

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

P R E S E N T :

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-10-13
ADJ. DATE 2-21-13
Mot. Seq. # 003- MotD, RTC

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STEVEN LAPIDUS and IRIS LAPIDUS,	CHRONAKIS SIACHOS & KAPLAN, LLC
	Attorney for Plaintiffs
Plaintiffs,	260 Madison Avenue, 18th Floor
	New York, New York 10016
- against -	
1050 TENANTS CORP.,	GALLET DREYER & BERKEY, LLP
	Attorney for Defendant
Defendant.	845 Third Avenue, 8th Floor
	New York, New York 10022
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Upon the following papers numbered 1 to 55 read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-30; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 31-50; Replying Affidavits and supporting papers 51-55; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiffs for an order pursuant to CPLR 3212 granting partial summary judgment is granted to the extent that plaintiffs are granted judgment in the sum of \$250,000. However, entry of summary judgment shall be held in abeyance pending the determination of any remaining causes of action or counterclaims herein. Plaintiffs’ motion is otherwise denied; and it is further

ORDERED that counsel for the parties are directed to appear before the Hon. Arthur G. Pitts, J.S.C., on June 20, 2013 at 9:30 a.m. at the Courthouse located at 1 Court Street, Riverhead, New York for a Preliminary Conference in this matter.

In 1983 the plaintiffs, Steven and Iris Lapidus, became owners of the cooperative shares attributable to Unit 4B in the defendant 1050 Tenants Corporation’s (“1050”) cooperative apartment building located at 1050 Park Avenue, New York, New York. Over the years, there were various and numerous claims by the plaintiffs of unremedied conditions regarding their apartment that resulted in protracted and substantial litigation between the parties (*see 1050 Tenants Corp. v Steven Lapidus*, 39 AD3d 379, 835 NYS2d 68 [1st

Dept 2007]). The end result of the lengthy litigation was a judgment of ejectment by the Hon. Marilyn Diamond, J.S.C., dated June 19, 2006. The plaintiffs were ejected by the New York County Sheriff on October 12, 2007, although they allege that they vacated the apartment on September 11, 2007. A contract of sale as to the apartment unit between the defendant and Francis and Regina Gannon was entered into on February 19, 2008. On May 30, 2008, the defendant completed the sale of the subject unit and issued a new proprietary lease to the purchasers of the cooperative shares appurtenant to the unit. The unit and shares sold for \$4,200,000 and the contract deposit while maintained in escrow earned interest of \$2,083.93, for gross proceeds from the sale of \$4,202,083.93. A week after the sale, a check in the sum of \$2,401,471.29 was remitted to the plaintiffs, together with an accounting with regard to the sale of the unit and shares. On February 1, 2010, an additional sum of \$35,127.19 was paid over to the plaintiff. The plaintiffs then initiated this action and their complaint seeks unspecified damages in the amount of \$901,270.61, plus interest. These damages are based on allegations that the defendant wrongfully withheld funds from the sale.

By way of a motion dated May 13, 2009, the defendant moved to dismiss pursuant to CPLR §3211. The Court, by decision dated December 1, 2009, denied the motion to dismiss and converted the defendant's pre-answer motion into a motion for summary judgment pursuant to CPLR §3211(c) and allowed the parties to submit additional papers in support or opposition thereto. In support of the motion, the defendant alleged that each of the withholdings from the sale were authorized by the proprietary lease. Specifically, the defendant alleged that from the gross sale proceeds of \$4,202,083.93 the defendants deducted the following: Real estate brokerage commissions; New York State and New York City real property transfer taxes; a New York City tax warrant; the cost of obtaining a lien and judgment against the plaintiffs; unpaid maintenance and charges, plus interest, including the time period after the plaintiffs vacated the apartment up and until the date of sale; satisfaction of four judgments previously entered in favor of the defendant against the plaintiffs; and a judgment entered in favor of Arthur Handler against the plaintiffs, which resulted in a restraining notice, together with interest from May 30, 2008. The defendant also deducted the legal fees incurred by it in connection with the various litigations involving the plaintiffs, with interest, including the cost of preparing the final accounting. Defendant also withheld a reserve fund in the sum of \$250,000 for pending litigation and other secured contingent liabilities. By a decision dated May 3, 2010, the Court denied the motion for summary judgment, finding that issues of fact existed. In the decision the Court stated that the "prior decision dated December 1, 2009 clearly found that the withholding of future legal expenses to be without merit, however, there is no motion presently before the Court addressing same."

In its May 3, 2010 decision, the Court also indicated that Suffolk County was not the proper venue for the action. Thereafter, defendant moved, by notice of motion dated June 10, 2010, for an order changing venue to New York County. That motion was granted by a decision dated December 13, 2010. Upon transfer to New York County, the defendant renewed its motion for summary judgment. The motion was denied by the Hon Donna M. Mills, J.S.C., pursuant to a Decision/Order dated March 20, 2012 on the ground that it violated the rule that successive summary judgment motions are not allowed. However, during this same time period, plaintiffs appealed the decision to change venue, and by order dated April 17, 2012, the Appellate Division, Second Department reversed that decision and transferred the matter back to Suffolk County.

Plaintiffs now move for partial summary judgment on some of their claims and to dismiss the defendant's counterclaims. In support of the motion, plaintiffs submit, *inter alia*, their attorney's affirmation, the affidavit of plaintiff Iris Lapidus, sworn to the December 12, 2012, the pleadings, copies of judgments, orders and pleadings from prior litigation between the parties. In opposition, the defendant submits, *inter alia*, its attorney's affirmation, copies of the contract of sale and related closing documents with regard to the sale of Unit 4B of the 1050 Tenants Corp., and copies of judgments and orders from prior litigation between the parties.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiffs have established that they are entitled to summary judgment with regard to the "reserve fund in the sum of \$250,000.00 for pending litigation and other secured contingent liabilities." Neither the 1983 proprietary lease, which the plaintiffs allege governs the sale of the cooperative apartment or the proprietary lease adopted by the shareholders in 2006, which the defendant alleges governs the sale, empower the defendant to withhold this "reserve fund." In light of this lack of authority, the funds were improperly withheld and the plaintiffs are granted summary judgment with regard to their claim to these funds. However, in light of the other pending claims and counterclaims in this matter, the entry of summary judgment on this claim shall be held in abeyance, pursuant to CPLR 3212 (e) (2), pending the determination of the other causes of action and counterclaims herein.

Plaintiffs' claim to the "flip tax" paid with regard to the sale of the subject apartment unit is without merit. The 2% flip tax was imposed on the transaction pursuant to the terms of the 2006 proprietary lease. The terms of that lease impose the tax on the seller of the property. However, no doubt due to the history of litigation between the parties, the buyers were induced to pay the flip tax instead. Thus, if the defendant is correct that the 2006 proprietary lease governs the sale, the plaintiffs benefitted because their obligation under the lease to pay the flip tax was taken over by the purchasers. The plaintiffs would thus have been spared an \$84,000.00 expense and the defendant would be entitled to the flip tax payment. If the plaintiffs are correct and the 1983 proprietary lease governs, the flip tax should not have been charged to them. In that event, the only party with a claim on those moneys would be the new purchasers of the apartment unit. Under either interpretation, the plaintiffs would have no claim to these moneys and, accordingly, that portion of the motion for summary judgment is denied in all respects.

With regard to the balance of the motion, both parties have raised significant issues of fact which preclude summary judgment. Therefore, the remaining portions of the motion are denied in all respects.

In light of the foregoing the motion by the plaintiffs for an order pursuant to CPLR 3212 granting partial summary judgment is granted to the extent that plaintiffs are granted summary judgment in the sum of \$250,000. However, entry of summary judgment shall be held in abeyance pending the determination of any remaining causes of action or counterclaims herein. Plaintiffs' motion is otherwise denied in all respects

Dated: May 16, 2013



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION