

<b>Matter of Hershkowitz v White House Owners Corp.</b>
2011 NY Slip Op 31029(U)
March 31, 2011
Sur Ct, Nassau County
Docket Number: 0352576/A
Judge: Edward G. McCabe
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
 COUNTY OF NASSAU

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 In the Matter of the Application of George Hershkowitz, as  
 Administrator of the Estate of

File No. 352576/A

CHERYL HERSHKOWITZ,

Dec. Nos. 27091

27108

Deceased,

27056

-against-

White House Owners Corporation and "John Doe No. 2,"  
 "John Doe No. 3," "John Doe No. 4," "John Doe No. 5,"  
 "John Doe No. 6," and "John Doe No. 7," whose  
 names are unknown but who are the individual members  
 of the Board of Directors of the White House Owners  
 Corporation, Respondents.

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 Before the court are four motions: (1) a third-party motion to intervene; (2) petitioner's  
 motion for partial summary judgment; (3) petitioner's motion to dismiss the answer; and  
 (4) respondent's motion to renew a prior motion for summary judgment. The petitioner is the  
 administrator of the estate of Cheryl Hershkowitz; respondent is White House Owners  
 Corporation, a co-operative apartment corporation; the third party is the individual who entered  
 into a contract of sale to purchase decedent's cooperative apartment.

The administrator of the estate commenced this proceeding for a declaratory judgment  
 and an order compelling White House Owners Corporation to consent to a contract of sale of the  
 decedent's cooperative apartment to a third party. The estate also seeks damages for breach of  
 fiduciary duty and tortious interference with a contract.

The proprietary lease between the corporation and decedent provides that a contract of  
 sale with a third party must be submitted to the corporation for approval and that there is no

limitation on the right of the corporation to withhold its consent. The estate argues that refusal to consent to the contract of sale is a breach of fiduciary duty and an unreasonable restraint on alienation of property. The corporation contends that it has the right to withhold consent to the sale on the grounds that the contract price is substantially below market value and the sale would negatively impact on the value of other units. The decedent purchased the unit in 2007 for \$425,000, with a mortgage loan from Wells Fargo Bank in the amount of \$340,000. The price in the current contract is \$141,000. The corporation had previously rejected a contract between the same parties for \$100,000.

In a decision dated February 22, 2010, the court determined that the standard to be applied to determine whether the corporation can withhold its consent is the business judgment rule. The application of that standard involves questions of fact which requires a trial as to that cause of action (*40 West 7th Street Corp. v Pullman*, 100 NY2d 147 [2003]).

In a subsequent decision/order (January 6, 2011) the court questioned whether jurisdiction was incomplete as the purchaser was not a party to the proceeding. The purchaser then made the instant motion to intervene as an additional petitioner. The purchaser, a stranger to the proprietary lease, lacks standing to compel the corporation to approve the contract of sale (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]; *Aridas v 244 East 60th Street Owners Corp.*, 292 AD2d 325 [1st Dept 2002]). Although she clearly has an interest in the outcome of these proceedings, her motion to intervene as an additional petitioner is denied.

The corporation now moves to renew a prior motion for summary judgment (CPLR 2221), based upon testimony elicited during pre-trial discovery. The motion to renew is granted. The

deposition of the administrator produced additional evidence which warrants reconsideration of the motion (*First Nat. Bank of Hudson Valley v Schantz*, 253 AD2d 735 [2d Dept 1998]).

On respondent's previous motion for summary judgment, the corporation argued that the estate, which is insolvent, lacks standing as it has no financial interest in whether the short sale of the subject apartment is approved by the corporation. The Bank's approval of the short sale has since expired and an application for an extension has been made. The corporation argues that even if the short sale is approved, the estate will not receive any of the proceeds of the sale, thus it has nothing to gain. Conversely, the estate cannot establish a loss if the sale is not approved because it has no assets other than the subject shares and lease.

At a hearing on the estate's prior motion for a preliminary injunction to prevent the corporation from transferring the shares assigned to the subject apartment, the administrator asserted that the estate has financial exposure as far as a deficiency judgment if the sale is not completed. The corporation questioned whether the estate had any assets other than the cooperative apartment against which a judgment could be enforced. In a deposition which post-dated both the hearing and the prior motions for summary judgment, the administrator admitted that the only asset of the estate is the cooperative apartment.

The corporation now seeks summary judgment dismissing the estate's cause of action for tortious interference with a contract on the grounds that no damages are alleged. The elements of a cause of action for tortious interference with a contract are: (1) the existence of a contract between petitioner and a third party; (2) respondent's knowledge of the contract; (3) respondent's intentional inducement of the third party to breach or otherwise render performance impossible;

and (4) damages to petitioner (*Lama Holding Co. v Smith Barney, Inc.*, 8 NY2d 413 [1996]; *Israel v Wood Dolson Co.*, 1 NY2d 116 [1956]). No cause of action arises until damages are sustained (*Kronos Inc. v AMX Corp.*, 81 NY2d 90 [1993]; *American Federal Group Ltd. v Edelman*, 282 AD2d 279 [1st Dept 2001]). Since the estate has neither alleged nor sustained any damages, the branch of the corporation's motion to dismiss the cause of action for tortious interference with a contract is granted.

As to the estate's cause of action for breach of fiduciary duty, such a cause of action requires actual damages (*IDT Corp. v Morgan Stanley Dean Witter*, 12 NY3d 132 [2009]). There being none here, the corporation's motion for summary judgment dismissing the cause of action for breach of fiduciary duty is also granted.

The corporation also seeks summary judgment dismissing the estate's cause of action for a permanent injunction. Damages are not an essential element of a cause of action for a permanent injunction. On the contrary, a permanent injunction is an equitable remedy which is not available if monetary damages would be adequate (*Parry v Murphy*, 79 AD3d 713 [2d Dept 2010]). Although typically an injunction is sought to prevent a certain action from being taken, the subject of a petition for a permanent injunction may be a request for an order directing affirmative action by the respondent (*Nat. Holding Corp. v Banks*, 22 AD3d 471 [2d Dept 2005]), often called a mandatory injunction. The relief requested herein is an order directing the corporation to consent to the sale. The time-honored rule is that there be no unreasonable restraint on alienation, even of personal property (*Allen v Biltmore Tissue Corp.*, 2 NY2d 534, 540 [1957]). By not approving the sale of the apartment to the purchaser, the corporation is restraining the estate's right to alienate

the property. As indicated, whether the corporation's refusal to approve the sale is unreasonable is a question of fact requiring a hearing. Thus, the branch of the corporation's motion dismissing the cause of action for a permanent mandatory injunction is denied.

The corporation alleges that it is entitled to summary judgment dismissing the petition on the grounds that neither a second contract nor a second application were submitted to the corporation for approval. The corporation argues that the information supplied in the application is necessary to determine the financial status of the prospective purchaser, which may have changed during the interval between submission of the first contract and execution of the second contract. The estate did not produce a copy of the second contract in opposition to the corporation's prior motion for summary judgment and to dismiss the petition. The court's prior decision stated that upon the trial of the action, the estate would be required to produce the second contract and evidentiary proof of submission of the contract to the Board of Directors for approval. The decision did not state (as the corporation asserts) that the estate was required to prove that a second application was submitted.

The administrator testified at a deposition that he delivered a copy of the second contract "to the offices of the White House Owners Corporation," but that the President of the Board of Directors "was hiding." The President of the Board of Directors denies that a copy of the second contract was delivered to his office.

The conflicting testimony of the administrator and the President of the Board of Directors raises a question of fact as to whether a copy of the second contract was delivered. A court may not weigh the credibility of witnesses on a motion for summary judgment unless it appears that

the issue is not genuine (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]; *Lipschutz v Kiderman*, 76 AD3d 178 [2d Dept 2010]).

The minutes of a Board of Directors meeting indicate the estate had a new contract for \$141,000 and that the selling price was insufficient. The estate argues that the minutes establish that the corporation must have received a copy of the second contract. The minutes are not conclusive on this issue; awareness of a purported contract is not conclusive evidence of possession of a copy of such a contract.

The corporation argues that even if the second contract had been submitted for approval, the purchaser's failure to submit a second application establishes that the estate did not meet the conditions for approval. The instruction sheet provided by the corporation to the administrator requires the purchaser to submit an application with information concerning the purchaser's finances and employment history. It is conceded that the purchaser supplied this information in support of the first contract. The corporation alleges that the failure to supply the information with respect to the second contract constitutes a failure to satisfy a condition precedent to the corporation's obligation to review the second contract. The court notes that the same person is the purchaser in both contracts.

In the absence of incorporation by reference, the instructions are not contractual terms. The corporation does not state that the instructions were attached to the proprietary lease (*Eis Group/Cornwall Hill Development Corp. v Rinaldi Const. Inc.*, 154 AD2d 429 [2d Dept 1989]) and the instructions are not identified in the lease (*Shark Information Services Corp. v Crum and Forster Commerical Ins.*, 222 AD2d 251 [1st Dept 1995]). The application requirements (aside

from the requirement of submission of a copy of the contract) are not part of the proprietary lease. Therefore, satisfaction of the requirements is not a condition precedent.

However, the alleged failure to provide updated financial information as required by the instruction sheet is a fact to be considered in assessing whether the corporation's refusal to consent violates the business judgment rule. An additional fact to be considered is whether the corporation requested updated information.

The corporation seeks denial of the estate's motion for partial summary judgment on the grounds that it violates the general proscription against successive motions for summary judgment (*Tolpygina v Teper*, 63 AD3d 722 [2d Dept 2009]).<sup>1</sup> That part of the estate's current motion, which seeks summary judgment on the grounds that the Mortgage Debt Relief Act of 2007 requires Wells Fargo Bank to approve the sale of the cooperative apartment without the consent of the Board of Directors, is an entirely new cause of action which requires a motion to amend the pleadings (CPLR 3025 [a]) and that branch of the motion is therefore denied. Despite the general proscription against successive summary judgment motions, the court will consider the balance of the estate's motion for summary judgment based upon the availability of newly discovered evidence; that is, the deposition of President of the Board of Directors (*Central Equities Credit Corp. v B & N Properties*, 56 AD3d 943 [2d Dept 2009]). The testimony, however, does not support the estate's motion for summary judgment. To prevail, the estate would have to establish, as a matter of law, that the Board's conduct was unreasonable under the business judgment rule.

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<sup>1</sup> The estate's prior motion for summary judgment was denied by order dated March 12, 2010.

The testimony was merely that the Board of Directors had not set a minimum price for the apartment. That branch of the motion is also denied.

The estate's motion also seeks to dismiss the answer (CPLR 3126) on the grounds that the corporation failed to produce a witness for deposition. The corporation states that it offered to produce the witness (as the person in the corporation having the most knowledge of the facts), that the offer was rejected and that the estate later changed its position and sought to depose the witness. The corporation alleges that it then adjourned the deposition because summary judgment motions were pending. There was no court order which directed the deposition of the specific witness.

A court is authorized to strike a pleading of a party when it refuses to obey a court order for disclosure or wilfully fails to disclose information which should have been disclosed (*Nunez v City of New York*, 37 AD3d 434 [2d Dept 2007]). The estate has not established either of these circumstances. Moreover, pre-trial discovery was automatically stayed during the pendency of motions for summary judgment (CPLR 3214 [b]); *Shovak v Long Island Commercial Banks*, 35 AD2d 837 [2d Dept 2006]).

The corporation seeks a hearing to increase the undertaking posted by the estate. The court previously granted the estate's motion for a preliminary injunction against the corporation on condition that the estate post a bond in the amount of \$7,500.00 (decision dated November 5, 2009). The bond was to secure the amount of maintenance charges in arrears.

The corporation states that the amount in arrears now exceeds the bond and that additional security is needed to cover maintenance costs which will accrue pending a decision in this matter.

A hearing is required on this application.

Accordingly, the corporation's motion to renew is granted and upon renewal, the corporation's motion for summary judgment is granted in part, dismissing the causes of action for breach of fiduciary duty and tortious interference with a contract. The corporation's motion is otherwise denied. The estate's motion to dismiss the answer is denied. The estate's motion for partial summary judgment is denied. The purchaser's motion to intervene is denied. A decision on the corporation's motion to increase the undertaking will be made after a hearing which is scheduled for May 17, 2011 at 9:30 a.m. The hearing will be followed by a conference to schedule further pre-trial discovery.

Settle order.

Dated: March 31, 2011

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court