

**Garcia v 2728 Broadway Hous. Dev. Fund Corp.**

2017 NY Slip Op 31285(U)

June 15, 2017

Supreme Court, New York County

Docket Number: 158778/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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DORIS GARCIA,

Plaintiff,

-against-

2728 BROADWAY HOUSING DEVELOPMENT  
FUND CORP., CYNTHIA CAESAR, TIFFANY  
GOLDBERG, NEREIDA TORRES AND ANA  
RODRIGUEZ,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

**DECISION/ORDER**

Index No.: 158778/2015

Mot. Seq. 004

**MEMORANDUM DECISION**

This is an action for, *inter alia*, breach of fiduciary duty. Defendants, 2728 Broadway Housing Development Fund Corp. (“HDFC” or the “Coop”), Cynthia Caesar, Tiffany Goldberg, Nereida Torres and Ana Rodriguez (collectively “Defendants”) now move for: (1) an order vacating the stay on discovery dated October 25, 2016, and upon such vacatur, pursuant to CPLR 3124 and 3126, an order compelling Plaintiff, Doris Garcia (“Plaintiff”), to respond to Defendants’ first and second items contained in their Demand for Discovery and Inspection dated August 4, 2016; (2) for a conditional order: (a) dismissing the amended complaint; (b) dismissing the reply; and (c) determining the counterclaims in Defendants’ favor, if Plaintiff further fails to comply with the Court’s prospective order; (3) if the counterclaims are not determined in Defendants’ favor, an order determining that Plaintiff’s household income, at the relevant times, exceeded the income restriction to purchase the subject apartment shares of the cooperation; and (4) if prospective mediation does not resolve this lawsuit following the disposition of the present

motion, a conditional order compelling Plaintiff to respond to Defendants' remaining discovery demands.

In response, Plaintiff cross-moves for: (1) a protective order pursuant to CPLR 3103, limiting or denying Defendants' demand that she disclose her income tax returns, or otherwise establish her income eligibility to transfer the shares from the estate of her father, Enrique Garcia, to herself; (2) an order pursuant to CPLR 3124 compelling Defendants to produce unredacted copies of e-mails and appear for depositions; and (3) an order pursuant to CPLR 3126 striking Defendants' answer, or establishing that Plaintiff is not required to establish her income eligibility to transfer the shares from the estate of Mr. Garcia to herself.

#### *Factual Background*

Plaintiff is a shareholder and proprietary tenant of 2728 Broadway, New York, New York ("Building"), Apartment 2D ("Apartment"). HDFC owns and operates the Building (*see* Deed). The Building was converted from a rental building to a cooperative corporation in November 2000 pursuant to Article XI of the New York Private Housing Finance Law. Plaintiff and Mr. Garcia became shareholders and proprietary tenants of the Apartment in December 2000, and are listed as co-owners on the Certificate of Shares (*id.* Ex. D, Share Certificate).

In 2004, Mr. Garcia died and his last will and testament essentially left his interest in the shares to Plaintiff (*see* Enrique Garcia's Last Will and Testament; *id.*, Ex. E, Waive/Renounce Letter). After Mr. Garcia's death, Plaintiff began residing in the Apartment.

When the Board allegedly withheld consent to Plaintiff's planned renovations to the Apartment, Plaintiff filed the instant complaint, alleging, inter alia, against the Board for breach of contract and fiduciary duty.

In their answer, Defendants seek, in their Second Counterclaim, a declaration that the initial transfer of interest from the Coop to Plaintiff was null and void if Plaintiff's household did not meet the income restriction at the relevant time (Shapiro Aff. Ex. L Answer, at ¶¶33-34). Additionally, the Third Counterclaim requests a declaration that the estate of Mr. Garcia's interest in the Apartment may not be transferred to Plaintiff without evidence that her household meets the income restriction (¶¶35-36).

Plaintiff then filed the amended complaint ("Complaint") seeking, *inter alia*, injunctive relief ordering the Coop to issue a revised share certificate transferring the shares co-owned by Plaintiff and Mr. Garcia to Plaintiff (Fifth Cause of Action).

In the course of discovery, Defendant made the August 4, 2016 Demand for Discovery and Inspection, requesting, among other things, items previously demanded in a May 31, 2016 Notice for Discovery and Inspection, to the extent not already provided (Doc. Demand 1), and the Federal, State and Local Income Tax returns, including W2s and all attachments for Plaintiff and the members of her household for the years 1999 ("1999 tax documents"), 2014 and 2015 ("current tax documents") (Doc. Demand 2) (Shapiro Aff. Ex. N, at ¶¶1-2). Plaintiff objected to such demands (*see id.* Ex. R, August 29, 2016 Response to Defendants Notice for Discovery and Inspection, at III, ¶¶1-2).<sup>1</sup>

#### *Defendants' Motion*

In support of their motion, Defendants argue that the May 2016 Notice and August Demand seek documents material and necessary to their Second and Third Counterclaims.

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<sup>1</sup>At a subsequent discovery conference on October 25, 2016, this Court stayed discovery and directed the parties to mediation. When mediation efforts failed, Defendants filed the instant motion and Plaintiff the instant cross-motion.

Specifically, Defendants' Second Counterclaim seeks to establish that Plaintiff's household income did not meet the income eligibility restriction at the time the Building was sold to the Coop. Defendants argue that Plaintiff was not entitled to purchase shares to the Coop without first demonstrating that her household income met the income requirement. The Deed, Proprietary Lease, and Certificate of Incorporation required that Plaintiff establish her income eligibility to purchase shares in the Coop at the time the Building was sold to the Coop.

Moreover, a List of Subscribers, which lists the names and apartment numbers of the purchasing tenants, indicates which tenants of the building may participate in the initial cooperative offering plan without confirming their meeting of the income eligibility restriction, Plaintiff, is not included in this List.

Further, Defendants' counsel at the time of the purchase incorrectly advised HDFC that it was permissible to "add the Plaintiff to the shares and proprietary lease to be issued" to Mr. Garcia, without confirming Plaintiff's household income (Shapiro Aff., at ¶25). Since the 1999 tax documents will demonstrate Plaintiff's household income at the time she purchased the shares, the documents are material and necessary to determine whether Plaintiff's household income exceed the eligible income requirement, and therefore whether she should have been permitted to purchase the shares.

Next, the Third Counterclaim seeks to establish that Plaintiff may not receive the transfer of the shares from the estate of Mr. Garcia since Plaintiff's current household income exceeds the income eligibility requirement. First, the shares were held by Plaintiff and Mr. Garcia as tenants in common, absent words conferring joint tenancy or survivorship rights, therefore, Plaintiff "assumed the risk" that she would not meet the income restrictions if she sought to transfer the

shares to herself (*id.*, at ¶33). Second, Plaintiff should not receive the benefit of residing in the Apartment, since she has not confirmed her income eligibility, did not reside at the Apartment at the time of the sale of the Building to the Coop and “was not recognized as a tenant by the City of New York” (Shapiro Aff., at ¶37[a]).

Moreover, Plaintiff’s household income exceeds the income eligibility permitted to live in the Apartment. Since the current tax documents will demonstrate Plaintiff’s current household income, the Documents are material and necessary to determine whether Plaintiff’s household income exceeds the eligible income requirement, and therefore whether she is permitted to receive the estate of Mr. Garcia’s interest in the shares of the Coop.

Further, no good-faith argument can be made that the documents sought are irrelevant.

#### *Plaintiff’s Opposition*

In her opposition, Plaintiff first argues that she is not required to demonstrate that she met the income restriction eligibility at the time the building was sold to the Coop. The Deed, Certificate of Incorporation, and Offering Plan establish that initial purchasers were not required to demonstrate their income eligibility. Defendants’ moving papers concede that Mr. Garcia, an initial purchaser, was not required to demonstrate his income eligibility to purchase the shares. The Offering Plain indicates that the only requirement to purchase shares as an initial purchaser is that the purchaser be on the rent roll (Shapiro Aff. Ex. C, Offering Plan at p.1). And likewise, Plaintiff was also an initial purchaser, and purchased the Coop shares when the Building was sold to the Coop.

Since Plaintiff is not required to demonstrate that her household did not exceed the income requirement, Defendants’ request for the 1999 tax documents are not necessary or

material. Further, other initial purchasers who added family members to their Certificate of Shares and Proprietary Leases and were not required to demonstrate the additional shareholder's income eligibility prior to their addition.

Next, Plaintiff's current tax documents are not indispensable to Defendants claims. The transfer of Mr. Garcia's interest in the Coop to Plaintiff is not prohibited by the income restrictions set forth in the Offering Plan, as the Plan indicates that the sale and transfer of shares applies only to new, and not initial, purchasers. Since Plaintiff already owns shares, she is not considered to be a "new" shareholder (*id.*, at p.5)

Moreover, a publication and e-mail from the New York City Department of Housing Preservation and Development ("HPD") establish that the income restrictions only apply to new purchasers, and not Plaintiff, since she already owns shares in the Coop (Fleishell Aff., Ex. S, HPD Publication; *id.*, Ex. T, October 11, 2016 e-mail from Jordan Press to Plaintiff).

Additionally, Plaintiff's counsel argues that in his experience, neither the HPD, nor HDFC required purchasing tenants to submit income verification. Moreover, it is customary practice to not require income verification for the transfer of shares of a deceased co-owner to another initial purchaser. Finally, Defendants' Second Counterclaim is time-barred.

#### *Plaintiff's Cross-Motion*

In support of her cross-motion, Plaintiff argues that the Board President of 2728 Broadway Housing Development Fund Corp., Cynthia Ceasar, should be produced for a deposition. Moreover, Defendants have not produced the following requested documents: (1) the appropriate Privilege Log with respect to the redacted e-mails<sup>2</sup>; (2) e-mails to and from the

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<sup>2</sup> Defendants do not object to furnishing Plaintiff a privilege log for Plaintiff to review, prior to Defendants deposition.

individual board members' personal e-mail accounts and computers regarding the business of the board; (3) e-mails dating from 2010; and (4) the minutes of the board meetings and financial records turned over to the Coop's accountant.

*Defendants' Opposition*

In opposition to Plaintiff's cross-motion, Defendants argue that Plaintiff failed to demonstrate that her household income in 2000 and 2014 through the present are not materially necessary to determine whether she met the income eligibility to own shares in the Coop. The issuance of a new share certificate listing Plaintiff as the sole shareholder is a "Transfer," as defined by the HDFC's "operating documents" (Shapiro Opp., at ¶32).

Plaintiff failed to establish that dismissal of the counterclaims pursuant to CPLR 3211 and 3212 is warranted, or that she is entitled to the estate of Mr. Garcia's shares, since the Deed, Certificate of Incorporation and Proprietary Lease require that Plaintiff meet the income eligibility requirement. Plaintiff's position as administrator of Mr. Garcia's estate does not exempt her from complying with the income eligibility requirement.

Further, Plaintiff's claim that she was an initial purchaser is false, as she does not appear on the "Section 8 records" and she lacks a connection to the Apartment prior to 2004 (Shapiro Opp. at ¶42). Nor does Plaintiff's name appear on the Subscribers List. Any claim that Plaintiff's name should have been designated on the Subscriber's List by the City of New York should have been made in an Article 78 proceeding.

Plaintiff's claim that she has been treated unfairly by the Coop's Board of directors is unfounded, since the Board has requested that all individuals who were added to existing shareholder certificates furnish the Board with proof of income for the relevant time periods.



Additionally, the HPD does not support her position that she is exempt from the income restrictions. Further, the statute of limitations does not preclude Defendants' claim that the initial purchase was null and void *ab initio*. Finally, it was Plaintiff's burden, not the Coop's, to seek the letters of administration for Mr. Garcia's estate. Therefore Plaintiff's failure to resolve Mr. Garcia's estate prior to 2016 does not render the Defendants' counterclaim meritless.

Plaintiff fails to address Defendants' argument that she must meet the income eligibility requirement since she entered the shares in tenants in common, and not as joint tenants.

Further, the branch of Plaintiff's cross-motion seeking disclosure must be denied, since the motion precedes "further good faith" to resolve any pending discover disputes. (Cohen Aff. at ¶2). Additionally, Defendants already furnished Plaintiff with copies of e-mails from the private e-mail servers of members of the Coop Board.

Moreover, since none of the matters alleged in the complaint preceded December 2014, they are irrelevant (Cohen Opp. at ¶10).

Finally, Plaintiff's request for further discovery should not be ordered until after Plaintiff furnishes Defendants with her tax documents.

#### *Discussion*

CPLR 3101(a) directs "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (*see Allen v. Cromwell–Collier Publ. Co.*, 21 N.Y.2d 403, 406 [1968]). It is within the Court's discretion to determine whether the materials sought are "material and necessary" as legitimate subject of inquiry or are being used for purposes of harassment to ascertain the existence of evidence (*see Roman Catholic Church of the Good Shepherd v. Tempco Systems*, 202 A.D.2d 257, 258,

608 N.Y.S.2d 647, 648 [1994]). "The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Kapon v. Koch*, 23 N.Y.3d 32, 38, 11 N.E.3d 709 [2014], citing *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430 [1968]).

Pursuant to CPLR 3124, the Court may compel compliance upon failure of a party to provide discovery. " 'It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims' " (*Forman v. Henkin*, 134 A.D.3d 529, 530, 22 N.Y.S.3d 178, 180 [1st Dept 2015], citing *Vyas v. Campbell*, 4 A.D.3d 417, 418, 771 N.Y.S.2d 375 [2d Dept 2004] [internal citations omitted]). And CPLR 3126 grants the court the power to sanction a party that fails to comply with a court's discovery order.

It is well established that "[b]ecause of their confidential and private nature, disclosure of tax returns is disfavored. The party seeking disclosure must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources" (*Williams v. N.Y. City Hous. Auth.*, 22 A.D.3d 315, 316, 802 N.Y.S.2d 55, 56 [1st Dept 2005]; see also *Sachs v. Adeli*, 26 A.D.3d 52 [1st Dept. 2005]; *Four Aces Jewelry Corp. v. Smith*, 256 A.D.2d 42 [1st Dept. 1998]; *Nanbar Realty Corp. v. Pater Realty Co.*, 242 A.D.2d 208 [1st Dept 1997]). "[T]he party seeking to compel production . . . must identify the particular information the return will contain and its relevance . . . and limit examination of the return to relevant material through redaction of extraneous information" (*Nanbar Realty Corp.*, 242 A.D.2d 661).

First, Defendants failed to demonstrate that Plaintiff's 1999 tax documents are material and necessary, as they failed to show that she was required to demonstrate her household's income eligibility at time the Building was sold to the Coop. In May 2000, prior to the sale of the Building from the City of New York to the Coop, the City furnished shareholders with the Cooperative Conversion Materials/Cooperative Offering Plan ("Offering Plan") (Shapiro Aff. Ex. C, Conversion Materials). The Offering Plan<sup>3</sup> explicitly states that the only requirement to purchase shares in the Coop is that the tenant appear on the Building's rent roll (*id.* p.1). Accordingly, tenants appearing on the rent roll (as opposed to the Subscribers List) is determinative of which tenants are eligible to purchase shares in the Coop. Neither party submitted the rent roll to the Court. Therefore, Defendants' contention that Plaintiff is absent from the List of Subscribers and is thus required to demonstrate her income eligibility at the time she purchased the shares is insufficient to warrant the production of Plaintiff's 1999 tax documents.

Further, the parties agree that initial purchasers were not required to demonstrate their income eligibility. Plaintiff has been a shareholder since the Building was sold to the Coop, as her name appears on the Certificate of Shares and the Proprietary Lease dated December 19, 2000, corresponding to the Apartment. Accordingly, the branch of Defendants' motion seeking to compel Plaintiff to produce her household's 1999 tax documents is denied.

However, Plaintiff's (current) tax documents at the time of transfer, are material and necessary to determine whether she meets the income eligibility requirement to receive the transfer of shares from Mr. Garcia's estate. The assignment of the Proprietary Lease and transfer

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<sup>3</sup> The Offering Plan includes as exhibits the Certificate of Incorporation, By-Laws and Proprietary Lease.

of shares in the Coop are governed by the Proprietary Lease, Certificate of Incorporation, and By Laws. Paragraph 5.05(b)(i) of the Proprietary Lease, which identifies the Restrictions on Transfers of shares indicates that,

[t]he Shareholder shall not assign this Lease or transfer the related Shares or any interest therein and no such assignment or transfer shall take effect as against the Corporation for any purpose, except in compliance with the restrictions of the Corporation's Certificate of Incorporation, the By-Laws (including resale restrictions adopted by the Shareholders), the nondiscrimination requirements in paragraph 3.02(f) of this lease and until the following conditions are satisfied:

....

(B) (1) The assignee signs and acknowledges an agreement, in form approved by the Corporation, by which the assignee affirms that he or she is a person of low income who earns no more than 165% of the median income of the standard metropolitan statistical area  
[emphasis added]

According to the plain language of Paragraph 5.05, the transfer of shares must be in compliance with the Certificate of Incorporation and By Laws. The Certification of Incorporation states:

Notwithstanding any other provision contained herein, the following restrictions . . . upon the use, sale, transfer, assignment or other exchange of the cooperative shares allocated to Individual Units shall apply:

A. The Housing Project shall provide housing for persons or families who earn no more than 165% of the median income of the standard metropolitan statistical area as determined from time to time by the Department of Housing and Urban Development. (Certificate of Incorporation, Art. X)

The By-Laws indicate that the transfer of shares shall be made by the Coop,

[i]n such a manner as to implement the rules and restrictions established for transfers in the Certificate of Incorporation and the Proprietary Lease . . . .

.....  
No sale, assignment or transfer of Shares allocated to any Apartment shall be effective until the requirements of this Section 4 have been complied with (By-Laws, Art. V. §4).

Thus arguably, in order for transfer of shares to take effect as against the Corporation—for any purpose—the assignee must have a household income not exceeding 165% of the median income of the standard metropolitan statistical area. Further, the plain language of the aforementioned documents indicate that the income eligibility restriction applies to all transfers, including those made from shareholder to shareholder and shareholder to non-shareholder, since neither the Proprietary Lease, Certificate of Incorporation, nor By-Laws direct the application of the restrictions on transfer to distinguish an existing shareholder with a non-shareholder.

Here, Plaintiff's household income is material and necessary for Defendants to pursue the Third Counterclaim, which alleges that Plaintiff's household income exceeds the income eligibility requirement. Moreover, Defendant shows that Plaintiff's household's current tax returns will demonstrate her household's income, and ultimately whether her household's income exceeds the income eligibility restriction, prohibiting her from receiving the estate of Mr. Garcia's interest in the shares.

Plaintiff cites to the narrative section of the Offering Plan, which notified the then-tenants of the restriction of the resale of shares from shareholders to non-shareholders after the sale of the Building to the Coop. The relevant portion states the following:

There are several restrictions regarding families who move into the Building after the sale of the Building to the Cooperative. These restrictions apply to the (a) sale of shares in the Cooperative by shareholders to new shareholders . . . Apartments may only be

sold, rented or sublet to families who earn up to 165% of the current median income for a family in the metropolitan area. (Shapiro Aff. Ex. C, Conversion Materials, p.5)

The narrative, however, by its plain language addresses the discreet issue of the sale of shares to new families who are non-shareholders, not the transfer of shares to existing shareholders, which is the type of transfer of shares Plaintiff seeks.

The relevant provisions of the offering plan, Proprietary Lease, Certificate of Incorporation, and By-Laws, read together (*see Sassi-Lehner v. Charlton Tenants Corp.*, 55 A.D.3d 74, 78-79, 863 N.Y.S.2d 20, 23 [1st Dept 2008] [cooperative offering plan read together with the controlling documents]) indicate that an assignee is required to demonstrate their income eligibility to receive shares in the Coop. Plaintiff's counsel's prior dealings in similar subject matter are not dispositive.

Moreover, while the legend on the share certificate addresses the income restriction on the sale of shares to new residents, it also states that the transfer of shares shall be made only in accordance with "the maximum limits on resident income contained in the Certificate of Incorporation . . . ." (Shapiro Aff. Ex C, at p.65). As discussed above, the Certificate of Incorporation does not distinguish between new and existing shareholders when applying the income eligibility restriction. Further, the HPD e-mail is not dispositive. Notably, the HPD e-mail fails to define "AMI levels," which is crucial to understanding the context of the e-mail.

Accordingly, the branch of Defendant's motion to compel Plaintiff to produce her household's current tax documents, is granted.

The branches of Defendants' motion requesting that, in the event the "counterclaims are not determined in Defendants' favor" the Court determine that, at the relevant times Plaintiff's

household income exceeded the income restriction, and requesting further discovery in the event that mediation fails, are denied as premature.

In light of the above, the branch of Plaintiff's motion seeking a protective order limiting or denying Defendants' demand that she disclose her income tax returns, or establish her income eligibility to transfer the shares from the estate of Mr. Garcia to herself, is denied. Accordingly, Plaintiff's cross-motion is denied.

### CONCLUSION

Accordingly, it is hereby

**ORDERED** that the branch of Defendants' motion for an order vacating the stay on discovery dated October 25, 2016, is granted, and the stay is hereby lifted; It is further

**ORDERED** that the branch of Defendants' motion pursuant to CPLR 3124 and 3126, for an order compelling Plaintiff to respond to Defendants' first and second items contained in their Demand for Discovery and Inspection dated August 4, 2016, is granted to the extent that, within fourteen (14) days of service of a copy of this order, Plaintiff shall produce her Federal, State and Local Income Tax returns, including W2s and all attachments for Plaintiff and the members of her household for the years 2014 and 2015. It is further

**ORDERED** that the parties shall appear for a compliance conference on August 1, 2017 at 2:30 p.m. It is further

**ORDERED** that the branch of Defendants' motion seeking a conditional order: (a) dismissing the amended complaint; (b) dismissing the reply; and (c) determining the counterclaims in Defendants' favor, in the event that Plaintiff fails to comply with the Court's

order directing production of the aforementioned tax returns, is denied, without prejudice. It is further

**ORDERED** that the branch of Defendants' motion seeking a conditional order determining (a) that Plaintiff's household income, at the relevant times, exceeded the income restriction to purchase shares of the cooperation, in the event the counterclaims are not determined in Defendants' favor, and (b) compelling Plaintiff to respond to Defendants' remaining discovery demands if prospective mediation does not resolve this lawsuit following the disposition of the present motion, are denied, without prejudice. It is further

**ORDERED** that Plaintiff's cross-motion is denied. It is further

**ORDERED** that Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 15, 2017



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDMEAD**  
**J.S.C.**