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| South Tower Residential Bd. of Mgrs. of Time Warner Ctr. Condominium v Ann Holdings, LLC |
| 2014 NY Slip Op 30465(U) |
| February 25, 2014 |
| Supreme Court, New York County |
| Docket Number: 156148/12 |
| Judge: Anil C. Singh |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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THE SOUTH TOWER RESIDENTIAL BOARD OF
MANAGERS OF TIME WARNER CENTER
CONDOMINIUM,

Plaintiff,

-against-

DECISION AND
ORDER

Index No.
156148/12

THE ANN HOLDINGS, LLC f/k/a THE ANN LLC,

Defendant.

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HON. ANIL C. SINGH, J.:

Plaintiff The South Tower Residential Board of Managers of Time Warner Center Condominium (“the Board”) moves for summary judgment on its cause of action for specific performance based on defendant The Ann Holdings, LLC (“Ann Holdings”) alleged obligation to convey title, pursuant to a right to purchase the unit pursuant to the Condominium’s By-laws. Ann Holdings opposes the motion and cross-moves to compel the production of documents and witnesses for deposition.

The undisputed facts are as follows. Ann Holdings owns a condominium unit in the South Tower Residential section of the Time Warner Center Condominium. The principal of Ann Holdings is Donald Netter. In 2011 or

earlier, Mr. Netter placed the unit for sale on the market.

Jacob Wohlstadter, owner of a unit adjacent to Mr. Netter's, was interested in purchasing the latter's unit to combine it with his own. Wohlstadter made an offer to Netter based on an escalating purchase price – i.e., a bid of \$7 million which escalated in \$25,000 increments, presumably upon the most recent bid being matched by another bidder. The limit of the escalation was \$7.7 million. Mr. Netter was apparently unaccustomed to this particular bidding practice, as were his advisers, and he rejected the offer, suggesting Mr. Wohlstadter's offer be a firm figure. Mr. Wohlstadter allegedly made an offer for \$7,800,000. Mr. Netter and the plaintiff disagree as to whether or not a firm offer of \$7.8 million was ever made. Apparently, Mr. Netter lost his taste for negotiating with Mr. Wohlstadter, affronted by his allegedly irritating negotiating tactics, and his viewing Ann Holding's unit – permitted by a building employee – without Mr. Netter's knowledge or consent.

On July 19, 2011, Mr. Netter then entered into a contract of sale with another bidder, Svetlana Sukhina, for the sum of \$7,400,000. Approximately a month later, Netter complied with his obligations under the condominium Bylaws to send notice of his contract with Sukhina to the Board, triggering the right to purchase the unit.

By letter dated September 1, 2011, the Board timely exercised its right to purchase the unit “by its designee, on behalf of all South Tower Residential Owners, upon the same terms and conditions as contained in a sale agreement dated as of July 19, 2011, between you, as seller, and Svetlana Sukhina, as purchaser, which sale agreement was received by the Condominium’s managing agent on or about August 16, 2011.”

The board’s designee was MS6TC, LLC, an entity controlled by Mr. Wohlstadter, who had earlier attempted unsuccessfully to purchase the unit directly from Ann Holdings. This transaction was the result of a discussion Mr. Wohlstadter had with Bill Brake, an employee of the Related Companies, which manages the South Tower Condominium. Mr. Wohlstadter proposed that the Board exercise its rights under the Bylaws and then assign the contract to MS6TC, LLC as its designee. Mr. Wohlstadter proposed to combine his unit and Mr. Netter’s by enclosing a portion of a common hallway between the units, for which he was willing to pay a substantial fee to the plaintiff.

The agreement between the Board and Mr. Wohlstadter was memorialized in a writing dated September 13, 2011, which designated MS6TC, LLC, as its designee, to acquire the unit. Additionally, it was agreed that a portion of a common hallway would be licensed for \$398,764.80. The fee was calculated on

the price-per-foot charged to other unit owners who incorporated common hallways when combining units.

The Board's designation was an accommodation to Mr. Wohlstadter, which necessarily required that Mr. Wohlstadter conduct negotiations with Mr. Netter. Mr. Wohlstadter agreed to pay additional costs covering some of the cost incurred by Ann Holdings. Ultimately, the negotiations – which lasted many months – broke down, in part, at least, over Mr. Wohlstadter's unwillingness to agree to provide the release of liability demanded by Mr. Netter and indemnify Mr. Netter against any third-party claims, such as from the first contract purchaser, Sukhina.

Thereafter, on July 16, 2012, the Board served a TIME IS OF THE ESSENCE notice on Ann Holdings that it was seeking to exercise its right of first refusal to have defendant convey title to the plaintiff. The closing was scheduled for July 30, 2012. Ann Holdings declined to appear for closing on September 7, 2012.

Plaintiff commenced the instant action seeking specific performance, alleging that defendant breached the Bylaws by failing to convey title after the Board had invoked its right to purchase the unit on the same terms and conditions of the Sukhina contract.

Ann Holdings opposes specific performance. It maintains that discovery is

necessary on the following triable issue of fact.

First, defendant maintains that Jacob Wohlstadter and his wife, Board member Deborah Wohlstadter, interfered with the marketing and selling of the unit. Ann Holdings maintains that this was done to depress the sale price of the unit so that the Wohlstadters could obtain the unit by using the Board's right of first refusal rather than engaging in a legitimate bidding process.

Second, the Board's decision to designate MS6TC, LLC as the entity to receive title was the result of self-dealing and bad faith by Board members. The Board failed to exercise a legitimate right on behalf of all residential owners as required by the By-laws. Defendant maintains that the right of first refusal requires the condominium to purchase the unit on behalf of all unit owners so that the unit may be put to communal use, such as a day-care center, spa or health club.

Third, the Board acted in bad faith by failing to close within sixty days of exercising its right of first refusal by attempting to force a transfer of title directly to the entity controlled by the Wohlstadters. Ann Holdings argues that this was done to save the Wohlstadters transfer taxes. The agreement had been negotiated over eight months and was agreed to by Ann Holdings, the Wohlstadters and the Board. Ann Holdings was ready, willing and able to transfer title pursuant to the terms of the negotiated agreement. However, the Wohlstadters and the Board

reneged on the terms of the agreement.

I find these arguments to lack merit. The Wohlstadters are not party to this action. Their negotiation tactics, or whether or not they offered \$7,800,000 for the unit, is of no legal consequence. Defendant believes that it was unable to maximize the value of the unit by selling to an adjoining unit owner. However, rather than negotiating with Mr. Wohlstadter, Ann Holdings on its own volition entered into a contract with Sukhina to sell the unit for \$7,400,000. Defendant was represented by counsel and understood that the contract triggered the Board's right to purchase the unit and designate on the same terms and conditions of the Sukhina contract. Ann Holdings' challenge to the designation as an act of bad faith fails as a matter of law. Defendant's contract with Sukhina provides at paragraph 8 that the sale is subject to the Board's right of first refusal. The By-laws at paragraph 8.1.1(b) require seller to give notice to the Board after executing a sales agreement. The notice "shall constitute an offer by the Offeree Unit Owner to sell its [unit], as the case may be, to the [Board] or its designee (corporate or otherwise), on behalf of all [South Tower] Residential Owner, upon the same terms and conditions as contained in the Sale Agreement"

Accordingly, the Board had the legal right to designate MS6TC, LLC as its designee – corporate or otherwise – under the By-laws.

The attempt by defendant to restrict the Board's right to purchase the unit by imposing a condition that the decision is in the best interest of all unit owners where all residents can actually use the space has no support. The By-laws simply require that the offer may be made on behalf all unit owners. The licensing fee obtained by the Board is on behalf of all unit owners. All unit owners benefit from additional revenue generated for the condominium.

The exercise of business judgment is not subject to judicial review where the action is taken in good faith for a legitimate corporate purpose (Levandusky v. One Fifth Ave. Apartment Corp., 75 NY2d 530 (1990)). "[S]o 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, even though the results show that what they did was unwise or inexpedient" (19A NY.Jur.2d Condominiums, Etc. Section 165). "The decisions of a cooperative board are thus largely insulated from judicial review under the business judgment rule" (Id.).

Here, even if defendant's characterization is accepted that the license fee is of incidental monetary benefit, the decision was lawful and furthered a legitimate corporate purpose. The condominium would realize an additional \$400,000 from a licensing fee that otherwise would have been lost had the Board not exercised its

right of first refusal.

Nor has there been any showing of self-dealing. Bruce Warwick, who is the secretary and treasurer of the Board, states in a sworn affidavit that Mrs. Wohlstadter recused herself from participating in the decision by the Board to exercise its right of first refusal (paragraph 14).

In short, the Board acted in accordance with the By-laws, and the decision to exercise its right of first refusal designating MS6TC, LLC as its designee falls squarely within the business judgment rule.

There is no question that the Board failed to close within sixty days of exercising its right to accept the offer (paragraph 8.1.2 of the By-laws). However, the parties charted their own course by engaging in a series of negotiations that lasted eight months. Ann Holdings should have either insisted on a closing within the sixty-day deadline, or put plaintiff on notice once the deadline passed of its intention to invoke the sixty-day deadline. Defendant waived any objection to a closing outside the sixty-day period.

Ann Holdings' contention that it was ready, willing and able to transfer title pursuant to the terms of the tri-party agreement, and that the Wohlstadters and the Board reneged on the agreement, misses the mark. Ultimately, after eight months of negotiations, no agreement was reached. It is of no moment which party is

responsible for the failure of the deal. Under the By-laws, the Board had the right to purchase the unit on the same terms and conditions of the Sukhina contract.

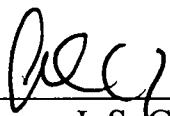
Plaintiff properly exercised this right. In its July 16, 2012 letter, the Board notified Ann Holdings that “[t]he Condominium is, and has been for some time, ready, willing and able to consummate the transaction and to close on the purchase of the Unit in its own name.... At the closing, the Condominium will be prepared to deliver the funds, and to perform the action, required by the purchase Agreement.” Ann Holdings refused to convey the unit as it was required by the Bylaws.

“The elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations, that defendant was able to convey the property, and that there was no adequate remedy at law” (EMF Gen. Contr. Corp. v. Bisbee, 6 A.D.3d 45, 52 [1st Dept., 2004]; see also Piga v. Rubin, 300 A.D.2d 68 [1st Dept., 2002]). Plaintiff substantially performed its obligations under the By-laws. It was ready, willing and able to perform the remaining obligations required by the Sukhina contract. Ann Holdings is able to convey the unit to the Condominium. There is no prejudice to defendant, as it will receive the benefit of its bargain – the contract price it agreed to accept from Sukhina.

For these reasons, plaintiff is granted summary judgment on its first cause of action for specific performance. Defendant's affirmative defenses and counterclaims are dismissed. The cross-motion by defendant for discovery is denied as moot.

Settle Judgment on Notice.

Dated: 2/25/14


J. S. C

HON. ANIL C. SINGH
SUPREME COURT JUSTICE