227-229 E. 14th St. Hous. Dev. Fund Corp. v Vaknine
2017 NY Slip Op 31391(U)
June 23, 2017
Supreme Court, New York County
Docket Number: 153557/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **2**
Justice

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227-229 EAST 14TH STREET HOUSING DEVELOPMENT FUND CORPORATION

Plaintiff,

- v -

ELI VAKNINE,

Defendant.

INDEX NO. 153557/2016

MOTION DATE

MOT. SEQ. NOS. 001 and 002

DECISION AND ORDER

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RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS, LISTED BY NYSCEF DOCUMENT NUMBER:

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UPON THE FOREGOING CITED PAPERS, THE DECISION AND ORDER ON THE MOTIONS IS AS FOLLOWS:

This is a dispute concerning the parties' respective rights to apartment unit 4W, located at 229 East 14th Street, New York, NY. In motion sequence No. 001, plaintiff 227-229 East 14th Street Housing Development Fund Corporation moves, by order to show cause, for a preliminary injunction enjoining defendant Eli Vaknine from, among other things, exercising possessory rights over the unit including performing construction work therein. In motion sequence No. 002, plaintiff moves for summary judgment in its favor on multiple causes of action, summary judgment striking affirmative defenses, an order severing defendant's counterclaims, and for discovery. Defendant cross-moves in motion sequence No. 002 for an order, among other things, compelling plaintiff to issue defendant 250 shares of corporate stock in plaintiff as well as a proprietary lease to the apartment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, as its name implies, is a housing development fund company, organized in November 1985 pursuant to Private Housing Finance Law article 11, "for the purpose of developing a housing project . . . for persons of low income." (Doc. No. 70.) The apartment was previously occupied by Roland Lyons, who has been in possession of the proprietary lease and shares associated with the apartment since 1987. (Doc. No. 72.) In June 2007, Lyons took out a one-year loan from Agape World, Inc. and executed a promissory note in the amount of $835,000, with 15% yearly interest. The note was secured by Lyons's 250 shares in plaintiff and the proprietary lease to the apartment, in conjunction with a loan security agreement that Lyons executed at the same time as the note. (Doc. No. 71.)

In June 2008, Lyons defaulted on the loan. In January 2009, Nicholas Cosmo, the principal of Agape, was arrested on federal wire fraud charges. Cosmo eventually pleaded guilty to wire

fraud, and is currently serving a 25-year prison sentence on that charge. *See United States v Cosmo*, 497 Fed Appx 100 (2d Cir 2012), *cert denied* 133 S Ct 917 (2013). Meanwhile, in February 2009, Agape filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Eastern District of New York. In February 2014, defendant was the successful bidder on the note and mortgage at a public auction. At that time, defendant executed a memorandum of sale and signed a document entitled "Terms and Conditions of Sale." (Doc. No. 74.) Schedule A of the documents that defendant executed included several pertinent provisions, namely that defendant:

> acknowledges that Lyons occupies the Real Properties under the terms and conditions of a Proprietary Lease. [Defendant] further acknowledges that the Real Property is located in a cooperative apartment building which has a governing cooperative board . . . [Defendant] further acknowledges that the Real Property has certain restrictions on ownership/tenancy of the Real Property. The Trustee makes no representations or warranties to, among other things, the Documents, the ability of [defendant] to collect on the Loan, and/or evict Lyons from the premises, collect rent from Lyons, **or whether the Cooperative Board would approve [defendant] or a subsequent transferee to [defendant] for ownership or tenancy of the Real Property.**

(emphasis added) (Doc. No. 74.) In March 2014, the Bankruptcy Court approved the sale, and the note and mortgage were assigned to defendant. (Doc. No. 73.)

In June 2014, defendant noticed, among others, plaintiff and Lyons of his intent to foreclose on the note and sell the shares and proprietary lease at a public auction on September 10, 2014. (Doc. No. 75.) On September 4, 2014, Lyons commenced an action against defendant in this Court under Index No. 158632/2014 and moved, by order to show cause, to block the sale. On September 5, 2014, this Court (Hagler, J.), signed the order to show cause and granted a temporary restraining order to that effect. (158632/2014, NYSCEF Doc. No. 14.) In December 2014, Lyons and defendant entered into a stipulation of settlement on the record that Lyons would pay defendant $590,000 to settle their disputes as to the note. (Doc. No. 77.)

After Lyons defaulted on the settlement, defendant again noticed Lyons and plaintiff, among others, of defendant's intent to sell the shares and proprietary lease at a public auction on April 24, 2015. (158632/2014, NYSCEF Doc. No. 59.) On April 24, 2015, defendant signed the terms of sale of the public auction. The terms provided, among other things, that "[i]t shall be the responsibility of the purchaser to make contact with and obtain any and all permission from [plaintiff] in order to allow the purchaser to take possession of the shares and [the apartment]. In the event the purchaser is unable to obtain permission from [plaintiff] for any reason whatsoever, or the purchaser is unable to close for any other reason, the purchaser shall be in default." (Doc. No. 78.) Defendant was the sole and winning bidder at the auction. (Doc. No. 79.)

After winning the auction, counsel for defendant was apparently in contact with counsel for plaintiff's board of directors. By email dated April 29, 2015, counsel for plaintiff's board advised defendant's counsel that there had been a conversation:

> with the Board regarding [defendant's] application. Since Mr. Lyons has not yet been evicted from the apartment, the Board will not consider any applications yet. Mr. Lyons still has a possessory interest in the apartment and any transfer by the Board would be premature at this point. Please update me on the status of the eviction. It is my understanding that you would be pursuing the eviction immediately after the auction.

(Doc. No. 104.) In May 2015, defendant moved, by order to show cause, for an order awarding possession of the unit to defendant, issuing a warrant of ejectment directed at Lyons compelling him to quit and vacate the unit, and directing the Sheriff of New York County to remove Lyons and all of his possessions from the unit, which order to show cause this Court (Hagler, J.) signed. (158632/2014, NYSCEF Doc. No. 59.) After Lyons defaulted on the motion, on August 3, 2015, said court issued an order and judgment with the following decretal paragraphs:

> ADJUDGED that defendant Eli Vaknine is entitled to sole possession of the Cooperative Unit known as 229 East 14th Street, Unit 4W, New York, New York 10003 as against plaintiff Roland Lyons, and the Sheriff of the City of New York,

> County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place defendant in possession accordingly; and it is further
>
> ADJUDGED that immediately upon entry of this Order and Judgment, defendant Eli Vaknine may exercise all acts of ownership and possession of the Cooperative Unit known as 229 East 14th Street, Unit 4W, New York, New York 10003, including entry thereto, as against plaintiff Roland Lyons.

(Doc. No. 80.)

Lyons was finally evicted from the apartment on December 9, 2015. (158632/2014, NYSCEF Doc. No. 101). According to Adaliz Rodriguez, a member of plaintiff's board of directors, after Lyons left the apartment, defendant thereafter moved in without ever seeking the board's approval to do so. (Doc. No. 16.) After moving in, defendant submitted the first application to the board in February 2016. There is no dispute that defendant's income, as documented in the financials submitted with that application, was above the income limitations on plaintiff. (Doc. No. 68.) For example, Steven Z Aisenbaum, the individual who has prepared defendant's taxes for over twenty years, stated in a letter submitted with the application that defendant's income in 2015 was $180,000 in salaries and that the business income would remain steady into the future. (Doc. No. 82.) By letter dated March 2, 2016, the board informed plaintiff that it had rejected defendant's application because his income was too high. (Doc. No. 83.) Rodriguez states that, beginning in March 2016, he observed that defendant had authorized construction on the apartment without first obtaining the board's approval or consent.

In April 2016, plaintiff commenced this action and moved, by order to show cause, for an order enjoining defendant from performing work and occupying the apartment. This Court signed the order to show cause and issued a temporary restraining order preventing defendant from occupying or taking any action to perform construction work in the apartment. (Doc. No. 26.) Concomitantly, this Court transferred this action to Justice Hagler, reasoning that it raised issues

linked to the language in the prior judgment issued by him that purported to award defendant sole possession of the apartment. By order dated May 2, 2016, Justice Hagler transferred this action back to this Court, finding that the prior determination "never addressed any claims as to the plaintiff's rights and responsibilities concerning defendant. This Court never addressed any claims between plaintiff and defendant." (Doc. No. 27.)

On May 3, 2016, after this case was returned to this Court's inventory, it issued an order continuing the effect of the temporary restraining order, directing that the parties exchange alterations packages that fully complied with plaintiff's rules and regulations, requiring plaintiff to respond in a manner that was not unreasonable, allowing that defendant could have limited access to the apartment in order to conduct surveys and appraisals, and extending defendant's time in which to answer the complaint. (Doc. No. 30.)

On September 28, 2016, the parties stipulated that, among other things, certain construction on the apartment could go forward and required defendant to begin to pay maintenance beginning in October 2016. (Doc. No. 46.) In January 2017, plaintiff moved for summary judgment in its favor on its causes of action for ejectment, trespass, conversion, striking defendant's affirmative defenses, severing defendant's counterclaims, and for a protective order covering certain of defendant's discovery demands. (Doc. No. 56.) Defendant cross-moved for an order, among other things, compelling plaintiff to issue shares of corporate stock and the proprietary lease for the apartment.

In December 2016, during the pendency of this action, defendant submitted another application to the board. (Doc. No. 114.) As part of that application, Aisenbaum submitted another letter in which he stated that defendant had sold his interest in his business that same month and had decided to retire. (*Id.*) Aisenbaum represented that defendant's projected income for 2017

and forward from "passive activities" was expected to be $30,000. (*Id.*) By letter dated January 20, 2017, the board denied the second application.

POSITIONS OF THE PARTIES

Plaintiff maintains, essentially, that notwithstanding any language in the prior judgment in the Lyons action, it never consented to defendant's possession of the apartment. For this reason, defendant has only ever been, at best, a mortgagee in possession of the apartment, without any actual right to possess the apartment himself. Plaintiff argues that its board reasonably withheld its consent for defendant to take possession of the shares and proprietary lease given that defendant's income, at least until very recently, exceeded the legal limit for the unit. It also asserts that, even to the extent that defendant purports to have rid himself of interests in business such that he is now below the legal limit, it has valid concerns both as to the veracity of this and that defendant would make a good neighbor based upon his behavior in the context of the aforementioned litigations.

Defendant asserts in response that he already has possession of the lease and shares in light of prior judicial determinations. He further maintains that, to the extent that plaintiff has refused his right to occupy the apartment and to issue him shares and a lease in his name, it has done so unreasonably. Defendant also asserts numerous claims of malfeasance on the part of the board.

LEGAL CONCLUSIONS

It is well settled that a coop board cannot block shares and a proprietary lease from passing to a transferee by operation of law, where, as here, an individual is the winning bidder at a foreclosure sale. *See H.H. Benfield Elec. Supply Co. v SMC Elec. Contr. Inc.*, 2014 NY Slip Op

31640(U) (Sup Ct, NY County 2014, Coin, J.); *House v Lalor*, 119 Misc 2d 193, 196-198 (Sup Ct, NY County 1983); *see also Matter of Starbuck*, 251 NY 439, 444 (1929); *Matter of Schulte*, Index No. 2005-4582/C, 2016 WL 1546922, *4 (Sur Ct, NY County, April 14, 2016, Mella, S.); *Key Bank of New York v Mahl*, Index No. 128337/1994, 1995 WL 17962387 (Sup Ct, NY County April 12, 1995). Indeed, it has been held that the coop may be compelled to issue shares and a proprietary lease in the name of a transferee by operation of law, under the reasoning that any other rule would interfere with the economic value of the property and the ability for the shares and lease to be used as collateral for loans. *See e.g. House v Lalor*, 119 Misc 2d at 198.

Notwithstanding that title to the shares and proprietary lease pass freely under these circumstances, the right to occupy the apartment does not. Where the coop board retains the right to do so, regardless of the transfer, it may still separately determine whether it will extend the right to occupy the apartment to the transferee. *See Matter of Katz*, 142 Misc 2d 1073, 1076-1077 (Sur Ct, NY County 1989); *Swatzburg v Swatzburg*, 137 Misc 2d 1042, 1043 (Sup Ct, NY County 1987); *House v Lalor*, 119 Misc 2d at 198. In the event that the coop board votes not to extend this right to the transferee, the transferee still retains title to the shares and proprietary lease. The transferee in such a situation will only have the right to enter the apartment at reasonable times to conduct reasonable repairs and alterations, with the consent of the board, as are necessary to make the apartment marketable for resale. *See Trepel v Diop*, No. 02 Civ 7726(GEL), 2003 WL 22283816, *3-4 (SD NY 2003).

The coop's determination whether to extend the right to occupy the apartment is generally protected by the business judgment rule. *See Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 (1990); *Buccellato v High View Estates Owners, Corp.*, 131 AD3d 912, 913 (2d Dept 2015); *Aguilera del Puerto v Port Royal Owner's Corp.*, 54 AD3d 977, 977-978 (2d Dept

2008); *Griffin v Sherwood Vil., Co-op "C", Inc.*, 130 AD3d 780, 781 (2d Dept 2015); *Hochman v 35 Park W. Corp.*, 293 AD2d 650, 651 (2d Dept 2002). In light of the application of the business judgment rule, a determination of the board will only be invalidated where it is outside the scope of its authority, does not further the corporate purpose, or was made in bad faith. *See 40 W. 67th St. v Pullman*, 100 NY2d 147, 155-158 (2003).

Finally, on a motion for summary judgment, the movant bears the initial burden to tender proof in admissible form demonstrating entitlement to judgment as a matter of law and the absence of material issues of fact, after which the burden shifts to the party opposing the motion to establish the existence of a triable issue of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

Plaintiff has satisfied its prima facie burden of showing that defendant is not entitled to occupy the apartment as a tenant. Plaintiff reserved its right to review defendant's application before granting him and his family permission to occupy the apartment. Further, plaintiff's denial of defendant's applications was protected by the business judgment rule, and was a proper exercise of business judgment, since defendant's income was too high. Although defendant claims to have disposed of his business interests in order to meet plaintiff's income requirements, this was done merely days before his second application. Considering the timing of defendant's actions, as well as his course of conduct in engaging in construction on the apartment without seeking board approval, plaintiff's determination to reject plaintiff's second application was also protected by the business judgment rule.

In opposition, defendant failed to raise an issue of fact as to bad faith. Indeed, considering the board's eminently reasonable motives for denying defendant's application, his allegations amount to nothing more than "conclusory assertions that the challenged actions of the board . . . were taken in bad faith or constituted improper disparate treatment of plaintiff." *Finegan v Family,*

LLC v 77 Horatio St. Condominium, 38 AD3d 365, 366 (1st Dept 2007); *see Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 (1st Dept 2008); *Goldstone v Constable*, 84 AD2d 519, 520 (1st Dept 1981); *cf. Saul v 476 Broadway Realty Corp.*, 290 AD2d 254, 255 (1st Dept 2002). Even assuming, for the sake of argument, that some tenant-shareholders of the coop are improperly subletting their units, defendant has not demonstrated any connection between this fact and the board's determination as to his occupancy.

The prior judgment in the action between Lyons and defendant is a nullity to the extent it may be read to have awarded defendant occupancy of the apartment. Since plaintiff was not a party to that action, and its approval was a prerequisite to occupancy, that Court was powerless to adjudicate occupancy as against plaintiff.

Accordingly, plaintiff is entitled to summary judgment on its cause of action for ejectment. *See Gordon v 476 Broadway Realty Corp.*, 129 AD3d 547, 548 (1st Dept 2015); *Trump Plaza Owners, Inc. v Weitzner*, 61 AD3d 480, 480 (1st Dept 2009); *Trump Plaza Owners, Inc. v Weitzner*, 47 AD3d 525, 525 (1st Dept 2008); *cf. Bryant v One Beekman Place, Inc.*, 73 AD3d 616, 616 (1st Dept 2010), *lv denied* 16 NY3d 701 (2011). Since defendant has the right to demand that plaintiff allow access to the apartment at reasonable times in order to prepare it for sale, however, and there is little indication in the papers that defendant entered except to do construction in order to improve the property, plaintiff has failed to establish its entitlement to summary judgment on the trespass and conversion causes of action, and the motion is denied to that extent. This Court also notes in this regard that defendant's use of the apartment occurred after he had received a favorable judgment with language that arguably could have been read to indicate that he had the right to occupy the apartment.

Turning now to the branch of plaintiff's motion that requests that this Court strike the affirmative defenses in defendant's answer, defendant has failed to indicate why any of the affirmative defenses should stand. As plaintiff asserts, the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, and thirteenth affirmative defenses are pleaded in a boilerplate, conclusory fashion, and there does not appear to be any merit to them. Further, the tenth and fourteenth affirmative defenses are pleaded against nonparties.

Plaintiff also includes a request to sever defendant's counterclaims. Although the counterclaims expand the scope of what will be at issue in this action, they relate squarely to defendant's relationship to plaintiff and its board of directors arising from his purchases. For this reason, plaintiff's request is denied. *See Shanley v Callahan Indus.*, 54 NY2d 52, 57 (1981).

As for defendant's cross motion, it is granted to the extent that plaintiff must issue shares and a proprietary lease in defendant's name but, since defendant is not entitled to occupy the apartment, it is otherwise denied.

Both parties have included requests for discovery related relief in their motions. There has not yet been a preliminary conference, so resolution of discovery disputes by motion is premature, and this Court will schedule a preliminary conference. If the parties are unable to resolve their disputes as to the scope of discovery at the conference, permission may be given at that time to renew the branches of the motions addressed to discovery related relief.

As for plaintiff's motion for a preliminary injunction, this Court's resolution of the parties' rights in the context of the ejectment cause of action makes it unnecessary to issue an injunction. The rights of the parties are more nuanced than as advanced in plaintiff's applications, and there is no indication that defendant has ever taken any actions to damage the property. Indeed, at the many appearances before this Court, plaintiff conceded that defendant has improved the property.

Additionally, plaintiff must allow defendant, as the rightful owner of the shares and lease by operation of law, reasonable access to the apartment in order to market it to potential buyers. In this regard, not every entry onto the property will constitute a trespass. For these reasons, plaintiff has not shown that it will be irreparably injured in the absence of the injunction that it seeks. *See Hoffman Invs. Corp. v Yuval*, 33 AD3d 511, 512 (1st Dept 2006); *compare CSC Acquisition-NY, Inc. v 404 County Rd. 39A, Inc.*, 96 AD3d 986, 987 (2d Dept 2012); *Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 504 (2d Dept 2002).

Although an injunction is not warranted under these circumstances, this Court will clarify the rights of the parties: (1) defendant may not use or occupy the subject apartment as a tenant, (2) defendant must relinquish the keys to the unit to plaintiff, (3) plaintiff must not interfere with defendant's right to access the apartment for the purpose of sale and must allow defendant, along with realtors or prospective buyers, to visit the apartment in connection with marketing it, at reasonable times and upon reasonable notice to plaintiff, (4) to the extent further maintenance or repairs to the unit are necessary in order to market it, defendant may not undertake those repairs or maintenance without the consent of the board, and the board may not unreasonably withhold its consent.

This Court notes that, pursuant to stipulation between the parties, so ordered by this Court, defendant has been paying monthly maintenance since October 2016. (Doc. No. 46.) As the papers did not address defendant's maintenance obligations, defendant should continue to do so at this time.

Accordingly, it is hereby:

ORDERED that the branch of plaintiff's motion for summary judgment in its favor on certain causes of action is granted with respect to the cause of action for ejectment, and is otherwise denied (motion sequence No. 002); and it is further

ORDERED that the branch of plaintiff's motion to strike affirmative defenses is granted, and the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth affirmative defenses are stricken (motion sequence No. 002); and it is further

ORDERED that the branch of plaintiff's motion to sever the counterclaims in defendant's answer is denied (motion sequence No. 002); and it is further

ORDERED that the branch of plaintiff's motion for discovery related relief is denied, without prejudice (motion sequence No. 002); and it is further

ORDERED that the branch of defendant's cross motion seeking an order directing plaintiff to issue him 250 shares and a proprietary lease in his name is granted, and plaintiff is directed to do so within 45 days hereof (motion sequence No. 002); and it is further

ORDERED that the branch of defendant's cross motion seeking an order permitting him and his family to occupy the apartment is denied, as defendant has no right to occupy the apartment as a tenant (motion sequence No. 002); and it is further

ORDERED that the branch of defendant's cross motion seeking summary judgment dismissing the complaint is denied and the branch of the cross motion seeking discovery related relief is denied without prejudice pending a preliminary conference (motion sequence No. 002); and it is further

ORDERED that plaintiff's motion for a preliminary injunction is denied and the TRO is vacated except with respect defendant's maintenance obligations (motion sequence No. 001); and it is further

ORDERED that the parties are directed to appear at a preliminary conference to discuss discovery issues on September 19, 2017 at 2:15 p.m.; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order, with notice of entry, on defendant within 20 days after it is entered.

This constitutes the decision and order of the court.

Dated: June 23, 2017 ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT