

Kowalxyk v Siegel

2019 NY Slip Op 35221(U)

June 26, 2019

Supreme Court, Queens County

Docket Number: Index No. 716184/18

Judge: Janice A. Taylor

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

-----x
LUDWIK KOWALXYK, as EXECUTOR OF THE
ESTATE OF MICHAEL MANKOWSKI,

Plaintiff(s),

Index No.:716184/18

Motion Date:2/26/19

- and -

Motion Cal. No.: 25

Motion Seq. No: 1

LESLIE SIEGEL, BILL DUNPHY, JEFF FAGEN,
ANGELA MINEIELLI, DOUG WEINER, BILL
SCHLESINGER, RICK LIPTON and GROVER
CLEVELAND TENANTS CORP.,

Defendant(s).

-----x
The following papers numbered 1 - 10 read on this motion by
defendants for an order dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Memorandum of Law.....	5
Affidavit in Opposition-Exhibits-Service.....	6 - 8
Memorandum of Law.....	9
Reply Memorandum of Law.....	10

Upon the foregoing papers it is **ORDERED** that the motion is
decided as follows:

This is an action for, *inter alia*, breach of fiduciary duty
and tortious interference with contract. It is uncontested that
plaintiff's decedent Michael Mankowski was the owner of 546 shares
of the defendant Grover Cleveland Tenants Corp. and that he was a
signatory to a proprietary lease for the apartment ("the subject
apartment") in which he lived. It is further uncontested that
plaintiff's decedent died on July 4, 2016 and that plaintiff was
appointed as Executor of the Estate of Michael Mankowski on January
11, 2018. Finally, it is uncontested that the individual
defendants are members of the Board of Directors of the corporate
defendant and that any sale of the subject apartment requires the
approval of the Board of Directors.

In his complaint, plaintiff alleges that, beginning on
September 6, 2016, he entered into a contract of sale for the
subject apartment and that due to a delay in the transaction, the

prospective buyers cancelled the sale. Plaintiff further alleges that, on March 20, 2017, on August 20, 2017, on January 11, 2018 and on March 8, 2018, he entered into separate contracts to sell the subject apartment with four potential buyers. Finally, plaintiff alleges that each of the proposed sales were rejected by the defendants.

Plaintiff commenced this action on October 25, 2018, by the filing of a summons and complaint. Defendants now move, pursuant to CPLR §3211(a)(1)(7), for dismissal of the complaint. The movants assert that the complaint should be dismissed, pursuant to CPLR §3211(a)(1), as documentary evidence proves that plaintiff cannot maintain this action and, pursuant to CPLR §3211(a)(7), for the plaintiff's failure to state a cause of action.

Motion to Dismiss Based on Documentary Evidence

In order to prevail on a motion made pursuant to CPLR §3211(a)(1), a movant must demonstrate that there exists documentary evidence which resolves all of the factual issues alleged in the complaint and conclusively disposes of the plaintiff's claim (see, *Kopelwitz and Co. v. Mann, et al.*, n83 AD3d 793 [2d Dept. 2011]; *Fontanetta v. John Doe 1, et al.*, 73 AD3d 78 [2d Dept. 2010]). In support of this application, the defendants submit the subject complaint and copies of the rejected contracts of sale. However, the movants have failed to submit documentary evidence that eliminates any questions of material fact. Accordingly, that portion of the instant motion which seeks dismissal of the complaint pursuant to CPLR §3211(a)(1) is denied.

Motion to Dismiss Based on Failure to State a Cause of Action

The movants also assert that the complaint should be dismissed pursuant to CPLR §3211(a)(7). It is well-settled that a motion made pursuant to CPLR §3211(a)(7) can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (See, *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]).

New York courts have ruled that, in deciding a motion made pursuant to CPLR §3211(a)(7), a court will decide whether a complaint makes out any cognizable cause of action, not whether a plaintiff will ultimately win on the merits of the allegations contained therein (see, *Stukuls v. State of New York*, 42 NY2d 272

[1977]; *Jacobs v. Macy's East*, 262 AD2d 607 [2d Dept. 1999]).

First and Second Causes of Action

Plaintiff's first and second causes of action assert that the defendants' rejection of the prospective buyers was based on discriminatory violations of New York State Human Rights Executive Law §296 and the federal Fair Housing Act. A review of the instant complaint reveals that plaintiff fails to state with requisite detail the facts and circumstances of the alleged discrimination. New York courts have ruled that merely conclusory allegations are insufficient to state a cause of action for discrimination (see, *Forest v. Jewish Guild for the Blind*, 3 NY3d 295 [2004]; *Goldin v. Engineers Country Club*, 54 AD3d 658 [2d Dept. 2008]). Accordingly, plaintiff's first and second causes of action are dismissed.

Third Cause of Action

Plaintiff's third cause of action alleges that the defendants tortiously interfered with the contracts of sale for the subject apartment. As previously stated, the proposed contracts of sale included a requirement that the prospective buyers must be approved by the defendant Board of Directors. Although plaintiff states that the rejections by the Board of Directors constituted tortious interference with the contracts, where a contract is expressly conditioned on the approval of a third-party, such approval is a condition precedent to the agreement. If the condition precedent is not met, than no viable contract exists (see, *Matter of Toussie v. County of Suffolk*, 26 AD3d 506 [2d Dept. 2006]; *Trick v. County of Westchester*, 216 AD2d 555 [2d Dept. 1995]).

In the instant action, the approval of potential buyers by the Board of Directors was a condition precedent to contract. As the required approval was not given, no viable contract of sale existed between plaintiff and the potential third-party purchasers. Accordingly, plaintiff has failed to state a cause of action for tortious interference of contract and his third cause of action is hereby dismissed.

Fourth Cause of Action

Plaintiff's fourth cause of action asserts that the defendants violated General Business Law ("GBL") §340, also known as the Donnelly Act, by improperly setting a minimum price for the sale of the subject apartment. In support of the instant application, defendants assert that plaintiff's failure to notify the New York State Attorney General of this violation prior to the commencement of this action, as required by GBL §340(5) is fatal to his cause of action. However, the New York Court of

Appeals has ruled that the notice requirement of GBL §340(5) is solely designed to apprise the New York State Attorney General and is not a condition precedent to commencement of an action (see, *Columbia Gas of New York, Inc. v. New York State Electric and Gas Corp.*, 28 NY2d 117 [1971]).

A pleading which asserts violations of the Donnelly Act must 1) identify the relevant product market; 2) describe the nature and effects of the purported conspiracy; 3) allege how the economic impact of the conspiracy restrains trade in the market in question and 4) show conspiracy or reciprocal relationship between two or more entities. (see *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 136 AD2d 461 [1st Dept., 1988]; see also *Abe's Room, Inc. v. Space Hunters, Inc.*, 38 AD3d 690 [2d Dept., 2007]). A review of the subject complaint reveals that it fails to meet the level of specificity required to maintain an action for violations of the Donnelly Act. Accordingly, plaintiff's fourth cause of action is dismissed.

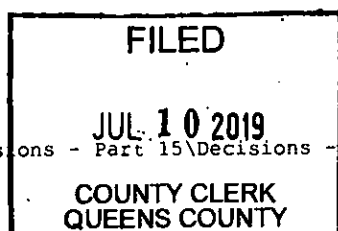
Fifth Cause of Action

Plaintiff's fifth cause of action alleges that the defendants breached their fiduciary duty to him as representative of the estate of a deceased shareholder. New York courts have ruled that, a complaint alleging breach of fiduciary duty must be dismissed where allegations of discrimination are conclusory and where the complaint fails to allege that the individual defendants acted tortiously in bad faith outside of the scope of their authority as members of the Board of Directors (see, *Cohen v. Kings Point Tenant Corp.*, 126 AD3d 843 [2d Dept. 2015]).

A review of the instant complaint reveals that plaintiff failed to detail or even allege that the individual members committed any tortious act independent of their joint denial of the prospective purchasers. Thus, the fifth cause of action must be dismissed. Accordingly, it is,

ORDERED, that the instant motion is granted and the complaint is hereby dismissed in its entirety. As the movants have submitted no evidence of their costs or attorneys fees incurred, that portion of the instant motion which seeks an award for reimbursement of same is denied.

Dated: June 26, 2019





JANICE A. TAYLOR, J.S.C.

H:\Decisions - Part 15\Decisions -2019\Dismissal\716184-18_kowalczyk_dismissal_al-a7_SFO.wpd