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

Charles Edward Ramos **53**

PRESENT: PART

Index Number : 600813/2007

SOLDIERS' SAILORS' MARINES"

VS

CARLTON REGENCY

Sequence Number : 001

DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED
JAN 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/15/08

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
SOLDIERS', SAILORS', MARINES' AND
AIRMEN'S CLUB, INC.,

Plaintiff, Index No. 600813/07

-against-

THE CARLTON REGENCY CORP.,

Defendant.
----------X

Charles Edward Ramos, J.S.C.:

Defendant, The Carlton Regency Corp. (the "Carlton") moves pursuant to CPLR 3211(a)(1),(2),(5),(7) and (10); CPLR 2221; and CPLR 5015, dismissing the complaint of plaintiff, Soldiers', Sailors', Marines' and Airmen's Club, Inc., (the "Club") for declaratory judgment, and in the alternative, dismissing the complaint for failing to join a necessary party pursuant to CPLR 1001.

Background

Since 1927, the Club has run a charitable not-for-profit corporation that provides discount accommodations and facilities to military personnel and retirees on a nightly basis in New York City. The Club purchased two connected buildings located at 281-283 Lexington Avenue, and in 1940, purchased the building located at 285 Lexington.

In 1972, the Club entered into a series of transactions[1] with two developers, James Conforti, Jr. and Stephen C. Lyras

[1] For the purpose of this motion, the parties do not dispute that the Sublease may be construed together with the Lease, Contract of Sale, and the Put Agreement (collectively the "1972 Agreements.")

(the "Developers"), whereby the Developers purchased the 285 Lexington property for $227,000 (the "Sale"), the Club leased the remaining properties to the Developers for 50 years with 2 consecutive 25-year renewal terms for $30,000 per year (the "Lease"), and the remaining leasehold was subleased back to the Club rent free for 25 years with one 15-year renewal term (the "Sublease").

The Lease expressly sets forth the Developer's intent to combine the newly purchased 285 Lexington property and combine it with 287 Lexington (owned by the Developers), to construct an apartment house using the unused air rights from 281-283 Lexington. Additionally, the Developers intended to connect the apartment to 137 East 36th Street by the construction of a connecting lobby across the rear portion of the 281-283 Lexington properties.

Further, the parties entered into a "Demised Premises Contract" (the "Put Agreement"). The Put Agreement granted the Club the option to sell to the Developers the 281-283 Lexington Property for $500,000 at any time before the termination of the sublease in 2013.

After the transactions were authorized by Court order in 1973, the Developers constructed the residential North Tower. In 1980, the Developers assigned their rights in the Lease, Sublease, and Put Agreement to a cooperative apartment corporation eventually known as the Carlton Regency Corporation, the defendant herein.

Motion to Dismiss

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law.'" *Leon v Martinez*, 84 NY2d 83, 88 (1994).

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Id.* at 87-88. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *Id.* The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Discussion

The defendant's motion to dismiss the complaint is denied. Plaintiff sets forth a valid claim for a declaratory judgment in the complaint. Defendant offers no conclusive documentary evidence establishing a defense as a matter of law.

Although the 1972 Agreements appear to be clear and unambiguous on their face, the plaintiff has set forth facts to

establish an apparent violation of the § 9-1.1[2] of the NY Estates, Powers & Trust Law (EPTL).

In *Warren Street Associates v City Hall Tower*, 202 AD2d 200, (1st Dept 1994), the First Department adopted the exception to the rule against perpetuities. *See* Restatement of Property § 395. Although the rule against perpetuities generally does not apply to options appurtenant to leases *(Metropolitan Transp. Augh. v Bruken Realty Corp.*, 67 NY2d 156, 165 (1986), the provisions set forth in the Lease may be null and void since they could be exercised after the initial lease term had expired.

Restatement of Property § 395 sets forth the exception:

> "When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee's term, (a) to purchase the whole or any part of the leased premises; or (b) to obtain a new lease or an extension of his former lease, then such option is effective, in accordance with the terms of the limitation, even when it may continue for longer than the maximum period..." (Emphasis supplied).

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[2] § 9-1.1. Rule against perpetuities

(a) (1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

(2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

Here, the renewal option in Article 8 of the Lease requires the tenant (co-op) to give the landlord (Club) written notice of its election to renew, at least one year prior to the expiration of the existing lease term. If, however, the tenant fails to give such timely notice, the landlord is required to give notice to the Club's mortgage lender because the leasehold is collateral for the mortgage loan. The mortgage lender then has the right to assume the lease within 30 days thereafter. Lease, Section 8.01.

If the Club fails to give the requisite notice to the mortgage lender less than 30 days before the end date of the lease, the mortgage lender could potentially exercise its option to renew the lease by assuming it after the termination of the 50 year term. This factual scenario would violate the exception to the rule against perpetuities. EPTL 9-1.1; Restatement of Property § 395.

Defendant argues that there is no possibility of this scenario taking place, because the Club must provide the mortgage lender with its option to assume the Lease *impliedly* within a reasonable time. However, this argument is unpersuasive, and does not salvage the Lease from violation of its express terms.

Furthermore, the court should not rewrite the specific and unambiguous language of the options clause so as to qualify it for exemption from the rule against perpetuities by eliminating the notification provision and allowing the option to be exercised only during the lease term. *Warren St. Assocs.* 202 AD2d 200 (1st Dept 1994); citing *Buffalo Seminary v McCarthy*, 86 AD2d

435, (4th Dept 1982), *affd* 58 NY2d 867 (1983).

The defendant additionally moves for dismissal on the ground that plaintiff's claim is time-barred. The defendant argues that because this is an action for declaratory judgment on the underlying issue of contract ambiguity, it is governed by a 6-year statute of limitations accruing from the date that the plaintiff had all the facts necessary to assert its claim. *See Lake Anne Homeowners Ass'n v Lake Anne Realty Corp.*, 220 AD2d 560, 561 (2nd Dept 1995), *lv denied* 87 NY2d 807 (1996), *rearg dismissed* 88 NY2d 920 (1996). Further discovery is required as to when the plaintiff acquired such facts.

In its argument, defendant points to a "proposed" Zoning Lot and Development Agreement that was alleged to have been negotiated among the parties in 1999. This document, it is asserted, is conclusive documentary proof that the plaintiff was fully aware of the terms of the 1972 Agreements, and any ambiguity that may have existed thereunder. However, the Court is unable to determine the plaintiff's alleged awareness, if any.

Finally, defendant argues that pursuant to CPLR 1001, because plaintiff has failed to name Developers' heirs ("Heirs") as a necessary party in this action, the complaint should be dismissed. This Court disagrees.

CPLR 1001(a) mandates joinder of a party in two situations: (1) where that party is necessary if complete relief is to be accorded between the persons who are parties to the action; or (2) where the unnamed party might be inequitably affected by a

judgment in the action. *NY County Lawyer's Ass'n v State*, 192 Misc. 2d 424, 427 (Sup Ct, NY County, 2002), *appeal dismissed* 305 AD2d 1123 (1st Dept 2003).

However, dismissal of an action for non-joinder of a given person is a possibility under the CPLR, but it is only a last resort. *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 821 (2003), *cert denied* 540 US 1017, quoting *Siegal NY Practice* § 133. In 2003, Developers' sons, as heirs, contracted with Carlton to take occupancy of plaintiff's building as subtenant on March 14, 2013, if the plaintiff does not to sell the property under the Put Agreement. Consequently, the Carlton and the Heirs' positions are aligned. This being so, Carlton, through the defense of this action, will adequately represent the Heirs' interests as their own. Furthermore, the Heirs are free to move for intervention under CPLR 1012.

Defendant's other arguments are found to be unavailing and will not be discussed.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is denied; and it is further

ORDERED that defendant shall serve its answer to the complaint within 20 days after service of this order with notice of its entry.

Dated: January 15, 2007

CHARLES E. RAMOS
J.S.C.

[* 9]

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.