SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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SHANE HENTY SUTTON,

Plaintiff,

-against- Index No.: 100236/06

151 WEST 17TH STREET CONDOMINIUM,

Defendant.
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PRELIMINARY STATEMENT

Shane Henty Sutton (hereinafter "plaintiff") submits this memorandum of law in support of plaintiff's motion for summary judgment against defendant 151 West 17th Street Condominium (hereinafter "the Condominium"). Summary judgment is appropriate as there are no issues of fact to be tried in this matter. The letter of indemnification issued by the Condominium to plaintiff clearly sets forth the obligations of the Condominium and there is no dispute that the Condominium has failed to honor its promises and written covenants to plaintiff.

STATEMENT OF FACTS

Plaintiff on July 15, 2002 purchased from the sponsors of the Condominium, H.G. Skyview Inc., and El Ad-Skyview Inc. (hereinafter "sponsors") a newly constructed condominium unit, #4B, located at 151 West 17th Street, New York, New

York (hereinafter "the unit"). At the time plaintiff closed on the purchase of that unit, he acquired the unit free and clear of any liens.

Notwitshtanding the foregoing, on or about December 12, 2002, a blanket mechanic's lien was filed by G.M. Crocetti Inc. (hereinafter "Crocetti") against all units of the Condominium, including plaintiff's. The lien was purportedly filed by Crocetti to secure payment of construction work that it allegedly had performed at the Condominium during the period from January 13, 2002 through to October 6, 2002. The alleged work performed at the Condominium, as set forth in the mechanic's lien, was done at the sole request of the Condominium's sponsors. None of the work allegedly performed by Crocetti was ever ordered, demanded or performed with plaintiff's consent, direction or request. Prior to the purchase of the unit, plaintiff was unaware that the sponsors had failed to reimburse Crocetti for the work that it allegedly performed at the Condominium.

Plaintiff was in no way responsible for the sponsors' alleged failure to pay Crocetti for its services rendered. Nevertheless, Crocetti filed the mechanic's lien against all units of the condominium with full knowledge that the sponsors had already sold most of the residential condominium units pursuant to the Offering Plan and that the sponsors were no longer the owners of most of the condominium units, including the unit owned and purchased by plaintiff.

In or about October 2005, plaintiff undertook to refinance the first mortgage on the unit. At the time of refinancing, and pursuant to a title search conducted as part of that transaction, plaintiff discovered the mechanic's lien that was filed by

Crocetti. The mechanic's lien acted as an encumbrance against the unit and plaintiff's title company advised him that the refinancing could not proceed unless the mechanic's lien was removed.

Plaintiff thereafter requested from the managing agent acting on behalf of the Condominium, Bellmarc Property Management (hereinafter "Bellmarc") a release of Crocetti's lien. Bellmarc indicated that it could not obtain a release of the lien but that it would be willing to provide plaintiff's lender, title insurance company and plaintiff with a letter of indemnification to indemnify all parties against any costs incurred by reason of the filing and existence of the mechanic's lien. The indemnification letter was provided to plaintiff on October 7, 2005. As a result of the issuance of that letter, plaintiff closed his refinancing. Notwithstanding the foregoing, plaintiff's title insurance company advised him that he should secure a release and discharge of the lien as the lien acted as an encumbrance on the unit and would affect any effort to sell the unit in the future. Plaintiff thereafter requested Bellmarc to determine what steps the Condominium would take to secure a discharge and release of the lien. In response, Bellmarc indicated that it should not have issued the letter of indemnification and that, in the future, it would not issue a similar letter in the event plaintiff sought to sell his unit. Bellmarc also indicated that the Condominium had no intention of taking any action against Crocetti.

Written demands were thereafter made to Bellmarc and Crocetti demanding that they secure a release and discharge of the mechanic's lien. Notwithstanding

those demands, both the Condominium and Crocetti refused to take any action to release and discharge the lien.

Plaintiff was therefore compelled to file legal proceedings against the Condominium and Crocetti. Subsequently, Crocetti agreed to release and discharge the mechanic's lien. Plaintiff thereafter demanded that the Condominium indemnify him against the costs and expenses which he incurred related to securing the release and discharge. The Condominium refused to indemnify plaintiff for those costs and expenses.

Plaintiff's costs and expenses continue to accumulate by reason of the fact that the Condominium has refused to honor its obligations under the letter of indemnification and plaintiff is further compelled to continue this lawsuit to secure indemnification and reimbursement. The Condominium has failed to satisfy its promises and written covenants under the indemnification agreement and to reimburse the plaintiff for those costs and expenses.

ARGUMENT

POINT 1

THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

C.P.L.R. Rule 3212 provides that a motion for summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. An opponent to a motion for summary judgment must present evidentiary facts sufficient to raise a triable issue of fact, and averments merely stating conclusions of fact or law are insufficient. *See Reagan v. Hartsdale Tenants Corp.,* 27 A.D. 3d 716, 813 N.Y.S.2d 153 (2d Dept. 2006); *STED Tenants Owners Corp. v. Chumpitaz,* 23 A.D.3d 373, 804 N.Y.S.2d 770 (2d Dept. 2005); *Callahan Industries, Inc. v. Micheli Contracting Corporation,* 124 A.D.2d 960, 508 N.Y.S.2d 711 (3d Dept. 1986).

Under New York law, a promise by one party to indemnify another party is enforceable when "…it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" that the parties intended such indemnification to apply. *Vigliarolo v. Sea Crest Constr. Corp.*, 16 A.D.3d 409, 410, 791 N.Y.S.2d 163 (2nd Dept. 2005). The Court of Appeals has stated that where parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *W.W.W. Associ*ates Inc. v. *Giancontieri*, 77 N.Y.2d 157, 162 (1990); *see also Jorjill Holding Ltd. V. Grieco Associates, Inc.*, 6 A.D.3d 500, 775 N.Y.S.2d 75 (2d Dept. 2004); *Cave v. Kollar*, 2 A.D.3d 386, 767

N.Y.S.2d 856 (2d Dept. 2003). The best evidence of the contracting parties' intent is the language of the agreement itself. *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 807 N.Y.S.2d 353 (1st Dept. 2006).

In the instant action, no material facts are in dispute. The letter of indemnification at issue clearly indicates that the Condominium, through its agent Bellmarc, agreed to "indemnify and hold harmless" plaintiff for "any actual costs" incurred as a result of the mechanic's lien being placed on plaintiff's unit. In order to remove and discharge the lien, the plaintiff incurred significant expenses, including attorney fees and other costs that, pursuant to the indemnification agreement, are expenditures which must be reimbursed by the Condominium. Plaintiff incurred such expenses only after both the Condominium and Crocetti failed to take any action to secure a release and discharge of the lien.

The indemnification letter prepared by Bellmarc clearly and unambiguously sets forth that the plaintiff is entitled to indemnification by the Condominium. Therefore, plaintiff has been justified in his reliance upon the terms, promises, and covenants of the letter of indemnification in taking measures to secure a release of the lien.

It is also well settled that a "principal is bound by notice to or knowledge of his agent in all matters within the scope of his agency." *Farr v. Newman*, 14 N.Y.2d 183,187,250 N.Y.S.2d 272, 275 (1964); *Martinson v. Massachusetts Bay Ins. Co*. 947 F. Supp. 124 (S.D.N.Y. 1996). This principle flows from the "assumption that the agent will live up to the duty to act in the principal's interest in light of all the pertinent

information [the agent] has acquired." *Marine Midland Bank v. Russo Produce Corp.*, 50 N.Y.2d 31, 427 N.Y.S.2d 961, 968, 405 N.E.2d 205, 210 (1980); *see also* Restatement [Second] of Agency § 272.

In this action, Bellmarc, acting as the Condominium's managing agent, had the express and actual authority to bind the Condominium in the letter of indemnification issued to the plaintiff. As such, once Belmarc issued the indemnification letter to plaintiff manifesting an intention to indemnify the plaintiff, such representation must act as a binding representation from the Condominium as well.

The Condominium's current refusal to honor its obligations under the letter of indemnification does not alter the express terms guaranteeing such indemnification. The Condominium should be held to honor its contractual obligation to plaintiff and should be forced to abide by the terms, promises and express agreements set forth in the letter.

For the foregoing reasons, plaintiff's motion for summary judgment should be granted as there are no issues of fact to be tried in this matter. The indemnification letter is as a clear and unequivocal contractual obligation by the Condominium to reimburse all costs and expenses incurred by plaintiff in connection with the mechanic's lien and the Condominium must be held accountable to its obligations.

CONCLUSION

As a result of the foregoing, it is respectfully requested that the Court grant plaintiff's motion for summary judgment requiring the defendant Condominium to indemnify plaintiff for all costs and expenses, including attorney fees.

Dated: New York, New York
July 14, 2006

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