paul J. Korngold, an attorney retained by the building's original sponsor to investigate the tax abatement discrepancies. Mr. Korngold stated that his investigations revealed that the Department of Finance did erroneously collect property taxes from units on the fourth floor and above at 50 Pine Street, all of which are within the Abatement Zone. According to Plaintiff's inquiries to HPD, her unit remains ineligible for tax abatement under the 421-g program.

The gravamen of Plaintiff's complaint seeks approximately \$136,000 in damages for

tortious interference with an expectation of tax abatement benefits on her 50 Pine Street unit. However, Plaintiff does not cite any statutory or case law authority to support her claim of a tortious interference with tax abatement expectancy. That is because New York does not recognize such a cause of action. Privity is required to commit a tort of interference. Certainly no privity exists between Plaintiff and Defendants with respect to tax credits offered by a governmental third party, the Department of Finance.

Moreover, even if the contractual basis for a claim of tortious interference existed, Defendant Elman committed no wrongdoing. In fact, she had the absolute right to lodge an inquiry with the appropriate administrative agency in the same way Plaintiff had the right to query HPD about her tax abatement status. Indeed, the building's sponsor also exercised the right to inquire of the City's agencies with respect to the building's tax abatement status. Finally, assuming *arguendo* that there was wrongdoing in Defendant Elman's inquiries to the agency, there is no tortious link between these inquiries and the agency's independent analysis of the tax code and determination of tax abatement status for the entirety of the parties' building. Plaintiff has failed to plead any wrongdoing on the part of defendants Elman or Yalovitser. The proper course of action to challenge an action taken by an administrative body is to file a special proceeding under Article 78. Although Plaintiff may disagree with a tax decision by the Department of Finance, the Defendants in this action are not the proper parties from whom to seek relief.

For these reasons, Plaintiff has failed to raise any triable issue of fact with respect to

the five causes of action set forth in her complaint. On the first cause of action for Tortious Interference with Property Rights, Plaintiff has failed to show any wrongdoing or damage to her right to transfer her unit at 50 Pine Street. Similarly, on the second cause of action for Tortious Interference with Economic Interest, Plaintiff fails to demonstrate privity or wrongdoing. Plaintiff's third and fourth causes of action erroneously attempt to use the penal code as a basis for monetary relief in civil court. The statutes cited, Judiciary Law §§ 478 and 485 do not create private rights of civil action. Finally, Plaintiff has failed to demonstrate an underlying wrongdoing on which to base the fifth cause of action entitled Aiding & Abetting. Therefore, Defendants' cross-motion for summary must be granted.

Plaintiff's motion to amend the complaint, Motion Sequence 002, was filed concurrently with Plaintiff's reply memoranda on Motion Sequence 001. The motion papers submitted by Plaintiff for Motion Sequence 002 are defective for failure submit supporting affidavits pursuant to CPLR 2214 at least eight days before the return date. Furthermore, Plaintiff failed to attach a copy of the original complaint nor did Plaintiff offer an explanation of which paragraphs she sought to amend. This defective motion to amend the complaint, therefore, has no effect upon this Court's directing of summary judgment for the Defendants.

Moreover, this Court finds Plaintiff's action an exercise of frivolous conduct. Her entire cause of action is wholly "without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," pursuant to the New York Rules of Court § 130-1.1(c). The claims in Plaintiff's papers are utterly

baseless legally and factually. This Court has weighed the public policy of New York offering free access to a judicial forum versus the deterrence of frivolous conduct. Defendants have requested sanctions for Plaintiff's frivolous conduct and this Court agrees that they are warranted.

FILED
MAY 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

It is therefore

ORDERED that Defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that Plaintiff Hela Miodownik shall pay to Defendants Ruslana Elman and Steven Yalovitser sanctions in the amount of \$750.00 in favor of each of the plaintiffs for attorneys' fees; and it is further

ORDERED that payment of the sanction shall be made within ten (10) days from service of a copy of this Order with Notice of Entry; and it is further

ORDERED that in the event Plaintiff fails to pay the sanction within the time allotted, Defendants Elman and Yalovitser may apply to the Court for a judgment against the defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/28/10

Enter:

ly
Louis B. York, J.S.C

LOUIS B. YORK
J.S.C.