

**Slukina v 409 Edgecombe Ave. Hous. Dev. Fund Corp.**

2013 NY Slip Op 31966(U)

August 16, 2013

Supreme Court, New York County

Docket Number: 154213/2012

Judge: Ellen M. Coin

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

PRESENT: ELLEN M. COIN  
J.S.C.  
Justice

PART 63

Index Number : 154213/2012  
SLUKINA, ELENA  
vs  
409 EDGECOMBE AVENUE HOUSING  
Sequence Number : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION AND CROSS-MOTION(S) ARE  
DECIDED IN ACCORDANCE WITH ANNEXED  
DECISION AND ORDER.**

*This constitutes the decision and order  
of the Court.*

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

Dated: 8/16/13

Ellen  
\_\_\_\_\_, J.S.C.  
ELLEN M. COIN  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

-----X  
ELENA SLUKINA and ADAM PLOTCH,  
Plaintiffs,

-against-

Index Number: 154213/2012  
Motion Date: April 17, 2013  
Motion Sequence: 001  
**DECISION AND ORDER**

409 EDGECOMBE AVENUE HOUSING  
DEVELOPMENT FUND CORPORATION, TANE,  
WATERMAN & WURTZEL, P.C., NATACHA  
PASQUIS SIMMONS a/k/a N. PAIGE SIMMONS,  
NEMO SEMRET, ELIZABETH MEKURIA and  
CITIBANK, N.A.,  
Defendants.

-----X  
**HON. ELLEN COIN, A.J.S.C.:**

Defendant 409 Edgecombe Avenue Housing Development Fund Corporation (409 Edgecombe) moves to dismiss the complaint and any cross-claims asserted herein against it. Defendants Tane Waterman & Wurtzel, P.C. (TW&W) and Natacha Pasquis Simmons a/k/a Paige Simmons (Simmons) move for similar relief.

**BACKGROUND**

Plaintiffs Elena Slukina (Slukina) and Adam Plotch (Plotch) are two apparently unrelated individuals who both submitted bids at the foreclosure auction of apartment 13A in a cooperative apartment building located at 409 Edgecombe Avenue in the County, City and State of New York. (Compl. ¶¶ 1, 11, 20, 35). According to the Notice of Auction, the sale was precipitated by the default of the proprietary lessee upon her financial obligations to 409 Edgecombe.

TW&W is the law firm that represents 409 Edgecombe, and Simmons is an associate attorney employed by TW&W. (Compl. ¶¶ 4-7). Defendants Semret and Mekuria are the

current record owners of unit 13A. (Compl. ¶¶ 8, 64-69). Plaintiffs assert no cause of action against defendant Citybank, N.A.

Plaintiffs allege that after unit 13A was foreclosed upon, the shares appurtenant to it were put up for auction on two occasions: first, on June 6, 2011, and again on July 11, 2011. Each auction was preceded by public notice published in the New York Post. (Compl. ¶¶ 11-19, 26-30). Plaintiffs specifically assert that the first of these notices (the June notice) stated, in pertinent part, as follows:

This sale is to satisfy an indebtedness in the principal amount of [\$63,462.64] plus interest thereon, late fees, attorneys fees, plus maintenance and assessments in arrears, if any, and all other charges due Lessor [i.e., 409 Edgecombe].

The apartment will be sold “as is” without representation or warranty. This sale is held to enforce the rights of the Lessor as holder of a security interest in the shares herein described based upon the non-payment of charges due it and unpaid. Lessor reserves the right to bid/purchase and reject all bids to the extent that the amount bid for the apartment is not greater than the amount of sums owing on the apartment as of the auction date. This sale is subject to the approval of the successful bidder by the Lessor if the Lessor is not the successful bidder. A bank or certified check or money order, payable to [TW&W’s] escrow account ... in an amount equal to ten percent (10%) of the successful bid is required at knockdown to purchase the apartment if the Lessor is not the successful bidder. No cash will be accepted. All funds must be exhibited to the auctioneer prior to the commencement of bidding. Unless proper funds have been verified, you will not be permitted to bid. The balance of the successful bid is payable at closing, which shall be held within thirty (30) days of the auction date, time being of the essence therefore.

(*Id.*, Ex. C).

Plaintiffs also specifically assert that the second of these notices (the July notice) contained the exact same language as the earlier, although the amount of the indebtedness had been increased to \$70,043.04, a change not reflected in the text of the July notice. (*Id.*, Ex. D). Plaintiffs have also presented copies of the “Terms of Sale” (terms of sale) that were appended to

each notice. Both copies are identical, and assert, in pertinent part, as follows:

1. The property to be sold at the public auction of the captioned date (the "Auction Date") consists of certain collateral in the possession of [409 Edgecombe]. The collateral consists of 250 shares of the capital stock (the "Shares") of Cooperative ..., and the proprietary lease (the "Lease") appurtenant to the Shares ... for apartment 13A (the "Apartment") in the building located at 409 Edgecombe Avenue, New York, New York 10032
2. The successful bidder (hereinafter, the "Purchaser") is required to provide Auctioneer with his or her name, address and telephone number prior to the commencement of auction. Purchaser must satisfy Cooperative income guidelines for "persons and families of low income as defined in Section 576 subdivision (1) (b) of Article XI of the Private Housing Finance Law of the State of New York." The Cooperative reserves the right to bid on the Apartment. The Cooperative further reserves the right to reject bids for any reason not prohibited by law.
3. The Purchaser at the auction shall be required to deliver to the Cooperative at auction a deposit amounting to not less than ten percent (10%) of the successful bid (the "down payment") before the auction shall be deemed concluded, payable to TWW, PC, as Attorney. ...
4. All deposits and final settlements are payable by official bank or certified check or money order drawn upon a member bank of the New York Clearing House. The Cooperative may allow another manner of payment in its sole discretion.
5. The collateral will not be delivered and no Bill of Sale will be issued to the Purchaser until the entire purchase price has been paid in full at a closing held at the offices of [TWW] at 10:00 a.m. at which date which is no more than thirty (30) days following Cooperative approval of Purchaser, if any, and notice of which date Cooperative will provide to Purchaser no less than 5 days earlier (the "Closing Date"), or such other time and place to which Purchaser and the Cooperative may mutually agree in writing.
6. This is an auction sale of the Shares and Lease appurtenant to the Apartment... .
7. Within five (5) business days after the Auction Date, the Purchaser shall make application to the Cooperative for approval of the Purchaser as a shareholder and proprietary lessee from the Cooperative with respect to the Apartment and shall supply the managing agent of the Cooperative with all

information and documentation commonly requested by it in connection with such application ... . The Cooperative reserves the right to reject the Purchaser for any reason or no reason except as may be proscribed by applicable law. Except in the case of a purchase by the Cooperative, only purchasers for occupancy will be considered.

8. If the Cooperative approves the Purchaser, it will issue a new stock certificate respecting the Shares and a new Proprietary Lease, both in the name of the Purchaser, and cause such new stock certificate, new Proprietary Lease and keys to be delivered to the Purchaser on the Closing Date.

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12. If the Cooperative has refused to approve the Purchaser:
- A. the Cooperative may, in its sole discretion: (1) offer the Collateral to the next highest bidder at purchase price equal to the bid of such bidder and upon these same Terms of Sale, or (2) purchase the Collateral itself at a purchase price equal to the bid of such bidder or (3) re-offer the Collateral at a new public sale. This paragraph 12 (a) shall apply to any successor purchaser as well; and
  - B. (1) if the Purchaser has fully complied with these Terms of Sale, including, without limitation, the making of a good faith application to secure the approval of the Cooperative as a shareholder and proprietary lessee of the Cooperative, Purchaser shall be entitled to the return of Purchaser's 10% down payment (without interest), less the expenses of the auction incurred by the Cooperative, or (2) if the Purchaser has not fully complied in good faith with these Terms of Sale, the Cooperative may retain the down payment as liquidated damages, the exact cost of such default being impossible to determine at this time.

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17. By announcement made at the auction, without further publication or notice, the Auctioneer reserves the right to adjourn, delay or terminate the auction.

18. The Cooperative reserves the right to set an "upset price," below which the collateral will not be sold, and may receive credit against the purchase price bid for all sums due to the Cooperative.

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20. This auction and any resultant sale is without recourse to the Auctioneer or the Cooperative, or the Cooperative's agents, officers, directors, shareholders, employees, attorneys and other professionals.

21. In the event of a dispute between bidders, (on the knockdown of a price, for example), the Auctioneer reserves the right to determine the successful bidder or to offer the Shares and Lease for resale.

22. The Record of Sale maintained by the Auctioneer and the Cooperative must be taken by Purchaser as absolute and final in all disputes. ...

(*Id.*, Exs. C, D).

Plaintiffs assert that they placed conforming bids on apartment 13A at both auctions, and were both times rejected. Specifically, plaintiffs assert that on June 6, 2011, Plotch appeared with a certified check for ten percent of the debt then due on apartment 13A, but that after a 15 minute private conference between the auctioneer, William Mannion (Mannion), and representatives from 409 Edgecombe and TW&W, the auction was declared adjourned. (Compl., ¶¶ 20-25). Plaintiffs further allege that on July 11, 2011, both Slukina and Plotch appeared with certified checks for ten percent of the new debt amount; that two rounds of bidding were held; that after the first, Semret was declared to be the successful bidder but, as he did not have a certified check for the amount due with him at that time, his bid was rejected and, after the second round of bidding, Slukina was declared the successful bidder with a bid of \$120,000.00. (Compl., ¶¶ 31-35, 51-54). Plaintiffs also assert, however, that, despite having been successful, Slukina's bid was rejected by Mannion when, after a private conference with Simmons, he informed her and Plotch that the bid had not met a "reserve price" that had been set for apartment 13A, although such a price had not been announced or referred to in either notice and although Mannion refused to disclose what it was. *Id.*, ¶¶ 55-63. Plaintiffs finally assert that 409

Edgecombe thereafter improperly sold apartment 13A to Semret and Mekuria for a price of \$276,100.00 on February 27, 2012. *Id.*, ¶¶ 64-69.

Plaintiffs commenced this action on July 2, 2012 by filing a summons and complaint that sets forth causes of action for: 1) violation of the auction procedures set forth in UCC Article 9; 2) collusion; 3) a declaratory judgment and injunction; 4) breach of contract; 5) breach of the covenant of good faith and fair dealing; 6) unjust enrichment; 7) abuse of process; 8) tortious interference with prospective business relations; 9) tortious interference with contract; and 10) violation of General Business Law § 349. Semret and Mekuria filed an answer with a cross-claim against 409 Edgecombe and TW&W. Although Plotch is named as a plaintiff in the caption, the complaint limits itself only to claims by Slukina, as she is alleged to be the highest bidder. Accordingly, the Court will consider only the viability of claims asserted on behalf of Slukina, and will dismiss the complaint as asserted on behalf of Plotch for failure to state a cause of action.

#### DISCUSSION

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1<sup>st</sup> Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1<sup>st</sup> Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." (See *e.g. Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303

[2001]). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. (See e.g. *Tectrade Intl. Ltd. v Fertilizer Dev. & Inv.*, 258 AD2d 349 [1<sup>st</sup> Dept 1999]; *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1<sup>st</sup> Dept 1994]). Inasmuch as the instant motions seek dismissal of the entire complaint, the court will review each cause of action in turn.

### *Reserve Auction*

There are generally three types of auction: an absolute auction, which states without any reservation by the seller that the auctioned property goes to the highest bidder; a reserve auction, which affords a seller an opportunity to set an undisclosed reserve amount below which the unit will not be sold to the prospective bidder; and a conditional auction, reserving to the seller the right to accept or reject bids after the close of the bidding. An auction sale is deemed to be “with reserve unless the goods are in explicit terms put up without reserve.” (*Drew v John Deere Co. of Syracuse, Inc.*, 19 AD2d 308, 311 [4<sup>th</sup> Dept 1963]; UCC §2-328). “Reserves are prices below which an item may not be sold at auction. They are agreed to by the seller and the auctioneer and are not made public.” (7 NY Jur, Auctions and Auctioneers §3 [2d ed]).

“In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale.” (UCC §2-328). Unlike an absolute auction, a reserve auction does not imply a contractual relationship to deliver the subject item to the highest bidder, but instead constitutes a request “that the bidders make offers to seller, [with a contract formed when the auctioneer closes the bidding.] Hence it is understood that the [seller] may reject all bids and withdraw the goods from sale until he announces completion of the sale.” (Rest 2d

Contr §28, Comment (b) [1981]; Am Jur 2d, Auctions and Auctioneers §34 ). “In a conditional sale, the seller reserves the right to accept or reject bids after the close of the bidding; those conditions generally inform potential buyers that the auctioneer does not have the authority to accept the high bid and that bids will remain mere offers until accepted by the sellers. The key distinction between an auction with reserve and a conditional auction is that property can only be withdrawn before the close of bidding in the former, but it can be withdrawn after the close of bidding in the latter” (7 Am Jur 2d, Auctions and Auctioneers §34, Cum Suppl).

A review of the terms of sale discloses that 409 Edgecombe clearly had the right to set an undisclosed “reserve price” for the sale of unit 13A, and that the auctioneer had the sole right to resolve disputes between bidders over the “knockdown” of the sale price and to subsequently offer the shares and their appurtenant lease to other parties via resale. Further, paragraph 20 of the terms of sale states that the auction is “without recourse” against 409 Edgecombe or its auctioneer, Mannion. As the auction was a reserve auction with additional conditions of approval by the lessor, the auctioneer withdrew the apartment shares after Slukina had made the high bid because that bid did not meet the undisclosed reserve price. (*See Drew*, 19 AD2d at 312). Thus, no contract was ever consummated between Slukina and 409 Edgecombe. In the absence of a valid and binding contract, there does not arise an implied duty of good faith and fair dealing. (*See American -European Art Assocs., Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 171 [1<sup>st</sup> Dept 1996]). Accordingly, plaintiffs’ third, fourth, fifth and eighth causes of action sounding in contract and quasi-contract must be dismissed.

Slukina’s first cause of action seeks a declaration that defendants violated portions of Article 9 of the UCC, specifically UCC § 9-610, which requires that collateral be disposed of in a

“commercially reasonable” manner, and UCC § 9-627, which sets forth the criteria by which a “secured party’s” conduct is judged to have been “commercially reasonable” or not. 409 Edgecombe argues that plaintiffs’ claim must fail as a matter of law, because UCC § 9-627 (a) provides that “[t]he fact that a greater amount could have been obtained by ... the secured party is not of itself sufficient to preclude the secured party from establishing that the ... acceptance was made in a commercially reasonable manner,” and the complaint merely alleges that 409 Edgecombe was “unwilling[] to recognize Slukina’s highest bid of almost double the indebtedness listed in the July auction notice.”

Slukina’s second cause of action asserts collusion “in the method and manner of the public auction sale and ... the ensuing sale of the collateral to Semret and Mekuria.” (Compl., ¶ 97). 409 Edgecombe argues that this cause of action must also fail, as a matter of law, because it sounds in fraud, and plaintiffs have failed to plead said fraud with sufficient particularity. Slukina argues that her cause of action is actually based on the “commercial reasonableness” requirement set forth in UCC § 9-610, and asserts that “collusion is a relevant element in establishing the commercial reasonableness of the auction sale.”

However, Slukina’s attempts to set aside the foreclosure sale as commercially unreasonable under Article 9 of the UCC are misplaced, as she does not have standing to invoke the protections of UCC §9-601 *et seq.* Pursuant to UCC §9-625 (c), only “a person that, at the time of the failure was a debtor, was an obligor, or held security interest in or other lien on the collateral may recover damages under subsection (b) for its loss.” (*Cf. Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222, 223 [2<sup>nd</sup> Dept 1994]). To the extent that Slukina does not seek money damages for 409 Edgecombe’s breach of Article 9 but would use it as the basis for invalidation

of the sale, the same conclusion follows. Article 9 is not a general statutory provision governing the rights and obligations of parties to an auction sale; that is the province of Article 2 of the UCC, specifically UCC §2-328. Article 9 applies to the relations between parties to a contractual transaction, regardless of its form, that creates a security interest in personal property or fixtures. (UCC §9-109). UCC §9-611(c) specifically provides that a notification before disposition of collateral must be given to the debtor, any secondary obligor and additional lien holders as specified in subsection (c)(3). Slukina does not claim to have had any interest, much less a security interest, in the shares allocated to apartment 13A before the June and July auctions. Therefore, Slukina is not entitled to any protections under Article 9 of the UCC. As a result, the first and second causes of action, for violation of Article 9 of the UCC, and the sixth cause of action, for unjust enrichment as a result of such alleged violation, must be dismissed.

Slukina's seventh cause of action for abuse of process is based on the alleged improprieties in the two auctions. As the court has already dismissed the underlying claims as invalid, they cannot serve as the basis for a claim of abuse of process.

Slukina's tenth cause of action alleges that defendants violated General Business Law § 349. The Court of Appeals has observed that, "[t]o successfully assert a claim under General Business Law §349 (h) or §350, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice [internal citations omitted].'" *Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 (2012). Here, the complaint alleges that "the failure and disregard by defendants in announcing the reserve price prior to the July auction constituted a deceptive act." (Complaint ¶ 160). However, paragraph 18 of the terms of sale afforded 409

Edgecombe the right to set a “reserve price” for the sale of apartment 13A at auction, and does not require that 409 Edgecombe disclose that price. Slukina’s opposition papers fail to set forth any legal precedent requiring such disclosure under General Business Law §349 .

In their cross-motion, TW&W and Simmons note that they are only named as defendants in the seventh through tenth causes of action, and seek dismissal of these claims. The court has already determined that those causes of action should be dismissed because they are belied by the documentary evidence herein. Therefore, the court grants the cross-motion.

Co-defendant Citibank has not answered, nor has it joined in either of the instant motions. However, as was previously noted, plaintiffs have stated in their complaint that they named Citibank as a defendant herein “for notice purposes only,” and that they do not assert any causes of action against it. Defendants Semret and Mekuria were named as current lessees of apartment 13A. There appears to be no cause of action against them independent of the claims against 409 Edgecombe, yet Semret and Mekuria have also not moved to dismiss the complaint as against them. In the interests of judicial economy, the court dismisses the complaint as against these remaining defendants *sua sponte*.

In accordance with the foregoing reasons, it is hereby

ORDERED that the motion pursuant to CPLR §3211 of defendant 409 Edgecombe Avenue Housing Development Fund Corporation is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion pursuant to CPLR §3211 of defendants Tane, Waterman & Wurtzel, P.C. and Natacha Pasquis Simmons a/k/a Paige Simmons is granted, and

the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the Clerk of Court shall dismiss the complaint as against defendants Citibank, N.A., Nemo Semret and Elizabeth Mekuria without costs and disbursements, and the Clerk is directed to enter judgment accordingly.

Dated: August 14, 2013  
New York, New York

ENTER:

  
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Hon. Ellen Coin, A.J.S.C.