IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL.

ONE INDEPENDENCE PLACE OWNERS' ASSOCIATION and TWO INDEPENDENCE OWNER'S ASSOCIATION, Plaintiffs,	:	February Term 2015
	:	No. 1153
v.	:	Commerce Program
FRUB PENN LLC, REBENSTEIN PARTNERS, MVP REIT, individually and t/a PHILADELPHIA WASHINGTON SQUARE, LLC, Defendants.	:	Control Nos. 16110339/16122010

ORDER

AND NOW, this 1st day of May 2017, upon consideration of Defendant FRUB Penn, LLC's Motion for Partial Summary Judgment (cn 16110339) and Plaintiffs' response in opposition and Plaintiffs' Partial Motion for Summary Judgment (cn 16122010) and Defendant FRUB Penn LLC's response in opposition and in accord with the attached Memoranda, it hereby is **ORDERED** as follows:

1. Defendant FRUB Penn, LLC's Motion for Partial Summary Judgment is **Granted** and judgment is entered in favor of Defendant FRUB Penn, LLC and against Plaintiffs on Count III (quiet title) of the Amended Complaint.
2. Plaintiffs' Motion for Partial Summary Judgment is **Denied**.

BY THE COURT,

PATRICIA A. McINERNEY, S.J.

One Independence Place -ORDOP

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OPINION

Presently before the court are the parties cross motions for partial summary judgment to count III (quiet title) of Plaintiffs' amended complaint. Plaintiffs are the owners' associations of two condominium towers known as One Independence Place Owners' Association (Tower One) and Two Independence Place Owners' Association (Tower Two) ("Plaintiffs"). Tower One and Tower Two sit on an underground garage which is the subject of the instant dispute. Defendant FRUB Penn LLC ("FRUB") is the current owner and tenant of the garage.

On May 10, 1971, by deed, Denny Development Corporation, a developer and owner, purchased the property located at 241 and 233 South Sixth Street which included the surface portion of the property. Denny Development Corporation subsequently developed the property into a Condominium Property, Tower One and Tower Two, and Garage, at the subsurface of the property. On July 15, 1971, Denny Development, landlord, entered into a Construction and Lease Agreement (Garage Lease) with W.S.E. Garage Corp., tenant, for a term of 99 years beginning May 10, 1971.

On February 8, 1973, Denny Development Corporation and W.S.E. Garage Corp. entered into a Modification Agreement by which the 1971 Garage Lease was amended. On the same

date, Denny Development and Washington Square East, executed a "Declaration of Easements and Restrictions" ("Declaration of Easements") whereby Denny Development acknowledged its intent to develop the overall property with the underground garage and two twenty-two story apartment towers on the Condominium property. The Declaration of Easements and Restrictions references the July 16, 1971 lease between Denny Development and W.S. E. Garage Corp. and the subsequent Modification Agreement dated February 8, 1973. Specifically, paragraph 5 (b) provides as follows:

> 5. "Subject to the terms and conditions of the Garage Lease and the provisions of paragraph 7 hereof:
>
> ...
>
> (b) Upon expiration or termination of the Garage Lease, the reversionary interest of Declarant [Denny Development] and the right to operate, repair and maintain the Garage Improvements and to establish reasonable rules, regulations, fees and other charges with respect to the use of those Improvements shall vest in the owners of Parcels One and Two [Towers One and Two] to the exclusion of the owners of Parcel Three [the club facility]."

In addition, in paragraph 14 of the Declaration of Easements provides:

> 14. "Anything to the contrary herein contained notwithstanding:
>
> (a) The obligations of this Agreement and the equitable servitudes impressed thereby upon the Parcels shall be subject and subordinate to the Garage Lease and to the rights of the Garage Tenant thereunder."

In 1979, Denny formally divided its fee interest in the overall property into two (2) parcels-"Premises A" consisting of the Condominium Property and "Premises B" consisting of the Garage, and via successor entities, conveyed the two (2) parcels to Independence Place Associates ("IPA") by deed dated December 27, 1979 ("Independence Place Deed") which instrument was recorded with the Philadelphia Department of Records ('Recorder's Office") at Deed Book 2149, Page 102.

On November 3, 1981, IPA, who was the owner of the Garage and the Condominium Property, and the Philadelphia Authority for Industrial Development ("PAID"), the then tenant under the Garage Lease, executed a Lease Amendment to modify the terms of the Garage Lease. This Lease extended the term of the Garage Lease for an additional 99 year term so that the term would expire on April 30, 2169. The Lease Amendment was recorded on February 18, 1982 in the Recorder's Office in book 406, Page 91. On December 4, 1981, approximately one month after the Garage Amendment was executed, IPA recorded the "Declaration of Condominium of One Independence Place Condominium" with the Recorder's Office at Deed Book 355, Page 68. On December 10, 1981, IPA sold the first unit in Tower One to Miriam G. Weiner and Bernard Weiner.

On February 2, 2015, Plaintiffs filed a writ of summons against defendant FRUB and other defendants[1] and indexed a *lis pendens* against the property. After defendants issued a rule to file a complaint, Plaintiffs filed a complaint on March 20, 2015 alleging claims for breach of contract, two counts for quiet title as well as a claim for appointment of a receiver. On September 10, 2015, the court sustained FRUB's preliminary objections and dismissed three counts of the complaint; the sole remaining count was count IV alleging quiet title. On November 23, 2015, Plaintiffs amended the complaint to assert claims for nuisance (count I), injunction to prevent waste (count II) and quiet title (count III). On August 10, 2016 and October 25, 2016 respectively, defendants filed joinder complaints. Presently before the court are the parties' cross motions for summary judgment to count III (quiet title) of the amended complaint.

[1] The other defendants were Rubenstein Partners and MVP REIT, individually and t/a MVP Philadelphia Washington Square, LLC. Defendant Rubenstein Partners was dismissed as a defendant when the court sustained its preliminary objections to the complaint. Plaintiffs discontinued the action against defendant MVP REIT, individually and t/a MVP Philadelphia Washington Square, LLC.

DISCUSSION

The only question to be decided by this court is whether the term extension in the 1981 Garage Lease is valid and enforceable. Plaintiffs argue that the term extension in the 1981 Garage Lease is not valid and enforceable because Plaintiffs, vested future owners, never consented to the amendment which delays Plaintiffs' possession of the garage. FRUB, on the other hand, argues that the term extension in the 1981 Garage Lease is valid and enforceable because consent by the future owner is not required and even if consent was required, the evidence establishes that the original owner of the Condominium Property and holder of the reversionary interest consented to the modification.

The Declaration of Easement paragraph 5 (b) grants Plaintiffs a future reversionary interest, also known as a possibility of reverter[2], in the Garage. At common law, a possibility of reverter is generally viewed as "a mere possibility that a right, or an estate in land, might arise in the future upon the happening of a contingency."[3] Here, before Plaintiffs' right or estate in the Garage arises, the lease must terminate or expire. At the time the Garage Lease was amended to lengthen the term for an additional ninety nine (99) years, the Garage Lease was neither terminated nor expired. As such, Plaintiffs' interest in the Garage did not vest and Plaintiffs consent was not required for the modification of term. Plaintiffs had and continue to have no immediate right to possess the garage.[4] They are the holders of a future interest contingent upon

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[2]A "possibility of reverter," is subject to alienation. *Herr v. Herr*, 957 A.2d 1280, 1285 (Pa. Super. 2008), *citing London v. Kingsley*, 368 Pa. 109, 115, 81 a.2d 870, 873 (1951).

[3] *London v. Kingsley*, 368 Pa. 109, 115, 81 A.2d 870, 873 (1951). *Calhoun v. Hays*, 155 Pa. Super. 519, 524, 39 A.2d 307, 310 (1944) Restatement—Property, sec. 154(3).

[4] See, *In re Estate of O'Connor*, 140 A.3d 77, 81 (Pa. Cmwlth. 2016).

the fulfillment of a condition precedent, the expiration or termination of the garage lease.[5] As holders of an unvested future interest, Plaintiffs claim that the modification to the Garage Lease is invalid and unenforceable for lack of consent is dismissed because their consent was not required.

The Declaration of Easement lends further support for this conclusion, i.e. that Plaintiffs consent was not required to modify the terms of the Garage Lease. Paragraphs (5) and (14) of the Declaration of Easement, respectively, state that Plaintiffs' reversionary interest in the Garage is "subject to and subservient to the terms and conditions of the Garage Lease". Hence, Plaintiffs' consent was not required because their interest was not vested and therefore Plaintiffs acquired an interest subject to whatever modifications the parties to the Garage Lease elected to make. Based on the foregoing, the amendment to the Garage Lease is valid and enforceable.

Even if consent was required, Plaintiffs' motion should nonetheless be denied since the holder of the reversionary interest at the time the modification was made consented. The owner of the Garage and the Condominium Property and the then tenant, Philadelphia Authority for Industrial Development ("PAID"), executed the Lease Amendment to modify the terms of the Garage Lease for an additional 99 years. At the time, IPA was the owner of the Garage and the Condominium Property, and the holder of the reversionary interest. IPA consented to the amendment.[6]

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[5] Contrary to plaintiffs' assertion, plaintiffs are not the holders of a vested reversionary equitable ownership interest.

[6] Here, plaintiffs, the Condominium Association would not have been able to consent to the modification of term since it had yet to be established.

CONCLUSION

For the foregoing reasons, Defendant FRUB Penn, LLC's Motion for Partial Summary Judgment is **Granted** and judgment is entered in favor of Defendant FRUB Penn, LLC and against Plaintiffs on Count III (quiet title) of the Amended Complaint. Plaintiffs' Motion for Partial Summary Judgment is **Denied**.

BY THE COURT,

PATRICIA A. McINERNEY, SJ.