

Size v Tribeca Enters. LLC

2018 NY Slip Op 32079(U)

August 23, 2018

Supreme Court, New York County

Docket Number: 652403/2010

Judge: Kelly A. O'Neill Levy

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**KELLY O'NEILL LEVY
JSC**

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

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DAVID SIZE,

Plaintiff,

- v -

TRIBECA ENTERPIRSES LLC, ARTHUR SKELSKIE, JAMES
DANIELS, BOARD OF MANAGERS OF 65 NORTH MOORE
CONDOMINIUM,

Defendants.

INDEX NO. 652403/2010

MOTION DATE 07/18/2018

MOTION SEQ. NO. 006

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 177, 180

were read on this motion to/for Summary Judgment.

HON. KELLY O'NEILL LEVY:

This is a breach of contract action arising from a real estate transaction.

Defendant Board of Managers of 65 North Moore Condominium (hereinafter, the Board) moves for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint, or in the alternative, declaring that any damages plaintiff David Size may recover must be offset by the market value of his property. Plaintiff did not oppose or appear before the court despite numerous missed court deadlines and accommodations.

BACKGROUND

This case arises from the attempted sale of a cellar unit in a small condominium located at 65 North Moore Street, Unit B in Manhattan (hereinafter, the condominium). Plaintiff owned and operated the unit for nearly 20 years before attempting to sell it to Emeé O’Larte Foussard (hereinafter, the buyer) in February 2009 [Contract of Sale (ex. N to the Paone aff.)]. The condominium’s certificate of occupancy allowed the unit only to be used for storage and a boiler

room, but plaintiff represented to the buyer that by the time of closing, he would have all approvals in place to change the certificate of occupancy to allow for further use of the unit, or else the agreement would be null and void (*id.*). Reflecting this representation, the Second Rider to the Contract of Sale provides, “The parties hereto agree that this contract of sale is contingent upon obtaining a change in the current certificate of occupancy for subject premises to allow the utilization of Unit B as a showroom for purchaser’s business” (*id.*). It also states, “In the event this application is unsuccessful for any reason whatsoever, Seller shall return Purchaser’s deposit made hereunder, at which time this contract shall be deemed null and void, with neither party having any rights or obligations vis-à-vis the other” (*id.*). The change to the certificate of occupancy required the construction of a second means of egress, which required the approval of the owners of the ground floor unit of the condominium, owned by Tribeca Film Center, Inc. (hereinafter, Tribeca), followed by the approval of the Board to request to change the certificate of occupancy, and then the approval of the Department of Buildings, which required the Board’s consent.

After the Contract of Sale was entered, plaintiff filed an application with the Department of Buildings without obtaining the approval of either Tribeca or the Board. In plaintiff’s application, he did not identify the building ownership as a condominium, but as an individual, giving the impression that he owned the entire building. After the Department of Buildings approved the application, the Board learned of plaintiff’s application, submitted in breach of his obligations not only under the law but the bylaws of the condominium, which required all application to a governmental agency to be executed by the Board only. The Board advised the Department of Buildings of the error and the application was placed on hold. Without the necessary approvals in place, the Contract of Sale fell through in May 2010.

DISCUSSION

The Board's motion for summary judgment is granted as it was unopposed, but the court will nonetheless discuss the motion's merits.

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Plaintiff's claim of breach of contract fails pursuant to the business judgment rule, which limits judicial review of decisions made by a condominium's board of managers to whether the board has "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 538 (1990) (internal citation omitted). "So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." *Id.* (internal citation and quotation omitted) Plaintiff submitted an application to the Department of Buildings for the change in the certificate of occupancy without the consent of the Board and Tribeca. The Board acted in fulfillment of its

fiduciary duty to the condominium in halting plaintiff's application to the Department of Buildings because plaintiff had not followed the condominium's procedure to obtain a change of the certificate of occupancy. There is no evidence that the Board was not acting in good faith to fulfill its fiduciary duty to protect the condominium from any potential adverse consequences of the desired change to the condominium's certificate of occupancy. Thus, the Board's decision is protected by the business judgment rule.

Furthermore, plaintiff failed to demonstrate that any wrongful conduct of the Board was the proximate cause of his damages. To recover damages for loss of his Contract of Sale with the buyer, plaintiff would have had to prove that the Board was the proximate cause of the buyer's cancelation of the contract because the contractual contingency of plaintiff securing a change in the certificate of occupancy was not met. Tribeca owed no duty to plaintiff to consent to the proposed plans to build a second means of egress. Tribeca's consent was a pre-condition for plaintiff's submission of the application to the Department of Buildings. The Board would also have needed to approve the application, but it would have needed an agreement with Tribeca allowing its unit to be impaired for the cellar unit to have a second means of egress. Since this pre-condition was not satisfied, no conduct of the Board was the proximate cause of plaintiff's loss of the Contract of Sale.

Plaintiff's claim for tortious interference with a contract fails because the contingency of plaintiff obtaining a change in the certificate of occupancy was not met, rendering the contract null and void, which prevents a finding of tortious interference with a contract.

Thus, the court grants the Board's motion for summary judgment and dismissal of the complaint.

The court need not consider the remaining arguments.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Board of Managers of 65 North Moore Condominium's motion, pursuant to CPLR § 3212, for summary judgment in its favor is granted; and it is further

ORDERED that the complaint is dismissed against all parties.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8/23/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

**KELLY O'NEILL LEVY
JSC**

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: