

Oshlani v Tomfol Owners Corp.
2017 NY Slip Op 30946(U)
May 5, 2017
Supreme Court, New York County
Docket Number: 158352/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
AGRON OSHLANI,

Plaintiff,

-against-

Index No.: 158352/2016

TOMFOL OWNERS CORP., CARLE WALKER,
SALLY WALKER, JOHN TOMASELLO,
MEGAN TRINIDAD, PENA BONITA,
WAKO HARDY, KIM KEEVER, LUIS STRULA
and DANIEL BAUM,

DECISION/ORDER

Mot. Seq. 001

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for, *inter alia*, tortious interference with a contract.

Defendants, Tomfol Owners Corp. (“Tomfol”), Carle Walker (“Carle”), Sally Walker (“Sally”), John Tomasello (“Tomasello”), Megan Trinidad (“Trinidad”), Pena Bonita (“Bonita”), Wako Hardy (“Hardy”), Kim Kever (“Kever”), Luis Strula (“Strula”), and Daniel Baum (“Baum”) (collectively “Defendants”), now move to dismiss Argon Oshlani’s (“Plaintiff”), complaint (“Complaint”) pursuant to CPLR § 3211(a)(7).¹

Factual Background

Ramon Rodriguez (“Rodriguez”) was the owner of 10.5 shares and the proprietary lease allocated to the premises: 206 East 7th Street, Apt. 6, New York, New York (“Apartment”). Defendant Tomfol, is the cooperative entity that owns the building where the Apartment is located. The remaining defendants comprise the Board of Directors of Defendant Tomfol.

¹ Although Defendants’ notice of motion also cites CPLR § 3211(a)(8) as a basis for dismissal, neither the attorney affirmation, nor Defendants’ affidavits or Reply addresses the issue of personal jurisdiction or improper service. Thus, Defendants’ motion to dismiss the Complaint pursuant to CPLR § 3211(a)(8), is denied.

Plaintiff alleges that on or about February 16, 2016, he entered into a contract of sale with Rodriguez to purchase the Apartment (“Contract”), and that he and Rodriguez notified Defendants of the Contract on the same date (Compl., at ¶¶ 14-15).

On April 1, 2016, Plaintiff submitted an application to purchase the Apartment to the Board of Directors (¶25). The Board of Directors held two votes. The first vote took place on May 6, 2016, at which Defendants Carle, Sally, Tomasello, Bonita, and Hardy participated. Plaintiff’s application was denied 4 to 1. The second vote took place on May 13, 2016, at which Defendants Carle, Sally, Tomasello, Trinidad, Bonita, Hardy, Keever, and two unidentified shareholders participated. Plaintiff’s application was denied 7 to 2. On May 22, 2016, Plaintiff received notice that the Board of Directors denied his application (¶27).

Thereafter, Plaintiff filed the instant Complaint. Plaintiff’s first cause of action alleges tortious interference with the Contract. Specifically, on numerous occasions Defendant Hardy offered to purchase the Apartment from Rodriguez for “substantially greater consideration” than Plaintiff, despite knowing about the Contract (¶30). Further, Defendant Hardy used her position on the Board of Directors to influence the Board of Directors to vote against Plaintiff’s application (¶31). And, the Board of Directors conspired to deny Plaintiff’s application (¶33).

The second cause of action alleges “fraud/self dealing/bad faith” on behalf of the Board of Directors. Defendant Hardy allegedly received notice of the Contract by virtue of her position as a director, and used that information “for her own personal benefit and obtain an economic advantage over [Plaintiff]” (¶38). Further, the Board of Directors “acted in ‘bad faith’ and in violation of their obligation to further the legitimate purposes of [Defendant Tomfol]” (¶41).

The third cause of action alleges that the Board of Directors “wrongfully and improperly

treated and discriminated against [Rodriguez], a shareholder of [Defendant Tomfol]” by denying Plaintiff’s application (¶44).

Last, the fourth cause of action seeks declaration that the Board of Director’s denial of Plaintiff’s application be rescinded and that Plaintiff’s application to purchase the Apartment be approved (¶¶ 49-50). The Board of Director’s decision to deny Plaintiff’s application to purchase the Apartment was based upon fraud, self-dealing, unequal treatment and in bad faith, in violation of the cooperative bylaws.

Defendants’ Motion

Defendants argue that the Complaint fails to state a claim for tortious interference. First, the Complaint fails to plead facts that allege tortious interference of the Contract on behalf of Defendant Tomfol. Further, Defendants Carle, Sally, Trinidad, Bonita, Hardy, Keever, Strula, and Baum expressly deny that the Board of Directors conspired to deny Plaintiff’s application in order to permit Defendant Hardy to purchase the Apartment. The Board of Directors reviewed Plaintiff’s application twice and determined that an interview was unnecessary. Further, although Defendant Hardy inquired with Rodriguez to purchase the Apartment when she became aware that the unit was for sale, Rodriguez did not respond to Hardy until the Board of Directors was notified. Moreover, Defendant Hardy did not purchase the Apartment. Additionally, the Complaint fails to allege intentional interference by any member of the Board. Further, Plaintiff failed to allege an act of malice or illegal means. And, the Complaint fails to allege that Plaintiff incurred an “injury to the relationship with [Rodriguez]” (Chun Aff., at ¶12). Moreover, the Board of Directors properly denied Plaintiff’s application since Plaintiff does not intend on residing at the Apartment. Plaintiff’s father owns a unit in the building, which Plaintiff rents to

others for illegal short term stays. Plaintiff intends to rent the Apartment in the same manner.

The Complaint also fails to state a claim for fraud. First, the Complaint fails to allege specific facts to state a claim for fraud in the inducement or fraudulent concealment. Next, Plaintiff's fraud claim must be dismissed as duplicative of its claim for tortious interference. Moreover, Plaintiff's claims for self-dealing and bad faith fall under a general breach of fiduciary duty. Yet, neither the Board of Directors, nor Defendant Tomfol owe any fiduciary duty to Plaintiff, a non-shareholder. Additionally, it was in the discretion of the Board to deny Plaintiff's application to purchase the apartment.

Furthermore, Plaintiff failed to state a discrimination claim, in that Plaintiff failed to allege the elements of discrimination and incorrectly bases this claim on Defendants' alleged discrimination against Rodriguez, not Plaintiff.

Finally, the Complaint fails to state a rescission claim, since Plaintiff has alleged an adequate remedy at law. Plaintiff likewise failed to plead any of the elements of rescission based on fraudulent inducement.

Plaintiff's Opposition

In opposition, Plaintiff asserts that he sufficiently alleged tortious interference with the Contract against Defendants in that Defendants refused to approve Plaintiff's application, so as to "force the sale of the Apartment" to Defendant Hardy (Opp., at ¶33). Moreover, the Board of Director's denial of Plaintiff's application was not made in good faith.

As to Plaintiff's claim for fraud, self-dealing and bad faith, the Board of Directors "conspired to allow [Defendant Hardy] to attempt" to purchase the Apartment, and further allowed Defendant Hardy to participate in the vote to deny Plaintiff's application (¶34).

Moreover, the Board of Directors' reason for denying Plaintiff's application was "false and misleading" (*id.*). Specifically, the Board denied Plaintiff's application because the Apartment would not be Plaintiff's "primary residence"; however, several board members own multiple units in the building and rent their apartments to non-shareholders.

Further, despite her knowledge of the Contract in January 2016, Defendant Hardy continued to make offers to purchase the Apartment from Rodriguez. Additionally, despite knowing about the Contract, Defendant Carle, president of the Board of Directors, attempted to persuade Rodriguez to sell the Apartment to Defendant Hardy by assuring Rodriguez that Defendant Hardy "would be approved by the Board of directors" (¶38). Moreover, Defendant Tomasello attests that the Board of Directors allowed Defendant Hardy to participate in the vote on Plaintiff's application, over Tomasello's objection to Hardy's participation in the vote, due to Hardy's interest in purchasing the Apartment. Moreover, Defendant Carle should have recused himself from voting on Plaintiff's application.

Further, Defendant Tomasello affirmed that the "documents and financials submitted by the [P]laintiff were more than sufficient to pass the guidelines set by the Board of Directors" (Tomasello Aff., at ¶11), and was "standard and has been accepted as sufficient in the past" (Opp., at ¶42). Further, although the Board of Directors has never imposed a primary residence requirement to purchase a unit, Plaintiff informed the Board that he intended to reside at the Apartment as his primary residence for at least two years.

As to Defendants' claim that Plaintiff rented Plaintiff's father's unit for short-term stays, it was his father's tenant who attempted to sublet the unit. Moreover, according to Defendant

Tomasello, several tenants, including Defendant Carle and Sally “have sublet their multiple apartments for short stays in the past” (¶42).

Finally, Plaintiff argues that imposing conditions to purchase the Apartment on Plaintiff that does not exist for other purchasers under similar circumstances is discriminatory.

Defendants' Reply

Defendants argue that the Complaint should be dismissed against Defendants Sturla and Baum, since Plaintiff's opposition fails to state that they were involved in the Board of Director's decision to deny Plaintiff's application. The Complaint should also be dismissed against Defendant Keever, since he voted to approve Plaintiff's application. Further, the Complaint fails to allege that Defendants Trinidad, Bonita, and Sally knew Defendant Hardy's intention to purchase the Apartment. Moreover, Plaintiff's application would have been denied notwithstanding Defendants Carle and Hardy's failure to recuse themselves from voting on Plaintiff's application. Finally, pursuant to the Business Judgment Rule, review of Plaintiff's application was in the discretion of the board.

Discussion

CPLR § 3211(a)(7): Failure to State a Cause of Action

In determining a motion to dismiss pursuant to CPLR § 3211(1)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 741 N.Y.S.2d 9 [1st Dept 2002]). The standard on such a motion is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept 1990]; *Leviton*

Manufacturing Co., Inc. v. Blumberg, 242 A.D.2d 205, 660 N.Y.S.2d 726 [1st Dept 1997]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see* CPLR § 3026), and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994]). Where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence” the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316, 538 N.Y.S.2d 532 [1st Dept 1989]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861 [2000]). While affidavits may be considered, if the motion has not been converted to a CPLR § 3212 motion for summary judgment, they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims (*see Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635–636, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]).

Tortious Interference with Contractual Relations

To state a cause of action for tortious interference with contract, Plaintiff must allege “(1) the existence of a valid contract[;] (2) [Defendants’] knowledge of that contract; (3) [Defendants’] intentional procuring of the breach of that contract[;] and (4) damages” (*Meghan Beard, Inc. v. Fadina*, 82 A.D.3d 591, 919 N.Y.S.2d 156 [1st Dept 2011]).

The Complaint sufficiently alleges that the Board of Directors interfered with Plaintiff's contract with Rodriguez to purchase the Apartment. Plaintiff alleges, first, the existence of the Contract, wherein Plaintiff agreed to purchase the Apartment from Rodriguez. Second, Plaintiff alleges that the Board of Directors was aware of the Contract, since Rodriguez notified the Board on two occasions: initially in February 2016, and again in March 2016. Third, Plaintiff alleges that the Board of Directors voted to deny Plaintiff's application to purchase the Apartment was so that Defendant Hardy could purchase the Apartment. And fourth, Defendants' denial of Plaintiff's application damaged Plaintiff by, *inter alia*, losing the right afforded by the Contract to purchase the Apartment (Compl., at ¶34).

Contrary Defendants' contention, Plaintiff is not required to plead the element of malice to state a cause of action for tortious interference (*see Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996]; *Shared Comms. Servs. of ESR, Inc. v. Goldman Sachs & Co.*, 23 A.D.3d 162, 163, 803 N.Y.S.2d 512, 513 [1st Dept 2005]).

Further, Defendants' reliance the business judgment rule is unavailing *at this juncture*. The business judgment rule protects the decisions of the board of directors from judicial scrutiny, unless it is shown that "the cooperative's decision was rendered in bad faith or in furtherance of purposes other than those legitimately held by the cooperative corporation" (*Woo v. Irving Tenants Corp.*, 714 N.Y.S.2d 276, 277, 276 A.D.2d 380 [1st Dept 2000], *citing Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 537-538, 554 N.Y.S.2d 807, 553 N.E.2d 1317 [1990] ("the business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'"); *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 419

N.Y.S.2d 920, 393 N.E.2d 994, *supra*); *see Aridas v. 244 E. 60th St. Owners Corp.*, 292 A.D.2d 325, 326, 739 N.Y.S.2d 703, 704 [1st Dept 2002] (denying non-shareholder plaintiff's cause of action for tortious interference by a board member to overcome the presumption of good faith afforded to directors pursuant to the business judgment rule); *Pesochinsky v. 77 Bleecker St. Corp.*, 250 A.D.2d 494, 495, 672 N.Y.S.2d 879, 879 [1st Dept 1998]; *Sinensky v. Rokowsky*, 2004 WL 5488403 [Sup. Ct. Kings County 2004], *affd* 22 A.D.3d 563, 802 N.Y.S.2d 491 [2d Dept 2005]).

Plaintiff, as a non-shareholder, sufficiently alleged that the Board of Directors acted in bad faith when they denied his application. The Complaint alleges that Defendant Hardy was an interested party since she offered to purchase the Apartment, and therefore should not have participated in the vote (*Barbour v. Knecht*, 296 A.D.2d 218, 225, 743 N.Y.S.2d 483, 489 [1st 2002] (holding that director's interest in purchasing the shares of cooperative for herself made her "interested director," and therefore was evidence of the board's bad faith); *see Bernheim v. 136 E. 64th St. Corp.*, 128 A.D.2d 434, 435, 512 N.Y.S.2d 825, 826 [1st Dept 1987] ("[i]f one or more members of the Board were involved for personal profit in an attempt for arrangements for a sale to others, there could be a question of good faith rejection."); *Boisson v. 4 E. Hous. Corp.*, 129 A.D.2d 523, 524, 514 N.Y.S.2d 374, 375 [1st Dept 1987]). Moreover, Defendant Hardy allegedly used her position on the Board of Directors to influence the vote on Plaintiff's application. Further, Defendant Carle allegedly attempted to persuade Rodriguez to sell the Apartment to Defendant Hardy, by all but guaranteeing that the Board of directors would approve her application. Further, the Board of Directors allegedly conspired to deny Plaintiff's application in order to "force" the sale to Defendant Hardy. And, Plaintiff alleges that the reason

furnished by the Board for denying Plaintiff's application—that he did not intend on residing in the Apartment—is false, since he did intend the Apartment to be his primary residence; indeed, it is claimed that the Board never required a “residency requirement” from prospective purchasers.

Since the Complaint sufficiently alleges that the Board of Directors acted in bad faith when it denied Plaintiff's application, Defendants' affidavits stating that the Board members acted in good faith do not warrant the dismissal of the tortious interference claim (*see Ackerman v. 305 E. 40th Owners Corp.*, 189 A.D.2d 665, 667 [1st Dept 1993] [“[p]re-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith.”]).

Further, Defendants' argument that the Complaint should be dismissed against Defendant, Kever, Strula and Baum is unwarranted, since the facts alleged by Plaintiff are assumed to be true under the circumstances (*Lawrence v Miller*, 11 N.Y.3d 588, 873 N.Y.S.2d 517 [2008], citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 [1976] (“[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action’ ”)). Moreover, paragraph 32 of the Complaint specifically alleges that Defendants Trinidad, Bonita, and Sally knew of Defendant Hardy's intention to purchase the Apartment. Additionally, the Complaint specifically addressed the Board of Directors of Defendant Tomfol (¶¶32,33).

Accordingly, Defendants' motion to dismiss Plaintiff's cause of action for tortious interference (first cause of action), is denied.

Fraud/bad faith/self-dealing

The Complaint alleges that Defendants decision to deny Plaintiff's application was based on fraud, bad-faith and/or self-dealing.

A cause of action for fraud requires Plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 883 N.Y.S.2d 147 [2009]). Further, allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings (*see CPLR § 3016(b); Anos Diner v. Pitios Gourmet*, 100 A.D.2d 948, 475 N.Y.S.2d 86 [2d Dept 1984]).

Here, the Complaint fails to allege the elements required to plead a cause of action for fraud with the required specificity. Plaintiff does not allege in detail any fraudulent representations Defendants made to Plaintiff or allegations of fact from which it could be inferred that Defendants agreed or entered into an understanding to deny Plaintiff's application (*see Nicosia v. Bd. of Managers of Weber House Condo.*, 77 A.D.3d 455, 456, 909 N.Y.S.2d 412 [1st Dept 2010]).

As to the remaining portion of the second cause of action for "self dealing/bad faith," Plaintiff's reliance on *Lama Holding Co. v. Smith Barney Inc.* (88 N.Y.2d 413, 668 N.E.2d 1370 [1996]) to establish the elements for "self dealing/bad faith" is incorrect (Hankin Aff., at ¶34). Rather, those elements recited in Plaintiff's opposition relate to a claim for fraud (*Lama*, 88 N.Y.2d at 421). Moreover, Plaintiff's opposition fails to address Defendants' argument that Plaintiff failed to state a claim for breach of fiduciary duty. Further, even if Plaintiff sought to allege a claim for breach of fiduciary duty, that claim would fail since Defendants do not owe Plaintiff, a non-shareholder, a fiduciary duty (*see Pesochinsky v. 77 Bleecker St. Corp.*, 250

A.D.2d 494, 494, 672 N.Y.S.2d 879, 879 [1st Dept 1998]). Therefore, Plaintiff's cause of action for "fraud/bad faith/self-dealing" (second cause of action), is dismissed.

Discrimination

Plaintiff's claim of discrimination likewise fails to state a cause of action.

Here, the Complaint alleges that Defendants "wrongfully and improperly treated and discriminated against [Rodriguez], a shareholder of [Defendant Tomfol]," and does not allege that plaintiff himself was discriminated against. Plaintiff fail to address Defendants' arguments that plaintiff lacks standing to assert such a claim of discrimination. Moreover, Plaintiff's claim (in opposition), that Defendants engaged in "unfair and discriminatory treatment of [Plaintiff] by imposing rules that do not exist for other purchasers under similar circumstances" (Opp., at ¶42) is also insufficient in that it fails to assert that plaintiff was part of any class protected under the law.² Thus, Plaintiff's third cause of action for discrimination is dismissed.

Rescission

The equitable remedy of rescission "is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored" (*Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 71, 747 N.Y.S.2d 441, 446 [1st Dept 2002], quoting *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 13, 330 N.Y.S.2d 33, 280 N.E.2d 867 [1972] (internal quotation marks and citations omitted); *Lichtyger v Franchard Corp.*, 18 N.Y.2d 528, 537 [1966] ("[w]here an adequate remedy at law is provided,

² It is noted that New York Civil Rights Law, § 19-a prohibits a cooperative from withholding "its consent to the sale or proposed sale of certificates of stock or other evidence of ownership of an interest in such corporation because of the race, creed, national origin, or sex of the purchaser" N.Y. Civ. Rights Law § 19. However, plaintiff does not allege that Plaintiff's application was denied on the basis of Plaintiff's race, creed, national origin or sex.

the reason for granting equitable relief disappears” (internal quotation marks and citations omitted)]. Here, plaintiff alleged an adequate remedy at law-damages for tortious interference, and acknowledges that seeks money damages for \$500,000.00 plus interest (Compl. ¶¶35, 41, 46). And, Plaintiff’s opposition fails to address Defendants’ argument that he has an adequate remedy at law and that Plaintiff failed to plead the elements of rescission for based upon fraudulent inducement. Accordingly, plaintiff’s fourth cause of action for rescission is dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the branch of Defendants’ motion to dismiss Plaintiff’s Complaint pursuant to CPLR § 3211(a)(8) is denied. It is further

ORDERED that the branch of Defendants’ motion to dismiss Plaintiff’s first cause of action pursuant to CPLR § 3211(a)(7) is denied. It is further

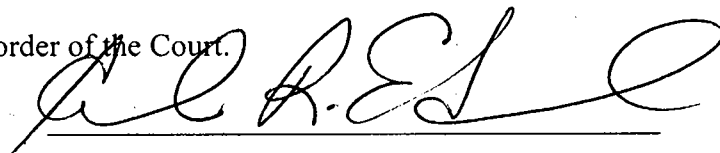
ORDERED that the branch of Defendants’ motion to dismiss Plaintiff’s second, third and fourth causes of action pursuant to CPLR § 3211(a)(7) is granted and the second, third and fourth causes of action are hereby severed and dismissed. It is further

ORDERED that the parties shall appear for a preliminary conference on July 11, 2017, 2:15 p.m. It is further

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 5, 2017



HON. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.