**Queens Units Venture, LLC v Tyson Ct. Owners Corp.**

2012 NY Slip Op 31390(U)

May 18, 2012

Supreme Court, New York County

Docket Number: 111568/2011

Judge: Louis B. York

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SCANNED ON 5/24/2012

[* 1]

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

LOUIS B. YORK
J.S.C.

**PRESENT:** _____ **PART** 2
*Justice*

Index Number : 111568/2011
QUEENS UNITS VENTURE, LLC
vs.
TYSON COURT OWNERS CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

**The following papers, numbered 1 to _____ , were read on this motion to/for** _____

**Notice of Motion/Order to Show Cause — Affidavits — Exhibits** _____ **No(s).** _____

**Answering Affidavits — Exhibits** _____ **No(s).** _____

**Replying Affidavits** _____ **No(s).** _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

FILED
MAY 23 2012
COUNTY CLERK'S OFFICE
NEW YORK

**Dated:** 5/18/12

_____, J.S.C.
LOUIS B. YORK

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 2**

QUEENS UNITS VENTURE, LLC,
Plaintiff,

-against-

TYSON COURT OWNERS CORP. and ALL AREA REALTY SERVICES, INC.,
Defendants.

INDEX NO. 111568/2011

**JUDGMENT & ORDER**

FILED

MAY 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

**LOUIS B. YORK, J.:**

Plaintiff Queens Units Venture, LLC, moves for summary judgment, pursuant to CPLR 3212, declaring that its shares in defendant Tyson Court Owners Corp. (TCOC) have the status of "Unsold Shares," and to receive the associated proprietary leases and share certificates. Defendant All Area Realty Services, Inc. (All Area) cross-moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it.

**Factual Background**

TCOC owns the residential cooperative building located at 5 North Tyson Avenue, Floral Park, New York (the Building). All Area is the Building's managing agent. The sponsor of the cooperative conversion of the Building pledged 1,556 TCOC shares (the Shares) as security for a $2.3 million bank loan, which was later assigned to plaintiff. *See* Motion, Exs. E-I. The Shares are allocated to units A2, A5, B1, B3, C1, C2 and C3 in the Building. The sponsor eventually defaulted on the loan, and plaintiff purchased the Shares.

Plaintiff commenced the instant action on October 12, 2011, asserting causes of action for a declaratory judgment on the status of the Shares, tortious interference with contract and attorney's fees. Motion, Complaint, Ex. K. The complaint alleges that All Area has not approved

plaintiff's purchase of the Shares and TCOC has refused to permit transfer of the shares to plaintiff. *Id.*, ¶¶ 26, 27.

**Legal Standard**

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

**Plaintiff's Motion for Summary Judgment**

Plaintiff claims that the Shares are "Unsold Shares," defined in TCOC's proprietary lease, section 38 (a), as

> "the shares of the Lessor which were issued to the Lessor's grantor(s) or individuals produced by the Lessor's grantor(s) pursuant to the Plan of cooperative organization of Lessor or to a nominee or designee of such grantor(s) or individual(s); and, all shares which are Unsold Shares retain their character as such (regardless of transfer) until (1) 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 (2) the holder of such shares (or a member of his family) become a bona fide occupant of the apartment. This Paragraph 38 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."

Motion, Ex. A.

The proprietary lease goes on to permit the subletting of the associated apartment and the assignment of its proprietary lease without "the consents (*sic*) of the Directors or shareholders." *Id.*, § 38 (b). The Shares, according to plaintiff, never became the property of a purchaser for bona fide occupancy, and neither plaintiff nor the debtor, the sponsor, or a family member, became a bona fide occupant of the associated apartments. Additionally, the cooperative offering plan, at page 55, stated that "[a]ny Unsold Shares and leases acquired by a holder of Unsold Shares may be sold or assigned by him or his apartment may be sublet by him, subject only to the consent of the Managing Agent or successor agent, which consent may not be unreasonably withheld." Motion, Ex. B. As a result, plaintiff requests that the share certificates and the proprietary leases for the Shares be issued to it. Nothing in the proprietary lease requires board approval for such a transaction involving unsold shares, plaintiff maintains.

TCOC opposes the motion on several grounds: (1) plaintiff has no standing; (2) no shares or proprietary leases were ever issued to plaintiff; (3) transfer of pledged shares by a secured party is covered by a section of the proprietary lease unreferenced by plaintiff; (4) All Area is an improper party because TCOC's board of directors has full and sole discretion in this matter; and (5) plaintiff is not entitled to damages or legal fees because it has no rights under the proprietary lease.

TCOC characterizes plaintiff merely as an "investor," "not even a shareholder in the first place, it has no basis to assert any rights." Gordon Affirm., ¶ 4. TCOC cites *Sims v Darwood Management, Inc.*, 147 AD2d 373 (1st Dept 1989), where the prospective buyer-plaintiff of a cooperative apartment sued for specific performance and declaratory relief against the sellers, and the cooperative corporation's board of directors and management company. The sellers held unsold shares allocated to the apartment at issue. The language of the sellers' proprietary lease

mirrored the language of the proprietary lease and the offering plan in the instant action. When the *Sims* board of directors set certain conditions on the transfer of the shares to the prospective buyer, he brought suit, arguing that the transaction needed "the consent only of the Lessor's then Managing Agent, provided the same shall not be unreasonably withheld[,]" in the words of the proprietary lease. *Sims*, 147 AD2d at 374. The court held that this provision of the proprietary lease "indicates an intention to benefit the *holder* of such [unsold] shares by facilitating assignments of the lease, but nothing in this provision suggests an intent to benefit third-party assignees." *Id.* at 376-377.

However, *Sims* does not offer proper guidance in the instant action, because the plaintiff here is not awaiting delivery of the Shares in order to complete a real estate buy/sell deal, as was the case in *Sims*. In 2008, Thomas John, the Building's sponsor, borrowed $2.3 million from a bank. At the time, according to All Area's counsel, "[t]he shares that corresponded to those particular [unsold] apartments were deemed to be 'Unsold Shares' and remained under the control and ownership of the Sponsor, Thomas John, who continued to collect the rent." In 2010, the bank, as Seller, assigned and conveyed to plaintiff "all right, title and interest of Seller in, to and under all of the documents, instruments, certifications and agreements . . . in connection with the loan . . . made by Seller to Thomas John secured by, inter alia, seven (7) cooperative apartments at 5 North Tyson Avenue, Floral Park, New York." Motion, Ex. E. When John defaulted on his loan, plaintiff gained possession of his collateral, the Shares.

The New York State Court of Appeals has "conclude[d] that whether plaintiffs are holders 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 NY3d 54, 57 (2005). Following *Kralik*,

the Appellate Division, First Department, has held that "the character of the unsold shares had not changed in that the original buyer from the sponsor was a holder of unsold shares within the meaning of the offering plan, and the shares never lost their character as unsold because the apartment was never occupied by a purchaser for a bona fide occupancy." *Mittman v Netherland Gardens Corp.*, 55 AD3d 512, 513 (1st Dept 2008). Again, when a party "indisputably acquired 80% of the co-op's shares in a bulk purchase from the sponsor's successor, it is deemed a sponsor, and . . . is in fact a holder of unsold shares." *Cole v 1015 Concourse Owners Corp.*, 70 AD3d 597, 598 (1st Dept 2010); *see also LJ Kings, LLC v Woodstock Owners Corp.*, 46 AD3d 321, 322 (1st Dept 2007) ("There being no dispute that plaintiff purchased its shares from a designated holder of unsold shares, that no bona fide purchaser has purchased the apartment for occupancy, and that neither plaintiff nor any immediate family member ever occupied the apartment, plaintiff is clearly a holder of unsold shares under the controlling documents, i.e., the offering plan and proprietary lease").

All Area cites *Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74 (1st Dept 2008), where the Appellate Division affirmed denial of summary judgment to a plaintiff who was denied closing by a cooperative building's board of directors. Plaintiff argued that its shares transferred from parents and gained through foreclosure were unsold shares and its acquisition of the associated apartment was not subject to board approval. The Court read the proprietary lease's provision for unsold shares as "limit[ing] any transfers of 'unsold shares' to those only where the transferor is an individual designated or produced by the sponsor." *Sassi-Lehner*, 55 AD3d at 81. All Area argues that this would preclude recognizing the transfer in the instant action as preserving the status of unsold shares. However, *Cole*, decided two years later by the Appellate Division, First Department, held that plaintiff was a holder of unsold shares "even

though it was never formally designated as such and has never complied with regulations governing holders of unsold shares." 70 AD3d at 598.

Plaintiff completed a discrete transaction assigning it sole interest in the Shares, which had never lost their identity as unsold shares under the terms of TCOC's proprietary lease. This is consistent with the position of UCC § 9-617 (1) that a secured party's disposition of collateral after default transfers to a transferee for value all of the debtor's rights in the collateral. Plaintiff's posture is akin to the prevailing parties in *Mittman* and *Cole*, purchasers of shares originating with the sponsor of the cooperative building's conversion. Movement of the Shares through several hands by itself did not affect their identity as unsold shares as long as they never became the property of a purchaser for bona fide occupancy, and neither plaintiff nor the debtor, or a family member, became a bona fide occupant of the associated apartments. Plaintiff, a transferee for value who acquired all of the debtor's rights in the collateral, is the holder of unsold shares according to TCOC's proprietary lease section 38 (a).

TCOC contends that paragraph 17 of its proprietary lease governs the transfer of shares by a secured party under a foreclosure. Paragraph 17 (a) states:

> "A pledge of this Lease and the shares to which it is appurtenant shall not be a violation of this Lease; but, except as otherwise provided elsewhere herein, neither the pledgee nor any transferee of the pledged security shall be entitled to have the shares transferred of record on the books of the Lessor, nor to vote such shares, nor to occupy or permit the occupancy by others of the Apartment, nor to sell such shares or this Lease, without first obtaining the consent of the Lessor . . ."

Consent is unneeded if the shares were transferred as a result of a default on a bank loan that financed the purchase of the shares, under paragraph 17 (b) (iii), which reads:

> "If the purchase by the Lessee of the shares allocated to the Apartment was financed by a loan made by a bank . . . and a default or an event of default shall have occurred . . . an individual designated by the Secured Party, or the individual nominee of the individual so designated by the Secured Party, shall be entitled to

become the owner of the shares . . . ."

TCOC argues, however, that consent was needed, because Thomas's loan was not used to purchase the Shares. His pledge of the Shares as collateral for the 2008 loan, approximately 19 years after the closing under the offering plan, without TCOC's consent, violated the proprietary lease, and disqualified the proposed transfer of the Shares.

Plaintiff contends that reliance on paragraph 17 is unwarranted, because the requirement to obtain consent before pledging shares is "except[ed] as otherwise provided elsewhere herein," specifically in paragraph 38 (b) addressing unsold shares. Unsold shares are insulated from the consent process described in paragraph 17 by the workings of paragraph 38 (b). There is no contractual restraint on plaintiff's attempt to exercise its right to the Shares.

TCOC's claims that All Area is an improper party because TCOC's board of directors has full and sole discretion in this matter. All Area similarly contends that it lacks independent discretion over whether or not to transfer shares. Both positions are belied by the words of the offering plan that require the consent of the managing agent to the assignment of unsold shares. All Area is, therefore, a proper party to this action, and shall be bound by this decision.

TCOC's final objection is to plaintiff's cause of action for attorneys' fees. The proprietary lease provides that:

> "If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense . . . in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent."

Motion, Ex. A, § 28.

New York's Real Property Law § 234 provides a reciprocal right of a lessee/tenant to recover "the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the

failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action." *See Duell v Condon*, 84 NY2d 773, 780 (1995) ("The overriding purpose of Real Property Law § 234 was to level the playing field between landlords and residential tenants, creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense"). In this instance, corporate entities are in dispute. No residential tenant is struggling with a landlord to gain or maintain the family home. Therefore, that part of the plaintiff's motion requesting attorneys' fees shall be denied.

**All Area's Cross Motion for Summary Judgment**

That part of All Area's cross motion unnecessarily requesting denial of plaintiff's motion is denied in light of the decision above. Additionally, All Area asks for dismissal of all claims as against it, arguing that it "does not have any authority or discretion vis-a-vis the transfer of shares." Sklar Affirm., ¶ 7. That matter also was addressed above, and All Area shall be bound by this order. Its cross motion, therefore, is denied in the entirety.

Accordingly it is,

ORDERED that Queens Units Venture, LLC's motion for summary judgment, seeking a declaration that its shares in defendant Tyson Court Owners Corp. have the status of "Unsold Shares," and to receive the associated proprietary leases and share certificates, is granted; and it is further

ADJUDGED and DECLARED that the shares allocated to units A2, A5, B1, B3, C1, C2 and C3, in the building owned by Tyson Court Owners Corp., located at 5 North Tyson Avenue, Floral Park, New York, are Unsold Shares, as defined by the governing proprietary lease, and Queens Units Venture, LLC, holds all right, title and interest to these shares; and it is further

ORDERED that defendant All Area Realty Services, Inc., issue and deliver the associated proprietary leases and share certificates for these Unsold Shares to Queens Units Venture, LLC, within 14 days of receipt of this order; and it is further

ORDERED that the cross motion by defendant All Area Realty Services, Inc., is denied.

**DATED:** **May 18, 2012**

**ENTER:**

FILED

MAY 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

**J.S.C.**

LOUIS B. YORK
J.S.C.