

Elias v Orsid Realty Corp.

2013 NY Slip Op 30419(U)

February 8, 2013

Supreme Court, New York County

Docket Number: 106727/2010

Judge: Lucy Billings

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

LUCY BILLINGS
J.S.C.

PRESENT: _____
Justice

PART 46

Index Number : 106727/2010
ELIAS, SIMON
vs.
ORSID REALTY
SEQUENCE NUMBER : 001
OTHER RELIEFS

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

The following papers, numbered 1 to 5, were read on this motion for summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2, 3
Answering Affidavits — Exhibits _____ | No(s). 4
Replying Affidavits _____ | No(s). 5

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

*The court grants defendant's motion for summary judgment in part and plaintiff's
CWDSS-motion for summary judgment in part and otherwise denies the motion and
CWDSS-motion. C.P.L.R. §§ 3001, 3212(b) and (e).*

FILED

MAR 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/8/13

Lucy Billings, J.S.C.

LUCY BILLINGS

J.S.C.

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x

SIMON ELIAS and IZAK SENBAHAR,

Plaintiffs

Index No. 106727/2010

- against -

DECISION AND ORDER

ORSID REALTY CORPORATION and 75 EAST
END OWNERS, INC.,

Defendants

-----x

FILED

MAR 01 2013

NEW YORK
COUNTY CLERK'S OFFICE

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs, the holders of unsold shares in defendant cooperative corporation that owns the building at 75 East End Avenue, New York County, seek a declaratory judgment that sales of their shares are not subject to a "Financing Rule" adopted by the cooperative and defendant Orsid Realty Corporation, the cooperative's managing agent, and applied by the managing agent. Paragraph 38(b) of the cooperative's Propriety Lease authorizes Orsid Realty, not the cooperative itself, to approve the sales of unsold shares. See Likokas v. 200 E. 36th St. Corp., 48 A.D.3d 245, 246 (1st Dep't 2008); Yatter v. Continental Owners Corp., 22 A.D.3d 573, 574 (2d Dep't 2005). Application of the Financing Rule disqualifies any prospective buyer who proposes to finance more than two-thirds of the purchase price. Plaintiffs seek a companion injunction prohibiting Orsid Realty from applying the Financing Rule to the sales of plaintiffs' shares.

Defendants move for summary judgment on plaintiffs' claim

for declaratory relief, declaring in defendants' favor that defendants have permissibly applied their Financing Rule and may continue to apply it, and dismissing plaintiffs' claim for injunctive relief. C.P.L.R. §§ 3001, 3212(b). Plaintiffs cross-move for summary judgment on their two claims. Both sides stipulated that the court may consider their exhibits authenticated and admissible for purposes of summary judgment. These exhibits set forth specific evidentiary facts demonstrating entitlement to a declaratory judgment. Big Four LLC v. Bond St. Lofts Condominium, 94 A.D.3d 401, 402-403 (1st Dep't 2012); Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d 51, 57-58 (1st Dep't 2006); United States Fire Ins. Co. v. American Home Assur. Co., 19 A.D.3d 191, 192 (1st Dep't 2005); 319 McKibben St. Corp. v. General Star Natl Ins. Co., 245 A.D.2d 26, 29-30 (1st Dep't 1997). See Ahead Realty LLC v. India House, Inc., 92 A.D.3d 424, 425 (1st Dep't 2012); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 99-100 (1st Dep't 2009); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253, 254 (1st Dep't 2006).

II. IMPLEMENTATION OF THE FINANCING RULE UNDER THE PROPRIETARY LEASE

Although the cooperative originally adopted the Financing Rule for sales of apartments occupied by shareholders, which ¶ 16 of the Proprietary Lease authorizes the cooperative to approve, nothing prohibits Orsid Realty from consulting with the cooperative regarding the approval of sales of unsold shares or from adopting policies consistent with the cooperative's

policies. Concomitantly, nothing prohibits the cooperative from communicating its views regarding the approval of sales of unsold shares to its managing agent. Moses v. Brown Harris Stevens Residential Mgt., LLC, 279 A.D.2d 257 (1st Dep't 2001); Wiener v. 150 W. End Owners Corp., 298 A.D.2d 385, 386 (2d Dep't 2002).

The Proprietary Lease does limit Orsid Realty's approval process, however, insofar as ¶ 38(b) requires that the managing agent not unreasonably withhold or delay its consent to the sales of unsold shares. Therefore the lease authorizes Orsid Realty's adoption and application of a policy or condition for approval of such sales only if it does not permit unreasonable withholding of consent. Zimiles v. Hotel Des Artistes, Inc., 216 A.D.2d 45 (1st Dep't 1995); Berglund v. 411 E. 57th Corp., 118 A.D.2d 431 (1st Dep't 1986); Himmelberger v. 40-50 Brighton First Rd. Apts Corp., 94 A.D.3d 817, 819 (2d Dep't 2012); Giordano v. Miller, 288 A.D.2d 181, 182 (2d Dep't 2001). See Demas v. 325 W. End Ave. Corp., 127 A.D.2d 476, 478 (1st Dep't 1987); Board of Mgrs. of Oceana Condominium No. Four v. Akodes, 71 A.D.3d 812, 813 (2d Dep't 2010); Zilberfein v. Palmer Terrace Coop., Inc., 18 A.D.3d 742, 744-45 (2d Dep't 2005).

Defendants justify their Financing Rule on the premise that the rule protects the cooperative's interest in the financial stability of its building. As plaintiffs acknowledge, the managing agent, acting on the cooperative's behalf, bears a duty to screen prospective buyers' finances and to reject buyers whose finances are inadequate to protect the interests of the

cooperative's current shareholders. The cooperative is interested in assuring future shareholders' ability to pay maintenance charges regularly, as their failure to pay timely imposes a financial burden on other shareholders to make up the shortfall and maintain the cooperative's financial viability. Disapproval of financially weak buyers is thus rationally and legitimately related to the cooperative's interests. Gleckel v. 49 W. 12 Tenants Corp., 52 A.D.3d 469, 470 (2d Dep't 2008). See Keles v. Morningside Hgts. Hous. Corp., 8 A.D.3d 160, 161 (1st Dep't 2004); Stowe v. 19 E. 88th St., 257 A.D.2d 355, 356 (1st Dep't 1999).

Prospective buyers who propose to finance more than two-thirds of the purchase price, however, are not necessarily financially weak. Their finances are not necessarily inadequate to pay maintenance charges regularly or otherwise protect the interests of the cooperative's current shareholders. Allowing Orsid Realty to consider only the percentage of the purchase price prospective buyers propose to finance, to the exclusion of other factors that may bear on the adequacy of the buyers' finances and be rationally and legitimately related to the buyers' financial strength, is contrary to the cooperative's interests: the touchstone of reasonableness in this context. Gleckel v. 49 W. 12 Tenants Corp., 52 A.D.3d at 470. See West v. 332 E. 84th Owners Corp., 68 A.D.3d 499, 501 (1st Dep't 2009); Stowe v. 19 E. 88th St., 257 A.D.2d at 356; Demas v. 325 W. End Ave. Corp., 127 A.D.2d at 478.

Prospective buyers' applications to purchase plaintiffs' unsold shares include the buyers' employment records, income tax statements, contracts of sale, and applications to and commitments from the financing institutions: documents supplied at Orsid Realty's request. Nonetheless, Orsid Realty does not even review prospective buyers' applications if the buyers propose to finance more than two-thirds of the purchase price and therefore fail to satisfy the Financing Rule. Thus Orsid Realty does not consider any of the information in the applications showing the applicants' financial condition and ability to purchase and maintain a cooperative unit: their ability to repay the financing, pay maintenance, and shoulder all other financial obligations of cooperative ownership. Nor does Orsid Realty consider any other factor bearing on the cooperative's financial interests.

III. THE FINANCING RULE'S UNREASONABLENESS

Consideration of the percentage of the purchase price to be financed, as one factor in determining whether to approve a buyer, is reasonable. Consideration of only this factor, to the exclusion of all other factors that may bear on the adequacy of the buyer's finances, however, is unreasonable. Orsid Realty may reject only those buyers whose finances reasonably are considered inadequate. Stowe v. 19 E. 88th St., 257 A.D.2d at 356; Gleckel v. 49 W. 12 Tenants Corp., 52 A.D.3d at 470. See West v. 332 E. 84th Owners Corp., 68 A.D.3d at 501; Demas v. 325 W. End Ave. Corp., 127 A.D.2d at 478. Withholding consent to buyers without

even reviewing their applications and without considering all reasonable, objective factors is unreasonable. In sum, insofar as the Financing Rule automatically disqualifies buyers who propose to finance more than two-thirds of the purchase price, the rule results in an unreasonable withholding of consent, in violation of ¶ 38(b) of the Proprietary Lease.

As long as Orsid Realty retains its approval authority based on all relevant financial factors, the managing agent still may disapprove any buyer unable to shoulder a shareholder's financial responsibilities. A prohibition against the Financing Rule operating as an automatic disqualifier and excluding consideration of all other relevant factors does not remove the Proprietary Lease's requirement for Orsid Realty's consent or shift approval authority to plaintiffs according to their unfettered selection of buyers. Instead, such a prohibition honors the requirement for consent wherever reasonable to extend it.

IV. DISPOSITION

Consequently, the court grants defendants' motion for summary judgment only to the extent of awarding a declaratory judgment that defendant Orsid Realty Corporation and any other agent of defendant 75 East End Owners, Inc., may consider the percentage of the purchase price to be financed in determining whether to approve a buyer of unsold shares. C.P.L.R. §§ 3001, 3212(b) and (e). The court grants plaintiffs' cross-motion for summary judgment to the extent of awarding a declaratory judgment

and permanently enjoining defendants from applying the Financing Rule as follows. Defendants and their agents may not consider, and the court permanently enjoins them from considering, the percentage of the purchase price to be financed in determining whether to approve a buyer of unsold shares, so that that percentage (1) automatically disqualifies a buyer or (2) excludes consideration of any other factor bearing on the adequacy of the buyer's finances. C.P.L.R. §§ 3001, 3212(b) and (e); Likokas v. 200 E. 36th St. Corp., 48 A.D.3d 245. See Blutreich v. Almalgamated Dwellings, Inc., 46 A.D.3d 352, 353 (1st Dep't 2007); Finegan Family, LLC v. 77 Horatio St. Condominium, 38 A.D.3d 365, 366 (1st Dep't 2007).

The court otherwise denies defendants' motion and plaintiffs' cross-motion. This decision constitutes the court's order and judgment awarding declaratory and injunctive relief as set forth above and otherwise dismissing this action.

DATED: February 8, 2013

Lucy Billings
FILED LUCY BILLINGS, J.S.C.
MAR 01 2013 LUCY BILLINGS
NEW YORK J.S.C.
COUNTY CLERK'S OFFICE