

Plotch v 435 E. 85th St. Tenants Corp.

2018 NY Slip Op 32643(U)

October 3, 2018

Supreme Court, New York County

Docket Number: 157881/2017

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29**

-----X
ADAM PLOTCH, Individually and as Assignee of
STEPHEN PLOTCH and BATIA PLOTCH,

Plaintiff,

- against -

435 EAST 85TH STREET TENANTS CORP.,
HALSTEAD MANAGEMENT COMPANY, LLC, JP
MORGAN CHASE BANK N.A. and RALPH
KAROW,

Defendants.
-----X

HON. ROBERT D. KALISH, J.:

Motion brought by Defendant JP Morgan Chase Bank N.A. (Seq. 001) to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (7), is granted for the reasons stated herein; and the motion brought by Defendants 435 East 85th Street Tenants Corp. and Halstead Management Company, LLC, (collectively, "Building Defendants") (Seq.002) to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (7), is granted, and the cross-motion by Plaintiff Adam Plotch for leave to amend the complaint, pursuant to CPLR 3025, is denied for the reasons stated herein.

BACKGROUND

The instant action arises from Plaintiff Adam Plotch's attempt to complete a prospective purchase of shares in a cooperative apartment – located at 435 East 85th Street, Apt. GB9, New York, New York – after entering the highest bid at a foreclosure auction conducted on January 29, 2014.

Around August 2003, Chase entered into a \$116,000.00 loan with Defendant Ralph Karow¹ (the "Borrower") for the financing of his purchase of the shares in

¹ Borrower was served with process on November 1, 2017, and Borrower has not appeared in the action. The complaint does not allege any specific causes of action against Borrower, and Borrower's name is

the cooperative apartment located at 435 East 85th Street, Apt. GB9, New York, New York 10028 (“the apartment”). At that same time, Borrower entered into a proprietary lease with Defendant, 435 East 85th Street Tenants Corp. (the “Corporation”), governing his lease of the apartment and purchase of the shares. In addition, at around the same time, Chase, the Corporation, and Borrower entered into a recognition agreement, which, among other things stated that:

“[CHASE] SHALL HAVE NO RIGHT OR POWER TO TRANSFER THE APARTMENT UPON FORECLOSURE OR OTHERWISE EITHER TO [CHASE] OR ANYONE ELSE WITHOUT [THE CORPORATION’S] APPROVAL AS REQUIRED BY THE LEASE provided, however, that nothing contained herein shall limit any rights [Chase] may have to dispossess the Lessee pursuant to law or realize upon [Chase’s] security in accordance herewith.”

(Chase Affirm. in Supp., Ex. E [Recognition Agreement] ¶ 3 [b].)

The Borrower defaulted on his payment obligations due under the loan prior to January 29, 2014. (Chase Affirm. in Supp., Ex. A [Complaint] ¶ 8.) As such, Chase notified the Borrower and the Building Defendants, “that the Note had been accelerated, and that a public auction of the Shares and Proprietary Lease would take place” (Complaint ¶ 9.)

On January 29, 2014, pursuant to said foreclosure, an auction of the Borrower’s shares was held by auctioneer Ivan Lau. Plaintiff submitted the highest bid, of \$146,000, and his deposit of \$14,600 was accepted by Mr. Lau, and a memorandum of sale was signed by Plaintiff and Mr. Lau. (Affirm. in Opp. [Seq. 001], Ex. A [Memorandum of Sale].) Plaintiff also signed a document entitled “Terms of Sale”—annexed to the memorandum of sale—that stated that “[t]he apartment is sold ‘AS IS’ and further subject to by-laws; rules, regulates [sic], procedures, resolutions, Offering Plan and any Amendments thereto of” the Corporation. The Terms of Sale further state:

only mentioned in the recitation of the allegations related to the first cause of action for declaratory judgment. Because this Court finds that Plaintiff has failed to state a cause of action for declaratory judgment—or any other cause of action—this Court sua sponte dismisses the complaint against Borrower.

“The purchase of the collateral is made subject to paragraph 17 (b) (iii) of the proprietary lease, the debtor's interest of which is to be transferred hereunder, and a copy of which is attached hereto. The purchaser acknowledges that it is his/her responsibility to comply with all requirements of the said proprietary lease, including but not limited to paragraph 17 (b) (iii) thereof.”

(Id. ¶ 7.) Paragraph 17 of the proprietary lease states in the relevant part:

“If this lease is terminated at the Lender’s request by reason of a default by the Lessee in any of the terms, covenants, provisions or in the payment to the Lender of any installment of principal or interest or in the performance of any other obligation of the Lessee to the Lender, the Lender may sell and assign the shares of the Lessor allocated to the apartment and this Lease, or sublet the apartment, for the account of the Lender to a reputable person of good financial standing subject only to the approval of the then Managing Agent of the Lessor, which approval shall not be unreasonably withheld.”

(Chase Affirm. in Supp., Ex. D [Proprietary Lease] ¶ 17; *see also* Affirm in Opp. re Seq. 002, Ex. 2 [Lease Surrender and Termination Agreement].)

Plaintiff alleges that, on or about September 2, 2015, he was advised by Defendant Halstead Management Company LLC, the Co-op's managing agent, that he had been approved to complete the purchase of the apartment. (Aff. in Opp. re Seq. 001 ¶ 10; Ex. E [September 2, 2015 Email] [stating “[t]he Board will allow the sale ...”].)

Plaintiff states that “[t]hat approval was subsequently withdrawn by the Managing Agent, with no explanation given, and I was then advised that Managing Agent and not Board approval was required.” (Aff. in Opp. re Seq. 002 ¶ 10.) Plaintiff alleges that upon the withdrawal of the approval, he did what he did on prior occasions: “I waited for Chase to prevail upon the Co-op to accept me as its foreclosure purchaser and permit me to close.” (Id. ¶ 11.)²

² Plaintiff attaches a copy of a summons and complaint, as Exhibit D to his affidavit, which he states Chase filed in a “similar circumstance” to compel a cooperative corporation to transfer the rights under the lease to him. (Plotch Aff. re Seq. 001 ¶ 11, Ex. D [Churchill Owners Complaint].)

Plaintiff states that, “[t]hinking that the Co-op might have some personal issue with me” he assigned the bid to his parents, Stephen and Batia Plotch. (Aff. in Opp re Seq. 001 ¶ 14.) Plaintiff states that Defendant Halstead, the managing agent, refused to approve the sale to his parents, “even though my parents are very strong financially and have no history of litigation.” (Id.)

In a letter, dated May 17, 2016, the Corporation’s general counsel wrote to Chase’s foreclosure counsel and a certain Adam Paul, Esq.³ “regarding the prospective transfer of unit GB9 at 435 East 85th Street to Stephen Plotch and Batia Plotch, and [to] respond to Mr. Paul’s e-mail dated May 8, 2016 addressed to Mr. Seimeca of the Corporation’s managing agent.” (Plotch Aff. in Opp re Seq. 002, Ex. 4 [May 17, 2016 Letter].) General counsel first wrote that with regard to section 17 of the proprietary lease—the provision that the Managing Agent’s approval shall not be unreasonably withheld—that section only applied if the lease had been terminated, and “[t]o our knowledge, the lease has not been terminated.” (Id. at 2.) As such, general counsel argued that Board consent was required pursuant to section 16 of the proprietary lease. (Id.)

General counsel further wrote:

“Even assuming, for the sake of argument, the managing agent consent requirement did apply, the managing agent would certainly have reasonable grounds to reject this application. Mr. Adam Plotch, the winning bidder at the foreclosure sale (and assignor of the bid to his parents, the applicants here), has been involved in at least sixteen (16) separate lawsuits dating back to 2005. He has a disturbing pattern of initiating lawsuits primarily involving purchases of cooperative apartments at foreclosure sales, as is the case here. He has also shown a disregard for cooperative rules and regulations in the past in connection with some of these litigations. The Corporation is also concerned with the structure of the transfer, in which Mr. Plotch, the winning bidder, has assigned his rights to his parents, although it is clear it is his intention to handle the renovations and ultimate re-sale of the Unit.”

(Id. at 2.) As such, General Counsel wrote that “the purchase application is rejected” and requested that Chase consider: “(a) a re-auction of the apartment, (b)

³ Building Defendants assert that this email address belongs to Plaintiff. (Building Def. Reply Memo. at 13 n 5.)

choose the next highest bidder from the auction (if there was one), or (c) engage a broker to market the apartment for sale.” (Id.)

Chase states that, in light of the Building Defendants’ refusal to approve the sale, Chase’s foreclosure counsel returned Plaintiff’s \$14,600.00 deposit to him on or about April 11, 2017. (Chase Affirm in Supp. re Seq. 001 ¶ 6, Ex. F [Return of Bid Letter].)

Plaintiff states that his parents then assigned “their claim” back to him, and Plaintiff commenced the instant action. (Pl. Aff in Opp. re Seq. 002 ¶ 11.)

The Complaint alleges the following causes of action against the Building Defendants: declaratory judgment, specific performance, breach of implied covenant of good faith and fair dealing, breach of contract, and attorney fees⁴ pursuant to the lease. Plaintiff alleges causes of action against Chase for breach of contract and breach of the implied covenant of good faith and fair dealing.⁵

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, “a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.” (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I*,

⁴ This cause of action for attorney fees is alleged only against the Corporation and not against the Managing Agent.

⁵ Plaintiff had previously alleged a cause of action against Chase for unjust enrichment, but that cause of action was withdrawn by stipulation dated November 6, 2017 (NYSCEF Document No. 11).

Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005].)

“Dismissal of a complaint pursuant to CPLR 3211(a)(1) is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff’s claims as a matter of law. The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence.”

(*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017] [internal citations omitted].) Construction of an unambiguous contract is a matter of law that may be decided by the court on a CPLR 3211 (a) (1) motion to dismiss. (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 325 [2007].)

This Court will first address the motion to dismiss brought by the Building Defendants along with Plaintiff’s cross-motion for leave to amend his complaint (Seq. 002) and will then address the motion to dismiss brought by Defendant Chase (Seq. 001).

Seq. 002 – Motion to Dismiss by Building Defendants

ARGUMENTS

Building Defendants argue that the complaint should be dismissed as against them because all of Plaintiff’s claims as against them, arise out of the alleged breach of the proprietary lease and the recognition agreement. Building Defendants argue that because Plaintiff was not a party to, or a third-party beneficiary of, either of those two contracts, Plaintiff cannot therefore enforce the terms of said agreements.

Second, Building Defendants argue that even if Plaintiff had standing to enforce the recognition agreement and proprietary lease, Plaintiff’s claims would

still fail because their refusal to approve the sale to Plaintiff would qualify as a proper exercise of their discretion under the business judgment rule.

Third, Building Defendants argue that Plaintiff's causes of action for specific performance are "deficient for the additional reason that the shares of stock allocable to the apartment at issue are not unique and Plaintiff himself concedes that he has an adequate remedy of law by virtue of his claims for money damages against Chase." (Building Def Memo in Supp. at 2.)

Plaintiff opposes the instant motion by Building Defendants and cross-moves for leave to amend his complaint to assert a cause of action for tortious interference with contract against Building Defendants.

Plaintiff argues that he is in fact not attempting to enforce the proprietary lease as a third-party beneficiary, but rather is exercising his rights, pursuant to CPLR 1004, to assert the rights on behalf of Chase that Chase should have asserted to protect his interests.

Plaintiff argues that Building Defendants' rescission of approval without any basis in reason and without regard to the facts may provide him with a right of action against Building Defendants, notwithstanding that he is a stranger to the proprietary lease and recognition agreement. (Pl. Memo in Opp. re Seq. 002 at 10-12, citing *Kallop v Bd. of Directors for Edgewater Park Owners' Co-op Inc.*, 155 AD3d 491, 492 [1st Dept 2017], lv to appeal dismissed sub nom. *Kallop v Bd. of Directors for Edgewater Park Owners' Coop. Inc.*, 30 NY3d 1101 [2018].)

Plaintiff further argues that there is a "question of fact" regarding the appropriate interpretation of paragraph 17 of the lease: whether Managing Agent approval applies only to a situation where the Lender (Chase) sublets the apartment, as Building Defendants contend; or, whether Managing Agent approval applies to situations where the Lender sells the shares and proprietary lease as well as where the Lender sublets (as Plaintiff contends). (Pl. Memo in Opp. re Seq. 002 at 16.)

In addition, Plaintiff contends that his claim for specific performance must stand because he is not required, on a motion to dismiss, to make an evidentiary

showing of the uniqueness of the interest for which he seeks a decree of specific performance.

Plaintiff further argues that the Court should grant his cross-motion for leave to amend the complaint and assert a tortious interference claim in that Building Defendants “intentionally interfered with that contract [with Chase] by various means, including, but not limited to unreasonably withdrawing approval of plaintiff’s application with the purpose of inducing the BANK not to close on the transfer and breach its agreement with plaintiff.” (Pl. Affirm. in Opp., Ex. 1 [Proposed Am. Compl.] ¶ 52.)

In Reply, Building Defendants re-iterate that Plaintiff is a stranger to the proprietary lease and recognition agreement, and as such Plaintiff lacks standing to sue for their alleged breach. Building Defendants further argue that in Plaintiff’s opposition to Chase’s motion and their motion, Plaintiff admits that he has no direct rights under the proprietary lease or recognition agreement. (Building Def. Reply Memo at 2 n. 3.)

In addition, Building Defendants argue that this Court should deny Plaintiff leave to amend his complaint to assert a cause of action for tortious interference by Building Defendants with his contract of sale with Chase, contending that Plaintiff fails to allege sufficient facts to plead such a cause of action.

ANALYSIS

I. The Complaint Must Be Dismissed as Against the Building Defendants.

In general, and in the absence of illegal discrimination or bad faith, a cooperative corporation is not restricted in withholding its consent to the transfer to an apartment. (*See Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d 486, 488 [1st Dept 2016], *affd*, 28 NY3d 1114 [2016]; *Bernheim v 136 E. 64th St. Corp.*, 128 AD2d 434, 435 [1st Dept 1987].)

A cooperative board’s decision to deny approval of a transfer of rights under the proprietary lease – like all decisions of a cooperative board – is generally reviewed under the deferential business judgment rule, “which places on the party seeking review of a cooperative board’s decision the burden of demonstrating a

breach of fiduciary duty.” (*Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 [1st Dept 2008].) However, the contractual right to challenge a cooperative board’s denial of a transfer rests solely with the owner attempting to sell his or her shares, and a contract vendee has no standing to challenge a board’s refusal to approve the transfer. (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Aridas v 244 E. 60th St. Owners Corp.*, 292 AD2d 325, 326 [1st Dept 2002]; *Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]; *Sims v Darwood Mgt., Inc.*, 147 AD2d 373, 376 [1st Dept 1989].)

A lease, bylaws, or other operative document can limit the discretion of a board or managing agent regarding the transfer of lease rights by, for example, requiring that approval may not be unreasonably withheld. (*Miller v Swingle*, 143 AD2d 984, 985 [2d Dept 1988].) However, again, the right to challenge the board’s denial of approval rests with seller-owner, and the contract vendee of shares in the corporation lacks standing to challenge the board’s decision. (*In re Hershkowitz*, 99 AD3d 906, 909 [2d Dept 2012]; *Louzon v Citibank*, 2013 N.Y. Slip Op. 31362[U] [Sup Ct, New York County 2013] [Scarpulla, J.] [holding that plaintiff-purchaser “lacks standing to assert any rights under Paragraph 17 of the proprietary lease because he is not a party to, or a third party beneficiary of the lease” where relevant proprietary lease clause was virtually identical to subject clause in instant action].)

Here, regardless of whether the proprietary lease allowed the board unfettered discretion to refuse or whether it required that the managing agent’s consent to transfer not be unreasonably withheld, Plaintiff still lacks standing to challenge the denial of approval, as Plaintiff is a mere contract vendee. The plain language of paragraph 17 makes clear that the right to sell or sublet the apartment – “subject only to the approval of the then Managing Agent of the Lessor, which approval shall not be unreasonably withheld” – was a right that inured to Chase, not a prospective purchaser.

Indeed, Plaintiff admits as much in his opposition papers to Chase’s motion when he writes: “Given plaintiff’s lack of direct rights under the Proprietary Lease, the above cited provision must be construed as an implicit promise by Chase that it will enforce its rights under this provision, so as to require the Co-op to accept plaintiff as its foreclosure purchaser.” (Pl. Memo in Opp. re Seq. 001 at 7-8.) As

such, Plaintiff admits that Chase was the only party with standing to assert that approval of the sale was being unreasonably withheld.

In arguing that he has standing, Plaintiff's reliance on *Kallop v Board of Directors for Edgewater Park Owners' Co-op Inc.*, (155 AD3d 491, 492 [1st Dept 2017]) is misplaced. In *Kallop*, the plaintiffs' "application to purchase a unit in defendants' cooperative residential complex was approved by defendant Board of Directors, and then rescinded two weeks later, based upon a Board member's erroneous report that plaintiff Richard Kallop told her he did not intend to reside in the complex, as required by the purchase contract." (Id. at 491.) As was revealed in an evidentiary hearing, plaintiff Richard Kallop's plan had "always been his plan to reside in the cooperative unit with his elderly mother, co-plaintiff Joan Kallop." (Id.) Having been previously approved for the purchase, the plaintiffs gave notice of their intention to vacate their rented home, which then went into contract with a third party. As such, the *Kallop* plaintiffs were effectively faced with the prospect of being homeless when the defendant board rescinded the sale, and a holdover proceeding was commenced against them by their landlord. The uncertainty of plaintiffs' living situation caused the elderly plaintiff Joan Kallop to suffer "further illness, including severe depression." (Id. at 492.) The Appellate Division, First Department found that "in these *unique circumstances*", the Supreme Court that compelled the sale to go forward "conducted a full evidentiary hearing which revealed the absence of any disputed material facts, and which established that in the absence of relief, it was highly likely that plaintiffs would suffer irreparable harm." (Id. at 491 [emphasis added].)

In contrast, the "unique" and dire circumstances that were present in *Kallop* are simply not present in the instant case. In addition, whereas the Kallops' purchase approval was rescinded on the erroneous belief that plaintiff Richard Kallop would not reside in the apartment, here, Building Defendants' refusal to approve Plaintiff's purchase application was based on a preference to avoid a purchaser with a history of litigiousness.⁶

⁶ The other cases that Plaintiff relies for his argument that he has standing are likewise inapposite to the facts of the instant case. (See e.g. *ARSR Sols., LLC v 304 E. 52nd St. Hous. Corp.*, 148 AD3d 660, 661 [2d Dept 2017] [finding that "under the terms of the Recognition Agreement, the defendant was required to transfer the shares to the plaintiff" [emphasis added]; *Miller v Swingle*, 143 AD2d 984, 986 [2d Dept 1988] [finding that plaintiff had standing to challenge conditions placed on the use of his apartment after the sale to him had been approved and the plaintiff had entered the apartment and commenced alterations]; *Trepel v Diop*, 02 CIV. 7726 (GEL), 2003 WL 22283816, at *3 [SDNY Oct. 2, 2003]

As Plaintiff lacks standing to assert the instant claims against Building Defendants, Plaintiff's claims cannot survive Building Defendants' motion by Plaintiff "speculating that discovery would provide the necessary evidence." (*Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 [1st Dept 2008].)

As such, Building Defendants' motion to dismiss the complaint is granted.

II. Plaintiff's Cross-Motion for Leave to Assert a Tortious Interference Claim Against Building Defendants Is Denied.

"As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted "absent . . . surprise resulting therefrom"].) "To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment." (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017].) "[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].)

Here, Plaintiff seeks leave to assert a cause of action against the Building Defendants for tortious interference with Plaintiff's contract of sale with Chase, on the grounds that Building Defendants "intentionally interfered" with that contract "by various means, including, but not limited to" by refusing to approve his purchase application. (Pl. Affirm. in Opp., Ex. 1 [Proposed Am. Compl.] ¶ 52.)

To state a cause of action for tortious interference with a contract, a plaintiff must allege: "a valid contract between the plaintiff and a third party, defendant's

[finding that plaintiff purchaser, after "shares in the cooperative corporation and a proprietary lease to the apartment were duly issued" to him, had a right to right to access the apartment for the purpose of selling the apartment, notwithstanding that cooperative board could deny him the right to live in the apartment].)

knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996].)

A claim against a cooperative board for tortious interference with a contract to purchase an apartment cannot be based merely on the board's "refusal to approve plaintiff's application to purchase the subject apartment" where board approval is "a contingency specifically contemplated in the contract of sale." (*Levine v Yokell*, 245 AD2d 138, 139 [1st Dept 1997].) That Plaintiff here adds that Building Defendants interfered by "various means" does not save Plaintiff's tortious interference claim. (*See also Aridas v 244 E. 60th St. Owners Corp.*, 292 AD2d 325, 326 [1st Dept 2002] ["Nor does plaintiff have a cause of action for tortious interference with contract absent a showing of fraud or self-dealing by a board member such as would overcome the business judgment shielding the board's rejection of her."].)

In addition, as will be discussed more below, Chase did not breach its contract with Plaintiff, but rather lawfully terminated it after Plaintiff failed to get approval to purchase. As such, Plaintiff also fails to satisfy the breach element of its tortious interference claim. (*Pober v Columbia 160 Apartments Corp.*, 266 AD2d 6, 6 [1st Dept 1999] ["Since there was no breach by [the seller] of its contract of sale with plaintiffs, the cause of action alleging that such a breach had occurred and that it had been tortiously induced by defendant [the cooperative board], was properly dismissed."]; *Louzon v Citibank*, 2013 N.Y. Slip Op. 31362[U] [Sup Ct, New York County 2013] [Scarpulla, J.] ["Apartment Corporation defendants did not procure a breach of the contract by requiring Louzon's application to be approved by the Apartment Corporation. In fact, the Apartment Corporation's approval was specifically contemplated by the contract and was a condition precedent to Louzon's purchase of the Apartment."].)

As such, Plaintiff's cross-motion to amend the complaint to add a cause of action as against Building Defendants for tortious interference is denied.

Seq. 001 – Motion to Dismiss by Chase:

ARGUMENTS

Chase first argues that the complaint should be dismissed in its entirety as against Chase because it argues that it had no contractual relationship with Plaintiff because it did not sign the memorandum of sale—but rather said document “is executed solely by Plaintiff.” (Chase Memo in Supp. at 6-7.) Chase further argues that, even if it had a contractual relationship with Plaintiff, the complaint should still be dismissed, as against Chase, because “Plaintiff’s primary grievance is that the Corporation and Managing Agent denied his application to purchase the Coop shares” and this “grievance has nothing whatsoever to do with Chase, who merely terminated the sale upon learning that the Corporation and/or Managing Agent had elected not to approve Plaintiff’s purchase of the Coop shares.” (Id. at 8-9.)

Plaintiff opposes Chase’s motion to dismiss, arguing first that he had a valid and binding contract with Chase because the memorandum of sale was signed by Chase’s auctioneer who was acting as Chase’s agent. In addition, Plaintiff alleges that pursuant to the recognition agreement and the proprietary lease, Chase had “the ability and the duty to require the Co-op to cooperate in the transfer of the Apartment upon the Managing Agent’s approval, which approval had to be given unless there were an articulable reason for withholding it.” (Memo in Opp. re Seq001 at 11.) Plaintiff further argues that “[g]iven plaintiff’s lack of direct rights under the Proprietary Lease, the above cited provision must be construed as an implicit promise by Chase that it will enforce its rights under this provision, so as to require the Co-op to accept plaintiff as its foreclosure purchaser.” (Id. at 11-12.) As such, Plaintiff argues that by “refusing to exercise those rights, Chase made it impossible for plaintiff to tender the balance of the purchase price and complete the transfer.” (Id.) As such, Plaintiff contends that he has sufficiently pleaded causes of action against Chase for breach of contract and breach of the implied covenant of good faith and fair dealing.

In reply, Chase reiterates that as a prospective purchaser of shares of a cooperative apartment, Plaintiff has no standing to challenge compliance with the terms of the proprietary lease. In addition, Chase argues that Plaintiff also lacks standing to challenge compliance with the terms of the recognition agreement, to which he is again neither a party nor a third-party beneficiary. Chase further argues that Plaintiff fails to plead a cause of action for breach of the covenant of good faith and fair dealing, as Plaintiff would have to plead that Chase somehow “act[ed] in a manner that, although not expressly forbidden by any contractual

provision, would deprive the other party of the right to receive the benefits under their agreement.” (Chase Reply Memo at 4, citing *Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003].)

In addition, Chase states that Plaintiff’s assertion that Chase had assisted him in getting approval to close in previous cases mischaracterizes Plaintiff’s past relationship with Chase. For example, Chase states that the action of *JPMorgan Chase Bank Nat. Assn. v. Churchill Owners Corp.*, et al., Index No. 156302/2015 – which Plaintiff relies on as an example of Chase assisting him to close on his purchase – was actually brought by Chase “under the threat of lawsuit from Plaintiff, and in order to obtain a preemptive adjudication on the issue before it became a defendant in a lawsuit brought by either Plaintiff or the cooperative board.” (Id. at 7.)

ANALYSIS

With regard to Chase’s first argument that it was not a party to the sale, that argument fails. “It is well settled that an auctioneer serves as a consignor’s agent.” (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 478 [2013].) As such, the auctioneer, Mr. Lau, executed the memorandum of sale on behalf of Chase when he signed it with Plaintiff.

As discussed in depth above, the right to challenge a cooperative board’s denial of a transfer rests solely with owner attempting to sell his or her shares, and the contract vendee has no standing to challenge a board’s refusal to approve the transfer. (*Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000]; *Sims v Darwood Mgt., Inc.*, 147 AD2d 373, 376 [1st Dept 1989]; *In re Hershkowitz*, 99 AD3d 906, 909 [2d Dept 2012].)

Plaintiff alleges, in sum and substance, that Chase had a duty to challenge the Building Defendants refusal both based on the memorandum of sale and the implied duty of good faith and fair dealing. The Court finds that there is no basis in fact, law, or in policy to place such a duty on Chase.

Turning to the terms of the memorandum of sale, there is no express language in the memorandum of sale which imposes a duty on Chase to sue the cooperative board to compel a sale. Indeed, Plaintiff himself admits that no such

language exists, but rather argues that Chase's duty here must be "construed" based on Plaintiff's lack of direct rights under the lease and Chase's rights under the recognition agreement and proprietary lease. (Plaintiff Memo in Opp re Seq001. at 7-8.) Plaintiff essentially asks the Court to read his contract with Chase as implicitly giving him, as a contract vendee, a back-door right to challenge Building Defendants' denial of sale by forcing the seller to sue on his behalf. For the Court to create such a precedent, the Court would essentially upend the current state of the law where the contract vendee lacks standing to challenge decisions of the cooperative board. As such, this Court finds that Plaintiff fails to state a claim for breach of contract against Chase.

Implicit in all contracts is "a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995].) "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." (Id.) However, "no obligation can be implied that would be inconsistent with other terms of the contractual relationship." (Id.)

In *Louzon v Citibank*, a case with similar facts, the plaintiff purchaser – who "successfully bid for the shares and proprietary lease appurtenant to the Apartment at an auction held by defendants Citibank N.A. and/or CitiMortgage (collectively, "CitiMortgage") – alleged that defendant CitiMortgage "breached the contract's implied covenant of good faith and fair dealing by canceling the sale and making no effort to obtain the managing agent's approval." (2013 N.Y. Slip Op. 31362[U] [Sup Ct, New York County 2013] [Scarpulla, J.]) Judge Scarpulla rejected this theory of liability, finding that the defendant "CitiMortgage had the right to sell the shares and proprietary lease to another party if Louzon's application was not approved by the Apartment Corporation within thirty days."

Here, similar to *Louzon*, the terms of sale made clear that it was the purchaser's "responsibility to comply with all requirements of the said proprietary lease," including obtaining approval to purchase. (Terms of Sale ¶ 7.) There was no basis for Plaintiff to assume that Chase had a duty to sue Building Defendants to obtain said approval on his behalf. Such an obligation would be inconsistent with the terms of his contractual relationship with Chase. As such, this Court finds

taht Plaintiff fails to state a cause of action for breach of the implied covenant of good faith and fair dealing against Chase.

Accordingly, Defendant Chase's motion to dismiss the complaint is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED the instant motion by Defendant JP Morgan Chase Bank N.A. (Seq. 001) to dismiss the complaint in its entirety, pursuant to CPLR 3211, is GRANTED; and it is further

ORDERED that the instant motion by Defendants 435 East 85th Street Tenants Corp. and Halstead Management Company, LLC (Seq.002) to dismiss the complaint in its entirety, pursuant to CPLR 3211, is GRANTED; and it is further

ORDERED that Plaintiff Adam Plotch's cross-motion for leave to amend the complaint (Seq. 002), pursuant to CPLR 3025, is DENIED; and it is further

ORDERED that, within 20 days of the date of this decision and order, Defendants JP Morgan Chase Bank N.A., 435 East 85th Street Tenants Corp. and Halstead Management Company, LLC shall serve a copy of this order with notice of entry upon Plaintiff; and it is further

ORDERED that the complaint is dismissed in its entirety as against said Defendants and Defendant Ralph Karow, with costs and disbursements to said Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: October 2, 2018
New York, New York

ENTER:


HON. ROBERT D. KALISH, J.S.C.