

Segev v 262 N 9 LLC
2019 NY Slip Op 30715(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 651697/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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RONEN SEGEV,

Plaintiff,

- v -

262 N 9 LLC, 260-262 NORTH 9TH STREET CONDOMINIUM,
BOARD OF MANAGERS OF 260-262 NORTH 9TH STREET
CONDOMINIUM, N. 9TH LLC, VICTOR EFREMEKOV,
VITTORIO ANTONINI, ERMAN AGIRNASLI, MATTHEW ELLER,
JENNIFER ELLENBERG, JOHN DOE #1 THROUGH JOHN DOE
#10, THE LAST TEN NAMES BEING FICTITIOUS AND
UNKNOWN TO THE PLAINTIFFS, THE PERSONS INTENDED
BEING THE PERSONS, IF ANY, INVOLVED IN THE ACTS OR
OMISSIONS DESCRIBED IN THE COMPLAINT

Defendant.

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INDEX NO. 651697/2018

MOTION DATE _____

MOTION SEQ. NO. 001, 002

DECISION AND ORDER

HON. SALIANN SCARPULLA:

In this action, *inter alia*, to recover damages for breach of contract, defendants 262 N 9 LLC, 260-262 North 9th Street Condominium, Board of Managers of 260-262 North 9th Street Condominium, Victor Efremekov, Vittorio Antonini, Erman Agirnasli, and Matthew Eller (collectively referred to as “defendants”) move to dismiss the complaint insofar as asserted against them, to cancel the notice of pendency pursuant to CPLR Section 6514(a), and for sanctions against the plaintiff (motion sequence no. 001). Plaintiff Ronen Segev (“Segev”) moves for partial summary judgment on his breach of contract claim against 262 N 9 LLC and his claim for tortious interference against the Board of Managers of 260-262 North 9th Street Condominium, and for monetary sanctions against all defendants except for Jennifer Ellenberg (“Ellenberg”)(motion sequence no. 002).

This action arises from a contract to sell individual condominium unit 6B located at 260 North 9th Street in Brooklyn (the “Apartment”). According to the allegations of the complaint, in or about June 2017, the Apartment was publicly listed for \$949,000.00. In October 2017, Segev entered into a contract with 262 N 9 LLC (“Seller”) for the purchase of the Apartment (“Contract”). The contract was signed by defendant Victor Efremenkov (“Efremenkov”) on behalf of the Seller. The purchase price was \$850,000.00 and Segev paid a contract deposit of \$85,000.00. Ellenberg was the broker on the sale. On October 4, 2017, the Contract price was stated on Ellenberg’s public listing of the Apartment at \$949,000.

The Contract provides that the Board of Managers of the 260-262 North 9th Street Condominium (“Board”) had a right of first refusal to purchase the Apartment. Specifically, Paragraph 5 provides: “Right of First Refusal: 5.1 If so provided in the Declaration or By-Laws, this sale is subject to and conditioned upon the waiver.” The supplemental language in paragraph 44 states:

“THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER ARE HEREBY MADE EXPRESSLY SUBJECT TO THE RIGHTS, IF ANY, OF THE BOARD OF MANAGERS OF THE CONDOMINIUM WITH RESPECT TO THE TRANSACTION EMBODIED HEREIN PURSUANT TO THE TERMS OF THE BY-LAWS OF THE SAID CONDOMINIUM, AS THE SAME MAY HAVE BEEN AMENDED.”

Paragraph 5.5 of the Contract further provides:

“If the Board’s failure to either exercise such right of first refusal or issue a Waiver Confirmation is attributable to either party’s bad faith conduct, that Party shall then be in default hereunder and the provisions of Article 10 shall apply.”

Article XIII of the By-Laws provides for a right of first refusal to the Board.

Specifically, Article XIII, Section 1 of the By-Laws gives the Board thirty days to elect to exercise the right of first refusal after receiving notice of the sale from the seller. Section 1 states, in part:

“Selling and Leasing of Units, No Unit Owner (other than the Sponsor or its designee or as otherwise specifically excepted by this Section) may convey his Unit or any interest therein by sale or lease except in the manner set forth in this Section.

Any Unit Owner who receives a bona fide written offer for the sale or lease of his Unit and who desires to accept such offer shall give written notice by registered mail to the Board of Managers of such offer and such intention together with the name and address of the proposed purchaser or lessee and the terms of the sale or lease, together with an offer to sell or lease such Unit to the Board of Managers on the same terms and conditions as contained in such offer, and such additional Information with respect to the proposed purchaser as the Board may require

Within thirty days after receipt of such notice and all Information requested by the Board, the Board may elect to purchase or lease such Unit by giving written notice by registered mail to such Unit Owner of its intention to buy or lease such Unit on the same terms and conditions as contained in the offer and as stated in the notice from the Unit Owner. In the event the Board shall elect to purchase or lease such Unit, the closing of title or lease shall be held at the office of the attorneys for the Condominium sixty (60) days after the giving of notice by the Board of its election to accept said offer. The Board may, if it believes accepting such offer to be in the best interest of the Condominium, call a special Unit Owners meeting to be held no more that [sic] five days after notice to the Unit Owners, for the purpose of voting upon the offer contained in the notice to the Board.”

This section of the bylaws also states:

“In order to purchase or lease any Unit offered for sale or lease in accordance with this section, the affirmative vote of at least 80% of all the Unit Owners cast at a special meeting called by the Board of Managers shall be necessary.”

“If the Board shall fail to call a meeting of Unit Owners as aforesaid with respect to the offer, it shall be deemed to have declined the offer.”

A November 2, 2017 email advised Segev and his attorney at the time that the Board would be exercising its right of first refusal to purchase the Apartment. 262 N 9 LLC transferred title of the Apartment to the Board by deed dated January 3, 2018.

After the sale of the Apartment to the Board Segev commenced this action, alleging six causes of action: (1) breach of contract against the Seller; (2) tortious interference with contractual relations; (3) conspiracy to tortuously interfere with contractual relations; (4) breach of fiduciary duty as against Ellenberg; (5) conspiracy to breach of fiduciary duty; and (6) tortious interference with fiduciary duties and/or aiding and abetting breach of fiduciary duty.

Segev alleges that the defendants engaged in misconduct when the Board exercised its right of first refusal and purchased the Apartment. Specifically, Segev maintains that the Board did not exercise its right of first refusal in the manner required by the by-laws. Segev claims that Seller's counsel admitted that this right was exercised because "Plaintiff's contract price was 'too low'." Segev also notes that the vote of the Board was unanimous, indicating that defendant Efremenkov voted to override the Contract that he had signed.

In addition, Segev alleges that on October 4, 2017, Ellenberg publicly listed the sale price of the Apartment at \$949,000.00, and thereafter the \$850,000.00 price disappeared entirely from the price history for the Apartment on Streeteasy.com. Segev claims that defendants Ellenberg, Efremenkov and Antonini, as well as the Sponsor, "all had motivation to show an inflated price for the Apartment so that the price trend would

show publicly as an increase at the asking price instead of a decrease approximately 10% below the asking price.” He further claims that Ellenberg tried to coerce him into buying the furniture in the apartment, telling him that if he did not, he “could expect that the deal to be derailed.”

All defendants, except for Ellenberg, move to dismiss the complaint insofar as asserted against them, to cancel the notice of pendency pursuant to CPLR Section 6514(a), and for sanctions against the plaintiff on the ground that Segev has failed to state a claim. Segev moves for partial summary judgment on his breach of contract claim against 262 N 9 LLC and his claim for tortious interference against the Board of Managers of 260-262 North 9th Street Condominium, and for monetary sanctions against all defendants except for Ellenberg.

Discussion

Breach of Contract

Defendants argue, *inter alia*, that the breach of contract claim must be dismissed because no breach occurred. Rather, the Contract was cancelled because the Board properly and legitimately exercised its right of first refusal.

Segev argues that the Seller breached the Contract by cancelling the Contract based on the Board’s exercise of the right of first refusal in contravention of the manner required by the by-laws, claiming that (1) there was no proper notice of the Contract to the Board; (2) there was no meeting or vote for the right of first refusal to be exercised; and (3) the sale of the apartment to the Board was on different terms and conditions than

those provided in the Contract, such as not selling it within 15 business days, not selling it for cash, and not selling it within 60 days of the purported exercise of the right of first refusal. Additionally, Segev alleges that Efremenkov, as a member of the Board, participated in the vote regarding the right of first refusal, notwithstanding his conflict of interest as the party who executed the Contract.

Pursuant to the Contract, the parties agreed that the Board had a right of first refusal, and the consequent sale of the Apartment to the Board, rather than Segev, is not a breach. *See Singh v. Turtle Bay Towers Corp.*, 74 A.D.3d 568 [1st Dept. 2010]). In addition, Segev, “a mere contract vendee,” has no standing to challenge alleged violations of the bylaws. *See Soho Bazaar v. Board of Mgrs. of Soho Intl. Arts Condominium*, 266 A.D.2d 65 (1st Dept 1999).

Segev’s allegation that Efremenkov’s failure to recuse himself, as a member of the Board, from the vote to exercise the right of first refusal, frustrated the purpose of the Contract he signed, is without merit. Segev argues that these facts state a cause of action for breach of contract based on a violation of the covenant of good faith and fair dealing.¹ However, even assuming that Efremenkov had an obligation to abstain from the vote, the remainder of the Board, four out of five members, nevertheless legitimately voted in favor of exercising the right of first refusal. Because Efremenkov’s vote did not change

¹ In support of this argument, Segev refers to the First Department’s decision in *85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC*, (45 A.D.3d 349 [1st Dept 2007]). However, that case is factually inapposite.

the ultimate outcome of the vote, Segev cannot establish any damages from Efremenkov's failure to recuse himself from the vote.

For these reasons, Segev's breach of contract cause of action is dismissed.

Tortious Interference with Contractual Relations

Defendants next argue that Segev has no standing to bring a claim for tortious interference against the Board. Additionally, defendants argue that the Board's decision to exercise its right of first refusal was made in good faith for the benefit of all of the owners, in accordance with its rights under the by-laws and the Contract.

To state a claim for tortious interference, a plaintiff must show: "(1) the existence of a valid contract[;] (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach of that contract[;] and (4) damages." *Meghan Beard, Inc. v Fadina*, 82 A.D.3d 591, 592 (1st Dept. 2011)(internal citations omitted).

As there is no privity between the Segev and the Board, Segev has no standing to challenge the Board's adherence to its by-laws:

"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."

Soho Bazaar v. Board of Mgrs. Of Soho Intl. Arts Condominium, 266 A.D.2d 65, 65-66 (1st Dept 1999); *see also Woo v. Irving Tenants Corp.*, 276 A.D.2d 380 (1st Dept. 2000).

Thus, the Board's actions under its by-laws may not form the basis of Segev's tortious interference with contract claim.

In any event, Segev has not sufficiently pled that the Board, in allegedly violating its by-laws, acted to intentionally procure the breach of Segev's contract. Further, Segev has not adequately alleged that the Board's exercise of its right of first refusal was not taken in good faith in the "lawful and legitimate furtherance of corporate purposes." *Bittens v. Board of Mgrs. Of the Octavia Condominium*, 132 A.D.3d 487, 487 (1st Dept. 2015)(internal citations omitted). Accordingly, the claim for tortious interference is dismissed.

Conspiracy

New York does not recognize an independent cause of action for civil conspiracy. *See Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 110 (1st Dept. 2009). Segev's third cause of action for conspiracy to tortuously interfere with contractual relations is dismissed because, as discussed above, Segev is unable to establish an underlying tortious interference or breach of contract claim.

In the fifth cause of action, Segev alleges that defendants engaged in certain conduct that was in contravention of the by-laws, including failing to hold a meeting of the Board on proper notice, failing to exclude interested Board Members from the meeting, and failing to hold a meeting of the unit owners. Further, Segev alleges that defendants aided Ellenberg in "manipulating public information regarding the Contract," and in "[i]ntentionally attempting to coerce plaintiff to buy furniture in the Apartment that was expressly excluded from the Contract." Segev alleges that these actions constituted a "conspiracy to breach a fiduciary duty," and caused him harm.

Segev has failed to adequately identify a fiduciary duty owed to him by the members of the alleged conspiracy, or a breach of any such duty. *See generally 600 Mgt. LLC v Lencheski*, 2010 N.Y. Slip. Op. 6909 (Sup. Ct. N.Y. Co., September 9, 2010). As such, no claim for conspiracy to breach a fiduciary duty can be maintained.

