SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Kushner, Adam

-v-

79 Barrow Street

INDEX NO. 109788/2011

MOTION DATE

MOTION SEQ. NO. 03

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/16/13

____, J.S.C.

LOUIS B. YORK

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
COUNTY OF NEW YORK : IAS PART 2

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ADAM KUSHNER,

Plaintiff,

INDEX NO.
109788/11

-against-

79 BARROW STREET OWNERS CORP.,

Defendant.

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LOUIS B. YORK, J.:

Plaintiff moves for an order pursuant to CPLR 3212 granting partial summary judgment[1] in his favor.

Defendant cross-moves for an order pursuant to CPLR 3212: (i) granting it summary judgment dismissing plaintiff's complaint in its entirety, and (ii) granting attorney's fees.

At all times relevant herein plaintiff was a tenant/shareholder of apartment 6 A/B (the "Apartment") in a residential cooperative building located at 79 Barrow Street in Manhattan (the "building"). Defendant Owners Corp. is the owner of the building.

According to plaintiff, who is a licensed architect and general contractor, he performed renovation work in the Apartment from October 2001 until March 2005. In May 2005, defendant hired the architectural firm of WYS Design to perform an audit of plaintiff's renovation work to determine if the renovations and alterations conformed to the New York City Department of Buildings Code (the "Code"). The audit was completed the following month.

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[1] Although not specified in his notice of motion, plaintiff is seeking summary judgment on his first (of six) cause of action for breach of contract.

After the audit was completed, the parties entered into an agreement on or about September 22, 2006 (the "2006 Agreement") "in settlement of all outstanding issues concerning the renovations to and use of Apartments 6A and 6B (including roof work) and cure and resolve all issues associated with the material breaches" (see defendant's exhibit A, ¶ III). Upon execution of the 2006 Agreement, plaintiff paid $3,000 to defendant and agreed to pay an additional $9,000 in six monthly installments for costs incurred by defendant "in connection with the renovation to date" (*id.*, ¶ 12f, ¶ 10).

On March 29, 2011, plaintiff entered into a contract to sell the Apartment to third party Gonzalo Mauricio Merlo ("Merlo"). Defendant's board of directors approved the sale by letter to plaintiff dated May 20, 2011 (the "Approval Letter"). The Approval Letter advised plaintiff that he would be responsible for legal fees incurred by defendant in connection with the closing along with any outstanding balances owed to defendant under the 2006 Agreement (see defendant's exhibit B). Plaintiff states that shortly after receipt of the Approval Letter he entered into a lease for a new apartment at another address.

Thereafter, on or about June 1, 2011, defendant informed plaintiff that it would not approve the sale to Merlo until the Apartment was re-inspected to confirm that there were no Code violations. In this connection defendant hired the firm of SW Engineering ("SW"), which inspected the Apartment on June 2, 2011. In its June 9, 2011 inspection report, SW identified eight Code violations (see defendant's exhibit C). The next day defendant advised plaintiff that it would not approve the sale to Merlo until all of the violations described in the SW report were remedied. According to plaintiff, he complied with defendant's demands "under protest ... and only to mitigate [his] damages resulting from their[*sic*] breach of the 2006 Agreement" (see plaintiff's moving affidavit, ¶ 11).

Prior to the closing, which had been postponed from June 4, to July 13, 2011 as a result of the activities described above, plaintiff was advised by defendant that he would be assessed the following closing costs: $8,250.00 to repair damage to the roof of the building purportedly caused by plaintiff when he installed an HVAC unit in May 2002; $960.00 for SW; and $5,670.00 for defendant's legal fees. The sale to Merlo closed on July 13, 2011, at which time plaintiff paid the costs set forth immediately above.

Plaintiff commenced this action in August 2011 by service of a summons and complaint. Issue was joined in November 2011 by service of defendant's answer.

The complaint asserts six causes of action in the following order: (i) breach of contract (the 2006 Agreement); (ii) breach of plaintiff's proprietary lease (extraction of unreasonable legal fees and other expenses); (iii) breach of the Approval Letter; (iv) breach of the proprietary lease (revocation of plaintiff's license for storage space); (v) promissory estoppel; and, (vi) breach of fiduciary duties (see complaint, plaintiff's exhibit A).

Plaintiff is now moving for summary judgment on his first cause of action for breach of the 2006 Agreement. The complaint alleges in pertinent part that plaintiff fully performed his obligations under the 2006 Agreement when he paid $12,000 to defendant to settle all disputes arising from his renovations and that defendant breached the Agreement "when it used its power to prevent the sale of the [Apartment] in order to extract additional performance by [plaintiff] relating to the renovations of the [Apartment] and repair of the co-op's roof, thus denying [plaintiff] the benefit of his bargain" (*id.*, ¶ 67). Plaintiff seeks the following damages stemming from defendant's alleged breach: $8,250.00 for the "HVAC Roof Repair"; $3,790.98 for the cost of curing the alleged Code violations set forth by SW; $960.00 he paid to SW for services it rendered to defendant; $8,408.04 for additional costs incurred by plaintiff resulting from

defendant's delaying the closing for six weeks; $4,377.70 for the cost of raising the HVAC unit onto dunnage; and $5,670.00 in excessive legal fees he was forced to pay to defendant's attorneys (*id.*, ¶ 68).

In support of his motion plaintiff argues that he performed no renovations to the Apartment after March 2005 and that all renovation work prior thereto was resolved by the 2006 Agreement which he fully performed by paying $12,000 to defendant. Plaintiff contends that defendant breached the 2006 Agreement by retracting its approval of the renovations after plaintiff contracted to sell the Apartment to Merlo and misusing its power and authority to delay the sale and force plaintiff to perform additional renovation work and pay additional fees.

In opposition, defendant argues that plaintiff's motion should be denied and his first cause of action should be dismissed because the actions complained of were authorized by the 2006 Agreement along with plaintiff's proprietary lease and defendant's by-laws.

In support of its cross-motion for summary judgment dismissing the complaint in its entirety defendant argues that plaintiff's second cause of action for breach of the proprietary lease, which alleges that defendant extracted unreasonable legal fees and other expenses from plaintiff before it would allow the sale to close, should be dismissed because defendant's actions were authorized by the 2006 Agreement and the lease. Defendant adds that under the 2006 Agreement plaintiff was responsible for the costs of repairing the housing around the HVAC unit he installed on the roof of the building and raising the HVAC unit onto dunnage as recommended by SW. Next, defendant argues that plaintiff's third cause of action alleging breach of the Approval Letter should be dismissed because the Letter states that defendant's legal costs along with any other outstanding balances owing to defendant under the 2006 Agreement and defendant's rules will be due and payable by plaintiff at the closing. Defendant states that

plaintiff did not fully comply with the 2006 Agreement until July 12, 2011 (the day before the closing).

Defendant then argues that plaintiff's fourth cause of action, alleging that defendant improperly revoked plaintiff's license of storage space in the building, should be dismissed because plaintiff's Storage Bin License Agreement specifically states that the storage bin is for plaintiff's personal use only, that it cannot be assigned or sublet without defendant's prior written consent, and that plaintiff's license will automatically terminate upon his sale of the Apartment. Defendant argues that plaintiff's fifth cause of action based on the doctrine of promissory estoppel should be dismissed because nowhere in the 2006 Agreement or the Approval Letter did defendant represent to plaintiff that he could sell the Apartment without having to make additional renovations or pay additional costs. Defendant concludes that plaintiff's sixth cause of action should be dismissed because its board of directors did not breach its fiduciary duties in relation to plaintiff's sale to Merlo. According to defendant, any delay in the closing was solely attributable to plaintiff's "complete disregard and breach of the Proprietary Lease and the 2006 Agreement."

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], rearg den 3 NY2d 941 [1957]). A motion for summary judgment is properly denied if the proponent fails to establish its cause of action or defense so as to warrant judgment in its favor as a matter of law (see *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966 [1988]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Issues of credibility cannot be determined at the summary

judgment stage (*S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 NY2d 338 [1974]).

The court finds that neither party has established its right to summary judgment with respect to plaintiff's first cause of action for breach of the 2006 Agreement. Plaintiff contends that his renovations were completed in March 2005, that all outstanding issues were resolved by the 2006 Agreement and that he fully performed his obligations thereunder. Indeed, as noted above, the 2006 Agreement provides that its purpose is to settle "all outstanding issues concerning the renovations to and use of [the Apartment] (including roof work) and cure and resolve all issues associated with the material breaches" (see defendant's exhibit A, ¶ III). However, the 2006 Agreement was, in fact, executory. It provides that plaintiff will grant defendant access to the Apartment to conduct an architectural and engineering audit of all renovations, to determine compliance with all applicable codes, city filed plans, board-approved plans and the proprietary lease (see *id.*, ¶¶ 1-3). The 2006 Agreement provides further that plaintiff will reimburse defendant for the costs of the audit and the costs of any repair and that plaintiff agrees to indemnify defendant against any latent damage or structural problem proximately caused by the renovations or alterations to his apartment or the roof "unidentified by the audit but which may become evident thereafter" (*id.*, ¶ 5). The 2006 Agreement concludes that defendant's rights under the proprietary lease, building rules and Offering Plan remain in full effect (*id.*, ¶ 17).

Plaintiff is obviously not entitled to summary judgment on his first cause of action because defendant did not breach the 2006 Agreement by "extract[ing] additional performance" from plaintiff as alleged in the complaint (see complaint, plaintiff's exhibit A, ¶ 67). Plaintiff has, however, succeeded in raising an issue which warrants denial of defendant's request for

summary dismissal of this cause of action. The obligation of good faith is implicit in any contract (see *Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 155 [1st Dept 1999]). Plaintiff's allegations that defendant used its power to, in effect, extort money from plaintiff before it would allow him to sell the Apartment to Merlo are sufficient to create an issue as to whether defendant violated its obligation of good faith (see *Kravtsov, supra*).

Plaintiff's second cause of action for breach of his proprietary lease (excessive and unwarranted fees and expenses) will also be sustained for the reasons set forth immediately above.

Plaintiff's third cause of action for breach of the Approval Letter is based on allegations that plaintiff and defendant "were parties to a binding letter agreement" which defendant breached by withdrawing its approval in order to extract additional performance from plaintiff (see complaint, plaintiff's exhibit A, ¶¶ 75-76). The damages sought are identical to the damages sought under plaintiff's first and second causes of action. The court finds that this cause of action cannot be sustained as a breach of contract claim. The Approval Letter is not a contract. It is a unilateral document, which is addressed to plaintiff and signed by the president of defendant's board of directors (see defendant's exhibit B). The letter incorporates the 2006 Agreement, makes reference to "unusual circumstances" and "special liabilities" and states that defendant's legal costs and any outstanding balances owing to defendant will be due and payable at the closing. Plaintiff is not seeking equitable relief under this cause of action and the damages sought replicate those sought under the first two causes of action, which afford plaintiff a full opportunity to pursue his claims. Accordingly, plaintiff's third cause of action will be dismissed.

Plaintiff's fourth cause of action, which alleges that defendant breached his proprietary lease by revoking his license for storage space in the building without notice, will also be

dismissed. The Storage Bin License Agreement states that "the Bin is for the Lessee's personal use only, and cannot be assigned, sublet, or otherwise transferred without prior written consent of the Cooperative" (see defendant's exhibit M, ¶ 10). The License Agreement also states that "Lessee acknowledges and understands that its license for the storage bin will automatically terminate upon the sale of the Lessee's apartment" (*id.*, ¶ 9).

In his fifth cause of action, which is based on the equitable doctrine of promissory estoppel, plaintiff alleges "in the alternative" that the doctrine applies to the 2006 Agreement, his proprietary lease and the Approval Letter (see complaint, plaintiff's exhibit A, ¶¶ 86-87). The court disagrees. "[I]n order to state a viable cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance" (*New York City Health & Hospitals Corp. v St. Barnabas Hospital*, 10 AD3d 489, 491 [1st Dept 2004], citing *Knight Securities LP v Fiduciary Trust Co.*, 5 AD3d 172 [1st Dept 2004]; see also *Cohen v Brown, Harris, Stevens, Inc.*, 99 AD2d 732, 733 [1st Dept 1984], affd 64 NY2d 728 [1984]; *Tribune Printing Co., Inc. v 263 Ninth Avenue Realty, Inc.*, 88 AD2d 877 [1st Dept 1982], affd 57 NY2d 1038 [1982] [the doctrine of promissory estoppel is limited to a narrow class of cases based on unusual circumstances not applicable to the facts before the Court. Even if the doctrine of promissory estoppel did apply, the elements of an oral promise needed to support plaintiff's claim of promissory estoppel is not present in the facts before the Court. Therefore, this cause of action will be dismissed.

Plaintiff's final cause of action, which incorporates all prior allegations of the complaint, alleges that defendant, through its board of directors, breached fiduciary duties owed to him,

causing him to sustain damages (out of pocket and punitive).

Determinations of a co-op board are protected by the "business judgment rule" so long as the board acts within the scope of its authority and in good faith (see *Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530, 538 [1990]). However, actions prompted by bad faith, self-dealing or other misconduct are not entitled to such immunity even if they pertained to matters within the scope of the board's authority (see *Matter of Vacca [Board of Managers of Primerose Lane Condominium]*, 251 AD2d 674, 675 [2d Dept 1998]). As with his first cause of action, plaintiff's contention that defendant's board used its power to thwart the sale to Merlo unless plaintiff complied with its unreasonable, unconscionable and (very) expensive (for plaintiff) demands is clearly sufficient to create an issue which warrants denial of defendant's request that this cause of action be summarily dismissed (see *Kravtsov v Thwaites Terrace House Owners Corp., supra*, 267 AD2d at 154).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is granted only to the extent that plaintiff's third, fourth and fifth causes of action are hereby dismissed. In all other respects the cross-motion is denied.

DATED: Oct. 16, 2013

J.S.C.

LOUIS B. YORK
J.S.C.