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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

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930 **FIFTH** CORPORATION,

Plaintiff,

-against-

KEN MILLER and **JOAN** MILLER,

Defendants.

INDEX NO. 114852/01

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

Cross-Motion: **[X] Yes** [ ] No

Upon the foregoing papers, it is ordered that: Plaintiff is a cooperative housing corporation which owns a building located on Fifth Avenue in Manhattan. With the plaintiffs prior consent, defendants purchased shares for Apartment 2D in the building on December 16, 1998 and were assigned a proprietary lease. Prior to the consideration of their application, the defendants were required to sign an inducement letter prepared by the Board in which they represented, ***inter alia,*** that they were aware that the existing policy of the cooperative was that "[p]ermission would not be granted for the keeping of any animals." Moreover, on this same subject, the proprietary lease signed by defendants expressly forbids the harboring of any animals in any apartments in the building.

Defendants moved into their apartment on January 10, 1999, along with a small dog. Approximately eighteen months later, on November 13, 2000, plaintiff served defendants with a Notice of Default alleging that they had breached the proprietary lease by keeping a dog in their apartment. The Notice of Default claimed that the managing agent for the building only became aware of the dog on or around November 13, 2000. On February 9, 2001, plaintiff commenced a holdover proceeding in Civil Court to evict defendants based on their insistence on keeping a dog in their apartment. Defendants moved for summary judgment dismissing the proceeding on the ground that it was time-barred under section 27-2009.1(b) of the Administrative Code of the City of New York ("Pet Law"). The Pet Law provides that a summary holdover proceeding to enforce a no-pet provision in a lease is time-barred, and the no-pet provision waived, unless the proceeding is commenced within three months of the date that the landlord or its agents had knowledge that the tenant is openly and notoriously harboring a pet. See ***Seward Park Housing Corp. v. Cohen,*** 287 AD2d 157 (1st Dept. 2001). On June 25, 2001, the Civil Court (Timmie Elsner, J.) dismissed the holdover proceeding on the ground that it was time-barred under the Pet Law. The dismissal has been affirmed on appeal. ***See*** 930 Fifth ***Corporation v. Miller,*** 2002 WL 229505 (App. Term 2002).

In this action, plaintiff alleges that defendants fraudulently misrepresented in the inducement letter that they would not keep animals in their apartment in order to induce the cooperative into entering into the proprietary lease. Plaintiff seeks rescission of the lease, compensatory damages and attorney's fees. In their answer, the defendants assert five counterclaims. Plaintiff has now moved for summary judgment in its favor. Defendants have cross-moved for summary judgment dismissing the complaint. They also seek summary judgment on their fourth counterclaim for breach of an escrow agreement and on their fifth counterclaim for attorney's fees, as well as an order prohibiting the plaintiff from withholding building services and an order imposing sanctions.

The record before the court clearly establishes that defendants made no misrepresentations that plaintiffs could have relied on in agreeing to enter into the proprietary lease. The inducement letter which

they signed merely states that "I have been advised of the existing policies with regard to the following....Permission will not be granted for the keeping of any animals." By signing this letter, defendants represented not that they would never keep an animal in the apartment but only that they had been advised of the existing policies that permission would not be granted for the keeping of a pet. By contrast, the letter also contains seven other affirmative representations, such as "I do not plan to make any alterations to the apartment other than minor decorating and painting." The clear language of the inducement letter, which was drafted by plaintiff, cannot be read more broadly, especially given the Civil Court's determination that plaintiff waived its no-pet policy by failing to timely commence the holdover proceeding.

Even if the court were to stretch the language of the letter to fit plaintiffs interpretation, an action on the inducement letter would be barred under the Administrative Code. Specifically, section 27-2009.1(c) of the Pet Law states that "[I]t shall be unlawful for an owner or his or her agent, by express terms or otherwise, to restrict a tenant's rights as provided in [the Pet Law]. Any such restriction shall be unenforceable and deemed void as against public policy." If, as plaintiff suggests, the inducement letter requires prospective tenants to represent that they will never harbor animals in the apartment prior to purchase and that the letter can thereafter be used as a basis for rescinding the proprietary lease of a tenant who nevertheless lives with a pet, it is clearly an attempt to restrict a tenant's rights under the Pet Law since the three-month rule would be effectively circumvented by application of the six-year statute of limitations for actions alleging fraud. As such, it would be inconsistent with the purpose of section 27-2009.1(c), which is "to protect from erosion the specific rights of tenants under the Pet Law. See *Seward Park Housing* ***Corp.*** *v.* Cohen, 287 AD2d at 165.

As to the defendants' cross-motion, the fourth counterclaim alleges that the plaintiff breached its escrow agreement with the defendants. Under the escrow agreement, the defendants were required to deposit one year's maintenance, totaling $10,588.32, in escrow. The agreement provides that the money will be held for two years from the date of closing and that the purchaser may thereafter request the return of the funds, less a 1% fee payable to the escrow agent. Although the agreement states that the decision whether to return the funds lies solely within the Board's discretion, it also states that the Board would not unreasonably refuse the purchaser's request or delay its agreement to return the funds. Defendants allege that they have made all timely maintenance payments and that plaintiffs refusal to return the funds has no reasonable basis. The court agrees and notes that plaintiff has provided no explanation for its refusal to return the funds other than what it wrongly terms as its broad discretion under the escrow agreement. The defendants are therefore entitled to the return of the escrowed funds, minus the 1% fee.

The motion for summary judgment on the fifth counterclaim for attorney's fees is denied without prejudice to renew at the conclusion of this case. The defendants' request for an order prohibiting the further withholding of building services is moot since the issue was resolved pursuant to a court-ordered stipulation entered into by the parties on September 6, 2001. There is no suggestion in the moving papers that plaintiff has failed to comply with this stipulation. The defendants' request for sanctions is denied.

Accordingly, the plaintiffs motion for summary judgment is denied, The defendants' cross-motion for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed. The defendants' cross-motion for summary judgment is granted with respect to their fourth counterclaim and the parties shall settle order on this claim. The motion is otherwise denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on June 18,2002 at 10 a.m. for a status conference.

ENTER ORDER

Dated: 5/03/02

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION