

Croydon Manor Apt. Corp. v Camelback Realty Holdings, LLC

2018 NY Slip Op 30866(U)

April 13, 2018

Supreme Court, Queens County

Docket Number: 710742/2017

Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

CROYDON MANOR APT. CORP.,

Index No.: 710742/2017

Plaintiff,

Motion
Date: February 13, 2018

-against-

Motion Cal. No.: 44

CAMELBACK REALTY HOLDINGS, LLC,
SUNSIDE REALTY CORP. and SUNSIDE
REALTY LLC,

Motion Sequence No.: 1

Defendant.

The following efile papers numbered 3-27 submitted and considered on this motion by defendants seeking an Order pursuant to CPLR 3211 dismissing the First, Third, Fourth, and Sixth Causes of Action of plaintiff's complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 3-15
Affirmation in Opposition-Affidavits-Exhibits.....	EF 16-21
Reply Affirmation-Affidavits-Exhibits.....	EF 22-27

FILED
APR 23 2018
COUNTY CLERK
QUEENS COUNTY

Plaintiff Croydon Manor Apt. Corp. (hereinafter "Croydon") alleged in its verified complaint that it is a corporation organized under the Business Corporation Law of the State of New York to acquire and operate an apartment house located at 43-08 41st Street, Sunnyside, New York 11104 as a residential cooperative. Croydon alleged that defendant Camelback Realty Holdings, LLC (hereinafter "Camelback") is the holder of unsold shares and defendant Sunside Realty Corp. (hereinafter "Sunside") was the Sponsor of the Offering Plan and was the predecessor to Camelback. Sunside acquired the building on August 20, 1979 and Sunside purported to convert the building from a rental building to a cooperative by filing an offering plan with the Attorney General of the State of New York. The Cooperative was formed on December 21, 1984, under the Business Corporation Law of the State of New York. On August 23, 2000, Sunside purported to transfer all

of its shares to Camelback, making Camelback the holder of unsold shares. Croydon alleged that there is no record available demonstrating the transfer of the unsold shares to the current owner, defendant Sunside Realty LLC (hereinafter "Realty").

Croydon alleged that on the date that the Offering Plan was accepted for filing with the New York Department of Law, the building contained fifty three (53) residential apartments (the "Apartments"), of which nineteen (19) were subject to rent control and thirty-three (33) were subject to rent stabilization. On the Offering Date, the Sponsor, Sunside alleged that there were only four (4) vacant apartments as of the Offering Date. The Sponsor represented that it was offering to the public 17,330 shares of the Co-op's capital stock allocated to the apartments. Plaintiff further alleged that under the Offering Plan a viable residential housing cooperative consisting of resident shareholders who were to enter into a proprietary lease for an apartment in the building with special benefits of the ownership of an apartment in a genuine cooperative building was envisioned.

Sponsor, and at the time the Sponsor-controlled co-op entered into an agreement in December 1983 where Sponsor contracted to convey the building to the co-op, incorporating the Offering Plan into the terms of the contract and sale. The Offering Plan states that the Sponsor/Holder of Unsold Shares is to make a good faith effort to sell shares of the co-op and appurtenant proprietary leases for the building apartments until it is converted to a fully viable apartment house. Although 30 years have passed since the Offering Plan was declared effective, Sunside the Sponsor still owns about 62 percent of the shares of the plaintiff and the appurtenant proprietary leases for thirty two (32) out of fifty three (53) of the building's apartments. Plaintiff alleged that Sunside is renting unsold apartments free of rent regulation, which can be rented for much higher rents and that Sunside is renting these apartments to transient tenants as they become vacant instead of complying with the Offering Plan. Croydon further alleged that Sunside as the sponsor and holder of unsold shares and it has attempted to vote and threatened to vote in the future in an attempt to control the Board of Directors of the Cooperative. Croydon alleged that defendants were obligated to amend the Offering Plan. Croydon alleged among other things, that the Offering Plan has been effectively abandoned, and Sponsor has continuously breached its fiduciary duty to cooperative and tenant-shareholders by attempting to maximize profits from the unsold apartments by renting them at free-market rent rather than selling them to bonafide purchasers. The breaches by the Sponsor has prevented the cooperative from operating as a cooperative residential community; deprives tenant-shareholders of the anticipated value of their assets also the ability to refinance or sell their apartments; and Sponsor is attempting to exercise undue influence over the Board.

Croydon's first cause of action alleges breach of contract; its third cause of action alleges fraud; its fourth cause of action alleges unjust enrichment and it alleges in its sixth cause of action that it is entitled to attorneys' fees, disbursements and costs incurred in this action.

Sunside moves to dismiss pursuant to CPLR 3211 dismissing the First, Third, Fourth, and Sixth Causes of Action of plaintiff's complaint because as demonstrated by the stock and lease for the unsold apartments, Sunside is currently the holder of the unsold shares of plaintiff; Camelback has never been a holder of unsold shares of plaintiff; and Realty transferred its ownership in plaintiff

no later than 18 years ago and is defunct, its corporate existence having ended more than 14 years ago. In addition, plaintiff's claim for attorneys fees should be dismissed, as the proprietary lease does not provide for fees in this action. Sunside attached to its motion papers a copy of the certificate representing the shares and proprietary lease for the unsold apartments, both dated July 1, 1999, in the name of Sunside because it is the actual holder of the unsold apartments. Defendants alleged that plaintiff is well aware that Sunside is the holder of the unsold shares. Sunside also attached a copy of minutes of plaintiff's Board of Directors held on June 13, 2017. These minutes reflect Israel Spira as the "Sponsor Representative" and at the end of the minutes, there is a notation showing that Sunside is the "sponsor". This evidence is clear that Sunside is the holder of plaintiff's unsold shares since 1999 and Camelback was never the holder of any unsold shares and Realty has not had any connection with plaintiff since 1999 and was dissolved by proclamation of the New York Secretary of State on June 23, 2003.

Defendants alleged that based upon its documentary evidence it has established that Camelback has never been an owner of shares of plaintiff. Moreover, the statute of limitations has run for these causes of action against Realty. Moreover, there is no basis to award attorneys' fees pursuant to paragraph 28 of the proprietary lease. The proprietary lease attorneys fees provision is limited to a default under the proprietary lease, which has no provision requiring anyone to sell an apartment when it becomes vacant. Further, plaintiff failed to allege in its complaint that Sunside, Camelback or Realty breached any provision of the proprietary lease. The First, Third and Fifth Causes of Action should be dismissed due to plaintiff's failure to name the shareholders to this lawsuit (see CPLR 1001, 1003 and 3211 (a)(10); *Red Hook/Gowanus Chamber of Commerce v N.Y. City Bd. Of Stds. & Appeals*, 5 NY3d 452 [2005]; *Eclair Advisor Ltd. v Jindo Am., Inc.*, 39 AD3d 240 [1st Dept 2007]).

In opposition, plaintiff submitted the affidavit of Lynn Van Den Hende, President of Croydon, who attested that over the years he has requested that the sponsor start selling units, attaching correspondence sent in 2009 from its attorney to Sunside. The lawsuit was initiated by the Board after Croydon's 2016 annual meeting where sponsor attempted to vote for a third and fourth individual for the Board. Before 2016, sponsor would attend the meeting and voted for two of the five seats on the Board, which he would obtain due to the large ownership of shares. However, after sponsor attempted to gain control of the Board, the shareholders became nervous and realized that sponsor's large ownership of shares is a detriment. The voting rights of the sponsor is not an issue at this juncture, however, the voting power is tied directly to sponsor's failure to sell apartments, which deprives others of the provisions contained in the proprietary lease. The refusal to sell units has resulted in only about twenty apartment which can serve on the board. Croydon cannot screen tenants of the sponsor because they do not need Board approval, which allows for 62 percent of the building constituting renters and many transients coming into and out of the building. Currently, they are unable to refinance the underlying mortgage because of the sponsor's large ownership of shares. If individual shareholders are named in this lawsuit, they will be harassed and retaliated against. The plaintiff wants the Sponsor to live up to its obligations set forth in the Offering Plan.

Plaintiff further alleged that there is no evidence that transfer from Camelback to Realty and

this transfer is not recorded on ACRIS, the City of New York's official recording system. According to ACRIS, the required tax returns were not filed. The books recording the initial transfers around the time of the conversion were not turned over to plaintiff's counsel to demonstrate a transfer to Realty in fact occurred.

In reply, defendants maintained that the transfer of unsold shares to Sunside occurred in 1999 before the 2004 offering plan amendment which erroneously announced the transfer of unsold shares to Camelback in the Fourteenth Amendment to the Offering Plan, attached to the papers. The proprietary lease and stock certificate issued in 1999 are in the name of Sunside. In 2009 plaintiff's counsel wrote to the attorney for Sunside to complain about Sunside's failure to make sales. In 2012, plaintiff's counsel as transfer agent for plaintiff, billed Sunside fees as transferor on the sale of a previously unsold apartment and the transfer tax return that was filed showed Sunside as the transferor and in the almost 20 years since the stock and lease were issued in Sunside's name, plaintiff has always recognized Sunside was the holder of the unsold shares; the Board of Director's minutes demonstrate that since 1999 plaintiff has acknowledged Sunside, and only Sunside to be the owner of the stock and proprietary leases for the unsold apartments in plaintiff's building. The First, Third and Fifth Causes of Action must be dismissed because the individual shareholders were not made parties. However, defendants claim that allegation is at best scurrilous because defendants do not manage the building and it is not the landlord for any of the other shareholders. It cannot refuse them any services or impose any fees. Plaintiff has not alleged that Sunside's representatives on the Board have opposed a suggestion that the lease be amended and plaintiff has never sought to amend the lease. Moreover, the current holder of the mortgage, National Consumer Cooperative bank has expressed a willingness to refinance the mortgage regardless of sponsorship ownership, by correspondence attached to the reply papers.

Motion to Dismiss based upon Documentary Evidence (CPLR 3211 [a] [1])

"To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; see also *Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607 [2d Dept 2017]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' " (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010] "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable, qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017])). The Court finds that based upon the documentary evidence set forth herein, the First, Third, Fourth, and Sixth Causes of Action should be dismissed against defendants Camelback Realty Holdings, LLC, and Sunside Realty LLC. Here the sponsor, Sunside Realty Corp maybe liable in contract to a cooperative for not undertaking in good faith to timely sell so many shares in the building as necessary to create a fully viable cooperative (see *511 West 232nd Owners Corp v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *West Gate House, Inc. v 860-870 Realty LLC*, 7 AD3d 412 [1 st Dept 2004]). "The Martin

Act authorizes the Attorney General to investigate fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State” (see *Kerusa Co. LLC v W10Z/515 Real Estate LTD. Partnership*, 12 NY3d 236 [2009]; see also General Business Law §§352, 353). However, the Martin Act does not preempt causes of action for fraud and breach of contract based upon affirmative misrepresentations in offering plan (see *Newswald Condo. V Shaya B. Pacific, LLC*, 102 AD3d 932 [2d Dept 2013]; *Caboara v Babylon Cove Dev. LLC.*, 82 AD3d 1141 [2d Dept 2011]; *Caboara v Babylon Cove Dev. LLC*, 54 AD3d 79 [2d Dept 2008]). The Court finds that plaintiff’s claims do not rest solely on alleged omissions from filings required by the Martin Act and the Attorney General’s regulations therein. The Court finds no basis to dismiss this matter based upon the statute of limitations, CPLR 3211(a)(5).

Motion to Dismiss for Failure to State a Cause of Action (CPLR 3211 [a] [7])

Movants also alleged that the case should be dismissed pursuant to CPLR 3211 (a) (7) because the facts alleged do not fit within any cognizable legal theory, lacking any merit (see generally *Hecht v Andover Assocs. Mgmt. Corp., et al.*, 114 AD3d 638 [2d Dept 2014]; *Salvatore v Bd. of Educ. of Mineloa Union Free School Dist.*, 89 AD3d 1078 [2d Dept 2011]; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]). “If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail” (*Cooper v 620 Prop. Assocs.*, 242 AD2d 359 [1997]). “On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the [plaintiff] must be accorded the benefit of every favorable inference” (*Leon v Martinez*, 84 NY2d 83 [1994]; see also *Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]).

The Court finds that based upon the documentary evidence set forth herein, the First, Third, Fourth, and Sixth Causes of Action should be dismissed against defendants Camelback Realty Holdings, LLC, and Sunside Realty Corp.

Motion to Dismiss due to the absence of a necessary party (CPLR 3211 [a] [10])

The Court finds that the shareholders are necessary parties to this action (see generally *Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd of Standards and Appeals*, 5 NY3d 452 [2005]; *Eclair Advisor LTD v Jindo America, Inc.*, 39 AD3d 420 [1st Dept 2007]), however, the Court declines to dismiss the matter on against remaining defendant Sunside Realty Corp. On these grounds, and instead grants plaintiff leave to amend the verified complaint within thirty (30) days of the date of this Order.

Therefore, based upon the foregoing it is

ORDERED, that defendants' motion is granted to the extent that plaintiff's First, Third, Fourth, and Sixth Causes of Action are dismissed against defendants Camelback Realty Holdings, LLC, and Sunside Realty Corp. pursuant to CPLR sections 3211 (a)(1) and (7); and it is further

ORDERED, that plaintiff is granted leave to amend its verified complaint to add additional necessary parties within thirty (30) days of the date of this Order served with Notice of Entry.

This constitutes the decision and order of this court.

Date: April 13, 2018



Hon. Chereé A. Buggs, JSC

FILED
APR 23 2018
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