

**Sutton Apts. Corp. v Sene**

2023 NY Slip Op 30334(U)

January 26, 2023

Supreme Court, New York County

Docket Number: Index No. 654181/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

-----X

SUTTON APARTMENTS CORPORATION,

Plaintiff,

- v -

CINDY LYNN SENE, PAPA LAMINE SENE,

Defendants.

-----X

INDEX NO. 654181/2020

MOTION DATE 01/25/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - MONEY.

Plaintiff’s motion for summary judgment is granted.

**Background**

Plaintiff seeks recovery of money it claims it paid to the New York City Housing Development Corporation (“HDC”) in connection with the sale of shares in an apartment owned by defendants. Plaintiff alleges that defendants overstated the amount they originally paid for the apartment which resulted in an underpayment to HDC.

Plaintiff explains that sellers must pay an appropriate share of the resale profits to HDC pursuant to an agreement with the City of New York and HDC. Plaintiff insists that these rules are in place because the apartments were developed in partnership with the City of New York and HDC to provide affordable housing and there are restrictions about who can qualify to own shares. It contends that defendants closed an agreement to sell their shares related to an apartment in the building on June 13, 2014.

Plaintiff alleges that defendants represented that the original purchase price for the shares was \$476,946 when, in fact, they had paid \$322,750 for these shares. That means that the resale profit from the sale (defendants sold the property for \$565,000) was much higher than what was represented on the Resale Profit Worksheet completed by the defendants. Plaintiff explains that sellers must pay 50% of the profit realized from the sale of any unit (the worksheet permits other costs associated from the sale of the shares to be deducted from the payment owed to plaintiff). So, here, plaintiff contends that defendants only paid \$15,150 instead of the \$92,248.17 they should have paid. Plaintiff contends that \$77,089.71 is due.

In opposition, defendants contend that “It is not sufficient for plaintiff to allege that defendants received benefits from plaintiff’s mistake in failing to check the calculation of RPW [Resale Profit Worksheet]” (NYSCEF Doc. No. 54, ¶ 3). They claim that plaintiff reviewed the RPW and approved it before the closing. Defendants blame plaintiff’s failure to do its due diligence. Defendant Cindy Lynn Sene claims that “if we had known that this was the amount due, we would not have sold our unit” (*id.* at 4). Defendants also make arguments about the statute of limitations.

In reply, plaintiff observes that defendants did not contest any of the facts asserted by plaintiff in its moving papers. It argues that defendants concede they were responsible for preparing the subject worksheet and that the misstatement on this worksheet cannot be overlooked. Plaintiff points to the survival of closing affidavit (attached to its moving papers) and that this provides a basis upon which plaintiff can seek recovery based on a misrepresentation.

## Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion. Clearly, defendants do not contest the critical issue in this case—the misrepresentation of the amount of the original sale price. The failure to raise an issue of fact about that issue confirms that defendants received a windfall from the sale of the shares. Defendants were supposed to pay 50% of the profit from the sale and they did not.


Defendants’ attempt to blame plaintiff or others is without merit. Of course, it would have been easier for all parties if plaintiff had found defendants’ misrepresentation sooner. But the fact is that defendants were tasked with preparing the worksheet concerning the profit earned and plaintiff did not immediately catch it. Plaintiff’s failure to identify the misrepresentation immediately does not mean it is precluded from seeking recovery and that defendants can get away with their attempt to sidestep their obligations and pocket the money. And, to the extent that defendants make arguments about the statute of limitations, the Court observes that those arguments were rejected in connection with a prior motion (NYSCEF Doc. No. 23).

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$77,089.71 plus statutory interest from June 13, 2014 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the issue of reasonable legal fees (as provided for under the Proprietary Lease) is severed and plaintiff shall make a separate motion for such fees on or before February 21, 2023 as movant did not request a specific amount.

1/26/2023  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: