

Plotch v Citimortgage, Inc.

2012 NY Slip Op 30694(U)

March 13, 2012

Supreme Court, New York County

Docket Number: 102708/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
JOAN M. KENNEY Justice

PART 8

Adam Plotch

INDEX NO. 102708/11

-v-

MOTION DATE _____

Citimortgage, Inc.,

MOTION SEQ. NO. 1

The following papers, numbered 1 to 13, were read on this motion to/for injunctive relief

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-12

Answering Affidavits — Exhibits _____ | No(s). 13

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

MAR 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/19/12

, J.S.C.
JOAN M. KENNEY

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART: 8

-----X

ADAM PLOTCH,

Index # 102708/11

Plaintiff,

-against-

CITIMORTGAGE, INC.,

DECISION & ORDER

Defendant.

-----X

HON. JOAN M. KENNEY, J.:

Papers considered in review of this motion seeking, *inter alia*,
injunctive relief:

Papers	Numbered
OSC, Affirmation, Affidavit and Exhibits, Memorandum of Law	1-12
Opposition Papers, Affirmation	13

Plaintiff's Counsel:
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Defendant's Counsel:
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MAR 22 2012

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In this action seeking specific performance of a contract,
plaintiff Adam Plotch (Plotch), moves for an Order enjoining
defendant Citimortgage Inc. (Citi or mortgagee), from declaring him
in default of the terms and conditions contained in the Terms of
Sale (the contract), executed between the parties. The contract is
dated December 8, 2010,. The second branch of plaintiff's
application also seeks an injunction¹ to prevent any further sale,

¹The application does not cite a specific section of the
CPLR under which plaintiff moves, so the Court is treating it as
a motion made pursuant to CPLR 6301 *et seq.* The judicial sale
also sought to assign the proprietary lease (the lease) pertinent
to the apartment at issue in accordance with the terms of the
contract.

transfer, lease or offering of any interest in the cooperative shares attendant to Apartment 6B (the apartment), located at 236 East 28th Street, New York, New York.

FACTUAL BACKGROUND

The following facts are undisputed. On December 8, 2010, the mortgagee, through a court appointed referee, attempted to auction the apartment. Plotch, a sophisticated investor who regularly attends foreclosure auctions, was apparently the successful bidder at this judicial sale. The hammer price for the shares was \$221,000.00. As a result, Plotch executed the contract when he tendered 10% of the sale price (\$21,100.00) on the day of the auction. The contract states in pertinent part as follows:

7. Subject to the terms and conditions of the Security Agreement, the Notice of Sale, Proprietary Lease, By-Laws of the Cooperative Board, Offering Plan and/or Prospectus, any and all provisions of the General Business Law of the State of New York governing cooperative associations, rights, of the cooperative board to reject the purchaser, or any other or future occupant of the apartment to be purchased hereunder, as tenant, and any tenants, occupants or persons in possession.

9. Purchaser shall within 72 hours of the sale herein contact the Cooperative Corporation to obtain the necessary approval for the purchase of the shares and proprietary lease. Purchaser shall submit application within 7 days of receipt of the application. Purchaser shall pay all fees charges in connection with such application, and, at the closing, pay the processing fee, if any, charges by the managing agent for its

services in connection with the sale and the transfer of the shares of stock and the Proprietary Lease and all expenses of transfer after this sale, including, but not limited to Real Property Transfer Tax, Flip tax and Transfer Stamps, if any, the legal fee of the corporation's attorney and the legal fee for the secured party's attorneys for the transfer in the amount of \$800.00.

In essence, the lease states that in the event the mortgagee of any shareholder is declared to be in default, and the shares sold at auction, the managing agent of the cooperative, rather than the board of directors, has the right to "approve" or "disapprove" the successful bidder. In this case the managing agent merely has to "consent" to the sale to the successful bidder, and said "consent shall not be unreasonable withheld or delayed." (Section 17(b) of the proprietary lease).

According to Citi's attorney, in order to obtain the consent of the managing agent, Plotch was required to submit a financial disclosure "package" to the managing agent. Pursuant to the custom in the trade, such a financial package includes without limitation, an application providing pedigree information, several years of tax returns, all bank statements, several personal/professional references and credit report(s). It is uncontested that Plotch never submitted a package to the managing agent for its review. Plotch attaches several emails between himself and the cooperative's attorney and managing agent to support his position

that he complied with the terms of paragraph 9 of the contract. However, Plotch does not provide any indication that he attempted to submit an application or financial package to the managing agent for the requisite approval.

DISCUSSION

CPLR 6301 sets forth the grounds for preliminary injunction and temporary restraining order:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

A party moving for a preliminary injunction must demonstrate by clear and convincing evidence (*W.T. Grant Co. v Sroggi*, 52 NY2d 496 [1981]), that it can establish, (1) a likelihood of success on the merits of the underlying claim; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of

the equities tipping in its favor (see *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Olympic Tower Condominium v Coccoziello*, 306 AD2d 159 [1st Dept 2003], citing, *Doe v Axelrod*, 73 NY2d 748, 750 [1988]).

This Court finds that Plotch has failed to satisfy the three-pronged test for the granting of a preliminary injunction nor has he met his burden of proof. Notably, Plotch has been unable to show that irreparable harm is 'imminent, not remote or speculative' (citations omitted). Moreover, '[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm' (citations omitted). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*Family-Friendly Media, Inc. v Recorder Television Network*, 74 AD3d 738 [2nd Dept 2010]).

Plotch's complaint pleads a single cause of action, specific performance. Plotch demands that Citi be directed to sell the shares pursuant to a strict interpretation of the contract. "[A] mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in 'unusual' situations, 'where the granting of the relief is essential to maintain the status quo pending trial of the action'" (citations omitted) (*Jones v Park Front Apartments, LLC*, 73 AD3d 612 [1st Dept 2010]). Plotch does not indicate in any way that he has complied

with the terms of the contract, and is in fact in default for having failed to complete his application for the managing agent's approval within the seven days he was required to do so, thereby breaching a material term of the contract at issue. In order to establish a prima facie case on a breach of contract claim, defendant must show proof of a contract, performance by one party on the contract, a breach by the other party and damages as a result (Flomenbaum v New York Univ., - AD3d -, 2009 NY Slip Op 08975 [1st Dept 2009]). Plotch has not set forth any proof that Citi has failed to perform it's obligations under the contract. Where the plain language of the contract establishes obligations on the other party that have not been met, [dismissal] is warranted (Bartfield v RMTS Assocs., LLC, 283 AD2d 240 [1st Dept 2001]).

For the reasons set forth above the motion is denied in its entirety. Accordingly, it is


ORDERED that the motion is denied.

Dated: March 13, 2012

FILED

ENTER:

MAR 22 2012


 NEW YORK COUNTY CLERK'S OFFICE
 Hon. Joan M. Kenney