As Segev has failed sufficiently to allege an underlying tort against the defendants, the conspiracy claim must also be dismissed.

Tortious Interference with Fiduciary Duties and/or Aiding and Abetting Breach of Fiduciary Duty

In the sixth cause of action, Segev alleges “tortious interference with fiduciary duties and/or aiding and abetting breach of fiduciary duty.” Specifically, Segev alleges that defendants “knowingly induced and/or participated in the breach” as they aided Ellenberg by engaging in all of the conduct alleged in paragraph 81 of the complaint. Further, Segev alleges that defendants aided Ellenberg in “manipulating public information regarding the Contract,” and in “[i]ntentionally attempting to coerce plaintiff to buy furniture in the Apartment that was expressly excluded from the Contract.”

“To prevail on [a tortious interference/aiding and abetting breach of fiduciary duty claim], plaintiffs must allege: ‘(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach’.” *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 25 (1st Dept. 2015). “A person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps to conceal or fails to act

when required to do so, thereby enabling the breach to occur. However, the mere inaction of an aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.” *Kaufman v/ Cohen*, 307 A.D.2d 113, 126 (1st Dept 2003).

Notably, Ellenberg has not moved to dismiss the complaint as asserted against her. In the fourth cause of action, which is a claim for breach of fiduciary duty against Ellenberg, Segev alleges that Ellenberg, as a licensed real estate salesperson, breached her fiduciary duty to him when she failed properly to advise plaintiff “of her role as a dual agent as the form she supplied to Plaintiff was not properly completed by her or the Plaintiff.” Essentially, Segev alleges that Ellenberg, acting as a dual agent, listed the price for the Apartment as higher than his Contract price in an attempt to “obtain higher prices for not just the Apartment, but also for the other four apartments for which Defendant Ellenberg had the listing with the Defendants.” In this way, Segev alleges, Ellenberg was working unlawfully to keep the other listings, and also induced Efremenkov, Antonini and Eller to vote in favor the right of first refusal. Segev also alleged that Ellenberg tried to coerce him to buy furniture in the apartment, stating that if he refused, it would “derail the deal.”

Assuming that these allegations are sufficient to establish a breach of fiduciary duty on the part of Ellenberg, Segev has nevertheless failed adequately to allege facts

showing that any of the other defendants purposefully aided and abetted in Ellenberg's alleged breach of fiduciary duties, or tortuously interfered with such duties.²

Both parties have moved for sanctions, however, neither have stated a sufficient basis for imposing sanctions. Further, given that the action has been dismissed against the owner of the Apartment, defendants' motion to cancel the notice of pendency pursuant to CPLR 6514(a) is granted. Finally, consistent with the foregoing, Segev's motion for partial summary judgment is denied.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants 262 N 9 LLC, 260-262 North 9th Street Condominium, Board of Managers of 260-262 North 9th Street Condominium, N. 9th LLC, Victor Efremenkov, Vittorio Antonini, Erman Agirnasli, and Matthew Eller is granted to the extent that the complaint is dismissed insofar as asserted against them, the notice of pendency is cancelled and the fourth cause of action is severed and shall continue (motion sequence 001); and it is further

ORDERED that the Clerk of the Court, upon service the Clerk of a copy of this order, is directed to sever and dismiss the action against defendants 262 N 9 LLC, 260-262 North 9th Street Condominium, Board of Managers of 260-262 North 9th Street Condominium, N. 9th LLC, Victor Efremenkov, Vittorio Antonini, Erman Agirnasli, and Matthew Eller, and to cancel the notice of pendency filed by plaintiff; and it is further

² As stated above, Segev's failure to obtain the Apartment was the result of the Board's proper exercise of its right of first refusal.

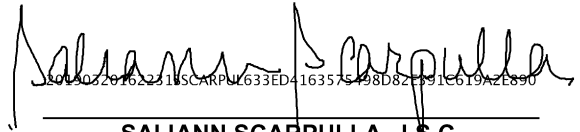
ORDERED that defendant Jennifer Ellenberg is directed to answer the complaint within thirty (30) days of the date of this order; and it is further

ORDERED that plaintiff Ronan Segev's motion for partial summary judgment and for sanctions is denied (motion sequence 002).

This constitutes the decision and order of the court.

3/20 /2019

DATE



SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE