

<b>Matter of Hershkowitz v White House Owners Corp.</b>
2010 NY Slip Op 30718(U)
February 22, 2010
Surrogate's Court, Nassau County
Docket Number: 352576
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
In the Matter of the Application of GEORGE HERSHKOWITZ,  
as Administrator of the Estate of

File No. 352576

CHERYL HERSHKOWITZ,

Deceased,

Petitioner,

-against-

Dec. No. 886

WHITE HOUSE OWNERS CORP., and "John Doe No. 1,"  
"John Doe No. 2," "John Doe No. 3," John Doe No. 4,"  
"John Doe No. 5," "John Doe No. 6," and "John Doe No. 7,"  
whose names are unknown but are the individual members of the  
Board of Directors of the White House Owners Corp.,

Respondents,

for an order requiring the respondents to approve the sale of the  
defendant's cooperative apartment Unit #28B, and for other relief.

-----X  
In this proceeding by the administrator of the estate for an order directing approval of the  
sale of a cooperative apartment, petitioner moves for an order granting summary judgment.

Respondents move to dismiss the petition and cross-move for summary judgment.

This proceeding was commenced by a petition dated July 30, 2009 for an order directing  
White House Owners Corporation (hereinafter "corporation") to approve the sale of a  
cooperative apartment, the shares of which were owned by decedent.

By order to show cause dated October 9, 2009, the court granted a temporary restraining  
order preventing the corporation from terminating the lease or transferring shares. Thereafter, a  
hearing was held to determine whether a preliminary injunction should be granted.

By decision dated November 5, 2009, the court granted petitioner a preliminary  
injunction, which prevented the corporation from transferring the decedent's shares in the

corporation pending a determination in this proceeding, on condition that the estate post security in the amount of \$7,500.00, representing unpaid maintenance charges. The security having been furnished, an order issued.

The estate contends that the corporation wrongfully refused to approve a contract of sale of decedent's shares in the corporation. The corporation alleges that the estate failed to comply with the requirement in the lease that a contract for sale be submitted for approval. Additionally, the corporation raised as an affirmative defense that the estate's interest in the proprietary lease and appurtenant shares terminated as a result of the failure to pay maintenance charges.

The decedent purchased the cooperative apartment in 2007 for \$425,000 with a mortgage from Wells Fargo Bank ("Wells Fargo") in the amount of \$340,000. Following her death, Wells Fargo commenced a mortgage foreclosure proceeding. Thereafter, the administrator executed a contract of sale dated February 17, 2009 for a purchase price of \$100,000, subject to approval by Wells Fargo. The contract was submitted to the Board of Directors for approval. Approval was denied. The corporation contends that the sales price was inadequate and a sale at that price would have diminished the value of other apartments.

The estate alleges in its petition that the original contract was then amended to provide for a sales price of \$141,000, which was approved by Wells Fargo and submitted to the Board of Directors for approval. The corporation denied in its answer that a second contract was submitted for approval to the Board of Directors.

The corporation moves to dismiss the petition. The corporation's motion to dismiss on the grounds that this court lacks subject matter jurisdiction (CPLR 3211 [a][2]) is without merit (NY Const art VI §12 [a]; SCPA 201; *Matter of Piccione*, 57 NY2d 278 [1982]).

The corporation's motion to dismiss the petition for lack of standing is based upon two grounds: (1) the estate's interest in the proprietary lease and appurtenant shares terminated following a notice to cure and notice of termination, and (2) the estate has no interest in the sale of the shares as the proceeds will be paid to Wells Fargo.

Where standing is put in issue by a respondent's answer, petitioner must prove its standing if it is to be entitled to relief (*Wells Fargo Bank Minnesota, Nat. Assn. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]).

As noted in the court's prior decision, approval of the second contract would have resulted in a "short sale." The estate would have benefitted under the contract from a release from liability on the balance of the mortgage debt. An inability on the part of the estate to obtain the consent of the Board of Directors will deprive the estate of the benefit of the bargain. The estate has standing (*Montano v County Legislature of County of Suffolk*, \_\_\_\_ AD \_\_\_\_ 2009, WL 3872341 [2d Dept]) based upon its interest in approval of the sale.

It is undisputed that the estate failed to pay maintenance charges for several months. The lease permits termination on the basis of failure to pay maintenance charges. The lease requires that the notices to the lessee be forwarded to the address of the building, by registered mail. The attorney for the corporation alleges that she forwarded by registered mail, a ten-day notice to cure dated September 4, 2009 and a five-day notice of termination dated September 17, 2009. The administrator alleges that he did not receive the notice of termination by registered mail. No receipt or proof of signature has been produced.

More importantly, the lease does not provide for notice to the fiduciary of an estate. The administrator of the estate is not the "lessee." The provision in the lease pertaining to assignment

of the lease distinguishes between the “lessee” and the “executor” or “administrator” of the estate.

The relationship between the shareholder/lessee and the corporation is determined by applying the usual rules of contract interpretation to the controlling documents including the proprietary lease (*Kralik v 239 East 77<sup>th</sup> Street Owners Corp.*, 5 NY3d 54 [2005]; *Consolidated Resources LLC v 210-220-230 Owners Corp.*, 59 AD3d 579 [2d Dept 2009]) and specifically to determine whether a lease has terminated (*40 West 67<sup>th</sup> Street Corp v Pullman*, 100 NY2d 147 [2003]).

Because equity abhors a forfeiture of valuable leasehold interests (*Zaid Theatre Corp.v Sona Realty Co.*, 18 AD3d 352 [1<sup>st</sup> Dept 2005]), the law requires strict compliance with the notice provisions in a lease for termination even where the lessee received actual notice (*Metropolitan Transp. Auth. v Cosmopolitan Aviation Corp.*, 99 AD2d 767 [2d Dept 1984], *affd* 64 NY2d 623 [1984] citing *Hendrickson v Lexington Oil Co.*, 41 AD2d 672 [2d Dept 1973]).

Here, the administrator states that he did not receive notice by registered mail. In addition, the lease does not provide for the method of giving a notice of termination to an administrator of a deceased lessee. Therefore, there can be no termination of the lease based upon default in paying maintenance charges and late fees. The remedy for the omission of a term in a contract is an application to the court to supply the missing term based upon commercial practice (*Metro-Goldwyn-Mayer, Inc. v Scheider*, 40 NY2d 1069 [1976]). However, that question is not presently before the court.

The corporation’s motion to dismiss for lack of standing is therefore denied.

The corporation alternatively seeks to dismiss the petition on the grounds that the estate

failed to submit adequate proof that a second contract of sale was submitted to the Board of Directors. Essentially, this part of the motion seeks dismissal for failure to state a cause of action (CPLR 3211[a][7]). The affidavit of the petitioner states that a second contract was executed and submitted. The corporation does not specifically deny the existence of a contract (petitioner has submitted a copy of a letter from Wells Fargo approving the contract), but the affidavit of the President of the Board of Directors states that it was not submitted.

In reviewing a motion to dismiss, the allegations in the petition are deemed to be true (*Dunn v Gelard*, 59 AD3d 385 [2d Dept 2009]). The corporation is entitled to dismissal only if petitioner's affidavit establishes conclusively that the estate has no cause of action (*Godfrey v Spano*, 13 NY3d 358 [2009]). Petitioner is not required, in opposition to a motion to dismiss, to supply evidentiary proof of the contract and its submission to the Board of Directors (*Ruvello v Orofino Realty Co.*, 40 NY2d 633 [1976]). The disagreement as to submission presents an issue of fact (*cf. Baywater Health Related Facility v New York State Dept. of Health*, 57 AD2d 996 [3d Dept 1977]), which cannot be determined on the papers.

Accordingly, the motion to dismiss for failure to state a cause of action is denied. On the trial of this proceeding, the estate will be required to furnish the contract upon which it relies and proof of its submission for approval, which was a condition for obtaining the consent of the Board of Directors.

The corporation seeks summary judgment on the grounds that (1) the corporation was granted unlimited authority to reject any contract of sale, and (2) if the corporation's authority is not unlimited, it had a right to reject the sale on the grounds that an inadequate price would diminish the value of other apartments. The estate contends that (1) the corporation's authority is

not unlimited, (2) the corporation did not act in good faith, and (3) the corporation's rejection of the sale constitutes an unreasonable restraint on alienation.

Where a lease gives the Board of Directors of a cooperative apartment unlimited discretion to withhold consent to a sale, the business judgment rule prohibits judicial inquiry into a decision made by the Board taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Pink v Half Moon Co-Op Apartments South, Inc.*, 68 AD3d 739, [2d Dept 2009]; *Oakwood on the Sound, Inc. v David*, 63 AD3d 893 [2d Dept 2009]). The law recognizes, however, that a decision of the Board of Directors might be arbitrary or malicious or otherwise abusive even though the Board is acting in the best interest of the corporation (*40 West 7<sup>th</sup> Street Corp v Pullman*, 100 NY2d 147 [2003]).

Whether or not the corporation acted in good faith and is therefore entitled to protection of the business judgment rule cannot be decided on the motion for summary judgment (*85 Fifth Ave., 4<sup>th</sup> Floor, LLC v I.A. Selig, LLC*, 45 AD3d 349 [1<sup>st</sup> Dept 2007]).

In addition, petitioner's cause of action for unreasonable restraint on alienation requires a hearing on issues of fact including the question of fair market value.

The estate does not seek summary judgment on the question of unlawful eviction and that issue is reserved for trial.

Accordingly, the corporation's motion to dismiss the petition is denied. The estate's

motion for summary judgment is denied. The corporation's cross-petition for summary judgment is denied.

The matter will appear on the court's calendar on March 11, 2010, at 9:30 a.m. for a conference to schedule pre-trial discovery and to select a trial date.

Settle order.

Dated: February 22, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court