SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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CAROLYN CURRAN,

Plaintiff,

-against-

HEARTSTONE HOUSING DEVELOPMENT FUND CORPORATION,

Defendant.

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DECISION & ORDER
Index No.
151953/2014

Kenney, J.:

Plaintiff Carolyn Curran (Curran) moves for an order, pursuant to CPLR 3212, granting summary judgment on her complaint: (i) declaring that she may sell her apartment, located at 519 East 11th Street, apartment 4W, New York, New York for an unlimited negotiated price under the 2013 Regulatory Agreement between New York City and defendant Heartstone Housing Development Corporation (Heartstone); (ii) directing Heartstone to provide Curran with an accounting verified by a certified public accountant; and (iii) granting Curran reasonable attorneys' fees.

This is a declaratory judgment action by an owner of shares in a cooperative housing corporation against Heartstone, the cooperative corporation, challenging Heartstone's actions in adopting a resale policy which amended the corporation's proprietary leases and the by-laws without the appropriate 2/3 votes of the shareholders. Curran asserts that Heartstone needed to have six out of eight shareholders approve such amendment, but that it only had five shareholders vote in favor of approval. Curran also contends that she is entitled to an order directing an accounting of the amounts due from her for past-due maintenance, and of amounts due to her for her reasonable attorneys' fees incurred in bringing this action.

BACKGROUND

Heartstone is the owner of the land and building at 519 East 11th Street, New York, New York (the Building). This Building is a residential building with 11 units, eight of which are owned by shareholders, who reside in them, and three of which are rented out by the corporation. It is a cooperative corporation organized pursuant to Article XI of the Private Housing Finance Law of the State of New York, and it serves low and moderate income persons (*see* exhibit C to notice of motion). Curran is a shareholder and proprietary lessee, and resides in apartment 4W in the Building (*see* exhibit D to notice of motion [Proprietary Lease]). Since it was converted to cooperative ownership, Heartstone has been bound by regulatory agreements it entered into with the City of New York Department of Housing and Preservation and Development (HPD), which agreements contain restrictions on resales of the apartments in the Building. These regulatory agreements provide that shareholders may only transfer their shares to income eligible purchasers as defined in Section 576 of Article XI of the Private Housing Finance Law (complaint, ¶¶ 7-9).

Effective January 13, 2013, Heartstone entered into a second regulatory agreement with HPD which placed restrictions upon the resale of apartments to ensure statutory compliance, providing that the income of a purchasing shareholder is limited to no more than 120% of the median income (*id.*, ¶ 14; *see* exhibit F to notice of motion [2013 Regulatory Agreement], § 3). It also provided that, in the event of a sale, Heartstone would receive 30% of the resale profits, and the selling shareholder would retain 70% thereof (complaint, ¶ 13; *see* exhibit F to notice of motion, 2013 Regulatory Agreement, § 5). The agreement contained no other limitation on sales other than that the shares must be sold to an income eligible buyer (complaint, ¶ 16). The 2013 Regulatory Agreement runs with the land, and supercedes any prior regulatory agreements prior to the effective date thereof

(exhibit F to notice of motion, 2013 Regulatory Agreement, § 14).

Curran has lived in her apartment since 1986, and had begun to fall behind in her maintenance payments starting in 2004 (affidavit of Carolyn Curran, dated July 8, 2015 [Curran aff], ¶¶ 13-15). She asserts that she has attempted on numerous occasions to resolve the issue of her maintenance arrears, but that Heartstone has given her inaccurate and inconsistent accountings of the amounts owed (*id.*, ¶¶ 14-15, 18; *see* exhibits G and H to attorney affirmation in further support [reply affirmation]). She submits a copy of a customer history that she received from Heartstone sometime after December 2009, showing total arrears as of that time of $5,300.00 (exhibit G to reply affirmation). She also submits a letter from Heartstone from February 9, 2012, indicating a total arrears then due of $15,680, and stating, instead, that $9,200 in arrears was due as of December 2009 (exhibit H to reply affirmation). Finally, she submits a letter from January 12, 2013, which states that she has maintenance arrears of "approximately $25,000," which contained no indication of how these arrears were calculated (*id.*). Curran contends that she has sought to sell her apartment since 2011 for an unlimited amount so that she could pay off her arrears and move out, but that Heartstone has sought to prevent this by trying to approve a resale policy which would limit the price she could obtain for her apartment (Curran aff, ¶ 20).

In October 2011, a resale policy (the Resale Policy) was proposed at a shareholders' meeting, at which five of the eight total shareholders were present and voting (exhibit G to notice of motion). This Resale Policy indicates that it amended the proprietary lease and by-laws, and set a formula for a maximum resale price for the subject apartments (exhibit H to notice of motion, Resale Policy §§ V, XII). It states that it was "adopted at a duly called meeting on October 30, 2011 by a vote of 5 out of 8 shareholders which represents 2/3 of shareholders eligible to vote at the time" (*id.*, Resale

Policy § XII). The Proprietary Lease provides, in section 3.03, that in order to make changes to the lease there must be a vote of shareholders "holding at least two-thirds of the issued and outstanding shares of the Corporation" (exhibit D to notice of motion, Proprietary Lease § 3.03 at 9).

On March 5, 2014, Curran commenced this action, asserting three causes of action: first, for a declaratory judgment, declaring that the Resale Policy was null, and that only the 2013 Regulatory Agreement controls the sale of her apartment; second, for an accounting of the maintenance arrears; and, third, for attorneys' fees and costs for Heartstone's breach of the Proprietary Lease. Heartstone answered the complaint, denying the material allegations and asserting several affirmative defenses.

During discovery, Heartstone failed to comply with this court's discovery orders and was precluded from offering any evidence in opposition to plaintiff's claim of liability unless it complied with plaintiff's September 5, 2014 discovery demands no later than January 23, 2015, and uploaded to the e-filing system an affirmation of compliance by defendant's counsel, with a copy served on plaintiff (Preclusion Order) (Order on Motion to Compel Disclosure [motion sequence No. 001], entered January 22, 2015). While depositions of Curran and Heartstone occurred on February 24 and 25, 2015, respectively, no affirmation of compliance with the Preclusion Order was filed, and Heartstone does not dispute Curran's contention that it failed to comply with that order.

Curran moves for summary judgment, contending that, as a matter of law, the Resale Policy was not properly adopted by at least two-thirds of the shareholders of Heartstone, which would have required at least six of the eight shareholders to vote in favor of the policy. As a result, the only controlling restrictions on the resale of her apartment are those contained in the 2013 Regulatory Agreement.

In opposition, Heartstone maintains that the policy was appropriately approved, because five

out of eight shareholders constitutes 5.33 shareholders, which number, according to mathematical principles, must be rounded down to five. It argues that Currant is not entitled to an accounting, because she has not shown a breach of fiduciary duty by the cooperative board.

DISCUSSION

The motion for summary judgment is granted.

The Resale Policy, purportedly adopted by Heartstone, was an amendment to the proprietary lease and by-laws. As such, section 3.03 of the Proprietary Lease unambiguously requires "a vote of Shareholder holding *at least two-thirds* of the issued and outstanding shares" of Heartstone (exhibit D to notice of motion, Proprietary Lease § 3.03 [emphasis added]). It is undisputed that there were eight outstanding shareholders (*see* exhibit L to notice of motion, deposition of Vincent Barnes, dated February 25, 2015 [Barnes dep tr], at 10; exhibit M to notice of motion, deposition of Rafael Jaquez, dated February 25, 2015). It is also undisputed that only five out of the eight voted in favor of the policy (exhibit G to notice of motion, shareholder meeting minutes). Contrary to Heartstone's contentions, a vote of five out of eight shareholders only constitutes 62.5%, which fails to meet the requirement of "*at least two-thirds*" (exhibit D to notice of motion, Proprietary Lease § 3.03 [emphasis added]; *see Matter of Downing v Gaynor*, 47 Misc 2d 535, 536-537 [Sup Ct, Nassau County July 30, 1965] [where concurrence of 2/3 of commission is required to disapprove action, and only three of five members voted to disapprove, that was insufficient, needed four members]). While the by-laws, in Article VII, section 1, provide that they may be amended "by a vote of shareholders representing a majority of the Total Votes at any meeting of the shareholders, provided that the proposed amendment or the substance thereof shall have been inserted in the notice of meeting or that all the shareholders be

present in person or by proxy," Curran has presented undisputed proof that the proposed resale policy was given out at the meeting, not before (exhibit L to notice of motion, Barnes dep tr at 16), and that not all shareholders were present (*see* exhibit G to notice of motion). Thus, the vote at that meeting failed to meet the requirements. Heartstone fails to present any triable issues of fact as to this claim. Curran, therefore, is not bound by the Resale Policy, but still must comply with the 2013 Regulatory Agreement. Accordingly, this court declares that the Resale Policy was not appropriately approved, and is void, and Curran may sell her apartment at a price limited only by the 2013 Regulatory Agreement.

With respect to the maintenance arrears, Curran admits that she owes maintenance arrears since at least 2009 (*see* Curran aff, ¶¶ 13, 16, 42). She has presented proof that she received various different calculations, as well as different total amounts due without any calculations, as to the maintenance arrears she owes (*compare* exhibits G and H of reply affirmation). Heartstone fails to present evidence otherwise. This issue is referred to a Special Referee to hear and report as to the amounts of maintenance due from Curran with respect to her apartment.

Curran's request for attorneys' fees and costs in pursuing this action is granted. Where a lease grants the cooperative corporation the right to reasonable attorneys' fees expended in pursuing a lessee's default, and the lessee successfully challenges a cooperative board's authority, the lessee is entitled to seek reasonable attorneys' fees under Real Property Law § 234. That statute provides for the reciprocal right of a lessee to recover such fees when the parties' lease confers such a right to the lessor (*see Matter of Cohan v Board of Directors of 700 Shore Road Waters Edge, Inc.*, 108 AD3d 697, 700 [2d Dept 2013]; *Conti v Citrin*, 174 AD2d 414, 414-415 [1st Dept 1991] [in declaratory judgment action where tenant successfully challenged defendant's

violations of lease provisions, tenant may seek reciprocal attorneys' fees under Real Property Law § 234]). Here, the Proprietary Lease provides that Heartstone may recover reasonable attorneys' fees and disbursements incurred in bringing or defending any lawsuit or proceeding with regard to any shareholder's default (exhibit D to notice of motion, Proprietary Lease § 6.01 [c] at 24). As discussed above, Curran has successfully challenged Heartstone's authority to approve the Resale Policy, which was purportedly passed in breach of the Proprietary Lease's amendment provision. Therefore, as the prevailing party, Curran has established her entitlement to reasonable attorneys' fees pursuant to Real Property Law § 234 (*Matter of Cohan v Board of Directors of 700 Shore Road Waters Edge, Inc.*, 108 AD3d at 700; *Dinicu v Groff Studios Corp.*, 257 AD2d 218, 225 [1st Dept 1999] [tenant, as the prevailing litigant, was entitled to attorneys' fees as an element of damages]; *see DiBernardo v Lindenwood Vil., Sec. A Coop. Corp.*, 73 AD3d 1117, 1117 [2d Dept 2010] [attorney's fee awarded to proprietary shareholder in declaratory judgment action declaring that cooperative corporation violated by-laws by failing to hold a required election]). The issue of the amount of the attorneys' fees and disbursements also is referred to the Special Referee to hear and report.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment which seeks a declaratory judgment with respect to the first cause of action is granted with costs and disbursements to plaintiff as taxed by the Clerk; and it is further

ADJUDGED and DECLARED that the Resale Policy dated October 30, 2011 is void, and that plaintiff may sell her apartment at 519 East 11th Street, apartment 4W, New York, New York for a price limited only by the 2013 Regulatory Agreement between defendant and the City of

New York; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment on the second and third causes of action also is granted as to liability; and it is further

ORDERED that the issues of the amount of the maintenance arrears due from plaintiff to defendant, and the amount of the reasonable attorneys' fees and disbursements incurred by plaintiff in pursuing this action to be paid by defendant are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this portion of plaintiff's motion regarding the second and third causes of action is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1] upon the Special Referee Clerk in the General Clerk's Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date.

Dated: January 20, 2016

ENTER:

JOAN M. KENNEY J.S.C.
J.S.C.

[1] Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.