

**Eight Broadway Assoc. v 3117 Broadway
Owners Corp.**

2008 NY Slip Op 32522(U)

September 15, 2008

Supreme Court, New York County

Docket Number: 0604253/2007

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON Justice

PART 55

Index Number : 604253/2007
EIGHT BROADWAY
VS.
3117 BROADWAY
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE 7/28/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-3
4-5
6

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 *is decided in accordance with the annexed memorandum decision and order.*

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

FILED
SEP 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/15/08

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
EIGHT BROADWAY ASSOCIATES,

Plaintiff,

Index No.: 604253/07

-against-

DECISION AND ORDER

3117 BROADWAY OWNERS CORP.,

Defendant.

-----x
JANE S. SOLOMON, J.

FILED

SEP 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Defendant moves to dismiss the action, pursuant to CPLR 3211

(a) (1) and (a) (7).

Defendant is the cooperative corporation that owns the property known as 3117 Broadway, and plaintiff is the owner of shares of stock and the proprietary lease for one of the units in the building. Plaintiff acquired the shares from the sponsor of the cooperative conversion of the building in 1990, as an investment, and the unit is occupied by the rent-regulated tenant who occupied the apartment at the time the building converted.

In December, 2006, through January, 2007, defendant became aware of a lead paint condition in the unit, based on complaints by the tenant. Defendant spent \$7,800.00 to remedy the situation, and billed plaintiff for the costs. Plaintiff has never paid for these costs, despite the fact that it has appeared

on each maintenance bill since the work was completed.

In November, 2007, defendant became aware of the fact that a lead paint condition still existed in the unit, and served plaintiff with a Notice of Default and Intention to Cancel Shares and Terminate Proprietary Lease, along with the Department of Housing Preservation and Development inspection reports detailing the lead paint violations.

According to the Proprietary Lease, plaintiff acquired the unit "as is," and is responsible for keeping the interior of the apartment in good repair, including interior walls, floors and ceilings, and is obligated to do all of the painting and decorating of the unit. Proprietary Lease ¶ 16 (a-b).

Defendant gave plaintiff 30 days in which to cure the lead paint problem. On December 28, 2007, plaintiff instituted the present action, along with an order to show cause, seeking, among other things, a Yellowstone injunction to toll its time to cure the defect. Since the institution of this suit, plaintiff has remedied the lead paint problem in the unit.

Based on the remediation, defendant withdrew its Notice to Cure and plaintiff withdrew its order to show cause, and the parties agree that plaintiff's first two causes of action, seeking a declaratory judgment that plaintiff was not in default and a preliminary injunction to stop the cancellation of the proprietary lease, are now moot.

Defendant now seeks to dismiss plaintiff's third cause of action, seeking a declaratory judgment that it, plaintiff, is not responsible to remove lead paint from the unit, and plaintiff's fourth cause of action, seeking attorneys' fees.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; or ...
- (7) the pleading fails to state a cause of action

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenberg Thalman & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

The court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994)). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88).

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "fit within any cognizable legal theory." *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 (1st Dept 1999).

Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

Pursuant to the Multiple Dwelling Law § 78 (1) and the Housing Maintenance Code § D26-10.01, it is the responsibility of the owner of the property to remove violations from the premises. Plaintiff contends that it, plaintiff, is not the owner of the property, merely a shareholder of the owner cooperative corporation, and therefore it is the cooperative corporation that is responsible for removing lead paint violations. In this, plaintiff is incorrect.

"A cooperative corporation is not considered the 'owner' of a rent-stabilized housing accommodation within the meaning of the Rent Stabilization Code, which **defines an owner as a** 'fee owner, lessor, or a **proprietary lessee** of a housing accommodation in a structure or premise owned by a cooperative corporation or association, or an owner of a condominium unit or the sponsor of such cooperative corporation or association or condominium development, or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation, or an agent of any of the foregoing.' No doubt this definition was so fashioned because of the absence of any kind of privity between a cooperative corporation and a nonpurchasing rent-stabilized tenant in occupancy [emphasis added and internal citation omitted]."

Richards v Estate of Kaskel, 169 AD2d 111, 118 (1st Dept 1991).

"[T]enants who do not purchase their rent-stabilized apartments

but remain in occupancy become the tenant not of the cooperative corporation but of the shareholder and proprietary lessee of the apartment." *Id.* at 118. Consequently, the proprietary lessee is considered the "owner" of the unit, and is responsible for removing all violations in the unit not caused by the cooperative corporation.

In *Caldwell v 302 Convent Avenue Housing Development Fund Corporation* (272 AD2d 112 [1st Dept 2000]), the tenants of a proprietary lessee sued the cooperative corporation for lead paint injuries. In granting the cooperative corporation's motion to dismiss, the court stated that when the unit was sold "as is" thirteen years before the injury occurred, the responsibility for any maintenance and repairs fell to the cooperative lessee. The court went on to hold that

"[a]s a matter of law, 13 years is more than a reasonable period in which to discover and remedy the hazard represented by the presence of lead paint. Moreover, the passing of title on an 'as is' basis generally extinguishes any claim for after-discovered defects or breakdowns [internal quotation marks and citations omitted]."

In the case at bar, plaintiff purchased the unit from the sponsor almost seventeen years prior to the complaint by the rent regulated tenant regarding lead paint in the unit, and therefore it is plaintiff, not defendant, who is responsible for the removal of any lead paint violations in the unit.

When a proprietary lessee fails to remedy building and

housing code violations that occur in its unit, it breaches its obligation under the proprietary lease. Under such circumstances, the cooperative corporation may seek various remedies, including making the repairs itself and charging the shareholder-lessee with the costs of the repair, or institute a proceeding to terminate the lease for the violation. *McMunn v Steppingstone Management Corp.*, 131 Misc 2d 340 (Civil Ct, NY County 1986).

The supposition posited by plaintiff's counsel in the opposition papers, that the lead paint problem may be partially caused by water penetration from the outside, is unavailing, since there is no evidence to that effect and the supposition is a conclusory statement made by plaintiff's counsel, an individual without personal knowledge of the situation. See *Banks v Auerbach*, 56 AD2d 819 (1st Dept 1977).

Based on the foregoing, defendant's motion to dismiss plaintiff's third cause of action is granted.

Since plaintiff's causes of action have been dismissed, plaintiff is not entitled to attorneys' fees.

CONCLUSION

It is hereby


ORDERED that plaintiff's first and second causes of action are dismissed as moot, pursuant to the agreement of the parties; and it is further

ORDERED that defendant's motion to dismiss the third and fourth causes of action is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/15/08

ENTER:



Jane S. Solomon, J.S.C.

JANE S. SOLOMON

FILED
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