SHORT FORM ORDER

INDEX No. 05-08248
CAL. No. 06-01823-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-15-06
ADJ. DATE 1-16-07
Mot. Seq. # 001 - MD
002 - XMD

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STRATHMORE GATE EAST HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

- against -

ROSE VALENTI and "JOHN DOE" and "JANE DOE," being fictitious names and intended to be persons in possession of the subject premises,

Defendants.

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Upon the following papers numbered 1 to 28 read on these motions for summary judgment; Notice of Motion and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 28; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint, is denied; and it is further

ORDERED that the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in its favor is also denied.

Initially, the Court notes that plaintiff's note of issue was filed on July 31, 2006 and that its cross motion for summary judgment was made on January 5, 2007, more than 120 days after the filing of its note of issue, which expired on November 28, 2006. Therefore, the cross motion is procedurally

defective because it was not interposed within the time limitation prescribed by the amendment to CPLR 3212(a)(L. 1996 Ch. 492) which states, *inter alia,* "such motion shall be made no later than one hundred twenty (120) days after the filing of the note of issue, except with leave of court on good cause shown." In ***Miceli v State Farm Mut. Auto. Ins. Co.,*** 3 NY3d 725, 786 NYS2d 379 (2004), the Court of Appeals underscored its holding in ***Brill v City of New York,*** 2 NY3d 64, 781 NYS2d 261 (2004) and made it clear "that [the] statutory time frames," of CPLR 3212, are "not options, they are requirements, to be taken seriously by the parties." Here, plaintiff offered no good cause for its untimely motion, and the Court is constrained by the cross motion's lateness (***Long v Children's Vil.,*** 24 AD3d 518, 805 NYS2d 286 [2005]). Accordingly, plaintiff's cross motion is denied as untimely.

Plaintiff corporation commenced this action for defendant's alleged violation of the cooperatives's by-laws and regulations. Article II of plaintiff cooperatives's regulations provides:

> In order to preserve the character of Strathmore Gate East Homeowners Association, Inc., as a Planned Retirement Community, anything to the contrary herein notwithstanding, occupancy of all units shall be restricted as follows:
>
> (a) To any person of the age of 55 years or over; or
>
> (b) A husband or wife, regardless of age, residing with his or her spouse, provided the spouse of such person is of the age of 55 years or over; or
>
> (c) The child or children, or grandchild or grandchildren residing with a permissible occupant, proved the child or children is or are of the age of 19 years or over; or
>
> (d) The individual of individuals regardless of age, residing with and providing physical or economic support to a permissible occupant.

The gravamen of plaintiff's complaint is that defendant does not reside in her unit, 5 Flair Way, Coram, but resides at 120 Evergreen Ave., in Medford, and that an adult man younger than 55 years of age (defendant admits that the young man is her son, Phil Valenti) and, at times, an adult woman younger than 55 years of age (admittedly Phil's girlfriend) do reside at the unit. Since defendant does not reside at the unit, her son does not reside there "with a permissible occupant" as provided in the regulations. Defendant now moves for summary judgment dismissing the complaint and argues that she does reside at the condominium, although she travels a great deal and therefore is away from the unit for long periods. In support of her motion, defendant offers the transcript of her deposition testimony in which she admits that her son, Phil, stayed at the unit for a few months when he was waiting for a house to be built[1] and that while she is traveling Phil often stays at her unit, although she doesn't know exactly how much. Defendant testified that before she bought her unit she lived with her son at his home at 120

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[1] Defendant stated that she asked for, and was granted, permission for her son to stay at the unit while his home was being built. While her son never closed title on the new home, defendant stated that he does not live at her unit but lives at his girlfriend's home in Yaphank.

Evergreen Ave., Medford. Defendant also offers copies of her driver's license and a LIPA bill, which state her address as 5 Flair Way, Coram.

Plaintiff's untimely cross motion for summary judgment, considered in opposition to defendant's motion, is supported by an affidavit from John Valentino, a member of plaintiff's board of trustees as well as a close neighbor to the subject unit. Mr. Valentino states that he has lived at his unit, across the street from defendant's, for more than five years; that he knows defendant by sight and that he has not seen defendant at her unit for more than two years; and that she does not reside at the unit but her son and his girlfriend do reside there. In support, plaintiff annexed, *inter alia*, recent copies of the electronic payment record for the unit's common charges, the real property tax assessment record for defendant's property located in Mastic Beach, as well as motor vehicle registration records. These record state that, as recently as December 2006, Rose Valenti's residence is 120 Evergreen Ave., Medford. Further, defendant was served with the instant complaint at 120 Evergreen Ave., Medford.

It is well settled that on a motion for summary judgment it is not the court's function to assess credibility (*see*, ***Ferrante v American Lung Assn.,*** 90 NY2d 623, 665 NYS2d 25 [1997]; ***Glick & Dolleck, Inc. v Tri-Pac Export Corp***., 22 NY2d 439, 293 NYS2d 93 [1968]). Moreover, in accordance with the often recited standards for summary judgment, it is the movant who has the burden to establish his entitlement to summary judgment as a matter of law (*see, **Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). For movant to prevail, it must clearly appear that no material and triable issue of fact is presented (*see*, ***Di Menna & Sons v City of New York***, 301 NY 118 [1950]). Here, the Court finds that defendant has not established her entitlement to summary judgment as a matter or law. Accordingly, the motion is denied.

Dated: MAR 2 6 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**