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Short Form Order & Partial Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIMEON GOLAR Justice — IA PART 24

RONALD YATTER,

Plaintiff,

- against-

CONTINENTAL OWNERS CORP.,

Defendant.

Index Number 19101 2001

Motion Date January 13, 2004

Motion Cal. Number 39

The following papers numbered 1 to 22 were read on this: (1) motion by 19 individuals, pursuant to CPLR 1002, 1013 and 1014, for an order granting them leave to intervene and joining them as party-plaintiffs; (2) cross motion by the defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and for an order permanently enjoining the plaintiff from subletting apartment 6-G without its consent, and an order severing its counterclaim; and, (3) cross motion by the plaintiff, pursuant to CPLR 3212, for summary judgment and a declaration that he is a holder of unsold shares allocated to apartment 6-G, and for an order permanently enjoining the defendant from terminating the proprietary lease for apartment 6-G as a result of alleged defaults relating to plaintiff's status as a holder of unsold shares, and a hearing on the amount of damages to be awarded on the second, third and fourth causes of action interposed in the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 3
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

I. The Relevant Facts

A. The Offering Plan, Amendments and Yatter's Purchases

By virtue of a cooperative offering plan dated December 31, 1982 ("the plan"), the defendant Continental Owners Corp. ("Continental") became the operative corporate entity for a residential cooperative located in Queens.[1]

According to a letter from the Office of the Attorney General ("AG's Office"), dated January 12, 2004, the plan was submitted on October 2, 1981, accepted for filing on January 7, 1983, and was declared effective by the third amendment to the plan on February 17, 1984.

Pursuant to paragraph S of the plan:

> "The Owner-Sponsor has agreed to obtain purchasers for any of the shares which have not been subscribed for prior to the Closing Date. Each tenant-shareholder who acquires Unsold Shares will acquire such Unsold Shares for his or its own account (beneficial and of record), and not as nominee of any corporation, joint venture, partnership, trust or estate. The holders of Unsold Shares will only share in the profits or losses arising out of the ownership or sale of the Unsold Shares owned by them.
>
> [Continental] will have a lien upon the Unsold Shares to secure the payment of all obligations of the holders of Unsold Shares.
>
> [Owner-Sponsor] guarantees payment of all maintenance charges and assessments due from a holder of Unsold Shares, regardless of transfer, until purchased by a bona fide purchaser for occupancy by him or a member of his family.
>
> No bond or other security has been or will be furnished by the Owner-Sponsor or any holder of Unsold Shares and

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[1] The original Owner-Sponsor was Continental Associates ("Owner-Sponsor"). The plan was initially an eviction plan; however, by first amendment dated November 28, 1983, it became a non-eviction plan. The Owner-Sponsor transferred title to Continental on June 1, 1984, prior to the fourth amendment dated June 8, 1984.

> the ability of holders of Unsold Shares to comply with the terms of their Proprietary Leases will depend solely upon their financial condition if and when called upon to perform ***.
>
> * * *
>
> The holders of such Unsold Shares shall have the right to freely sublet the related apartments to such persons and on such terms and conditions as it [sic] deems desirable *** without having to obtain the consent of the Board of Directors of [Continental]. The consent of [Continental] or of its directors or shareholders shall not be required with respect to any such subletting, sale or transfer. The Unsold Shares shall retain their character as such until such time as they are sold or transferred to a purchaser for bona fide occupancy."

Paragraph 38[a] of the proprietary leases similarly defines the term "unsold shares."

No identification of the holders of unsold shares appears in the plan or any amendment thereto until the fourth plan amendment, dated June 8, 1984, which was a post-closing amendment. That amendment contained a list of unsold apartments taken back by the Owner-Sponsor, and included apartment 6-G.

Yatter and his wife agreed to purchase apartment 6-G by contract of sale dated August 3, 1984, which was made subject to the rights of existing rent-stabilized tenants.[2]

During his examination before trial ("EBT"), Yatter indicated that he also purchased apartment 15-P and resided therein with his family, as well as apartments 7-K and 15-O which, apparently, were also occupied by rent-stabilized tenants and never occupied by Yatter or his family. According to Yatter, at the time of the purchase of apartment 6-G he was informed that he would become a holder of unsold shares and would not require Board approval for any future sale or sublet of that apartment.

By fifth amendment to the plan dated on or about November 5, 1984, the Owner-Sponsor indicated that it still held certain unsold shares; however, apartment 6-G no longer appeared on that list. In the sixth amendment dated July 2, 1985, the Owner-Sponsor referred

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[2] For estate purposes, Yatter's wife subsequently transferred all of her interest in apartment 6-G to Yatter, alone.

back to the fourth amendment to the plan, and annexed a list of the names of purchasers of unsold shares and apartments relating thereto, and of the remaining unsold shares and apartments. Yatter was listed as the purchaser of apartment 6-G as of October 2, 1984.

Generally, in every subsequent amendment to the plan, the Owner-Sponsor continued to list the apartments it held representing unsold shares, and purchasers or potential purchasers of unsold shares and apartments.

At some point, an attorney for the Board of Directors of Continental ("Board") indicated that Yatter and others did not constitute holders of unsold shares. Yatter, himself a former Board member, consequently met with a representative of the AG's office and with a representative of the former Owner-Sponsor.

On or about January 19, 2001, a former partner of the Owner-Sponsor wrote a sworn letter "To Whom It May Concern" that:

> "This is to confirm that all of the purchasers of unsold shares in [Continental] identified in the Amendments to the Offering Plan were intended to be designated as holders of unsold shares as defined in the Offering Plan and Proprietary Lease and afforded all of the rights of holders of unsold shares pursuant to the Offering Plan and Proprietary Lease of [Continental]."

During his EBT, the same former partner of the Owner-Sponsor did not know, inter alia, whether the Owner-Sponsor designated anyone as a holder of unsold shares.

By letter dated March 20, 2001, Continental advised Yatter and other individuals that they were erroneously accorded the status of holders of unsold shares. Continental asserted that to qualify, Yatter and the others had to: (1) be designated as such by the Owner-Sponsor at the time that they acquired title to the shares, as the Owner-Sponsor was supposed to guarantee the monetary obligations of the purchaser designated as a holder of unsold shares; and, (2) have current broker-dealer registration statements on file with the AG's Office, and annually file updated amendments to the plan.

Continental advised Yatter that the others that they should furnish evidence of the Owner-Sponsor designation, the filed broker-dealer statements and of their regular updates of the cooperative plan by April 30, 2001, or it would presume that the Board correctly determined that they were not holders of unsold shares.

Although prior amendments to the plan were filed by the Owner-Sponsor and/or Continental, on or about November 14, 2001, Yatter and other individuals filed a 13th amendment to the plan. That amendment provides that Yatter and certain other individuals were holders of "unsold shares" and "[s]uch individuals were designated by [Owner-Sponsor], as holders of Unsold Shares."

C. Complaint and Counterclaim

When Yatter's long-term rent-stabilized tenant in apartment 6-G vacated, Yatter sought to sublet to a new tenant. By letter dated June 19, 2001, Continental advised him that any sublet without the prior consent of the Board would constitute a breach of the lease and of the Board's sublet policy. By notice to cure dated July 6, 2001, Continental informed Yatter that unless he cured his default in subletting or assigning apartment 6-G on or before July 21, 2001, his lease to that apartment would expire five days thereafter.

By order to show cause Yatter commenced this action seeking: (1) a declaration that he was a holder of unsold shares and a permanent injunction preventing Continental from terminating his lease; (2) damages for breach of the lease; (3) damages for intentional interference with his contract with a subtenant; and, (4) an award of reasonable attorney's fees pursuant to Real Property Law § 234.[3]

Continental interposed various affirmative defenses, including that the action was barred by Business Corporation Law ("BCL") § 501[c]. Continental also counterclaimed against Yatter asserting that: (1) the plan required the Owner-Sponsor and/or any holder of unsold shares to sell their stock in the co-op within a reasonable time; (2) Yatter was never a holder of unsold shares or, if he was, he breached the plan by failing to sell the stock and proprietary lease within a reasonable period of time; and, (3) as a result, the co-op was deprived of long-term occupancy by owners and was being populated by transient tenants. In response, Yatter generally denied the allegations of the counterclaim.

Apparently, Yatter's new subtenant moved into apartment 6-G without incident.

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[3] This court (Golia, J.) temporarily restrained Continental from acting to terminate Yatter's lease pending a hearing and determination of the matters raised in the complaint. Yatter and Continental subsequently agreed to continue the stay pending a determination of this action.

II. Motion and Cross Motions

Nineteen individuals move for leave to intervene or to be joined as party plaintiffs. They contend that they also received Continental's letter requiring documentation of their status as holders of unsold shares, and complied with all statutory or other requirements to attain that status. In support they annex, inter alia, their affidavits and numerous proposed verified complaints containing causes of action similar to Yatter's.

Continental opposes the motion asserting, inter alia, that there are no common questions of law and facts as: (1) all individuals purchased their apartments at different times, spoke to different people and had different tenants so there would be differences in proof as to whether each individual is a holder of unsold shares and as to damages; and, (2) Continental would be prejudiced by the joinder as schedules for discovery would differ.

Continental cross-moves for summary judgment dismissing the complaint contending, inter alia, that: (1) 13 NYCRR § 18.3[w] requires a sponsor to formally designate any holder of unsold shares, there is no evidence that the Owner-Sponsor ever designated Yatter as such, and the letter by a former partner of the Owner-Sponsor is insufficient; (2) Yatter only belatedly complied with the regulation by registering as a broker-dealer on or about January 19, 2001, and preparing an amendment to the offering plan on November 14, 2001; (3) Yatter cannot designate himself as a holder of unsold shares by filing a plan amendment, and a memo by the AG's Office issued in October, 1987 specifically states that the Owner-Sponsor must make the designation; (4) in any event, BCL § 501[c] prevents Yatter from receiving preferential treatment over other shareholders; and, (5) in any event, it is entitled to summary judgment dismissing the third cause of action interposing a claim for tortious interference, as Yatter's tenant was permitted to move in without incident.

Yatter cross-moves for summary judgment contending, inter alia, that: (1) the regulations relied upon by Continental are inapplicable to the plan which was submitted prior to April 1, 1982; (2) in any event, he complied with all requirements of the later-enacted regulation; (3) the case of Riggin v Balfour Owners Corp. (137 AD2d 799), involved an identical plan prepared by the same Owner-Sponsor and determined that the purchaser therein constituted a holder of unsold shares; (4) in any event, the later-enacted regulation fails to indicate how a holder of unsold shares is designated, and does not require a formal written designation; (5) in any event, the evidence overwhelmingly

demonstrates that he is a holder of unsold shares and was intended to be designated as such; and, (6) the doctrines of equitable estoppel, laches and the statute of limitations bar Continental from asserting that he is not a holder of unsold shares.

Continental replies, inter alia, that: (1) the plan indicates that the first offering was December 31, 1982, which was nine months after the effective date of the regulation; (2) Yatter is a person who purchased shares for an apartment occupied by another and is governed by a different regulation; and, (3) Yatter cannot become a holder of unsold shares by estoppel or laches as the lease contains a non-waiver provision.

III. Decision

A. Applicability of 13 NYCRR § 18.3

The threshold issue presented in this action is whether the plan is subject to the regulations found in 13 NYCRR § 18.3[w]. Pursuant to 13 NYCRR § 18.1, a plan required by General Business Law § 352-e is subject to Part 18; however, subdivision [n] of 13 NYCRR § 18.1 provides that:

> "(1) This Part, as in effect on June 2, 1982, applies to offering plans that *** were submitted on or after April 1, 1982 but before July 20, 1983."

The plan at issue is not subject to this provision of 13 NYCRR § 18.1, as it was submitted for filing on October 2, 1981.

13 NYCRR § 18.1[n][2] provides:

> "(2) This Part, as revised by revisions filed with the Secretary of State on May 24, 1983, applies to offering plans that *** are submitted on or after July 20, 1983."

That subdivision is similarly inapplicable, as the plan was submitted prior to July 20, 1983.

As a result, the regulations promulgated in 13 NYCRR Part 18 are not applicable to the plan at issue, and Yatter was not required to comply with the requirements of 13 NYCRR 18.3[w]. (See, 13 NYCRR § 18.1[n]; Baranello v Lehrberger, 212 AD2d 781; Warner v The W. 90th Owners Corp., 170 AD2d 315, lv denied, 78 NY2d 855; see also, Riggin v Balfour Owners Corp., 137 AD2d 799; cf., Kralik v 239 E. 79th St. Owners Corp., ___ AD2d ___, 2004 NY App Div LEXIS 1230 [1st Dept. 2/10/04]; Pacella v 107 W.

25th St. Corp., 271 AD2d 342; Gorbatov v Gardens 75th St. Owners Corp., 247 AD2d 440.)

Contrary to Continental's contention, Yatter is entitled to the benefits associated with holders of unsold shares. The Owner-Sponsor designated the shares to apartment 6-G as unsold shares in the fourth amendment to the plan and, in the fifth amendment, indicated that Yatter was a purchaser of the unsold shares for that apartment. Neither Yatter nor any member of his family ever occupied apartment 6-G, and Yatter never sold his shares to a purchaser for bona fide occupancy.

There is no other language in the plan or related documents which sets a timetable by which the holders of unsold shares must sell their shares. (See, Baranello v Lehrberger, supra.) In addition, the plan contains provisions indicating that the Owner-Sponsor would guarantee all maintenance charges and assessments due from a holder of unsold shares, but would not provide any bond or security therefor. Finally, Continental's argument that Yatter's status as a holder of unsold shares violates BCL § 501[c] lacks merit. (See, Susser v 200 E. 36th Owners Corp., 262 AD2d 197.)

Accordingly, Yatter is entitled to summary judgment on the first cause of action seeking a declaration that he was a holder of unsold shares and a permanent injunction preventing Continental from terminating his lease for alleged defaults relating to that status. Continental's cross motion for summary judgment on the first cause of action is denied.

B. Third Cause of Action For Tortious Interference

A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach the contract; and (4) damages to the plaintiff. (See, Foster v Churchill, 87 NY2d 744; Bernberg v Health Mgmt. Systems, Inc., 303 AD2d 348; Schuckman Realty, Inc. v Cosentino, 294 AD2d 484.)

Here, it appears that Yatter's new tenant actually moved in, despite the dispute between Yatter and Continental. Moreover, there is no evidence that Continental intentionally procured a breach of contract by that tenant, and Yatter has not demonstrated that he suffered any damages. As a result, that branch of Continental's cross motion for summary judgment dismissing the third cause of action is granted, and Yatter's cross motion for summary judgment and a hearing on that cause of action is denied.

C. Second and Fourth Causes of Action

Although Yatter and Continental each purport to cross-move for summary judgment on the second and fourth causes of action, neither has proffered any argument or proof in support of that branch of their cross motion. Accordingly, the branches of the cross motions of Yatter and Continental for summary judgment on the second and fourth causes of action are denied.

D. Intervention/Joinder

As Yatter has been granted summary judgment on the first cause of action, and the 19 individuals improperly submitted separate proposed amended complaints rather than one single amended complaint adding their claims to Yatter's action (see, CPLR 1013, 1014), the individuals' motion for leave to intervene or to be joined as party plaintiffs in this action is denied.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the motion by the 19 individuals for an order granting them leave to intervene and joining them as party-plaintiffs is denied; and it is further

ORDERED that the cross motion by the defendant for summary judgment dismissing the complaint, an order permanently enjoining the plaintiff from subletting apartment 6-G without its consent, and an order severing its counterclaim is granted to the extent that the defendant is granted summary judgment dismissing the third cause of action, that cause of action is dismissed and, otherwise, the cross motion is denied; and it is further

ORDERED that the cross motion by the plaintiff for summary judgment and a declaration that he is a holder of unsold shares allocated to apartment 6-G, an order permanently enjoining the defendant from terminating the proprietary lease for apartment 6-G as a result of alleged defaults relating to plaintiff's status as a holder of unsold shares, and a hearing on the amount of damages to be awarded on the second, third and fourth causes of action interposed in the complaint is granted to the extent that the plaintiff is granted summary judgment on his first cause of action and, otherwise, the motion is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that the plaintiff is a holder of unsold shares allocated to apartment 6-G at the cooperative

premises known as 70-20 108th Street, Forest Hills, New York 11375; and it is further

ORDERED that the defendant is permanently enjoined from terminating the plaintiff's proprietary lease for apartment 6-G as a result of alleged defaults by plaintiff relating to his status as a holder of unsold shares.

Dated: APR 06 2004

J.S.C.