SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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UTICA & REMSEN II, LLC

Index No. 162514/2014

Plaintiff,

-against-

DECISION/ORDER

VRB REALTY, INC, ET AL.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1 ,2
Affidavits in Opposition.....	3,4
Replying Affidavits.....	5,6
Exhibits.....	7

This litigation concerns the sale of a commercial condominium unit located at 62 W. 47th St. (the "Unit") within the Diamond and Jewelry Industry Commercial Condominium (the "Condominium"). Defendants VNB Realty Inc. ("VNB") and 64 West 47th Street LLC ("64 West") have brought the present motion to dismiss the first and sixth causes of action in the amended complaint for breach of contract and specific performance for failure to state a cause of action. Defendants Board of Managers of the Diamond and Jewelry Industry Commercial Condominium (the "Board") and Marc Beznicki have brought a separate motion to dismiss the complaint. At the oral argument of this motion, plaintiff agreed to withdraw its third cause of action for breach of the declaration.

The relevant facts, as alleged in the amended complaint, are as follows. Defendant VNB owned the Unit in the Condominium. On or about November 14, 2014, defendant VNB entered

into an agreement of sale with defendant 64 West in which defendant VNB agreed to sell the Unit to defendant 64 West in exchange for payment in the amount of $20,000,000.00. Pursuant to Article XVI Section 1 of the Declaration of the Condominium ("Declaration"), the seller or lessor of a unit in the Condominium must first provide the Board with thirty days' notice of the sale and or lease. Article XVI Section 1 of the Declaration further provides that the failure of the Board "to act within such thirty days shall constitute approval." If the Board disapproves the sale or lease, then Article XVI Section 1 of the Declaration goes on to provide that "[the Board] shall within fifteen days of making its decision known produce a purchaser or lessee approved by it who will accept the transaction upon terms as favorable to the seller or landlord as the terms stated in the notice to the Board."

On or about December 15, 2014, the Board considered plaintiff's principals as the substitute purchaser of the Unit, which designation was communicated to purchaser's principals. On or about December 16, 2014, at a duly held meeting of the Board, the Board voted to exercise its right of first refusal over the Unit and designate plaintiff's principals as purchaser of the Unit. On that same day, plaintiff's principals, through their counsel, notified the Board that they were willing to purchase the Unit on the same terms and conditions set forth in the Agreement of Sale and to acquire title in an entity they control, which is Plaintiff. Plaintiff's principals expressly agreed to accept the terms of the Agreement of Sale.

By email dated December 16, 2014, counsel for plaintiff's principals wrote to an attorney for the Board and asked whether the letter indicating plaintiff's acceptance of the designation could be on behalf of counsel or whether it was required to be on company letterhead. Counsel for the Board responded that "It should be on the letterhead of the proposed buyer and signed by

an officer." Plaintiff's counsel responded that a letter had already been prepared on counsel's letterhead and submitted and that he hoped that was okay.

Article XVI Section 5 of the Declaration provides in part:

> Where the Board has produced a purchaser . . . who fulfills the requirements set forth in Section 1 of this article and agrees thereto, a binding contract shall be deemed to have come into existence and the unit owner shall be bound to consummate the transaction with such purchaser. . . .

On or about December 17, 2014, the Board through its counsel Ira Kazlow confirmed to plaintiff's counsel by telephone that the Board had voted to designate plaintiff's principals through an entity controlled by them as the buyer of the Unit. Thereafter, by email sent on December 17, 2014 at 2:10 P.M. with a copy to VNB's counsel, the Board's counsel again confirmed plaintiff's designation:

> This will confirm my telephone conversation with you of this morning in which I informed you that I represent The Diamond & Jewelry Industry Commercial Condominium. My client has agreed to allow your client to purchase the above-captioned unit on the same terms and conditions as set forth in the attached contract. THIS MUST CLOSE BY DECEMBER 31, 2014. I urge you to contact Steven R. Goldberg, Esq., at Rosenberg & Estis, P.C., who is representing the Seller.

On December 17, 2014, plaintiff's counsel and VNB's counsel spoke at various times to coordinate a closing date for the sale of the Unit so that closing could occur in accordance with the time of the essence provision of the Agreement of Sale. In furtherance of such conversations, at approximately 4:21 P.M. on December 17, 2014, VNB's counsel provided plaintiff's counsel with a title report to facilitate preparations necessary to effect the imminent closing of the transaction on or before December 22, 2014. By email sent on December 17, 2014 at approximately 8:28 P.M., the Board's counsel Ira Kazlow notified plaintiff's counsel and VNB's

counsel as follows: "My client has reconsidered and . . . waives its right of 1st refusal and consents to the sale to 64 West 47th Street LLC."

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a) (1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

Defendants VRB and West 64th argue that the first cause of action for breach of contract and the sixth cause of action for documentary evidence must be dismissed on the ground that plaintiff fails to allege that the Board unequivocally and unconditionally exercised its right of first refusal or that the seller ever received such unequivocal and unconditional acceptance. According to moving defendants, the Board did not make its decision known that it disapproved of the original transaction and the Board did not inform the seller that plaintiff was actually willing to purchase the Unit pursuant to the same terms as the agreement of sale. Initially, this

court finds that plaintiff has sufficiently alleged in the complaint that the Board exercised its right of first refusal. The complaint specifically alleges that at a duly held meeting of the Board, the Board voted to exercise its right of first refusal over the Unit and designate plaintiff's principals as purchaser of the Unit. The complaint also alleges that plaintiff's principals, through their counsel, notified defendant Board that they were willing to purchase the Unit on the same terms and conditions set forth in the agreement of sale.

The argument by defendants that the exercise of the right of first refusal was not effective as a matter of law because the Board never explicitly stated that it was disapproving the original transaction is without basis. The mere fact that plaintiff does not allege the Board did not expressly state that it was disapproving the original transaction is insufficient to establish that plaintiff failed to allege that the Board exercised its right of first refusal as the only implication that can be drawn from the Board's vote to exercise its right of first refusal over the Unit and allow plaintiff to purchase the Unit is that it was disapproving the original transaction.

Similarly, defendants' argument that the exercise of the right of first refusal was not effective as a matter of law because plaintiff did not allege in the amended complaint that the Board informed the seller that plaintiff was actually willing to purchase the Unit pursuant to the same terms as the agreement of sale is without merit. Plaintiff has sufficiently alleged in the complaint that the seller was at all times aware that the Board had exercised its right of first refusal and that the plaintiff had accepted the designation based on its allegations that there were explicit discussions between plaintiff's counsel and buyer's counsel regarding the scheduling of a closing date and that seller's counsel had in fact sent a copy of the title report to plaintiff's counsel. These allegations are sufficient to withstand a motion to dismiss particularly in light of the fact that the Condominium Declaration does not contain any specificity as to how the seller is

to be notified of the Board's disapproval of its purchaser and the Board's exercise of its right of first refusal.

Defendants' argument that plaintiff's claims are barred by the statute of frauds because there is no contract between the seller and plaintiff for the sale of the Unit is without merit. The agreement to let plaintiff purchase the Unit is an agreement between plaintiff and the Board. It is not an agreement between plaintiff and the seller. The right of plaintiff to purchase the Unit, if it exists, arises from its agreement with the Board and the Board's right to exercise its right of first refusal with respect to any sale by the seller pursuant to the terms of the Condominium Declaration.

Moreover, the cases cited by defendants for the proposition that the statute of frauds is applicable to a right of first refusal are inapposite. *See, e.g., McCormick v. Bechtol,* 68 A.D.3d 1376, 1379 (3d Dept 2009); *Naldi v. Grunberg,* 80 A.D.3d 1, 14 (1st Dept 2010). These cases hold that a right of first refusal is subject to the statute of frauds, as a result of which the essential terms of the right of first refusal must be set forth in a writing which satisfies the statute of frauds. In the present case, there is no allegation that the right of first refusal itself, which is contained in the condominium declaration, fails to satisfy the statute of frauds or that it is missing any essential terms or that it fails to identify the parties subject to the right of first refusal.

The court will now address the motion by the Board defendants to dismiss the complaint as against them. Initially, the motion by the Board to dismiss the second cause of action on the ground that it fails to allege an enforceable contract between the parties is denied. The Board argues that the second cause of action for breach of the duty of good faith and fair dealing fails to state a claim because the amended complaint does not allege "that plaintiff itself ever accepted

the Board's conditional offer to designate plaintiff as purchaser or that plaintiff otherwise agreed to be obligated before the Board revoked the offer by email..." Defendant argues that the acceptance of the designation by plaintiff's counsel rather than plaintiffs themselves is insufficient as a matter of law to create an enforceable contract based on the email from the Board that the acceptance should be on the letterhead of the proposed buyer and signed by an officer. However, the documentary evidence upon which defendants rely, their counsel's email to plaintiff's counsel stating that the acceptance should be signed by an officer, does not definitively dispose of plaintiff's claims. It is unclear from reading the email whether the statement that the acceptance should be on the letterhead of plaintiff and signed by an officer was an absolute requirement for an enforceable contract, especially where there is no allegation that the Board ever explicitly rejected the acceptance by plaintiff's counsel. To the contrary, on the very next day, an attorney for the Board once again confirmed by email that the Board was agreeing to allow plaintiff to purchase the Unit. Under these circumstances, the Board cannot establish as a matter of law that the failure of plaintiff to accept the designation by plaintiff itself rather than plaintiff's attorney caused the agreement to be unenforceable.

The motion to dismiss the tortious interference claim against the Board is denied for the reasons already stated in this decision as the Board is moving to dismiss this claim on the same grounds as the seller and buyer have moved to dismiss the complaint against them.

Finally, the motion to dismiss the claim against the individual board member Beznicki for tortious interference with contract is granted. Under New York law, individual directors and officers are not subject to liability absent the allegation that they committed separate tortious acts. *Konrad v. 136 E. 64th St. Corp.*, 246 A.D. 2d 324 (1st Dept 1998). "That the cooperative corporation's board of directors may have taken action that 'deliberately singles out individuals

for harmful treatment' does not, ipso facto, expose the individual board members to liability." *Id.* In the instant case, the amended complaint does not allege that the individual board member committed any acts outside his role as board member that amount to independent tortious conduct. As a result, the claim should be dismissed as against Beznicki.

Based on the foregoing, the motions are denied in their entirety except that the fifth cause of action against Beznicki is hereby dismissed and the third cause of action has been withdrawn. The foregoing constitutes the decision and order of the court.

Dated: 11/20/15

Enter: _____

J.S.C.
CYNTHIA S. KERN
J.S.C