

**Board of Mgrs. of the Soundings Condominium v
Foerster**

2014 NY Slip Op 33704(U)

August 7, 2014

Supreme Court, New York County

Docket Number: 153150/14

Judge: Nancy M. Bannon

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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. Nancy Bannon
Justice

PART 42

BOARD OF MANAGERS OF THE
SOUNDINGS CONDOMINIUM

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MOTION DATE 8/6/14

SONJA FOERSTER

MOTION SEQ. NO. 001

The following papers, numbered 1 to 5, were read on this motion by the defendant Sonja Foerster for summary judgment dismissing the complaint pursuant to CPLR 3212.

Notice of Motion/ Order to Show Cause – Affirmation – Affidavit(s) – Exhibits – Memorandum of Law.....	No(s). <u>1</u>
Answering Affirmation(s) – Affidavit(s) – Exhibits	No(s). <u>2</u>
Replying Affirmation – Affidavit(s) – Exhibits	No(s). <u>3</u>
Sur-Reply	No(s). <u>4</u>
Response	No(s). <u>5</u>

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

It is well settled that the proponent of a motion for summary judgment pursuant to CPLR 3212 must establish its entitlement to such relief as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, *supra*; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, *supra*; O'Halloran v City of New York, *supra*; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970).

While the laudable public policy reasons supporting the enactment of Social Services Law §390(12) are undisputed, the defendant's moving papers fall short of demonstrating the absence of triable issues as to its applicability here. The defendant's own affidavit suggests that she purchased the

subject condominium unit with the intent to operate a day care facility on the premises should her child not be accepted into a suitable public pre-kindergarten program, rather than as residence for her child's caretaker as represented to the plaintiff. Even assuming that the defendant had met her burden on the motion in the first instance, the papers submitted in opposition raise triable issues, *inter alia*, as to whether the subject condominium unit is, in fact, a "dwelling" within the meaning of Social Services Law § 390(12) and whether, in the course of purchasing the unit, the defendant made any misrepresentation as to the intended use of the unit that may impact the validity of the parties' agreement or the applicability of the statute under the circumstances. Therefore, the instant motion must be denied. However, since there has been no discovery conducted to date, the denial is without prejudice to renew upon completion of discovery.


Accordingly, it is,

ORDERED that the defendant's motion for summary judgment is denied without prejudice to renew, and it is further,

ORDERED that the parties shall appear for a preliminary conference on October 30, 2014, at 9:30 am.

This constitutes the Decision and Order of the court.

Dated: August 7, 2014


 _____, JSC
HON. NANCY M. BANNON

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE