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

PRESENT: Hon. BARBARA R. KAPNICK Justice PART 12

Cohane, J.

-v-

TRUMP PLAZA OWNERS

INDEX NO. 112028/07

MOTION DATE

MOTION SEQ. NO. 002

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 and cross-motion are decided in accordance with the accompanying memorandum decision

FILED
APR 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 3/31/09

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

BARBARA R. KAPNICK J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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ESTATE OF JAK COHANE, by Morris E. Cohen, Executor,

Plaintiff,

-against-

TRUMP PLAZA OWNERS, INC. and BELLMARC PROPERTY MANAGEMENT,

Defendants.

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DECISION/ORDER
Index No. 112028/07
Motion Seq. No. 002

BARBARA R. KAPNICK, J:

This is an action for declaratory relief and other remedies arising from defendants' alleged violation of a covenant and/or agreement to issue a stock certificate and Proprietary Lease upon request to the adult sibling of plaintiff's decedent.

Background

Jak T. Cohane ("Jak") passed away on February 17, 2006 and his brother Morris E. Cohen ("Morris") was appointed as Executor of the Estate on May 12, 2006. Prior to his death, Jak purchased 255 shares of defendant Trump Plaza Owners, Inc. ("Trump") appurtenant to the leasehold rights to Apartments 5A and 5B at the building located at 167 East 61st Street, New York, New York. Defendant Bellmarc Property Management ("Bellmarc") was the managing agent of the building.

In addition to Morris, Jak was survived by two other brothers- David E. Cohen ("David") and Charles J. Cohen ("Charles") - and

various nieces and nephews. Jak's Last Will and Testament dated April 10, 2004 provides that on his demise, the Apartments at 167 East 61st Street would go "equally to the four children of my brother David E. Cohen: Eileen Escava, Eliot D. Cohen, Aaron Cohen and Shari Cohen ('the legatees'). The assets derived from the sale, after taxes, or rental of these properties will be shared by the four persons equally." Jak also left Teri Cohen Betesh (Charles' daughter) ("Teri") all of his furniture, house furnishings and all personal effects.

Paragraph 14 of the Proprietary Lease provides that

> "[t]he Lessee shall not, without the written consent of the Lessor on such conditions as the Lessor may prescribe, occupy or use the Apartment, or permit the same or any part hereof to be occupied or used, for any purpose other than a private dwelling for the Lessee and the Lessee's spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees ... In addition to the foregoing, the Apartment may be occupied from time to time by guests of the Lessee for a period of time not exceeding one month, unless a longer period is approved in writing by the Lessor, but no guests may occupy the Apartment unless one or more of the permitted adult residents are in occupancy or unless consented to in writing by the Lessor. ...

Paragraph 15 provides that

> ... the Lessee shall not sublet the whole or any part of the Apartment, ... unless consent thereto shall have been duly authorized by a resolution of the Board, or given in writing by a majority of the Board or, if the Board shall have failed or refused to give such consent, then by lessees owning at least sixty-five (65%) percent of the then issued shares of the Lessor, ... There shall be no limitation on the right of the Board or lessees to grant

> or withhold consent, for any reason or for no reason, to a subletting, except that such refusal of consent shall not be based on race, religion, color, creed, or any other ground proscribed by law... .

Section 16(b) of the Proprietary Lease provides that "[i]f the Lessee shall die, consent shall not be unreasonably withheld to an assignment of this lease and shares to a financially responsible member of the Lessee's family (other than the Lessee's spouse, adult siblings or adult children or parents, as to whom no consent is required)."

On or about July 20, 2006, an application was submitted to the Cooperative's Board of Directors for the transfer of the stock and Lease appurtenant to Apartment 5B to Teri for the purchase price of $590,000. At the time, the monthly maintenance fee for the apartment was $1536.81. Although plaintiff contends that Teri was a financially responsible person within the meaning of paragraph 16(b), defendants contend that the tax returns submitted to the Board in connection with her application reflected that she was not employed and that her only guaranteed income was $55,757.16 annually as an anticipated rental income and management fee from a building she and her brother had jointly inherited from Jak the day before her application was submitted. In light of her lack of cash flow and the illiquidity of her assets, the Board determined that she was not financially responsible and rejected her application.

At Teri's attorney's request, the Board reconsidered her application, this time with Morris offering to act as guarantor. On October 11, 2006, her application was rejected again.[1]

The legatees then signed a letter dated October 16, 2006 authorizing Morris to sell the estate's entire interest in the Apartments.

Thereafter, the Estate entered into a contract of sale for Apartment 5B with Charles, who is 83, and sent a letter to Bellmarc dated October 25, 2006 stating, inter alia, as follows:

> Please be advised that paragraph 16(b) of the Proprietary Lease, "Consents: Death of the Lessee", provides that the sale of a unit to the owner's adult sibling is not subject to Board approval. Accordingly, no purchase application is submitted herewith; the enclosed documents are for informational purposes only. Further, as no bank financing will be involved, there will be no recognition agreement for the Board's execution.
>
> We will contact you accordingly in order to schedule a closing.

On or about December 6, 2006, having received no response from Trump, the Estate apparently transferred its right, title and

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[1] The Complaint alleges that counsel for the Estate spoke to the President of Bellmarc who advised him that the Board had declined to consent to Teri's application because the contract price of $590,000 was too low, and suggested that Teri and the Estate "fabricate a 'designer credit' or 'decorator's credit' of $200,000 which would artificially drive the listed price of the sale above its actual level." The Cooperative's Managing Agent disputes ever making this statement.

interest in Apartment 5B to Charles, although defendants never transferred the stock certificate or Proprietary Lease into his name.

The Board then came to learn from the Building's employees that Teri had moved into one or both of the Apartments soon after Jak's death, although she was never approved as a subtenant or long-term guest of Apartment 5A or 5B. Defendants contend that her occupancy of one or both of the Apartments constitutes an event of default under paragraphs 14 and 15 of the Proprietary Lease. Trump's attorney sent a Notice of Default dated May 3, 2007 with respect to Apartment 5B to Morris, as Executor of the Estate of Jak T. Cohane, who the letter acknowledged was the last record owner of shares allocated to the apartment and the Lessee under the Proprietary Lease.

Teri apparently never vacated the Apartments and the Board's attorneys delivered a second Notice of Default dated September 12, 2007, with respect to Apartment 5B to Morris, as Executor of the Estate. Defendants also indicate that they learned from an Appraisal Report dated June 7, 2006 which was first produced during discovery in this case, that at some point a doorway was created illegally connecting Apartments 5A and 5B and that the kitchen appliances were removed from 5B. No request for such alteration was

ever requested or approved, thus constituting an additional alleged default under the Proprietary Lease.

Lawsuit

Plaintiff commenced this action by Complaint dated August 28, 2007.

In the first cause of action, plaintiff seeks a declaration that Charles is the lawful owner of all the shares of Trump stock allocated to Apartment 5B of the building and that Trump must issue all usual and customary documents including a stock certificate and a Proprietary Lease in his name. In the second cause of action for breach of contract, the Estate seeks to be made whole for the economic loss related to defendants' breach of its obligations under the Proprietary Lease. In the third cause of action, plaintiff seeks a judgment declaring that Trump is obligated to pay its' reasonable attorneys' fees and expenses pursuant to Real Property Law (RPL) § 234.

Defendants' Answer contains eight affirmative defenses alleging that the Complaint fails to state a claim for which relief may be granted; plaintiff's claims against Bellmarc must be dismissed because Bellmarc was acting as an agent for a disclosed principal; the relief sought by plaintiff is a subterfuge intended

to undermine a prior determination made by Trump's Board of Directors in the proper exercise of its business judgment; plaintiff is barred from relief because it is in violation of its contractual and common-law duties to observe and promote the cooperative purposes for the accomplishment of which Trump is incorporated; unclean hands; estoppel; granting of the Complaint would create liability to third parties; and RPL § 234 does not apply to the facts and circumstances of this action.

Plaintiff now moves for an order granting summary judgment on its Complaint declaring that plaintiff has prevailed in this action and that defendants are obligated to issue the Proprietary Lease and appurtenant shares in Unit 5B of Premises 167 E. 61st Street, New York, New York to Charles; an Order directing defendants to expeditiously perform all necessary actions to issue the referenced Lease and shares; a judgment declaring that plaintiff is entitled to be reimbursed for legal fees and expenses expended in compelling defendant Trump to perform its covenants and agreements under the Proprietary Lease, pursuant to RPL § 234, and an Order setting further proceedings to establish the amount of legal fees and expenses due to plaintiff.

Defendants cross-move for an order: (i) granting summary judgment in their favor, pursuant to CPLR § 3212(b), on the grounds

that, as a matter of the application of law to the undisputed facts, the consent of the Cooperative's Board of Directors is required to effect the transfer of the Cooperative Stock and Lease concerning which plaintiff seeks an order directing transfer; (ii) in the alternative, dismissing plaintiff's Complaint, pursuant to CPLR § 3211, on the grounds that plaintiff may not maintain an action claiming breach of contract because it is in default of the contract;[2] (iii) awarding defendants their attorneys' fees, expenses and costs incurred in connection herewith, pursuant to the terms of the Proprietary Lease and (iv) scheduling further proceedings to establish the amount of their attorneys' fees, expenses and costs.

Discussion

Plaintiff claims that it is entitled to summary judgment because the Board has waived its right under the terms of the Proprietary Lease to object to the transfer of the shares to Charles and thus there is an obvious and inevitable duty to issue the shares to Charles once the proper documents are submitted.

Defendants, however, argue that plaintiff's motion for summary judgment must be denied and their cross-motion granted because as

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[2] Plaintiff is not seeking summary judgment on its cause of action for breach of contract.

a matter of law possessory interest in the apartment actually vested in the four legatees upon Jak's death.

The defendants further claim that the letter signed by the four legatees on October 16, 2006 authorizing Morris "as Executor of Estate of Jak T. Cohane to sell the estates [sic.] entire interest in such apartments at the ... appraisal values and to distribute the net proceeds to the undersigned in equal shares" does not change the fact that interest in the apartments had actually vested in the legatees upon Jak's death, so that the proposed transfer to Charles requires the consent of the Cooperative Board.

Defendants also claim that Morris' selection of Charles as the buyer is prima facie a premeditated act to attempt to avoid the applicable provisions of the Proprietary Lease. Defendants contend that this act does not convert the sale of the legatee's interest to their uncle into a brother-to-brother transfer between Jak and Charles and does not create an inference that a brother-to-brother transfer was the decedent's testamentary interest so as to bring the transaction within the ambit of paragraph 16(b).

Finally, defendants contend that the relationship between the legatees and their uncle Charles does not fall within paragraph

16(b), and the Proprietary Lease provides no right of *inter vivos* intra-family transfers between nieces and nephews and their uncle without consent of the Board.

In the alternative, defendants argue that their cross-motion to dismiss should be granted because plaintiff may not maintain an action claiming breach of contract based on the Proprietary Lease when it is itself in default of that contract by permitting Teri to continue to occupy the apartment. In addition, defendants allege that Apartment 5B has been rendered uninhabitable by the removal of the kitchen and that plaintiff is proposing to transfer one-half of an illegally combined Apartment without making any showing that it will separate the Apartment back into its constituent parts or take action to render Apartment 5B habitable.

In the further alternative, defendants argue that plaintiff's motion must be denied because the bad faith and unclean hands of plaintiff in attempting to structure a step transaction to transfer an apartment in the Cooperative to a previously-rejected purchaser raises questions of fact which require a trial on the claims and defenses asserted by the parties.[3]

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[3] Defendants contend that the first step of plaintiff's planned tiered transaction is to transfer the apartment to decedents brother Charles (Teri's father), allegedly as of right, and the second step would be for the transferee brother to further transfer the apartment to his daughter Teri, also allegedly as of right.

In the final alternative, defendants contend that plaintiff's motion should be denied or a continuance ordered pursuant to CPLR § 3212(f) because there are facts essential to defendants' opposition which require the depositions of plaintiff and certain non-party witnesses. In particular, defendants anticipate that the facts which would be adduced from further discovery would, to the extent it may not be demonstrated already, reveal bad faith on the part of plaintiff sufficient to raise questions of fact justifying the denial of plaintiff's motion.

In reply, plaintiff argues that the words used by Jak in his Last Will and Testament must be analyzed within the context of what the testator intended to accomplish through the disposition of his assets. Plaintiff contends that looking at paragraph 2 of the Will as a whole, the court will discern that although the assets of sale or rental will "go equally to the four children of [his] brother Morris" they are not vested with legal title. Plaintiff urges that a close analysis of the language of the Will performed in light of the standard canons of construction will yield the inescapable conclusion that Jak intended to authorize Morris, as the executor, with the right and obligation to sell [or rent] the cooperative units in question "on such terms as in the opinion of [Morris] will be most advantageous to" the four emancipated legatees. See, EPTL 11-1.1(5)(B).

Plaintiff further contends that what Charles Cohen chooses to do with his apartment once he obtains title is not an issue before this Court on this motion, nor does the sale price of the unit have anything to do with defendant Trump's obligations to issue the shares to decedent's adult brother. Rather, it is plaintiff's position that the Lease clearly permits a transfer to the adult sibling of a unit holder without obtaining Board approval, with no further qualifications.

Both parties argue that the words used in the Will are "clear and definite", but disagree as to what they clearly and definitely mean.

Paragraph 2 under Schedule of Assets of Jak's last Will and Testament states that "[o]n my demise this property will go equally to the four children of my brother David E. Cohen: ... the assets derived from the sale, after taxes, or rental of these properties will be shared by the four persons equally." This does not say that the interest in the Apartment vested immediately after Jak's death in the legatees, just that they would share equally in the proceeds of a sale or rental of the Apartments (5A and 5B). Moreover, the letter of consent signed on October 16, 2006 indicates that the legatees understood that the title and interest in the Apartment vested in the estate upon Jak's death and that they would share in the monetary proceeds of the sale.

In addition, section 16(b) of the Proprietary Lease provides that "[i]f the Lessee shall die", no consent is required to the assignment of the Lease to an adult sibling of the Lessee - i.e., Charles. Accordingly, after reading all the papers submitted and hearing oral argument on the record on July 23, 2008, this Court determines that plaintiff is entitled to summary judgment on its first and third causes of action.

It is hereby

ORDERED that defendants Trump and Bellmarc are directed to issue the Proprietary Lease and shares appurtenant to Unit 5B of Trump Plaza Owners, Inc. in the building located at 167 East 61st Street, New York, New York to Charles J. Cohen, and it is further

ORDERED that plaintiff is entitled to a judgment declaring that Trump is obligated to pay plaintiff's reasonable attorneys' fees and expenses pursuant to Real Property Law § 234.

The issue of the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and determine.

Upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50R calendar for reference to a Special Referee.

Defendants' cross-motion is denied in all respects.

This constitutes the decision and order of this Court.

Dated: March 31, 2009

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

Supreme Court
60 Centre Street, New York, New York 10007

Special Referee Clerk, Room 119

Information Sheet To be attached to a copy of order and filed in Room 119 Special Referee Selection Program

Date: March 31, 2009

Title of Action: Estate of Jak Cohane, y Morris E. Cohen, Executor v. Trump Plaza Owners, Inc. and Bellmarc Property Management

Index No. 112028/07

Issues: See order dated: March 31, 2009 (reasonable attorneys fees and costs)

Estimated Length of Time Needed for Hearing: 1-2 days

Attorneys	**Names, Address and Telephone Numbers**	
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For Defendant:	Kenneth E. Citron, Esq. Snow Becker Krauss P.C. 605 Third Avenue New York, New York 10158	(212) 687-3860