Estate of Del Terzo v 33 Fifth Ave. Owners Corp.
2014 NY Slip Op 32534(U)
September 30, 2014
Supreme Court, New York County
Docket Number: 154950/12
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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ESTATE OF HELEN DEL TERZO, MICHAEL DEL TERZO and JULIUS ROBERT DEL TERZO,

Plaintiffs,

- against -

33 FIFTH AVENUE OWNERS CORP.,

Defendants.

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Index No. 154950/12
Motion Date: May 7, 2014
Motion Seqs.: 001 and 002

ELLEN COIN, J.:

By this lawsuit, two brothers challenge the refusal of the board of a cooperative apartment corporation to let them take joint ownership of their late parents' apartment in a building where the family had resided for over 57 years.

In motion sequence 001, plaintiffs Estate of Helen Del Terzo (Estate), Michael Del Terzo (Michael) and Julius Robert Del Terzo (Robert) move, pursuant to CPLR 3212, for summary judgment in their favor. In motion sequence 002, defendant 33 Fifth Avenue Owners Corp. (the Coop) moves for summary judgment dismissing the complaint.

FACTUAL ALLEGATIONS

The Del Terzo family has lived at 33 Fifth Avenue, New York, New York (the Building) since 1955 (Affidavit of Michel Del Terzo, sworn to Jan. 17, 2014 [Michael Aff.], ¶ 5). Michael and Robert's parents, Dr. Julius Robert Del Terzo (Robert Sr.) and Helen Del Terzo (Helen), rented apartment 5C in 1955 and apartment 5D in 1965 (*id.*). Robert Sr., assisted by his wife, maintained a medical practice in the Building for 30 years (Verified Complaint [Cmplt.], ¶ 2). Robert and Michael were born in 1958 and 1959, respectively, and lived their entire childhood in the Building (Michael Aff., ¶ 5). The 5C apartment has two bedrooms and the 5D apartment has

one bedroom; at some point in time the two apartments were combined into a single unit (Affirmation of Gary Ehrlich dated Jan. 21, 2014 [Ehrlich Affirm.], Ex. C: Michael Tr. at 7 & Ex. J: Sticker Tr. at 55).

In November 1985, the Building was converted to cooperative ownership and Robert Sr. and Helen purchased the 597 shares allocated to, and became tenants under the appurtenant proprietary lease, for apartment "5C/D" (Michael Aff., Exs. D & E). Robert Sr. died in 1988, and Helen became the sole owner of the apartment (Michael Aff., ¶ 6). Robert moved back into the apartment in 2004 to take care of his aging mother (*id.*). He currently resides there with his wife, two college-age children, and a cousin and nephew of Helen, Gregory Donio (Michael Aff., ¶ 6; Cmplt., ¶¶ 23-25). Michael has a "thriving" medical practice specializing in urology in Lancaster, Pennsylvania, where he has resided for approximately nine years (Michael Aff., ¶ 6). He is also married with one child (Ehrlich Affirm., Ex. C: Michael Tr. at 12).

Helen died in November 2010, and Michael and Robert inherited the shares and proprietary lease to the apartment (Michael Aff., ¶ 6). Paragraph 16 (b) of the proprietary lease provides:

> "If the Lessee shall die, consent [of the board of directors] shall not be unreasonably withheld to an assignment of the lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse, as to whom no consent is required)."

(Michael Aff., Ex. D at 12).

On November 30, 2011, the property manager of the Building, Gumley Haft, submitted to the Coop's board of directors (the Board) an application to transfer the apartment to Michael and Robert. Although Michael is listed as the applicant and Robert the coapplicant, only Michael's

financial information was included therein, allegedly at the instruction of Gumley Haft (*see* Kurzman Aff., ¶¶ 4-9). When this advice turned out to be incorrect, a second application was submitted on February 7, 2012, adding Robert's financial information and references (Michael Aff., Ex. I). At the time of this submission, the monthly maintenance charges on the Apartment were $3,544.52 (Michael Tr. at 59; *see also* Michael Aff., Ex. I at DEF0480).

The second application contained a letter to the Board from Michael and Robert dated December 13, 2011, which states in full:

> "Dear Board Members:
>
> As you know, our parents, Helen and J. Robert Del Terzo, lived in the above apartments (the "Apartment") for 55 years. Indeed, we each grew up there. Our father died in 1988 and our mother ("Helen") continued to live there after his death. In recent years, Helen's son Robert and nephew, Gregory, have lived with her. Robert and Gregory (and Robert's wife) have continued to live in the Apartment since Helen's death more than a year ago.
>
> It is our intention to maintain the status quo regarding the Apartment for the foreseeable future. In other words, Robert and his wife and our cousin Gregory will continue to live there. It is Michael's hope that he will ultimately be able to return to New York (and occupy the Apartment in question as his primary residence). However, Michael is not yet in a position professionally to make that move.
>
> Although Robert will be responsible for the maintenance and other expenses associated with the Apartment, Michael has agreed to guarantee those payments. Helen's Estate is currently paying all expenses associated with the Apartment."

(Michael Aff., Ex. I at DEF0260). In the application itself, named as "all proposed occupants" of the apartment were eight individuals, consisting of the two brothers, their wives, their three children, and their cousin, Gregory Donio (*id.* at DEF0262).

Regarding the applicants' finances, the second application revealed that Michael's income in each of 2009 and 2010 was approximately $500,000, and his net worth was $5.8 million (Michael Aff., Ex. I, at DEF0475). There is no real dispute that Michael is a "financially responsible" family member (Sticker Tr. at 62-65).

Robert, on the other hand, was listed as retired, and reported that his last job was in 1992 (Michael Aff., Ex. I at DEF0262). Robert's total assets were reported at $1.5 million, with the value of the apartment comprising $945,000 of that figure and the remainder from the "Helen Del Terzo Residuary Trust" (*id.* at DEF0480-0481). He reported annual income of $45,583 from social security ($33,584) and trust income ($15,000) (*id.*). Total annual expenses were listed at $75,987, that number comprising living expenses ($30,000) and maintenance on the Apartment ($45,987) (*id.*). In a footnote to the maintenance costs, Robert's financial statement states that the maintenance and utilities on the apartment were being paid by the Estate (*id.*).

Robert submitted the first two pages of his joint federal income tax return for 2010 showing income of $57,465 and itemized deductions of $71,441 (Michael Aff., Ex. I at DEF0490-0491). This return, dated February 25, 2011, also showed a Las Vegas, Nevada address for Robert and his wife (*id.*). A cover letter from Christine Kehoe, the Estate's fiduciary administrator, to Gumley-Haft explained that Robert was not required to submit a return for 2009 and that the 2011 return has not yet been completed (*id.* at DEF0258). In this same cover letter, Ms. Kehoe also stated:

> "As we have explained, Bob has not had meaningful earned income in recent years as a result of his having moved east to take care of his mother. Her trust assets supported the family's living expenses, including maintenance of the apartments. These assets remain available to Bob and Michael.

> [ ] We recognize that Bob's finances alone would not appear to support retention of the apartments, but we believe that Michael's resources do. As a co-owner of the apartments, Michael is responsible for any expenses connected with the apartments. He would be pleased to sign any further guarantees the board might request."

(Michael Aff., Ex. I at DEF0258). Gumley-Haft also, with Robert's consent, obtained a credit report dated November 30, 2011 (Ehrlich Affirm., Exs. F & I). This credit report revealed that Robert had a FICO score of 747, $34,623 in credit card debt, and that all active accounts were "currently satisfactory" (*id.*, Ex. I at 1).

Eight of the nine members of the Board met in person to discuss, among other things, the Del Terzo brothers' second application in February or March of 2012 (Sticker Tr. at 10, 66-68). The eight board members voted unanimously to deny the application to transfer the shares and proprietary lease for the apartment from the Estate to Michael and Robert (*id.* at 68). According to the deposition testimony of the then Board treasurer, Harry Sticker (Sticker), no one at the Board meeting thought it was a "credible application," and it was denied because the Board did not have a financially responsible potential shareholder (*id.* at 51, 76). Sticker testified that Michael was not going to be a resident of the Building, and even if Michael actually intended to reside in the Apartment, the Coop did not allow two separate families to reside in one apartment (*id.* at 55-56, 82). In addition, the Board felt that certain financial information relating to Robert's finances was missing and that his finances were not sufficient to meet the maintenance charges on the Apartment (*id.* at 51-55, 62). By letter dated March 19, 2012, Ms. Kehoe was informed that the Board was rejecting the application despite having "recognized the Del Terzos' long history with the building" (Del Terzo Aff., Ex. J).

By letter dated March 25, 2012, Michael wrote to the then president of the Board, Nancy Cohen, asking for the Board "to reconsider [their] decision and to open a discussion about what we need to do to meet your requirements" (Michael Aff., Ex. K). In this letter, Michael documents his contacts with his childhood home, his frequent visits to New York City, and his "longstanding goals to remain at 33 Fifth Avenue" (*id.*). Michael and Robert's attorney was advised, via telephone, on May 4, 2012, that the Board had met and denied plaintiffs' request for reconsideration (Affidavit of Kenneth R. Jacobs, sworn to February 26, 2014, ¶ 6; Sticker Tr. at 74-76).

This lawsuit was commenced on July 26, 2012. The complaint's first cause of action seeks a judgment finding that the Coop has breached paragraph 16 (b) of the proprietary lease by its unreasonable denial of the application to transfer the shares and proprietary lease from the Estate to Michael and Robert. In the second cause of action, Michael and Robert seek the same relief as the intended third-party beneficiaries of the proprietary lease. The third cause of action seeks a declaratory judgment in plaintiffs' favor and the fourth cause of action seeks to recover their reasonable attorneys' fees pursuant to paragraph 28 of the proprietary lease and Real Property Law § 234. The Coop has asserted a singled counterclaim to recover its attorneys' fees pursuant to paragraph 28 of the proprietary lease.

DISCUSSION

The Coop first argues that the complaint must be dismissed as untimely, because it was not brought within four months of the Board's decision by letter dated March 19, 2012, citing CPLR 217 (1). However, the Coop waived this defense by failing to raise it in their answer or by a pre-answer motion to dismiss (CPLR 3211 [e]; *Horst v Brown*, 72 AD3d 434 [1st Dept 2010];

Buckeye Retirement Co., L.L.C., Ltd. v Lee, 41 AD3d 183, 183-184 [1st Dept 2007]). Even if the statute of limitations defense were not waived, it lacks merit.

CPLR 217 (1) sets a four-month period for commencing an article 78 mandamus proceeding against a "body or officer," and applies to claims that a corporation is in breach of its own governing documents, such as its constitution or bylaws (*see, e.g., Buttitta v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250, 251 [1st Dept 2004] [action to enjoin a cooperative corporation from enforcing its own bylaws]; *Schiffer v Tarrytown Boat Club*, 219 AD2d 704 [2d Dept 1995] [action for declaration that boat club violated its own constitution and bylaws by expelling plaintiff from the club without good cause]). In this case, the Estate and the Del Terzo brothers, as third-party beneficiaries, contend that the Coop has breached paragraph 16 (b) of the proprietary lease, and demand that the Coop specifically perform its contractual obligation to approve the transfer of the shares and proprietary lease to Michael and Robert. "A proprietary lease for a cooperative apartment is not only an indicia of ownership of the apartment but is also a contract, enforceable under general rules of New York contract law" (*Matter of Chapman v 2 King St. Apts. Corp.*, 8 Misc 3d 1026[A], 2005 NY Slip Op 51294[U], *5 [Sup Ct, NY County 2005]). Breach of contract actions are subject to a six-year statute of limitations (CPLR 213 [2]).

In most instances, courts review the decisions of cooperative boards under the business judgment rule, which requires a court to defer to the board's determination "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). But where a provision of a proprietary lease, such as paragraph 16 (b) here, provides that the cooperative board's consent "shall not be unreasonably withheld," the family members of a deceased lessee

have "different and more favorable rights to acquire the [cooperative apartment] than an unrelated purchaser who would have to run the usual gauntlet of Board approval" (*Matter of Chapman v 2 King St. Apts. Corp.*, 8 Misc 3d 1026[A], 2005 NY Slip Op 51294[U], *5; *see also Stowe v 19 E. 88th St.*, 257 AD2d 355, 356 [1st Dept 1999] [business judgment rule does not apply to board decision where lease requires a standard of reasonableness]). Indeed, paragraph 16 (c) of the proprietary lease, which applies to consents generally, states that there "shall be no limitation" on the rights of the Board to grant or withhold consent to an assignment (Michael Aff., Ex. D at 12).

In this case, both sides argue that summary judgment in their favor is warranted. Plaintiffs insist the Board acted unreasonably, while the Coop argues that its decision was not unreasonable as a matter of law. Plaintiffs contend that the Board's president admitted at his deposition that the Coop applied the discretionary consent standard in paragraph 16 (c) of the proprietary lease applicable to unrelated purchasers rather than the reasonableness standard of paragraph 16 (b). When asked whether the Board applied different criteria when there is a transfer from an estate to a family member, Sticker testified that "[a] transfer is a transfer. It's an applicant applying to take over those shares," and could not recall whether the Board considered paragraph 16 (b) of the proprietary lease (Sticker Tr. at 47-49).

Plaintiffs next argue that the Board incorrectly found that the second application was missing information and that Ms. Kehoe's cover letter adequately explained why only Robert's 2010 income tax return was being submitted. Further, Michael's finances alone appear to have more than satisfied the Board's financial requirements.

Finally, plaintiffs argue that the Board acted unreasonably in rejecting the Del Terzo brothers' joint application, based on the Coop's unwritten policy against two families residing in one apartment when the Estate actually owned two apartments, 5C and 5D. However, both Michael and Sticker testified that the two apartments had been combined into one unit (Michael Tr. at 7; Sticker Tr. at 55). Contrary to plaintiffs' contention, the Coop's prohibition against more than one married couple residing together in one apartment is not an unwritten policy, but is a use and occupancy restriction contained in the proprietary lease. Paragraph 14 of the lease provides that:

> "the Lessee shall not, without the written consent of the Lessor on such conditions as Lessor may prescribe, occupy or use the Apartment or permit the same or any part thereof to be occupied or used for any purpose other than as a private dwelling for the Lessee and Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees and by one adult unrelated to the Lessee, provided that such unrelated adult resides in the apartment together with the Lessee. *In no event, however, shall more than one married couple occupy the Apartment without the written consent of the Lessor*" (emphasis added)

(Michael Aff., Ex. D at 10).

Herein lies the real issue. There is no real dispute that Michael, a 55-year old doctor with a thriving urology practice and life in Lancaster, Pennsylvania, was not going to uproot himself at any foreseeable time to move back to New York City and make the Apartment his primary residence. His December 13, 2011 letter to the Board admits as much. In essence, plaintiffs sought to transfer the Apartment to both brothers, in accordance with the administration of Helen's Estate, but to continue to have Robert and his family and the cousin reside in the Apartment as their primary residence with Michael's finances satisfying any financial requirements of the Board and Michael acting as a guarantor of the maintenance obligations to

the Coop. Therefore, the court must determine whether the Board's rejection of this "status quo" proposal was reasonable as a matter of law.

The Coop argues that since the Apartment would not be Michael's primary residence, at least for the foreseeable future, his ownership violates the Coop's "strong preference" against nonresident owners (Ehrlich Aff., Ex. F; Sticker Tr. at 68). While adherence to such a policy has been considered reasonable (*see Wiener v 150 W. End Owners Corp.*, 298 AD2d 385, 386 [2d Dept 2002]), in this case, at least one of the owners – Robert – would make the Apartment his primary residence. Sticker testified that the Board had experienced no problems with the Del Terzo family living in the Apartment prior to Helen's death (Sticker Tr. at 38-39, 83), and it appears undisputed that the family has always paid the fees charged to the Apartment on time (*see* Michael Aff., ¶¶ 18, 87). In addition, the Coop has allowed exceptions to the primary occupancy rule. Paragraph 15 of the proprietary lease and the Coop's House Rules allow subletting for up to two years and even longer, with the consent of the Board (Michael Aff., Ex. D at 11 & Ex. M at ¶ 10b, DEF000582), and Sticker admitted at his deposition that at least three apartments in the Building had been advertised for rent in 2010 and 2011 (Sticker Tr. at 77-80).

More importantly, Paragraph 16(b) does not condition an assignment of the lease and shares to a member of the lessee's family who intends to occupy the apartment. The only express condition is financial responsibility. As Paragraph 16(b) specifically addresses the circumstance of death of a shareholder, it takes precedence over general policies and preferences of a co-op (*cf. Bank of Tokyo-Mitsubishi, Ltd. v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998][citation omitted][the specific provision controls when there is an inconsistency between a general and a specific provision). Paragraph 16(b) is not intended to address general assignments of the lease

and co-op shares and is tailored to formalization of ownership made necessary by circumstance of a cooperator's death. In such a circumstance, the immediate family members inheriting decedent's share are entitled to preferential consideration.

There is no question that the Board disregarded Michael's finances and found Robert's financial capabilities insufficient to make the $3,544.52 monthly maintenance payments. However, the brothers were co-applicants, and thus their finances should have been considered together. There is nothing in the record that suggests that the Estate had the ability to transfer the apartment to Robert alone. There is no dispute that Michael met the Board's financial requirements and was willing and able to fund both brothers' obligations (Sticker Tr. at 62-65). As a joint lessee, Michael would have been jointly and severally liable for the maintenance and other charges on the Apartment by virtue of paragraph 43 of the proprietary lease (*see* Michael Aff., Ex. D at 34).

In short, the Board acted unreasonably under Paragraph 16(b) of the Proprietary Lease in rejecting Robert and Michael's joint application. Approval of their joint application would merely formalize the living arrangements as they existed at the time of their mother's death. In accordance with the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion (seq. no. 001) for summary judgment is granted on the first through third causes of action, and is otherwise denied, and plaintiffs shall settle judgment on notice; and it is further

ORDERED that defendant's motion (seq. no. 002) for summary judgment is denied.

This constitutes the decision and order of the Court,

Dated: September 30, 2014

ENTER:

Ellen M. Coin, A.J.S.C.