

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. GERALD LEBOVITS
J.S.C.

PRESENT: _____
Justice

PART 7

Index Number : 650530/2015
LIBERTY ON WARREN LLC.
vs.
DRAGON ESTATES CONDO
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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 according to the attached decision/order dated
6/15/16.*

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

Dated: 6/15/16


HON. GERALD LEBOVITS J.S.C.
J.S.C.

- 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
NEW YORK COUNTY: PART 7**

LIBERTY ON WARREN LLC,
NICOLENA NATOLI-OMANSKY and
LAWRENCE A. OMANSKY,

Plaintiffs,

Index No.: 650530/2015
DECISION/ORDER
Motion Seq. No. 002

-against-

DRAGON ESTATES CONDO, BOARD
OF DIRECTORS OF DRAGON ESTATES
CONDO, STEVEN HARRIS and MARTIN KERA,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' motion for summary judgment, defendants Dragon Estates & Dragon's Board of Directors' cross-motion for summary judgment, and defendant Kera's cross-motion for summary judgment.

Papers	Numbered
Plaintiffs' Notice of Motion.....	1
Plaintiff Natoli's Affidavit in Support of Motion for Summary Judgment.....	2
Plaintiffs' Memorandum of Law.....	3
Defendants' Two Notices of Cross-Motion.....	4, 5
Affidavit of Sylvia Pedder-Khanna in Opposition to Plaintiffs' Motion.....	6
Defendants' Memorandum of Law.....	7
Defendant Kera's Memorandum of Law.....	8
Defendant Kera's Reply Affidavit.....	9

Lawrence A. Omansky, Esq. (Lawrence A. Omansky of counsel), for plaintiffs.
Braverman Greenspun, P.C. (Andreas E. Theodosiou of counsel), for defendants Dragon Estates Condo, Board of Directors of Dragon Estates Condo, and Steven Harris.
Martin Kera, pro se defendant.

Gerald Lebovits, J.

Upon the foregoing papers, plaintiffs' motion for summary judgment is denied, and defendants' two cross-motions for summary judgment are granted.

Plaintiff Nicolena Natoli Omansky (Natoli) is the owner of two units in the Dragon Estates Condominium (Dragon) located at 49-51 Warren Street. Plaintiff Natoli owns one unit personally and the other through her sole ownership of Liberty on Warren

LLC (Liberty), which owns the second unit. Dragon is a real-estate development sponsored by Tribeca Realty LLC, of which plaintiff Lawrence A. Omansky (Omansky) is the sole principal. (Defendant Dragon Estates & Dragon's Board of Directors Notice of Cross-Motion Exhibit B.) Omansky drafted the by-laws for Dragon. Defendant Martin Kera is the managing agent of Dragon. On or about July or August of 2014, Natoli obtained a potential purchaser, Erica Lerner doing business as Erissa LLC (Erissa), to purchase the two units. Under Dragon's by-laws, plaintiffs notified defendants of the potential sale of the unit to enable defendants to exercise their right of first refusal to purchase the units under the same terms and conditions offered to Erissa. (Aff. of Sylvia Pedder-Khanna in Opposition to Plaintiffs' Motion at 12.) Defendants waived their right of first refusal and invited Lerner to meet with Dragon's Board of Directors (the Board) to discuss her intended use of the units. (Aff. of Sylvia Pedder-Khanna in Opposition to Plaintiffs' Motion 12.) Lerner notified the Board that she intended to use the units for a dance studio and would be seeking a public-assembly permit for the space. (Aff. of Sylvia Pedder-Khanna in Opposition to Plaintiffs' Motion 13.) The Board notified Lerner that the certificate of occupancy forbids more than 10 people to occupy each unit at a time, that the stairs and elevators did not meet public-assembly requirements, and that the by-laws prohibited the first-floor commercial unit from being used as a rehearsal studio. (Affidavit of Sylvia Pedder-Khanna in Opposition to Plaintiffs' Motion 13.) The final sale between Erissa and the plaintiffs never materialized. (Defendant's Memorandum of Law at 7-10.)

Plaintiffs move, and defendants cross-move, for summary judgment under CPLR 3212. In their complaint, plaintiffs assert four causes of actions: tortious interference, fraud and negligent misrepresentation, breach of contract, and declaratory judgment.¹ Plaintiffs seek a declaratory judgment compelling defendants to amend their application for a permanent certificate of occupancy to the Department of Buildings to incorporate Natoli and Liberty's architectural plans for the units.

Plaintiffs' first cause of action for tortious interference is dismissed. Tortious interference with a contract requires the existence of a valid contract between a plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom. (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996].) Plaintiffs argue that defendants' refusal to allow Erissa to operate a dance studio in the units was intentional — to force Erissa to breach its contract with plaintiffs. But defendants had the right and fiduciary duty to enforce the condominium's declaration.² Therefore, any breach that occurred with respect to the sale

¹ Plaintiffs' fifth cause of action for slander against defendant Martin Kera was dismissed on the record during oral argument on April 20, 2016.

² Article 8 provides that in the event the first floor became one or more commercial unit, that unit shall not be leased or used for any of the following purposes: 1. discotheque, nightclub, sound studio, rehearsal studio, or drug or alcohol rehabilitation clinic. (Defendants' Memorandum of Law, Exhibit C "the Plan" & Exhibit L "Declaration.")

between plaintiffs and Erisa because of defendants' actions or communications with Erisa was justified.

Plaintiffs' second cause of action for fraud and negligent misrepresentation is dismissed. To plead a cause of action for fraud, "a plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Lama Holding Co.*, 88 NY2d at 421.) Under CPLR 3016 (b), a claim rooted in fraud must be pleaded with the requisite particularity. When the facts themselves do not plainly show fraud, those facts may be "supplemented by the circumstances surrounding the alleged fraud." (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) Neither the allegations in the complaint nor the surrounding circumstances give rise to a reasonable inference that defendants participated in a scheme to defraud or misrepresent facts to Erisa to prevent the sale between plaintiffs and Erisa. Plaintiffs' argument hinges on their contention that the units could have been used as a dance studio under the certificate of occupancy and bylaws. Dragon's declaration and by-laws, however, forbid the units to be used as a dance studio. Defendants had the right to inform Erisa of Dragon's Declaration and by-laws. No reasonable inference can be made that Erisa relied on any misrepresentation or material omission of fact from defendants in canceling its purchase of the units.³

Plaintiffs' third cause of action for breach of contract and fourth cause of action for a declaratory judgment on the basis of breach of contract are also dismissed. Plaintiffs' basis for these causes of action is found in Article 8 of the Declaration: "The Condominium Board may not exercise any right to amend the Certificate of Occupancy prohibiting or limiting the permitted use of any Commercial Unit once same has been purchased or if same is held by sponsor." (Defendants' Memorandum of Law Exhibit L "Declaration Art. 8".) Even though this provision prevents the Board from limiting the preexisting uses of the units, a different provision in the Declaration provides that only the Board may amend the certificate of occupancy to expand the units' permissible uses. (Defendants' Memorandum of Law Exhibit L "Declaration Art. 13 sec. z.") Whether the Board should expand the certificate of occupancy to permit additional uses for the units is not for this court to decide. A court may not question the reasonableness of a board of directors' decisions "[a]bsent proof of a breach of fiduciary duty to the cooperative corporation." (*Katz v 215 W. 91st. St. Corp.*, 215 AD2d 265, 266-267 [1st Dept 1995].) No proof exists that defendants breached a fiduciary duty; therefore, this court will not question the Board's decision to maintain the current permitted uses under the Declaration. Because plaintiffs have not demonstrated that defendants breached the contract, the third and fourth causes of actions are dismissed.

³ Erisa alleges that it "would only close on the units if the Sellers were able to deliver the Units with an appurtenant right to use the units as a commercial dance studio and a valid certificate of occupancy." (Defendants' Memo of Law "Exhibit R at 12.")

Accordingly, it is hereby ORDERED that plaintiffs' motion for summary judgment is denied and that defendants' two cross-motions for summary judgment are granted; and it is further

ORDERED that defendants are directed to serve a copy of this order with notice of entry on plaintiffs and the Clerk of the Court, who is directed to enter judgment accordingly.

This opinion is the court's decision and order.

Dated: June 15, 2016



J.S.C.

HON. GERALD LEBOVITS
J.S.C.