SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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PHYLLIS KOSSOFF,

Plaintiff,

- v -

910 FIFTH AVENUE CORP., BOARD OF DIRECTORS OF 910 FIFTH AVENUE, NEW YORK, NEW YORK 10021, RUDD REALTY MANAGEMENT CORP.

Defendants.

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INDEX NO. 161513/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 22, 37, 38

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

Plaintiff's order to show cause directing defendants to remove the plywood covering the windows on plaintiff's balcony and replacing the windows and sills with materials of a kind and quality customary to the building and premises is granted.

Plaintiff resolved the stay request by stipulation (NYSCEF Doc. No. 18).

Background

Plaintiff is a 92-year-old woman who has lived in an apartment located at 910 Fifth Avenue in Manhattan since 1966 and eventually, after the building was converted into a cooperative ("coop"), plaintiff and her husband became proprietary lessees thereof. Defendant 910 Fifth Avenue Corp. is the coop corporation and defendant Board of Directors of 910 Fifth Avenue is the Board of the coop (hereinafter "defendants"). This case arises from a dispute about whether

plaintiff or defendants are responsible for replacing and paying for the replacement of plaintiff's balcony windows and sills.

On March 22, 2018, plaintiff claims that she was approached by defendants and asked whether she was interested in selling her apartment to another shareholder of the coop who lived on her floor. Plaintiff informed defendants that she was not interested in selling her home of over 50 years.

Four days later, on March 26, 2018, defendants informed plaintiff that her balcony windows constituted an unsafe condition and had to be replaced pursuant to new Facade Inspection & Safety Program ("FISP") inspection regulations. When plaintiff took possession of the property in 1966 the subject balcony windows and sills were already on the premises.

Defendants allege that after they notified plaintiff about the need for replacing the windows, plaintiff acknowledged that she was responsible for the replacement and repeatedly assured defendants that she would get it done. Defendants informed plaintiff that they retained an engineering company that would charge $3000 to draw up plans for the window replacement and that the building's management company would charge $250 per hour for any services relating to the replacement (Defendants' Exhibit E at pg.4).

Plaintiff insists that she never agreed or obligated herself to replace the windows. Plaintiff's attorney, who is also her son, claims that he attempted to engage in a series of good faith communications with the Board about the window issue on behalf of his mother. Plaintiff claims that because she wanted the dispute resolved quickly and amicably, she was willing to pay defendants' engineer and consultation fees for the window replacement (the $3000 amount) and cooperate with defendants to ensure the replacement process was moving along. Plaintiff argues, however, that she never agreed to pay the entire cost of replacing the windows.

According to plaintiff, the Board was unresponsive to her communications, thereby stalling the replacement process and leaving her unable to take any action in moving it forward. The coop is within a Landmark District and any work done on the coop requires a permit from the Landmark Preservation Commission and the Department of Buildings. Plaintiff claims that because of the unresponsiveness of the defendants and because she could not act without the permission of the Board, complicated by the landmark issue, plaintiff was unable to make any progress on the window replacement for the next several months.

Defendants, however, also insist that they tried to communicate with plaintiff, allowing plaintiff's son to submit plans and specifications for the window replacement, which he purportedly failed to do. Because several months had passed without any resolution and because defendants feared receiving a violation from the New York City Department of Buildings for unsafe conditions, defendants decided to unilaterally act and remove plaintiff's balcony windows. Defendants inserted insulated aluminum panels and boarded up any openings with plywood. The "windows" remain in this condition to this day.

On November 1, 2018, defendants sent plaintiff an itemized bill in the amount of $55,040.30 for work done to remove and board up the windows (NYSCEF Doc. No. 10). The bill included a total of $23,407 in legal fees. This litigation ensued.

Plaintiff wants defendants to remove the plywood covering her window frames and install windows and sills in a material that is customary to the coop. Plaintiff claims that it is the defendants' obligation to replace her windows pursuant to Article 18(a) of her lease. She insists that the defendants have purposefully delayed replacing her windows in an attempt to scare her into vacating the premises so that another shareholder can purchase her apartment.

In response, defendants claim that Article 18(a) only obligates the coop to *repair* windows not *replace* them. Defendants state that because they are not obligated to replace windows, the cost of replacement is plaintiff's responsibility. Defendants also say that plaintiff's assertions that defendants are attempting to push plaintiff to vacate the premises are meritless.

Discussion

Article 18(a) of the lease states

> "The Lessee shall take possession of the apartment and its appurtenances and fixtures 'as is' as of the commencement of the term hereof. Subject to the provisions of Paragraph 4 hereof, the ***Lessee shall keep the interior of the Apartment*** (including interior walls, floors and ceilings, but ***excluding windows, window panes, window frames, sashes, sills***, entrance and terrace doors frames and saddles) ***in good repair***, shall do all of the painting and decorating required for his apartment, including the interior of window frames, sashes and sills and shall be solely responsible for the maintenance, repair and replacement of plumbing, gas, and heating fixtures and equipment such as refrigerators, dishwashers, air conditioners, washing machines, ranges and other appliances, as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which the Lessee may install within the wall or ceiling or under the floor, but shall not include gas, steam, water or other pipes or conduits either within the walls, ceilings or floors or exposed within the apartment which are part of the standard building equipment or are for the general benefit of the building. The ***Lessee shall be solely responsible for the maintenance, repair and replacement of all lighting and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers and electrical wiring and conduits from the junction box at the riser into and through the Lessee's apartment***. Any ventilator or air conditioning device which shall be visible from the outside of the building shall at all times be painted by the Lessee is a standard color which the Lessor may select for the building." (emphasis added).

NYSCEF Doc. No. 6 at pg. 6

Defendants' argument is that Article 18(a) makes a distinction between "repair" and "repair and replacement." They claim that where a repair is required, Article 18(a) explicitly provides that it is the coop's obligation to handle the repair. However, where a replacement is required,

defendants insist that Article 18(a) places the burden of replacement on the lessee. Defendants insist that because the issue at hand is regarding replacement of windows and not repair of windows, plaintiff is responsible for the replacement.

In response, plaintiff argues that Article 18(a) does not specify who is responsible for replacing windows. Plaintiff insists that the lease makes it clear that window repairs are defendants' responsibility but points out that the act of replacing windows is not mentioned anywhere in the lease. Plaintiff claims that in the absence of an express requirement, defendants should be responsible for the replacement pursuant to its non-delegable duty to keep the premises in good repair.

This Court finds that the defendants are required to remove the plywood covering the windows and replace the windows. Defendants' argument about the distinction between "repair" and "repair and replacement" is unconvincing as it pertains to windows. Article 18(a)'s only mention of windows is to say that the tenant need not repair them, "The lessee shall keep the interior of the Apartment…(excluding windows, window panes, window frames, sashes, sills, entrance and terrace doors frames and saddles) in good repair…" (Article 18[a], lines 3-5). Window repairs are the sole responsibility of the lessor. Because the windows and sills are the coop's responsibility, the coop is responsible for them. The coop must maintain them, and if they are no longer deemed safe and it can no longer repair them, then the coop must replace them.

The lease only obligates the lessee to replace "plumbing, gas, and heating fixtures…lighting and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers and electrical wiring" (*id.* at lines 7-21). Although there was plenty of opportunity, the lease does not add replacement of windows to that list of lessee's obligations.

A proprietary lease is interpreted using general principles of contract law (*see Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 80, 863 NYS2d 20 [1st Dept 2008]); *Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 832 NE2d 707 [2005]). In instances of ambiguity within leases, the ambiguity should be interpreted as against the drafter of the document (*327 Realty, LLC v Nextel of New York, Inc.*, 150 AD3d 581, 582, 55 NYS3d 202 [1st Dept 2017]). In this case the drafter of the document is the lessor. If there is ambiguity about who is responsible for window replacement in Article 18(a), the lease provision must be interpreted as against lessor/drafter and the defendants should bear the burden of replacing the windows. Quite simply, it would be terribly improper to "read in" that the tenant must replace the windows when the lease never says that.

Summary

While the Court understands that defendants are simply trying to conform to current safety standards by having the windows replaced, the responsibility of replacing the windows does not fall upon the tenant. Although the lease does not expressly indicate who is responsible for window replacement, the language of the lease, general contract principles, and common sense lead to the conclusion that defendants must bear the responsibility of replacing the windows. If the landlord, the drafter of the lease, wanted the tenant to be responsible for replacing windows, it should have said so in the lease.

Even though the Court was not asked to allocate the expenses relating to the window replacement at this time, judicial economy suggests that this Court make clear that all expenses shall be borne by defendants. It just makes no sense to require more court intervention about cost allocation.

The parties are directed to appear for a preliminary conference on July 23, 2019 at 2:15 p.m.

According, it is hereby

ORDERED that the branch of plaintiff's order to show cause directing defendants to remove the plywood covering the windows on plaintiff's balcony and replace the windows and sills with materials of a kind and quality customary to the building and premises and in accordance with the Landmarks Law is granted and defendants shall commence such work (including applying for applicable permits) within thirty days, and it is further

ORDERED that the branch of plaintiff's order to show cause to stop defendants from terminating plaintiff's lease based on the windows is moot, and it is further

ORDERED that the window replacement shall be at defendants' expense.

Conference: 7/23/19 @ 2:15 pm

6/6/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE