

**Canada v 207-213 W. L 44th St. Hous. Dev. Fund Corp.**

2017 NY Slip Op 30612(U)

March 22, 2017

Supreme Court, New York County

Docket Number: 155016/16

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: D'Auguste Justice

PART 2

Canada, Sheryll
207-213 W. 144th St.

INDEX NO. 155016/16
MOTION DATE
MOTION SEQ. NO. 02

The following papers, numbered 1 to , were read on this motion to/for Injunction
Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).
Answering Affidavits - Exhibits No(s).
Replying Affidavits No(s).

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 3/22/17

HON. JAMES E. d'AUGUSTE
NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER

- 1. CHECK ONE: CASE DISPOSED
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

parties,
Respondents.
Hon. James E. d'Auguste

Motion Sequence Nos. 001 and 002 are consolidated for the purposes of disposition. In Motion Sequence No. 001, petitioners Sheryll Mitchell Canada, Martin Smith, Billy Turner, Kathleen Julian, and Frank Hoyle move, by order to show cause, for an order, pursuant to New York Business Corporations Law ("BCL") Section 1104-a, seeking dissolution of respondent 207-213 West 144th Street Housing Development Fund Corporation ("Corporation"). In Motion Sequence No. 002, petitioners move, by order to show cause, for an order (1) staying any sales of apartments and approvals of pending sales; (2) restraining the Corporation from taking any action to terminate tenancies and from commencing proceedings in housing court against tenants or shareholders; (3) staying all pending legal proceedings and evictions of any shareholders or tenants of the Corporation until a hearing on the instant petition can be had; (4) directing

respondent New York City Department of Housing Preservation and Development (“HPD”) to act immediately, pursuant to its power to supervise the activities of the Corporation under New York Private Housing Finance Law (“PHFL”) Section 32, including but not limited to forming a new Board of Directors of the Corporation (“Board”); (5) appointing a receiver, pursuant to BCL Section 1202(a)(1), to pay the bills of the Corporation while this action is pending and to take all other necessary steps to protect the assets of the Corporation as ordered by this Court; and (6) restraining the Corporation from entering into any settlement agreements with the City of New York (“City”) or obligating the Corporation in any way without the participation of petitioners and their counsel and the supervision of this Court. For the reasons stated herein, the relief sought in Motion Sequence No. 001 is hereby held in abeyance and the relief sought in Motion Sequence No. 002 is granted to the extent that a receiver is appointed to manage the premises.

#### **Factual and Procedural History**

This special proceeding arises out of a dispute regarding the aforementioned Corporation’s alleged mismanagement of its assets, which consist of two buildings containing thirty-eight units located at 207-213 West 144th Street, New York, New York (collectively, “the premises”) that are currently in foreclosure. The Corporation was formed under Section 402 of the BCL and Article XI of the PHFL for the purpose of providing housing for persons with low income. Petitioners are shareholders representing 20% of the outstanding shares of the Corporation. The instant application was filed by petitioners in response to the serious ongoing violations of the PHFL, the BCL, and the Corporation’s certificate of incorporation. Petitioners contend that shareholders’ financial interests have been virtually destroyed over the years and have deep concerns that the current Board does not understand what its responsibilities are, as the Board consists of five tenants, two of which are not shareholders. Petitioners allege that

either one or no apartments have been sold in the premises since 2003 and nearly half of the apartments have never been sold. To the extent that apartments have been sold, petitioners allege that two or three of the apartments originally sold in 2003 have reverted back to the ownership of the Corporation as a result of illegal conversion based upon the fact that shareholders died or were evicted and their shares were never sold.<sup>1</sup> Said apartments were rented to other individuals without protections of any kind and neither the original shareholders nor the decedents' estates received any remuneration. Petitioners allege that less than half of all apartments in the premises are owned by shareholders, three of whom are recently deceased. Additionally, a current Board member, who petitioners claim may not actually be a shareholder, allegedly purchased an apartment at the time of the Corporation's conversion of the premises and that documents relating to said sale may have been falsified. With respect to any tenants who are currently renting apartments from the Corporation, petitioners allege that the majority are month-to-month tenants.

For years, the Corporation failed to pay taxes and fees related to the property and currently owes the City over \$400,000 in delinquent property taxes, water/wastewater arrears, and other charges. The only payment made to the City by the Corporation, pertaining to the premises, was on May 9, 2016 in the amount of \$2,500. Though the Corporation claims that it has entered into an installment agreement with the New York City Department of Finance ("DOF") to pay the delinquent funds, the Corporation has not submitted any evidence to indicate that any payment has been made pursuant to the alleged agreement. Further, petitioners allege that the HPD performed emergency repairs in an excess of \$11,000 to 207-209 West 144<sup>th</sup> Street

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<sup>1</sup> Petitioners believe the alleged illegally converted apartments are apartments 1A and 3A in 207-209 West 144<sup>th</sup> Street and apartment 3B in 211-213 West 144<sup>th</sup> Street.

in 2015 as a result of the Corporation's failure to make repairs and the Corporation still owes that sum to the City.

Since the commencement of this proceeding, the Corporation has initiated at least five evictions of tenants who have lived in the premises between three and fifteen years. There are currently ten evictions pending in New York City Housing Court that were commenced by the Corporation, this includes seven open cases against tenants, one judgment by default, and two warrants pending against shareholders.<sup>2</sup> With knowledge of the pendency of this proceeding, the Corporation attempted to coerce long time tenants to sign one-year leases, which required the tenants to waive the warranty of habitability and the covenant of quiet enjoyment, in exchange for withdrawing eviction proceedings against them in Housing Court.<sup>3</sup> Petitioners also claim that the Corporation has attempted to evict another shareholder in a holdover proceeding in Housing Court, an individual who had been a shareholder since 2003. This particular shareholder acquiesced to convert the action to a non-payment proceeding in order to seek rental assistance, at which point the Corporation allegedly took \$21,000 of his retirement funds over the period of five months in order to satisfy arrears owed while the shareholder was awaiting assistance from the New York City Department of Social Services. When it appeared to the Corporation that the shareholder would be able to pay the remainder of any arrears by the end of that month, he was evicted on June 15, 2016. Though the Housing Court temporarily restored the shareholder, the Corporation added an additional \$5,112 in legal fees to the arrears owed and will evict if the additional amounts are not paid. Petitioners claim that the Corporation evidently wanted both

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<sup>2</sup> The tenant in apartment 1B of 211-213 West 144<sup>th</sup> Street has apparently moved out of the apartment prior to the return date of the Housing Court petition and has since not been heard from.

<sup>3</sup> The Corporation made these attempts in Housing Court on June 30, 2016, the return date for the holdover proceedings taking place against said tenants.

the shareholder's money and his three-bedroom apartment. Additionally, petitioners allege that the Corporation stopped accepting rent from at least three additional tenants. It appears to petitioners from the rent role that the Board, which has remained essentially unchanged for many years as a result of the lack of shareholders to select Board members from, the existing Board members have managed to keep their rent and maintenance payments artificially low. One example of the mismanagement and self-dealing alleged by petitioners is how the maintenance payments were determined in order to favor certain shareholders and not others, specifically that shareholders were given a 5% increase in maintenance by vote of the Board. For comparison, petitioners state that the maintenance for apartment 3C, a three-bedroom apartment in 207-209 West 144<sup>th</sup> Street, increased from \$690 per month to \$724.50 per month, however, the President of the Board, a shareholder of apartment 2C, also a three-bedroom apartment, paid \$550 per month prior to the increase in maintenance costs and now pays \$577.50 per month, which is \$147 less per month for the same unit one floor below.

Accordingly, petitioners move in Motion Sequence No. 001, pursuant to BCL Section 1104-a, to dissolve the Corporation on the grounds of mismanagement and self-dealing, and, in Motion Sequence No. 002, *inter alia*, to appoint a temporary receiver, pursuant to BCL Section 1202(a)(1), to remedy the alleged mismanagement of the premises by the Corporation.

#### **Discussion**

BCL Section 1202(a)(1) authorizes the court, in its discretion, to appoint a receiver of the property of a corporation only in certain limited circumstances, in this instance in “[a]n action or special proceeding brought under . . . article 11 (Judicial dissolution).” BCL Section 1113, entitled “Preservation of assets; appointment of receiver,” states the following:

At any stage of an action or special proceeding under this article, the court may, in its discretion, make all such orders as it may deem proper in connection with

preserving the property and carrying on the business of the corporation, including the appointment and removal of a receiver under article 12 (Receivership), who may be a director, officer or shareholder of the corporation.

The purpose of BCL Section 1202 permits the court to appoint a receiver under the rules of the CPLR. *Sabo v. Canderò*, 2002 WL 34460618 (Sup. Ct. N.Y. County Jan. 3, 2002) (Omansky, J.). Here, as in *Sabo*, petitioners, as shareholders of the Corporation, brought this action due to concern for the waste and dissipation of the assets of the Corporation. In such an instance, appointment of a receiver is proper where there exists “clear and convincing evidence” of “danger of irreparable loss or material injury to the corporation or its assets.” *McBrien v. Murphy*, 156 A.D.2d 140, 140 (1st Dep’t 1989) (citing CPLR 6401(a)); *Sabo*, 2002 WL 34460618. The Court notes that extreme caution must be exercised in deciding whether to appoint a receiver and, therefore, the moving party is required to make a clear and detailed evidentiary showing of the need to safeguard the property at issue and to protect its interest in the subject property. *See Moran v. Moran*, 77 A.D.3d 443 (1st Dep’t 2010); *In re Armienti*, 309 A.D.2d 659, 661 (1st Dep’t 2003). Where compelling evidence was presented that the subject corporation was threatening its own continued viability, the Appellate Division, First Department upheld the appointment of a receiver. *Rosan v. Vassell*, 257 A.D.2d 436 (1st Dep’t 1999). *But see Di Bona v. General Rayfin Ltd.*, 45 A.D.2d 696 (1st Dep’t 1974) (denying the appointment of a receiver where there was an insufficient demonstration that the subject corporation was diverting or wasting its assets).

The appointment of a receiver is always a fact specific, case-by-case analysis. Here, the corporate records are in complete disarray and there are significant issues of the Corporation’s use of the absence of records to allegedly strip co-op owners of their respective interest in the premises. While the Court appreciates that counsel for the respondent Corporation attempted to

bring some semblance of order to the premises, he reports to the same Board that is allegedly attempting to use the mismanagement of the premises to favor some shareholders and disadvantage dissident shareholders. This is exactly the type of situation a receiver is warranted. The Court also gives recognition to the fact that the Corporation attempted to resolve its exorbitant tax delinquencies by entering into an installment agreement with the DOF. However, any ameliorative benefit of the above agreement does not change the fact that the Corporation has failed to pay \$400,000 in taxes and other charges over a period of years, as well as outstanding repair costs owed to the City in the amount of \$11,000 for emergency repairs. As alleged shareholders of more than 20% of the Corporation, petitioners have demonstrated an interest in the premises that it is in danger of being lost or materially injured due to the demonstrated mismanagement of the Corporation. In light of the compelling evidence of mismanagement, the “appointment of a receiver [is] necessary to conserve the . . . real property and protect the parties’ interests, given the state of affairs between them.” *Suissa v. Baron*, 107 A.D.3d 689, 689 (2d Dep’t 2013); see *Butler v. Gibbons*, 225 A.D.2d 335 (1st Dep’t 1996). Accordingly, a receiver is appointed to prevent any irreparable loss or material injury to petitioners’ interests in the Corporation and its assets and to remedy any alleged mismanagement of the premises.

To ensure that the Corporation gets the greatest benefit of a receivership in this instance, the Court requested the City to provide a list of qualified individuals who are experienced in the type of duties this receivership would impose. In response, the City, provided a list of three potential receivers, referred by the HPD, such as Ronald J. Finger, who has experience managing the type of corporations that is the subject of the instant proceeding. Much of the other relief sought in Motion Sequence No. 002 is premised upon the absence of the appointment of a



receiver, such as commencing actions against tenants or seeking court approval prior to entering into an agreement with the City. Such relief is unnecessary in light of the fact that this Court is granting that branch of petitioners' motion seeking the appointment of a receiver, and is therefore denied without prejudice. Since a remedy at the end of this proceeding could potentially be a dissolution of the Corporation, with rent stabilization protections provided to the tenants and owners of the units, every effort should be made, through the appointment of a receiver, to save the Corporation. As such, the relief sought by petitioners in Motion Sequence No. 001 to dissolve the Corporation is held in abeyance in light of this Court's appointment of a receiver to manage and oversee the premises.

Accordingly, based upon the foregoing, it is hereby

ORDERED that the branch of the instant motion seeking the appointment of a receiver pursuant to BCL Section 1202(a)(1) is granted; and it is further,

ORDERED that Ronald J. Finger, President and CEO of Finger Management Corp., is hereby appointed as Receiver; and it is further,

ORDERED that the Receiver is authorized to take charge and enter into possession of the property; and it is further,

ORDERED that any assets being held in the accounts of the Board, Corporation, counsel for the Corporation, or managing agent of the Corporation are to be turned over to the Receiver, except for any funds held by either the managing agent or counsel for services rendered up to the date of this Order; and it is further,

ORDERED that said Receiver be and is hereby directed to demand, collect, and receive from the occupants, tenants, and licensees in possession of said premises, or other persons liable therefore, all the rents now due and unpaid or hereafter to become due, and that Receiver is

hereby authorized to institute and carry on all legal proceedings necessary for the protection of the property or to recover possession of the whole, or any part thereof, and/or apply to the Court to fix reasonable rental value and license fee value and to compel the tenants and occupant(s) to attorn to the Receiver; and it is further,

ORDERED that said Receiver, or any party hereto, may at any time, on proper notice to all parties who may have appeared in this action, apply to this Court for further or other instructions or powers necessary to enable said Receiver to properly fulfill his duties; and it is further,

ORDERED that before entering upon his duties, said Receiver shall be sworn to fairly and faithfully discharge the duties committed to him and shall execute to the People of the State of New York and file with the Clerk of this Court an undertaking in the penal sum of \$100,000.00, conditioned for the faithful discharge of his duties as such Receiver; and it is further,

ORDERED that, pursuant to the provisions of the General Obligations Law Section 7-105, anybody holding any deposits or advances of rental as security under any lease or license agreement affecting space in the premises affected by this action shall turn over the same to said Receiver within five (5) days after said Receiver shall have qualified; and thereupon the Receiver shall hold such security subject to such disposition thereof as shall be provided in an order of this Court to be made and entered in this action; and it is further,

ORDERED that anybody in possession of the same shall turn over to the Receiver all rent lists, orders, unexpired and expired leases, agreements, correspondence, notices and registration statements relating to rental space or facilities in the premises; and it is further,

ORDERED that the Receiver be and is authorized to rent or lease any part of the premises for terms not exceeding one (1) year or such longer terms as may be required by the City and State of New York; to keep said premises insured against loss by damage or fire; to pay the taxes, assessments, water rates, sewer rents, vault rents, salaries of employees, supplies and other charges; to comply with all the lawful requirements of any municipal department or other authority of the municipality in which the mortgaged premises are situated; and to procure such fire, plate glass, liability and other insurance as may be reasonably necessary; and it is further,

ORDERED that the tenants, licensees, or other persons in possession of said premises attorn to the Receiver and pay over to the Receiver all rents, license fees, and other charges of such premises now due and unpaid or that may hereafter become due; and that respondents be enjoined and restrained from collecting the rents, license fees, and other charges of said premises and from interfering in any manner with the property or its possession; and from transferring, removing or in any way disturbing any of the occupants or employees; and that all tenants, occupants, employees and licensees of the premises, and other persons liable for the rents be and hereby are enjoined and restrained from paying any rent, license fees, or other charges for such premises to the defendants, their agents, servants, or attorneys; and it is further,

ORDERED that the Receiver is prohibited from incurring obligations in excess of the monies in his hands without further order of this Court or written consent of petitioners' attorney; and it is further,

ORDERED that the 207-213 West 144th Street Housing Development Fund Corporation turn over to the Receiver all rents collected from and after the date of this Order; and it is further,

ORDERED that the Receiver named herein shall comply with Section 35-a of the Judiciary Law, Sections 6401-6404 of the CPLR, Section 1325 of the RPAPL, and Rule 36 of the Chief Judge; and it is further,

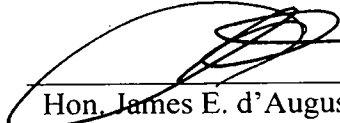
ORDERED that any proposed settlement of this matter be subject to approval by the Receiver and presented to the Court for review; and it is further,

ORDERED that the Receiver may enter into, adjust, and make payments on any payment or installment agreements with the City of New York in order to keep the premises from entering default; and it is further,

ORDERED that movants shall serve a copy of this order with notice of entry upon all parties, and the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158), in accordance with e-filing protocol, within thirty (30) days.

This constitutes the decision and order of this Court.

Dated: March 22, 2017

  
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Hon. James E. d'Auguste, J.S.C.