[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: York PART 2

Justice

Queens Unit Venture

- v -

Tyson Court

INDEX NO. 111568/11

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Renewal

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 21 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/17/12

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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QUEENS UNIT VENTURE, LLC,

Plaintiff,

Index No. 111568-2011

-against-

TYSON COURT OWNERS CORP. and
ALL AREA REALTY SERVICES, INC.,

Defendants.

----------x

YORK, J.:

Defendant Tyson Court Owners Corp. ("TCOC") moves, by notice of motion dated June 12, 2012, to renew/reargue, pursuant to CPLR 2221, 6301 and 6313(a), its opposition to plaintiff's motion for summary judgment, granted in the order and decision of this court dated May 18, 2012. Plaintiff Queens Unit Venture ("QUV") opposes the motion and cross-moves, by order to show cause dated June 27, 2012, to reargue, pursuant to CPLR 2221(d), its prior motion for summary judgment to set up a hearing on damages. Defendant All Area Realty Services, Inc. ("All Area") supports TCOC's motion and opposed that of QUV.

BACKGROUND

TCOC owns the residential cooperative building located at 5 North Tyson Avenue, Floral Park, New York (the "Building"). All Area is the Building's managing agent. The sponsor of the cooperative conversion of the Building, Thomas John (the "Sponsor"), pledged 1,556 TCOC shares (the "Shares") as security for a $2.3 million bank loan from Bank Leumi, which was later

assigned to plaintiff. The Shares are allocated to units A2, A5, B1, B3, C1, C2 and C5 in the Building. The Sponsor eventually defaulted on the loan, and plaintiff purchased the Shares at the foreclosure sale.

Plaintiff commenced the instant action on October 12, 2011, asserting causes of action for a declaratory judgment on the status of the Shares, tortious interference with contract and attorney's fees. The complaint alleges that All Area has not approved plaintiff's purchase of the Shares and TCOC has refused to permit transfer of the shares to plaintiff. The claim for tortious interference with contract is based on All Area's allegedly unlawful collection of monthly rents from tenants and refusal to remit them to QUV since September 1, 2010, when QUV acquired the Sponsor's loan from Bank Leumi.

On January 11, 2012 plaintiff moved for summary judgment on its three causes of action. TCOC opposed the motion by the attorney affirmation of Robert L. Gordon, signed January 30, 2012. All Area opposed QUV's motion and cross-moved for summary judgment on February 23, 2012. On March 12, 2012 TCOC submitted an attorney affirmation in support of All Area's motion. It attached to the affirmation three affidavits from residents of the Building in which they asserted that Units C-1 and C-5 had been occupied for several years by members of the Sponsor's family. These allegations, if true, would undermine plaintiff's claim that shares appurtenant to these units were unsold. In a letter to the court dated March 22, 2012, plaintiff characterized the March 12 submission as an impermissible sur-reply to its motion for summary judgment and asked the court to reject them. At the oral hearing, QUV repeated its request, and it was granted. The affidavits were not considered on plaintiff's motion for summary judgment.

By Judgment and Order dated May 18, 2012, this court declared that QUV's shares are unsold shares and ordered All Area to issue and deliver share certificates and proprietary leases

attributed to the units within 14 days of receipt of the order. The Decision does not mention the remittance of rents for the period starting on September 1, 2010. QUV requests clarification of the Decision and a hearing to determine damages due to defendants' refusal to acknowledge QUV's ownership of the shares appurtenant to the units.

Defendant TCOC asks for the modification of the order to correct erroneous references to Unit C-3 rather than to Unit C-5. This issue was resolved by attorney stipulation. On its motion to renew, TCOC requests that the three affidavits previously rejected were accepted as providing new facts. Upon renewal, it urges this court to vacate its previous decision with respect to Units C-1 and C-5.

DISCUSSION

Defendant's motion for renewal

CPLR 2221(e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination ...and shall contain reasonable justification for the failure to present such facts on the prior motion." The new facts defendant TCOC tries to introduce are contained in three affidavits from residents of the Building who testified that the Sponsor used units C1 and C5 as residences for members of his family. This information is new in the sense that it was not considered on plaintiff's motion for summary judgment. TCOC is correct that if the sponsor's family lived in the two apartments, the shares attached to it would lose their character as "unsold shares" by the terms of paragraph 38(a) of the proprietary lease:

> "the shares of the Lessor which were issued to the Lessor's grantor(s) or individuals produced by the Lessor's grantor(s) pursuant to the Plan of cooperative organization of Lessor or to a nominee or designee of such grantor(s) or individual(s); and, all shares which are Unsold Shares retain their character as

> such (regardless of transfer) until (1) such shares become the property of a purchaser for bona fide occupancy (by himself or a member of his family) of the Apartment to which such shares are allocated, or (2) the holder of such shares (or a member of his family) become a bona fide occupant of the apartment. This Paragraph 38 shall become inoperative as to this Lease upon the occurrence of either of said events with respect to the Unsold shares held by the Lessee named herein or his assignee."

TCOC argues that it has a reasonable justification why it failed to submit the three affidavits in its original opposition. Plaintiff's motion for summary judgment was made before discovery in this action, and it took defendant some time to locate persons who knew about the sponsor's use of the apartments in question. Plaintiff's claim that the affidavits were available six weeks prior to oral arguments on the motion (Pl. Memo Opp., P.2) does not address the reasons why they were rejected at that time. QUV further remarked that if TCOC needed additional time to complete its investigation, it should have sought an adjournment (*id.*, PP. 7-8). The court agrees that TCOC's handling of the matter could benefit from better planning. However, even if TCOC does not have an impeccable explanation for its untimely submission of the affidavits, its failure can be excused.

The First Department has emphasized in a number of cases that courts have flexibility in treating the requirements of CPLR 2221(e).

> While it is true that a motion for leave to renew is intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention , the rule is not inflexible and the court, in its discretion, may grant renewal, in the interest of justice, upon facts known to the movant at the time of the original motion. Indeed, this Court has held that even if

the rigorous requirements for renewal are not satisfied, such relief may still be granted so as not to defeat substantive fairness.

Rancho Santa Fe Ass'n v Dolan-King, 36 AD3d 460, 461; 829 N.Y.S.2d 39 [1st Dept 2007] (citing Garner v. Latimer, 306 A.D.2d 209, 210, 761 N.Y.S.2d 657 [1st Dept 2003]; Tishman Constr. Corp. of N.Y. v. City of N.Y., 280 A.D.2d 374, 377, 720 N.Y.S.2d 487 [1st Dept 2001]). *See*, also, Mejia v Nanni, 307 AD2d 870, 871; 763 N.Y.S.2d 611 [1st Dept 2003]; Tsioumas v Time Out Health & Fitness, 78 AD3d 619; 912 N.Y.S.2d 194 [1st Dept 2010] (providing the rationale for such flexibility in the strong judicial policy that favors determination of actions on the merits).

Plaintiff does not dispute the information contained in the three affidavits. It does not deny that the Sponsor used the two apartments for his own purposes. Instead, it argues that the affidavits are conclusory, self-serving and unsubstantiated. As minimal as the affidavits are, they are sworn statements from individuals with personal knowledge of the matter, and raise a factual issue that prevents a grant of summary judgment to plaintiff in relation to units C1 and C5.

In the interest of justice, this court will exercise its discretion, and grant the defendant's motion for leave to renew. Upon renewal, the prior order of this court dated May 18, 2012 is modified to exclude the two units from its coverage. The issue of whether the units were used by the Sponsor is to be resolved at trial.

Plaintiff's motion to reargue

A motion for reargument is addressed to the sound discretion of the court, and is designed to give parties a chance to convince the court that relevant facts or law were overlooked or misapprehended (CPLR 2221(d) (2); Foley v. Roche, 68 AD2d 558,567, 418

N.Y.S.2d 588, 593 [1st Dep't 1979]). QUV noted that the May 18 order did not resolve the issue of its entitlement to rents from the apartments that served as a security for the loan from Bank Leumi, its predecessor in interest. Thomas John assigned rents from these apartments to Leumi, and as a holder of John's debt, plaintiff stepped into the shoes of the bank. QUV has the right to rents as an owner of shares that this court declared belong to it. The amount due will be determined at the trial of this action..

CONCLUSION

For the foregoing reasons, it is

ORDERED that defendant TCOC's motion to renew is granted; and it is further

ORDERED that upon renewal, the order of this court dated May 18, 2012 is modified to deny plaintiff's motion for summary judgment with respect to units C1 and C5; and it is further

ORDERED that plaintiff's motion to reargue is granted and the hearing on the amounts due to plaintiff in rents shall be determined at trial; and it is further

ORDERED that by a "so-ordered" stipulation all references to Unit C3 in the initial order are replaced by references to nit C5.

Dated: 8/17/12

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.