SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MARILYN SHAFER** **PART 36**
Justice

NICOLE A. DE SOIGNES,

INDEX NO. 112044/02

Plaintiff(s), **MOTION DATE** _____

-against- **MOTION SEQ. NO.** 002

CORNASESK HOUSE TENANTS CORP **MOTION CAL. NO.** _____

Defendant(s).

The following papers, numbered 1 to were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Defendant moves for an order granting summary judgment as follows: (i) declaring that plaintiff does not have the unconditional right to sublet the subject apartments and is required to obtain the consent of defendant's Board of Directors (the Board) prior to subletting or renewing any previously authorized sublet; (ii) declaring that plaintiff is in violation of her proprietary leases because she sublet the apartments without Board approval; (iii) declaring that defendant's current sublet policy is valid and enforceable; (iv) dismissing plaintiff's second cause of action for injunctive relief; and, (v) dismissing plaintiff's third cause of action for attorney's fees and granting defendant's counterclaim for attorney's fees.

Plaintiff cross-moves for an order granting summary judgment as follows: (i) declaring that defendant's notices to cure are invalid; (ii) declaring that plaintiff has an unconditional right to sublet her apartments; (iii) declaring that plaintiff is not in violation of heir

proprietary leases; (iv) declaring that the sublet policy adopted by defendant on January 1, 2002 is void; (v) enjoining defendant from terminating her leases; and, (vi) awarding plaintiff her attorney's fees.

Plaintiff is the proprietary lessee and the owner of the shares allocated to apartments 1B, 2B and 5A (collectively, the Apartments) in a cooperative apartment house (the building) owned by defendant and located at 238 East 84th Street in Manhattan. Plaintiff has never resided in any of the Apartments, which she purchased in 1972, 1973 and 1980 for investment purposes and subleased thereafter.

On August 1, 2001, the Board adopted new subletting rules, effective January 1, 2002 (the 2002 Rules). The 2002 Rules, inter alia, restrict the subletting of apartments to two of every four years and impose a 10% surcharge on every sublet. On May 25, 2002, plaintiff received a 10-day notice to cure for each of the Apartments. The notices state that plaintiff is in violation of paragraphs 14, 15 and 16 of her proprietary leases because she does not occupy the Apartments and because she sublet the Apartments without first obtaining; defendant's consent.

Plaintiff commenced this action on June 5, 2002, seeking inter alia a declaration that she has an unconditional right to sublet the Apartments by virtue of a letter dated December 11, 1972 (the Letter) that she received from defendant's then Chairman of the Board. The Letter states: "[t]his will confirm our conversation whereby we stated that the shareholders of Cornasesk House Tenants Corporation are allowed to sublet inconditionally[sic] their apartment(s) for the duration of their ownership" (see plaintiff's exhibit 3). This court granted plaintiff's application for a temporary restraining order by order dated June 13, 2002 and granted plaintiff's application for a *Yellowstone* injunction by order dated August 23, 2002.

In support of its motion for summary judgment defendant invokes the business judgment rule, cites plaintiff's purported violations of the subletting provisions of her leases., contends that plaintiff's reliance on the Letter is misplaced because the Letter merely states defendant's policy in **1972,** contends that the Letter violates paragraphs **14, 15** and **16** of the leases as well as § 501(c) of the Business Corporation Law (BCL), defends the **2002** Rules, and requests attorney's fees.

In opposition and in support of her cross-motion, plaintiff makes the following arguments: she purchased the Apartments for investment purposes in reliance on the Letter; she voluntarily submitted sublet packages to the Board; she sublet the Apartments for over **30** years without interference from defendant; defendant's motion is barred by the doctrine!; of waiver, estoppel and laches; defendant acknowledged that it could not prevent plaintiff from subletting in March **1991** when it withdrew its attempt to impose consent requirements; the **2002** Rules violate Article **5.04** of defendant's by-laws by imposing a **10%** surcharge on all sublets; the notices to cure are defective because they are vague and fail to state how plaintiff can cure her purported defaults; and, plaintiff is entitled to attorney's fees pursuant to Real Property Law **§ 234.**

The Letter served plaintiff well for the past **30** years, but the past is past. The Letteir is not incorporated in plaintiff's leases. Paragraph **15** of the leases provides in pertinent part that the lessee cannot sublet the apartment(s) or renew any previously authorized sublease without consent of the Board or lessees owning at least **65%** of the then issued shares of the lessor, subject to such conditions as the Board or lessees may impose, which consent can be withheld for any reason or no reason (see defendant's exhibits E-G, ¶**15).** Plaintiff has never obtained Board or shareholder consent. Although the Board obviously sat on its hands for decades (except, perhaps, for March **1991),** plaintiff's arguments concerning reliance, waiver, estoppel and laches, which at first glance appear persuasive, are of no avail because they are

in conflict with BCL § 501(c). The Letter, ***supra,*** which purports to grant to plaintiff the unrestricted right to sublet the Apartments for the duration of her ownership, violates BCL §501(c) (all shareholders of same class to be treated equally) because it grants special subletting privileges to plaintiff which are not available to the other proprietary lessees of the building (see Spiegel v. 1065 Park Avenue Corporation, __AD2d__, 759 NYS2d 461,462-463 [1st Dept 20031; see also, Wapnick v. Seven Park Avenue Corporation, 240 AD2d 245, 246-247 [1st Dept 19971). The doctrines of waiver, estoppel and laches are not available to plaintiff because the preferential treatment she received is in violation of the statute (see Spiegel, ***supra:*** at 463). The court concludes that plaintiff is in violation of paragraph 15 of her leases because she failed to obtain defendant's consent to her subletting.

Plaintiff's challenge to two of the provisions in the 2002 Rules (subletting restricted to two out of four years and 10% surcharge on subletting -- see defendant's exhibits O and P) is well founded. Paragraph six of the leases provides that the "form" of the lease cannot be changed unless the change is authorized by 75% of the lessor's shares then issued (see defendant's exhibits E-G, ¶ 6). Article 5.01 of defendant's by-laws, entitled "Form of Lease,"' includes subletting (see defendant's exhibit Q, Article 5.01). Article 5.04, "Fees on Assignment," which also includes subletting, states that the Board may impose "the proper fees of its attorneys and managing agent for services in connection therewith" (**id.,** Article 5.04). There is no provision for a surcharge (ibid.). The court finds that the 2002 Rules (see defendant's exhibits O and P), to the extent that they restrict the subletting of apartments to two (out of four) years and impose a 10% surcharge on subletting, represent an unauthorized change to the form of the leases and are in violation of paragraph six of the leases and Article!; 5.01 and 5.04 of defendant's by-laws (see Zimiles v. Hotel Des Artistes, 216 AD2d 45 [1st Dept 1995]; Bailey v. 800 Grand Concourse Owners, Inc., 199 AD2d 1,3 [1st Dept 19931). The fact that the court finds two of the 2002 Rules (which are not relied upon herein by defendant) to

be invalid does not change the fact that plaintiff breached her leases by subletting the Apartments without obtaining defendant's consent.

The notices to cure are not vague, as argued by plaintiff. The notices cite paragraphs **14, 15, 16, 28** and **31** of the leases and state, correctly, that plaintiff is in default because she failed to occupy the Apartments **(¶ 14)** and because she failed to obtain approval for her subleases **(¶ 15).**

Paragraph **28** of the leases provides that defendant may recover attorney's fees and expenses incurred in connection with plaintiff's default and defendant's defense of an action or proceeding. In view of the court's finding herein, defendant's application for attorney's fees and disbursements will be granted.

Accordingly, defendant's motion and plaintiff's cross-motion are granted to the extent that it is hereby

ORDERED, ADJUDGED and DECLARED that:

Plaintiff does not have the unconditional right to sublet the Apartments and is required to obtain Board consent prior to subletting or renewing any previously authorized sublet;

Plaintiff is in violation of her proprietary leases because she sublet the Apartments without Board approval;

Plaintiff's second and third causes of action are dismissed and her first cause of action is dismissed to the extent that it seeks a declaration judgment that the notices to cure are invalid, that plaintiff has the unconditional right to sublet the Apartments and that plaintiff is not in violation of her proprietary leases;

Defendant is entitled to reasonable attorney's fees and disbursements; and,

The 2002 Rules, to the extent that they limit subleasing to two out of four years and impose a **10%** surcharge on sublets, are invalid.

In all other respects, the motion and cross-motion are denied.

The issue of reasonable attorney's fees and disbursements is hereby severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR **4317,** the Special Referee shall determine the aforesaid issue. Absent such stipulation, final resolution of this issue will be stayed pending a motion pursuant to CPLR **4403.**

The parties are directed to serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room **311)** to obtain a calendar date.

This constitutes the decision, order and judgment of the court.

Dated: 7/29/03

MARILYN SHAFER
J.S.C.

J.S.C.

Check one: [ ] **FINAL DISPOSITION** [✓] **NON-FINAL DISPOSITION**