

**Board of Mgrs. of Dragon Estates Condominium v  
Omansky**

2010 NY Slip Op 34056(U)

May 18, 2010

Supreme Court, New York County

Docket Number: 603511/09

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon Joan A. Madus  
Justice

PART 11

Brd of Mgrs.

INDEX NO. 603511/09

MOTION DATE 3-11-10

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

- v -

Lawrence A. Omanesky

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision + Order.

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

Dated: May 18, 2010

[Signature]  
HON. JOAN A. MADUS  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----X  
BOARD OF MANAGERS OF DRAGON ESTATES  
CONDOMINIUM,

Plaintiff,

-against-

Index No. 603511/09

LAWRENCE A. OMANSKY and TRIBECA REALTY  
LLC,

Defendant.

-----X  
JOAN A. MADDEN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, plaintiff Board of Managers of Dragon Estates Condominium moves, by order to show cause, pursuant to CPLR 6301 (a), for an order directing defendants to obtain a permanent certificate of occupancy for the building known as 49-51 Warren Street, New York, New York, and to pay all expenses and fines in connection with obtaining the permanent certificate of occupancy.

In motion sequence number 002, defendants Lawrence A. Omansky (Omansky) and Tribeca Realty LLC (Tribeca) move to deny a preliminary injunction and to dismiss the complaint against both defendants for lack of personal jurisdiction and against defendant Omansky for failure to state a cause of action.

This is an action to compel the sponsor of the Dragon Estates Condominium (the Condominium) to obtain a permanent certificate of occupancy for the premises and to recover damages

to reimburse the Condominium for expenditures by the Condominium that were made to complete work in the building, and that were allegedly the responsibility of the sponsor. Plaintiff asserts causes of action for, among other things, breach of contract, and breach of warranty.

Tribeca was the sponsor of the Condominium. Omansky was a member and manager of Tribeca, and signed the Certification by Sponsor and Sponsor's Principals, required by the New York State Attorney General, on behalf of Tribeca and individually. Omansky executed the Declaration of Condominium as president of Tribeca, on January 4, 2005. Tribeca dissolved on November 17, 2008.

Under the offering plan for the condominium, the sponsor offered 10 residential and two commercial units for sale. It is undisputed that Omansky retained control over one commercial unit, Unit 1W-C.

The complaint alleges that, pursuant to the offering plan, prior to the closing of the first unit in the building, the sponsor was obligated to obtain a temporary certificate of occupancy and to escrow sufficient funds "to insure the completion of the renovations in order to obtain a permanent Certificate of Occupancy." Offering Plan, at 37, annexed to Order to Show Cause as Exh. F. The complaint further alleges that, pursuant to the regulations of the New York State Attorney General governing condominiums, "the sponsor and its principals

must obtain a permanent certificate of occupancy for the property within a projected timetable after closing the first unit."

Complaint ¶ 16; see 13 NYCRR § 20.3 (t) (11). It is undisputed that, although the sponsor obtained a temporary certificate of occupancy, no permanent certificate of occupancy has been obtained by the sponsor. According to plaintiff, the temporary certificate of occupancy has been renewed by the Condominium's expediter every three months, at the cost to the Condominium of approximately \$750 for each renewal or a total of approximately \$3000 per year.

Plaintiff alleges that the lack of a permanent certificate of occupancy has caused the Condominium to pay a higher insurance premium and "will present problems in closing initial individual mortgages on units in the current mortgage climate." Affidavit of Steven A. Polansky, president and treasurer of Dragon Estates Condominium, ¶ 8.

Plaintiff further contends that the Department of Buildings (DOB) will only renew temporary certificates of occupancy for a limited period of time, and that, should the DOB refuse to issue another temporary certificate of occupancy, unit owners will not be able to sell their units or refinance their mortgages. Therefore, according to plaintiff, it will be irreparably harmed if this court does not issue a preliminary injunction requiring the sponsor to obtain a permanent certificate of occupancy within

a date certain.

Defendants oppose the preliminary injunction on the basis that, by means of its motion for a preliminary injunction, plaintiff is seeking the ultimate relief on the merits.

"A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite." *St. Paul Fire and Mar. Ins. Co. v York Claims Serv., Inc.*, 308 AD2d 347, 349 (1<sup>st</sup> Dept 2003) (citation omitted). No such extraordinary circumstances exist here. Although plaintiff fears that at some point in the future the DOB might refuse to grant additional temporary certificates of occupancy, or individual unit owners might have problems selling their units or obtaining mortgages, there is no evidence that any of these fears have materialized. The additional expenses that allegedly have been, and will be, incurred by the Condominium, can potentially be recovered as damages from the sponsor, and thus, do not constitute irreparable harm, necessary to obtain a preliminary injunction. *Famo, Inc. v Green 521 Fifth Ave. LLC*, 51 AD3d 578 (1<sup>st</sup> Dept 2008).

Finally, in light of the lack of proof of irreparable harm at this stage of the litigation, it is not necessary for the court to address the dispute of facts between the parties regarding why a final certificate of occupancy has not yet been obtained.

Plaintiff's motion for a preliminary injunction is, therefore, denied.

Defendants move to dismiss the complaint based upon inadequate of service of process. Defendants contend that the order to show cause signed by this court required that they be personally served with a copy of the order to show cause, and the summons and complaint, on or before January 6, 2010. Defendants contend that service was defective and that, therefore, plaintiff failed to serve Omansky and/or Tribeca.

Plaintiff submits the affidavit of service of David Goldberg, who states that on December 30, 2009 at 1:48 P.M., December 31, 2009 at 2:39 P.M., January 4, 2010 3:15 P.M. and January 5, 2010 at 1:36 P.M. he went to Omansky's office at 51 Warren Street, but that Omansky was not present on those occasions, and that he affixed copies of the summons, complaint and order to show cause and supporting papers on the door and mailed copies of the papers to the same address. Such alternative service is permissible pursuant to CPLR 308.

In his affidavit dated March 2, 2010, Omansky asserts that he "never received any summons personally and I did not receive one that was allegedly mailed personally to me." Affidavit of Lawrence A. Omansky, dated March 2, 2010, ¶ 26. In his earlier affidavit, however, he stated that "Plaintiff only nailed one summons to the door of Plaintiff's office and mailed only one copy

to my office." Affidavit of Lawrence A. Omansky, dated January 23, 2010, ¶ 16. Although he later argues that the nail and mail service was not effective as to the corporation, he appears to concede that a copy of the papers was in fact mailed to his office.

Citing *Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.* (65 NY2d 865 [1985]), defendant contends that personal service, pursuant to CPLR 308, does not confer jurisdiction over Tribeca. *Lakeside Concrete*, however, dealt with service on a corporation, which is governed by CPLR 311. With respect to service on a Limited Liability Company, CPLR 311-a provides that service shall be made by delivering a copy personally to

(i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

CPLR 311-a.

Here service was made on Omansky, the managing member of the Tribeca, by nail and mail, a form of personal service upon a natural person authorized by CPLR 308. Thus, the service was authorized pursuant to subsections (i) and (ii) of CPLR 311-a.

Defendant further contends that only one copy of the papers was left at and mailed to the Warren Street address, and that, therefore, even assuming that the purported service was complete with respect to Omansky, it was defective as to Tribeca.

Martin S. Kera, the managing agent for the condominium, states that he sent three copies of the papers to the process server to serve on the defendants. See Reply Affidavit of Martin S. Kera, dated February 1, 2010, ¶ 12. Even assuming that only one copy of the papers was received by Omansky, that would not invalidate the service on Tribeca. As the Court of Appeals stated in *Raschel v Rish* (69 NY2d 694, 696 [1986]):

[w]hile the CPLR is silent as to the number of copies of a summons and complaint that must be served on a person conceivably acting in more than one representative capacity, the guiding principle must be one of notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (citations omitted).

Here, where Omansky was both an individual defendant and an appropriate person to serve to obtain jurisdiction over the LLC, pursuant to CPLR 311-a, service of just one copy of the papers would be reasonably calculated to apprise the LLC of the action and would not be defective as to Tribeca.

Citing *Rothstein v Equity Ventures, LLC* (299 AD2d 472 [2d Dept 2002]), Omansky also argues that he should be dismissed as a defendant, because members of an LLC may only be sued if they participate in the commission of a tort in furtherance of company

business. Here, however, pursuant to the rules of the New York State Attorney General governing condominiums, Omansky signed the Certification By Sponsor and Sponsor's Principals in his personal capacity as a principal as well as on behalf of the LLC, and, therefore, the principle asserted in *Rothstein* is inapplicable. Furthermore, pursuant to the regulations of the Attorney General governing the obligations of the sponsor, in the event of dissolution of the sponsor, the principals of the sponsor must provide financially responsible entities or individuals to assume the responsibilities of the sponsor under the offering plan, applicable laws and regulations, and the principals of the sponsor must guarantee such obligations. 13 NYCRR 23.3 (v) (9). Therefore, it is not necessary for the court to determine whether plaintiff can pierce the veil of the LLC to maintain an action against Omansky as an individual. Omansky's motion to dismiss for failure to state a cause of action is, therefore, denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' motion to dismiss is denied; and it is further

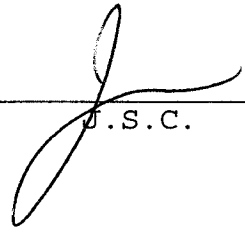
ORDERED that defendants are directed to answer the complaint within 30 days of date of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference shall be held in Part 11, room 351, on July 1, 2010, at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated: May 18, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.