SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

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MARK D. O'BRIEN,

Plaintiff,

-against-

41 FIFTH OWNERS CORP.

Defendant.

- X

Index No.: 602879/98

Cal. No.: 10 of 1/12/99

DeGrasse, J.:

Defendant 41 Fifth Avenue Cooperative, a cooperative corporation that owns a residential apartment building in Manhattan ("the building"), moves for summary judgment in this action arising from a dispute with Mark D. O'Brien, who owns the shares of stock and proprietary lease appurtenant to penthouse B in the building. The parties disagree as to the amount of roof space that is covered by O'Brien's proprietary lease, and whether a portion of the roof claimed herein by O'Brien may be maintained by defendant for the use of all shareholders. O'Brien cross-moves for summary judgment.

FACTS

O'Brien's predecessor in penthouse B, Thomas Eyen ("T. Eyen"), commenced occupancy of the apartment in 1974 pursuant to a rental agreement. Plaintiff has offered uncontradicted evidence from Richard Eyen ("Richard"), T. Eyen's brother, that the latter made use of the entire roof adjacent to penthouse B all the way to the easterly parapet wall of the building. This portion of the roof, approximately 2550 square feet, essentially encompasses all

of the roof not allocated to penthouse A, the only other penthouse apartment in the building. Penthouse A's portion of the roof is approximately 1121 square feet. As discussed at greater length below, defendant claims approximately 1100 square feet of the 2550 square feet claimed by O'Brien.

According to Richard, T. Eyen caused wooden planking and planters to be placed at various points on this entire 2550 square feet of rooftop, including the area closest to the eastern parapet that is the disputed section herein. T. Eyen's rental lease is not before the court and the parties make no representations concerning whether it contained language concerning T. Eyen's use of the roof.

T. Eyen purchased penthouse B when the building converted to cooperative ownership in 1985. The offering plan provided that each tenant in occupancy had the right to purchase the apartment he occupied on the date the plan was accepted for filing. It also provided that once the subscription agreement has been accepted, no change could be made "in the apartment, size or layout of an apartment or in the number of shares allocated thereto."

The offering plan contains no statement that any portion of the roof is retained for use by all shareholders. The engineering report that accompanied the offering refers to "exits to the penthouse terraces," including one that is in the area now claimed by the cooperative corporation.

The standard proprietary lease at the building, which defendant does not dispute was signed by T. Eyen, recites that:

> As used herein "the apartment" means the rooms in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment.

Paragraph 7 of the proprietary lease states:

> It the apartment includes a terrace, balcony, or a portion of the roof adjoining a penthouse, the Lessee shall have and enjoy the exclusive use of the terrace or balcony <u>or that portion of the roof appurtenant to the penthouse</u>, subject to the applicable provisions of this lease and to the use of the terrace, balcony or roof by the Lessor the extent herein permitted. The Lessor shall have the right to erect equipment of the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the building and shall have the right of access thereto for such installations and for the repair thereof.

The offering plan assigned 917 shares to penthouse B and 857 to penthouse A. As discussed below, defendant relies heavily on a comparison of shares of the two penthouses to argue that O'Brien is not entitled to all of the 2550 square feet that he claims.

The undisputed evidence is that after he purchased penthouse B T. Eyen continued to use the whole roof from the apartment to the eastern parapet wall until his death in 1992. This evidence is comprised of the affidavits of Richard, and of

Janus Barton, the current owner of penthouse A, both of whom observed T. Eyen's use of the space. After purchasing the apartment T. Eyen sought to add additional space to his apartment. He submitted plans to the coop's board that O'Brien claims showed that a portion of the proposed addition would protrude into the portion of the roof now claimed by defendant. The board raised various objections to the plans, but not to the fact that the proposed structure was to be built on this now-disputed area of roof. In a letter confirming receipt of the plans, the coop's managing agent wrote to T. Eyen stating that "[a]ccording to the offering plan you do have roof rights, but you do not have ownership of the roof." The import of this ambiguous statement is the subject of disagreement by the parties. T. Eyen never carried through his plan to build an addition to penthouse B.

T. Eyen died in May 1991 and ownership of his apartment passed to his estate. The estate apparently had a difficult time selling the apartment in the down market of the early 1990s.

In May 1994 Richard received notice from the coop board that the board would be considering at its next meeting the creation of a common area for all shareholder in the portion of the roof from one of the bulkheads to the eastern parapet. As noted above, T. Eyen had used this portion of the roof exclusively during his tenure in penthouse B.

Defendant claims that it decided that this area in fact belonged to the coop, and not to T. Eyen, when it had to effect repairs in 1994 to damage to the roof allegedly caused in part by

some of T. Eyen's installations and planters. At that time the board of the coop compared the amount of roof used by T. Eyen with his share allocation and concluded that the coop had reserved this portion of roof for the use of all shareholders. Richard and his lawyer protested the proposed division of the roof both at and subsequent to the board meeting. However, T. Eyen's estate decided not to proceed with litigation, purportedly because it feared that it would be impossible to sell the apartment while a lawsuit was pending.

Some time in 1996 the coop built a fence to separate the disputed portion of the roof from that portion that the board determined fairly belonged to penthouse B. The fence was in place when O'Brien bought the apartment in January 1997. O'Brien was made aware of the dispute over the roof by Richard, and Richard states that T. Eyen's estate reduced the asking price for penthouse B in view of the uncertain status of the disputed portion of the roof. The coop did not require that O'Brien waive his right to the disputed portion of the roof as a condition of its approval of his purchase. Upon closing on penthouse B, O'Brien did not immediately protest the board's division of the roof. He states in his affidavit that he did not wish to antagonize the board during the period he needed its approval for renovations he hoped to carry out in his apartment. O'Brien also installed his own fence right next to the coop's fence, ostensibly to protect his family's privacy.

Once his renovations were completed O'Brien brought this

lawsuit.

DISCUSSION

The genesis of this lawsuit arises from the ambiguity of the proprietary lease. As noted above, paragraph 7 of the lease provides that the owner of penthouse B shall have and enjoy the exclusive use of "that portion of the roof appurtenant to the penthouse." The meaning of "appurtenant" is ambiguous in this context.

O'Brien points to numerous facts that appear to indicate that he is entitled to the whole portion of the roof. It appears that T. Eyen had long used the whole roof prior to the building's conversion. At the time of the conversion, the offering plan provided that each tenant in occupancy had the right to purchase the apartment he occupied on the date the plan was accepted for filing. In T. Eyen's case, it would appear that he was "occupying" penthouse B and the whole portion of the roof not allocated to, or shared with, penthouse A. However the record before the court is not clear on this point as there is no discussion of the terms of T. Eyen's rental lease and what rights, if any, it gave him to use the roof around the penthouse. If T. Eyen had no rights to use the roof area pursuant to his rental lease, then the fact that he used the whole roof as a renter would appear to be of no moment. The question would then become, again, what did the incorporators mean by "appurtenant."

O'Brien's argument is also strengthened by the fact that

defendant has offered no document relevant to the cooperative's creation or governance that so much as mentions a common roof area open to all shareholders. Moreover, the board said nothing about the reservation of a common area at the time that T. Eyen applied for permission to build an addition that apparently would have encroached partially on the disputed area. These facts give rise to the inference that the coop board opportunistically seized a portion of the roof at a time that the owner was least able to protest.

The fact that a fence dividing the roof was in place at the time O'Brien purchased his shares is far from decisive. If the correct size of the apartment represented by penthouse B's 917 shares included the disputed portion of terrace, the board had no right to erect the fence and thereby decrease the size of the apartment -- and the value of the shares -- purchased by O'Brien. Any decrease in the number of shares allocated to an apartment would presumably require an amendment of the certificate of incorporation. (BCL § 402; Cooperative Corporations Law §§ 11, 12.) Allowing a coop to decrease an apartment's allocated space without concomitantly reducing its shares would subvert this requirement.

On similar facts, courts have found that coop board's division of roof space to be an unlawful partial eviction. In Washburn v 166 East 96th Street Owners Corp. (166 AD2d 272) a penthouse owner's lease provided that he had exclusive use of all the roof "appurtenant" to his apartment. After the coop's board

effected repairs to the roof it decided that two thirds of the area claimed by the owner was in fact common property. After trial, the court ordered the return of the disputed roof area to the penthouse owner. A similar result was reached on facts analogous to those at bar in Gracie Terrace Apartment Corp. v Goldstone (103 AD2d 699).

However, the decision in Washburn came after a trial. Apparently the trial court took expert testimony on the reasonable relationship of the shareholders's number of shares to the amount of roof space he claimed was "appurtenant" to his penthouse apartment. (Washburn, supra, 166 AD2d at 273.) Similarly, only a portion of the disputed roof area was returned to the penthouse owner in Gracie on summary judgment; a determination of the ownership of other disputed portions of the roof required a trial.

Here there are issues of triable fact that preclude summary judgment. The apparent disparity between the size of the roof area allocated to penthouse A (1121 square feet) and the area claimed by O'Brien (2550 square feet) undercuts O'Brien's claim. As noted above, penthouse A has been allocated 857 shares; penthouse B 917 shares. The parties differ in their calculation of how many shares should be allocated to the [illegible] areas of the two penthouses. However, even based on the estimate offered by O'Brien in his complaint (196 shares) it appears that penthouse B would have far more square footage relative to its shares than penthouse A. The ratio of the two apartments' shares to space would appear to be much closer if defendant's calculation of

penthouse B's roof space is used.

O'Brien claims that defendant's calculations are based on at least two incorrect assumptions. First, he claims that defendant has failed to take into account that he is barred from using the area under the water tower that stands on the undisputed portion of penthouse B's section of the roof. Second, he argues that penthouse A's roof area was reduced when an addition was added to that apartment, and that defendant has not allowed for the greater size of the interior of penthouse A in making its calculation.[1] If these two incorrect assumptions are corrected, O'Brien argues, than the ratio of penthouse B's shares to its square footage is close to that of penthouse A's. These arguments are undercut somewhat by defendant's claim that it did its calculations based on penthouse A's old roof area square footage. Defendant also points out that, just as O'Brien may not use the area under the water tower, not all of penthouse A's roof space is usable.

While the parties disagree as to the disparity between the two penthouses' shares-to-square-footage ratios, defendant's calculation is at least plausible and does seem to indicate a disparity. This disparity could be evidence that the incorporators of the cooperative did not intend to allocate to penthouse B the entire roof area claimed by O'Brien.

For the above-stated reasons, the proprietary lease is

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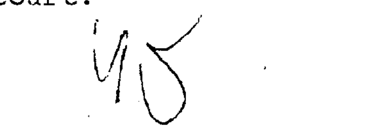
[1]In fact neither side has provided a concrete measure of either the interior or roof area comprised by penthouse A.

unclear as to what portion of the roof is "appurtenant" to penthouse B. This ambiguity cannot be resolved where there are issues of fact concerning the proper allocation of shares to penthouse B. Where a contract is ambiguous, summary judgment is improper because the interpretation of the contract becomes a fact issue. (See Yanuck v Simon Paston & Sons Agency Inc., 209 AD2d 207.)

CONCLUSION

Defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is denied. This constitutes the decision and order of the court.



DATE: MAR 23 1999

J.S.C.