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

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

----------x

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner(s),

-against-

JPMORGAN CHASE BANK, N.A., THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondent(s),

-and-

FLETCHER INTERNATIONAL, LTD, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD, FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTC.,

Intervenor(s)-Respondent(s).

----------x

INDEX NO.: 157631/2015

MOTION DATE: 4/30/21

MOTION SEQ. NO(s).: 12

Respondent The Dakota, Inc. (Dakota) moves (Motion #12) for summary judgment.

The following papers filed on NYSCEF were read on the motion:	**Doc. Nos.**
Notice of Motion (#12), Affirmation, Affidavit, Exhibits (26), Memo of Law	213-241
Affirmation in Opposition, Exhibits (11), and Memo of Law	285-299
Affirmation in Reply, Affidavit, Exhibits (2), and Memo of Law	309-313

Upon the foregoing papers, it is ordered that the motion is decided in accordance with the annexed decision and order.

Dated: New York, New York
August 4, 2021

HON. LEWIS J. LUBELL, J.S.C.

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

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

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

----------x

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner(s),

-against-

JPMORGAN CHASE BANK, N.A., THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondent(s),

-and-

FLETCHER INTERNATIONAL, LTD, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD, FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTC.,

Intervenor(s)-Respondent(s).

----------x

INDEX NO.: 157631/2015

DECISION & ORDER ON MOTION

Background

By way of background, defendant The Dakota, Inc. (Dakota) is a residential cooperative corporation that owns the building located at One West 72nd Street, New York, New York. In 2001, respondent Alphonse Fletcher, Jr. (Fletcher) acquired certain shares of capital stock (Shares) allocated to and associated with Fletcher's two apartments (that is, apartments 52 and PHB) in the Dakota and the related proprietary lease (Lease).

On or about February 8, 2008, Fletcher executed and delivered to Chase two notes in the aggregate amount of $11,250,000.00 (collectively, the Notes). The Notes were secured by two separate loan security agreements dated February 8, 2008 and executed by Fletcher in favor of Chase to create a security interest in, and lien on the Shares and Lease (Loan Security Agreements). Fletcher also assigned to Chase all of his right, title and interest in the Lease through a formal assignment that was executed and notarized on February 8, 2008 (Assignment of Lease). On or about February 8, 2008, Fletcher, Chase, and the Dakota executed an agreement, which addressed various aspects of the signatories' relationship in connection with one of the Notes (Recognition Agreement). The Recognition Agreement provided, among other things, that:

> "2. (a) [The Dakota] will not consent to any further encumbrances, subletting, termination, cancellation, surrender or modification of the Apartment by the Lessee without [Chase's] approval, which [Chase] will not unreasonably withhold but this provision shall not apply to any modification or termination which, by the terms of the Lease, may be effective against a Lessee when approved by a fixed percentage of other holders of [the Dakota's] shares, or which may be effective in the event of condemnation or casualty.
>
> * * * *
>
> 4. While [Chase has] the right but no obligation to cure the Lessee's defaults under the Lease, if [Chase does] not do so within the time provided for herein, [the Dakota] shall have no obligation to [Chase], except that in the event of sale or subletting the Apartment, [the Dakota] shall recognize [Chase's] rights as lienor against the net proceeds of any sale or subletting (after reimbursement to [the Dakota] of all sums which are due to [the Dakota] under the Lease)."

In 2011, Fletcher commenced an action with the filing of a summons and complaint, later amended, against, among others, the Dakota in connection with the Dakota's denial of Fletcher's application to purchase another apartment (Fletcher Action).[1] The amended complaint set forth several causes of action for discrimination and retaliation as well as two claims for breach of fiduciary duty (that is, the First and Second Causes of Action). The First Cause of Action alleged, among other things, that each member of the Board and the Finance Committee of the Dakota owed Fletcher a fiduciary duty to Fletcher as a shareholder of the Dakota and the Second Cause of Action alleged, among other things, that the Dakota breached its fiduciary duty to Fletcher by refusing to comply with an internal policy, which made it easier for existing shareholders to purchase apartments in the building than for non-shareholders. The Dakota interposed an answer along with various counterclaims, including the first counterclaim (First Counterclaim) which alleged that the Lease provides, among other things, that "if the Dakota defends any action, proceeding, or claim therein commenced by Fletcher, Fletcher shall reimburse all reasonable expenses, including reasonable attorneys' fees and disbursements, thereby incurred by the Dakota." Petitioner represented Fletcher for some period of time during the Fletcher Action.

On July 15, 2015, petitioner commenced the instant proceeding against Fletcher for an order to seize and sell Fletcher's right, title, and interest in the Shares and the Lease. The petition alleges that petitioner had previously obtained a money judgment

[1] The Fletcher Action was commenced in the Supreme Court, New York County and was entitled *Alphonse Fletcher, Jr. and Fletcher Asset Management, Inc. v The Dakota, Inc., Bruce Barnes and Peter Nitze*, Index No. 101289/2011.

(Kasowitz Judgment) in the amount of $2,748,244.03 against Fletcher in an action[2] to recover attorney's fees for its representation of Fletcher in the Fletcher Action. The Dakota interposed an answer along with, among other things, a cross-claim for a declaratory judgment that the Dakota's rights and interest in the Shares and Lease are superior to those of Chase. Chase also interposed an answer along with, among other things, a cross-claim for a declaratory judgment that Chase's rights and interest in the Shares and Lease are superior to those of the Dakota as well as 19 affirmative defenses.

On December 26, 2017, a judgment was entered in the Fletcher Action in favor of the Dakota and against Fletcher on the First Counterclaim in the amount of $3,118,076.26, plus post-judgment interest at the rate of 9% per annum from the entry of judgment (Bluth Judgment).

At this time, the Dakota and Chase are the sole remaining parties to this proceeding. Now, the Dakota and Chase move for summary judgment.

In support of its motion, the Dakota proffers evidence that it is owed $4,542,151.61 as of November 30, 2020. The Dakota notes that the bulk of this amount is derived from the Bluth Judgment along with the post-judgment interest, which amounted to $831,885.66 as of November 30, 2020. The Dakota contends that, pursuant to its governing documents and the New York Uniform Commercial Code (UCC), its lien is entitled to priority vis-à-vis Chase's lien.

In response, Chase puts forward various arguments for its position that the Dakota's claim for priority is unavailing for several reasons. Initially, Chase concedes that UCC § 9-322 (h) (1) provides a cooperative organization security interest priority with respect to all amounts secured, but, Chase contends, the same provision limits the security interests to those "obligations incident to ownership of that cooperative interest." Chase contends that the Bluth Judgment is not incident to Fletcher's ownership of that cooperative interest, but rather is incident to Fletcher's claims of discrimination as a prospective buyer and is not an "indebtedness" based on Fletcher's obligations to the Dakota as an existing stockholder. Next, Chase asserts that the Bluth Judgment is based on an erroneous reading of Paragraph 15th of the Lease. Chase argues that this provision only provides for an award of attorney's fees when the lessee is in default, which was not the case in the Fletcher Action. Indeed, Chase asserts that an explanatory comment, which circulated among shareholders before the applicable language of Paragraph 15th was finalized, clarifies that recovery should be limited to instances in which a shareholder is in default. In addition, Chase asserts that, as interpreted by the Dakota, Paragraph 15th of the Lease would be unconscionable because it would permit the Dakota to recover attorney's fees irrespective of whether it was the defaulting party and whether it was the prevailing party. Further, Chase contends that the Recognition Agreement does not

[2] Petitioner commenced the action to recover attorney's fees in the Supreme Court, New York County, which was entitled *Kasowitz, Benson, Torres & Friedman LLP v Alphonse Fletcher, Jr. and Fletcher Asset Management, Inc.*, Index No. 158590/2013.

provide the Dakota with a priority lien, but merely recognized that the Dakota could reimburse itself with proceeds from a sale, before Chase, for sums due under the Lease. Regardless, Chase contends the Recognition Agreement was executed with respect to only one of the Notes and thus has no bearing on the other note or on Chase's rights as assignee of the Kasowitz Judgment, which takes priority since it preceded the Bluth Judgment. Next, Chase asserts that it may challenge the propriety of including the Bluth Judgment in the Dakota's lien as Chase was not a party to the Fletcher Action and could not have intervened. As such, Chase contends, its arguments here are not a collateral attack on the Bluth Judgment. Lastly, Chase contends that the Dakota's assertion of a lien (that is, its priority claim in the instant proceeding) constitutes a breach of the Recognition Agreement wherein the Dakota agreed not to further encumber the Shares and Lease without Chase's permission.

Analysis of the Issues Presented

Whether the Dakota's security interests are superior to those of Chase

A cooperative organization's security interest, which is created by a cooperative record "that provides that the owner of a cooperative interest has an obligation to pay amounts to the cooperative organization incident to ownership of that cooperative interest and which states that the cooperative organization has a direct remedy against that cooperative interest if such amounts are not paid," is governed by Article 9 of the UCC (*see* UCC §§ 9-102 [a] [74] and 9-109 [a] [7]). A "cooperative organization" refers to "an organization which has as its principal asset an interest in real property in this state and in which organization all ownership interests are cooperative interests" (UCC § 9-102 [a] [27-c]). A "cooperative interest" refers in part to "an ownership interest in a cooperative organization, which interest, when created, is coupled with possessory rights of a proprietary nature in identified physical space belonging to the cooperative organization" (UCC § 9-102 [a] [27-b]). A "cooperative organization security interest" refers to a "security interest which is in a cooperative interest, is in favor of the cooperative organization, is created by the cooperative record, and secures only obligations incident to ownership of that cooperative interest" (UCC § 9-102 [a] [27-d]). A "cooperative record" refers to "those records which, as a whole, evidence cooperative interests and define the mutual rights and obligations of the owners of the cooperative interests and the cooperative organization" (UCC § 9-102 [a] [27-e]). "A cooperative organization security interest becomes perfected when the cooperative interest first comes into existence and remains perfected so long as the cooperative interest exists" (UCC § 9-308 [h]). This "cooperative organization security interest has priority over all other security interests in a cooperative interest" (UCC § 9-322 [h] [1]).

Here, Art. VI, § 6 of the Dakota's bylaws (Bylaws) provides in pertinent part:

> "Corporation's Lien. The corporation shall at all times have a lien upon the shares of stock owned by each stockholder to

> secure the payment by such stockholder of all rent to become payable by such stockholder under the provisions of any proprietary lease issued by the corporation and at any time held by such stockholder and for all other indebtedness from such stockholder to the corporation and to secure the performance by the stockholder of all the covenants and conditions of said proprietary lease to be performed and complied with by the stockholder. . . ."

The Lease provides, among other things, that, "FIRST: [Fletcher] will pay the rent or maintenance charge, and any other assessment, charge or imposition imposed by the [Dakota] upon its shareholders (such assessments, charges and impositions 'additional rent') to the [Dakota] . . . ." By creating a first lien on the Shares in order to secure payment of all rent and other indebtedness, the Bylaws establish the Dakota's "direct remedy" against Fletcher's "cooperative interest" if the Lease obligations are not paid. Thus, the Bylaws and the Lease constitute a "cooperative record" that grants the Dakota a perfected cooperative organization security interest in the Shares (*see* UCC §§ 9-102 [74], 9-102 [27-d], 9-308 [h]). As a claim secured by a perfected cooperative organization security interest, the Dakota's claim has priority over any other claims secured by the Shares (*see* UCC § 9-322 [h] [1]). Thus, the Dakota's security interest in the Shares and Lease is superior to those of Chase. Next, the Court considers whether the Bluth Judgment is properly considered part of this superior security interest.

Whether the Bluth Judgment is properly considered part of the Dakota's superior security interests

The Lease provides that:

> "FIFTEENTH: If [Fletcher] shall at any time be in default hereunder, and the [Dakota] shall take any action against [Fletcher] based upon such default, or if the [Dakota] shall defend any action or proceeding (or claim therein) commenced by [Fletcher], [Fletcher] will reimburse the [Dakota] for all expenses (including, but not limited to attorneys' fees and disbursements) thereby incurred by the [Dakota], so far as the same are reasonable in amount, and the [Dakota] shall have the right to collect the same as additional rent or damages."

This provision clearly and unambiguously provides that the Dakota may recover, among other things, attorney's fees in two situations: (1) if the Dakota commences an action against Fletcher because he is in default under the Lease and (2) if Fletcher commences any action or proceeding against the Dakota. As it finds Paragraph 15th to be clear and unambiguous, the Court will not consider parol evidence to create an ambiguity

(*see Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 55 [1st Dept 2015]).

Chase's contention that this provision is unconscionable is unavailing for several reasons. First, Chase did not plead that the Lease was unconscionable. CPLR 3018 provides in relevant part that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." Generally, an affirmative defense is deemed waived if not raised in the pleading (*see Citicorp Leasing, Inc. v U.S. Auto Leasing, Inc.*, 58 AD3d 479 [1st Dept 2009]; *Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]; 5A Carmody-Wait 2d § 30:47). That some portion of the Lease is substantively unconscionable is undoubtedly a defense, which would take the Dakota by surprise and would raise issues of fact not appearing on the face of a prior pleading (*see Inc. Vil. of Philmont v X-Tyal Intern. Corp.*, 67 AD2d 1039, 1040 [3d Dept 1979]).[3] As the Court of Appeals has explained, "[a] determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—*i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]). As Chase did not plead unconscionability as an affirmative defense, that defense is deemed waived.

Second, the Court notes that it is not at all clear that Chase is entitled to challenge the validity of the Lease, a contract to which it is not a party (*Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86, 90 [1st Dept 2003] ["It is well settled that in order to have standing to challenge a contract, a non-party to the contract must either suffer direct harm flowing from the contract or be a third-party beneficiary thereof"]). Although Chase's recovery would be diminished by the Dakota's recovery of attorney's fees in the Fletcher Action, Chase will not suffer a direct harm as a result of this provision. In addition, there is nothing to indicate that Chase was a third-party beneficiary under the cooperative record.

Third, the forgoing notwithstanding, the Court does not find the subject provision to be unconscionable. In *Krodel v Amalgamated Dwellings Inc.*, the First Department was presented with a lease, which provided that the Lessor would recover, among other things, attorney's fees in any action based on the Lessor's default (166 AD3d 412, 412 [1st Dept 2018]). In *Krodel*, the Lessee alleged the Lessor's default, the Lessee prevailed, and the Lessor still sought to recover its attorney's fees (*id.* at 413). The First Department found that the trial court properly declined to enforce that provision of the contract as unconscionable (*id.*). The First Department explained that in making this finding, the

[3] The Court has found no authority for this precise point in the First Department. However, in such situations, the "Court is bound by the doctrine of *stare decisis* to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" (*D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]).

Court must "giv[e] due consideration to the nature of the contract and the circumstances" (*id.*). Here, by contrast, the Lease does not provide that the Dakota may recover attorney's fees in situations where it does not prevail. Rather, the Lease is silent as to whether it may do so. It is well settled that "a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided" (*ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 503 [1st Dept 2012]). As *Krodel* demonstrates, to permit the Dakota to recover attorney's fees in an action with its residents even when it does not prevail would produce an unconscionable result. And, as the Lease does not expressly provide that the Dakota could recover its attorney's fees in an action where it does not prevail, such a construction must be avoided. Regardless, as the Dakota prevailed in the Fletcher Action, the Court may avoid the issue altogether (*see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Ass'n, Inc.*, 24 NY3d 528, 535 [2014]).

Chase's contention that the Fletcher Action was unrelated to Fletcher's position as a shareholder of the Dakota is also unavailing. As noted above, the First and Second Causes of Action in the Fletcher Action are plainly grounded in Fletcher's position as a shareholder of the Dakota. Thus, the Court may also avoid the potentially closer issue of whether the Dakota would be entitled to recover attorney's fees in an action commenced by Fletcher that was truly unrelated to Fletcher's position as a shareholder of the Dakota. Accordingly, the Bluth Judgment, constituting the Dakota's expenses for the successful defense of the Fletcher Action, is an obligation incident to Fletcher's ownership of his cooperative interest in the Dakota and properly considered part of the Dakota's superior security interest and not a further encumbrance in violation of the Recognition Agreement.

Conclusion

To the extent not specifically addressed herein, the Court finds the remaining arguments of Chase to be without merit. Based on the foregoing, it is hereby

ORDERED that the Dakota's motion (Motion #12) is GRANTED in its entirety; and it is further

ORDERED that the Dakota shall submit a proposed judgment within 30 days hereof; and it is further

ORDERED that Chase's motion (Motion #13) is DENIED.

Dated: New York, New York
August 4, 2021

HON. LEWIS J. LUBELL, J.S.C.