

420 W 206th St. Owners Corp. v Lorick

2014 NY Slip Op 30348(U)

February 5, 2014

Sup Ct, New York County

Docket Number: 650403/12

Judge: Ellen M. Coin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 50

RECEIVED NYSCEF: 02/06/2014

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

PRESENT: COIN
Justice

PART 63

420 W. 206TH STREET OWNERS CORP.

INDEX NO. 650403/12

- v -

EDWARD LORICK, ET AL.

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for default judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3, 4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

~~NOT DECIDED~~ DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

Dated: 2/5/14

EW
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

420 W 206th STREET OWNERS CORP., by
its BOARD OF MANAGERS; JAMES W.
SWIFT; MARILYN NODA; KRIKOR KALFAYAN;
JORGE MORBAN; LANA GAITAN;

Plaintiffs,

- against -

EDWARD LORICK; A LEADERSHIP MANAGEMENT
CORPORATION; EDWARD LORICK d/b/a
A LEADERSHIP; JOHN DOES 1-10;

Defendants.

Index No.: 650403/12

DECISION/ORDER

COIN, ELLEN, J.:

This action arises out of a dispute between plaintiffs, a residential cooperative corporation and members of its board of directors, and defendant Edward Lorick (Lorick), a holder of unsold shares in the cooperative, over Lorick's rights and obligations as a holder of unsold shares. The complaint alleges causes of action for breach of fiduciary duty, breach of contract, and fraud, and for a declaratory judgment and injunctive relief. Defendants have counterclaimed, and now move for a default judgment on their counterclaims, or, alternatively, for partial summary judgment on plaintiffs' third cause of action and defendants' first counterclaim for a declaratory judgment and injunctive relief. Plaintiffs cross-move for leave to serve a reply to the counterclaims, and for summary judgment on their causes of action for a declaratory judgment, injunctive relief, and attorneys' fees.

Background

Plaintiff 420 W 206th Street Owners Corp. (the Coop) is a New York cooperative housing corporation which owns the building located at 420 West 206th St., New York, New York (the building). The individual plaintiffs are shareholders and members of the Coop's Board of Directors. Defendant Lorick is a shareholder and holder of unsold shares in the Coop. Defendant A Leadership Management Corp. is, according to Lorick, a currently inactive corporation used by him as the management company for the apartments, other than his residence, that he owns in the building. Answer, ¶ 3.

In 1983, the building was converted to a cooperative housing corporation under a non-eviction plan. Lorick purchased several apartments for himself and members of his family in or around 1983 and 1986, and in 1997, he purchased unsold shares appurtenant to 36 additional apartments from the Coop's sponsor or the sponsor's successor in interest, some of which he later sold. Currently Lorick is the holder of unsold shares for 31 or 32 of the Coop's 72 units (Counterclaims, ¶ 15),¹ constituting approximately 45 percent of the Coop's shares.

¹In his Answer with Counterclaims, and in his affidavit in support of defendants' motion, Lorick stated that he was the holder of unsold shares for 32 apartments (see Answer, ¶¶ 15, 109; Lorick Aff. in Support of Defendants' Motion), but in his affidavit in opposition to plaintiffs' cross motion, he asserts that he now holds unsold shares for 31 apartments. Lorick Aff. in Opposition to Plaintiffs' Cross Motion, ¶ 9.

The Coop's Board of Directors (Board) is comprised of five members. Lorick was a member of the Coop's Board from 1984 to 2011. See Lorick Aff. in Support of Defendants' Motion (Lorick Aff.), ¶¶ 16-17. Plaintiffs claim that Lorick, from 2000 to 2008, controlled the Board and mismanaged the building (Complaint, ¶¶ 69-70), and contend that after a new Board was elected in 2008, which included Lorick, numerous disputes arose, and have continued, between the Board and Lorick over refinancing of the Coop's mortgage, building repairs, and maintenance charges. In January 2011, at an annual shareholders meeting, five Board members were elected by the shareholders, none designated by Lorick, apparently because he nominated his candidates after the allotted time to make nominations. Lorick Aff., ¶¶ 24-25; Smith Aff. in Opp. to Defendants' Motion and in Support of Plaintiffs' Cross-Motion (Smith Aff.), ¶¶ 40, 42, 44. The election was certified and not subsequently challenged by Lorick. See Certification, Ex. D to Lorick Aff. Lorick claims, however, that since the January 2011 meeting, plaintiffs have failed to call an annual shareholder meeting, as required by the By-Laws, or to call a special meeting to elect a new Board of Directors. Lorick Aff., ¶¶ 31-32; Counterclaims, ¶¶ 20-21, 28.

Article III, Section 2 of the Coop's By-Laws, addressing the election of the Coop's Board of Directors, provides, in pertinent part:

"At least two Directors representing the Holder(s) of Unsold Shares shall be elected to the Board of Directors of the Apartment Corporation for as long as the Holder(s) of Unsold Shares shall own and possess proprietary leases for at least fifteen (15) apartments. Upon the earlier of three (3) years subsequent to the Closing of Title with the Apartment Corporation or after fifty-one percent (51%) of the shares have been sold to other than the Holder(s) of Unsold Shares, such Holder(s) of Unsold Shares will relinquish control of the Board of Directors if they have such control and will not elect a majority of the Directors of the Apartment Corporation even though the number of shares owned by them may enable them to otherwise do so."

See Offering Plan, Ex. K to Lorick Aff., at 155.

The interpretation of this section of the By-Laws is at the crux of the parties' dispute in this case. Plaintiffs commenced this action in February 2012 "to once and for all resolve" the issue of whether Lorick is entitled to cast his votes for all five seats on the Coop's Board. See Smith Aff., ¶ 54.

Plaintiffs seek a declaration that Lorick is a holder of unsold shares and that he "may not elect more than a minority of the Board of Directors, even though he may have the votes sufficient to do so," and "may cast his votes for only two of the five members of the Board of Directors in any election in which he is entitled to vote." Complaint, ¶¶ 114, 115. Plaintiffs also seek an injunction compelling Lorick to turn over books and records of the cooperative corporation to the managing agent, and to sell

his unsold shares. Complaint, ¶ 183.

Defendants seek a declaration that Lorick is entitled to vote all of his shares at Coop elections for any candidate for the Coop's Board in addition to his two designated appointments as sponsor, and a declaration that plaintiffs have improperly and illegally failed to hold an annual shareholders meeting and failed to hold a special meeting to elect a new Board, and seek an injunction directing plaintiffs to do so. See Memorandum of Law in Support of Defendants' Motion, at 4; Counterclaims, ¶ 28. Defendants further seek a declaration that certain notices of default issued to Lorick by the Board should be vacated. Counterclaims, ¶ 28.

Discussion

The branch of defendants' motion which seeks a default judgment on their counterclaims, based on plaintiffs' failure to timely reply, is denied. Plaintiffs offer a reasonable excuse for their delay in replying based on settlement discussions and counsel's medical leave. There is no indication that plaintiffs intended to abandon their claims or that defendants were prejudiced as a result of plaintiffs' delay in replying, and entry of judgment on the counterclaims would not serve the interests of judicial economy. See *Pagan v Four Thirty Realty LLC*, 50 AD3d 265 (1st Dept 2008); *Spira v New York City Tr. Auth.*, 49 AD3d 478 (1st Dept 2008); *Estate of Spiegel v Rickey*,

29 AD3d 1180 (3d Dept 2006). Further, where, as here, a default judgment has not been entered, an affidavit of merit is not essential to vacate a default or to compel acceptance of a late response. see *Guzetti v City of New York*, 32 AD3d 234 (1st Dept 2006); *Terrones v Morera*, 295 AD2d 254 (1st Dept 2002); *DeMarco v Wyndham Intl., Inc.*, 299 AD2d 209 (1st Dept 2002). Therefore, the branch of plaintiffs' cross-motion for leave to serve a reply to the counterclaims is granted.

Turning to the motion and cross motion for summary judgment, it is well settled that notwithstanding that it is considered a "drastic remedy," summary judgment is proper where there are no genuine issues of any material fact warranting a trial. See CPLR 3212 (b); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Andre v Pomeroy*, 35 NY2d 361, 364 (1974); *Mishkin v 155 Condominium*, 2 Misc 3d 1001(A) (Sup Ct, NY County 2004). Further, with respect to summary judgment in contract disputes, interpretation of an unambiguous contract is an issue of law for the court. See *Bailey v Fish & Neave*, 8 NY3d 523, 528 (2007); *Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 (1986). Whether a contract is ambiguous also is a question of law for the courts (see *South Rd. Assoc., LLC v International Bus. Mach. Corp.*, 4 NY3d 272, 278 [2005]; *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548, [1995]), and ambiguity should be "determined by looking within

the four corners of the document, not to outside sources." *Kass v Kass*, 91 NY2d 554, 566 (1998), citing *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162-163 (1990). A contract is unambiguous if, when "read in the context of the entire agreement" (*id.* at 163), "on its face [it] is reasonably read to convey one meaning." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 (2002) (citation omitted); see *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 (1st Dept 2008), *affd* 13 NY3d 398 (2009); *Chimart Assoc.*, 66 NY2d at 573. A contract is not rendered ambiguous merely because the parties differ in their interpretation of the agreement. See *Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 (1957); *Vertical Computer Sys., Inc. v Ross Sys., Inc.*, 59 AD3d 205, 205 (1st Dept 2009); *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 114 (1st Dept 1998).

The offering plan and by-laws of a cooperative corporation constitute a contract with the shareholder-tenants. See *Lesal Assoc. v Board of Mgrs. of the Downing Ct. Condominium*, 309 AD2d 594 (1st Dept 2003); *Benjamin v Madison Med. Bldg. Condominium*, 2008 WL 5478708, 2008 NY Misc LEXIS 10726 (Sup Ct, NY County 2008), *affd* 66 AD3d 510 (1st Dept 2009); *Mishkin*, 2 Misc 3d 1001(A); see also *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 (2002). In this case, the parties do not dispute that under Article III, section 2 of the Coop's By-Laws,

Lorick is a holder of unsold shares who owns more than 15 apartments, and that more than three years have passed since closing of title and more than fifty-one percent of shares have been sold to other than the holder of unsold shares. Thus, there is no dispute that Lorick is entitled to designate two representatives to the Board of Directors, and that the voting rights limits set out in Article III, section 2 apply to Lorick. Neither defendants nor plaintiffs argue that the language of the By-Laws is ambiguous or that there are triable issues of fact with respect to Lorick's voting rights under the By-Laws. However, the parties present different interpretations of the provision in Article III, section 2 that Lorick must "relinquish control of the Board . . . and will not elect a majority of the Directors . . .," and dispute whether that clause restricts him to voting for only the two designated Board members and no others or whether he can also vote his shares for other candidates.

Pursuant to General Business Law § 352-e (6) (a), New York's Attorney General has promulgated rules and regulations (AG regulations) governing cooperative conversions and offering plans. See 13 NYCRR § 18.3; see also *Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 (2005); *Council for Owner Occupied Hous., Inc. v Abrams*, 72 NY2d 553, 556-557 (1988). The AG regulations, among other things, prohibit sponsors and holders of unsold shares from indefinitely controlling a cooperative's board

of directors, and to that end, require that if the plan for conversion to cooperative ownership is presented as, or amended to, a noneviction plan, the "sponsor and other holders of unsold shares must agree not to exercise voting control of the board of directors for more than five years from closing, or whenever the unsold shares constitute less than 50 percent of the shares, whichever is sooner." 13 NYCRR 18.3 (v) (5) (i).

The purpose of 13 NYCRR 18.3 (v) (5) (i) "is to provide that the offering plan contains assurances by the sponsor that it will, *inter alia*, ultimately relinquish voting control over the board of directors." *Board of Directors of Exec. House Owners, Inc. v E.H. Assoc., L.P.*, 248 AD2d 530, 532 (2d Dept 1998); see *Kensington Terrace Apts., LLC v 160 Ocean Parkway Owners Corp.*, 23 Misc 3d 1105(A) at *15-16 (Sup Ct, Kings County 2009). This regulation applies where there are no other limitations set out in a cooperative's offering plan or by-laws and where the offering plan or by-laws of a cooperative address the limits of a sponsor's control of a board of directors by incorporating the language of the regulation that a sponsor, or other holder of unsold shares, must relinquish voting control of the cooperative's board. See *Matter of Park Briar Assoc. v Park Briar Owners, Inc.*, 182 AD2d 685 (2d Dept 1992); *Rego Park Gardens Assoc. v Rego Park Gardens Owners*, 174 AD2d 337 (1st Dept 1991); see also *Matter of Welco Assoc. v Gordon*, 174 AD2d 58, 63

(1st Dept 1992).

In such cases, courts interpreting 13 NYCRR 18.3 (v) (5) (i) have "narrowly construed the phrase 'voting control' to mean the power to nominate or designate a majority of board members, or to cause members to be elected that are on the sponsor's payroll or otherwise receive remuneration from the sponsor." *Kensington Terrace Apts., LLC*, 23 Misc 3d 1105(A), at *6; see *Rego Park Gardens Assoc.*, 174 AD2d at 338-339. Therefore, "[t]he cooperative corporation cannot prevent the [sponsor] from voting for any director unless it is shown that the director in question is on the [sponsor's] own slate or receives a salary or other remuneration from it." *Matter of Park Briar Assoc.*, 182 AD2d at 686, citing *Rego Park Gardens Assoc.*, 174 AD2d 337. As courts have explained, citing comments of the Attorney General with respect to 13 NYCRR 18.3 (v) (5) (i), "'what constitutes board control by the [sponsor] involves not disenfranchisement of the [sponsor] but rather its inability to designate related parties to fill a majority of the board member seats.'" *Matter of Park Briar Assocs.*, 182 AD2d at 687; *Kensington*, 23 Misc 3d 1105(A) at *6.

Thus, in cases like those cited above, in which a cooperative's by-laws or offering plans provide that a sponsor "shall relinquish control" or "shall not exercise voting control" after a period of time or the happening of a particular event,

courts have consistently held that

“the ‘voting control’ prohibition set forth in the Attorney General regulations merely prevents the designation, by a sponsor or holder of unsold shares, of candidates under its own control so as to create a majority of the Board. Unless a restriction on the sponsor's voting rights is specifically contained within the by-laws, offering plan or certificate of incorporation, a sponsor can vote for unrelated board candidates without limitation.”

Kensington, 23 Misc 3d 1105(A) at *6; see *Rego Park Gardens Assocs.*, 174 AD2d at 338-339.

Courts, however, when considering the limits imposed on a sponsor or holder of unsold shares by a cooperative's offering plan and by-laws, have distinguished the so-called “voting control” cases from cases involving “will not elect” provisions. See *Matter of Fort Hamilton Dev. Corp. v Bay Ridge Towers, Inc.*, 190 Misc 2d 335 (Sup Ct, Kings County 2001); see generally Siegler, Richard and Talel, Eva, *Cooperatives and Condominiums; Voting Rights of Holders of Unsold Shares*, NYLJ, July 7, 2004 at 5, col 2 (and cases discussed therein).

In *Matter of Fort Hamilton Dev. Corp.* (190 Misc 2d 335), as well as in *Matter of Flagg Ct. Realty Co. v Flagg Ct. Owners Corp.* (230 AD2d 740 [2d Dept 1996]), the cooperative's by-laws provided that any sponsor or holder of unsold shares, after a certain time or upon the occurrence of certain conditions, agreed

"not to elect a majority of the Board of Directors," language that is essentially the same as the language in the instant case. The courts found in *Flagg* and *Fort Hamilton* that this specific restriction on the voting rights of a sponsor or holder of unsold shares prohibited the sponsor from casting any votes for board members other than those members it was entitled to designate. See also *Matter of Frost Equities Co. v Frost Owners Corp.*, 223 AD2d 510 (1st Dept 1996). Similarly, in *Visutton Assoc. v Anita Terrace Owners, Inc.* (254 AD2d 295 [2d Dept 1998]), the Court found that a by-laws provision restricting a sponsor to voting its shares "for one less than a majority of the Board of Directors" permitted the sponsor to vote for three members of a seven-member board, but not for the other four members. See also *Natt v White Sands Condominium*, 95 AD3d 848 (2d Dept 2012) (provision that unit owners other than sponsor may elect five-member board, "except that two members may be designated by the sponsor," even if inconsistent with one share one vote provision, interpreted to preclude sponsor from choosing any board members other than the two designees).

While it appears settled in the Second Department that "will not elect" provisions prohibit a holder of unsold shares from voting its shares for more than one less than the majority of directors to be elected, the issue is not as clearly settled in the First Department. In *Matter of Frost Equities Co.* (223 AD2d

510) and *Matter of Madison v Striggles*, 228 AD2d 170 (1st Dept 1996), decided in the same year, the Court considered "will not elect" provisions and reached different conclusions. In *Striggles*, the language of the offering plan distinctly provided that the Sponsor's "'votes and those of other holders of Unsold Shares will not elect a majority of the Board of Directors'" (228 AD2d at 170), and the court found that this particular language did "not prohibit the sponsor from combining her votes with those of other resident shareholders, who are not holders of unsold shares, to elect three or more members of the five-member Board of Directors." *Id.*

Subsequently, in 2003, the First Department, relying on Second Department cases, held that a by-law provision, restricting the sponsor to the election of no more than two directors "by reason of" its vote of unsold shares, clearly limited the sponsor to voting its shares for one less than a majority of the board of directors. *Mundiya v Beattie*, 2 AD3d 317, 318 (1st Dept 2003). Thus, appellate precedent in both the First and Second Departments weighs in favor of finding, in this case, that Lorick similarly should be restricted to voting his unsold shares only for the two directors he is permitted to designate. To the extent that *Mishkin* (2 Misc 3d 1001 [A]) holds otherwise, the court is not bound by that decision, especially in view of its reliance on *Striggles* and its failure to address

Mundiya. Nor do Business Corporation Law §612(a) and the offering plan and By-Laws provisions entitling shareholders to "one vote for each share" require a different result. "The bylaws do not prohibit the sponsor from casting all its votes, but merely bar the sponsor from obtaining control of the board under certain circumstances." *Mundiya*, 2 AD3d at 318, citing *Matter of Visutton Assoc.*, 254 AD2d at 296; see also *Natt*, 95 AD3d at 849-850.

Plaintiffs' cross-motion for summary judgment on their third cause of action, therefore, will be granted. Summary judgment on the seventh and eighth causes of action, however, is denied. To the extent that plaintiffs seek summary judgment on their claim for attorneys' fees, plaintiffs make no showing, and do not even argue, that paragraph 28 of the proprietary lease is applicable to this case.

As to the seventh cause of action for injunctive relief, plaintiffs present no evidence to dispute Lorick's attestation that he is not in possession of the books and records they seek. Plaintiffs assert only that Lorick refused to intervene to get the documents from the Coop's former counsel, and took months to turn over some records. *Lorick Aff. in Opp. to Cross Motion*, ¶¶ 13-15; *Smith Aff.*, ¶¶ 23-24. Plaintiffs also have not demonstrated their entitlement to injunctive relief related to their breach of contract claim that Lorick, as a holder of unsold

shares, breached an implied promise to sell all the unsold shares within a reasonable time. See Complaint, ¶¶ 129-131. Even assuming, without deciding, that Lorick has a duty, as a holder of unsold shares amounting to less than a majority, to sell his unsold shares in a reasonable time, there are issues of fact as to whether he has done so. Further, neither *Jennifer Realty Co.* (98 NY2d 144) nor *Cole v 1015 Concourse Owners Corp.* (NYLJ, Dec. 1, 2008, at 19, col 3 [Sup Ct, Bronx County 2008], *affd* 70 AD3d 597 [1st Dept 2010]), on which plaintiffs rely, supports summary judgment, for the reasons outlined by defendants. See Farca Aff. in Opposition to Plaintiff's Motion for Partial Summary Judgment on their Seventh Cause of Action, ¶¶ 25-26, 32-38.

Similarly, defendants' motion for summary judgment on their first counterclaim is denied. To the extent that defendants seek an injunction directing plaintiffs to immediately hold a shareholders meeting, there is no dispute that the parties previously agreed that the Coop will notice a shareholders meeting within 60 days after the issuance of a decision on the instant motion and cross-motion. See Stipulation dated June 22, 2012, Ex. D to Smith Aff. in Opp. To the extent that defendants seek vacatur of default notices, defendants fail to address that claim in their moving papers.

Accordingly, it is

ORDERED that defendants' motion is denied, and it is further

ORDERED that plaintiffs' cross-motion is granted to the extent that it is

ADJUDGED AND DECLARED that defendant Lorick may vote his unsold shares for only two of the five members of the Board of Directors in any election in which he is entitled to vote; and it is further

ORDERED that plaintiffs' cross-motion for leave to serve a reply to the counterclaims is granted, and plaintiffs' reply, in the form annexed to the cross-motion, is deemed served as of October 9, 2013, the date of submission of the instant motion and cross-motion; and it is further

ORDERED that plaintiffs' motion is otherwise denied; and it is further

ORDERED that the remaining claims and counterclaims are severed and shall continue.

This is the decision and order of the Court.

Dated: _____

2/5/14

ENTER:



HON. ELLEN M. COIN, A.J.S.C.