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| <b>Bittens v Board of Mgrs. of the Octavia<br/>Condominium</b>                                                                                                                                                                                                   |
| 2013 NY Slip Op 33218(U)                                                                                                                                                                                                                                         |
| December 17, 2013                                                                                                                                                                                                                                                |
| Sup Ct, NY County                                                                                                                                                                                                                                                |
| Docket Number: 653026/2012                                                                                                                                                                                                                                       |
| Judge: Joan M. Kenney                                                                                                                                                                                                                                            |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEYPART 8

Justice

Index Number : 653026/2012  
 BITTENS, ANDREW B  
 vs  
 BOARD OF MANAGERS OF THE  
 Sequence Number : 001  
 SUMMARY JUDGEMENT

INDEX NO. 653026/12  
 MOTION DATE 10/17/13  
 MOTION SEQ. NO. 001

The following papers, numbered 1 to 105, were read on this motion to/for SJ motion

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

No(s). 1-7Answering Affidavits — Exhibits X motion + memo to courtNo(s). 8-50Replying Affidavits app to X motion + memo to courtNo(s). 51-70

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

71-78

79-81

82-85

102-105

Reply memo + reply to X motionReply to Motion + memoSee Reply per Court order + memo of Law

## MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

 MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):
Dated: 12/17/13

Joan M. Kenney, J.S.C.  
 JOAN M. KENNEY

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
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 8

-----X

ANDREW BITTENS,

Plaintiff,

Index No.: 653026/2012

-against-

THE BOARD OF MANAGERS OF THE OCTAVIA  
CONDOMINIUM, 320 57<sup>TH</sup> STREET, LLC, MICHAEL  
LAM, JOSEPH T. WONG, WALTER EPSTEIN,  
MICHAEL BOUFFARD, LESLIE WACKERMAN,  
ALLEN FOSTER TENNANT, MAXWELL-KATES, INC.,  
MICHAEL BOGART and DAVID DEGIDIO,  
Defendants.

-----X  
**JOAN M. KENNEY, J.:**

This action arises out of a failed real estate transaction between plaintiff Andrew Bittens and nonparty seller, whereby plaintiff alleges that the defendant The Board of Managers of the Octavia Condominium (Board) acted improperly in exercising its right of first refusal. Defendant Joseph T. Wong moves, pursuant to CPLR 3212, for an order dismissing the complaint as against him. Plaintiff cross-moves, pursuant to CPLR 3126, for an order striking Wong and defendant 320 57<sup>th</sup> Street, LLC's answer, along with an order precluding these defendants from offering any evidence in their defense. Plaintiff also cross-moves, pursuant to CPLR 3212 (b) and (e), to strike Wong and 320 57<sup>th</sup> Street, LLC's affirmative defenses and seeks partial summary on his first cause of action as against only Wong and 320 57<sup>th</sup> Street, LLC, and requests a money judgment in the amount of no less than \$240,000.00, and a hearing to measure further damages.

Defendants Board of Managers, Michael Lam (Lam), Walter

Epstein (Epstein), Michael Bouffard, Leslie Wackerman, Allen Foster Tennant, Maxwell-Kates, Inc., Michael Bogart (Bogart) and David DeGidio (DeGidio) (collectively, Condo-defendants) request, pursuant to CPLR 3212 (b), that the court search the record and grant summary judgment to all defendants. Defendant 320 57<sup>th</sup> Street, LLC, represented by Wong's attorney, seeks the same relief.

#### **BACKGROUND AND FACTUAL ALLEGATIONS**

In June 2012, plaintiff became aware of a condominium unit (Unit) being privately offered for sale at the Octavia Condominium, which is located at 216-218 East 47<sup>th</sup> Street, New York, NY. Plaintiff, a lawyer who is representing himself in this action, is a partner at a real estate litigation firm. The seller of the Unit (Seller), entitled Elizabeth Atwood or 216 East 47 LLC, is a client at plaintiff's law firm. On July 6, 2012, plaintiff entered into a contract with Seller to purchase the Unit for \$300,000. Plaintiff states that he "intended to reside in the Unit as [my] primary residence." Wong's exhibit A, complaint, ¶ 31. A closing date was scheduled for July 31, 2012.

Pursuant to the contract (the Contract) between plaintiff and Seller, the prospective sale was subject to a right of first refusal whereby the Board could purchase the Unit in accordance with the Condominium's bylaws. The Contract states the following, in pertinent part, "[i]f so provided in the Declaration or By-Laws, this sale is subject to and conditioned upon the waiver of a right

of first refusal to purchase the Unit held by the Condominium and exercisable by the Board." Plaintiff's exhibit BB, exhibit A, ¶ 8.

Pursuant to the Contract, the Seller had the obligation to inform the Board of the contemplated sale. If the Board decided to exercise its right of first refusal, pursuant to the Contract, the Seller was to refund plaintiff the down payment and the Contract "shall be deemed cancelled and of no further force or effect and neither party shall have any further rights against, or obligation or liabilities to, the other by reason of this contract." *Id.* The Board had 20 days to exercise its right of first refusal or it would be waived. Section 10 in the Contract sets forth the understanding that the purchaser has examined the declaration and the bylaws of the Condominium, or has waived such an examination.

Evidently, when the Board found out about the prospective purchase, it was concerned how the below-market price sale would affect the other units in the building. Epstein, who is the President of the Board, during his testimony estimated the fair market value of the apartment to be between \$500,000 and \$700,000. Epstein testified that the adverse implications of the sale included "that the valuation of everyone's units would be adversely affected by having a purchase at that price." Condo-defendants' exhibit B, Epstein tr at 133. As such, the Board wanted to buy the Unit and then proceed with a "quick flip of that unit," for the best interests of the condominium.

According to the bylaws, the Unit may be purchased by the Board or its "designee." The Board may levy an assessment against each unit owner to purchase the Unit or finance the Unit, in its discretion. Article 8.6 of the bylaws states the following:

"The purchase of any Unit by the Board or its designee, on behalf of all Unit owners, may be made from the funds deposited in the capital and/or expense accounts of the Board. If the funds in such accounts are insufficient to effectuate any such purchase, the Board may levy an assessment against each Unit Owner, in proportion to his respective Common Interest, as a Common Charge, and/or the Board may, in its discretion, finance the acquisition of such Unit; . . . ."

Plaintiff's exhibit II at 36.

After it heard about the prospective sale, the Board held a special meeting to discuss the options. The Board did not have enough money in its reserve funds for the purchase and it did not want to levy an assessment against the unit owners. However, according to the Condo-defendants, the Board did not have enough time, due to the right of first refusal time constraints, to secure a traditional loan from a bank. After the Board reached out to several people, Wong advised the Board that he could assist with a loan in a short time frame and guarantee the Board a minimum return.

A meeting was held on July 18, 2012 to discuss the right of first refusal with respect to the Unit. The Board voted to exercise its right of first refusal, and designated Wong or an LLC

formed by Wong, to be its designee. The minutes of the meeting provide that the Board would enter into a joint venture agreement with Wong or an LLC formed by Wong. Wong would be the designee who financed and purchased the Unit. Then, after re-sale, Wong and the Condominium would split the profits, but the Condominium would receive no less than \$100,000 on any re-sale. Exhibit MM.

On July 25, 2012, the Board entered into an agreement with Wong or an LLC formed by Wong (Designee Agreement). The agreement specifically was between the Board and "Joseph T. Wong, Esq. or an LLC to be formed, ('Wong'), with an address at 1- Lafayette Street . . . ." Plaintiff's exhibit A. The agreement set forth what was discussed at the Board meeting and emphasized, in caps, that the Condominium was to receive no less than \$100,000 of the re-sale of the Unit. The agreement noted that "Wong shall essentially step into the shoes of the Board and pay any and all costs, fees and taxes due by or from the Board in its exercise of its right of first refusal." Plaintiff's exhibit A at 1. The agreement also emphasized that the Board was acting as agent for its unit owners.

Epstein testified that the financing agreement arranged with Wong and the Board was not in violation of the bylaws. Epstein testified that it was acceptable and authorized within the bylaws for Wong or his entity to receive the money. He further stated "[w]e are permitted to engage in financing transactions for the benefit of the condominium unit holders. And in that regard, we

have to exercise proper judgment as a board as to what would be a responsible transaction for the benefit of the holders." Epstein tr at 55.

By letter dated July 25, 2012, the Seller was informed that the Board wanted to exercise its right of first refusal and purchase the Unit. The letter stated the following, in pertinent part:

"Please be advised that pursuant to Article 8 of the Bylaws of the Octavia Condominium, the Board of Managers hereby exercises its right of first refusal to purchase Unit 22A at 216 East 47<sup>th</sup> Street, New York, New York, upon the same terms and conditions as set forth in the Contract of Sale dated July 6, 2012 between 216 East 47 LLC and Andrew B. Bittens.

"We are eager to close on the transaction so upon your receipt of this letter, kindly contact our counsel . . . to set up the Closing of Sale to the Unit."

Plaintiff's exhibit BB, exhibit B.

One day later, plaintiff was informed about the Board's decision. On July 31, 2012, Bogart, who was counsel to the Board for this transaction, emailed the Seller's lawyer, "[w]e will take title in the name of 320 57<sup>th</sup> Street LLC c/o Joseph Wong, 100 Lafayette Street . . ." Condo-defendants' exhibit K at 1.<sup>1</sup>

Lam, a member of the Board, is also a member of 320 57<sup>th</sup> Street LLC. Apparently the Board was unaware that Lam was a 10% owner in 320 57<sup>th</sup> Street, LLC until after this action commenced. Lam himself

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<sup>1</sup> Bogart is in-house counsel for defendant Maxwell-Kates, Inc., which is the managing agent for the Octavia Condominium.

was unaware that he was listed as 10% owner of the entity that did the purchasing. Epstein stated that, although he wished that he knew of Lam's interest prior to the sale of the Unit, it would not have changed his judgment on the transaction. The Condo-defendants further advise that section 2.13 of the bylaws permits the Board to contract with a Board member, "except in cases of bad faith of willful misconduct, incurring any liability for self-dealing." Plaintiff's exhibit II at 9. Lam informed the Board that he had no economic interest in the transaction.

According to defendants, 320 57<sup>th</sup> Street, LLC's title company would not provide title insurance until the Board waived its right of first refusal prior to closing. . Wong's and 320 57<sup>th</sup> Street, LLC's exhibit 12. DeGidio, secretary of the Board of Managers, testified that this was a "normal document that we would sign for a closing," either for the attorneys or the title companies. Condo-defendants' exhibit D, DeGidio tr at 69. As such, on August 10, 2012, DeGidio, as Secretary to the Board, issued the Board's waiver and release of the Board's right of first refusal with respect to the sale of the Unit on the terms and conditions set forth in an offer by 320 57<sup>th</sup> Street, LLC. The title report lists 320 57<sup>th</sup> Street, LLC as the purchaser and the proposed insured, and provides all of Wong's contact information.

On that same date, the Unit was sold from the Seller to 320 57<sup>th</sup> Street, LLC for \$300,000, plus some additional small fee

adjustments.

On December 20, 2012, as promised in the Designee Agreement, 320 57<sup>th</sup> Street, LLC re-sold the Unit to other purchasers for \$540,000. The Condominium then received a check for \$112,086.00, payable to the Octavia Condominium, which represented 50% of the profits from the sale. The funds were for the benefit of all the unit owners, and no board members received any funds from this transaction. Wong or his entity received the other 50%, pursuant to the Designee Agreement.

Plaintiff then commenced this action against the defendants, claiming that the Board had no right to exercise its right of first refusal to "usurp Plaintiff's contract for the benefit of Defendant 320 57<sup>th</sup> Street, LLC." Complaint, ¶ 48.

Plaintiff's first cause of action is for tortious interference with contract. In this cause of action, plaintiff argues that he entered into a valid contract with the Seller and that defendant improperly and tortiously interfered with the contract by purporting to exercise a right of first refusal and then failing to consummate the sale. Plaintiff believes that the apartment is worth \$800,000 and that he has suffered financial harm as a result of defendants' alleged malicious actions.

Plaintiff's second cause of action is for fraud. He alleges that he was advised that Seller would be selling the Unit to the Condominium. He states that he relied on the information received

that the Condominium would be purchasing the Unit. Had he known that the Board would waive its right to first refusal and that 320 57<sup>th</sup> street LLC would be purchasing the Unit, he would have made sure to consummate his contract with the Seller.

Plaintiff claims in his third cause of action that defendants intentionally inflicted harm on plaintiff with their actions.

In his fourth cause of action, plaintiff seeks to have his application fee refunded to him, arguing that his application was not properly reviewed. He states that he should receive his processing fee back since defendants conducted a sham process.

Plaintiff requests a declaration of the respective rights of the parties in his fifth cause of action.

In his sixth cause of action, plaintiff is seeking a return of his financial records which he delivered to defendants in support of his purchase application.

Plaintiff claims that, by exercising its right to first refusal and then waiving its rights, the Board violated the bylaws. As such, he argues that the notice to exercise the right of first refusal was nullified. He further maintains that the Board violated the bylaws, alleging that it did not purchase the Unit for the benefit of all the owners.

Plaintiff claims that the individual members of the Board were able to profit from this transaction, in violation of the bylaws. He contends that the designation of 320 57<sup>th</sup> Street LLC as a

designee was an improper attempt to allow an insider to profit from the sale. He summarizes:

"Upon information and belief, the Board of Managers and its individual members, along with their attorneys and managing agent, concocted a scheme to tortiously interfere with Plaintiff and Seller's contract and defraud Plaintiff whereby it would represent that it was purchasing the unit on behalf of all unit owners and then on the day of the closing waive that right in favor of a third party, 320 57<sup>th</sup> Street, LLC."

Complaint, ¶ 53.

Wong brought a motion for summary judgment dismissing the complaint as against him. Wong argues that the documentary evidence controverts plaintiff's allegations, and that the complaint should be dismissed as against him and 320 57<sup>th</sup> Street, LLC.

Plaintiff brings a cross motion for summary judgment, seeking to strike Wong and 320 57<sup>th</sup> Street LLC's answer and their affirmative defenses, and also seeking partial summary judgment on his first cause of action against Wong and 320 West 57<sup>th</sup> LLC and also a money judgment as against those parties.

The Condo-defendants do not bring a motion or cross motion for summary judgment. Instead they request that the court search the record and dismiss the complaint as against them, arguing that the Board exercised a proper right of first refusal in accordance with the bylaws.

## DISCUSSION

### I. Summary Judgment:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). CPLR 3212 (b) provides, "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

### Tortious Interference With A Contract:

To successfully plead a cause of action for tortious interference with a contract, plaintiff must prove: "(1) the existence of a valid contract, (2) defendants' knowledge of the contract, (3) defendants' intentional interference with the contract and a resulting breach, and (4) damages. *Avant Graphics v United Reprographics*, 252 AD2d 462, 463 (1<sup>st</sup> Dept 1998).

Applying the law to the case at hand, plaintiff's claim for

tortious interference with a contract fails as a matter of law. In the present situation, plaintiff specifically denied that the Seller breached the contract at issue, which is the one between himself and the Seller. He testified that the Seller, who was also represented by a senior partner in plaintiff's law firm, in no way breached the contract with him and that the Seller was a "victim" like he was, just without damages. Condo-defendants' exhibit A, Plaintiff's tr at 172.<sup>2</sup>

Moreover, plaintiff cannot establish damages. Plaintiff's down payment was returned to him. He testified that he intended to live in the Unit "indefinitely," and that he had not planned on how long he would reside in the Unit. Plaintiff's tr at 80.<sup>3</sup> As such, plaintiff is alleging some future hypothetical sale as a basis for his loss.<sup>4</sup> As explained in *Maruki, Inc. v Lefrak Fifth Ave. Corp.* (161 AD2d 264, 267 [1<sup>st</sup> Dept 1990]), "damages for the prospective consequences of tortious injury cannot be recovered when so highly

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<sup>2</sup> The court notes plaintiff's attempt to alter his testimony after receiving the defendants' opposition papers to allege that he is now claiming that there was an unintended breach by the Seller. Regardless of what plaintiff claims, the Seller did not breach the Contract.

<sup>3</sup> The court notes plaintiff's attempt to alter his testimony after receiving the defendants' opposition papers. He changed his testimony to "a year or two until I sold the unit" rationalizing that he misunderstood the question.

<sup>4</sup> Plaintiff's use of *White v Farrell* (20 NY3d 487 (2013)), in which the Court discusses the damages available to the seller when there was a breach of the contract by the buyer, does not bolster his argument.

speculative." See also *Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124, 125 (1<sup>st</sup> Dept 2003) ("The damages for which a party may recover for a breach of contract are such as ordinarily and naturally flow from the non-performance. They must be proximate and certain, or capable of certain ascertainment, and not remote, speculative or contingent [internal quotation marks and citation omitted]").

Despite the lack of breach by the Seller, and lack of damages, plaintiff keeps reiterating that, although the Seller did not breach the Contract, the defendants interfered in such contract with a tortious act. Plaintiff alleges that the Board failed to properly exercise its right of first refusal and, in fact, did not legally exercise it at all, since it was waived on the date of the closing. However, as set forth below, the Board did not commit a tortious act.

The Contract between plaintiff and Seller advised plaintiff that his sale was conditioned on the Condominium's right of first refusal in the manner provided for in the bylaws. The bylaws state that the Board could either purchase the Unit itself or assign a designee for that purpose. Wong, or an LLC formed by Wong, which was 320 57<sup>th</sup> Street, LLC, became that designee. The Board unanimously voted that the designee, or 320 57<sup>th</sup> Street, LLC would finance and facilitate the exercise of the right of first refusal by purchasing it and then reselling it for the benefit of the unit owners. The Board believed that if the Unit were sold to plaintiff

and then not quickly resold, the other units in the building would be devalued, since the plaintiff's purchase price was well below market value. Pursuant to the designee agreement, the Condominium received a check for half of the proceeds of the sale after 320 57<sup>th</sup> Street, LLC re-sold the Unit.

Prior to the closing, the Board was required to sign a waiver of the right of first refusal as a condition for 320 57<sup>th</sup> Street, LLC to receive title insurance. The Condo-defendants entitle this a "ministerial" act, done solely in order to obtain title insurance, which 320 57<sup>th</sup> Street, LLC needed in order to comply with the Designee Agreement. The designee and purchaser still remained 320 57<sup>th</sup> Street, LLC, pursuant to the July 25, 2012 Designee Agreement, which set forth the details of the right of first refusal. As defendants stated, the Board had to do this in order to carry out the Designee Agreement and to protect its investment.

There is no indication that the Board failed to comply with the bylaws in furtherance of exercising the right of first refusal in all aspects, including who provided the financing and who became the designee. In any event, plaintiff does not have standing to allege a claim of tortious interference of a contract grounded in the Board's alleged non-compliance with its bylaws.<sup>5</sup> As set forth in *Soho Bazaar v Board of Mgrs. of Soho Intl. Arts Condominium* (266

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<sup>5</sup> The court notes that plaintiff reiterates that he does not wish to enforce the bylaws but is seeking a determination that the defendants' actions were not authorized by the bylaws.

AD2d 65, 65 [1<sup>st</sup> Dept 1999]), a case cited by Condo-defendants, a plaintiff who is a "mere contract vendee" lacks standing to challenge condominium bylaws. The Court in *Soho Bazaar* summarized with the following:

"Although the two units in question have been sold, the issues raised on this appeal, involving plaintiff's claims as a contract vendee of those units, are not moot inasmuch as there remains pending an action by plaintiff for money damages allegedly sustained by it as a consequence of defendant condominium's allegedly wrongful purchase of the units pursuant to a right of first refusal provision in its favor contained in the condominium by-laws. Turning to the merits, plaintiff, a mere contract vendee, lacks standing to enforce the condominium by-laws. We would also note that the board's actions were taken in good faith to further a legitimate interest of the condominium corporation, especially when consideration is given to the corporation's start-up financial status."

*Id.*

Accordingly, taking all of the arguments above, plaintiff has not raised a triable issue of fact with respect to his claim for tortious interference with a contract, and his cross motion for partial summary judgment is denied. Although Wong was the only defendant who moved for summary judgment, "a motion for summary judgment, irrespective of by whom it is made, empowers a court, even on appeal, to search the record and award judgment where appropriate [internal quotation marks and citation omitted]." *DCA Adv. v Fox Group*, 2 AD3d 173, 174 (1<sup>st</sup> Dept 2003). Since there are

no triable issues of fact with respect to tortious interference with a contract, all of the defendants are granted summary judgment dismissing this cause of action.

Fraud:

Plaintiff states that defendants made material misrepresentations of fact when they delivered the July 25, 2012 notice to exercise the right of first refusal to him. He claims to have relied on the Board's representations that the Condominium was purchasing the Unit in accordance with the bylaws for the benefit of all unit owners. Plaintiff reiterates that he suffered damages of no less than \$500,000.00 as a result of this alleged misrepresentation.

The elements of a fraud claim require a plaintiff to establish the following: "(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) intent to induce reliance, (4) justifiable reliance and (5) damages." *Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 (1<sup>st</sup> Dept 2010).

There was no false or material misrepresentation by the Board when, after learning about the proposed sale between plaintiff and Seller, it informed the Seller's lawyer that it would be exercising its right of first refusal.<sup>6</sup> The Board, acting as an agent of its

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<sup>6</sup> The Seller's lawyer, who works in plaintiff's firm, advised plaintiff that the Board had elected to exercise its right of first refusal and delivered a copy of the notice to exercise right of first refusal to him.

unit owners, purchased the Unit through a designee, 320 57<sup>th</sup> Street, LLC.

"[T]he damages incurred by reason of the fraudulent conduct must be actual pecuniary losses." *Pope v Saget*, 29 AD3d 437, 441 (1<sup>st</sup> Dept 2006). As previously indicated, plaintiff cannot establish that he suffered damages. Therefore, as a matter of law, plaintiff's claim for fraud must fail and all defendants are granted summary judgment dismissing this cause of action.

Prima Facie Tort:

"Plaintiff failed to plead facts that are sufficient to support a cause of action for prima facie tort because the allegations do not establish that defendants' purportedly tortious conduct was motivated by an otherwise lawful act performed with the intent to injure or with 'disinterested malevolence' [internal citation omitted]." *Princes Point, LLC v AKRF Eng'g, P.C.*, 94 AD3d 588, 589 (1<sup>st</sup> Dept 2012). The defendants have shown that the Board was motivated to purchase the Unit for the benefit of all the unit owners, not by disinterested malevolence. As such, all defendants are granted summary judgment dismissing this cause of action.

Return of Application Fee:

Plaintiff alleges that he is entitled to return of his application fee to purchase the apartment since his application was allegedly not properly reviewed. Plaintiff has not created a triable issue of fact with respect to the entitlement of the return

of his application fee. As such this cause of action for conversion of his application fee is dismissed as against all defendants.

Declaratory Judgment:

As a result of this decision the complaint is dismissed as against all defendants and plaintiff is not entitled to a declaratory judgment.

Return of Records:

Plaintiff's request for a return of the records provided in conjunction with his application to purchase the apartment is denied.

Plaintiffs' Cross Motion:

As a result of this decision, plaintiffs' cross motion is moot, since all defendants have been granted summary judgment dismissing the complaint. This cross motion is denied.

The court has considered plaintiff's other contentions and finds them without merit.

Accordingly, it is hereby

ORDERED that the motion of defendant Joseph T. Wong to dismiss the complaint herein is granted and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that, after searching the record pursuant to CPLR 3212 (b), summary judgment dismissing the complaint is granted to defendants The Board of Managers of the Octavia Condominium, Michael Lam, Walter Epstein, Michael Bouffard, Leslie Wackerman, Allen Foster Tennant, Maxwell-Kates, Inc., Michael Bogart, David DeGidio, and 320 57<sup>th</sup> Street, LLC, and the complaint is dismissed in its entirety against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the cross motion of Andrew Bittens is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants.

December 17, 2013

  
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**JOAN M. KENNEY**  
J.S.C.