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

PRESENT: DEBRA A. JAMES *Justice* PART 59

RICHARD ROMANOFF and DEBRA ROMANOFF,

Plaintiffs,

- v -

JAMES LEVITAS, DONNA LEVITAS and 101 E. 81 REALTY CORP.,

Defendants.

Index No.: 101431/2010

Motion Date: 03/30/12

Motion Seq. No.: 003

The following papers, numbered 1 to 4 were read on this summary judgment motion:

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion for summary judgment dismissing the complaint against defendant 10 E. 81 Realty Corp. pursuant to CPLR 3212 shall be GRANTED.

Plaintiffs bring this action for breach of contract, seeking specific performance of a contract to purchase from the individual defendants shares of stock allocated to Unit #1 and the proprietary lease therefor in the cooperative apartment building owned by the moving corporate defendant ("10 E. 81 Realty Corp.").

Attached to the moving papers is a copy of the Contract

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

of Sale for Unit #1 ("the Contract") between plaintiffs and James Levitas and Donna Levitas, the individual defendants who owned the shares and proprietary lease ("the sellers"). Paragraph 1.1.2 of the Contract states: "Purchaser": "RICHARD ROMANOFF and DEBRA ROMANOFF***(see Rider's option to assign to "Omni Food Sales, Inc., a New York corporation" Address: 355 Food Center Drive, Bronx, New York 10474 [sic]". The Contract includes a "Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards" form signed as of August 1, 2009 by the plaintiffs, personally, and by the sellers, and plaintiffs remitted a $155,000 Contract Deposit to the Escrowee.

Paragraph 1.6 provides that the name of the cooperative housing corporation ("Corporation") is 10 E. 81 Realty Corp. ¶6.1 states that "This sale is subject to the unconditional consent of the Corporation" and ¶13.2 provides that "In the event of a default or misrepresentation by Seller, Purchaser shall have such remedies as Purchaser is entitled to at law or in equity, including specific performance, because the Unit and possession thereof cannot be duplicated."

As pointed out by plaintiffs, paragraph 54 of the "Rider to, and Part of" the Contract provides that the Contract would remain in full force and effect and the plaintiffs would purchase the apartment as individuals, without an assignment to any corporate entity, should the Corporation prohibit such

assignment.

Plaintiffs submitted a purchase application for Unit # 1, along with a letter dated August 5, 2009 from their attorney requesting that "title to above captioned apartment be held under the name of the newly formed Limited Liability Company which will be a wholly owned subsidiary of Omni Food Sales, Inc, a company owned by Richard and Debra Romanoff. Such ownership is requested in order to further Mr. and Mrs. Romanoff's complex estate plan."

By letter dated October 2, 2009, the Corporation wrote plaintiffs that "after careful deliberations the Board of 10 E. 81 Realty Corp. has denied your purchase application. Regretfully the Board's decision is final."

Plaintiffs allege that the sellers and 10 E. 81 Realty Corp. breached the Contract because in bad faith the sellers contacted the members of the 10 E. Realty Corp.'s Board of Directors and persuaded them to disapprove the application, and that such 10 E. 81 Realty Crop. Board denied approval of their application in bad faith and to benefit the sellers, and for no legitimate business reason. As evidence of such bad faith, plaintiffs argue 10 E. 81 Realty Corp. knew that as provided under the Contract, they stood ready, willing and able to close without any assignment of the shares and proprietary lease to a corporate entity in accordance with any Board restriction or disapproval of such assignment.

10 E. 81 Realty Corp. moves for an order of summary judgment dismissing the complaint, contending that it breached no duty, contractually or otherwise, owed to the plaintiffs with respect to the sale of Unit #1. Co-defendants, the sellers, support the motion, arguing that plaintiffs misconstrue the applicable law in that regard. They further urge that assuming *arguendo* that 10 E. 81 Realty Corp. owes some duty to plaintiffs, plaintiffs' responsive papers contain no admissible evidence that tends to show a breach of any such duty. They also contend that even if 10 E. 81 Realty Corp. mistakenly determined that the Contract mandated that shares be assigned to a corporate entity, such mistake does not constitute a breach of the business judgment rule enunciated in Matter of Levandusky v One Fifth Avenue Apt. Corp., 75 NY2d 530 (1990).

This court concurs with 10 E. 81 Realty Corp. that "plaintiff[s] as ... mere contract vendee[s] of shares rather than a shareholder, [do] not have a cause of action for breach of contract against the cooperative (see 85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC, 45 A.D.3d 333349...[(1st Dept) 2007]" (Harris v Seward Park Housing Corporation, 79 A.D.3d 425, 426 [1st Dept 2010]). See also Woo v Irving Tenants Corp., 276 A.D,2d 380 (1st Dept 2000 and GSG Holdings v Multi Boro Realty Corp., 240 A.D.2d 159 (1st Dept 1997. Of course, under the civil rights laws, 10 E. 81 Realty Corp. owes a duty to plaintiffs not

to engage in invidious discrimination in reaching its decision with respect to consent (Hirschmann v Hassapoyannes, 52 AD3d 221 [1st Dept 2008]), but the plaintiffs make no such claim here.

In opposition to 10 E. 81 Realty Corp.'s application for summary dismissal of the complaint, one of the plaintiffs states by affidavit, that one of his friends, whose name is Tillis, told plaintiff that one of Tillis's friends, an alleged Board member named Wuhl, advised Tillis that the Board had not distributed copies of the application to the Board members for their review and that the sellers pressured the Board members to deny the application so that the sellers could sell Unit #1 for more than the purchase price under the Contract. Putting aside that the absence of privity is fatal to plaintiffs' breach of contract cause of action against 10 E. 81 Realty Corp., the plaintiffs' "hearsay within hearsay" evidence of bad faith is insufficient to defeat defendant's motion, or to rebut 10 E. 81 Realty Corp.'s testimony that Wuhl was not on the Board. See Arnold Herstand & Co. v Gallery: Gertrude Stein, Inc., 211 A.D.2d 77 (1st Dept 1995). Nor do any of plaintiffs' blunderbuss demands for documents or interrogatories seek any discovery that refers to Wuhl or Tillis, and therefore "plaintiff[s] ha[ve] failed to establish how discovery will uncover further evidence or material in the exclusive possession of defendants, as required under CPLR(f)" (Kent v 534 E. 11th St, 80 AD3d 106, 114

[1st Dept 2010]).

Accordingly, it is

ORDERED that the motion of defendant 10 E. 81 Realty Corp. for summary judgment is granted and the complaint is dismissed as to only defendant 10 E. 81 Realty Corp. with costs and disbursements to defendant 10 E. 81 Realty Corp. as taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: August 6, 2012

ENTER:

DEBRA A. JAMES J.S.C.