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

PRESENT: Hon. Herman Cahn PART 49
Justice

FIELDING, FRANCOISE

INDEX NO. 406417/07

MOTION DATE

- V -

MOTION SEQ. NO. 1

RACHESKY MARK

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 [X] No

FILED
OCT 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

Dated: September 29, 2008

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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FRANCOISE FIELDING, DIANE KRANZ and FREDERICK LUBCHER, as co-Executors of the ESTATE OF YOLANDE FIELDING SCHEFTEL,

Plaintiffs,

-against-

Index No. 406417/07

MARK RACHESKY and JILL RACHESKY,

Defendants.

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CAHN, J.:

This is an action to recover a portion of the proceeds from the sale of a cooperative apartment. Plaintiffs move for summary judgment as to liability only (CPLR 3212[e]). Defendants cross-move for summary judgment dismissing the action in its entirety.

Facts

The following facts are taken from the parties' statements pursuant Rule 19-a of the Rules of the Justices of the Commercial Division, and the pleadings, affidavits and documentary evidence submitted with the motion papers.

Non-party 998 Fifth Avenue Corporation (the "Co-op") is a cooperative corporation which owns the building located at 998 Fifth Avenue in New York City. Until her death in August 2005, Yolande Fielding Scheftel ("Scheftel") held the proprietary lease to Unit 8W in the building and was the owner of the 1010 shares in the Co-op allocable to that unit. Plaintiffs Francoise Fielding, Diane Kranz and Frederick Lubcher (the "Executors") are the co-executors of Scheftel's estate (the "Estate") and succeeded to her interest in Unit 8W.

On December 1, 2005, the Estate entered into a contract (the "Contract") to sell the shares relating to Unit 8W and assign its proprietary lease, to defendants Mark and Jill Rachesky (the

"Racheskys") for $20,000,000. During the negotiations, the Estate had learned that the Co-op intended to sell a maisonette apartment, Unit 1W, known as Maisonette West (the "Maisonette") and distribute the proceeds to its shareholders. Addressing the consequences of the anticipated sale, paragraph 42 of the Contract provides:

> The Corporation owns a Unit Known as Maisonette West, which it is seeking to sell (the "Maisonette"). The Seller is retaining the right to receive the portion of the proceeds of sale of the Maisonette attributable to the Unit, if, as and when the Maisonette is sold. At the closing, Purchaser and Seller shall execute and deliver to the Corporation irrevocable written instructions to pay any distribution attributable to the sale of the Maisonette to Seller. If, notwithstanding such instruction, the Corporation shall pay any such distribution to the Purchaser, the Purchaser shall promptly remit such distribution received by Purchaser to Seller less any taxes or expenses incurred by Purchaser as a result of said distribution.

The sale of Unit 8W closed on March 14, 2006. Pursuant to the Contract, defendants delivered a letter to the Co-op instructing it "to directly pay any distribution attributable to the Unit connection with the sale of the Maisonette West to the Estate of Yolande Fielding Scheftel."

The Co-op sold the Maisonette for approximately $9,400,000 on or about June 28, 2006. Closing costs were $662,435, and a portion of the proceeds were apparently used to pay off an outstanding line of credit. Plaintiffs allege that the remaining balance was approximately $5,500,000 to $6,000,000.

The Co-op thereafter consulted its counsel, Sullivan & Cromwell, about making the intended distribution to its shareholders. However, the Co-op was advised that the distribution might jeopardize its not-for-profit tax status. Accordingly, the funds were instead placed into the Co-op's general operating account.

Monthly maintenance fees for all Co-op shareholders thereafter dropped from $131 to $46.05 per share. In view of their ownership of 1,010 shares, defendants fees were reduced by $7,149 per month. In January 2007, however, per share fees were raised to $51 per month.

After learning of the sale, in November 2006 the Estate's counsel wrote to defendants' counsel to demand payment of plaintiffs' share of the proceeds. Defendants rejected this demand by letter dated November 22, 2006, asserting that notwithstanding the Co-op's decision to create a reserve for building expenses and reduce maintenance fees, they had not received a "distribution" within the meaning of the Contract. This action followed.

The complaint sets forth four causes of action, all effectively asserting a claim to a share of the proceeds of the sale. The first seeks payment of the full proceeds of the sale of the Maisonette attributable to Unit 8W, regardless of whether defendants received a distribution. The second asserts the reduction in maintenance fees enjoyed by defendants is the functional equivalent of a "distribution" under the Contract. The third alleges that the Co-op has set aside a portion of the proceeds sufficient to reduce defendants' maintenance fees or guard against future increases. The fourth asserts that defendants have been unjustly enriched by the benefits of the sale at the expense of plaintiffs. The complaint estimates that plaintiffs' allocable share of the Maisonette proceeds is between $500,000 and $1,000,000.

Discussion

In interpreting a contract, the court must read the parties' agreement as a whole, giving a practical interpretation to the language employed and rejecting an interpretation which would leave any provision substantially without force or effect (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42 [1956]; *Ruttenberg v Davidge Data Systems Corp.*, 215 AD2d 191 [1st Dep't 1995]). The court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007][internal quotations and citations omitted]). An ambiguity does not exist simply because the parties urge different interpretations" or because "one party's view strain[s] the contract language beyond its reasonable and ordinary meaning" (*Elletson v Bonded Insulation Co. Inc.*, 272 AD2d 825, 827 [3d Dep't 2000]).

The Contract at issue unambiguously conditions defendants' obligation to pay plaintiffs upon a "distribution" from the Co-op. It does not, as plaintiffs urge, obligate defendants to remit the dollar equivalent of the reduction in maintenance fees, or of any other indirect benefit that may have resulted from the sale. Plaintiffs' construction of the agreement cannot be accepted without impermissibly straining the contractual language.

Although plaintiffs did retain "the right to receive the portion of the proceeds of sale of the Maisonette attributable to the Unit," that right was not unqualified. Plaintiffs did not contract directly with the Co-op to receive an immediate percentage share of the proceeds upon a sale, or demand that defendants absolutely guarantee the payment of such a percentage. Rather, they accepted a limited right to share in the proceeds if, and only if, those funds were used by the Co-op in a particular way -- to make a "distribution." That more specific direction regarding the disposition of the proceeds must control over the Contract's general language regarding plaintiffs' rights (*see*, *Waldman v New Phone Dimensions, Inc.*, 109 AD2d 702 [1st Dep't 1985]).

As plaintiffs concede, the Co-op expressly decided not to make a distribution. Instead, the funds are being employed to pay ordinary operating and maintenance expenses. Defendants have not received any distribution from the proceeds.

Plaintiffs' argument that the reduction in maintenance fees is the "functional equivalent" of a distribution is untenable. "Clear and unambiguous terms should be understood in their plain, ordinary, popular and non-technical meaning," *(Lopez v Fernandito's Antique, Ltd.*, 305 AD2d 218, 219 [1st Dep't 2003]). As used in the Contract, the word "distribution" clearly anticipates a direct cash payment from the sales proceeds. Had the Co-op used the proceeds to install a more efficient heating or air conditioning system defendants also might have saved some money, but those savings could not reasonably be viewed as a "distribution." No sums were distributed to the Co-op's shareholders; rather they were used to pay the building's expenses thus incidentally

benefitting all the shareholders indirectly.

In this connection, it is significant that plaintiffs do not object to the Co-op's use of $1,500,000 of the proceeds to pay off a line of credit, even though that reduction in debt will ultimately benefit defendants as shareholders. The Co-op's vendors and maintenance providers are, like the bank, merely creditors, and there is no reason to single out the payments to them as somehow constituting "distributions" to defendants. Moreover, even if plaintiffs' alternative interpretation were reasonable, plaintiffs would still not prevail because they drafted the clause in question, and the court would therefore be constrained to construe it against them (*Greenfield v Philles Records, Inc.*, 23 AD3d 214 [1st Dep't 2005]).

Plaintiffs' reliance on cases involving the concealment of embezzled or misappropriated funds proceeds through money laundering or other means (*see, e.g.*, *Republic of Haiti v Duvalier*, 211 AD2d 379 [1st Dep't 1995]) is misplaced. The funds in question in this case were not "stolen" from plaintiffs. Plaintiffs never acquired a right to the proceeds because there was never a distribution made as required by the Contract. The question of whether the reduction in maintenance is traceable to the use of the proceeds is therefore irrelevant.

A closer question would be presented had the Co-op retained the proceeds for the sole purpose of defeating plaintiffs' rights, but that is simply not the situation presented here. Plaintiffs do not argue that the decision to place the proceeds in the general operating account was a subterfuge engineered by defendants, or that defendants controlled the Co-op's actions. Rather, plaintiffs concede that the Co-op denied distributions to all shareholders for the legitimate purpose of preserving its favorable tax status.

The first through third causes of action sounding in contract must accordingly be dismissed. The fourth cause of action for unjust enrichment must also fail, as it merely restates the facts underpinning the failed contract claims (*see*, *Interstate Adjusters, Inc. v First Fidelity Bank, N.A., New Jersey*, 251 AD2d 232 [1st Dep't 1998]; *Yeterian v Heather Mills N.V. Inc.*, 183

AD2d 493 [1st Dep't 1992]; *Julien J. Studley, Inc. v N.Y. News*, 70 NY2d 628 [1987]; *Clark-Fitzpatrick, Inc. v Long Is. R.R.*, 70 NY2d 382 [1987]).

Accordingly, it is

ORDERED, that plaintiffs' motion is denied and defendants' cross motion is granted, and it is further

ORDERED, that the complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court, and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: September 29, 2008

ENTER:

J.S.C.