SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

1823 NEWTON STREET TENANT'S ASSOCIATION,	)	**Civil Case No. 05-CA-4444**
Plaintiff,	)	**Calendar 12**
	)	**Judge Robert E. Morin**
v.	)	
NEWTON PARTNERS, LLC, *et al.*,	)	
Defendant.	)	

ORDER

This comes before the Court on Defendants' Motion for Summary Judgment and Plaintiff's Opposition thereto.

Plaintiffs bring this action to challenge a number of actions taken by the defendants concerning the purchase and sale of a 14-unit rental housing building located at 1823 Newton Street, N.W. ("the Property"). Plaintiffs' claims focus on two sales of the Property, occurring in 2002 and 2004. With respect to each sale, Plaintiffs allege (1) defendants violated the Rental Housing Act, D.C. Code § 42-3401.01, *et seq.* ("Rental Housing Act") (Counts I and II), (2) defendants violated the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.* ("CPPA") (Counts III and IV), (3) that they are entitled to declaratory relief that defendants must offer to sell the Property to them (Counts V and VI), (4) defendants engaged in constructive fraud (Counts VII and VIII), (5) defendants engaged in conspiracy to commit constructive fraud (Counts IX and X), and (6) defendants aided and abetted constructive fraud (Counts XI and XII).

Certain facts are not in dispute:

On August 23, 2001, Stephen S. Snook and Jean S. Snook ("the Snooks") became owners of the Property. Thereafter the defendants entered into a number of transactions and agreements that led to this litigation.

2002 Transaction:

On or about July 26, 2002, the Snooks deeded a 95% interest in fee simple to the Property ("95/5 transaction") to Newton Partners, LLC, ("Newton"), for a price of $550,000. Previously, on January 22, 2002 the Snooks entered into an agreement to sell the Property to Spruce Street, LLC, an entity controlled by defendants Jeogian and Kretschman for $550,000. This initial transaction, however, was replaced with the 95/5 transaction by agreement of the parties. Prior to closing on the 95/5 transaction defendants Jeogian and Kretschman formed Newton and assigned the contract to the new entity.

At the time of the closing of the 95/5 transaction parties entered into a Co-Ownership Agreement whereby they agreed that although the Snooks were 5% owners they would receive only .1% of the profits and Newton would receive 99.9 % of the profits.

Approximately twenty-three (23) months later, the Snooks deeded their remaining 5% interest in fee simple to the Property to Newton. Although the deed reflects that Newton paid an additional $27,500 in consideration for the Snooks remaining interest, in fact Newton paid no consideration in addition to that which was paid by it at the initial closing. Thus, even though the agreement was structured as a 95/5 transaction, the Snooks received all their consideration at the July 2002 closing, receiving no additional consideration for their subsequent transfer of the remaining interest. (Collectively referred to as the "2002 transaction").

2004 Transaction:

On August 2, 2004, defendants Jeogian and Kretschman agreed to sell their 100% interest in Newton Partners, 99% to defendant Christopher Bogdan and 1% to defendant Daniel Pomykala for $1,100,000. The parties closed on the agreement on September 22, 2004 when defendants Bogdan and Pomykala became purported principals of Newton.[1] (Collectively referred to as "the 2004 transaction").

Defendants collectively move for summary judgment raising a number of arguments including (1) Plaintiffs, individually and as a tenant association, do not have standing to claim a violation of the Rental Housing Act, (2) Plaintiffs cannot claim violation of the CPPA as it is superseded by the Rental Housing Act for claims relating to sale of housing accommodations, (3) the 2002 and 2004 transactions were not "sales" subject to a tenant's opportunity to purchase under the Rental Housing Act, and (4) Plaintiffs' remaining derivative claims of constructive fraud, conspiracy and aiding and abetting fail because there has been no substantive violation of either the Rental Housing Act or the CPPA.

To prevail on a motion for summary judgment, the moving party must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact in dispute and that the movant is therefore entitled to judgment as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super. Ct. Civ. R. 56(c). A trial court considering a defendant's motion for summary judgment must view the pleadings, discovery materials and affidavits or other materials in the light most favorable to the plaintiff and may grant the motion only if a reasonable jury could not find for the plaintiff as a matter of law. *Grant*, 786 A.2d at 583

[1] Plaintiffs allege with some factual support that defendant Pomykala was a "sham" partner who received no financial interest and had no dealings with Newton or the Property.

(citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995). The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is a genuine issue of material fact in dispute. *Grant*, 786 A.2d at 583 (citing *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). The non-moving party may not simply rest on conclusory allegations or denials of the movant's pleadings to establish that a genuine issue of material fact is in dispute. *Boulton v. Inst. of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002); Super. Ct. Civ. R. 56(e). To avoid conceding a fact, the non-moving party must come forward with a response showing that there is a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). If the non-moving party fails to establish that a genuine issue of material fact is in dispute, the moving party is entitled to summary judgment. *Adickes*, 398 U.S. at 160-61; *Boulton*, 808 A.2d at 502; Super. Ct. Civ. R. 56(e).

1. Standing

With respect to the individual named Plaintiffs, Defendants correctly point out that the Court of Appeals has determined that individual tenants do not have a standing to sue for the alleged violations made in this Complaint. *West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 721 n.1 (D.C. 1994); *Stanton v. Gerstenfeld*, 582 A.2d 242, 245 (D.C. 1990). Therefore, the motion for summary judgment with respect to the tenant's opportunity to purchase claims made by Carlos Castillo, Teofila Moya, Jessie Clyburn, Norma Parker, Juan Carlos Umanzor, Mario Gallo and Adermo Acosta is granted.

With respect to the standing of 1823 Newton Street Tenants' Association, Inc. ("the Association"), the issue is whether the Association meets the statutory definition of an

organization that is authorized by statute to bring an action on behalf of eligible tenants. A tenant organization is explicitly authorized to bring claims under the Sale Act. D.C. Code § 42-3405.03 (2001). Such an organization is defined at D.C. Code § 42-3401.03(18):

> "Tenant organization" means an organization that represents at least a majority of the heads of household in the housing accommodation excluding those households in which no member has resided in the housing accommodation for at least 90 days and those households in which any member has been an employee of the owner during the preceding 120 days.

a. Standing for 2002 transaction:

In light of this definition, Defendants argue that in order to meet the "majority-representation" requirement Plaintiff 1823 Newton Street Tenants' Association, Inc. ("the Association") must demonstrate that among its members at the time of the filing of this action, June 10, 2005, were at least 51% of the tenants who resided at the Property at the time of the 2002 transaction who had been living there for 90 days.

In response, Plaintiffs seem to suggest that the majority-representation requirement is measured as of the time of the filing of the action. In other words, under Plaintiff's construction, if a tenant association includes as its members 51% of the eligible tenants who remain in the building as of the time of the filing of the action, the majority-representation requirement is met. Such a construction, however, is contrary to the temporal limitations set forth in the statute.

Under the statutory definition, a tenant who resides at the property less than 90 days prior to the sale or moved into the property after the sale would not sustain a harm recognized by the Rental Housing Act. Only those tenants who are in the property at least 90 days prior to the sale sustain a recognized harm. Consequently, by definition a tenant association must represent a majority of eligible tenants, *i.e.*, those who sustained a legally recognized harm at

the time of the sale, in order to be able to sue on behalf of those tenants. In this case, the Association must demonstrate that it represents 51% of the eligible tenants who suffered harm as a result of the 2002 transaction—those tenants who lived at the property for at least 90 days prior to the sale.

Defendants aver that at the time of the 2002 transaction there were 14 eligible tenants, and therefore, the Association must include among its members at least 8 eligible tenants. In response, the Association argues that the Defendants' evidence about the number of eligible tenants at the time of the 2002 transaction is unreliable, unauthentic, hearsay and irrelevant as to time. Because of these difficulties, the Association suggests that there is a material question of fact that must be resolved as to the number of units that were occupied on the date of the 2002 transaction.

What is lacking from the Association's submission, however, is any showing that it has met the majority representation requirement for the 2002 transaction. It is axiomatic that once challenged a party has the burden to demonstrate its standing to bring a claim. *Friends of the Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.* 528 U.S. 167, 180, 191 (2000); *Brentwood Liquors, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 661 A.2d 652, 655 (D.C. 1995); *Friends of Tilden Park, Inc. v. District of Columbia,* 806 A.2d 1201 (D.C. 2002). Thus, the Association must demonstrate that it has standing to bring its claim and absent such a demonstration Defendants' motion is well taken.

It is unclear whether the Association has failed to make a showing of its standing because it is unable to do so or because it misunderstood its burden in this regard. Therefore, the Court shall take under advisement Defendants' motion for summary judgment with

respect to the Association's lack of standing for 14 days after the date of this Order to allow the Association to make any additional submission it deems appropriate.[2]

b. Standing for 2004 transaction:

Defendants make no argument that the Association lacks standing to bring claims concerning the 2004 transaction.

2. Claims under the CPPA:

In Counts III and IV Plaintiffs challenge the 2002 and 2004 transactions as violative of the CPPA. The Defendants are correct, however, when they argue that the Court of Appeals has directly held that the Rental Housing Act supersedes any alleged claims under the CPPA. *Twin Towers Plaza Tenants Assoc., Inc. v. Capitol Park Assoc., L.P.*, 894 A.2d 1113, *7-8 (D.C. 2006). Therefore, Defendants' motion for summary judgment as to Counts III and IV and portions of other Counts VII, VIII, IX, X, XI and XII alleging derivative claims relating to purported violations of the CPPA, are granted.

3. Whether the 2002 and 2004 transactions constituted "sales" under the Rental Housing Act

Defendants assert that neither the 2002 transaction nor the 2004 transaction constituted a "sale" within the definition of the Rental Housing Act and, therefore, Plaintiffs cannot assert claims under the statute.

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[2] The Association argues that even if it did not have standing as a "tenant organization" under the statute with respect to the 2002 transaction, it still would have "associational standing" to bring claims out of that transaction. Under this doctrine an association has standing to bring an action on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of Tilden Park, Inc. v. District of Columbia,* 806 A.2d 1201 (D.C. 2002) (quoting *Hunt v. Washington State Apple Adver.* Comm'n, 432 U.S. 333, 343 (1977). The Court of Appeals expressly has recently reserved ruling on this question. *Twin Towers Plaza Tenants Assoc., Inc. v. Capitol Park Associates, L.P.,* 894 A.2d 1113, *7-8 (D.C. 2006). Nevertheless, it seems unlikely that the Association would be able to meet the first prong, *i.e.,* its members would otherwise have the standing to sue, because tenants do not have the right to bring individual actions. *West End Tenants Assoc. v. George Washington Univ.*, 640 A.2d 718, 721 n.1 (D.C. 1994); *Stanton v. Gerstenfeld*, 582 A.2d 242, 245 (D.C. 1990).

Under the Rental Housing Act, before the owner may "sell" a housing accommodation to a third party it must give notice to the tenants and an opportunity to purchase the accommodation. D.C. Code § 42-3404.02 ("Sale Act"). Not all transfers of ownership interests to third persons, however, constitute a sale under the Act. The Court of Appeals has given guidance as to what transfers of ownership interests constitute sales that trigger the tenants' opportunity to purchase under the Act.

In *Wallasey Tenants Association v. Varner,* 893 A.2d 1135 (D.C. 2006), the Court of Appeals observed that the Sale Act creates a statutory right of first refusal in favor of the tenant. This right of first refusal "follow[s] the same principals and [is] subject to the same analyses," as contractual right of first refusal. *Id. at *5.* While an owner may construct a transaction in such a way to avoid the application of the right of first refusal, in determining whether transaction triggers the right of first refusal, courts must deal with the "true nature" of the transaction and may take into account whether the transaction was a "sham." *Id.*; *West End Tenants Ass'n.*, 640 A.2d at 730 (D.C. 1974) (quoting *Kings Antiques Corp. v. Varsity Properties, Inc.,* 121 A.D.2d 885, 503 N.Y.S.2d 575, 576-77 (1986).

In *West End Tenants Association*, the Court of Appeals interpreted the terms "sell" and "sale" as:

> There appears to be an almost *universal consensus* that, in the context of real property transactions, the word "sale" signifies an *absolute transfer* of property. BLACK'S LAW DICTIONARY 1337 (6th ed. 1990) defines sale, inter alia, as
>
> > A contract whereby property is transferred from one person for a consideration of value, implying the passing of the *general and absolute title, as distinguished from a special interest falling short of complete ownership.*

640 A.2d at 7272-28 (some emphasis added).

a. 2002 Transaction: Defendants correctly point out that the 2002 transaction, in which the Snooks transferred 95% of their ownership interest and retained 5%, on its face does not constitute an absolute transfer of property and therefore is not a sale as defined by the Sale Act. Recently, in *Twin Towers*, *supra*, the Court of Appeals held that a similar 95/5 transaction did not constitute a sale under the Sale Act that trigger the tenants' right of first refusal. In this case, however, the Association presents additional factual matters that were not present in *Twin Towers* and which, if proven, call into substantial question the "true" nature of the 2002 and 2004 transactions.

Taking the Association's facts in a light most favorable to it, a reasonable factfinder could conclude that in the 2002 transfer the Snooks agreed to an "absolute transfer" of the Property that occurred in two stages and not a true 95/5 transaction that Defendants claim it to be:

1. Mr. Snook testified at deposition that it was his understanding as a complete transfer;
2. The parties initially entered into a contract for sale of 100% fee simple in January 22, 2002 for a total price of $550,000. Thereafter on or about June 2002, they entered into the 95/5 transaction for a price of $550,000 and backdated the agreement to January 2002;
3. At the time of closing on the 95/5 sale, the parties entered into a Co-Ownership Agreement that reduced the Snooks' interest in both income and expenses to $1/10^{th}$ of 1%;
4. After the closing on the 95/5 sale the Snooks were not involved in the property and neither received any income from, nor paid expenses of, the Property;
5. When the Snooks subsequently transferred their remaining 5% they did not request nor receive any additional income;
6. The Snooks transferred their remaining 5% interest when they received a telephone call from one of the principals of Newton "reminding" them they needed to "close up" the 5%, as they had presumably agreed;
7. In connection with a tax return filed by the parties, they attributed consideration for the transfer of the 5% of $27,500 representing 5% of the purchase price originally paid, although

the Snooks received no additional consideration when they signed the 5% deed.

These facts, if accepted as true, would lead a reasonable person to conclude that Defendants engaged in a "paper" or sham 95/5 transaction when in reality and substance, the Snooks absolutely transferred their entire interests in the Property at the July 2002 closing when they received the entirety of their consideration. Thereafter, the Co-Ownership Agreement, under which they retained or were responsible for 1/1000 of the income and the transfer of the remaining 5% ownership interest for no additional consideration represented nothing more than paper accommodations to a sham transaction.

While under *Twin Towers* parties may intentionally engage in a 95/5 transaction for the purpose of avoiding the consequences of the right of first refusal under the Sale Act, that case presupposes that the parties have engaged in a true 95/5 transaction with the sellers retaining a 5% interest in the property. *Twin Towers* does not and cannot stand for the proposition that parties may engage in sham or phantom transactions to avoid the consequences of the Sale Act.

b. 2004 Transaction: The 2004 transaction purportedly involved a transaction whereby 99% of the ownership interest is transferred to one transferee and the other 1% is simultaneously transferred to another transferee.

In this transaction Defendants Jeogian and Kretschman sold 99% of interest in Newton Partners to defendant Christopher Bogdan and 1% of their interest to defendant Daniel Pomykala for $1,100,000. Defendants suggest such a transfer does not trigger the right of first refusal under the Sale Act because it is not a transaction as defined by D.C. Code § 42-3404.02(c) that, at the time of the transaction, provided:

> For the purposes of this subchapter, the term "sell" or "sale" *includes* the transfer of 100% of all partnership interest in a partnership which owns the accommodation as its sole asset to 1 transferee or of 100% of all stock of a corporation which owns the accommodation as its sole asset to 1 transferee in 1 or more transactions occurring during a period of 1 year form the date of the first such transfer[.](Emphasis added.)

D.C. Code § 42-3404.02(c) (2001) (amended 2005). Under Defendants' theory, since the 2004 transaction did not involve a 100% transfer of partnership interest to 1 transferee, it does not constitute a "sale" under the Sale Act.

Initially, Defendants' assertion that *only* a 100% transfer of partnership or corporate interest invokes the operation of the Sale Act is questionable in light of the language of the statute that such a transaction is "included" in the definition, which suggests that other examples may also constitute a sale within the statutory definition. Defendants' constrained view of what types of such transaction qualify as a "sale" under the statute certainly does not comport with the intent of the statute, as reaffirmed by the City Council. *See Columbia Plaza Tenants' Ass'n v. Columbia Plaza, L.P.* 869 A.2d 329, 334 (D.C. 2005); *Twin Towers*, 894 A.2d 1113 at *4; *Plaintiff's Memorandum at 24-25.*

Moreover, the facts as discovered by Plaintiffs if accepted as true, would lead a reasonable factfinder to find that Mr. Pomykala was a "phantom" partner who had no interest and no role in the partnership other than to defeat Plaintiff's right of first refusal and that the true nature of the transaction was effectively a 100% transfer to Mr. Bogdan:

1. Mr. Pomykala is a longtime friend of Mr. Bogden;
2. Mr. Pomykala is not involved in the real estate business;
3. Mr. Pomykala did not sign the Agreement of Sale;
4. Mr. Pomykala paid no consideration for his partnership interest;
5. Mr. Pomykala never saw any documents relating to the transaction;
6. Mr. Pomykala executed a power of attorney to Mr. Bogdan who executed all documents concerning the transaction;
7. Mr. Pomykala never received any income nor paid any expense concerning the Property;

8. Mr. Pomykala never saw and had no involvement in the Property;
9. Mr. Pomykala never received a K-1 form or any other tax documents concerning the partnership; and
10. Mr. Pomykala was not aware as to what, if anything, he would receive with respect to his "ownership" of the 1% interest.

Accepting these facts as true, a reasonable factfinder could find that the 2004 transaction was a sham created to defeat Plaintiff's rights to purchase the property. And, when taken with the actions of defendants Jeogian and Kretschman in the 2002 transaction each of whom were also parties to the 2004 transaction, these facts create an inference that the defendants engaged in a series of sham transactions for the purpose of defeating Plaintiff's rights under the Sale Act. While defendants Jeogian and Kretschman were within their rights as owners to structure transactions to avoid the application of the Sale Act, they could not create sham transactions in order to do so. *Wallasey Tenants Association*, 893 A.2d 1135 at *5; *West End Tenants Ass'n.*, 640 A.2d at 730 (quoting *Kings Antiques Corp.*, 121 A.D.2d 885, 503 N.Y.S.2d at 576-77.

4. Derivative Claims Against Individual Defendants (Counts VII, VIII, IX, X, XI and XII).

The Court agrees with Defendants that derivative claims brought against individual defendants for purported violations of the CPPA cannot be maintained because as a matter of law no substantive violation of that statute can occur under the facts alleged or discovered. As set forth above, however, there are facts from which a reasonable factfinder could conclude that the individual defendants engaged in tortuous and unlawful acts to deny Plaintiffs' rights of first refusal to purchase the Property as guaranteed by statute. Therefore, Defendants' motion for summary judgment with respect to the alleged violations of the Rental Housing Act is denied.

Wherefore for there reasons stated, it is this 17th day of May, 2006, hereby,

ORDERED, that Defendants' motion for summary judgment with respect to Plaintiff's claims under the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.*, (Counts III and IV) is granted; it is further,

ORDERED, that Defendants' motion for summary judgment with regard to the 2002 transaction because Plaintiff Association lacks standing is taken under advisement and the Association shall have 14 days from the date of this Order to make a showing as to how many tenants there were at the time of the 2002 transaction and how many the Association represents in this action; it is further,

ORDERED, that Defendants' motion for summary judgment with regard to the 2002 transaction based on the fact that the transaction did not constitute a "sale" under the meaning of Rental Housing Act, D.C. Code § 42-3401.01, *et seq.* is denied without prejudice subject to the Association establishing standing; it is further,

ORDERED, that Defendants' motion for summary judgment with regard to the 2004 transaction based on the fact that the transaction did not constitute a "sale" under the meaning of Sale Act because it is not a transaction as defined by D.C. Code § 42-3404.02(c), *et seq.* is denied; it is further,

ORDERED, that Defendants' motion for summary judgment with the respect derivative claims brought against individual defendants is granted in part in that claims under the D.C. Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.*, is hereby granted and claims brought for violations of the Rental Housing Act are denied.

Judge Robert E. Morin
(Signed in Chambers)

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