SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

ESTHER LEE,

Plaintiff,

- v -

JAY HOUSING CORPORATION, HARPREET K. SANDHU, GAURAV S. BATH, VANDITA SINGH, ROHIT SINGH, SARAH WALKER, and GARRETT WALKER,

Defendants.

----------X

INDEX NO. 656670/2021

MOTION DATE 08/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, and 121

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

This action arises out of the efforts of plaintiff Esther Lee, to sell Unit 5 of the building located at 13 Jay Street, New York, New York. Defendant Jay Housing Corporation ("JHC") owns and operates the building, and the individual defendants are other tenants and shareholders of the building. Presently before the court is Lee's motion for partial summary judgment on the fifth and sixth causes of action in the verified amended complaint. Lee seeks a declaration that the conditions imposed on her sale of the building by defendants are improper restraints on alienation, and that defendants be permanently enjoined from imposing any such conditions on her sale of her apartment. Lee also seeks summary judgment dismissing defendants' counterclaims compelling access for an inspection (first counterclaim), allowing defendants to assess additional shares upon Lee's apartment (second counterclaim), for damages attributable to fines and penalties allegedly stemming from Lee's rooftop addition to her apartment (seventh

counterclaim), and compelling Lee to obtain an amended certificate of occupancy for the building (eighth counterclaim). Upon the foregoing documents, Lee's motion is denied, without prejudice to renewal, based on the following memorandum decision.

Background

Lee and her husband, nonparty Cary Paik, purchased Unit 5 in July 2012 (Lee aff., NYSCEF Doc. No. 40, ¶ 3). In May 2014, Lee presented the other shareholders in the building with plans for their contemplated renovation of the rooftop, the exclusive use of which was given to Unit 5 in the cooperative documents (offering plan, NYSCEF Doc. No. 82). Plaintiff asserts that the plans were approved by the cooperative board unanimously, and without any allocation of additional shares of JHC (Lee aff., NYSCEF Doc. No. 40, ¶ 31; Weiss aff., NYSCEF Doc. no. 42, ¶¶ 31-32; Pelavin aff., NYSCEF Doc. No. 44, ¶¶ 3, 21-22; Montifiore aff., NYSCEF Doc. No. 45, ¶¶ 22-23; Holcomb aff., NYSCEF Doc. No. 46; ¶¶ 24-25). Plaintiff also received approvals from, among others, the Landmarks Preservation Commission ("LPC"), the New York City Department of Buildings ("DOB"), and the Fire Department of the City of New York ("FDNY") (Lee aff., NYSCEF Doc. No. 40, ¶ 34; see also LPC approved Plans, NYSCEF Doc. No. 57). Construction of the rooftop addition was substantially complete as of September 2017 (Lee aff., NYSCEF Doc. No. 40, ¶ 38).

In 2019, Lee and Paik listed their apartment for sale (*id.*, ¶ 39; email exchange dated June 5, 2019, NYSCEF Doc. No. 58). Approximately two years later, Lee entered into a contract of sale for $9,500,00.00 (contract of sale, NYSCEF Doc. No. 14), and put down a deposit on a house in Westchester County (Lee aff., NYSCEF Doc. No. 40, ¶¶ 44-45). At a shareholders' meeting on June 14, 2021, to discuss the sale, defendant Vandita Singh stated that she would "not be comfortable" approving the sale absent an increase in shares allocated to Unit 5 (*id.*, ¶

51). In response, Lee obtained statements from the prior members of the board who had approved the sale, stating, that there would be no increase in allocated shares due to the rooftop project (prior Board member statements, NYSCEF Doc. No. 62). Plaintiff then alleges that defendants delayed consideration of the proposed sale, and when defendants did decide, they imposed several conditions on the Board's approval (Lee aff., NYSCEF Doc. No. 40, ¶ 70; email to plaintiff's transaction counsel dated August 27, 2021, NYSCEF Doc. No. 64). Specifically, the Board, through its managing agent, required that Lee:

1. Allow an inspection of the unit at her expense to verify, among other things, the additional square footage of the rooftop addition;
2. Obtain a permanent certificate of occupancy for the building;
3. Agree to make the new owner and any succeeding owners responsible for all potential costs associated with complying with Local Law 11;
4. Allow a proportionate additional allocation of shares to Unit 5 due to the rooftop addition; and
5. Pay for a mechanical engineer to inspect all connections from the rooftop edition to the building's mechanical systems and reimburse JHC for any necessary repairs.

(Email to plaintiff's transaction counsel dated August 27, 2021, NYSCEF Doc. No. 64.) Due to the conditional nature of the board's approval, Lee and Paik's buyer canceled the sale (termination notice, NYSCEF Doc. No. 66).

Lee commenced this action, asserting claims for breach of the proprietary lease, breach of fiduciary duty, tortious interference with business relations/prospective economic advantage, tortious interference with contract, breach of contract against JHC by imposing an additional

shares allocation, and unjust enrichment, as well as the two causes of action listed above that are the subject of the motion. No discovery has yet been exchanged by the parties.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

Here, issues of fact in the record preclude summary judgment at this time. The central dispute between the parties is whether or not defendants may allocate additional shares to Unit 5. Defendants seek to add other conditions to the sale of Unit 5, such as inspections, clearing unrelated violations, and assuming sole responsibility for statutory compliance with Local Law

11. The court finds many of these requirements to be of dubious legality, and particularly notes that in the years since the addition was completed, the DOB has yet to find that the building is subject to Local Law 11. Nevertheless, the court is sympathetic to the idea that the increase in usable space and concomitant increase in property taxes on the building has created a situation where the shareholders of Unit 5 derive an unequal benefit from an increased cost to the entire building. Many, if not all of the requirements placed upon the sale are an attempt by defendants to remedy what they see as a structural inequality in the shares of JHC, which runs afoul of Business Corporation Law § 501. The statute provides that, among other things, maintenance charges and assessments "have been and are hereafter fixed and determined on an equal per-share basis or on an equal per-room basis or as an equal percentage of the maintenance charges" (Business Corporation Law § 501 [c]). The easiest way to accomplish this would be to allocate additional shares to Unit 5, potentially allowing the parties to amicably resolve the other conditions attached to the sale. Thus, everything covered by the motion stems from this underlying dispute regarding share allocation.

Plaintiff asserts that the rooftop addition was approved expressly without any additional shares to be allocated to Unit 5, citing affidavit testimony from the prior members of the board, as well as statements obtained by them prior to the litigation (Lee aff., NYSCEF Doc. No. 40, ¶ 31; Weiss aff., NYSCEF Doc. no. 42, ¶¶ 31-32; Pelavin aff., NYSCEF Doc. No. 44, ¶¶ 3, 21-22; Montifiore aff., NYSCEF Doc. No. 45, ¶¶ 22-23; Holcomb aff., NYSCEF Doc. No. 46; ¶¶ 24-25; prior Board member statements, NYSCEF Doc. No. 62). As is plain from the record, however, there is no contemporaneous written evidence of such an agreement. Defendants assert that the absence of a written alteration agreement is a violation of the proprietary lease for Unit 5 (proprietary lease, NYSCEF Doc. No. 83, ¶ 21 [a]). There is at least an argument to be made

that the prior Board waived that requirement as a matter of policy, again based on affidavit testimony from prior Board members (*e.g.* Weiss reply aff., NYSCEF Doc. No. 112, ¶ 30). The immediate problem caused by a lack of an alteration agreement is not with regard to whether the Board waived the requirement, but instead with the lack of contemporaneous documentary evidence of what the Board agreed to. As Eliezer Weiss, the prior President of the Board, avers, the meeting minutes that would have also recorded such unanimous approval and bar on share allocation were destroyed in a flood (*id.*, ¶¶ 32-33). Thus, resolution of the various questions raised about the existence of an agreement regarding share allocation hang on the testimony of the prior Board members and plaintiff, none of whom have been subject to cross-examination (*e.g. Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 625 [1st Dept 2013]). Defendants make the argument, which cannot be discounted based on the limited record, that in the absence of a writing, any agreement that Unit 5 would never be allocated additional shares violates the statute of frauds (General Obligations Law § 5-701). Defendants are entitled to examine these witnesses under oath to explore these issues, and to conduct related document discovery. At the close of that process, plaintiff may renew its motion.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that counsel shall appear for a preliminary conference in Room 1166, 111 Centre Street on January 29, 2025 at 2:15 PM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at

https://ww2.nycourts.gov/courts/1jd/supctmanh/preliminary_conf_forms.shtml, to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:

12/17/2024
DATE

LOUIS L. NOCK, J.S.C.

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