

Murlar Equities v 328 W. 96th St. Owners Corp.

2011 NY Slip Op 32944(U)

October 31, 2011

Sup Ct, NY County

Docket Number: 115854/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 115854/2010
MURLAR EQUITIES
vs.
328 WEST 96TH STREET OWNERS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

Motion to/for _____
_____ | No(s). 6
_____ | No(s). 2
_____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

FILED

NOV 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/31/11


HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MURLAR EQUITIES,

Index No.
115854/10

Plaintiff,

**DECISION
and ORDER**

- against -

328 WEST 96th STREET OWNERS CORP.,
SCOTT B. SCHULTZ, GREG McDONALD,
MATTHEW LUKOSE, CHRISTOPHER MARTINEZ
and MARK FESSEL,

Mot. Seq.
002

FILED

Defendants.

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HON. EILEEN A. RAKOWER

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Murlar Equities ("Murlar") is a partnership comprising of brothers Murray and Lawrence Zucker. Murlar claims that it is the holder of unsold shares in defendant 328 West 96th Street Owners Corp. ("the co-op") pertinent to Units 5C and 5D of 328 West 96th Street in New York County. Murlar states that the property was converted to a co-op on or around March 2, 1988. On or around March 3, 1988, Murlar executed a proprietary lease for 5C and 5D. Murlar states that it thereafter began to sublet the apartments.

Murlar asserts four causes of action against Defendants. Murlar's first cause of action alleges that it is the holder of unsold shares appurtenant to, and the proprietary lessee of, Apartments 5C and 5D. As such, Murlar claims that it is exempt from paying any charges or fees to the co-op for subletting its units. However, despite its status as a holder of unsold shares, Defendants "have wrongfully deprived the plaintiff of its right to sublet apartments 5C and 5D" by "wrongfully impos[ing] charges against [Murlar's] account for prior subletting," in violation of the proprietary lease, by-laws and offering plan.

Murlar's second cause of action alleges that Defendants continue to refuse to allow it to sublet the subject units, and "have threatened to deny access to [Murlar's]

prospective subtenants, such that [they] cannot see or inspect the premises.” Murlar claims that this has caused it to “suffer monetary loss, the diminution of [its] leasehold, and the loss of their proprietary rights.” Murlar claims that Defendants’ actions have further caused it to incur legal fees, and have exposed Murlar to potential liability for failure to deliver possession of its units.

The third cause of action alleges that, in accordance with the terms of the proprietary lease and pursuant to Real Property Law §234, Murlar is entitled to reasonable attorney’s fees incurred in connection with this action.

Murlar’s fourth and final cause of action claims that, through the actions set forth above, the individually-named board members of the co-op have breached their fiduciary duties to Murlar.

In its affidavit, Murlar claims that, since 2000, the co-op began to claim that Murlar was not a holder of unsold shares. Accordingly, the co-op began to charge Murlar fees and expenses for subletting the apartments. Murlar states that it advised the management company by letter dated November 10, 2000 that Murlar maintains sponsorship rights. Murlar states that, “last year,” after 5D became vacant, Murlar’s efforts to sublet the apartment were thwarted by the co-op, which “interfered with the inspection of the premises by [prospective] tenants by posting signs and shutting off the electric power to the apartment.” While the apartment was ultimately rented to a third party in December of 2010, Murlar states that “for a long period of time, the apartments remained vacant due to the acts of the defendants.” Murlar further claims that defendants “continued to interfere with the plaintiff and have attempted to charge the plaintiff with fees and expenses that are incorrect and violate the law”

Murlar now moves for an order granting summary judgment on the issue of liability and directing an assessment of damages. Murlar submits the affidavit of Murray Zucker. Annexed to the affidavit as exhibits are copies of the proprietary lease; Murlar’s shares; and Murlar’s November 10, 2000 letter to the management company. Also annexed to the affidavit is a March 3, 1989 letter from Lawrence Schlosser on behalf of the co-op. The letter states

Dear Murray & Larry:

Enclosed please find stock Certificate Number 26 Four

Hundred Ninety Five (495) Shares and Stock Certificate Number 27 for Five Hundred Ten (510) Shares of 328 West 96th Street Owners Corp. along with the Proprietary Leases for apartments 5C and 5D at the property known as 328 West 96th Street, New York, New York. This transfer is being made to you as Holders of Unsold Shares and you shall continue to have all rights of Holders of Unsold Shares pursuant to the terms of the Offering Plan and Proprietary Lease.

Defendants oppose the motion and cross-move for summary judgment. Defendants submit an attorney's affirmation and the affidavit of Scott B. Schultz, President of the co-op and a named defendant herein. Defendants point to paragraph 37 of the proprietary lease, which provides

The term 'Unsold Shares' means and refers to shares of the lessor [the co-op] which have been issued or transferred to the Sponsor or to an individual or individuals produced by the Sponsor as provided in Section R of the Offering Plan - A Plan to Convert to Cooperative Ownership - Premises 328 West 96th Street, New York, New York ... to acquire Unsold Shares nominee or designee of such Sponsor or individual(s) and all shares which are Unsold Shares retain their character as such (regardless of transfer) until an individual purchases same for use and occupancy by himself or a member of his family ...

Section R of the Offering Plan provides, in pertinent part

A Holder of Unsold Shares shall amend the Plan to provide current and accurate information concerning all Holders of Unsold Shares as is required for principals of the Sponsor by the regulations promulgated by the Department of Law, until the shares held as Unsold Shares have been sold to bonafide purchasers. A Holder of Unsold Shares also shall provide prospective purchasers with a copy of the Offering Plan and all filed amendments.

Defendants annex copies of all amendments made to the Offering Plan. They note that Apartments 5C and 5D are never designated as unsold shares. Schultz further states that Murlar has received and retained certain tax abatements from the State of New York that pertain only to holders of sold shares, and annexes a printout of the co-op's ledger demonstrating receipt of certain tax abatements. As for the letter from Schlosser, Defendants state that

Nowhere in said correspondence is there a formal attestation of the character of the transfer being made by Mr. Schlosser. Nowhere in said document is there indication of formal recognition of the transfer by [the co-op] as a transfer of unsold shares. Nowhere is there any indication of an amendment to an Offering Plan memorializing the transfer as indicating that the apartments at issue were recognized as a transfer of unsold shares.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

As a preliminary matter, the court notes that Murlar has failed to provide copies of the pleadings with its motion filed with the court, as is required by CPLR §3212(b). However, the failure to annex copies of the pleadings is a procedural defect which the court may overlook where the record is sufficiently complete (*Welch v.*

Hauck, 18 A.D.3d 1096, 1098 [3rd Dept. 2005] (cited by *Breytman v. Olinville Realty, LLC*, 46 A.D.3d 484 [1st Dept. 2007]); see also *Pennbus Realities, LLC v. H Eighth Ave. Assoc. LLC*, 2010 NY Slip Op 51991U [Sup. Ct. N.Y. County 2010]). Plaintiff's failure to annex the pleadings with the motion papers filed with the court appears to be a clerical error. Although Murlar's affidavit in support states, "Annexed hereto and made a part hereof as **Exhibit 'E'** are copies of the pleadings," the moving papers filed with the court do not contain an Exhibit "E". The court further notes that Defendants do not note or object to copies of the pleadings missing from Murlar's motion. Accordingly, inasmuch as copies of the pleadings were previously filed with the court in a prior (withdrawn) motion, the court will consider the motion.

The Court of Appeals has held that the issue of whether a party is a holder of unsold shares "should be determined solely by applying ordinary contract principles to interpret the terms of the documents defining their contractual relationship with the cooperative corporation" (*Kralik v. 239 E. 79th St. Owners Corp.*, 5 N.Y.3d 54, 57 [2005]). As noted above, the Offering Plan and proprietary lease require that the Offering Plan be amended to list all holders of unsold shares. The record indicates that the Offering Plan has been amended 13 times between 1988 and the present; 11 of these amendments occurred after Murlar purchased its shares in March of 1989. The shares appurtenant to the subject apartments are never listed as unsold shares in any of these amendments. This is sufficient prima facie evidence that Murlar is not a holder of unsold shares.

However, the court finds that Murlar has demonstrated the existence of an issue of material fact in light of the March 3, 1989 letter from Schlosser, a purported admission by the co-op, signed on behalf of the co-op, claiming to transfer the shares for the subject units to Murlar as "Holders of Unsold Shares." If the co-op did indeed transfer "unsold shares" to Murlar, Defendants would not be able to challenge plaintiff on this point based solely upon the fact that the units are not listed as "unsold shares" in any amendments to the Offering Plan, as it would have been the responsibility of Defendants, not Murlar, to amend the Offering Plan (see *A.H.A. Gen. Constr. v. New York City Hous. Auth.*, 92 N.Y.2d 20, 31 [1998]) (It is a "well-settled and salutary rule that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself").

Plaintiff contends it holds shares as "unsold shares." Defendants, while not contesting the transfer of the shares to plaintiff itself, challenges the Schlosser letter

that accompanied the transfer and designated the shares "unsold shares." Such designation is not confirmed on the share certificates, in the offering plan and amendments to plan, or in any other corporate record presented. It is important to note that the amendments to the plan, themselves, contain clear errors. The number and allocation of total shares representing the designated "unsold shares" is internally inconsistent (see for example, the Fourth Amendment to the Offering Plan wherein it states "Sponsor holds 7,465 unsold shares of the apartment Corporation representing seventeen (17) apartments or (68%) percent of the total number of apartments. See Schedule A annexed hereto as Exhibit A." Exhibit A then goes on to list 16 units for a total number of shares of 7,165).

The Court cannot determine as a matter of law, on the record before it, that plaintiff should or should not be treated as a holder of unsold shares. The inconsistencies between the corporate filings and the Schlosser letter, despite defendants conclusory contest to Schlosser's authority to have designated the shares as "unsold shares," create an issue of fact sufficient to defeat both the motion and the cross motion.

Wherefore it is hereby

ORDERED that Murlar's motion for summary judgment is denied; and it is further

ORDERED that Defendants' cross-motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 31, 2011


EILEEN A. RAKOWER, J.S.C.

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