

534 East 11th St. HDFC v Hendrick

2013 NY Slip Op 31987(U)

August 23, 2013

Sup Ct, New York County

Docket Number: 116064/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: RAKOWER
Justice

PART 15

Index Number : 116064/2008
534 EAST 11TH STREET
VS.
HENDRICK, PETER
SEQUENCE NUMBER : 004
DISMISS

FILED

AUG 27 2013

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

COUNTY CLERK'S OFFICE

The following papers, numbered 1 to _____, were read on this motion to NEW YORK

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3</u>
Replying Affidavits _____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 8/23/13


HON. EILEEN A. RAKOWER J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

534 EAST 11th STREET HDFC,

FILED

Plaintiff,

AUG 27 2013

INDEX NO. 116064/08

MOTION DATE _____

- v -

COUNTY CLERK'S OFFICE
NEW YORK

MOTION SEQ. NO. _____

PETER HENDRICK,

MOTION CAL. NO. 4

Defendants.

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2,</u>
Answer — Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Plaintiff is a cooperative corporation owning the premises located at 534 East 11th Street in the County and State of New York. Defendant is a shareholder and proprietary lessee. The agreement plaintiff seeks to enforce in this action, in essence, involves the assignment of plaintiff's right to purchase the shares and proprietary lease associated with unit 6 in the premises to defendant in exchange for defendant's promise to sell his shares and proprietary lease associated with unit 5 in the premises.

Plaintiff previously moved to amend its verified complaint to reflect changes in the cooperative's by laws, and such amendment was permitted. Defendant now moves to dismiss the Second Amended Complaint pursuant to CPLR §3211 on the grounds that Plaintiff has unclean hands.

The agreement states, in pertinent part:

The parties hereto specifically covenant and agree that the within Assignment and Assumption has been entered into in consideration of the covenant and promise of Assignee [defendant] that he will make best efforts to sell the shares of

534 East 11th Street HDFC and appurtenant Proprietary Lease both allocated to Apartment #5 in the building known as 534 East 11th Street, New York, New York to Dustin Shryock for the sale price of \$110,000 as soon as possible and, if such sale is not possible, to sell said Shares and Proprietary Lease allocated to Apartment #5 to a Purchaser approved by Assignor as soon as possible.

The complaint states that Defendant, assignee, in fact purchased the shares and proprietary lease associated with apartment 6. Defendant then entered into a contract of sale to sell Dustin Shryock the shares and proprietary lease associated with apartment 5 for the sale amount of \$110,000. Dustin Shryock exercised his right to cancel the purchase contract for apartment 5 because he was unable to obtain financing. Defendant next proposed a purchaser for apartment 5, Lia Gangitano.

At a Special Meeting of the Shareholders of the Plaintiff, Lia Gangitano was interviewed, but the majority of the Shareholders of Plaintiff did not approve the application of Lia Gangitano to become a Shareholder of Plaintiff. Pursuant to Plaintiff's By-Laws, the majority of the Shareholders of the Plaintiff then voted that Dustin Shryock would be the person approved to become the Shareholder and Proprietary Tenant of Apartment #5 in the subject building.

The complaint acknowledges that "Dustin Shryock has informed Plaintiff that he no longer wishes to purchase the Shares of Stock and appurtenant Proprietary Lease allocated to said Apartment #5." The complaint states that upon information and belief, "Defendant will refuse to propose any purchaser of said Shares of Stock to be approved, or not, by a vote of Plaintiff's Shareholders, thus preventing transfer of said Shares of Stock and Proprietary Lease to an incoming Shareholder."

The Plaintiff seeks specific performance of the contract, in that it seeks to have Defendant "propose a purchaser and, after approval by Plaintiff of such purchaser, transfer the Shares of Stock and appurtenant Proprietary Lease allocated to Apartment #5 to such purchaser pursuant to Plaintiff's By-Laws."

Defendant moves to dismiss based on Plaintiff's unclean hands. Defendant asserts facts, outside the four corners of the complaint, arguing that Plaintiff's refusal to accept his proposed purchaser coupled with Plaintiff's insistence that he renegotiate a sale to Dustin Shyrock for a reduced price, demonstrate a breach of the covenant of fair dealing.

The covenant of good faith and fair dealing is breached when a party acts in a manner that deprives the other party of the right to receive benefits under the agreement. In order to establish a breach of the covenant of good faith and fair dealing, the party asserting the breach must allege facts that tend to show that the other party sought to prevent performance of the contract or to withhold its benefits from the party asserting the breach. Whether or not a party to a contract breached the implied covenant of good faith and fair dealing is often a factual question.

On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the plaintiff accorded the benefit of every possible inference. (*See, Leon v. Martinez*, 84 NY2d 83, 614 NYS2d 972, 638 NE2d 511 [1994]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). The court's function on a motion to dismiss pursuant to CPLR §3211(a)(7) is to determine whether the plaintiff's factual allegations fit within any cognizable theory, without regard to whether the allegations ultimately can be established. *See, Union State Bank v. Weiss*, 65 AD3d 584, 884 NYS2d 136 [2nd Dept 2009]).

The complaint states that the "shares of Stock and Proprietary Lease allocated to Apartment #5 are unique and cannot be otherwise transferred except by enjoining Defendant as asserted herein." While Defendant may have defenses to the action, the complaint, affording Plaintiff every possible inference, and looking only to the four corners of the complaint, states a cause of action upon which relief may be granted.

Wherefore, it is hereby

ORDERED that the motion to dismiss is denied, and Defendant is to file

and serve an Answer to the Second Amended Complaint within 20 days of service of a copy of this Order with Notice of Entry..

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: August 23, 2013



Eileen A. Rakower, JSC

FILED
AUG 27 2013
COUNTY CLERK'S OFFICE
NEW YORK