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| Louzon v Citibank, N.A. |
| 2013 NY Slip Op 31362(U) |
| June 17, 2013 |
| Supreme Court, New York County |
| Docket Number: 653542/2012 |
| Judge: Saliann Scarpulla |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA
Justice

PART 19

AMIT LOUZON, Plaintiff,

INDEX NO. 653542/2012

- v -

MOTION DATE

CITIBANK, N.A., CITIMORTGAGE, INC., and 522 WEST 50TH ST., INC., Defendants.

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to consolidate

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that the cross-motions are determined in accordance with the accompanying decision/order.

This constitutes the Decision and Order of the Court.

Dated: 6/17/13

Saliann Scarpulla, J.S.C.

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION
Check if appropriate: [] DO NOT POST [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----- X

AMIT LOUZON,
Plaintiff,

Index Number: 653542/2012
Submission Date: 2/20/13

- against -

DECISION and ORDER

CITIBANK, N.A., CITIMORTGAGE, INC. and
522 WEST 50TH ST., INC.,

Defendants.

----- X

For Plaintiff:
Wagner Davis P.C.
99 Madison Avenue, 11th Floor
New York, NY 10016

For Defendants Citibank and Citimortgage:
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New York, NY 10104

For Defendant 520 West 50th St.:
Phillips Nizer LLP
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Papers considered in review of defendant 520 West 50th St.'s cross-motion to dismiss and plaintiff's cross-motion to amend (motion seq. no. 001):

| | |
|---|---|
| Order to Show Cause/Exhibits..... | 1 |
| Notice of Cross-Motion/Affirm. of Counsel/Exhibits..... | 2 |
| Memo in Opp..... | 3 |
| Notice of Cross-Motion/Affirm. of Counsel/Exhibits..... | 4 |
| Memo in Opp..... | 5 |

HON SALIANN SCARPULLA, J.:

Plaintiff Amit Louzon (“Louzon”) commenced this action for declaratory and injunctive relief to consummate a purchase of shares and a proprietary lease appurtenant

to Apartment D1 in a residential cooperative building located at 520 W. 50th Street, New York, NY (“the Apartment”).

Defendant 520 W. 50th Street, Inc. (“Apartment Corporation”) cross-moves to dismiss Louzon’s amended verified complaint pursuant to CPLR § 3211(a)(7).¹ Louzon cross-moves for leave to amend the complaint to seek further declaratory relief, to add two causes of action, to add defendants, and to amend the caption to reflect the correct entity name of the Apartment Corporation.

In his complaint, Louzon alleges that, on July 16, 2012, he 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”). Louzon entered into a contract with CitiMortgage to purchase the shares and lease for \$92,000 (“the contract”). The contract incorporated the terms of sale from the auction.

Louzon attached a copy of the contract to his complaint. The contract states that the successful bidder is “subject to the approval of the Apartment Corporation as provided in the Proprietary Lease or the corporate by-laws.” The contract also states that the successful bidder must submit an application to purchase the Apartment to the Apartment Corporation or managing agent within five days of the sale.² The contract

¹ The Apartment Corporation was incorrectly sued herein as 522 W. 50th Street, which Louzon now seeks to amend. The Apartment Corporation cross-moves from Louzon’s proposed order to show cause filed on October 9, 2012.

² The contract also states that if “approval or refusal is not given to the Successful Bidder within thirty (30) days of the Date of Sale, the Secured Party [CitiMortgage] may, at its sole option, accept the next highest bid or re-notice the sale.”

further states that all bidders must “represent to the secured party that they intend to occupy such apartment as a residence.”

Shortly after the auction, Louzon submitted an application to purchase the Apartment. The Apartment Corporation’s board of directors (“the Board”) denied Louzon’s application by letter from its counsel dated August 17, 2012. The letter did not specify the Board’s reason for declining to proceed further with Louzon’s application.

The August 17 letter also stated that Louzon’s purchase was not subject to the managing agent’s approval under Paragraph 17 of the proprietary lease, as Louzon claimed.³ The letter stated that Paragraph 17 applies “only if the proprietary lease is terminated at the request of a lender. . . [which] has not occurred.”

Subsequently, after the Board’s denial of Louzon’s application, CitiMortgage scheduled an auction sale of the shares and proprietary lease of the Apartment to take place on October 10, 2012.

Louzon commenced this action against the Apartment Corporation and CitiMortgage on October 9, 2012. In his complaint, Louzon seeks a declaratory judgment that: (a) the Apartment Corporation’s approval is subject to Paragraph 17 of the proprietary lease; (b) the Apartment Corporation’s approval was unreasonably withheld; (c) the contract between Louzon and CitiMortgage has not been cancelled; and (d)

³ Paragraph 17 of the proprietary lease states that “[i]f this lease is terminated at the Lender’s [CitiMortgage] request by reason of a default by the Lessee . . . the Lender may sell and assign the shares of the Lessor allocated to the apartment and this Lease . . . 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.”

Louzon is entitled to specific performance of the contract. Louzon also seeks an injunction: (i) ordering CitiMortgage to compel the Apartment Corporation to approve Louzon's application; (ii) enjoining defendants from selling the Apartment; and (iii) compelling defendants to sell the shares and proprietary lease to Louzon.

On October 9, 2012, Louzon also moved by order to show cause to enjoin CitiMortgage from holding a second sale of the shares and proprietary lease of the Apartment. In my interim order dated October 10, 2012, I declined to sign Louzon's order to show cause for a temporary restraining order to stop the second sale of the shares and proprietary lease because Louzon failed to join the owners of the shares as necessary parties, and he failed to make a sufficient showing for a temporary restraining order.

Thereafter, CitiMortgage's sale of the shares and proprietary lease took place on October 10, 2012. At the sale, the Apartment Corporation was the successful bidder of the shares and proprietary lease for the Apartment.

On January 4, 2013, I issued a further order denying Louzon's motion for a preliminary injunction to stop the sale of the Apartment. However, I granted Louzon's motion to the extent that I directed CitiMortgage to "use the proceeds from the sale of the apartment at issue to pay off the outstanding mortgages" and "to hold the remaining amount of the sale proceeds after payment of the mortgages, in escrow pending further order of the Court."

1. Motion to Dismiss

The Apartment Corporation now moves to dismiss Louzon's amended complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7). The Apartment Corporation argues that Louzon fails to state a claim for declaratory and injunctive relief because: (1) the sale of the Apartment was subject to the approval of the Apartment Corporation; and (2) the Apartment Corporation has the right to reject Louzon's application to purchase the Apartment for any reason under the business judgment rule, except discrimination which is not alleged by Louzon.

The Apartment Corporation also contends that Louzon's purchase is not subject to managing agent approval under Paragraph 17 of the proprietary lease because Louzon lacks standing to enforce the proprietary lease, and that provision does not apply because CitiMortgage never terminated the lease prior to the July 16, 2012 sale.

In opposition, Louzon argues that the Apartment Corporation improperly rejected his application to purchase the Apartment. First, Louzon claims that his application is subject only to managing agent approval under Paragraph 17, not Board approval. Louzon also argues that Paragraph 17 applies in this case because CitiMortgage's notice of sale constituted *de facto* termination of the lease.

Second, Louzon argues that the Apartment Corporation acted improperly when it rejected his application without any reason, and when it later rejected his application on the basis that he did not intend to occupy the Apartment as his primary residence. Louzon claims that the contract only requires the Apartment to be used as a residence, not his

primary residence. Louzon further argues that the business judgment rule does not apply because the Board acted *ultra vires* in rejecting his application, and the Board engaged in self-dealing by causing the Apartment Corporation to purchase the Apartment at the second sale held on October 10, 2012.

2. Motion to Amend

Louzon moves to amend his complaint to state two new causes of action. First, Louzon seeks to add a claim for tortious interference with contract against the Apartment Corporation, the managing agent, and individual board members.⁴ Louzon argues that the Apartment Corporation defendants procured CitiMortgage's alleged breach of the contract by prohibiting the managing agent from approving Louzon's application and threatening CitiMortgage with litigation to compel CitiMortgage to cancel the sale.

Second, Louzon seeks to add a breach of contract claim against CitiMortgage. Louzon claims that CitiMortgage breached the obligation of good faith and fair dealing by canceling the sale and making no effort to obtain the managing agent's approval.

Louzon also seeks to add a claim for further declaratory relief against a new defendant, Ibrahim Soliman, the owner of the shares and proprietary lease. Louzon seeks a declaration that Ibrahim Soliman does not have any interest in the Apartment. Louzon

⁴ Louzon also seeks to amend the complaint to add the following defendants: the managing agent entities, Merlot Group, Inc. and Merlot Management, Inc., the owner of the managing agent, Beth Markowitz; and board members Anthony Tower, John Fitzpatrick, and John Doe 1-4 ("the Apartment Corporation defendants").

also seeks a declaration that the Apartment Corporation defendants interfered with his contractual or prospective contractual rights under the contract with CitiMortgage.

The Apartment Corporation opposes the motion to amend on the grounds that Louzon fails to allege sufficient facts to establish his three proposed causes of action, and he fails to identify the changes or additions to be made in the pleading as required by CPLR § 3025(b). The Apartment Corporation does not oppose the motion to amend the caption to reflect its correct entity name, 520 West 50th St., Inc.

Discussion

1. Motion to Dismiss

CPLR § 3211(a)(7) provides that a defendant may move for judgment dismissing the complaint on the grounds that “the pleading fails to state a cause of action.” In determining whether to grant a motion to dismiss based on a failure to state a cause of action, the “court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep’t 2002).

However, where the parties submit extrinsic evidence in connection with a CPLR § 3211(a)(7) motion to dismiss, the appropriate standard of review is “whether the proponent of the pleading has a cause of action, not whether he has stated one.” *IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 402 (1st Dep’t 2007) (internal quotations omitted). Moreover, the interpretation of a contract is a question of law for the

court, and the provisions establish the rights of the parties and prevail over the conclusory allegations in the complaint. *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001).

Here, both Louzon and the Apartment Corporation submitted extrinsic evidence – most significantly, the contract – in connection with this motion to dismiss. Therefore, I will review the motion to dismiss according to the standard of whether Louzon has a cause of action for the declaratory and injunctive relief that he seeks.

The Apartment Corporation first moves to dismiss Louzon's claim for a declaratory judgment. On a motion to dismiss a declaratory judgment claim under CPLR § 3211(a)(7), the question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, not whether the plaintiff is entitled to a declaration favorable to him. *Fillman v. Axel*, 63 A.D.2d 876, 876 (1st Dep't 1978); *Rotblut v. 150 East 77th Street Corp.*, 79 A.D.3d 532, 533 (1st Dep't 2010).

In his complaint, Louzon presented a proper case for a declaratory judgment as a justiciable controversy exists over Louzon's right to purchase the shares and proprietary lease under the contract. However, I find that Louzon is not entitled to a declaration in his favor based on the terms of the contract.

Under the contract, Louzon's purchase was clearly subject to the Apartment Corporation's approval. The contract expressly states that the successful bidder is “subject to the approval of the Apartment Corporation.”

Contrary to Louzon's claim, his purchase of the shares and proprietary lease is not subject to managing agent approval under Paragraph 17 of the proprietary lease. The sale of the shares and proprietary lease to Louzon is governed by the terms of the contract, which stated that his application is subject to the approval of the Apartment Corporation, not the managing agent. In addition, Louzon 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. *Woo v. Irving Tenants Corp.*, 276 A.D.2d 380, 380 (1st Dep't 2000); *Aridas v. 244 East 60th St. Owners Corp.*, 292 A.D.2d 325, 326 (1st Dep't 2002).

Louzon argues that even if his application is subject to the Apartment Corporation's approval, the Board acted improperly and in bad faith when it denied his application without any reason, or on the grounds that he did not intend to occupy the Apartment as his primary residence. However, the board of a residential cooperative has the right to withhold approval of a purchase for "any reason or no reason" under the business judgment rule, absent illegal discrimination, self-dealing, or misconduct. *Simpson v. Berkley Owner's Corp.*, 213 A.D.2d 207, 207 (1st Dep't 1995). And although Louzon accurately points out that the contract required him "to occupy the Apartment as a residence" – the Board is not required to approve Louzon's application based on his mere satisfaction of this condition.

Louzon also contends that the business judgment rule does not apply because the Apartment Corporation engaged in a self-dealing transaction by purchasing the shares and

proprietary lease of the Apartment at the second sale. However, the Apartment Corporation's purchase of the shares and proprietary lease does not amount to a self-dealing transaction. A self-dealing transaction is a transaction in which a corporate director violates the duty of loyalty to the corporation by acting for his or her own personal benefit, rather than the benefit of the corporation. *Limmer v. Medallion Group, Inc.*, 75 A.D.2d 299, 302 (1st Dep't 1980). Here, Louzon does not allege that any of the Board's directors acted in their own self interest, rather than for the benefit of the Apartment Corporation. *Goldstone v. Constable*, 84 A.D.2d 519, 520 (1st Dep't 1981).

Although Louzon is not entitled to the declaratory relief he seeks as a matter of law, a motion to dismiss a declaratory judgment claim should not be denied, but should be considered a motion for a declaration in defendant's favor. *Tilcon New York, Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150 (2d Dep't 2011); *see Rotblut*, 79 A.D.3d at 533. Therefore, I find that the Apartment Corporation is entitled to a declaration that Louzon's application was subject to the Apartment Corporation's approval, and that the Apartment Corporation acted within its authority to reject Louzon's application.

The Apartment Corporation also moves to dismiss Louzon's claim for injunctive relief to compel the sale of the Apartment to him. For the reasons set forth above, Louzon does not have a cause of action for an injunction to compel the sale of the shares and proprietary lease to him. Therefore, I grant the motion to dismiss Louzon's injunctive relief claim.

In sum, I grant the Apartment Corporation's motion to dismiss the amended complaint to the extent that the Apartment Corporation is entitled to a declaration in its favor as stated above, and the injunctive relief claim is dismissed.

2. Motion to Amend

CPLR §3025(b) provides that a party may amend a pleading at any time by leave of court. If an amendment is sought, leave must be freely granted absent prejudice to the opposing party. *Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001).

On a motion to amend, the court "should examine the sufficiency of the merits of the proposed amendments" and deny leave to amend when the proposed amendments are legally insufficient and totally devoid of merit. *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 25 (1st Dep't 2001).

In accordance with my decision on the motion to dismiss, I deny Louzon's motion to amend the complaint because his proposed amendments are legally insufficient and devoid of merit. First, Louzon's proposed amendment to assert a tortious interference with contract claim against the Apartment Corporation defendants is without merit. To assert a cause of action for tortious interference with contract, a plaintiff must allege: (1) the existence of a valid contract; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach of contract; and (4) damages. *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006).

Here, the 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.

Second, Louzon's proposed amendment to assert a breach of contract claim against CitiMortgage is also without any merit. To assert a breach of contract claim, the plaintiff must allege: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) the defendant's breach; and (4) damages. *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Louzon alleges that 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. However, CitiMortgage did not breach the contract by canceling the sale to Louzon. Under the terms of the contract, 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.

Louzon also seeks to amend the complaint to seek further declaratory relief that Ibrahim Soliman has no interest in the Apartment, and that the Apartment Corporation defendants interfered with his contract with CitiMortgage. As these proposed amendments are also devoid of any merit, I deny Louzon's motion to amend the complaint for further declaratory relief.

However, I grant Louzon's motion to amend the caption to reflect the correct entity name of the Apartment Corporation, 520 W. 50th St., Inc. The Apartment Corporation does not oppose the motion to amend the caption.

In sum, Louzon's motion to amend is granted only to the extent that the caption is amended to reflect the correct entity name of the Apartment Corporation, 520 W. 50th St., Inc., and otherwise denied.

In accordance with the foregoing, it is

ORDERED that defendant 520 W. 50th St., Inc.'s cross-motion to dismiss plaintiff Amit Louzon's complaint pursuant to CPLR § 3211(a)(7) is granted to the extent that 520 W. 50th St., Inc. is entitled to a declaration in its favor, and Louzon's claim for an injunction is dismissed as against all defendants; and it is further

ADJUDGED and DECLARED that plaintiff Amit Louzon's purchase of the shares and proprietary lease appurtenant to Apartment D1 in 520 W. 50th Street, New York, NY is subject to the Apartment Corporation's approval under the terms of the contract, and the Apartment Corporation acted within its authority to reject Louzon's application; and it is further

ORDERED that plaintiff Amit Louzon's cross-motion to amend the complaint to seek further declaratory relief, to add two causes of action, to add defendants, and to amend the caption pursuant to CPLR § 3025(b) is granted only to the extent that the

caption is amended to reflect the correct entity name of the Apartment Corporation, 520 W. 50th St., Inc. and otherwise denied; and it is further

ORDERED that this action shall bear the following caption:

Amit Louzon,

Plaintiff,

v.

Citibank, N.A., CitiMortgage, Inc., and 520 W. 50th St., Inc.,
Defendants.

And it is further

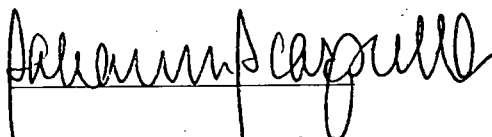
ORDERED that plaintiff Amit Louzon shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 7, 2013

ENTER:



Saliann Scarpulla, J.S.C.