

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

MARSHALL & MARYELLEN : September Term 2010
GORODETZER, et. al., :
Plaintiffs, : No. 4032
v. :
22 FRONT STREET, L.P., MARC B. : Commerce Program
KAPLIN and ANDY KAPLIN, :
Defendants. : Control Nos. 11081149/11090003

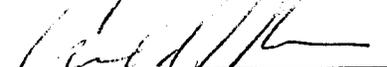
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C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 21st day of November 2011, upon consideration of defendants Marc Kaplin and Andrew Kaplin's Preliminary Objections to Plaintiffs' Third Amended Complaint and defendant 22 Front Street, L.P.'s Preliminary Objections to Plaintiffs' Third Amended Complaint and Plaintiffs' responses in opposition, it hereby is **ORDERED** that the Preliminary Objections are **Sustained in part and Overruled in part** as follows:

1. Defendants Marc Kaplin and Andrew Kaplin's Preliminary Objections are **sustained** and Counts I, II and III are dismissed.
2. Defendant 22 Front Street, L.P.'s Preliminary Objections are **sustained in part** and count I alleging breach of the Condominium Act only and Count III (tortious interference with contractual relations) are dismissed.

BY THE COURT,


ARNOLD L. NEW, J.

Gorodetzer Etal Vs 22 Front Street, L. P. Eta-ORDOP



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OPINION

This is an action instituted by fourteen owners of condominium units at 22 S. Front Street, Philadelphia, Pa. Defendant Declarant 22 South Front Street, L.P. (“the Declarant”) is responsible for building, managing and developing the Condominium as well as selling and marketing the units. Defendants Marc Kaplin and Andy Kaplin (“the Kaplin Defendants”) are members of the Executive Board of 22 Front Street Condominium Association. 22 Front Street Condominium Association is not a party to this litigation.

22 Street Condominium was formed as a “luxury residential facility” and actively marketed and sold by Declarant as a “premier” high-end “new concept in boutique condominium living”. Declarant has sold twenty five (25) units, fourteen of which were sold to plaintiffs. It is alleged that each of the purchasers purchased their units in reliance upon the Declaration and the Public Offering Statement on the promise that 22 South Street Condominium would continue to exist as a “luxury residential facility”.

In or about the end of July or the beginning of August 2010, various owners in the 22 Front Street Condominium learned that the condominium was no longer being marketed as a “premier” high-end “new concept in boutique condominium living”, but was now being actively

marketed as a retirement community. Declarant never advised plaintiffs of its intent to convert the Condominium and never obtained plaintiffs' consent on the conversion.

The plaintiffs further allege that since the Condominium's inception, the Executive Board, whose members include Marc B. Kaplin and Andy Kaplin, have controlled all affairs, books and records of the Association. Since June 14, 2010, there have been no unit owners serving on the Executive Board. Plaintiffs allege that the Executive Board has grossly mismanaged the Condominium.

Plaintiffs instituted suit against defendants alleging claims for breach of contract, breach of fiduciary duty and tortious interference with contractual relations.¹ Presently before the court are defendants' respective preliminary objections to the third amended complaint.

DISCUSSION

Count I of the third amended complaint purports to state a claim for breach of contract and for violation of the Uniform Condominium Act, 68 Pa. C. S. A. § 3101 *et. seq.* According to plaintiffs, defendants Declarant and the Kaplins violated section 3404 of the Condominium Act and breached the terms of the Public Offering Statement and Declaration. Specifically, plaintiffs allege the following breaches: failing to act in good faith in dealing with plaintiffs, managing the Association and with complying with the explicit terms of the Declaration and the Bylaws; failing to comply with the Roof Plan as submitted with the Declaration to build a common area rooftop terrace; failing to maintain the common elements of the 22 Front Street Condominium; failing to hold regular annual meetings as set forth in 22 Front Street Condominium's Bylaws; failing to maintain detailed financial records; commingling funds admittedly by utilizing the Associations' account for developer related items such as marketing; staging and fixing punch

¹ The Defendant Friends Center City Retirement Community was also a defendant in this litigation. Plaintiffs have voluntarily dismissed their claims against the Defendant Friends Center City Retirement Community.

list items; failing to pursue and remedy readily apparent construction defects in the 22 Front Street Condominium such as badly leaking east stairwell; leaks in the parking area that have caused damage to owners' cars parked in the lot and splitting and cupping; separating and developing heat damage related to poorly regulated radiant heat water temperature as well as known potential leaks in heating tubes under floors in many of the sold and unsold units; failing to address various warranty issues in the building including significant problems with the floors; hot and cold water and the HVAC systems and permitting monetary judgments and assessments to accumulate.

As it pertains to the Kaplin defendants, the claim for breach of contract is dismissed. The Kaplins are not signatories to the Declaration or the Public Offering Statement. As such, they may not be liable to the plaintiffs for breaches of same.² As for the claim that the Kaplin's violated the Uniform Condominium Act, the court finds that any duty owed by the Kaplin's as members of the Executive Board is and was owed to the Association, not the individual unit owners.³ Since the Association is not a party to this litigation, the Kaplin defendants' preliminary objection to count I is sustained and the claim for breach of contract is dismissed against the Kaplin defendants.⁴ Moreover, a breach of contract claim may not be based on a statute. As such, any claim for breach of contract based on the Condominium Act asserted against defendants Kaplin and the Declarant are dismissed.

Likewise, plaintiffs' claim for breach of fiduciary duty in count II of the third amended complaint is also dismissed against the Kaplin defendants. The third amended complaint alleges

² See Fleetway Leasing Co. v. Wright, 697 A.2d 1000, 1003 (Pa. Super. Ct. 1997)(In Pennsylvania, a person who is not a party to a contract cannot be held liable for a breach by one of the parties to a contract.).

³ See 68 Pa. C. S. A. § 3303, the Executive Board owes duties to the Association.

⁴ The claim for breach of contract and violation of the Condominium Act may proceed against the Declarant since the Declarant was a signatory to the Public Offering Statement and the Declaration.

defendants owed plaintiffs a fiduciary duty to manage the business operations and affairs of the Association and 22 Front Street Condominium. However, the Kaplin defendants, as members of the Executive Board, owe a fiduciary duty to the Association. Since the Association is not a plaintiff in this action, the claim for breach of fiduciary duty is dismissed against the Kaplin defendants.⁵

Count III of the third amended complaint also purports to state a claim for tortious interference with contract against the Kaplin defendants and the Declarant. Under Pennsylvania law, the four elements necessary to state a claim for tortious interference with contractual relations in Pennsylvania are: (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with the contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct.⁶ In the case at bar, plaintiffs allege defendants acted purposefully and with specific intent to harm plaintiffs by interfering with the final settlement agreement and preventing the completion of same. The third amended complaint fails to allege defendants' acts of interference and is therefore factually insufficient. Based on the foregoing, defendants' preliminary objections to count III are sustained.

CONCLUSION

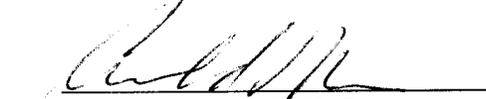
Based on the foregoing, the defendants' preliminary objections are sustained in part and overruled in part as follows: defendant Kaplin's preliminary objections to counts I, II and III of the third amended complaint are sustained and the complaint is dismissed against the Kaplin defendants. Defendant 22 Front Street, L.P.'s preliminary objections to count I (breach of

⁵ The Association may bring a claim for breach of fiduciary duty against the Kaplin Defendants.

⁶ See Triffin v. Janssen, 426 Pa. Super. 57, 63, 626 A.2d 571, 574 (1993).

contract) alleging violation of the Condominium Act and to III (tortious interference with contract) are sustained. All other preliminary objections are overruled.

BY THE COURT,



ARNOLD L. NEW, J.