Board of Mgrs. of Warren House Condominium v 34th St. Assoc. LLC
2015 NY Slip Op 31548(U)
August 18, 2015
Supreme Court, New York County
Docket Number: 152052/13
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

THE BOARD OF MANAGERS OF THE WARREN HOUSE CONDOMINIUM on its own behalf and on behalf of individual unit owners,

Plaintiff

- Against-

34TH STREET ASSOCIATES LLC, 4-34TH LLC, EAST 34TH PARTNERS LLC and 155 PARTNERS LLC,

Defendant.

INDEX NO. 152052/13
MOTION DATE 07-22-2015
MOTION SEQ. NO 002
MOTION CAL. NO

The following papers, numbered 1 to 9 were read on this motion /for Summary Judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4 , 5-6, 7-8
Replying Affidavits	9

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment by defendants is denied. Plaintiff's cross motion for summary judgment under motion sequence 003 is denied. There are issues of fact that require a trial.

Plaintiff brings this action for "a declaratory judgment that the defendants be required to undertake commercially reasonable efforts to market for sale at commercially reasonable prices, so many of the 123 unsold units that either: (a) currently are rented to tenants at fair market value, upon expiration of the existing leases for such units, or (b) upon vacatur by current occupants, will no longer be subject to either the Rent Stabilization Law and Code or the New York City Rent and eviction Regulations, until such time as there are fewer than one hundred (100) unsold units remaining in the building."

It is plaintiff's contention that by failing to sell more than 62% of the residential units in the condominium building defendants have failed to create a viable condominium thereby frustrating the ability of unit owners to re-sell their apartments, or obtain refinancing. [see Summons and Complaint Exhibit A]

Plaintiff is the Board of the Warren House Condominium, which was formed pursuant to an offering plan and condominium declaration filed and recorded on October 31, 1986, that converted a building located at 155 East 34th

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

street from a rental to a condominium. The building is comprised of 330 apartments, all of which were rent stabilized prior to Condominium conversion, and five (5) commercial units. Between 1986 and 1998 the sponsor sold to third parties 207 residential units and retained ownership of 123 residential apartments and the 5 commercial units. The Condominium operated without any issues until the Real Estate Market downturn of 2008. After the market downturn all mortgage lending tightened and Fannie Mae and Freddie Mac adopted stricter lending protocols which impacted all borrowers. The new protocols require that a sponsor have no more than a 10% ownership interest in the Condominium's residential units. Because the sponsor owned a large percentage of units in the Condominium the newly adopted regulations discouraged lenders from making loans secured by mortgages on apartments in the Condominium. According to plaintiff this large percentage ownership of shares by the defendants in the Condominium units makes the Condominium unviable. [see Affidavit Lori Buchbinder]

Defendants, Successor sponsors to the original sponsor and among whom the original sponsor has divided its ownership interest in the Condominium units, move for summary judgment dismissing the complaint and for a judgment on its First counterclaim "declaring that...defendants are under no obligation to dispose of any units...." In support of their motion defendants rely on the offering plan "Special Risks" section which gives them the right to retain units. The offering plan does not obligate the sponsor to "offer or sell any units" and gives it the right to "withhold one or more units for future sale". In addition the sponsor has the right to "use unsold units for any lawful purpose, including without limitation the leasing or renting of any or all of the same .." Finally the offering plan makes no representation or warranty that financing will be available to anyone who executes a purchase agreement. [see Affidavit Lori Buchbinder, Offering plan Exhibit D]

Defendants allege that because there were no issues with the Condominium prior to 2008 and because they have only retained 37% of the Condominium Units, the Condominium is viable. In support of its motion defendants cite the case of Bauer v. Beekman International Center LLC, 125 A.D.3d 534, 7 N.Y.S.3d 808 [1st. Dept. 2015] for the proposition that " because the sponsor has sold a majority of the condominium units(53.8%) the sponsor had satisfied the elements of condominium viability sufficient to justify dismissal of the plaintiff's complaint." Here, defendants argue, "the sponsor has sold 62% of the units to Third parties" and therefore the court should find Condominium viability and as in Bauer dismiss plaintiff's complaint.

Plaintiff opposes the motion and submits the affidavit of its president, Donald Kohlreiter, who is also a licensed associate Real Estate broker and who has personal knowledge that since March 6, 2012, the date the shares were transferred to the defendants, eleven (11) of the eighteen (18) sales of residential units in the building were "all-cash deals". He further states that unit owners have been "unable to obtain refinancing and purchasers have been unable to obtain mortgages to purchase a unit in the building. The building continues to maintain a reputation as being an 'all-cash' building wherein only purchasers who can buy an apartment without a mortgage can buy in. The lending crisis in the building is a direct result of promises broken by defendant to create a viable

Condominium in which units may be freely mortgaged and sold."[see Affidavit in opposition to motion for Summary Judgment with exhibits]

Plaintiff Cross-moves for summary judgment, for judgment in its favor on its complaint and for dismissal of the defendants First Counterclaim. In support of its cross-motion plaintiff submits affidavits from its president , its managing agent and Unit owners, along with e-mails and other documentation to show that the Condominium is no longer viable. The affidavits relate the unwillingness of banks to make mortgage loans to prospective buyers or to owners for refinancing. Banks have deemed the Condominium "unacceptable" because the developer is renting all of the unsold units and is out of compliance with Fannie Mae's 10% single entity requirement." " In addition the defendants have allowed certain of the unsold units to be tenanted by more than one family at a time and by occupants who flout Condominium rules of basic decorum, to the detriment of, and at the expense of residential unit owners....because of situations like this...the wear and tear on the common elements of the building, such as elevators, is greater than it should be, to the detriment of the residential unit owners who foot the bill for maintaining the common elements....certain renters in unsold units allow their dogs to urinate and defecate in the hallways and in front of the building (and not cleaning up after them)." Finally, Ms. DeCastro, a unit owner, describes her inability to obtain refinancing or to sell her apartment due to the position banks have taken on the building because of the large percentage of units retained by defendants. [See Exhibits and the Affidavits of Ingrid McGregor, Donald Kolhreiter and Amanda DeCastro annexed to plaintiff's motion for summary judgment Motion Seq.003].

Defendants oppose Plaintiff's cross-motion with the same arguments that they make in support of their motion for summary judgment (Motion Seq. 002).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

Defendants have made out a prima facie showing of entitlement to judgment as a matter of law "[Defendants] have shown that their retention of units for rent was in accordance with the offering plan in existence since 1988 and that the condominium was a viable condominium until the rules changed in 2008. However Plaintiff has raised issues of fact that must be resolved at a trial. Plaintiff has submitted evidence to show that defendants' retention of a minority of residential units for lease has had the effect of frustrating the individual owners' ability to resell their units, interfered with the individual owner's ability to obtain

favorable financing terms and caused wear and tear to the building for which plaintiff and the individual owners have had to pay increased common charges." (see Bauer v. Beekman, Supra ; Bauer v. Beekman, 40 Misc.3d 1237(A) [Sup. Ct. N.Y. County, Silver J..].

That defendants have retained a minority of the shares in the Condominium is not dispositive of the issues in this case. What matters is the impact their retention of these shares, and the uses they have made of the units, has had on the viability of the Condominium (511 West 232nd. Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]).

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (511 W. 232nd. Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, Supra). Defendants must act in a manner than will not frustrate plaintiff's rights under the agreement. Although under the offering plan defendants retained the right to keep unsold units and to use them for any lawful purpose including the leasing or renting of any or all of them, they do not have the right to frustrate plaintiff's rights under the offering plan, deprive plaintiff of the value of its units or benefit itself at plaintiff's expense (see Pleiades Publishing Inc., v. Springer Science + Business Media, LLC, 117 A.D.3d 636, 987 N.Y.S.2d 36 [1st. Dept. 2014]; Demetre v. HMS Holdings Corp., 127 A.D.3d 493, 7 N.Y.S.3d 110 [1st. Dept. 2015]).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

There are issues of fact for a trial court to decide, more specifically whether defendants retention of the unsold units in the building, and their leasing or renting of the same, coupled with the difficulties in obtaining a mortgage to purchase apartments or to refinance apartments in the building have made the condominium unviable.

Accordingly, it is ORDERED, that defendants' motion for summary judgment and plaintiff's cross-motion are denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: August 18, 2015

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE