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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Rotvelut

INDEX NO. 602854/07

MOTION DATE

- v -

MOTION SEQ. NO. 01

150 East 77th Street Corp.

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
JUN 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/12/09

LOUIS B. YORK J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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WILLIAM D. ROTBLUT and LOIS B. ROTBLUT

Plaintiffs, Index # 602854/2007

-against-

150 EAST 77th STREET CORP.

Defendant.

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YORK, J.:

Pro se plaintiff, William Rotblut, Esq. ("Rotblut"), appearing on behalf of himself and his wife, moves for an order granting them summary judgment on their first cause of action seeking a declaration that they were the holders of unsold shares. The Cooperative opposes the motion and cross moves for an order granting it summary judgment dismissing the complaint.

Background

In late 1994, after the building in issue was converted to a cooperative, the Rotbluts acquired the shares and proprietary lease for apartment 5F from the Resolution Trust Corporation (RTC) for $23,000. That apartment was, at the time of the cooperative conversion, evidently occupied by a non-purchasing rent stabilized tenant. It seems that unsold shares and a proprietary lease were issued by the sponsor to a purchaser, who

financed that purchase through a loan obtained from Ensign Federal Savings Bank. The purchaser defaulted on the loan, resulting in a non-judicial foreclosure. The RTC, in its capacity as receiver for that bank, came into possession of the lease and shares as a consequence of the non-judicial foreclosure. RTC in turn sold the shares and proprietary lease to the Rotbluts.

The contract of sale signed by the Rotbluts on May 25, 1994, provided that the seller had no knowledge of any agreement, aside from the lease, affecting the apartment's use and occupancy which adversely affect the buyers. The contract also provided that the buyers examined or waived examination of the lease, the corporation's certificate of incorporation, its bylaws and house rules. In it, the buyers acknowledged that they had a sufficient chance to make legal and factual inquiries that they deemed necessary, and that they had satisfactorily examined or waived examination of the cooperative plan and the corporation's rules and regulations. Further, the contract of sale recited that the purchasers acknowledged that, because the seller acquired the shares and lease through receivership and foreclosure, the seller had scant or no knowledge of the unit's economic "characteristic." The buyers also acknowledged that they were taking the unit without any representations or guarantees from the seller. The contract indicated that the purchasers

acknowledged that the seller was not making any representations about the unit's fitness for a particular use, its profitability or marketability. Therefore, the buyers were not entitled to rely on the seller or its agents regarding the "use or other legal status of the Premises." The buyers also acknowledged that the lease might require the cooperative corporation's "consent to the sale and assignment of the Shares and Lease."

The Rotbluts then submitted an application dated September 8, 1994 to the Cooperative's managing agent on a form, which did not indicate that they were seeking to acquire unsold shares, and recited that "NO TRANSFER OF SHARES IS PERMITTED WITHOUT THE PRIOR INTERVIEW AND APPROVAL BY THE BOARD OF TRUSTEES." (Rotblut aff. Of 8/6/08, exh. 2. The Rotbluts also submitted a financial statement as well as character references. The Rotbluts were not interviewed by the Cooperative's board, but a December 20, 1994 Consent to the assignment of the shares and lease from the RTC to the Rotbluts was executed by the Cooperative's president on behalf of the corporation, and a corporate seal was affixed to the document "by order of the Board of Directors." *(Id.* at exh. 4.)

The tenant continued to reside in the unit pursuant to renewal leases without a renewal fee. In June 2003, Rotblut, who wanted to transfer his shares to a family LLC, wrote to the

Cooperative's board, asserting that even though board approval was not required for unsold shares, in the interest of maintaining good relations with the board, they wanted to know what the procedure was to effectuate the transfer. The Cooperative responded that based on the manner in which the Rotbluts obtained their shares, they were not the holders of unsold shares. Consequently, the shares could not be transferred merely by obtaining approval from the managing agent. Evidently, the Rotbluts then advised that they had been treated as holders of unsold shares of unit 5F, and after purchasing the shares to apartment 5F, acquired an interest in unit, 11G, and had been permitted to renovate and sell that unit without board approval. The Cooperative's counsel advised a mistake had been made as to unit 11G by the managing agent, but that did not entitle the Rotbluts to the same mistake with respect to unit 5F.

Meanwhile, in July 2004, the tenant in unit 5F died. The Rotbluts determined that they wanted to renovate the apartment, and contended as holders of unsold shares, they were entitled to do so with only the managing agent's permission. Rotblut also attempted to negotiate a settlement with the Cooperative over the issue of whether he and his wife were holders of unsold shares. Specifically, he advised that they would give up their claim that they were holders of unsold shares if it were agreed that they could renovate the apartment solely with management's approval,

rent the unit for a period of five years, as if they were holders of unsold shares, and then sell the unit, subject to only management's approval. The Cooperative's counsel advised that the proprietary lease gave holders of unsold shares no special status with respect to alterations, and that consent of the Lessor was required for any shareholder, but that, in any event, the Rotbluts were not holders of unsold shares. The Rotbluts were further advised that they were proceeding as though the board might act in a manner different from the managing agent, which was not necessarily true, and as a consequence they might suffer no damages. While the board adhered to its position that the Rotbluts were not holders of unsold shares, it was suggested by the Cooperative's counsel that they submit any alteration, sublet or sales requests to the board. Any such submissions would not constitute a waiver of their claim that they were holders of unsold shares.

The Rotbluts, who assert that they did not want to renovate the apartment without knowing that they would be able to sublet it for a period long enough to recoup the renovation costs, claim that, as a result of the board's position, they were forced to sell unit 5F with the board's permission. The unit was sold in February 2005 for $ 1,070,000.00. Aff. in Support of Cross Motion, exh. G. Then, the Rotbluts commenced this action seeking a declaration that they were the holders of unsold shares, as

well as costs, legal fees and damages for, among other things, lost rental income and a diminished sale price as a consequence of being unable to sell unsold shares.

The Instant Motion

The Rotbluts now move for summary judgment on their first cause of action, which seeks a declaration that they were the holders of unsold shares. They assert that they were treated as such holders as they were never interviewed before the consent was issued and because they were never charged an application fee or sublet fees. They further point out that their other apartment, 11G, was treated as though they held unsold shares. Rotblut alleges that the RTC advertised the sale of unit 5F as one involving a sale of unsold shares.

The Rotbluts also maintain that section 38 (a) of the proprietary lease is the "controlling document" which establishes that they were holders of unsold shares. Rotblut aff. of 8/6/08. That section provides that,

> The term "unsold Shares' means and has exclusive reference to the shares of the Lessor which were issued to the Sponsor-Seller or individuals produced by the Sponsor-Seller pursuant to the Plan of Cooperative Ownership or Contract of Sale under which the Lessor acquired the land and the building; and all shares which are Unsold Shares retain their character as such (regardless of transfer) until (I) such shares become the property of a purchaser for bona fide occupancy (by himself or a member of his family) of the apartment to which such shares are allocated, or (ii) the holder of such shares (or a member of his family) becomes a bona fide occupant of the

> apartment. This Paragraph 38(b) shall become inoperative as to this lease upon the occurrence of either of said events with respect to the Unsold Shares held by the Lessee named herein or his assignee.

According to Rotblut, since the shares originally were transferred by the sponsor to one of Rotblut's predecessors in interest, and since no prior owner of the shares occupied the unit, the shares retained their unsold character.

The Cooperative maintains that Rotblut's interpretation of section 38 (b) of the proprietary lease is erroneous, and that such section must be read together with the offering plan and interpreted pursuant to the basic rules of contract construction (*Kralik v 239 79th Street Owners Corp.*, 5 NY2d 54 [2005]). The Cooperative notes that, under the heading of "UNSOLD SHARES," the offering plan provides that,

> The Sponsor-Seller will acquire all shares not subscribed for prior to the Closing Date and execute proprietary leases for all the apartments to which such shares are allocated, so that all of the shares of the Apartment Corporation will be issued and proprietary leases will be executed for all apartments to which shares are allocated. However, not later than three years after the Closing Date the Sponsor-Seller will sell any shares which it acquires to one or more financially responsible individuals, each for his own account, who will not be acting for or on behalf of the Sponsor-Seller. The Sponsor-Seller has agreed to pay the maintenance charges due under each proprietary lease which it acquires until the lease and the accompanying shares of the Apartment corporation are sold to a purchaser for occupancy.[1] Aff. in Support, exh. D.

[1] Much of the substance of this clause in now encompassed within the Attorney General's regulations governing the format

The Cooperative asserts that this provision when read with section 38 (b) of the proprietary lease establishes that the Rotbluts were never owners of unsold shares. The Cooperative maintains that in order to be designated or produced as a holder of unsold shares by the sponsor, the holder had to have been a financially responsible individual to whom the sponsor sold its shares within three years of the closing date. The Cooperative further observes that neither the Rotbluts nor the entity from which they obtained their shares (RTC as receiver of Ensign Federal Savings Bank) was designated or produced by the sponsor as holders of unsold shares, since they were not sold their shares by the sponsor, much less sold them within the requisite three year period.

Accordingly, the Cooperative, relying on the Appellate Division First Department's recent decision in *Sassi-Lehner v Charlton Tenants Corp.* (55 AD3d 74 [2008]) claims that the Rotbluts were never holders of unsold shares. In that case, which involved the same proprietary lease provision contained in section 38 (b) and similar offering plan provisions relating to unsold shares, the First Department held that the plaintiffs could not claim unsold share status where they acquired the shares through a foreclosure sale since the transferor was not

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and content of offering plans. *See* 13 NYCRR 18.3 (w) (1), (3), (5), (7).

"an individual designated or produced by the sponsor." *Compare Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 81, *with L.J. Kings, LLC v Woodstock Owners Corp.*, 46 AD3d 321 (1st Dept 2007).

The Cooperative additionally claims that because the board did not interview the Rotbluts before they were permitted to obtain the shares and proprietary lease and that they were not charged sublet fees does not constitute a waiver of the Cooperative's right to assert that the Rotbluts were never owners of unsold shares. Those facts do not constitute an intent to relinquish that right. Furthermore, the Cooperative asserts that any waiver argument is undercut by the proprietary lease's no waiver clause which provides (at ¶ 26) that,

> The failure of the Lessor to insist, in any one or more instances, upon a strict performance of any of the provisions of this lease, or to exercise any right or option herein contained, or to serve any notice, to institute any action or proceeding, shall not be construed as a waiver, or a relinquishment for the future, of any such provisions, options or rights, but such provision, option or right shall continue and remain in full force and effect. The receipt by the Lessor of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach, and no waiver by the Lessor of any provision hereof shall be deemed to have been made unless in a writing expressly approved by the Directors.

In reply, Rotblut, who does not claim that he lacks any of the Cooperative's bylaws, rules, regulations, or any portions of the offering plan or amendments thereto that might be needed to oppose the cross motion, asserts that *Sassi-Lehner* (55 AD3d at

74) is inapplicable because the language in the offering plan in that case was not identical to the language in the offering plan in this case, and because the other case involved a foreclosure action where the property was ultimately sold via an auction, a situation which did not occur here. Rotblut further asserts that the Cooperative should be estopped from claiming that he and his wife were not the holders of unsold shares, because they allegedly purchased the shares in detrimental reliance on the Cooperative's acts, evidently in not interviewing them or charging an application fee or thereafter not charging fees when the tenant renewed his lease.

Following a review of the motion papers and the applicable law, the motion is denied, and the cross motion to dismiss is granted. The proprietary lease (at 38 [b]) clearly provides that unsold shares "means and has **exclusive reference** to the shares of the Lessor which were issued to the Sponsor-Seller or individuals produced by the Sponsor-Seller **pursuant to the Plan of Cooperative Ownership**." Emphasis added. The only individuals referred to in the offering plan's unsold shares provision, who could conceivably be those produced by the Sponsor-Seller, are those financially responsible individuals, who within three years of the closing date were sold shares by the Sponsor-Seller. Neither the Rotbluts nor RTC were such individuals, and thus,

like the plaintiffs in *Stassi-Lehner* (55 AD3d at 80), "do not qualify as original holders of unsold shares." Further, as noted by the Appellate Division in *Sassi-Lehner* (*Id.* at 80-81), the term "regardless of transfer," set forth in the proprietary lease, "limits any transfer of 'unsold shares' to those only where the transferor is an individual designated or produced by the sponsor." Since RTC was not such an individual, the Rotbluts never acquired unsold shares. That there was no formal foreclosure action or auction in the instant case is a distinction without a difference.

Nor have the Rotbluts established that the Cooperative waived any claim that the Rotbluts were not holders of unsold shares or that the Cooperative should be estopped from asserting that. There is nothing in the contract of sale which suggests that the Rotbluts were purchasing unsold shares. To the contrary, RTC seemed to go out of its way in driving home the point that it had limited knowledge about the property in light of the manner in which it acquired it, was not making guarantees, was leaving it up to the Rotbluts to conduct any necessary investigations, including of the relevant Cooperative documents, and that it was not the sponsor or the sponsor's nominee under the Cooperative's organization plan. Also, the contract of sale provided that the cooperative corporation's consent to the sale

might be required. In addition, the application that the Rotbluts submitted indicated that no transfer of shares could occur without board approval. That no application fee was charged or that the Rotbluts were not interviewed does not constitute an "intentional relinquishment" of the Cooperative's right to assert that the Rotbluts were not holders of unsold shares (*Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 968 [1988]), especially since the proprietary lease contained a no-waiver clause which required waivers to be in a writing signed by the board (*Katz v 215 W. 91st St. Corp.*, 215 AD2d 265 [1st Dept 1995]; *Luna Park Housing Corp. v Besser*, 38 AD2d 713 [2d Dept 1972]). Even, assuming arguendo, that the Cooperative waived its rights under the proprietary lease to interview the Rotbluts or charge them an application fee, that did not constitute a knowing determination to grant them a change in status. Further, under the circumstances presented here, the fact that Rotblut was, as an attorney and accountant, a sophisticated buyer, and that the contract of sale was executed well in advance of any acts of the Cooperative, vitiated any claim of detrimental reliance. Also, failure to interview the Rotbluts or charge an application fee prior to or at the time they purchased the shares is insufficient to estop the Cooperative from asserting that the Rotbluts were not holders of unsold shares.

Accordingly, it is

ORDERED that the motion of William and Lois Rotblut for summary judgment on their first cause of action is denied; and it is further

ORDERED that the cross motion of defendant 150 East 77th Street Corp. for summary judgment is granted, and the complaint is dismissed in its entirety with costs and disbursements to defendant to be taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: 6/12/09

ENTER:

J.S.C.

LOUISE YORK
J.S.C.

FILED
JUN 17 2009
COUNTY CLERK'S OFFICE
NEW YORK