UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In Re	:	
	:	
	:	Chapter 11
THE DUNCRAGGEN REALTY CORPORATION	:	Case No. 92-B-40605 (PCB)
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	:	
Debtor.	:	
	:	

APPEARANCES:

WILLIAM A. GARCIA, ESQ.
Attorney for Jose Brito and Maria Puente
71 West 190th Street, Suite D
New York, New York 10040
By: William A. Garcia, Esq.

PENN PROEFRIEDT SCHWARZFELD & SCHWARTZ
Attorneys for Ronald Edelstein and Edelstein & Son Realty, LLC
1211 Avenue of the Americas
New York, New York 10036-8701
By: Stephen H. Penn, Esq.

MEMORANDUM DECISION GRANTING MOTION TO
PERMIT PAYMENT OF CONTRIBUTION FEE

BEATTY, PRUDENCE CARTER, U.S.B.J.

INTRODUCTION

Jose Brito ("Brito") and his wife have moved to have this case reopened so they may pay a capital contribution fee of $3,088.98 (the "Contribution Fee").[1] Prior to the

[1] On October 25, 2001, Brito and his wife moved to have this case reopened pursuant to Bankruptcy Code §350

confirmation of the debtor's chapter 11 plan, the Court directed that notice be mailed to every shareholder of the debtor cooperative apartment corporation informing them of the potential for forfeitures of their shares if they failed to pay maintenance arrears and a specified contribution fee. The payment of a contribution fee was a requirement under the proposed chapter 11 plan in order for each shareholder to retain their cooperative apartment. As a result of the non-payment of the Contribution Fee by Brito, the new majority shareholder of the debtor, Ronald Edelstein ("Edelstein"and with Edelstein & Son Realty LLC, the "Edelstein Entities") has alleged that the shares of Brito's apartment were forfeited to the Edelstein Entities. The Court held a trial at which Brito was the only witness. He testified credibly that he never received notice of the need to pay the Contribution Fee.

Based on the testimony and the arguments made, the Court grants Brito's motion and directs the Edelstein Entities to accept payment of the Contribution Fee by Brito.

BACKGROUND

At the time it filed its chapter 11 case on January 30, 1992 (the "Filing Date"), Duncraggen Realty Corporation (the "Debtor") was a cooperative corporation owning the building located at 867 West 181st Street in New York City (the "Building"). The Building had been converted to a cooperative by the sponsor in 1989 but faired poorly in the market downturn of the late 1980's and early 1990's. As of the Filing Date, of the 72 apartments in the Building, only about 18-20 were owned by shareholders other than the sponsor. *See At Some Co-ops, Investors Succeed Banks as Lender*, by Alan S. Osner, N.Y. Times, June 22,

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(the "Code") and Bankruptcy Rule 5010. That portion of the motion was granted in order for this Court to proceed to the merits of the motion. Unless otherwise noted, all Code section provisions referenced in this case are to the provisions of the Code as they existed prior to the October 17, 2005 amendments.

1997. The bankruptcy filing was principally precipitated by the Debtor's inability to meet its obligations on the Building's $2,615,125.80 mortgage from Crossland Federal Savings Bank and the commencement of a foreclosure action by the bank. *See Postings: Trouble in the Heights; Co-op Bankruptcy*, N.Y. Times, Feb. 9, 1992. *See* Transcript of Proceedings ("Tr.") dated November 14, 2006 at 23-24.

On the Filing Date, Brito and his wife were shareholders of the Debtor and owned 262 shares of stock with a proprietary lease entitling them to cooperative apartment 3-C (the "Apartment"). They purchased the Apartment for approximately $70,000. Brito and his wife made an initial down payment on the Apartment of $30,000. The remaining amount was paid by obtaining a mortgage. At the time of the hearing on the present motion, they had paid the mortgage off. In 1992, they sublet the Apartment. In 1994, while the bankruptcy case was pending, Brito and his family relocated to Ecuador.[2] Brito testified that the subtenant paid rent in an amount that was enough to cover the mortgage while Brito paid the maintenance fees via an electronic transfer from his checking account. Tr. at 9. During the chapter 11 case, Brito was never in arrears on any of the payments for maintenance or on the mortgage.

Prior to leaving for Ecuador, Brito learned of the Debtor's bankruptcy and left the subtenant and his sister with instructions to forward to him any mail he received at the Apartment. Brito also testified that prior to his move he informed a building representative that he and his family were relocating to Ecuador. He stated that he provided his address and telephone number and instructed that mail could also be sent him at the American Consulate. Tr. at 11.

On March 6, 1997, this Court held a hearing on the Debtor's First Amended Disclosure Statement ("the Disclosure Statement"). The Disclosure Statement described the chapter 11 plan (the "Plan"). The Plan provided for the reorganization of the cooperative by the Edelstein Entities investing new capital, taking over the sponsor's shares, providing a means for tenants to maintain their apartments by bringing maintenance payments current and making an additional contribution[3] or if they chose not to do so, to obtain two-year renewal leases, inter alia.[4] Under the Plan, individual shareholders could retain their shares if they became current on all arrears in their maintenance payments and agreed to pay the designated contribution fee for their apartment. In the event that shareholders did not elect to pay the maintenance arrears and the contribution fee, the Edelstein Entities would acquire those apartments and shares. Non-electing shareholders had the right to a two-year lease to the apartment they occupied.

At the March 6th hearing, the Court discussed its concerns with respect the significant impact of the Plan on the individual, non-sponsor shareholders should they fail to pay the maintenance arrears and the designated contribution fees. The Court stated its concerns about the reasons why each shareholder needed to be individually served:

> "I will approve [the Disclosure Statement] subject to your providing by letter to *each shareholder individually* the individual information applicable to his unit, discuss what the special amendment would be, what the change in maintenance would be, what his arrears are and the approximate date when you believe those payment would have to be made***then they would be in the position to know if they need to come and tell then if they had a problem, they should contact somebody and they need to show up at the confirmation hearing because the plan as presently provides, provides

[2] Although not from Ecuador, Brito accepted a position with a bank located there.

[3] The contribution fee varied based on the number of shares allotted to each particular apartment.

[4] The Code permits plans of reorganization similar to the Debtor's Plan. *See* Code §1123(a)(3) & (5).

> their unit would be forfeited.*** I am reluctant to keep holding this process [up] through what may seem to be paperwork, but to me it is quite substantive in a way that people know*** they need to know they have to elect either to make the payment or not to make the payment and if they don't make the payment, then they *** [are] in trouble with the [cooperative and could loose their apartment.]" *Emphasis added.*

Tr. at 9-10.

The Order approving the Disclosure Statement expressly provided that shareholders of the Debtor were to be given individual notice of their need to pay the maintenance arrears and the contribution fee (the "Notice of Rights") in order to preserve their cooperative apartment. *See* Order Approving Form of Notice to Shareholders in Connection with the Debtor's First Amended Disclosure Statement dated March 25, 1997. The Notice of Rights was a three-page document informing the shareholders of the key terms of the proposed Plan and as well as of the time and place for the confirmation hearing and the shareholder's right to be heard by the Court. The Notice of Rights advised each shareholder their options under the terms of the Plan and the consequences of each option. As directed by the Court, the Notice of Rights was to be mailed to *every individual shareholder* together with the Disclosure Statement, the Order approving the Disclosure Statement, the ballot and the election form.

The Debtor subsequently filed an affidavit of service with this Court detailing the names of those to whom the Notice of Rights and accompanying documents had been mailed. Nowhere in the affidavit of service of the Notice of Rights does Brito's name appear. On June 18, 1997, the Court confirmed the Plan. In 1999 the Edelstein Entities sought to evict the subtenant.

Brito testified without contradiction that he never received the Notice of Rights. He further testified that neither his wife nor anyone else ever brought the Notice of Rights to his

attention. Brito testified that the subtenant and his sister did forward mail to him. However, it is evident that the Notice of Rights could not have been forwarded to him since it was never mailed to him.[5]

Brito testified that had he been aware of the Notice of Rights he would have paid the Contribution Fee. Since over the years he had made all mortgage and maintenance payments it would have been economically irrational for him to forfeit his Apartment. Moreover, it was not objectively reasonable for the Edelstein Entities to presume Brito intentionally failed to pay the small Contribution Fee and forfeit the Apartment in the absence of any maintenance defaults.

DISCUSSION

1. Notice Provisions

The fundamental issue before the Court is whether the Edelstein Entities can obtain the benefit of acquiring the shares of the Apartment when Brito, a shareholder, never received notice informing him of the obligation to pay the Contribution Fee necessary to retain his shares under the terms of the proposed Plan. The Edelstein Entities' rights turn on whether Brito was served the Notice of Rights.

The Order directed the Notice of Rights, together with the Disclosure Statement, the Order Approving the Disclosure Statement and other materials to be sent to, and served on, all shareholders and lien holders. The Notice of Rights provided the information necessary for shareholders to maintain their interests and avoid forfeiture. The Notice of Rights informed shareholders that they would be required to pay maintenance arrears as well as an additional

[5] The affidavit of service did include the name of Brito's wife with an address at the Apartment. However,

contribution fee for their apartment and that failure to pay the arrears and/or the contribution fee would result in the cancellation of the shares for their unit. The Order itself did not identify the shareholders by name. The affidavit of service did not include Brito's and Brito was not served with the Notice of Rights or the accompanying documents. Since no mailing was made to Brito, no presumption of receipt can arise.

Bankruptcy Rule 9007 states that "[w]hen notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the entities to whom, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined." Clearly, this Court has the authority to regulate notices. Furthermore, once the disclosure statement is approved it must be provided to shareholders, together with the plan, or a summary of the plan. *See* Code §1125. Bankruptcy Rule 2002(b) governs the form and manner for hearing on confirmation. The Order therefore plainly was a proper exercise of this Court's authority.

In *Mullane v. Central Hanover Bank & Trust Co. et al.*, 339 U.S. 306, 314-15 (1950) the Supreme Court stated that the "fundamental requisite of due process of law is the opportunity to be heard [and that] * * * [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* In the instant case, the consequence of failing to pay the Contribution Fee was so severe that the Court made it a condition to its

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nothing in the record demonstrates that she in fact received the Notice of Rights.

approval of the Disclosure Statement that each shareholder be served individually with the Notice of Rights in order to ensure that every shareholder understood their rights.

The Edelstein Entities argue that even if the failure to send Brito a copy of the Notice of Rights was a negligent act of the Debtor, it was the burden of the Debtor, not of the Edelstein Entities. However, the Edelstein Entities were inextricably involved in the Debtor's bankruptcy case, as they were the proponents and/or primary beneficiary of the Plan. The Edelstein Entities acquired the building mortgage, took over the apartments owned by the sponsor, which were the substantial majority of the number of apartments, as well as acquiring any forfeited apartments.

There is nothing in the record to indicate that a proper mailing address for Brito could not have been obtained from a number of sources, including the subtenant. The Edelstein Entities knew or could have easily discovered that Brito no longer lived in the Apartment and certainly knew the status of maintenance payments. The major economic loss to Brito that would result from the loss of the Apartment dwarfs anything the Edelstein Entities' would experience by not obtaining its unwitting forfeiture. The harm to the Edelstein Entities is not sufficiently material to overcome the fundamental unfairness to Brito that would result from a forfeiture of the Apartment. The amount of the Contribution Fee, $3,088.98, is minimal in comparison to Brito's $70,000 dollar investment in his Apartment. Because of the failure to follow this Court's direction to serve each individual shareholder with the Notice of Rights, the Edelstein Entities are attempting to get the benefit of the forfeiture provisions of the Plan when Brito's due process rights have been violated.

2. Laches

In further opposition to this motion the Edelstein Entities assert that laches should apply for Brito's delay in bringing this motion. They state that the case reached finality in 1997 when the Plan was confirmed. The Court finds this argument non-persuasive.

A lapse of time alone does not give rise to laches. *Batsone v. Emmerling (In re Emmerling)*, 223 B.R. 860, 864 (2d Cir. B.A.P. 1997). This was a lengthy bankruptcy case and it could hardly be expected that Brito would keep apprised of the state of the bankruptcy case on a moment-to-moment basis. When the Edelstein Entities sought to evict the subtenant in the middle of 1999, Brito first became aware that the Edelstein Entities asserted that his rights to the Apartment had been terminated. Brito testified that once he learned of the Contribution Fee, he contacted the Edelstein Entities in an attempt to pay it. During that time Brito also actively participated in the Eviction Action. Upon realizing that the Edelstein Entities would not budge and that his Contribution Fee would not be accepted, Brito promptly sought relief from this Court.

The Court finds that that Brito timely brought this motion to reopen.

CONCLUSION

Brito's motion to pay the Contribution Fee and retain the Apartment is granted.

Settle Order.

Date: August 29, 2007
New York, New York

/s/Prudence Carter Beatty
United States Bankruptcy Judge