

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. FLAHERTY IA PART 35  
Justice

	x	Index
ASSOCIATION FOR NEUROLOGICALLY IMPAIRED BRAIN INJURED CHILDREN, INC.		Number <u>14660</u> 2007
		Motion
-against-		Date <u>October 22,</u> 2009
		Motion
GREENBRIAR TENANTS CORP.		Cal. Number <u>1</u>
	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 12 read on the motion by plaintiff Association for Neurologically Impaired Brain Injured Children, Inc. (ANIBIC) for an order (1) granting summary judgment and declaring that members of ANIBIC are entitled to occupy apartments at the residential building located at 85-15 Main Street, Briarwood, New York, owned and operated by defendant Greenbriar Tenants Corp., as owners of the apartments, and that Greenbriar is not entitled to collect sublet fees from ANIBIC as a result of such occupancy; (2) awarding ANIBIC damages in an amount equal to all sublet fees paid to Greenbriar to date, in the sum of \$88,749.71, together with interest; and (3) awarding ANIBIC all reasonable costs and fees, including attorney's fees incurred as a result of this action.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit - Exhibits (A-D, 1-6).....	1-5
Opposing Affidavit - Affirmation - Exhibit (1).....	6-9
Reply Affirmation - Exhibits (E-J).....	10-12

Upon the foregoing papers this motion is determined as follows:

Plaintiff Association for Neurologically Impaired Brain Injured Children, Inc. (ANIBIC) is a Type B not-for-profit corporation organized pursuant to section 601 of the Not-For-Profit Corporation Law. Defendant Greenbriar Tenants Corp., is the lessor of residential units of The Greenbriar Condominium located at 85-15 Main Street, Briarwood, New York.

In the early 1990's, ANIBIC purchased the shares of stock allocated to several apartments located in The Greenbriar Condominium. ANIBIC alleges that each of its apartments are occupied by its members and that ANIBIC does not charge its members rent.

Plaintiff alleges that in March 2006, Robert Batz, the president of Greenbriar Tenants Corp. (Greenbriar) informed ANIBIC that sublet fees were assessed against ANIBIC for seven of its nine apartments, as the residents were not the owner or a member of the owner's immediate family. In a letter dated March 29, 2006, Mr. Batz informed ANIBIC that the sublet fee imposed for 2004 was a single payment of one month's maintenance; that the fees for 2005 were 15% of the maintenance prorated and payable monthly; and that the fees for 2006 were 20% of the maintenance prorated and payable monthly. Mr. Batz requested payment of arrears for the sublet fees.

ANIBIC's counsel, in a response dated April 12, 2006, informed Mr. Batz that it had not sublet any apartments, that the apartments were all occupied by ANIBIC's members, and, thus, were owner-occupied, and that it was not subject to the sublet surcharges. Mr. Batz, in a response dated April 17, 2006, rejected ANIBIC's assertion that it was not subject to the sublet fee, stating that since 2004, the apartments occupied by individuals under the care of ANIBIC met the criteria for assessment, in accordance with the terms of the proprietary lease. Counsel for the parties exchanged similar letters in May and June 2006, and on August 8, 2006, ANIBIC was served with a Thirty Day Notice to Cure. The parties could not otherwise resolve the matter, and ANIBIC paid Greenbriar for all sublet fees, pursuant to a check dated September 27, 2006. The check and a letter protesting said payment were sent to Greenbriar's counsel.

ANIBIC thereafter commenced the within action on June 8, 2007, and in the first cause of action for declaratory judgment seeks a declaration to the effect its members are entitled to occupy the subject apartments as owners of the apartments and that Greenbriar is not entitled to collect sublet fees as a result of said occupancy. The second cause of action alleges that Greenbriar's imposition of sublet fees constitutes a breach of the proprietary lease, and seeks to recover as damages the sums assessed and paid for sublet fees, including the sum of \$33,181.56, together with interest from September 27, 2006, and costs and attorney's fees. The third cause of a action seeks to recover reasonable costs and fees arising

out of this action, including attorney's fees, based upon Greenbriar's willful and deliberate conduct.

Defendant has served an answer and interposed eight affirmative defenses and counterclaims for attorney's fees, continuing sublet fees, and for declaratory judgment to the effect that the plaintiff has violated the proprietary lease by illegally subletting apartments.

The note of issue was filed on May 1, 2009 and the within motion was served on August 20, 2009, and, therefore, is timely (CPLR 3212[a]).

Plaintiff, in its moving papers, asserts that it owns shares of stock to nine apartments, and that seven of these apartments were assessed sublet fees, defendant asserts that there are only seven apartments at issue, as apartments 2Q and 6A are owned and occupied by individual owners and were never charged a sublet fee. Plaintiff seeks to recover all sublet fees it paid, totaling \$88,749.71, plus interest. Plaintiff also seeks to recover attorney's fees and costs incurred in this action, and asserts a reciprocal right to such fees and costs under the terms of the proprietary lease.

Gerard Smith, the Executive Director of ANIBIC, states in his affidavit that ANIBIC is a Type B domestic not-for-profit corporation, dedicated to the service of children and adults with special needs, and that according to its bylaws, the members of ANIBIC can vote, serve on its board of directors, and in essence, make up the corporation. He states that ANIBIC provides care to its members by providing residential services or living arrangements to said members and does not charge its members rent for the use of such residential premises. Mr. Smith states that at the time the shares to the subject apartments were purchased, Greenbriar's officers were fully aware of ANIBIC's intended use of said apartments by its members. He states that neither Greenbriar's board nor its managing agent ever requested that ANIBIC submit a proposal to sublet the apartments, and that Greenbriar's board never sought to interview any of the alleged sublessees, or obtain a credit check for any of the individuals residing in the subject apartments.

In support of the motion, plaintiff has submitted a copy of the proprietary lease for apartment 3Q, dated February 1, 1995, for a lease term of February 1, 1995 to December 31, 2088, which provides, in pertinent part, as follows:

"Use of Premises"

14. The Lessee shall not, without the written consent of the Lessor on such conditions as the Lessor may prescribe, occupy or use the apartment or permit the same or any part hereof to be occupied or used for any purpose other than

as a private dwelling for the Lessee and the Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees or, if the Lessee is a Corporation, partnership or other entity, any individual who is an officer, director, shareholder, principal or beneficiary of the Lessee who is designated by Lessee from time to time to occupy the apartment in a written notice delivered to Lessor or its managing agent and such individual's spouse, children, grandchildren, parents, grandparents, brothers, sisters or domestic employees. In no event shall more than one married couple occupy the apartment without the written consent of the Lessor. Lessee may also allow one (1) unrelated party and the party's dependant children to occupy the apartment together with Lessee without the prior written consent of Lessor."

Plaintiff has also submitted a copy of a letter it obtained from Greenbriar, dated November 29, 1990, which states, in pertinent part as follows:

"A contract of sale is to be entered into for the purchase of the shares of stock allocated to apartment 3G and 6E in The Greenbriar Condominium. The prospective Purchaser/Lessee, Association for Neurologically Impaired Brain Injured Children, Inc. (ANIBIC) requests the written consent of the Lessor to the use of the apartments above stated to be used and occupied as a private dwelling for the designees of the Lessee."

"The Lessor hereby gives its consent to such use and occupancy."

ANIBIC obtained an identical letter from Greenbriar, dated October 24, 1994, with respect to apartments 9C, 10J, 3Q and 6Q, in which Greenbriar expressly gave its consent to ANIBIC to use said apartments as a private dwelling for the "designees of the Lessor." The earlier letter contains the signature of Robert Batz, as President of Greenbriar, while the later letter contains Mr. Batz's name and title, but not his written signature.

ANIBIC asserts that pursuant to the terms of the proprietary lease, its designees, who are members of ANIBIC, are entitled to occupy the subject apartments; that Greenbriar expressly consented to occupancy by ANIBIC's designees; that ANIBIC consists of its members, who are, thus, shareholders in Greenbriar; and that ANIBIC is entitled to a declaration that its members are entitled to occupy the apartments as owners and that Greenbriar is not entitled to collect sublet fees as a result of such occupancy.

Greenbriar, in opposition, asserts that prior to the commencement of this action, plaintiff did not provide any notice, written or otherwise, to Greenbriar or its managing agent

of the names of the individuals it placed in occupancy in the subject apartments. It is further asserted that plaintiff has failed to provide the court with the names of the individuals residing in the apartments during various periods since 2004, and has failed to provide any information which establishes that said individuals are members of the plaintiff corporation. It is further asserted that plaintiff has not provided any documentation regarding its corporate structure, that section 601 of the Not-For-Profit Corporation Law provides that members are not required for Type B corporations and that plaintiff has failed to provide any evidence that it has members. It is asserted that absent such evidence, plaintiff cannot demonstrate that the imposition of the sublet fees is improper, and that such fees are not subject to judicial review under the business judgment rule. Defendant, thus, asserts a triable issue of fact exists as to whether plaintiff has complied with the terms of the proprietary lease, warranting the denial of this motion.

Plaintiff, in reply, asserts that it is in compliance with the proprietary lease, as it requested Greenbriar's consent to the use of the subject apartments by ANIBIC's designees and such consent was granted; that paragraph 14 of the proprietary lease does not require that ANIBIC provide Greenbriar with the names of its designees or the relationship of the designees to ANIBIC; and that the designees are members of ANIBIC and, as such, make up the not-for-profit corporation and, that the members occupy the apartment as shareholders of Greenbriar. Plaintiff asserts that no triable issues of fact exist and that it is entitled to a declaration that its members are entitled to occupy the subject apartment as owners of the apartment, and that Greenbriar is not entitled to collect sublet fees. Plaintiff also asserts that under the reciprocal right provided in the proprietary lease, ANIBIC is entitled to recover reasonable costs and attorney's fees incurred in this litigation.

Plaintiff submitted a copy of ANIBIC's certificate of incorporation and bylaws with its reply papers. Plaintiff has also submitted a copy of a letter dated November 5, 2008 and addressed to the defendant's office manager, which sets forth the names of the members occupying apartments 2Q, 3G, 3Q, 6A, 6E, 6Q, 9C, 10J and apartment PHD.

It is well settled that “[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties’ reasonable expectations (*id.*; see *Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2007]; *Correnti v Allstate Props., LLC*, 38 AD3d 588, 590 [2007]). The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court (see *Katina, Inc v Famiglietti*, 306 AD2d 440, 441 [2003]). A court “should not, under the guise of contract interpretation, ‘imply a term which the parties

themselves failed to insert' or otherwise rewrite the contract" (*Lui v Park Ridge at Terryville Assn.*, 196 AD2d 579, 581 [1993], quoting *Mitchell v Mitchell*, 82 AD2d 849 [1981]). A contract must be interpreted as a whole in light of all the circumstances (*Genovese v Axel*, 40 AD3d 693 [2007]). Courts should avoid an interpretation of a contract that is unreasonable, illogical, or would render certain terms superfluous or meaningless (*see 45-02 Food Corp.*, 37 AD3d 522, 525 [2007]; *Reiss v Financial Performance Corp.*, 279 AD2d 13, 18-19 [2000]).

In construing the terms of a contract, the judicial function is to give effect to the parties' intentions (*Greenwich Vil. Assocs. v Salle*, 110 AD2d 111 [1985]). The parties' course of performance under the contract is considered to be the "most persuasive evidence of the agreed intention of the parties" (*Webster's Red Seal Pubs. v Gilberton World-Wide Pubs.*, 67 AD2d 339, 341 [1979]). "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence" (*Old Colony Trust Co. v City of Omaha*, 230 US 100, 118 [1913]; *see Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39 [1999]).

At the outset, the court finds that plaintiff's assertion that its members are shareholders of Greenbriar is rejected. Plaintiff has failed to present any documentary evidence regarding the purchase of the shares of stock allocated to the subject apartments in The Greenbriar Condominium. To the extent that ANIBIC, a not-for-profit corporation purchased the shares of stock allocated to the subject apartments, said corporation, and not its individual members, is the owner of the shares in Greenbriar.

Plaintiff has only submitted one proprietary lease, dated February 1, 1995, which pertains to apartment 3Q. Said proprietary lease is between Greenbriar, as the lessor, and ANIBIC, as the lessee, and identifies the lessee as the owner of 275 shares of stock to which said lease is "appurtenant and has been allocated to Apartment 3Q in the Residential Unit." ANIBIC has not submitted any documentary evidence which establishes an ownership interest in the shares of stock allocated to apartment 3Q on the part of any individual members, including the occupants of said apartment.

Paragraph 14 of the proprietary lease for apartment 3Q, also requires ANIBIC to give Greenbriar, or its managing agent, written notice that it has designated an individual who is an officer, director, shareholder, principal or beneficiary to occupy the apartment along with that individual's spouse, children, grandchildren, parents, grandparents, brothers, sisters or domestic employees. The documentary evidence submitted herein does not establish that ANIBIC provided Greenbriar with such written notice. The letters issued by Greenbriar granting ANIBIC written consent to use and occupy apartments 3G, 6E, 9C, 10J, 3Q and 6Q,

as a “private dwelling for the designees of the Lessee,” are not evidence of ANIBIC’s compliance with the terms of the proprietary lease. These letters were written prior to the sale of the shares of stock allocated to these apartments, and prior to the execution of proprietary leases for these apartments. However, these letters are evidence of Greenbriar’s knowledge that the buyer of the shares was a not-for-profit corporation, and that the corporation’s designees would occupy the subject apartment as a private dwelling.

Since ANIBIC is a not-for-profit corporation, it is prohibited from having shareholders, but may have members (N-PCL § 501). ANIBIC, pursuant to its bylaws, has four categories of members. Plaintiff, however, has not presented any evidence that it has issued membership cards or certificates, in accordance with N-PCL § 501, and has not submitted any evidence which establishes that any of the occupants of the subject apartments are, in fact, members of ANIBIC.

It is noted that the lease does not define the term “beneficiary.” Corporations, however, ordinarily do not have beneficiaries, and plaintiff does not claim that the occupants of the apartment are beneficiaries of the corporation. Although paragraph 14 does not specifically require ANIBIC to provide the name of the designated individual, it does require that the corporation provide some information which demonstrates that such individual falls into the permitted group of designees.

Although the proprietary lease submitted herein does not make any reference to a not-for-profit corporation’s members in its list of permitted designees, it is unclear as to what the parties’ course of conduct has been since ANIBIC’s purchase of the shares of stock in the early 1990’s, and Greenbriar’s first claim for the payment of sublet fees, some 10 to 14 years later.

In view of the foregoing, plaintiff’s request for summary judgment is denied, as the documentary evidence is incomplete and insufficient to warrant relief, and triable issues of fact exist regarding the parties’ course of conduct, and whether the occupants of the apartments qualify as corporate designees, so as to be exempt from the sublease fees.

Dated: January 11, 2010

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J.S.C.