

Kalikow v Hochfelder
2003 NY Slip Op 30260(U)
November 14, 2003
Supreme Court, New York County
Docket Number: 602965/02
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Charles Edward Ramos
Justice

PART 53

Kalishou MR

INDEX NO. C602965-02

Hochfelder AC & A

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

SCANNED

The following papers, numbered 1 to _____ were read on this motion to/for NOV 19 2003

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 11/14/03

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

CHARLES E RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
-----X

N. RICHARD KALIKOW,

Plaintiff,

Index No. 602965/02

- against -

ADAM C. HOCHFELDER, AMY HOCHFELDER and
MAX NEW YORK, LLC,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

The defendants Adam C. Hochfelder (Hochfelder), Amy Hochfelder and Max New York, LLC (MaxNew York) (collectively, defendants) move for an order dismissing the second amended complaint as moot for the reasons set forth in the defendants' "offer of rescission."

Max New York is a Delaware limited liability corporation which invests in real estate. Pursuant to an operating agreement, the plaintiff N. Richard Kalikow (Kalikow) was a manager, and 60% owner, of Max New York. Hochfelder was also a manager, and owned the remaining 40% of Max New York. Pursuant to a redemption agreement, Hochfelder and his wife, Amy Hochfelder, acquired Kalikow's interest in Max New York.

The second amended complaint (complaint) alleges that, at a point in time after Kalikow accepted the Hochfelders' offer, but before the redemption agreement was executed, Hochfelder breached section 13.1 of the operating agreement by concealing investment opportunities, including, inter alia, the purchase of the UFT building at 260 Park Avenue South, in Manhattan.

Paragraph 28 of the complaint alleges that four days prior to the

closing of the redemption agreement, Hochfelder stated to Kalikow that he was 'buying the UFT building.' The complaint sets forth causes of action against Hochfelder for: (first) fraudulent concealment; (second) fraudulent misrepresentation; (third) negligent misrepresentation; (fourth) breach of fiduciary duty; and (fifth) breach of contract. The sixth cause of action is against Max New York, and is for breach of contract. The seventh cause of action is against Hochfelder, Amy Hochfelder, and Max New York, and is for breach of contract.

An earlier made motion to dismiss the complaint for failure to state a cause of action is sub judice.

In support of this latest motion to dismiss the complaint, the defendants have proffered a written offer to rescind the redemption agreement. It is argued that this renders the complaint moot.

In opposition to the motion, Kalikow makes the following arguments. First, he has the right to choose money damages as his remedy. Second, he maintains that this motion is barred by the defendants' prior motion to dismiss. Finally, he asserts rescission is impracticable for various reasons, **including** the tax consequences.

Obviously, this motion presents a creative attempt to win dismissal of a complaint. However, as a matter of procedure, nothing in either the CPLR, or the case law, appears to support the motion. Indeed, the notice of motion fails to cite a section of the CPLR. As a practical matter, the defendants' offer of

rescission may expose the overall weakness of Kalikow's case. However, the court declines to dismiss a complaint on the unique grounds proposed by the defendants.

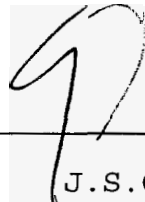
Any simplified procedure for court resolution of disputes (CPLR 3031), tender (CPLR 3219), offer to liquidate damages (CPLR 3220) offer to compromise (CPLR 3221), or action on submitted facts (CPLR 3222) requires the consent of both sides. Such consent is absent here.

Finally, at this pre-answer stage of the litigation, the court cannot summarily determine the issues of either the proper measure of damages, or the tax consequences presented by the offer of rescission.

Accordingly, it is

ORDERED that the motion to dismiss is denied.

Dated: November 14, 2003



J.S.C.
CHARLES E. RAMOS