

Alphonse Hotel Corp. v Tran
2015 NY Slip Op 31365(U)
July 14, 2015
Supreme Court, New York County
Docket Number: 653410/2013
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

-----X
ALPHONSE HOTEL CORPORATION

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 653410/2013

**CAROLINE TRAN and THU TRAN a/k/a CORINNE
THU SULKES a/k/a XUAN THU TRAN**

Defendants

-----X

NANCY M. BANNON, J.

In this action for, inter alia, declaratory relief, the plaintiff ("Alphonse") moves for summary judgment on the complaint. The defendants oppose the motion and cross-move for summary judgment dismissing the complaint. For the reasons set forth below, Alphonse's motion is granted in part and the defendants' cross-motion is denied.

Alphonse is the owner of several parcels of real property, including a six story building at 239 Elizabeth Street in Manhattan. Until his death in May 2012, Truong D. Tran ("Truong") owned 80% of the shares of Alphonse and was President of Alphonse until mid-2010. The remaining 20% was owned at 5% each by four women believed to be mothers of Truong's children, Hung Nguyen ("Hung"), mother of the defendants, Sang Nguyen ("Sang"), Hoa Phan ("Hoa"), and Cham Nguyen ("Cham"). In July 2010, two new seats were added to the Board of Directors and Hung and Cham were elected to those seats. Hung was elected President of Alphonse by unanimous written consent of the Board, effective as of September 30, 2010. Truong maintained his shares, but did not hold any office or management position in Alphonse after September 30, 2010.

On November 1, 2010, Truong executed two leases, signing as President of Alphonse, one for Apartment No. 5 and the other for Apartment No. 9 at 239 Elizabeth Street, in favor of defendants Caroline Tran ("Caroline") and Thu Tran a/k/a Corinne Thu Sulkes a/k/a Xuan Thu Tran ("Corinne"). The leases were for a term of 20 years commencing on November 1, 2010 and provided that no security deposit was required and that the rent would be zero for the

entirety of the term. Truong died intestate in May 2012. The Surrogate's Court appointed Hon. Stanley Parness as temporary administrator of Truong's estate on October 25, 2012 and Justice Parness assumed management of Alphonse thereafter. On July 15, 2014, the Surrogate's Court appointed Hon. Ernst H. Rosenberger successor temporary administrator after Justice Parness' death. Justice Rosenberger was elected President and sole director of Alphonse on August 11, 2014.

This action was commenced on October 2, 2013 seeking a declaration that the two leases for Apartment No. 5 and No. 9 at the 239 Elizabeth Street building are void as unsupported by any consideration by the defendants and because they were not and could not have been duly authorized by Alphonse. Alphonse further seeks the fair value of the defendants' use and occupancy of the apartments since November 1, 2010.

Alphonse now moves for summary judgment on the complaint on the grounds that the leases granted to the defendants are void as a matter of law and that it is entitled to recover for the defendants' use and occupancy based on the defendants' valuation. The defendants oppose the motion and cross-move for summary judgment dismissing the complaint on the grounds that the action is barred by the doctrine of laches and that the corporate actions gifting the leases to them were proper and the leases remain valid. In the alternative, the defendants seek referral of the leases to DHCR for administrative determination of the legal rent.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

Alphonse established its prima facie entitlement to summary judgment, as Alphonse's submissions establish that Truong had no authority, either actual or apparent, to enter into the subject leases with the defendants on the plaintiff's behalf. "The president or other general officer of a corporation has the power, prima facie, to do any act which the directors could authorize or ratify... The true test of his authority to bind the corporation is...whether, at the time, he is engaged in the discharge of the general duties of his office, and in the business of the corporation." Odell v 704 Broadway Condominium, 284 AD2d 52 (1st Dept. 2001) *quoting* Hastings v The Brooklyn Life Insurance Co., 138 NY 473 (1893); see Goldston v Bandwidth Technology Corp., 52 AD3d 360 (1st Dept. 2008). Here, Truong was merely a shareholder of Alphonse on November 1, 2010 when the subject leases were executed by Truong as

President. Indeed, the defendants as well as Hung admit that Hung was President of Alphonse at the time Truong executed the subject leases. Truong, therefore, had no actual authority to execute the subject leases.

Furthermore, Truong had no apparent authority to enter into the subject leases. "The rule is well settled that it will ordinarily be presumed that a president of a corporation has the power to make contracts pertaining to the business of the corporation and coming within the apparent scope of his authority." Odell v 704 Broadway Condominium, *supra* at 57 *quoting Spitzer v Born, Inc.*, 194 AD 739 (1st Dept. 1921). A corporation's president "has apparent authority to act within the general scope of his [or her] office and such acts are binding on the corporation against one who does not know of any limitation or the president's true authority." Odell v 704 Broadway Condominium, *supra* at 57. Here, the defendants admit that Hung and not Truong was President of Alphonse at the time the leases were executed. They acknowledge that Alphonse owned the 239 Elizabeth Street building, rather than Truong and Hung, individually. Further, the defendants stated that they did not know whether any other director or shareholder of Alphonse knew about the leases and they did not know whether the leases were ever discussed at any meeting of the directors or shareholders of Alphonse.

Even if Truong had actual authority to bind Alphonse at the time the leases were executed, the leases are void and may not be ratified. *See Owen v Hamilton*, 44 AD3d 452 (1st Dept. 2007). Alphonse's certificate of incorporation lists the purpose of the corporation to acquire real property; erect, repair, and maintain hotel and motel properties and conduct general hotel, motel, and café business; as well as establish, maintain, and operate, inter alia, newsstands, novelty shops, and ticket agencies. While leasing its property may fall under "the business of the corporation," gifting residential leases to family members for apartments owned by Alphonse without consideration does not. Although the defendants contend that the execution of the leases was authorized by the majority of directors of Alphonse, who were also the majority of shareholders, it is well settled that "waste or a gift of corporate assets are void acts and cannot be ratified by a majority of stockholders." *See Arnoff v Albanese*, 85 AD2d 3, 4 (2nd Dept. 1982); *cf.* BCL § 202(a)(12) [corporations may make charitable donations]. Therefore, Alphonse established its prima facie entitlement to summary judgment on its cause of action for a judgment declaring that the subject leases are void and unenforceable.

In opposition to Alphonse's motion and in support of their cross-motion for summary judgment, the defendants argue that the leases remain valid and that Alphonse's action is barred by the doctrine of laches. However, the defendants' affidavits fail to raise a triable issue of fact as to Alphonse's cause of action for declaratory relief or establish their entitlement to summary judgment. The defendants state in their affidavits that Truong gave numerous gifts to

family members and that Hung and Truong, the majority of the directors and shareholders of Alphonse, authorized the execution of both leases. However, past similar actions and approval of directors and shareholders cannot, as a matter of law, ratify a void act, such as the execution of the subject leases. See Arnoff v Albanese, supra.

Nor is there any merit to the defendants contention that the action is barred by the doctrine of laches. It is well settled that laches is “an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 (2003), *cert denied* 540 U.S. 1017 (2003); see Bank of America Natl. Assoc. v Lam, 124 AD3d 430 (1st Dept. 2015); Moreschi v DiPasquale, 58 AD3d 545 (1st Dept. 2009). Key to the application of the defense is a showing of actual prejudice. See Capruso v Village of Kings Point, 23 NY3d 631 (2014). That is, “mere delay alone, without actual prejudice, does not constitute laches.” Bank of America Natl. Assoc. v Lam, supra at 431, *citing Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678 (2nd Dept. 2011).

Here, there was no “lengthy neglect or omission” on the part of the plaintiff, and no demonstrated prejudice to the defendants. Alphonse commenced this action less than three years after the execution of the subject leases and within months of appointment of the temporary administrator of Truong’s estate was appointed. Moreover, the defendants have failed to establish that any delay in commencing this action was prejudicial. See Zwarycz v Marnia Constr., Inc., 102 AD3d 774 (2nd Dept. 2013) [no prejudice in 4 ½ year delay in commencing action]. Indeed, the only basis asserted for the defendants’ claim of prejudice is that they expended money in renovating the apartments. This conclusory assertion falls short of constituting the actual prejudice necessary to dismiss an action upon the defense of laches. Therefore, the defendants’ cross-motion for summary judgment is denied.

For the above reasons, Alphonse established its entitlement to an award of past use and occupancy. Although Alphonse submits evidence that Corrine has been subletting Apartment No. 9 for some period of time at a rate of \$1,900 per month, Alphonse has not established the rate at which use and occupancy should accrue for both apartments and the record contains insufficient information to allow for any such calculation. See Oxford Towers Co., LLC v Wagner, 58 AD3d 422 (1st Dept. 2009). Accordingly, a hearing shall be held to determine the rate to be assessed for use and occupancy since the execution of the subject leases.

The parties’ remaining contentions are without merit.

Accordingly, it is

ORDERED that the branch of the plaintiff's motion for summary judgment on its cause of action for declaratory relief is granted, and it is further

ADJUDGED and DECLARED that the lease for Apartment No. 5 at 239 Elizabeth Street, New York, New York, executed on November 1, 2010 in favor of defendant Caroline Tran is void and invalid, and it is further

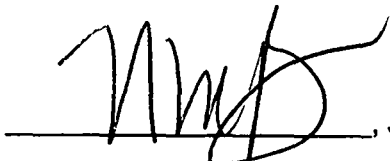
ADJUDGED and DECLARED that the lease for Apartment No. 9 at 239 Elizabeth Street, New York, New York, executed on November 1, 2010 in favor of defendant Thu Tran a/k/a Corinne Thu Sulkes a/k/a Xuan Thu Tran is void and invalid, and it is further

ORDERED that the branch of the plaintiff's motion for summary judgment on its cause of action for use and occupancy is granted to the extent the parties shall appear for a hearing on September 30, 2015 at 2:30 p.m., on the issue of the rate to be assessed for use and occupancy since November 1, 2010, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: July 14, 2015


_____, JSC
HON. NANCY M. BANNON