[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Parker East

- v -

305 EAST 24th Owners

INDEX NO. 102895/08

MOTION DATE 2/13/09

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

FILED

MAY - 1 2009

COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby NEW YORK

ORDERED that the motion for discovery is resolved; and it is further

ORDERED that the cross-motion by plaintiff Parker East 24th Apartments, LLC for an Order (1) granting summary judgment against defendant 305 East 24th Owners Corp. for reimbursement of sublet fees improperly collected by the Co-op and (2) granting attorneys' fees is denied; and it is further

ORDERED that the parties appear for a preliminary conference on May 26, 2009 (2L:15 2/15 CAE) p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/30/2009

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

PARKER EAST 24TH APARTMENTS, LLC,

Index No. 102895/08

Plaintiff,

-against-

Motion Sequence #002

305 EAST 24th OWNERS CORP., NARDONI REALTY INC. and STEPHEN NARDONI,

Defendants.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In response to a motion for discovery,[1] plaintiff Parker East 24th Apartments, LLC ("Parker East" or "plaintiff") cross moves for an Order (1) granting summary judgment against defendant 305 East 24th Owners Corp. (the "Co-op") for reimbursement of sublet fees improperly collected by the Co-op and (2) granting attorneys' fees, in amounts to be determined at a hearing.

The Complaint

Parker is the holder of unsold shares appurtenant to certain apartments in the cooperative building located at 305 East 24th Street ("the Building") pursuant to a Proprietary Lease with the Co-op. Parker also leases apartments in the building from the Co-op. In February 2008, Parker entered into a sublease for apartment 10V with a "Paul Simmons" as the proposed subtenant for the rental rate of $2,795 per month. Plaintiff advised the Managing Agent of the proposed sublet in order to obtain his consent, which cannot be unreasonably withheld. However, the Managing Agent has refused to meet with the proposed tenant because Parker refused to sign off on a

[1] Defendants 305 East 24th Owners Corp., Nardoni Realty Inc. and Stephen Nardoni ("defendants") moved to dismiss the complaint or compel compliance with the Preliminary Conference Order for failure to provide discovery. Defendants' motion was resolved at a conference before the Court.

Sublease Approval Form mandating Parker to pay a 25% maintenance surcharge. As a holder of unsold shares, the only condition applicable to Parker in connection with a sublet is that the "consent of the Managing Agent is required which shall not be unreasonably withheld or delayed." Further, pursuant to the Proprietary Lease, defendants cannot impose any change in the form, terms, or conditions of the Proprietary Lease which affect the rights of the holder of unsold shares relating to sublets, without Parker's consent. And, the imposition of a surcharge constitutes such an improper change in the form, terms and conditions of the Proprietary Lease.[2]

Parker's Cross-Motion

In support of summary relief, Parker contends that as the holder of unsold shares, it is exempt from restrictions on subletting and the imposition of sublet surcharges. Parker argues that under cooperative law, a holder of unsold shares has greater rights and protections than those afforded to other individual proprietary lessees. In the instant case, even individual proprietary lessees are insulated from sublet charges because the Proprietary Lease does not contain any clause permitting the Co-op to charge sublet fees. Nor is there a provision in the Offering Plan that permits the Co-op to compel Parker to pay subletting surcharges. In fact, the Co-op has failed to follow the appropriate procedure to implement the imposition of sublet charges upon any individual proprietary lessees, let alone against Parker, who as the holder of unsold shares, is expressly forever exempt from such fees.

The Co-op has violated Parker's rights by requiring the payment of sublet surcharges as a

[2] Parker asserts five causes of action: (1) plaintiff is entitled to a judgment declaring that it is not liable for any sublet charges; (2) defendants breached the Proprietary Lease by previously collecting sublet surcharges from Parker, which Parker paid out of fear of losing out on rents under subleases which needed the Co-op's approval; (3) a permanent injunction should be entered mandating the Co-op to entertain Parker's sublet applications without first requiring Parker to sign any approval form that imposes a surcharge; (4) tortious interference with Parker's proposed sublease; and (5) plaintiff is entitled to attorneys' fees.

precondition to approval Parker's proposed subtenants. From the plain language of the Proprietary Lease and original By-Laws, the Co-op has no authority to collect sublet surcharges from Parker. The Co-op alleges that its right to impose such fees stems from a purported 1995 amendment to the By-Laws (the "Amendment"). The purported effect of the Amendment was to materially change the Proprietary Lease.

The Proprietary Lease, which prohibits the Co-op from imposing sublet fees upon Parker, were completely ignored and improperly nullified. Paragraph 6 of the Proprietary Lease states that any amendment thereto can only be ratified and effectuated by a shareholders' vote consisting of approval by two-thirds of the co-op's total issued shares. The Co-op never followed this procedure and no two-thirds vote of shareholders was ever obtained in connection with the Co-op Board's unilateral decision to impose sublet surcharges. The Amendment was merely enacted by a vote of the Co-op's board of directors. Due to the Co-op's failure to obtain the requisite two-thirds of shareholder approval, the Amendment was not validly effectuated, as a matter of law, and it must be deemed void *ab initio*. Allowing the improperly enacted Amendment to stand, in contravention of the express terms of the Proprietary Lease, would render all shareholders' rights illusory.

Even if the Co-op followed proper procedure in implementing a sublet surcharge, Parker, as the holder of unsold shares, would continue to be insulated from such charges. The Co-op claims that Parker somehow waived its right to not pay sublet surcharges by paying them in the years preceding this litigation. However, Parker was under economic duress to pay these fees. The Co-op made it clear that refusal to pay the surcharge would result in denial by the managing agent of proposed subtenants. Parker was forced to pay these fees in order to see any return on

its investment in the Co-op *via* the rental of unsold apartments. In any event, the Co-op's arguments are moot considering that the Amendment was invalid from its inception. Although the Amendment may have required sublet fees to be paid, the Co-op's failure to properly amend the Proprietary Lease makes the waiver claim irrelevant. The Co-op's claim that Parker afforded implied consent to imposition of the sublet fees under the 1995 Amendment lacks merit. The Offering Plan and the Proprietary Lease, however, contain provisions that were drafted and included in order to protect Parker's interests. Parker's consent to such sweeping changes to its rights as a holder of unsold shares was never requested and most certainly never given.[3]

In addition, Paragraph 38(c) offers additional protections to Parker. Paragraph 38(c) provides that, without the Lessee's consent, no change in the form, terms or conditions of this lease, as permitted in Paragraph 6, shall (1) affect the rights of the holder of Unsold Shares allocated to the apartment to sublet the apartment or to assign this lease, as hereinbefore provided in this Paragraph 38 or (2) eliminate or modify any other rights, privileges or obligations of such holder of unsold shares.

Paragraph 38(b) is also relevant with regard to Parker's rights as the holder of unsold shares. Paragraph 38(b) provides that Parker is exempt from paying any sums for expenses of the Lessor and its managing agent as set forth in paragraph 6(a)(iv). And, paragraph 16(a)(iv) expressly refers to "reasonable legal and other expenses of the Lessor and managing agent in connection with such assignment and transfer of shares." Assuming that Paragraph 16(a)(iv)

[3] Jean-Pierre Vaganay, the managing member of Parker attests that Parker is the: (i) holder of unsold shares appurtenant to many apartments located in the Co-op's building; and (ii) lessee pursuant to the Proprietary Lease. The Co-op never requested, nor did it ever receive shareholder approval of the purported amendment. As the court will recall, Parker was forced to commence this action because the Co-op refused to approve a proposed subtenant unless Parker agreed to pay sublet surcharges.

allows the Co-op to impose sublet fees on individual proprietary lessees, Parker is a holder of unsold shares and is exempt, as a matter of contract and the law, from such charges.

Parker also argues that upon the granting of judgment in Parker's favor, Parker is entitled to attorneys' fees that Parker has been unjustifiably forced to incur in litigating this action pursuant to Paragraph 28 of the Proprietary Lease.

Opposition

Parker's claims that the Co-op is prohibited from collecting sublet fees from it because it is a holder of unsold shares and that the Co-op improperly imposed sublet fees against Parker, must fail because Parker relies on lease provisions which do not preclude the Co-op from collecting sublet fees. While the Co-op cannot charge a holder of unsold shares expenses related to the sale or transfer of its apartments, it may assess fees for subletting because the lease does not expressly prohibit the Co-op from imposing sublet fees, even upon a holder of unsold shares. Paragraph 38(b), on which Parker relies, in fact relates to expenses associated with the sale or transfer of shares, and not to the Co-op's right to charge fees to plaintiff for subletting its apartments. Specifically, Paragraph 38(b) of the lease provides in relevant part that, the subletting of the apartment by the holder of unsold shares shall not require the consent of the Board or shareholders to which reference is made in Paragraphs 15 and 16 of this lease, but the consent only of the Lessor's then managing agent which shall not be unreasonably withheld and a holder of unsold shares shall not be required to pay any sums for expenses of the Lessor and its managing agent as set forth in subparagraph (a)(iv) of said Paragraph 16. Paragraph 16 (a)(iv) provides that all sums due from the Lessee shall have been paid to the Lessor, together with a sum to be fixed by the Board to cover reasonable legal and other expenses of the Lessor and its

managing agent in connection with such assignment and transfer of shares. Based upon these provisions, the Co-op is not proscribed from assessing sublet fees on a holder of unsold shares. The unambiguous lease provision was drafted by the original sponsor, Parker's predecessor-in-interest, and does not exempt subletting fees for a holder of unsold shares. Since the lease does not expressly prohibit or refer to the Co-op's assessment of sublet fees in said situation, Parker is not exempt from being assessed the fees at bar. If the sponsor wanted a provision in the lease exempting the holder of unsold shares from sublet fees, it would have been plainly stated as any ambiguities in the offering plan and related documents should be construed against the party who prepared the documents.

Additionally, Parker's summary judgment motion must also be denied because plaintiff waived its claims of any exemption from paying sublet fees based upon its actions in acknowledging and paying the sublet fees for years prior to instituting this action. Parker's payment of sublet fees in accordance with the by-laws without objection constitutes a knowing waiver of its rights, in and of itself. Further, by not objecting to the by-law provision's sublet fee requirement and paying the sublet fees without objection since the initial conversion, the course of conduct between the parties demonstrates that plaintiff approved and ratified the sublet fee and defendants had the right to rely upon this income, and thus plaintiff should be estopped from now claiming otherwise. In 24 years, plaintiff and its predecessor in interest objected to the payment of sublet fees in 1991 and 1992. Parker and its predecessor-in-interest have both acknowledged and paid sublet fees since 1984, even before the by-law provision was first enacted. In fact, the designee of Parker's predecessor-in-interest had not only paid and acknowledged sublet fees, but despite having been given prior notice, did not attend the board meeting at which the board

voted to adopt the 1995 by-law amendment which permitted the Co-op to assess sublet fees in connection with all shareholders' sublets, including holders of unsold shares.

Further, issues of fact exist regarding Parker's argument of paying the fees under "economic duress" in response to defendants' waiver argument. Parker failed to make out a claim for duress. Plaintiff failed to show that the Co-op's actions constituted a wrongful threat that precluded the exercise of free will. A mere allegation that an action was undertaken because of financial pressure and an unequal bargaining position is insufficient to constitute economic duress. Further, a party seeking to avoid a contract allegedly induced by duress must act promptly to repudiate it, otherwise as a consequence, they waive that right, and here, there are no allegations that the Co-op threatened to commit unlawful conduct or deprived Parker of its free will. Rather, Parker claims that it made a business decision to pay the fees. Indeed, by (a) agreeing to pay the sublet fees for 24 years since the conversion and claiming duress more than 24 years after it agreed to pay sublet fees, plaintiff has waived its claims.

At the very least, Parker's assertion of "economic duress" raises an issue of fact to which defendant is entitled to additional discovery. Parker's cross-motion for summary judgment was brought in response to defendants' motion to compel discovery. Parker's deposition is necessary, since the facts surrounding such issues are within Parker's exclusive knowledge. Defendants should also have an opportunity to obtain facts relevant to the claims of waiver and estoppel.

Reply

Defendants failed to address the controlling case law, and the cases cited by defendant in support of this claim are distinguishable. Nor are there any issues of fact. Although at times summary judgment prior to completion of discovery is premature, the voluminous document

production proffered by Parker is already in defendants' possession, namely, the subject Offering Plan, Amendments, Proprietary Lease and proofs of payments of years worth of subletting surcharges (which have no bearing on the fact that the Co-op collected surcharges based upon the 1995 Amendment which was improperly enacted). Any depositions of Parker will do nothing to correct the Co-op's improper enactment of the Amendment.

Further, defendants' waiver argument does not apply. And, since defendants fail to address caselaw contrary to defendants' position, the waiver argument is barred as a matter of law. Additionally, in order for defendants to invoke waiver, defendants would have to concede that the Co-op is contractually barred from charging subletting surcharges to a holder of unsold shares. It is incongruous to argue that Parker waived a right unless defendants first admit that Parker had such a right to waive. And, Parker did not intentionally relinquish a known right. Defendants point out that in 1991, Parker's predecessor-in-interest "questioned" the Co-op's charging of subletting surcharges. In response, the Co-op's managing agent wrote that the Proprietary Lease did not bar the imposition of sublet surcharges. The parties did not litigate this issue in 1991, but back then there was no Appellate Division case law that would definitively support either side's position. Recent caselaw decided in 2008 however establishes that the Co-op's imposition of sublet surcharges was improper. If Parker sat on its hands after such change in caselaw, defendants might be able to argue that Parker was guilty of waiver. However, Parker has not sat on its hands. It was the Co-op's managing agent's outright refusal to interview a proposed subtenant unless Parker agreed to pay sublet surcharges that left Parker with no alternative other than to commence this action.

The only relevance that duress has in this case is that as soon as Parker refused to pay

subletting surcharges, the Co-op's managing agent refused to review (let alone approve) a proposed sublet thereby resulting in the commencement of this action. It should be noted that the Co-op has already secured a windfall. Parker understands that the 6-year statute of limitations applies to its claim for damages. The Co-op will never be made to return the sublet surcharges collected prior to 6 years before the commencement of this action.

Further, the 1995 Amendment was improper. Defendants admit that the Amendment was promulgated merely by a Board vote, and failed to address the fact that the Co-op failed to follow the appropriate procedure to implement the imposition of sublet charges upon any individual proprietary lessees, let alone against Parker.

The 1995 Amendment is another reason that waiver does not apply in this case. If the Co-op is found to have been improperly collecting sublet surcharges pursuant to a faulty Amendment, then the principle of waiver cannot apply. A finding of waiver on these facts would set a dangerous and flawed precedent. Such a finding would open the door to Co-ops arguing that any Amendments, even if they were improperly enacted, would be enforceable in time due to shareholders' so-called "waiver." For obvious public policy arguments, rights of shareholders are subject to scrutiny and waiver should not be freely relied upon as a method to protect any Co-op's enactment of faulty amendments. Allowing the improperly enacted Amendment to stand, in contravention of the express terms of the Proprietary Lease, would render all shareholders' rights illusory.

Finally, defendants have not refuted Parker's entitlement to attorneys' fees in the event that it is declared the prevailing party in this action.

Analysis

The proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law in its favor, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (CPLR § 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of

hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Whether defendants have a right to collect sublet surcharges turns on the interpretation of the following paragraphs of the Proprietary Lease, which state in pertinent part:

> 38. (a) The term "Unsold Shares" means and refers to shares of the Lessor which have been issued or transferred either to the Sponsor or individual designee(s) of the Sponsor of the Offering Statement . . . and all shares which are Unsold Shares retain their character as such (regardless of transfer) until an individual purchases same and actually occupies (by himself or a member of his family) the apartment to which such shares are allocated.
>
> (b) Neither the subletting of the apartment . . . nor the assignment of this lease by the holder of Unsold Shares . . . shall require the consent of the Board or shareholders to which reference is made in Paragraphs 15 and 16 of this lease, but the consent only of the Lessor's then managing agent which shall not be unreasonably withheld or delayed . . . and a holder of Unsold Shares shall not be required to pay any sums for expenses of the Lessor and its managing agent as set forth in subparagraph (a)(iv) of said Paragraph 16 or to furnish a search or certificate as set forth in subparagraph (a)(v) of said Paragraph 16.
>
> * * * * *
>
> 15. *Except as provided in Paragraphs 38 and 39 of this lease*, the 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 . . . the Board or . . . lessees owning at least 66 2/3% of the then issued and outstanding shares of the Lessor. . . *Any consent to subletting may be subject to such conditions as the Board or lessees, as the case may be, may impose.* There shall be no limitation on the right of the Board or lessees to grant or withhold consent . . . .
>
> 16. *Except as provided in Paragraphs 38 and 39 of this lease*,
> (a) The Lessee shall not assign this lease or transfer the shares to which it is

> appurtenant or any interest therein, and no such assignment or transfer shall take effect as against the Lessor for any purpose, until
>
> (i) An instrument of assignment in form approved by the Lessor executed and acknowledged by the assignor shall be delivered to the Lessor; and
>
> (ii) An agreement executed and acknowledged by the assignee . . .
>
> (iii) All shares of the Lessor to which this lease is appurtenant shall have been transferred to the assignee, with proper transfer taxes paid and stamps affixed; and
>
> (iv) *All sums due from the Lessee shall have been paid to the Lessor, together with a sum to be fixed by the Board to cover reasonable legal and other expenses of the Lessor and its managing agent in connection with such assignment and transfer of shares* . . . .
>
> (Emphasis added).

Based on a plain reading of the above provisions, Paragraph 38 provides the holder of unsold shares the right to assign or sublet its apartment, without the consent of the Board or shareholders, and without having to pay the sums as set forth in Paragraph 16 (a)(iv). Paragraph 16 (a)(iv) refers to sums the Board may fix due to legal or other expenses in connection with transferring or assigning shares. Notably, Paragraph 16 pertains solely to assignments and Paragraph 15 pertains solely to sublets. However, Paragraph 15 is silent as to any sums the Board may fix pertaining to subletting, and only refers to the right of the Board to impose "conditions" to subletting. Thus, Paragraph 15 grants the Board the right to impose a condition, including the payment of sublet fees, to subletting. Although the Proprietary Lease does not expressly authorize the Co-op to impose upon a holder of unsold shares a sublet surcharge, and as stated by defendants, "does not in any way proscribe the Coop from assessing sublet fees on a holder of unsold shares" (Memo of Law, p. 4). That Paragraph 38 exempts the holder of unsold shares from paying fees relating to assignments, but contains no similar exemption relating to subletting, is reasonable, since the Paragraph 15 (subletting) is silent on any sums to be paid. Thus, since Paragraph 15 contains no reference to sums to be paid as a condition to subletting, to

impose such a sum constitutes a change in the rights of a holder of unsold shares, which must be effectuated pursuant to Paragraph 6 of the Proprietary Lease.

Paragraph 6 provides, in relevant part, that:

> . . . The form and provisions of all the proprietary leases then in effect and thereafter to be executed may be changed by the approval of lessees owning at least 66 2/3% of the Lessor's shares then issued and outstanding, and such changes shall be binding on all lessees even they did not vote for such changes except that . . .*(iii) the provisions hereof are subject to the provisions of Paragraph 38(c) of this lease.* Approval by lessees as provided for herein shall be evidenced by written consent or by affirmative vote taken at a meeting called for such purpose.

Paragraph 38(c) provides that:

> *Without the Lessee's consent, no change in the form, terms or conditions of this lease, as permitted by Paragraph 6, shall (1) affect the rights of the holder of Unsold Shares allocated to the apartment to sublet the apartment* or to assign this lease, as hereinbefore provided in this Paragraph 38, or (2) eliminate or modify any other rights, privileges or obligations of such holder of Unsold Shares.

The record indicates that defendants failed to obtain the approval of 66 2/3% of the lessee's vote. Further, based on Paragraphs 6 and 38(c), consent by the lessee is also required to effect a "change in the form, terms or conditions" of the Proprietary Lease. Although defendants contend that in 1995, the Co-op's Board duly passed a By-law which authorized the imposition of sublet surcharges, defendants point to no provision in the Proprietary Lease permitting such action. Therefore, the record indicates that defendants failed to properly amend the Proprietary Lease to impose a sublet fee upon a holder of unsold shares.

Where "the By-Laws and Proprietary Lease of defendant contain no specific authority for the imposition of a sublet surcharge," and "defendant failed to follow the proper procedures to effectuate an amendment of the Proprietary Lease authorizing such a sublet surcharge," the surcharge is void *ab initio*, and requiring the return of the improperly obtained surcharges

(*Zimiles v Hotel Pes Artistes*, 216 AD2d 45; 627 NYS2d 382 [1st Dept 1995]). And, as detailed above, the Proprietary Lease was never properly amended (*see e.g., Likokoas v 200 East 36th Street Corp.*, 48 AD3d 245, 850 NYS2d 451 [1st Dept 2008] [as holders of unsold shares in the cooperative, plaintiffs were expressly exempt from paying sublet fees and the requirement that defendant consent to any subletting]). There is no indication that the Amendment was be ratified and effectuated by a shareholders' vote consisting of approval by two-thirds of the Co-op's total issued shares and that consent by Parker was given. Thus, Parker established that the 1995 Amendment is void *ab initio*.

However, defendants raised an issue of fact exists as to whether Parker waived its contractual right of exemption from subletting fees by acknowledgment and payment of such fees since the conversion. "Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned, which may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, L.P.*, 7 NY3d 96, 817 NYS2d 606 [2006]). However, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection (*id.*). Generally, the existence of an intent to forgo such a right is a question of fact (*id.*).

It is undisputed that in May 1991, Parker's predecessor-in-interest "questioned" the Co-op's charging of subletting surcharges, and that the Co-op's managing agent responded in August 1991 that the Proprietary Lease did not bar the imposition of sublet surcharges. It is also uncontested that the parties did not litigate this issue in 1991. However, there is no indication that Parker objected to the imposition of the sublet fees on its12 subsequent sublet application

forms from August 1991 through 2007. Yet, Parker maintains that caselaw recently decided establishes that the Co-op's imposition of sublet surcharges is improper, and that it was the Co-op's refusal to interview a proposed subtenant unless Parker agreed to pay sublet surcharges that caused Parker to commence this action.

Therefore, an issue of fact exists as to whether Parker's history of payments over the course of 16 years constitutes a waiver of its rights under the Proprietary Lease (*see Tatko v Sheldon Slate Products Co., Inc.*, 2 AD2d 1030, 769 NYS2d 626 [3d Dept 2003]["plaintiff's claims concerning the bonuses authorized by defendants, as well as formalities such as written notice of annual shareholder meetings or formal elections and voting, were all waived by his failure to object or request compliance with the requirements of the corporations' bylaws or the Business Corporation Law"]; *see also, General Motors Acceptance Corp. v Clifton-Fine Central School District*, 85 NY2d 232, 623 NYS2d 821 [1995] [in light of the apparent failure of plaintiff to protest or direct that payment be made to it, after two payments were made to another party, issues of fact exist as to whether plaintiff waived its rights under the assignment]).

Additionally, an issue of fact exists as to whether Parker agreed to the sublet fees in the sublet application under economic duress. An agreement "is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will [citations omitted]" (*Sosnoff v Carter*, 165 AD2d 486, 568 NYS2d 43 [1st Dept 1991]). Economic duress can be shown where one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand, that the withholding of performance will result in an irreparable injury or harm (*id.*) Parker had a right to sublet apartments upon consent by the

Managing Agent which shall not be unreasonably withheld, unconditioned upon the payment of any sublet fees. Defendants' insistence that Parker pay fees as a condition to Parker's exercise of its sublet rights under the Proprietary Lease raises an issue as to whether Parker agreed to such fees under economic duress (*Blumenthal v Tener*, 227 AD2d 183, 642 NYS2d 26 [1st Dept 1996] [finding issue of fact as to whether documents were executed under economic duress, where documents were given by plaintiffs, as co-venturers of defendants, in the midst of a real estate development project, when the defendants opted not to go forward with the project, leaving plaintiffs in a precarious position]). Thus, Parker's assertion in response to defendants' defense of waiver, that it signed the sublet approval form under economic duress, is insufficient to overcome the defense at this juncture.

Although *Zimiles v Hotel Pes Artistes* (*supra*), held that the lessee was entitled to the reimbursement of sublet fees, where defendant failed to follow the proper procedures to effectuate an amendment of the Proprietary Lease authorizing such a sublet surcharge, such case did not address the defense of waiver, as raised herein.

Likewise, it cannot be said that the voluntary payment doctrine bars Parker from seeking reimbursement (*cf. Eighty Eight Bleecker Co., LLC v 88 Bleecker Street Owners, Inc.*, 34 AD3d 244, 824 NYS2d 237 [1st Dept 2006] [where plaintiff paid overcharges "without protest or even inquiry, and [was] not laboring under any material mistake of fact when [it] did so," its claim as to the basic rent overcharge is barred by the voluntary payment doctrine; plaintiff was not acting under a mistake of fact, and its "marked lack of diligence in determining what its contractual rights were" demonstrates that the payments were voluntary and not made under mistake of law]). Parker's claim that the law was unclear at the time of its payment of sublet fees, and

argument of duress, raise an issue as to whether the voluntary payment doctrine applies. For the reasons above, defendants' claim of estoppel cannot be determined at this juncture.

Attorneys' Fees

In light of Parker's failure to establish its entitlement to reimbursement of sublet fees, attorneys' fees cannot be granted at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion for discovery is resolved; and it is further

ORDERED that the cross-motion by plaintiff Parker East 24th Apartments, LLC for an Order (1) granting summary judgment against defendant 305 East 24th Owners Corp. for reimbursement of sublet fees improperly collected by the Co-op and (2) granting attorneys' fees is denied; and it is further

ORDERED that the parties appear for a preliminary conference on May 26, 2009, 2L:15 p.m.; and it is further

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This constitutes the decision and order of the Court.

Dated: April 30, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD