SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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NAR 57, LLC,

Index No. 650929/2018
Motion Sequence 001

Plaintiff,

- against -

GOTHAM TOWNE HOUSE OWNERS CORP.,

Defendant.

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HON. TANYA R. KENNEDY, J.S.C.:

Plaintiff, NAR 57, LLC ("Plaintiff") moves, pursuant to CPLR 3212, for summary judgment in its favor on the first, second, and third causes of action, and to dismiss the first and second affirmative defenses, and first counterclaim of Defendant, Gotham Towne House Owners Corp. ("Defendant or Apartment Corporation") The Court heard oral argument on the motion, which is denied in accordance with the following.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant is a cooperative corporation and owner of the land and building located at 153 East 57th Street, New York, New York (the "Building") pursuant to a plan of cooperative conversion filed sometime in 1984 (Plaintiff Statement of Material Facts, ¶¶4-5).

On or about October 18, 1995, Overseas Commodities Limited ("OCL"), the then holder of unsold shares, Samuel Rosen, the Apartment Corporation, and Plaintiff's immediate predecessor in interest, Apt. E. 57 Corp., executed an agreement, wherein OCL, *inter alia*, conveyed all the then unsold shares in the Building to Apt. E. 57 Corp., Plaintiff's predecessor in interest (the "October 1995 Agreement") (Kramer Affirmation, Exhibit D). The Apartment

Corporation recognized Apt. E. 57 Corp. as the Holder of Unsold Shares by virtue of the transfer of ownership and Holder of Unsold Shares status from OCL under the October 1995 Agreement (*id.*). The October 1995 Agreement provided, among other things, that:

> "Upon transfer of any apartment by E. 57 and on which transfer E. 57 seeks to transfer unsold shares, OCL shall reaffirm in writing all of its obligations . . .
>
> . . . In the event that such reaffirmation or designation is not obtained, E. 57 and any subsequent Holder of Unsold Shares may nevertheless transfer Unsold Shares' status, without the consent of the Apartment Corporation"
> (id., ¶2[a]).

In 2002, Plaintiff, a limited liability company, acquired from Apt. E. 57 Corp. 25,640 Unsold Shares and twenty-five (25) Unsold Apartments in the Building, each of which Unsold Apartments was then subject to the rent regulated tenancy rights of non-purchasing tenants in occupancy at the time of the cooperative conversion (Plaintiff Statement of Material Facts, ¶¶2, 6; Weiner Opposing Affidavit, ¶7).

On or about December 13, 2012, Plaintiff and the Apartment Corporation executed a Modification and Ratification Agreement (the "MARA") modifying the October 1995 Agreement, wherein the parties agreed, *inter alia*, that "the term 'Holder of Unsold Shares' shall also apply to [Plaintiff]" and acknowledged the assignment of the October 1995 Agreement to Plaintiff (Kramer Affirmation, Exhibit E). The MARA further provided, *inter alia*, that "[t]he [October 1995 Agreement] and this agreement may not be further assigned by [Plaintiff] unless the assignee assumes the terms of this agreement and there is a personal guarantee of the maintenance obligations of the assignee" (*id.*).

Plaintiff currently owns the stock and lease appurtenant to ten (10) Unsold Apartments in the Building, all of which, other than Apartment 3F ("Apartment 3F"), the apartment in dispute, are occupied by rent stabilized tenants. (Plaintiff Statement of Material Facts, ¶7). Paragraph 1(j)

of the Fourth Amendment to the Offering Plan of the Apartment Corporation defines "Holders of Unsold Shares" as:

> Sponsor or the persons so designated by Sponsor at or after closing and thereafter disclosed in an amendment to the Plan who own the Unsold Shares or to whom the Unsold Shares are transferred from time to time for other than personal occupancy by themselves or their families.
> (Bauman Reply Affidavit, Exhibit A).

Since 2002, NAR promptly sold the shares and Proprietary Lease appurtenant to fifteen (15) Unsold Apartments to third-party purchasers for occupancy following the vacatur of the original, rent stabilized occupants (Plaintiff Statement of Material Facts, ¶¶8-9). Paragraph 12(a) of the Fourth Amendment to the Offering Plan of the Apartment Corporation provides that a Holder of Unsold Shares has the right to "freely and without charge . . . to sell such Unsold Shares and transfer the appurtenant Proprietary Lease to any person. The consent of the Apartment Corporation . . . shall not be required with respect to any such . . . sale or transfer" (Kramer Affirmation, Exhibit C).

On November 17, 2017, Plaintiff, as seller, entered into a contract of sale with 153 E. 57 3F, LLC, as purchaser (the "Purchaser") for the purchase of stock and Proprietary Lease appurtenant to Apartment 3F (the "Contract of Sale") (*id.*, Exhibit F; Plaintiff Statement of Material Facts, ¶16). The purchase price was $445,000.00, which was not contingent upon any financing (Kramer Affirmation, Exhibit F; Plaintiff Statement of Material Facts, ¶¶17-18). The Purchaser was also required to assume Plaintiff's transfer tax obligation in the sum of $6,418.30 (Plaintiff Statement of Material Facts, ¶17).

The Contract of Sale and Rider included an agreement for Plaintiff to assign to Purchaser its rights as a Holder of Unsold Shares for Apartment 3F and provided for the individual managing members of Purchaser to personally guarantee to the Apartment Corporation the Purchaser's maintenance obligations under the Proprietary Lease (*id.*).

Defendant's counsel forwarded a January 19, 2018 letter to Plaintiff's counsel advising that Defendant did not consent to the proposed sale because the "proposed sale to a non-individual third party [was] not a transaction that [could] be consummated without first obtaining the consent of the Apartment Corporation" (Kramer Affirmation, Exhibit H). According to Defendant's counsel, "the [October 1995 Agreement] [permitted] the original [H]older of [U]nsold [S]hares, East Fifty-Seventh Street Associates, to transfer blocks of [U]nsold [S]hares and the appurtenant [P]roprietary [L]ease to individual third parties without the consent of the Apartment Corporation" and that "[t]he MARA did not modify this provision" (*id.*).

Plaintiff's counsel then sent a February 6, 2018 email to Defendant's counsel to advise that the individual members of Purchaser agreed to obtain title in their individual names on the condition that the Board of the Cooperative Corporation would treat them as Holders of Unsold Shares so long as they or their immediate family did not occupy the apartment, and that the closing would occur by February 9, 2018 (*id.*, Exhibit I). The following day, Defendant's counsel sent an email to Plaintiff's counsel advising that Defendant would consent to the sale to individual members of Purchaser only if the members agreed not to obtain status as a Holder of Unsold Shares (*id.*, Exhibit J). Defendant's counsel also stated in the email, *inter alia*, that in the event Plaintiff rejected Defendant's proposal, Plaintiff "should market apartment 3F to individuals who wish to purchase the apartment for their personal occupancy and who will not seek the status of [H]olders of [U]nsold [S]hares" (*id.*).

Counsel for the Purchaser and the individual members of Purchaser sent a February 12, 2018 letter to Plaintiff and its attorney terminating the Contract of Sale based upon the Apartment Corporation's refusal to treat the Purchaser or its individual members as Holders of Unsold Shares and demanded the return of its $44,500.00 deposit, which was immediately returned (*id.*, Exhibit K; Plaintiff Statement of Material Facts, ¶27).

Plaintiff commenced this action against Defendant on February 27, 2018, asserting causes of action for breach of contract to recover monetary damages of $451,418.30 based upon breaches of the Offering Plan, the October 1995 Agreement, the Proprietary Lease, and the MARA (first cause of action); for a declaratory judgment permitting Plaintiff "to assign, without consent, condition or interference, [H]older of [U]nsold [S]hare status to any qualifying third party meeting the legal requirement of a [H]older of [U]nsold [S]hares" (second cause of action); and an award of attorneys' fees pursuant to Real Property Law (RPL) §234 (third cause of action) (Kramer Affirmation, Exhibit A).

Issue was joined when Defendant filed its answer on March 20, 2018, which asserts two affirmative defenses and a counterclaim (*id.*, Exhibit B.) The first affirmative defense asserts that the terms of the October 1995 Agreement and the MARA does not permit Plaintiff to sell Apartment 3F to a non-individual without the consent of the Board of the Apartment Corporation (*id.*, Exhibit B, ¶¶40-43). The second affirmative defense for breach of the covenant of good faith and fair dealing asserts that the Board of the Apartment Corporation reasonably denied the proposed transaction because the proposed sale contravened the purpose of the Offering Plan, the October 1995 Agreement, and the MARA to facilitate the sale of shares and the transfer of appurtenant Proprietary Leases to owner-occupants, rather than for non-occupants to indefinitely continue ownership (*id.*, Exhibit B, ¶¶44-47).

The counterclaim alleges that this action is without merit and that Plaintiff is entitled to reasonable attorneys' fees and disbursements pursuant to paragraph 28 of the Proprietary Lease, which provides:

> If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expenses (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to

the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent (*id.*, Exhibit B, ¶49).

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment in its favor on the first, second, and third causes of action, and to dismiss Defendant's first and second affirmative defenses, and first counterclaim.

ARGUMENTS

Plaintiff argues that the language of the October 1995 Agreement explicitly provides that Plaintiff has the right to transfer Unsold Shares status without the Apartment Corporation's consent. In support of such argument, Plaintiff relies upon paragraph 2(b) of the October 1995 Agreement which states:

> "The Holder of Unsold Shares shall have the right, freely and without charge, to sublet each of his Unsold Apartments, one or more times, to such person and on such terms and conditions as he deemed desirable and shall also have the right, freely and without charge. . . to sell each block of Unsold Shares and transfer the appurtenant Proprietary Lease to any individual third party"
> (*id.*, Exhibit D).

Plaintiff notes that the words "and any subsequent [H]older of [U]nsold [S]hares" were handwritten onto the document and initialed by the parties, and that "the parties intended to capture the acknowledgement that successor [H]olders of [U]nsold [S]hares such as [Plaintiff] could 'transfer [U]nsold [S]hares without the consent of the [Apartment Corporation]'" (Bauman Affidavit, ¶11). Plaintiff also maintains that the rule in contract construction is that greater weight is given to the handwritten language as opposed to a typewritten form or document.

According to Plaintiff, Defendant incorrectly interprets the word "individual" in paragraph 2(b) as requiring the transfer of Unsold Shares to a person and not to any entity, such as an LLC, partnership or corporation. However, Plaintiff maintains that the right to transfer Holder of Unsold Shares status is applicable to an individual or entity. Plaintiff also argues, *inter alia*, that paragraph

2(b) of the October 1995 Agreement recognized that a Holder of Unsold Shares could be a person or an entity since the words "his" and "he" were used regarding the reference to a Holder of Unsold Shares, even though OCL and Apt. E. 57 Corp. were corporate entities and parties to such Agreement.

Plaintiff also argues, *inter alia*, that the language set forth in paragraph 8 of the MARA confirms Plaintiff's ability to transfer Holder of Unsold Shares status to any entity. That provision states that: "[t]he [October 1995 Agreement] and this agreement may not be further assigned by [Plaintiff] unless the assignee assumes the terms of this agreement and there is a personal guarantee of the maintenance obligation of the assignee" (Kramer Affirmation, Exhibit E). As such, Plaintiff contends that the condition of a personal guarantee would be rendered meaningless if only transfers to individuals were permitted. Lastly, Plaintiff argues, *inter alia*, that it is the prevailing party in this action, and entitled to attorneys' fees pursuant to RPL §234.

In opposition, Defendant argues, *inter alia*, that summary judgment should be denied because there is an issue of fact as to whether the October 1995 Agreement and the MARA permit the proposed sale. According to Defendant, the purpose of such agreements was to transfer the bulk ownership of multiple unsold apartments and not the transfer of a single apartment. Defendant notes that OCL transferred a block of 40,200 Unsold Shares and 28 Unsold Apartments to Apt E. 57 Corp. under the October 1995 Agreement and that the MARA modified and ratified the terms of the October 1995 Agreement in connection with Apt. E. 57 Corp.'s transfer to Plaintiff of 25,460 Unsold Shares and 25 Unsold Apartments.

Defendant also maintains that summary judgment should be denied because there is an issue of fact as to whether the October 1995 Agreement and the MARA permit the sale of Unsold Shares and the associated Unsold Apartments to an investment entity without the Cooperative's consent. Additionally, Defendant argues that Plaintiff ignores the plain meaning of the term

"individual third party" under paragraph 2(b) of the October 1995 Agreement, which refers to a person and not an entity. As such, Defendant contends that there is an issue of fact as to whether Defendant breached its covenant of good faith and fair dealing when it did not consent to the proposed sale.

Defendant also maintains, *inter alia*, that the language of the October 1995 Agreement and the MARA reflects the drafters' intent to discourage investor-ownership. Additionally, Defendant maintains that summary judgment is premature because discovery is incomplete, and that evidence relevant to oppose the motion is unavailable to Defendant. Lastly, Defendant argues that the request for attorneys' fees is improper because, among other things, Plaintiff is an investor and RPL §234 is limited to residential tenants.

DISCUSSION

"The proponent of a summary judgment motion must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact" (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341[1974]).

Generally, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties' agreement and the best evidence of the

parties' agreement is their written contract (*Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]).

"To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole . . . [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]; *see also US Oncology, Inc. v Wilmington Trust FSB*, 102 AD3d 401, 402 [1st Dept 2013] ["A contract is ambiguous when on its face [it] is reasonably susceptible of more than one interpretation" [internal quotation marks and citations omitted]; *Discovision Assoc. v Fuji Photo Film Co., Ltd.*, 71 AD3d 488, 489 [1st Dept 2010] [same result]).

On a motion for summary judgment based upon a written contract, "the construction of an unambiguous contract is for the court to pass on, and circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered when the intention of the parties can be gathered from the instrument itself. [N]evertheless, where, as here, interpretation of contract terms or provisions is susceptible to at least two reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, it becomes an issue of fact that must be resolved at trial" (*Yanuck v Passton & Sons Agency*, 209 AD2d 207, 208 [1st Dept 1994] [internal citations omitted]).

The terms of the October 1995 Agreement and the MARA are ambiguous. There are factual issues with respect to whether the October 1995 Agreement and the MARA restricted transfer to the bulk ownership of multiple Unsold Apartments rather than the transfer of a single apartment; whether the drafters of both agreements intended to restrict ownership to shareholder-occupants; and whether Plaintiff is entitled to transfer Holder of Unsold Shares status to an entity without

Board approval. The Court need not consider the parties' remaining arguments since the existence of factual issues mandate the denial of summary judgment.

Therefore, considering the foregoing, it is

ORDERED that the motion of Plaintiff, NAR 57, LLC, pursuant to CPLR 3212, for summary judgment in its favor on the first, second, and third causes of action, and to dismiss the first and second affirmative defenses, and first counterclaim of Defendant, Gotham Towne House Owners Corp., is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 7, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 2, 2019

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY