

Oltarsh v Park Royal Owners, Inc.

2007 NY Slip Op 32471(U)

August 6, 2007

Supreme Court, New York County

Docket Number: 0106248/2006

Judge: Shirley W. Kornreich

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

PRESENT: ~~HON. SHIRLEY WERNER KORNREICH~~

PART 54

Index Number : 106248/2006

OLTARSH, VALERIE

vs

PARK ROYAL OWNERS INC

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 106248'2006
MOTION DATE 6/28/07
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED
1, 2
3, 4

FILED
AUG 09 2007

NEW YORK
COUNTY CLERK'S OFFICE

JUDGE SHIRLEY WERNER KORNREICH

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: 8/6/07

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X

VALERIE OLTARSH,
Plaintiff,

Index No.:106248/06

-against-

**DECISION and
ORDER**

PARK ROYAL OWNERS, INC.,
Defendant.

-----X

KORNREICH, SHIRLEY WERNER, J.:

FILED
AUG 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Valerie Oltarsh moves for summary judgment against defendant, Park Royal Owners, Inc. ("PRO"), and seeks a judgment declaring that: (1) she is a holder of Unsold Shares allocated to her cooperative apartment ("Apartment") in "The Park Royal," a residential building owned by PRO and located at 23 W. 73rd Street; (2) she is not obligated to obtain the consent of PRO's Board of Directors ("Board") for subletting or selling the Apartment; and (3) PRO is prohibited from charging her any fees or additional sublet security for subletting the Apartment. Ms. Oltarsh also moves for summary judgment on her claim for damages and attorneys' fees on account of PRO's breach of the Cooperative Offering Plan ("Offering Plan") and her Proprietary Lease ("Lease"). PRO cross-moves for summary judgment, dismissing the complaint.

I. Facts

The materials are not in dispute. Ms. Oltarsh purchased the Apartment in August 1994 from Broadway Associates ("Broadway"), the Sponsor of the cooperative conversion plan. Beginning in July 2002 and continuing through the present, PRO refused to recognize Ms. Oltarsh's status as a holder of Unsold Shares and improperly charged her subletting fees, legal fees and additional sublet security, thus breaching the Offering Plan and her Lease. Her Contract

of Sale with Broadway, dated August 3, 1994, provided as follows:

Purchaser understands that at Closing, Seller [Broadway] will not be obligated to deliver possession of the Apartment to Purchaser [Ms. Oltarsh] and that Purchaser will acquire the Shares and Lease subject to the rights of an existing tenant under a lease between the Seller, as Landlord, and Saul Bolasni, as Tenant, dated August 3, 1994, a copy of which has been reviewed by Purchaser and her attorney.

Ms. Oltarsh's Lease Agreement with Mr. Bolasni, who was approximately 70 years old at the time of the transaction and now is approximately 84 years old, provides that:

[Term] [c]ommencing on Sept. 27, 1994, and for so long thereafter as Tenant wishes to remain in the premises, provided that he remain the primary resident thereof, and provided that he will not sublet subject apartment. This right to continue Tenant's tenancy is personal only to Tenant and to no other person or entity, and this right cannot be assigned or transferred to any other party whomsoever. Tenant acknowledges that subject apartment is not subject to the provisions and/or protection of Rent Stabilization Law and Code of 1969, as amended. Tenant further acknowledges and agrees that any other occupant of subject apartment including a roommate or immediate family member or otherwise shall not acquire any rights of tenancy whatsoever in subject apartment.

The Offering Plan contemplated that natural persons could become holders of Unsold Shares if they purchased an apartment from the Sponsor after the initial closing of the cooperative. Page 134 of the Offering Plan states:

At closing, all Unsold Shares shall be acquired and owned by Sponsor as part of the exchange for the transfer of the Property to the Apartment Corporation. However, **the right is reserved by Sponsor to have all or some of these Unsold Shares acquired by one or more financially responsible natural persons procured by Sponsor....**

It is presently contemplated that all Unsold Shares will be acquired by Sponsor, in which case Sponsor represents and agrees to sell or transfer to one or more financially responsible natural persons ... by no later than the third anniversary of the Closing Date....

The Sponsor may hold any Unsold Shares beyond the above mentioned three year period and may transfer by sale or otherwise the Unsold Shares to other than natural persons....

The holders of Unsold Shares, **whether they be Sponsor, non-natural persons or natural persons produced by Sponsor, are herein collectively called 'holders of Unsold Shares.'**

(emphasis added). The Offering Plan also defines natural persons who purchased from the

Sponsor after the initial closing and do not buy for personal occupancy as holders of Unsold Shares:

Sponsor or the persons so designated by Sponsor at closing and thereafter disclosed in an amendment to this Plan who own the Unsold Shares or to whom the Unsold Shares are transferred from time to time for other than personal occupancy by themselves or their families.

Page 136 of the Offering Plan, titled, "Rights and Obligations of Holders of Unsold Shares," expressly exempts such holders from subletting restrictions set forth in the Lease and in PRO's

Bylaws:

Until such time as each and every Unsold Apartment is purchased for the bona fide occupancy of the purchaser or members of his family or until a holder of Unsold Shares (or a member of his family) becomes a bona fide occupant of such Unsold Apartment, each holder of Unsold Shares shall have the rights and be subject to the obligations set forth hereafter, notwithstanding the provisions of the Proprietary Lease or By-laws to the contrary:

1. Each holder of Unsold Shares shall have the right, freely and without charge, to sublet his Unsold Apartments to such person and on such terms and conditions as he deems desirable and shall also have the right, freely and without charge (except for stock transfer stamps), to sell such Unsold Shares and transfer the appurtenant Proprietary Lease to any individual third party. The consent of the Apartment Corporation or its shareholders shall not be required with respect to any such subletting, sale or transfer.
2. The Apartment Corporation shall not prevent nor unreasonably impede nor interfere with the sale of any block of Unsold Shares nor the subletting of an Unsold Apartment...
4. No discriminatory charge or fee may be imposed on any lessee who is a holder of Unsold Shares.
20. The provisions of this section supersede provisions of the Proprietary Lease and By-Laws and in the event of any inconsistency, the provisions of this section shall govern and the Apartment Corporation shall be bound thereby.

Ms. Oltarsh asserts that since the foregoing provisions supersede the terms of her Lease and PRO's Bylaws, she is not required as a holder of Unsold Shares to obtain Board approval of her Apartment sublet or any future sale. In fact, several provisions in Ms. Oltarsh's Contract of

Sale also indicate that the Offering Plan is the governing document. For instance, paragraph 16 states:

All representations, understandings and agreements had between the parties with respect to the subject matter of this agreement are merged in this agreement which alone fully and completely expresses their agreement. [sic] * together with the Cooperative Offering Plan for the Building and all Amendments thereto.

And, paragraph 24(B) in the rider annexed to and forming a part of the Contract of Sale provides:

Purchaser acknowledges having entered into this Contract without relying upon any promises, statements, estimates, representations, warranties, conditions or other inducements, expressed or implied, oral or written, not set forth herein or in the Offering Plan as amended.

Additionally, Ms. Oltarsh contends that PRO is barred from charging her any subletting fees, regardless of whether her Lease or PRO's Bylaws contain subletting requirements, because paragraph 50(b) of her Lease expressly acknowledges that the Offering Plan grants additional rights to holders of Unsold Shares.

On July 8, 2002, PRO's management agent, Orsid Realty Corporation, sent Ms. Oltarsh a letter stating:

Our records do not indicate that you applied to the Board of Directors for sublet approval or any specific circumstances to allow Mr. Bolasni to occupy the apartment for an extended period of time. The subletting regulations of the corporation do not allow sublets beyond a two-year time limit...."

On January 3, 2004, Ms. Oltarsh then received a letter from PRO's President, Joan Slavit, which acknowledged Ms. Oltarsh's right to sublet to Mr. Bolasni:

Your apartment was purchased with a special caveat regarding your using this apartment to place a subtenant in it. Since the agreement was made with the Sponsor who sold you apartment 602A, the Corporation [PRO] intends to abide by this caveat.

However, Ms. Slavit's letter incorrectly advised Ms. Oltarsh that the "caveat" did not release her from paying a sublet fee, and PRO began charging her a sublet fee and other charges in

connection with subletting in January 2004. According to Ms. Oltarsh, "PRO's imposition of a sublet fee is in direct breach of [her] contractual rights as a holder of [U]nsold [S]hares as set forth in the ... Offering Plan, which *expressly* supersedes the terms of the [l]ease and *expressly* prohibits the Board from charging [her] any subletting fee for [her] Apartment."

PRO asserts that the Lease and "House Rules" concerning subletting authorize the collection of the sublet fees, and it disputes that the terms of the Offering Plan and Ms. Oltarsh's Contract of Sale gave her the status of a holder of Unsold Shares. PRO relies upon the Lease which states: "[a] Lessee shall not sublet the whole or any part of the Apartment or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by a resolution of the Directors." It also asserts that its House Rules similarly provide that a Lessee, such as Ms. Oltarsh, cannot sublet an apartment or renew or extend any previously authorized sublease without the Board's consent. Because Ms. Oltarsh renewed and extended Mr. Bolasni's sublease without the Board's consent, PRO insists that she is subject to a fine and a sublet fee and is responsible for any legal fees PRO incurs from this case.

Ms. Oltarsh asserts that paragraph 28 of her Lease expressly provides that PRO, as Lessor, is entitled to recover expenses, including attorneys' fees, if it institutes or defends an action based on her default under the Lease. She argues that, pursuant to New York Real Property Law § 234, the existence of this Lease provision "creates an implied, reciprocal right" entitling her, as Lessee, to recover reasonable attorneys' fees and other expenses she incurs due to PRO's default under the Lease.

PRO contends that the definition of a holder of Unsold Shares in the Offering Plan is limited to a person who is designated such a holder in an amendment to the Offering Plan by the Sponsor, Broadway. Accordingly, PRO refuses to recognize Ms. Oltarsh as a holder of Unsold

Shares, and, consequently, required her to pay a sublet fee by January 1, 2004. It admits to charging her a sublet fee, sublet arrears, legal fees and legal fees arrears since January 2004.

Further, PRO argues that even if the Court finds that Ms. Oltarsh fulfilled the requirements to become a holder of Unsold Shares, she forfeited her status by failing to comply with sections 17 and 19 of the Offering Plan, which require that holders of Unsold Shares:

17. [A]mend the Plan to provide current and accurate information to prospective purchasers until his (their) Unsold Shares have been sold to bona fide purchasers. Such information shall include information about the holder(s) of the Unsold Shares that is similar to the information disclosed in the "Identity of Parties" section about the principals of Sponsor. The holder(s) of Unsold Shares also shall provide prospective purchasers with a copy of the Offering Plan and all filed amendments.

19. [R]egister as a broker-dealer of securities with the Department of Law unless he is already registered. In addition, each holder of Unsold Shares shall provide the Department of Law with the information required of a principal of a sponsor when submitting an offering plan.

Finally, PRO contends that Ms. Oltarsh is not entitled to attorneys' fees and/or other expenses under Real Property Law § 234, as PRO did not breach her rights under the Offering Plan or Lease by charging her a sublet fee.

II. Conclusions of Law

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 790 N.E.2d 772, 778 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 404 N.E.2d 718 (1980).

The question of whether Ms. Oltarsh is a "holder of Unsold Shares" is resolved by applying ordinary contract principles to interpret the terms of the documents defining her

contractual relationship with the cooperative corporation. *See Kralik v. 219 East 79th Street Owners Corp.*, 5 N.Y.3d 54, 54 (2005). These documents include the relevant offering plan, amendments to the plan and the proprietary lease. *See Yatter v. Continental Owners Corp.*, 22 A.D.3d 573, 574 (2nd Dept. 2005). Where the terms of a contract are unambiguous, they may be interpreted by the Court as a matter of law. *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172 (1973); *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540 (1969) (“The construction of a plain and unambiguous contract is for the court to pass on, and ... circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself.”).

Here, the express terms of PRO’s Offering Plan and Ms. Oltarsh’s Lease confirm that she is a holder of Unsold Shares of stock, and that PRO is prohibited from charging her fees for subletting the Apartment to Mr. Bolasni. Page 17 of the Offering Plan defines “holders of Unsold Shares” as:

Sponsor or the persons so designated by Sponsor at closing and thereafter disclosed in an amendment to this Plan who own the Unsold Shares or to whom the Unsold Shares are transferred from time to time for other than personal occupancy by themselves or their families.

PRO’s exclusive reliance on the language stating that a holder of Unsold Shares “must either be the Sponsor or be designated by the Sponsor” ignores the remaining alternative clause of the definition preceded by the word “or,” which defines a holder of Unsold Shares as persons “to whom the Unsold Shares are transferred from time to time for other than personal occupancy by themselves or their families.” It is a cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect. *Gen. Elec. Co. v. Hatzel & Buehler, Inc.*, 19 A.D.2d 40, 43 (1st Dept. 1963). A court should read a

writing as a whole and seek to give each clause its intended purpose in the promotion of the primary and dominant purpose of the contract. *Williams Press, Inc. v. State*, 37 N.Y.2d 434, 440 (1975); see also *Peripheral Equip., Inc. v. Farrington Mfg. Co.*, 29 A.D.2d 11, 14 (1st Dept. 1967). PRO's interpretation of the definition would render the final clause of the definition surplusage, and therefore the Court will not adopt that construction.

As Ms. Oltarsh acquired her shares from Broadway without the intention to occupy the Apartment, she falls under the definition of a holder of Unsold Shares. Ms. Oltarsh acquired all of Broadway's Unsold Shares of stock that were allocated to the Apartment when she directly purchased the Apartment from Broadway on September 26, 1994. See *Geiser v. Maran*, 189 Misc. 2d 442, 443-44 (2nd Dept. 2001) (“‘[U]nsold shares’ retain their character as unsold shares until they become the property of a purchaser for occupancy.”).

Other provisions in the Offering Plan bolster Ms. Oltarsh's argument. For example, page 134 of the Offering Plan states:

At closing, all Unsold Shares shall be acquired and owned by Sponsor as part of the exchange for the transfer of the Property to the Apartment Corporation. However, **the right is reserved by Sponsor to have all or some of these Unsold Shares acquired by one or more financially responsible natural persons procured by Sponsor.... The holders of Unsold Shares, whether they be Sponsor, non-natural persons or natural persons produced by Sponsor, are herein collectively called ‘holders of Unsold Shares.’**

(emphasis added).

Because neither Ms. Oltarsh nor her family purchased the Apartment with the intent to occupy it, and never did occupy it, and because the Apartment has been Mr. Bolasni's primary residence since September 30, 1994, Ms. Oltarsh is a holder of Unsold Shares in accordance with the aforesaid definition of “holders of Unsold Shares.” Additionally, the Contract of Sale for Ms. Oltarsh's purchase of the Apartment referred to the Lease providing a lifetime tenancy for Mr.

Bolasni, and PRO's Board expressly agreed to abide by the terms of the Contract in its January 3, 2004 letter to Ms. Oltarsh.

Thus, PRO breached Ms. Oltarsh's rights under the Offering Plan and her Lease by improperly charging her fees for subletting the Apartment to Mr. Bolasni. The Offering Plan explicitly exempts Ms. Oltarsh, as a holder of Unsold Shares, from the subletting restrictions set forth in her Lease (including the House Rules) and PRO's Bylaws that require Board approval and impose subletting fees. In particular, certain parts of the section, "Rights and Obligations of Holders of Unsold Shares," provide that: "Each holder of Unsold Shares shall have the right, freely and without charge, to sublet his Unsold Apartments;" that the "consent of the Apartment Corporation or its shareholders shall not be required with respect to any such subletting, sale or transfer;" that "[n]o discriminatory charge or fee may be imposed on any lessee who is a holder of Unsold Shares;" and that "[t]he provisions of this section supersede provisions of the Proprietary Lease and By-Laws and in the event of any inconsistency, the provisions of this section shall govern and the Apartment Corporation shall be bound thereby." Furthermore, paragraph 50(b) of Ms. Oltarsh's Lease, which Broadway assigned to her, expressly acknowledges her additional rights granted by the Offering Plan as a holder of Unsold Shares.

PRO is incorrect in arguing that Ms. Oltarsh's failure to amend the Offering Plan to include current information regarding her identity, and her failure to register as a broker-dealer of securities with the New York State Department of Law, as set forth in sections 17 and 19 of the Offering Plan, stripped her of her status as a holder of Unsold Shares. The disclosure requirements for broker-dealers of securities do not create a person's status as a holder of Unsold Shares. *Kralik*, 5 N.Y.3d at 59; *see also Trusu v. Thornton-Burns Owners Corp.*, 271 A.D.2d 683, 683 (2nd Dept. 2000). The Offering Plan, Lease and Contract of Sale are the governing

documents. *Kralik*, 5 N.Y.3d at 59. Here, the controlling documents confer the status on Ms. Oltarsh.

With respect to attorneys' fees, paragraph 28 of Ms. Oltarsh's Lease entitles PRO to such fees and other expenses if Ms. Oltarsh defaults under the Lease. *See Emily Towers Owners Corp. v. Carleton Emily Towers, L.P.*, 175 Misc. 2d 283 (App. Term, 2nd Dept., 1997).

According to New York Real Property Law § 234:

[T]here shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease....

Because PRO defaulted under the Lease by charging Ms. Oltarsh certain fees for subletting the Apartment, Ms. Oltarsh is entitled to recover damages in the amount of the costs and disbursements, including reasonable attorneys' fees, she incurred in connection with enforcing her rights under the Offering Plan and the Lease. Accordingly, it is

ORDERED that Ms. Oltarsh's motion for summary judgment, pursuant to CPLR § 3212, is granted; and it is further

ORDERED, ADJUDGED and DECLARED that Ms. Oltarsh is a holder of Unsold Shares allocated to her Apartment; and it is further

ORDERED, ADJUDGED and DECLARED that Ms. Oltarsh is not obligated to obtain the consent of PRO's Board of Directors for subletting or selling the Apartment; and it is further

ORDERED, ADJUDGED and DECLARED that PRO is prohibited from charging Ms. Oltarsh any fees or additional sublet security for her sublet of the Apartment; and it is further

ORDERED that the issue of reasonable attorneys' fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing on the issue of attorneys' fees; and it is further

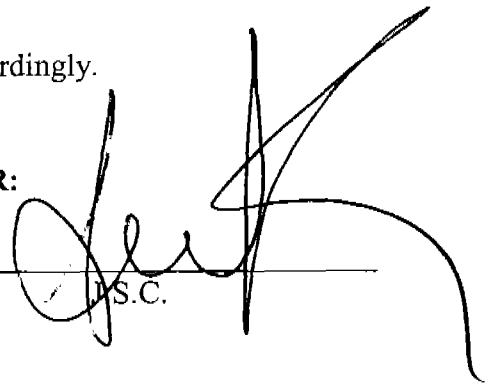
ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that PRO's motion for summary judgment and for attorneys' fees is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

August 6, 2007

ENTER:



J.S.C.

FILED
AUG 09 2007
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