Monaghan v 165 Hous. Corp.
2018 NY Slip Op 30352(U)
February 26, 2018
Supreme Court, New York County
Docket Number: 153419/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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William S. Monaghan as Trustee of the MONAGHAN QUALIFIED PERSONAL RESIDENCE TRUST,

Plaintiff,

-against-

165 HOUSING CORP., ROBERT McGRAW, TODD LOPEZ and ALAN MARASH,

Defendants.

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Index No. 153419/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT

HON. ARLENE P. BLUTH

The motion by plaintiff for summary judgment on a portion of its third cause of action for a permanent injunction is denied.

Background

This dispute arises out of the number of shares owned by plaintiff and allocated to an apartment in defendant 165 Housing Corp. ("165 Housing"). Plaintiff, a trustee of a personal residence trust that owns the shares of the subject apartment, was one of the sponsors of an offering plan to convert a warehouse located at 165 Perry Street to a co-op in 1980. The offering plan allowed Apartment 6 (plaintiff's apartment), which is on the top floor, to add living space by building on the roof. Plaintiff alleges that he added this additional space while the building was being converted to a co-op.

Plaintiff and Gail Marcus (the sponsors of the conversion) were allocated 23 shares for Apartment 6, which was to be held by the sponsors rather than sold. A bedroom was added to

the unit in 1985. Plaintiff alleges that the sponsors relinquished control of the Board of defendant 165 Housing Corp. ("165 Housing") in 1989. In 1997, a proprietary lease was executed for apartment 6, which at that point was owned by plaintiff's personal residence trust.

Plaintiff claims that in 2015, the Board attempted to issue new shares and allocate them to Apartment 6 based on the expansion of his unit. Plaintiff maintains that the Board requested that plaintiff buy 24 additional shares and pay 6 years of back maintenance (an amount totaling $2,716,479). Plaintiff acknowledges that the Board has the right under the co-op's bylaws to take this action but emphasizes that such action must be taken within 120 days from the completion of the work enlarging the apartment and alleges that the 120 days passed many years ago. Plaintiff also questions whether the share allocation complies with the reasonable relationship requirement between the apartment size and share ownership. Plaintiff insists that he found a buyer for the unit and that this Board is stalling that deal because of the instant dispute.

Plaintiff moves for summary judgment on this third cause of action for an injunction barring the co-op from conditioning consent to the sale of the apartment on plaintiff purchasing additional shares. Plaintiff insists that whether plaintiff has to buy additional shares is an issue for the Court to decide rather than 165 Housing. Plaintiff argues that the Board does not have the power to condition a sale of the unit on the purchase of additional shares. Plaintiff stresses that the Board did not take any action for 26 years (from 1989, when control of the Board was relinquished, until 2015). Plaintiff acknowledges that the Board can reject any applicant seeking to buy a unit, but claims that the Board is acting in bad faith because it is attempting to use its ability to withhold consent as leverage to force plaintiff to buy the additional shares.

In opposition, defendants contend that the injunction sought is inequitable because it

would force the other shareholders of 165 Housing to subsidize the largest apartment in the building. Defendants maintain there are numerous issues of fact that prevent the granting of summary judgment including, but not limited to, the date plaintiff completed his apartment renovations (1982, 1985, 1986 or 1997), whether 165 Housing waived its right to allocate additional shares, and the date the Sponsor relinquished control of the Board.

Defendants argue that plaintiff controlled the Board from 1980 through June 2015 because he maintained a seat on the Board (and was Board President) through that time. Defendants also argue that what plaintiff can sell is in dispute; defendants claim that the addition on the seventh floor (the apartment is located on both the sixth and seventh floors) is not part of the co-op and, therefore, plaintiff can only transfer it as personal property. Defendants stress that plaintiff has not met his burden for entitlement to a permanent injunction, especially given that discovery has not been completed in this action.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then

produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"[T]he relief of an injunction is a drastic remedy granted only in a clear case, reasonably free from doubt" (*Standard Realty Assocs., Inc. v Chelsea Gardens Corp.*, 105 AD3d 510, 510, 964 NYS2d 94 [1st Dept 2013]). A permanent injunction "may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*Parry v Murphy*, 79 AD3d 713, 715, 913 NYS2d 285 [2d Dept 2010] [internal quotations and citations omitted]). "[T]here must also be some pressing or serious emergency or danger of loss" (67A NY Jur. 2d Injunctions § 45).

Here, the Court finds that plaintiff is not entitled to partial summary judgment because plaintiff has not established irreparable harm. To be clear, plaintiff has moved for summary judgment on *only a portion of* his third cause of action which seeks an injunction preventing 165 Housing "from requiring plaintiff to purchase such additional shares as a condition precedent for consideration of an application to approve a proposed transfer of the shares and lease to Apartment 6" (NSYCEF Doc. No. 1, ¶ 44).

The inability to sell the apartment during the pendency of this lawsuit does not constitute

irreparable harm especially where, as here, plaintiff has not moved for summary judgment on his other causes of action which include, for instance, a request for a declaratory judgment that he need not buy additional shares (*see id.* ¶ 37). It makes no sense for the Court to issue a permanent injunction barring defendants from taking certain action while a declaratory judgment claim relating to the same relief remains pending and discovery is ongoing.

Plaintiff insists that 165 Housing is not permitted to hold up a sale even though the parties have a dispute over the allocation of shares. Plaintiff points to two, non-binding cases for this proposition. Neither compel this Court to grant plaintiff's requested relief.

Matter of Schiller (12 Misc3d 1160(A), 819 NYS2d 213 (Table) [Sur Ct, NY County 2006]) dealt with a closing for the sale of co-op shares for an apartment where the original owner (along with her husband) died in an apartment fire. The co-op tried to hold up the sale because the co-op thought it was owed damages as a result of the decedent's purported negligence in causing the fire (*id.*). The fiduciaries of the estate suggested that the amount demanded by the co-op be placed in escrow pending resolution of the dispute, but the co-op rejected this offer (*id.*). The Surrogate's Court found that the fiduciaries of the decedent's estate were entitled to a preliminary injunction allowing the sale to go through as long as the injunction was conditioned on the establishment of an escrow account for the amount in dispute (*id*).

The facts in *Schiller* are clearly inapposite to the instant matter. There is no suggestion in this case about the formation of an escrow amount for the purported amount due. And part of the rationale in *Schiller*– that the co-op has a fiduciary duty to the seller, a shareholder– suggests a different outcome here. In this action, the Board is concerned that the number of shares allocated to plaintiff's apartment is unfair to the rest of the shareholders in the building. The Board alleges

a fiduciary duty to resolve this dispute before allowing the apartment to be sold with the exact same amount of shares allocated to it. According to defendants, plaintiff's apartment occupies the top two floors but only has 11% of the total shares rather than the percentage of the building it occupies (28%). In other words, defendants claim that the other shareholders are bearing the brunt of the common expenses and paying part of plaintiff's share.

Plaintiff does not dispute the size of his apartment or defendants' characterization of the disparity in shares allocated to Apartment 6.[1] Instead, he claims that the Board waived its right to allocate more shares by not acting within 120 days after construction was completed. Plaintiff may ultimately prevail on that claim, but unlike *Schiller* where the co-op held up the sale based on claims that were unproven, it is not an abuse of the co-op's power here to look out for all shareholders where the co-op claims that it is owed over $2 million and that a shareholder's maintenance fees are drastically lower than they should be.[2]

Plaintiff also relies on *Chemical Bank v 635 Park Ave. Corp.* (155 Misc2d 433, 588 NYS2d 257 [Sup Ct, NY County 1992]) where the Supreme Court granted a preliminary injunction rejecting a proposed amendment to the proprietary leases that effectively prohibited transfer of co-op shares by forcing shareholders who wanted to sell their shares to settle any claims they might have against the co-op before the sale would be approved. In *Chemical Bank*, it appeared that this amendment was directed squarely at plaintiffs (*id.*). Clearly, that proposed

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[1]Plaintiff does not, however, agree with defendants' calculation of how many additional shares should be allocated.

[2]Obviously, another factor in *Schiller* was to avoid depleting the estate by ongoing maintenance; there was no prejudice to the maintenance being paid by the new owner so long as the escrow covered alleged damages.

amendment was a self-interested act meant to prevent a specific shareholder from pursuing claims against a co-op. That is not the case here, where plaintiff and defendants have a legitimate dispute over whether more shares can or should be allocated. And, unlike *Chemical Bank*, the disputed issue here will be resolved within this litigation as plaintiff seeks declaratory relief that no more shares can be allocated to his unit.

While a sale would clearly benefit plaintiff, it does not mean plaintiff is entitled to a permanent injunction allowing such an action. To grant plaintiff's motion would, in effect, give plaintiff the ultimate relief he seeks in this case– to sell the apartment without the allocation of the additional shares or paying back maintenance without resolving the substantive issues of declaratory judgment and share allocation.

After discovery is complete, plaintiff may be entitled to summary judgment on all of his claims, but at this point the Court finds that plaintiff has not met his burden for summary judgment imposing a permanent injunction.

Summary

The Court stresses that for purposes of the instant motion, the arguments about when the renovations were completed, purported control over the Board and whether improper settlement discussions were used in connection with this motion relate to the merits of *the declaratory judgment cause of action* rather than the claim for a permanent injunction. Here, the Court is focused only on whether such a drastic remedy is appropriate.

As plaintiff points out, he does not have to accept defendants' demands relating to the allocation of shares in order to be able to sell his apartment. But that does not mean that he is

entitled to a permanent injunction barring defendants' purported attempt to condition the sale on taking more shares. Plaintiff may ultimately be entitled to the declaratory judgment but at this point, his requested relief is simply premature.

Accordingly, it is hereby

ORDERED that the motion for partial summary judgment is denied.

The parties are directed to appear for the already-scheduled conference on June 5, 2018 at 2:15 p.m. By that time, the Court expects that the parties will have complied with the preliminary conference order (*see* NYSCEF Doc. No. 6).

This is the Decision and Order of the Court.

Dated: February 26, 2018
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH