SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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MICHAEL HIRTENSTEIN,

Plaintiff,

against

ONE YORK PROPERTY LLC and DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,

Defendants.

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Index Number 112972/2008
Submission Date Oct. 8, 2008
Mot. Seq. No. 001

DECISION AND ORDER

For the Plaintiff:
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Papers considered in review of this motion for preliminary injunction and motion to dismiss:

Papers	Numbered
Order to Show Cause, Affidavit, Memo of Law	1, 2, 3
Notice of Cross-Motion, Affirmation	4, 5
Sur-reply Affidavit of Perelman	6
Sur-reply Affirmation	7

PAUL G. FEINMAN, J.:

The motion brought by order to show cause, and the cross-motion are consolidated for purposes of decision.

Plaintiff, who contracted with defendant One York Property LLC to purchase a condominium unit, seeks a preliminary injunction to stay the closing of "Unit 7," restraining One York from taking any steps to cancel or enforce the purchase agreement or to seek the release of the down payment, and extend the time to cure the default. One York cross-moves to dismiss the complaint based on documentary evidence, failure to state a cause of action, and failure to plead with sufficient particularity, pursuant to CPLR 3211(a) (1) and (7), and CPLR 3013 or, in the

alternative, to compel arbitration. For the reasons which follow, the motion and complaint are deemed converted to an Article 78 proceeding. Upon conversion, the City is directed to answer the petition. The motion seeking preliminary injunctive relief is denied and the cross-motion to dismiss as against One York is granted.

Plaintiff originally contracted with One York on September 19, 2006, to purchase three apartment units that would be combined into one "Unit 7," in One York's "luxury condominium" (OSC, Ex. A, Agreement, and Rider). Second, Third, and Fourth Riders, dated November 16, 2006, December 20, 2007, and February 28, 2008, respectively, were subsequently negotiated and signed concerning the purchase of additional units to be combined into Unit 7.

At issue is a clause agreed to in the Third Rider, which states:

> 3.1 In light of the continuing delay in the redesign of the Unit . . . **Purchaser acknowledges that a TCO [temporary certificate of occupancy] for the Unit may be obtained by Sponsor, and a closing may be scheduled for the Unit, prior to completion of the Unit** in accordance with all of Purchaser's Modifications and Additional Purchaser's Modifications.

(Third Rider ¶ 3.1, emphasis added).

Plaintiff alleges that in the spring of 2008, he became aware of "deficiencies" in the supervision and performance of certain of the work on his apartment, and believed he was being invoiced "exorbitant" sums of money for little visible result (OSC Hirtenstein Aff. in Supp. ¶ 8). He ultimately requested by letter of July 3, 2008 that One York cease all work other than what was needed to acquire the TCO (OSC Hirtenstein Aff. in Supp. ¶ 9).

A TCO was issued by the New York City Department of Buildings on July 25, 2008 (OSC Ex. C). Accordingly, One York scheduled the closing for August 21, 2008 (OSC, Hirtenstein Aff. ¶ 12; Ex. D). Plaintiff did not attend because he believed that the unit was not

sufficiently ready such that a TCO should have been issued. One York served a letter of default dated August 22, 2008, indicating that if he did not cure his default by closing title on September 26, 2008, the purchase agreement would be deemed canceled and the monies paid by plaintiff would be considered as part of liquidated damages, with One York seeking other damages as well (OSC Ex. E).

Plaintiff commenced this action by order to show cause dated September 24, 2008, seeking declaratory and injunctive relief. His verified complaint alleges that the TCO was not properly issued and should not have been issued as the conditions in the unit are unsafe and uninhabitable (OSC, Summons and Ver. Compl.).[1] He seeks to enjoin preliminarily and permanently the defendant One York from taking any steps to enforce or cancel the purchase agreement or to seek either the release or retention of his escrowed funds and down payments. He also seeks declarations that he is not in default and that the TCO is invalid. In addition, he seeks damages for breach of the covenant of good faith and fair dealing, and breach of agreement to perform in a diligent and workmanlike manner, based on what he claims is the current status of the premises.

The gravamen of the complaint is that the TCO was issued in error and the apartment is not yet ready for any sort of habitation, and thus plaintiff seeks administrative relief against the issuer of the TCO, the City of New York's Department of Buildings. The City did not submit papers on the instant motion. However, at oral argument on October 8, 2008, the attorney representing the City was present and stated that the Department of Buildings "is treating the

[1]In support, plaintiff attaches copies of photographs of the unit and an affidavit by a Building Code Consultant who did a partial inspection of the property (OSC, Dailey Aff.; Ex. I).

plaintiff's complaint as an administrative appeal of the determination to issue the TCO," and that an inspection of the unit was scheduled for a date prior to October 23, 2008 (*Michael Hirtenstein v One York Property LLC and Department of Buildings of the City of New York*, Transcript of Proceedings on Oct.8, 2008, at 18: 6-11 [Feinman, J.]).[2]

It is within the court's power to convert a proceeding over which it has jurisdiction into the proper form when it has been improperly categorized (CPLR 103 [c]). Here, although plaintiff commenced a plenary action, his claims flow from the issuance of a TCO by the Department of Buildings which he argues was done in error. Accordingly, the court deems this proceeding to be a special proceeding brought under Article 78 of the CPLR, and deems the summons and complaint converted to be a petition, and the parties renamed petitioner and respondents. It further directs the City to file an answer to the petition within 20 days of service of a copy of this decision with notice of entry.

Addressing the arguments set forth in the current papers, the branch of the application for injunctive relief is denied. A preliminary injunction is only granted where the movant establishes a clear right thereto under the law and demonstrates a clear right to relief that is plain from the undisputed facts (*Hoeffner v John R. Frank, Inc.*, 302 AD2d 428, 429-430 [2d Dept. 2003]). After hearing from all parties on the return date of the order to show cause, the court declined to issue a temporary restraining order. Among other concerns raised by the court was that the petitioner would have a remedy in the form of a claim for money damages if the TCO is rescinded based on the October inspection of Unit 7 and it turns out that petitioner was forced,

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[2]According to petitioner's attorney, the Department of Buildings informed her that it would reinspect the unit on October 15, 2008 (Diamond Affirmation of 10/13/08 ¶ 9).

under the terms of the purchase agreement with One York, to close prematurely. Furthermore, the court did not find the terms of the purchase agreement ambiguous in that a closing was required upon issuance of a TCO, which One York had obtained from the Department of Buildings. The court, therefore, was not persuaded that there was a likelihood of success on petitioner's claims against One York. Accordingly, the court declined to issue a temporary restraining order. For the same reasons, preliminary injunctive relief is also inappropriate.

Furthermore, to the extent that petitioner alleges that the construction work done by One York and its contractor in order to obtain the TCO was done without diligence or in a workmanlike manner, and that there was a breach of the covenant of good faith and fair dealing, these claims are also premature, given that the City is re-investigating the premises and its decision to issue the TCO.

The cross-motion by One York to dismiss the claims as against it, is granted pursuant to CPLR 3211 (a) (7). Here, where the subject of the petition concerns the quality of the work that has been done in order to obtain the TCO, any argument concerning poor quality is for the City to address. Thereafter, claims by petitioner concerning the quality of the work are to be resolved through arbitration, as set forth in the Fourth Rider of the purchase agreement.[3]

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[3]Under the Fourth Rider, it states:

2.5.2 If Purchaser claims that **any line item on any invoice does not reflect work performed properly** as certified by Bovis Lend Lease and Sponsor based on approved plans and specifications and previously agreed amounts to any contractor or professional, **then, in that instance only, Purchaser shall not be obligated to pay the amount of such line item(s) ("Disputed Amount") within such 10 day period, provided Purchaser delivers to sponsor written objection** ("Written Objection") of such Disputed Amount within such 10 day period. * * *

2.5.3 **If Sponsor and Purchaser cannot resolve the payment of the Disputed**

Accordingly, it is

ORDERED that the summons and complaint are deemed converted to an Article 78 petition pursuant to CPLR 103 (c) and upon conversion, the caption shall be amended to read as follows:

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MICHAEL HIRTENSTEIN,
Petitioner Index Number 112972/2008
-against-
ONE YORK PROPERTY LLC and DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK,
Respondents.
----------X; and it is further

ORDERED that the branches of the petition seeking preliminary injunctive relief are denied, and the branches alleging breach of contract are dismissed; and it is further

ORDERED that the City is directed to serve and file its answer within 20 days of service of a copy of this decision and order with notice of its entry and that the parties shall requisition the County Clerk's file and restore the proceeding to the Submission Calendar in Room 130, 60 Centre Street, New York, New York for the purpose of having the petition submitted after the City's answer is filed; and it is further

ORDERED that the cross-motion to dismiss the petition as against One York Property, LLC is granted, without prejudice to a breach of contract complaint being commenced if and when the closing has transpired; and it is further.

> **Amount. . . Sponsor and Purchaser agree to submit to binding arbitration.**

(Fourth Rider, emphases added).

ORDERED that the petitioner shall serve a copy of this order on the Trial Support Office and the Clerk of the Court who shall amend their records to reflect the conversion of this action to a special proceeding and then enter judgment accordingly as to One York Property, LLC.

This constitutes the decision and order of the court.

Dated: November 7, 2008
New York, New York

J.S.C.