

1764 Tenants Corp. v Bhatia
2010 NY Slip Op 31976(U)
July 6, 2010
Supreme Court, New York County
Docket Number: 100304/10
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Justice

Index Number : 100304/2010
 1764 TENANTS CORP.
 VS.
 BHATIA, RAJIV
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1

2

3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUL 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/6/10


HON. EILEEN A. RAKOWER
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: PART 15

-----X
1764 TENANTS CORP.,

Index No.
100304/10

Plaintiffs,

-against-

**DECISION
and ORDER**

RAJIV BHATIA, DARCY BHATIA, "JOHN DOE" and
"JANE DOE",

Mot. Seq.
001

Defendants.

FILED
JUL 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER:

Plaintiff 1764 Tenants Corporation ("the Corporation") is a cooperative housing corporation and the owner of the building known as 17 West 64th Street in Manhattan ("the Building"). Defendants Rajiv Bhatia and Darcy Bhatia (collectively "the Bhatias") are owners of Apartments of PHA and PHB, two penthouse apartments in the Building. The Corporation brings this action to seeking a judgment of possession in favor of the Corporation and ejecting the Bhatias from certain common space within the Building, and for use and occupancy.

The complaint alleges that, on or around February 23, 2010, the Bhatias sought to purchase the following common space of the Building from the Corporation: (1) public corridor space on the 10th floor consisting of approximately 188 square feet of space which was ultimately used to combine Apartments PHA and PHB; (2) other common space on the 10th floor contiguous to Apartments PHA and PHB, consisting of approximately 237 square feet of living space, which was ultimately used to construct a walk-in closet and roof space; and (3) wrap around terrace space on the 10th floor, consisting of approximately 1531 square feet, located immediately adjacent to Apartments PHA and PHB (collectively "the Premises"). The complaint further alleges that, in or around February 2003, the Corporation and the Bhatias came to an agreement in principle whereby the Bhatias would purchase the Premises, subject to negotiation of the purchase price, the Bhatias' assumption of the obligation to amend the Building's Certificate of Occupancy, and the determination of the number of

shares in the Corporation which would be issued to represent the space to be purchased.

The complaint states that the Bhatias took possession of the Premises based on the parties' agreement in principle and the Corporation's good faith belief that the Bhatias would purchase the Premises. However, despite negotiations for several years, the parties never came to a final agreement, and negotiations were terminated. The complaint further alleges that the Bhatias performed alterations and construction work to combine their apartments and to expand the combined apartments into the Premises, all without the Corporation's permission. On December 23, 2009, the Corporation served a purported Notice of Termination of License, demanding that the Bhatia's quit the Premises. On or around January 11, 2010, the Corporation commenced the instant action seeking an order (1) ejecting the Bhatias from the Premises; and (2) directing them to pay use and occupancy of \$5,000.00/month from February 23, 2003 until the date of repossession of the Premises by the Corporation.

The Bhatias move to dismiss the action pursuant to CPLR §3211(a)(1) & (7). Plaintiff annexed copies of the complaint, the Proprietary Lease between the Bhatias and the Corporation ("Lease"); and a Plan/Work Approval Application ("DOB Application") executed by the Corporation and approved by the New York City Department of Buildings ("DOB"). The Bhatias claim that dismissal is warranted based upon the Lease and the DOB Application. With respect to the Lease, the Bhatias point to Paragraph "7", which provides,

If the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony or that portion of the roof appurtenant to the penthouse....

Furthermore, the DOB Application submitted by the Bhatias contains the signature of the Corporation's president, authorizing the Bhatias to perform the work specified therein.

The Corporation submits an affidavit in opposition to the motion. Annexed as exhibits to the affidavit are e-mails from January 2003 between Rajiv Bhatia and the Corporation wherein the parties make clear that the Corporation's approval for purposes of the DOB Application is merely to expedite the application process, and

that the Corporation does not give its permission to perform the construction thereby. The Corporation also submits a February 24, 2003 letter from Rajiv Bhatia, wherein he agrees, *inter alia*, that the Corporation's signing of the DOB Application "so that [Bhatia] may 'fast-track'" the application process "does not commit the board to a final financial agreement with [him]."

The Corporation further alleges that, despite this arrangement, the Bhatias commenced the construction work in or around June 2004. The Corporation submits a July 29, 2004 letter from Rajiv Bhatia wherein he agrees, *inter alia*, "not to commence with additional work at the Penthouse until I have board approval...." The Corporation states that, notwithstanding this representation, the Bhatias subsequently resumed construction work.

As for the Bhatias' argument that they enjoy exclusive use of the subject Premises pursuant to the Lease, the Corporation states the Bhatias' access to the terrace space was only obtained after that the Bhatias "gained access to terrace space, without [the Corporation's] consent, by constructing a doorway through an exterior wall in their cooperative apartment," and that "[t]he terrace space was never purchased by [the Bhatias] and was never demised to [the Bhatias]." The Corporation cites to the paragraph of the Lease preceding the enumerated paragraphs, which defines "the apartment" as

the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment.

The Corporation also submits an August 2, 2006 e-mail from the Bhatias' attorney, which acknowledges that a reallocation of shares to account for the then-anticipated acquisition of the terrace by the Bhatias would be required.

The Bhatias submit a reply affirmation.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence; [and]
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Here, the court finds that the Bhatias have failed to demonstrate entitlement to dismissal. The correspondence submitted by the Corporation in opposition to the Bhatias’ motion indicates that the Corporation president’s signature on the DOB Application was for the sole purpose of expediting the Bhatias’ application process in anticipation of a final agreement for the purchase of the Premises. In those documents, Rajiv Bhatia expressly acknowledges that the Corporation’s endorsement of the DOB Application was not to be construed as the Corporation’s recognition that the Bhatias either (1) enjoyed exclusive use of the Premises; or (2) that they had the Corporation’s approval to perform construction thereon. Moreover, there is nothing in the Lease which conclusively demonstrates that the Bhatias enjoy exclusive use of the subject Premises. Indeed, the August 2, 2006 e-mail from the Bhatias’ prior counsel seemingly acknowledges that, to the contrary, the shares presently owned by the Bhatias do *not* account for the space constituting the subject Premises (*see*

Washburn v. 166 East 96th Street Owners Corp., 166 A.D.2d 272 [1st Dept. 1990]). As the evidence submitted by the Bhatias fails to conclusively establish defenses to the Corporations complaint as a matter of law, dismissal is inappropriate.

Wherefore it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve there answer within ten days of receipt of a copy of this order with notice of entry thereof; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on Tuesday, August 3, 2010 at 9:30 a.m. at 80 Centre Street, Room 308.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: July 6, 2010


EILEEN A. RAKOWER, J.S.C.

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JUL 14 2010
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