NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

RUBY COLE, NATALIE FERMIN, RAFAEL FERMIN, ELBA FERMIN-CABRERA, JULIA FERMIN, MILLIE RODRIGUEZ and AZAD ALLY,

Plaintiffs,

Index No. 302277/07

-against-

1015 CONCOURSE OWNERS CORP., M 1015 G.C. LLC and M & L MILEVOI MANAGEMENT INC.,

Defendants.

HON. MARK FRIEDLANDER

Plaintiffs move for summary judgment and a final order declaring the rights and obligations of the parties.

An extensive discussion of the issues herein was previously set forth by this Court in prior decisions. However, a brief synopsis of the factual background, which is not in dispute, is set forth for the purpose of continuity. Plaintiffs are seven cooperators who reside in the building at 1015 Grand Concourse, which building was converted into a cooperative in 1989. There are 59 apartments in the building, of which approximately twenty per cent are owned by plaintiffs or by others similarly situated. Defendants are 1015 Concourse Owners Corporation ("CO") which owns the building; M 1015 G.C. LLC ("MGC"), an entity which owns approximately eighty per cent of the shares of the co-op, and has proprietary rights to a corresponding percentage of apartments (which are, for the most part, rented to "non-owner" tenants); and M & L Milevoi Management, Inc. ("MLMI"), the management company.

By Decision and Order, dated November 13, 2008, and as affirmed by the Appellate Division, 70 A.D.3d 597 (2010), it was held, *inter alia*, that MGC was a bulk purchaser from the sponsor's successor, and as such, is bound by the sponsor's obligations. As a result, MGC is in fact a holder of unsold shares, even though it was never officially designated as such, and it has never complied with regulations governing holders of unsold shares.

There is no statutory obligation by sponsors to dispose of all or a specified number of unsold shares in a cooperative after the offering plan has become effective. However, an implied intent or promise to do so within a reasonable time may be inferred from the offering plan and subscription agreement. *511 Est 232nd Owners Corp. v. Jennifer Realty Co.*, 285 A.D.2d 244 (1st Dept. 2001). After review of the offering plan, the Court finds such an implied intent or promise. Furthermore, no evidence whatsoever has been produced by MGC demonstrating a good faith attempt to sell the unsold shares in the over ten years since MGC's purchase thereof.

Nevertheless, plaintiffs' position that all unsold shares be sold within one year is untenable, as the conversion was accomplished pursuant to a non-eviction plan which prohibits sponsors from evicting tenants merely because they refuse to purchase shares in the cooperative. General business Law §352-333 [2][c] [ii].

Based upon the foregoing, plaintiffs' motion is granted to the following extent:

Plaintiffs are entitled to a declaratory judgment as follows:

(1) That the plaintiffs, *inter alia*, and/or other shareholders who subsequently come to own and occupy their apartments, are entitled to control the Board of Directors of CO;

(2) That MGC stands in the shoes of the original sponsor, and is bound by the original sponsor's obligations, including the obligation to provide a building reserve fund for the benefit

of CO;

(3) That MGC is enjoined from dissolving CO absent a Court Order permitting same;

(4) That MGC, and any successor party, whether designated, or undesignated, as Holder of Unsold Shares, and/or any non-resident investor, upon the apartment(s) becoming vacant, must use its best efforts, in arms length transactions, to sell all the shares of stock it owns, with the propriety leases appurtenant thereto, to a bona fide purchaser who intends to own and occupy said unit(s);

(5) That defendants are to forthwith permanently relinquish control of the Board of Directors of CO, by restricting their representation on a five member Board of Directors to one seat; and plaintiffs are to select among themselves four temporary members of the Board of Directors, and thereafter an annual meeting shall be held for election of 4 members of the Board of Directors, with votes cast only by those who own and occupy their units;

(6) That the renting or rerenting of apartments to "non-owner" tenants shall be permitted only on consent of the new Board of Directors, upon a showing of economic necessity by MGC, including the unavailability of purchasers after the making of good faith efforts to find potential buyers, and the need for rental income on a temporary basis to permit proper maintenance of the building. The consent of the Board of Directors shall not be unreasonable withheld.

(7) That defendants are to turn over forthwith to plaintiffs' counsel all original corporate and banking records of the CO, including but not limited to original mortgages, notes, stock certificates, proprietary leases, minutes and contracts;

(8) That defendant MGC is to prepare an Amendment to the Offering Plan detailing all of its purchases of apartments in CO and the shares of stock and proprietary leases appurtenant

thereto, and to list each and every apartment it controls, the current person or persons who may occupy the unit, lease terms, (including the date the lease is to expire, if applicable), the current maintenance paid, the current rent received, whether the apartment is subject to rent stabilization or control, and all apartment buy and sale transactions from the date it purchased its interest in the corporation up to the date the amendment is filed, and to disclose the financial obligations of MGC, including any encumbrances on the individual units, in a form acceptable for filing with the Attorney General's Office, which amendment shall be filed within sixty days of the date of service of a copy of an order or judgment entered herein, with notice of entry;

(9) That the County Clerk and Clerk of the Supreme Court, Bronx County, and/or the Commissioner of Finance of the City of New York, shall release the $15,000.00 deposited pursuant to the bonding requirement previously ordered by this Court, plus accrued interest, after deducting any lawful fees, to plaintiff's counsel, as attorney;

(10) Voiding all undertakings provided by plaintiffs, including removing and voiding any liens placed on the apartments of plaintiffs specifically to secure and protect defendants when the original injunction was issued by this Court;

(11) Ordering that plaintiffs' counsel continue to hold in escrow the disputed "maintenance increase" provided by plaintiffs pursuant to the Court's Order dated November 9, 2007 and January 2, 2008, until the newly constituted Board of Directors, controlled by the plaintiffs, is established, and to thereafter follow the directions of such newly reconstituted Board regarding such funds;

(12) That defendant MGC is directed to comply with the unfulfilled obligations of the prior Sponsor to pay to the Reserve and Working Capital Fund (the "Fund"), three percent (3%)

of the sales price of any apartments sold, with statutory interest from the date these funds should have been deposited in the Fund, and, going forward, to pay within thirty (30) days of sale of any apartments, three percent (3%) of the sales price to the MGC's Reserve Fund, which is required under the Offering Plan.

Plaintiffs' request to cancel and void any contract CO nay have with the management company is denied. The new Board of Directors, when constituted, may take whatever lawful action it deems necessary and appropriate with regard to any outstanding contracts.

The counterclaim of defendants for legal fees is dismissed. Plaintiffs' request for legal fees pursuant to RPL§234 is denied, as the action herein was not one to enforce a covenant or obligation of plaintiffs' leases or a violation of their leases. *Jerulee v. Sanchez,* 43 A.D.3d 328 (1st Dept. 2007); *Ellison v. New York State Div. Of Housing and Community Renewal,* 33 A.D.3d 457 (1st Dept. 2006); *Busbee v. Ken-Rob Co.,* 280 A.D.2d 406 (1st Dept. 2001). The Court further declines to pierce the corporate veil or award legal fees to plaintiffs under BCL§626.

Settle Order.

Dated: 5/11/11

MARK FRIEDLANDER, J.S.C.