Cobb v 1710 Carroll Owners Corp.
2018 NY Slip Op 33118(U)
November 27, 2018
Supreme Court, Kings County
Docket Number: 508771/18
Judge: Carolyn E. Wade

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of November 2018.

PRESENT:

HON. CAROLYN E. WADE,
Justice

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THOMAS COBB,

Plaintiff,

- against -

Index No. 508771/18

1710 CARROLL OWNERS CORP., MEDALLION REAL ESTATE LLC, SCADI ETIENNE AND CHASS PROPERTIES, LLC,

Defendants,

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KINGS COUNTY CLERK FILED 2018 DEC -4 AM 8:08

The following papers numbered 1 to 11 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5, 6-7
Reply Affidavits (Affirmations)	8-9
Sur-Reply Affidavits (Affirmations)	10, 11

Upon the foregoing papers, and after oral argument, plaintiff Thomas Cobb ("plaintiff" or "Cobb") moves by Order to Show Cause for a temporary restraining order and preliminary injunction restraining defendants, 1710 Carroll Owners Corp., Medallion Real Estate LLC, Scadi Etienne and Chass Properties, LLC (collectively "defendants") or any

other of their agents[1] from 1) evicting Cobb from apartment F10 located at 1710 Carroll Street in Brooklyn ("Apartment"); 2) commencing an ejectment or summary proceeding with respect to the Apartment; and 3) transferring, selling, encumbering or alienating the shares and the proprietary lease associated with the apartment.

On May 17, 2018, the Honorable Ellen M. Spodek, JSC, signed the instant order to show cause with the stays Cobb requested. Thereafter, by Order, dated August 10, 2018, this court continued the stays, and marked the application "submitted." For the reasons set forth below, this Court will continue the stays upon the terms enumerated herein.

Cobb's Allegations

Cobb alleges that on June 8, 2016 he acquired ownership of the Apartment by purchasing 153 shares of stock in defendant 1710 Carroll Owners Corp. ("Owners Corp.") and executing with Owners Corp. a proprietary lease ("Lease") appurtenant to the Apartment. The Apartment is Cobb's only home (*see* Cobb's May 1, 2018 aff at ¶ 2).

He claims that immediately after the purchase, the Apartment became uninhabitable with leaks in his unit's bathroom and hallway. Cobb complained about the condition of his bathroom for a month, to both the building superintendent and the managing agent, defendant Medallion Real Estate LLC ("Medallion"), but nothing was done. Cobb then spent $7,500.00 to repair his bathroom (*id.* ¶¶ 3-4 and7). The elevator, he states, is most often out-of-service (*id.* at ¶ 5); his mailbox lock is broken, the key he has does not fit the lock, and he

[1]Plaintiff requests a restraining order against defendants' "attorneys, agents, representatives, assigns . . . " which the court collectively designates as agents.

receives no mail (*id.* at ¶ 8). The building, according to plaintiff, is unsanitary, and the Apartment is infested with various vermin (*id.* at ¶6). Cobb alleges he also complained about these conditions to Owners Corp. and Medallion to no avail (*id.* at ¶¶ 3,9 and 10). On or about July 1, 2016, one month after moving into the Apartment, Cobb stopped paying his maintenance on the ground that he was personally incurring the expense of remedying the defects to make the Apartment habitable (*id.* at ¶ 9). Cobb acknowledges receiving a maintenance invoice from Medallion on behalf of Owners Corp. on January 26, 2018 (*id.* at ¶ 10).[2] By e-mail, he responded that he can not pay $7,500 in late charges, and that he continues to do all the repairs in the Apartment as well as pest control (*id.* at ¶ 10 and exhibit I).

On March 22, 2018, Mr. Cobb found a typed notice, dated March 22, 2018, under the Apartment door, apparently signed by defendant Scadi J. Etienne ("Etienne"), as CEO of defendant Chass Properties LLC ("Chass"), stating that he had purchased the Apartment that day at an auction. Etienne, according to Cobb, also called him, and stated that he was the new owner of the Apartment (*id.* at exhibit J).

After learning that the Apartment had been sold at an auction, Cobb contacted his attorney. He then learned that the certificate of auction showed the Apartment was sold on January 18, 2018; that defendant Etienne owns defendant Chass; and that Andrew Press is an agent for both defendants Chass and Medallion (*id.* at ¶¶ 16-17).

[2]The latest invoice herein, dated January 1, 2018, lists past due maintenance of $9,079.74, late charges of $675.00, legal charges of $3,000.00 and an unspecified other charge of $250.00, for a total balance due of $13,509.17 (*see* exhibit S, annexed to Cobb's reply papers).

Cobb avers that he was never notified that the Apartment would be auctioned. Owners Corp. and Medallion dispute Cobb's factual recitation by claiming that all notices, either required by law or the proprietary lease, were served.[3]

The Parties' Contentions

Cobb asserts that he is entitled to injunctive relief for various reasons. He argues that the Apartment was uninhabitable; that Owners Corp. lacked a perfected security interest in the Apartment, thus negating the non-judicial sale of the stock under the UCC. He further contends that Owners Corp. failed to give him notice of either his default or that his shares and proprietary lease would be canceled, reissued and auctioned; and that the auction sale of the Apartment was in bad faith, and smacks of collusion between the defendants.

All defendants contest each of plaintiff's theories and urge that the court denies the TRO application. Defendants also argue that plaintiff needed to pursue relief by an article 78 proceeding, which is now time-barred. Alternatively, defendants argue that Cobb be directed to post a bond if the injunction is continued.

Discussion

To prevail on a preliminary injunction application, a movant must "demonstrate a likelihood or probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in his favor (*see* CPLR § 6301; *see generally*

[3] Defendants at no time admit that the Apartment or the building was in any disrepair or improperly maintained.

Doe [*v Axelrod*], 73 NY2d [748,] at 750 [1988])" *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 718 [2012]); *306 Rutledge, LLC v City of New York*, 90 AD3d 1026, 1028 [2011]; *Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 624 [2011]).

In the instant application Cobb has prevailed in showing irreparable harm. He, unlike the movant in *Lombard*, who was an investor, uses the Apartment as his sole residence. Clearly, for Cobb to lose his sole residence, one in which he claims to have invested some effort, i.e., installing a new bathroom and providing regular pest control, significantly tips the equities more in his than defendants' favor.[4]

Cobb, in trying to show a likelihood that he will succeed on the merits, cites many purported defects in the non-judicial foreclosure in arguing for voiding the sale. Cobb first claims that he did not receive any of the mailed notices to which he was entitled under the Lease. This argument is unpersuasive. Nothing in the record contradicts defendants assertion that the notices were mailed, and there is no requirement that the notices be received, simply that they be served (*see Thornton v Citibank*, 226 AD2d 162, 162 [1996], *lv denied* 89 NY2d 805 [1996], *rearg denied* 89 NY2d 1021 [1997]). Mailing and certified mailing are irrefutably reasonable methods to send notice, and Cobb himself admits that he has in fact has received some mail from defendants (*see* Cobb's May 1, 2018 aff at ¶ 10 and

[4]However, the court notes that Cobb has failed to allege that he has no other place to move if he is evicted; and he has also omitted how he became owner of the Apartment, what he paid for it, and how he was unaware that the Apartment and building were as neglected as he alleges.

exhibit I). Cobb argues that because his mailbox was broken, defendants should have known he would not get any notices they mailed him, and thus defendants' use of the mail to deliver notices was unreasonable. That argument is unpersuasive. Cobb certainly could have secured his mail box or attempted to get a post office box if he wanted his mail delivered. He also could have told defendants to mail his notices to a different address where he would get his mail, especially considering his maintenance dispute with Owners Corp. and Medallion. Hence, Cobb has failed to show a likelihood of having the Apartment sale set aside because of the undelivered notices sent to him.

Cobb further argues that the non-judicial sale should be set aside because defendants breached the warranty of habitability, and he was therefore rightfully retaining his maintenance. Asserting breach of the warranty of habitability would not cure Cobb's default, and at most would result in a setoff, not a complete waiver of his obligations to pay maintenance (*see Park W. Mgt. Corp. v Mitchell,* 47 NY2d 316, 329-330 [1979], *cert denied* 444 US 992 [1979]).

Cobb also maintains that Owners Corp. did not have the right to proceed with the non-judicial sale of the stock because it did not possess the shares and lease. In the instant matter, since Cobb kept possession of the Lease and shares, Owners Corp. canceled Cobb's Lease and shares, reissued a new Lease and shares, and then auctioned those. Cobb asserts that Owners Corp. lacked the authority to cancel his Lease and shares. The court disagrees. Courts have consistently held that a Proprietary lease is a secured interest pursuant to UCC

§ 9-604. Much like the facts in *Lombard*,[5] Owners Corp.'s bylaws, the language in its Proprietary Lease and the stock shares state:

> The rights of any holder of the shares evidenced by this certificate are subject to the provisions of the certificate of incorporation and the by-laws of the corporation and to all the terms, covenants, conditions and provisions of a certain proprietary lease made between the corporation, as Lessor and the person in whose name this certificate is issued, as Lessee for an apartment in the apartment house which is owned by the corporation and operated as a 'co-operative' which proprietary lease limits and restricts the title and rights of any transferee of this certificate.
> The shares represented by this certificate are transferable only as an assignee of such proprietary lease approved in writing, in accordance with the provisions of the proprietary lease. Directors of this corporation may refuse to consent to the transfer of the shares represented by this certificate until any indebtedness of the shareholder to the corporation is paid" (*see* Cobb's May 1, 2018 aff at exhibit A).

It is clear that Cobb was subject to all rights and restrictions contained in the Owners Corp. bylaws; that the proprietary lease created the security interest in the shares; and that Owners Corp. was entitled to issue new shares, and a new proprietary lease once Cobb defaulted and did not tender his shares or the proprietary lease. Holding that Owners Corp. could not

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[5]In fact, the language in the proprietary lease and bylaws in the two cases is near identical. The only differences in the instruments that create the secured interests in the two cases is that the stock certificate in *Lombard* (94 AD3d at 719), explicitly states that the shares are subject to a lien and the shares in this matter state that shares are subject to the bylaws, the certificate of incorporation and the proprietary lease. It also informs the holder of the shares that the corporation's directors may refuse to consent to the transfer of the shares unless all indebtedness of the shareholder is paid to the corporation (*see* exhibit A annexed to the May 17, 2018 order to show cause).

cancel the old shares and lease would rest the power to thwart the security interest, to which Owners Corp. and Cobb had agreed, solely on Cobb's whim, i.e. to simply decide to retain the documents. Allowing such an outcome would undo the parties' power to contract and the public policy favoring non-judicial dispute resolution.

Having determined that Owners Corp., in fact, had a valid security interest, that there were no fatal defects in the notice given to Cobb, that breach of the warranty of habitability is not a defense in this action, still leaves determining if the manner of selling the security interest was reasonable.

Uniform Commercial Code § 9-610 governs disposition of secured property. The statute allows for easy disposition of secured property for the creditor while protecting the debtor. The disposition of collateral may occur by public or private sale and at any time and place and on any terms. "Every aspect of a disposition of collateral including the method, manner, time, place and other terms must be commercially reasonable" (Uniform Commercial Code § 9-610 [b]).

Cobb seems to assert that the foreclosure was commercially unreasonable because Etienne, who owns Chass, uses Andrew Press as Chass' agent, and Mr. Press also works for Medallion, the managing agent of Owners Corp. The purchase of the foreclosed apartment by a business[6] associated with the foreclosing cooperative is unseemly at best. The situation argues against the auction ever having been an arm's length transaction when a successful

[6] In the instant matter it is unclear whether it was Mr. Etienne or his corporation Chass Properties, who was the successful bidder at the foreclosure.

bidder is an insider. Additionally, according to Etienne's submission, this is at least the second foreclosed apartment that he has purchased from Owners Corp. since 2014 (*see Mattie Dickerson v. Chass Properties LLC and 1710 Carrol Owners Corp.*, Sup Ct, Kings County, Jan. 12, 2015, Schmidt, J., index No. 12192/14).

Despite Etienne/Chass having been successful in *Dickerson,* this court notes that the procedural history is distinct from that matter. In *Dickerson,* the court found that Judge Marton's housing court ruling that Etienne/Chass owned the apartment, precluded re-litigation of apartment ownership under the theories of collateral estoppel or res judicata (*id.* at p 4). There is no such procedural bar herein. Moreover, this court does have the authority to set aside this sale if collusion is revealed, even if the purchase price can somehow be justified.

> "In the exercise of its equitable powers, a court has the discretion to set aside a foreclosure sale where there is evidence of fraud, collusion, mistake, or misconduct (*see Guardian Loan Co. v Early*, 47 NY2d 515, 520 [1970]; *U.S. Bank N.A. v Testa*, 140 AD3d 855, 856 [2016]; *Astoria Fed. Sav. & Loan Assoc. v Hartridge*, 58 AD3d 584, 585 [2009])" (*NYCTL 1998-1 Trust v Rodriguez,* 154 AD3d 865, 866-867 [2017]).

The court finds that the successful bidder was familiar and interconnected with Owners Corp. or Medallion. Defendants have thus allowed the auction process to become subject to credible allegations of collusion; and Cobb has a substantial likelihood of success on such cause of action. Cobb, however, can not remain in the Apartment without posting security under CPLR § 6312 (b). The security must be sufficient to cover the amount paid

for the Apartment by Etienne, and Cobb must pay the maintenance on the Apartment going forward.

Lastly, Owners Corp. and Medallion argue that the lawsuit is time-barred as against Owner's Corp. because this matter should have been brought as an article 78 proceeding. However, there is nothing conclusive in this record to show when Cobb was first made aware of the non-judicial foreclosure.[7] In addition, given that Cobb is to remain in the Apartment if he posts security, restraining Owners Corp. from transferring the Apartment's shares or Lease is prudent. Accordingly, it is

ORDERED that the stays contained in the May 17, 2018 order to show cause shall continue, and Cobb shall post bond for $45,000.00 and pay all maintenance going forward starting December 1, 2018 to Owners Corp.; and it is further

ORDERED that if Cobb fails to post such bond and/or pay maintenance, as directed, within forty-five (45) days after service of this order with notice of entry, then any of the defendants can, on three (3) days e-filed notice, apply to lift the stays.

Plaintiff's Order to Show Cause is granted to the extent set forth above.

The foregoing constitutes the Decision and Order of the court.

ENTER

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

A.J.S.C.

[7]The court also notes that since there was no cross-motion to dismiss, Cobb did not address this point.