

346 W. 48th St. Hous. Dev. Fund Corp. v Estate of Tapia

2018 NY Slip Op 32689(U)

October 18, 2018

Supreme Court, New York County

Docket Number: 151121/2017

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 IAS MOTION 2

Justice

-----X INDEX NO. 151121/2017

346 WEST 48TH STREET HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ESTATE OF RAMON TAPIA c/o MARIA VARELA AS EXECUTOR,
MARIA VARELA, INDIVIDUALLY, MARIA ALVAREZ, TABITHA YI,
"JOHN DOE", and "JANE DOE",

**DECISION, ORDER, AND
JUDGMENT**

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is granted as follows.

In this action seeking declaratory relief, an order of ejectment, and monetary damages, plaintiff 346 West 48th Street Housing Development Fund Corporation (plaintiff or the HDFC) moves: 1) pursuant to CPLR 3212, for summary judgment on its complaint; and 2) pursuant to CPLR 3211(a)(6), (7), and (b), dismissing the affirmative defenses and counterclaims asserted by the defendants. Defendant Maria Varela (Varela), individually and as Executor of the Estate of Ramon Tapia (the Estate), oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Ramon Tapia (Tapia) was a shareholder in the plaintiff HDFC, a low-income cooperative formed pursuant to the Private Housing Finance Law. Doc. 27, affidavit of Gina Georgiou

(Georgiou), President of plaintiff's Board of Directors (the Board). In or about 1989, Tapia was issued a proprietary lease (the lease) correlating to apartment 1E at 346 West 48th Street, New York, New York (the apartment). *Id.* Following Tapia's death in 2014, his niece, Varela, became Executor of his Estate and attempted to transfer the unit to her twin sister, Maria Alvarez (Alvarez). *Id.* After meeting with Alvarez in June of 2015, the Board unanimously rejected her application based, in part, on the ground that she was not a financially responsible candidate. *Id.* It also rejected her application since she stated that she did not intend to live in the apartment. *Id.* The Board also learned that Alvarez initially intended to tell the HDFC that she was Varela, and that she (Varela) planned to assign the lease and the stock to herself in order to obtain the apartment. *Id.* However, the sisters never followed through with this scheme. *Id.*

Varela met with the Board in December of 2015 and her application was also rejected. *Id.* The Board determined that the combined incomes of Varela and her husband exceeded the maximum allowable income for a two-person household for the year 2014. *Id.* It also found that Varela gave inconsistent versions regarding whether she intended to live in the apartment. The Board further questioned whether Varela, who owned two homes in New Jersey, would satisfy the requirement, set forth in the lease, that she reside in the apartment for at least 183 days out of the calendar year. *Id.*; Doc. 32, at par. 5.03(b)(i).

Following Varela's rejection by the Board, she permitted Alvarez, as well as another relative, defendant Tabitha Yi (Yi)¹, as well as other unknown individuals, named herein as defendants John Doe and Jane Doe, to live in the apartment without Board consent despite the fact that paragraph 5.03(a) of the proprietary lease provided that:

¹ Defendants' papers were unclear as to whether Yi was the daughter of Varela or Alvarez.

The Shareholder shall not occupy or use the Apartment or permit it or any part of it to be occupied or used for any purpose other than as a private residence for the Shareholder, Shareholder's spouse, children, parents, brothers, sisters, grandparents, grandchildren and domestic employees. Occupancy of the Apartment by any other person shall require prior approval in writing by the [HDFC] on such conditions as the [HDFC] may prescribe.

Doc. 32.²

Additionally, paragraph 5.05(a) of the lease provided that:

The Shareholder shall not sublet the whole or any part of the Apartment or extend any previously authorized sublease without the consent of the Board of Directors given by a resolution of the Board or in writing by a majority of the Board, or, if the board refuses or fails to give such consent, then with the consent of shareholders holding two thirds (2/3) of the shares which are issued and outstanding, given either in writing or by affirmative vote taken at a meeting called for this purpose in the manner provided in the By-Laws.

Doc. 32, at par. 5.05(a).

At a meeting on October 20, 2016, the Board voted to allow the Estate 30 days to cure the lease violations. Doc. 27. A 30-day notice to cure was served on the Estate, via Varela, on October 27, 2016, warning that, if the violations were not cured by November 30, 2016, the Estate's tenancy would be terminated. Doc. 45. On December 14, 2016, after the thirty-day period expired without a cure, plaintiff served the Estate with a 5-day notice of termination. Doc. 46. Since defendants remained in possession of the apartment after the expiration of the 5-day notice of termination, plaintiff commenced the captioned action against them. Docs. 27, 47.

² Although plaintiff does not submit the actual lease issued to Tapia, its form proprietary lease required that "[e]ach Proprietary Lease shall be in the form of this lease . . ." Doc. 32, at par. 3.03(a). During a search of its records, HDFC found the signature page of Tapia's proprietary lease as well as an affidavit signed by Tapia attesting to the fact that he had lost his HDFC share certificate. Docs. 33 and 34. Defendants do not dispute that the form lease submitted by plaintiff in support of the instant application contains language identical to that in Tapia's lease.

In the summons and verified complaint, filed February 2, 2017, plaintiff demanded: 1) a declaratory judgment that the Estate was a shareholder of the HDFC and was thus bound by the proprietary lease and by-laws of the HDFC; 2) an order of ejectment and warrant of eviction removing the Estate and all individually named defendants from the apartment; and 3) awarding plaintiff use and occupancy in the amount of \$3,422.50, plus interest from November 1, 2016 through the date of the filing of the complaint,³ plus accruing use and occupancy at the rate of \$772.50 per month. Doc. 47.

In their answer filed March 23, 2017, defendants denied all substantive allegations and asserted affirmative defenses and counterclaims. Doc. 23. As a first affirmative defense, defendants claimed that service of the 30-day notice to cure was improper since it was only addressed to the Estate and not the remaining defendants. As a second affirmative defense, defendants asserted that HDFC waived its right to object to the transfer of shares and the proprietary lease by accepting payments of maintenance from Varela. As a third affirmative defense, defendants asserted that HDFC waived its right to object to occupancy of the apartment by defendants based on paragraph 5.03 of the lease since that provision allows the apartment to be “occupied as the private residence for family members.” As a fourth affirmative defense, defendants assert that HDFC served its notice of termination and commenced this action in retaliation for a lawsuit commenced by Varela and other shareholders against plaintiff as part of a shareholder derivative action styled *Yorgo Valyrakis, et. al. v 346 West 48th Street Housing Development Fund Corporation* under Supreme Court, New York County Index Number 152111/16 (the Valyrakis action). As a fifth affirmative defense, defendants asserted that the

³ This amount was increased in the instant motion to \$10,640.70 from November 1, 2016 through July 14, 2017. Doc. 52, at p. 31. Additionally, the “wherefore” clause of the complaint demanded interest through the date of judgment instead of through the date of the filing of the complaint.

action should be stayed or consolidated with the Supreme Court action pending under Index Number 152111/16.

As a sixth affirmative defense and first counterclaim, defendants asserted that the Board arbitrarily and unreasonably withheld consent to the transfer of the shares to Alvarez, as a member of Tapia's family, and that defendants were thus liable for compensatory and punitive damages. As a seventh affirmative defense and second counterclaim, defendants alleged that the Board arbitrarily and unreasonably withheld consent to the transfer of the shares to Alvarez because it wished to offer defendants a different unit so that defendants would relinquish their claim in the apartment, and that plaintiff was thus liable for compensatory and punitive damages. As an eighth affirmative defense and third counterclaim, defendants claimed that they are entitled to legal fees in the event they prevail in the captioned action.

Plaintiff thereafter served a response to defendants' counterclaims and simultaneously asserted several affirmative defenses in response thereto. Doc. 24.

On August 7, 2017, plaintiff filed the instant motion: 1) pursuant to CPLR 3212, for summary judgment on its complaint; and 2) pursuant to CPLR 3211(a)(6), (7), and (b), dismissing defendants' affirmative defenses and counterclaims. In support of the motion, plaintiff argues that it is entitled to a declaratory judgment that Tapia owned the shares of the apartment and that the illegal use of the premises by the other defendants violated the terms of the lease. Plaintiff further maintains that the Estate owes \$10,640.70 in use and occupancy from November 1, 2016 through July 14, 2017, continuing to accrue at \$772.50 per month. See Maintenance Ledger, Doc. 50.

Plaintiff asserts that defendants' affirmative defenses and counterclaims must be dismissed since they have no merit. In support of this contention plaintiff specifies, inter alia, that it did not

waive any right to object to the tenancy of the apartment by defendants because: there was a non-waiver provision in the lease⁴; it properly served the Estate with the notice to cure and notice of termination; it applied the business judgment rule in denying defendants' application to have the lease and stock assigned and that, absent the business judgment rule, the denial was reasonable.

In opposition to the motion, Varela, in her personal capacity and as Executor of the Estate, asserts that she and Alvarez were denied the right to live in the apartment in retaliation for Varela joining with other shareholders against the HDFC in the *Valyrakis* action and because Georgiou wanted the apartment for herself.⁵ Varela further asserts that plaintiff's motion is premature since there is discovery outstanding. She also insists that Georgiou's affidavit is based on hearsay and speculation because she did not state that she had personal knowledge of unauthorized individuals living in the apartment. Additionally, Varela maintains that the predicate notices served on the Estate were defective and defendants' affirmative defenses and counterclaims should not be dismissed.

In reply, plaintiff argues that its motion for summary judgment is not premature because Varela has not pointed to any specific discovery she must obtain. Further, Georgiou and other Board members submit affidavits attesting to the fact that unauthorized persons lived in the apartment, as well as details about such activity. Additionally, plaintiff maintains that it properly served the Estate with the notice to cure and the notice of termination and that it did not waive any of its rights to enforce the lease by accepting maintenance paid by Varela in her individual capacity.⁶

⁴ The lease provided, inter alia, that "[t]he receipt by the [HDFC] of maintenance payment or rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach" and that the HDFC could not waive any provision of the lease unless such waiver was in writing and expressly approved by the [Board]." Doc. 32, at par. 6.03.

⁵ The other defendants do not oppose the motion.

⁶ Plaintiff maintains that, after it discovered that Varela had made payments from her personal funds, it requested that she instead make the payments from the assets of the Estate, and that she then did so. Doc. 75, at par. 36.

LEGAL CONCLUSIONS:

Plaintiff's Motion for Summary Judgment

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff has established its prima facie entitlement to summary judgment by submitting the affidavit of Georgiou as well as the exhibits annexed thereto including, inter alia, the pleadings, the lease, the notice to cure, the notice of termination, and the affidavit of lost HDFC shares. These documents confirm that Tapia was the holder of the lease and owner of the shares for the apartment. Although paragraph 5.03(a) of the lease allows certain enumerated relatives of the shareholder, here the Estate, to reside in the apartment, that provision does not include nieces. Additionally, paragraph 5.05(a) prohibits subletting of the apartment without Board approval, and proof of such approval is absent from the motion papers. Thus, neither Varela, Alvarez, nor Yi had a legal right to reside in the apartment. *See Bregman v 111 Tenants Corp.*, 97 AD3d 75, 81-82 (1st Dept 2012).

In opposition, defendants fail to raise a material issue of fact warranting denial of the motion. Thus, plaintiff is entitled to a declaration that the Estate is the owner of the apartment

and is thus bound by the terms of the lease and HDFC's by-laws. Thus, plaintiff is entitled to an order of ejectment directing the marshal to remove defendants, who do not have a right to reside in the apartment, from the premises.

Plaintiff also establishes that the Estate is responsible for use and occupancy in the amount of \$772.50 per month, continuing until the present. Doc. 50. Although the motion papers refer to maintenance payments made by Varela, in her personal capacity, as well as by the Estate, it is unclear how much was paid by Varela and whether plaintiff still demands the sum of \$10,640.70 in use and occupancy from November 1, 2016 through July 14, 2017, continuing to accrue at \$772.50 per month.⁷ Thus, the issue of the amount owed by the Estate for use and occupancy, as well as the amount of costs and attorneys' fees owed to plaintiff, is hereby referred to a referee for determination.

Plaintiff's Motion to Dismiss Affirmative Defenses and Counterclaims

That branch of plaintiff's motion seeking the dismissal of defendants' affirmative defenses and counterclaims is granted on the ground that the said claims are without legal and factual support. Although this Court, as a matter of expediency, declines to address each and every affirmative defense and counterclaim in detail, it addresses below some of the defendants' allegations which exemplify these claims.

Initially, the second affirmative defense alleges that plaintiff waived its right to object to defendants' transfer of the shares and lease on the ground that it accepted maintenance payments from Varela. However, as noted above, this contention is undermined by the non-waiver clause set forth in paragraph 6.03 of the lease.

⁷ Any payments by Varela, in her personal capacity, which were accepted by plaintiff do not constitute a waiver of plaintiff's claim that defendants have no right to reside in the apartment. Doc. 32, at par. 6.03.

Additionally, although defendants assert as a third affirmative defense that “pursuant to paragraph 5.03 of the proprietary lease, the subject apartment may be occupied as the private residence for family members”, this claim is disingenuous given that the said paragraph specifically enumerates which relatives may live in the apartment, and nieces and their children are excluded from the list.

Defendants’ fourth affirmative defense is that plaintiff served the notice of termination and commenced this action against them as retaliation for the *Valyrakis* action, a claim which is utterly speculative.

Further, although the sixth affirmative defense/first counterclaim alleges that plaintiff arbitrarily and unreasonably withheld consent to transfer the lease and shares to Alvarez and Varela, Georgiou clearly sets forth the reasons why the Board decided against such transfer. In any event, defendants’ remedy would have been the commencement of an Article 78 proceeding against plaintiff, and the time in which to commence such a proceeding has expired.

The parties’ remaining contentions are either without merit or need not be addressed in light of the findings set forth above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff 346 West 48th Street Housing Development Fund Corporation for summary judgment in its favor is granted; and it is further

ADJUDGED AND DECLARED that the defendant Estate of Ramon Tapia is the holder of the proprietary lease and shares of stock in plaintiff 346 West 48th Street Housing Development

Fund Corporation issued in connection with apartment 1E at the said premises and is therefore bound by the terms of the proprietary lease and the by-laws issued by plaintiff; and it is further

ORDERED that the Sheriff of the City of New York is directed to permanently remove Maria Varela, as Executor of the Estate of Ramon Tapia and in her personal capacity, Maria Alvarez, Tabatha Yi, and any other individual from apartment 1E at 346 West 48th Street, New York, New York, and to put plaintiff 346 West 48th Street Housing Development Fund Corporation in possession of the apartment, with the Sheriff of the City of New York to execute such order as if it were an execution for the delivery of the possession of real property; and it is further

ORDERED that the branch of the motion seeking dismissal of defendants' affirmative defenses and counterclaims is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion seeking use and occupancy, as well as the costs and reasonable attorneys' fees associated with filing the instant motion, is granted, and the calculation of the amounts of the awards for the foregoing items, plus interest on use and occupancy running from December 19, 2016, is referred to a special referee to hear and report or, if the parties so agree, to hear and determine; and it is further


ORDERED that, within 20 days of the date hereof, plaintiff's attorney is to serve this decision, order, and judgment, with notice of entry, on counsel for defendants; and it is further

ORDERED that this matter is referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign the issue to an available Special Referee as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this decision, order and judgment with notice of entry, together with a completed Information Sheet (which can be accessed at http://www.nycourts.gov/courts/ljd/supctmanh/SR-JHO/SRP-InfoSheet.pdf) containing all the information called for therein, on the Special Referee Clerk by fax (212-401-9186) or email spref@courts.state.ny.us, and, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee's Part; and it is further

ORDERED that this constitutes the decision, order and judgment of the court.

10/18/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: