

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

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JOSEPHINE MULROY		Number <u>19263</u>	2006
- against -		Motion	
		Date <u>June 26,</u>	2007
NANAKA OGURI, et al.		Motion	
	<u>x</u>	Cal. Number <u>25</u>	
		Motion Seq. No. <u>2</u>	

The following papers numbered 1 to 15 read on this motion by plaintiff pursuant to CPLR 3212 for partial summary judgment in her favor against defendants on the first and second causes of action asserted in the complaint, and to sever the third and fourth causes of action for further proceedings; and this cross motion by defendants for summary judgment in their favor and against plaintiff on their counterclaims.

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Answering Affidavits - Exhibits.....	11-13
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff alleges that she is an owner of the shares and a proprietary lease appurtenant to an apartment numbered "6D" in the premises known as 103-26 68th Avenue, Forest Hills, New York, owned and operated by Boulevard Apartments, Inc. (the Cooperative), a residential cooperative corporation. Plaintiff also alleges that at the time she entered into the lease, she entered into a license agreement, whereby the Cooperative granted her an exclusive license to possess and use a parking space (#28) in the parking garage at the premises. Plaintiff further alleges that the term of the license agreement was to run concurrent with the proprietary lease,

and that the proprietary lease, by its terms, does not expire until December 31, 2035. In May or June 2006, the Cooperative's Board of Directors (Board), allegedly terminated the license agreement on the ground that plaintiff had sublet her apartment. Plaintiff further alleges that the Board caused locks and other entryways to the garage to be changed, preventing use of the parking space. Plaintiff commenced this action against defendants, the individual members of the Board, alleging that their conduct constitutes a breach of the license agreement and the wrongful eviction from her parking space. She seeks declaratory and permanent injunctive relief, and monetary damages.

Defendants Oguri, Zangas, Cortese, Culley and Siegel served an answer admitting certain allegations of the complaint and denying other material allegations, and asserting various affirmative defenses. They also interposed counterclaims seeking declaratory relief and an award of reasonable attorneys' fees.

The parties thereafter entered into a stipulation whereby they agreed to the substitution of Larry Tsien, Demi Kesiakidis and Annelise Goetz in place and stead of defendants John Doe #1, Jane Doe #1, and Jane Doe #2 respectively, and the amendment of the caption reflecting such substitution, and in addition, deleting reference to defendants Oguri, Cortese and the remaining John and Jane Doe defendants. They also agreed to deem the answer, previously served on behalf of defendants Oguri, Zangas, Cortese, Culley and Siegel, to constitute the answer of all the defendants, including those persons having been substituted.

Plaintiff served a reply denying the material allegations of the counterclaims and asserting two affirmative defenses. Plaintiff previously moved for a preliminary injunction, enjoining defendants from interfering with her use of the parking space pending the ultimate determination of the issues in this action. By order dated November 2, 2006, the motion was granted.

Plaintiff moves for summary judgment on her first and second causes of action, and to sever the third and fourth causes of action for breach of contract and wrongful eviction for further proceedings. As a first cause of action, plaintiff seeks a judgment declaring that (1) under the license agreement defendants have no right to terminate the license agreement based upon her subletting of the apartment or assignment of the lease, and (2) defendants may not withhold unreasonably their consent to the use of the parking space by her subtenant or assignee, so long as such subtenant or assignee is pre-approved by defendants. As a second cause of action, plaintiff seeks a permanent injunction enjoining defendants (or their agents, assigns, etc.) from

interfering with her right to use, enjoy and possess the parking space and directing defendants to provide her with all keys and other instruments or devices necessary to gain access to the parking space. In addition, she seeks, as part of that cause of action, to enjoin defendants from unreasonably withholding their consent to the use of the parking space by a person who they have pre-approved as a subtenant or assignee of the proprietary lease.

Plaintiff states that defendants sent her a notice dated June 7, 2006 that her parking privileges for space #29 were terminated because she purportedly had sublet her apartment to one "Anthony Camas, a non-relative," and that the parking space had "revert[ed] back" to the Cooperative. The notice also stated that Mr. Camas's car would be towed at his expense if he continued to occupy the spot. Plaintiff asserts that defendants wrongfully terminated her parking privileges because she, in fact, had not sublet her apartment to Mr. Camas, and has never sublet it to him. Plaintiff further asserts that Mr. Camas merely had sought Board approval of his application to sublet her apartment, and during his meeting with the Board, was told he could not use the parking space. Plaintiff allegedly received a letter dated May 8, 2006, that Mr. Camas's application had been approved by the screening panel of the Cooperative.

Plaintiff states she thereafter learned from Mr. Camas that the key for the garage was no longer operable, and she inquired about obtaining a new one, but was told by the operator of the garage that she would no longer have access to the parking space. Plaintiff additionally states that defendants refused the monthly payment for July 2006 for use of the parking space. Plaintiff argues that defendants cannot terminate the license agreement or effect a modification or abrogation of her rights under it, including her right to use the parking space for herself or her guests, in the absence of her consent, and any purported passage of a house rule by defendants does not suffice to constitute her consent. In addition, plaintiff alleges that she never otherwise consented to any modification of the license agreement.

Defendants oppose the motion by plaintiff and cross-move for summary judgment in their favor on their counterclaims. They seek as a first counterclaim a judgment declaring that the amendment to "the cooperative plan," regarding parking regulations was "duly passed and authorized," and that plaintiff "has no legal right to assert any rights to the subject parking spot." As a second counterclaim, they seek an award of reasonable attorneys' fees. Defendants claim that plaintiff's license to use of the parking space was properly terminated due to her noncompliance with house rules, as amended pursuant to a resolution by the Board of

Directors on November 4, 2004, and as disclosed in the 24th Amendment (dated February 24, 2005) to the offering plan. Defendants assert that Mr. Camas's use of the parking space violated the license agreement.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The first counterclaim by defendants is somewhat ambiguous. Defendants utilize the phrase "cooperative plan" therein, and offer, in support of their cross motion for summary judgment, a copy of the 24th Amendment to the offering plan, and an undated letter from the New York State Attorney General, indicating that such amendment was accepted for filing. The acceptance of the 24th Amendment to the offering plan for filing by the Attorney General, however, does not demonstrate that the amendment was "duly passed and authorized" (see generally Matter of Whalen v Lefkowitz, 36 NY2d 75, 78 [1975]; State v Fashion Place Associates, 224 AD2d 280 [1996]). Defendants fail to provide this court with a copy of the offering plan, as amended, or other evidence that such amendment to the offering plan was "duly passed and authorized." Thus, to the extent defendants seek summary judgment declaring the 24th Amendment was duly passed and authorized, that branch of the cross motion is denied.

To the extent, however, that the arguments advanced by defendants in support of their cross motion, and by plaintiff in opposition thereto, focus on the authority for, and passage of, the amendment to the Cooperative's house rules governing parking, the court shall read the counterclaim as one seeking a declaration that such amendment was duly authorized and passed by defendants. In support of their cross motion, defendants submit, among other things, the affidavit of defendant Leonard Zangas, a vice-president of the Cooperative, who states that on November 4, 2004, the Board passed a resolution amending the parking regulations. According to the minutes of the November 4, 2004 meeting, the amendment provides that when a shareholder moves out and sublets his or her apartment, the parking space used by that shareholder shall revert to the Cooperative and the Cooperative shall offer the parking space to the next person on the waiting list.

The proprietary lease provides that the lease is subject to the house rules, and that the house rules may be altered, amended or repealed by the Board of Directors. The house rules annexed to

the proprietary lease provide that they "may be added to, amended or repealed at any time by resolution of the Board of Directors of the Lessor." The minutes of the November 4, 2004 meeting state that the Board voted, by a five to one vote of those directors in attendance, in favor of the resolution to amend the parking regulations. Based upon such documentary evidence, defendants have established a prima facie case that such amendment to the house rules governing parking was duly authorized and passed. Plaintiff has failed to rebut such showing by raising a triable issue of fact.

With respect to the issues of whether plaintiff has a right to the parking spot, and whether defendants have a right to terminate the license agreement based upon plaintiff's subletting of her apartment or assignment of her lease, it is clear based upon the documentary evidence that the parking spot is not part of the demised premises and that the license agreement is not part of the proprietary lease. Plaintiff argues that the license agreement is not subject to revocation at will. She asserts that it is for a definite period of time, i.e. coterminous with the proprietary lease.

Paragraph 7 provides:

"ALTHOUGH THIS IS NOT A LEASE but merely a license to park agreement, the term of the license shall run concurrent with space user's current apartment lease and the fee charged hereunder shall increase in the same percentage as allowed by DHCR for space of user's apartment. **(NOT APPLICABLE FOR CO-OP OWNERS [sic] RENTING A GARAGE SPACE)**"

(emphasis supplied).

Contrary to plaintiff's argument, paragraph #7 of the license agreement is not applicable herein insofar as she admittedly is a cooperative owner and the parking space is in the garage.

Furthermore, the license agreement specifically provides that it "is NOT ASSIGNABLE and User(s) may not sublet their assigned space(s) or allow any other vehicle other than the ... listed vehicle to park in said spot." Thus, to the extent plaintiff permitted another person to use her parking spot to park an undesignated vehicle, she is in violation of this provision.

Plaintiff argues that defendants have waived their right to object to her permitting a person who had had his sublease application approved to use her parking space. She claims they

previously acquiesced to the use of the parking spot by her prior subtenants without objection.

Waiver is the voluntary abandonment or relinquishment of a known right (Jefpaul Garage Corp. v Presbyterian Hosp., 61 NY2d 442, 446 [1984]). The past conduct of the Cooperative and defendants, in failing to object to the use of the parking space by persons other than plaintiff, at most, related to their failure to object to the use of the parking space by plaintiff's subtenants. In this instance, the Board apparently learned, during its meeting with Mr. Camas, of his use of the parking space at a time prior to the official approval of his sublease application. That the Board protested such use, and refused to allow Mr. Camas to use it even following the approval of his subtenant application, was within their rights under the license agreement.

In addition, the Board's passage of the amendment to the house rules must be viewed, as constituting a bilateral modification of the license agreement by the parties to include a provision, whereby the subletting of the apartment triggers a revocation of the space user's license to park in the spot. The proprietary lease specifically provides that it is subject to the house rules, and plaintiff, having entered into it, has agreed to be bound by them as amended.

Plaintiff, furthermore, does not press to be able to continue to use the parking space herself, assuming that in fact she has not sublet her apartment. Such failure to do so, undoubtedly relates to the fact she resides elsewhere and has not occupied the apartment for years. In addition, under the terms of the license agreement, assuming for the purpose of this motion and cross motion, that the spot did not revert to the Cooperative in accordance with the amended house rule because plaintiff did not sublet the apartment to Mr. Camas, plaintiff would continue to be responsible for the payment of the monthly licensing fee.

To the extent plaintiff seeks a declaration that defendants may not withhold unreasonably their consent to the use of the parking space by her subtenant or assignee, so long as such subtenant or assignee is pre-approved by defendants, defendants have no obligation under the license agreement or the amended house rules to permit the use of the parking space by anyone other than plaintiff, as the space user. Furthermore, under the business judgment rule, the Board may rely upon the license agreement in determining that no one other than the space user can use the parking spot. Under the business judgment rule, the court must defer to a cooperative board's determination so long as it "acts for the purposes of the cooperative, within the scope of its

authority and in good faith" (Levandusky v One Fifth Ave. Apartment Corp., 75 NY2d 530, 538 [1990]).

To the extent defendants seek summary judgment with respect to their second counterclaim for attorneys' fees, they have failed to allege or prove a basis for such an award (see Hunt v Sharp, 85 NY2d 883 [1995]; Chapel v Mitchell, 84 NY2d 345, 348-349 [1994]; Mighty Midgets v Centennial Ins. Co., 47 NY2d 12, 21 [1979]).

Under such circumstances, the cross motion by defendants is granted only to the extent of granting them summary judgment on their first counterclaim declaring that the amendment to the house rules governing parking was duly authorized and passed by the Board of Directors on November 4, 2004, and that plaintiff has no right under the license agreement to assign the license agreement or sublet her parking space. The motion by plaintiff is granted only to the extent of declaring that defendants have the right to revoke the license agreement based upon the subletting of plaintiff's apartment.

That branch of the motion by plaintiff seeking to sever the third and fourth causes of action is denied.

Dated: September 28, 2007

AUGUSTUS C. AGATE, J.S.C.