354 Bowery-Bazbaz LLC v Board of Mgrs. of Bowery Tenants Condominium
2019 NY Slip Op 32952(U)
October 7, 2019
Supreme Court, New York County
Docket Number: 158113/2019
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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354 BOWERY-BAZBAZ LLC, individually and derivatively on behalf of Bowery Tenants Condominium,

Plaintiff,

- v -

THE BOARD OF MANAGERS OF BOWERY TENANTS CONDOMINIUM, *et al.*,

Defendants.

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INDEX NO. 158113/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13-23 were read on this order to show cause for preliminary injunction.

By order to show cause, plaintiff moves pursuant to CPLR 6301 for an order enjoining defendants from selling and/or transferring any right, title, or interest in the lien or collection rights attaching to certain condominium units. Defendants defaulted on the application.

I. BACKGROUND

By affidavit dated August 20, 2019, plaintiff's managing member specifies that the injunctive relief requested pertains to the five condominium units at 354 Bowery, New York, New York. The sole commercial unit is owned by plaintiff (unit 1) (NYSCEF 5), and the four residential units are owned by defendants Bowery Acquisition Partners, LLC (BAP) (unit 2), Bowery Shed LLC (Shed) (unit 3), Three To Get Ready LLC (TGR) (unit 4), and Arena LLC (Arena) (unit 5).

Plaintiff's manager asserts that Shed, Arena, and TGR are owned or controlled by defendant Anthony M. Marano, the president of defendant Board who appointed a company he

owns, defendant Ozymandius Realty LLC (Ozymandius), to serve as the condominium's managing agent. Given Marano's ownership and control over a majority of the condominium's units and of the managing agent, plaintiff's manager alleges that Marano has "exclusive managerial, operational, and financial control over the [c]ondominium," an incident of which is the high-interest mortgage loans Marano had obtained from non-parties and secured by Shed's, Arena's, and TGR's units. Moreover, he asserts, Marano has paid no maintenance charges on those units, accumulating more than $70,000 in past due charges, not including interest, late fees, penalties or collection costs, which should be assessed. He maintains that the balance is continuing to accrue monthly at $2,700, plus penalties, interest, and fees.

Given Marano's interest in Shed, Arena, and TGR, he made no attempt to collect the outstanding common charges or assert a common charge lien against them. Consequently, plaintiff and BAP withheld payment of their common charges until the other entities cured their default. Thereafter, Marano prepared common charge liens on all of the units.

Plaintiff's manager maintains that plaintiff is ready, willing, and able to satisfy its unpaid common charges, and believes that BAP is willing to do so, if it has not already done so. He reports that Marano has stated that "there is no source of cash to pay the outstanding common charges on my units," and that he thus, seeks to sell or transfer all of the liens to an undisclosed related party.

Plaintiff's manager submits Marano's email dated August 8, 2019, in which he states that the owners of unit 2 have paid their common charges in full, that a "related party" is buying the liens on units 3 and 4, that he is trying to sell the lien on unit 5 to another party, and that "[w]e also anticipate offering the lien on [unit 1], in the event ownership does not satisfy the arrears." He added that the attorney he had hired to draft the condominium declaration believes that it is

permissible to file a lien and sell the claim. (NYSCEF 6).

According to plaintiff's manager, Marano seeks to redevelop units 3, 4, and 5 and add a penthouse floor, and seeks to bring in investment partners, including one of the principals of BAP, who loaned Marano funds for unit 5. Marano has also made several "well-below market value" offers for plaintiff's unit, using the common charges to drive down the value of the unit. Plaintiff's manager also alleges that the "related party" to which Marano referred to in his email is involved in the redevelopment project.

Plaintiff's manager argues that the sale of the lien and collection rights on the units is not permitted under the condominium declaration and by-laws (NYSCEF 4), or the Real Property Law. Moreover, as Marano acknowledges that the sale is to a related party, he is conflicted and must recuse himself from any decision-making relating to the sale of the liens or collection rights. While plaintiff objects to the sale, as it believes Marano is acting solely in his own self-interest, it has demanded that defendants cease and desist from taking any action to sell or transfer the liens and collections rights, and that any sale process must be open, transparent, and invite multiple bids (NYSCEF 9). If defendants are not restrained from executing a sale, he contends, plaintiff would be irreparably harmed, as a sale would deprive the condominium of the past-due maintenance charges, plus interest, late charges, administrative fees, and collection costs. Moreover, a sale or transfer will subject plaintiff and BAP to foreclosure by an outside investor, placing title to their respective units at risk, even though the foreclosure is not authorized under the condominium declaration or by-laws. (NYSCEF 3).

On August 20, 2019, plaintiff's order to show cause was granted to the extent that defendants were temporarily restrained and enjoined from selling, assigning, or otherwise transferring any rights to collect past-due common charges, including any rights to record or

enforce a lien against of the condominium units. (NYSCEF 15).

II. CONTENTIONS

Plaintiff contends that it will suffer irreparable harm if defendants are not restrained from selling the common charge liens and collection rights on the units, as any shortfall between the lien amount and the sale price would have to be absorbed by all unit owners, including plaintiff. It also maintains that "a common charge lien constitutes a cloud upon [plaintiff's] interests in real property, which is a unique and irreplaceable asset." Once a sale is completed, moreover, the board will no longer have standing to dispute the lien and it is "unclear whether the Court could unwind any completed lien rights sale." Even if plaintiff extinguished the lien on its unit, it would be subjected to increased assessments resulting from any possible shortfall between the sale price and lien amount.

Plaintiff maintains that it is likely to succeed on the merits in proving that Marano breached his fiduciary duty to the condominium and its members by facilitating the sale to a related entity in contravention of the condominium declaration and by-laws, which along with the Real Property Law, do not allow for the board to sell or assign its lien rights.

The balance of equities is in its favor, plaintiff argues, as permitting the sale to proceed would make it difficult or impossible to prevent harm, while a delay on the sale results in no prejudice to defendants. It observes that the condominium is financially stable and can do without the income from the proposed sales. (NYSCEF 10).

III. ANALYSIS

Pursuant to CPLR 6301, the court may grant a preliminary injunction "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights." Preliminary injunctions are drastic remedies,

substantially limiting the nonmovant's rights, and are awarded in special circumstances. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]). To be entitled to a preliminary injunction, the movant must demonstrate a likelihood of success on the merits, irreparable injury absent the injunction, and that the equities weigh in its favor. (CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

Irreparable harm is not established where monetary damages are an adequate remedy. (*Harris v Patients Med., P.C.*, 169 AD3d 433, 434–435 [1st Dept 2019]). To the extent plaintiff's alleged damages are its liability for the possible shortfall between the lien amount and the sale price, they are compensable by monetary damages and thus, not irreparable. That plaintiff is uncertain as to whether an unauthorized lien sale can be remedied falls short of demonstrating that the alleged harm is irreparable. (*See Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 716 [2d Dept 2011], *lv dismissed* 17 NY3d 875 [2011] [plaintiff must demonstrate that irreparable harm is "imminent, and not remote or speculative"]; *Sterling Fifth Assocs. v Carpentille Corp.*, 5 AD3d 328, 329 [1st Dept 2004] [plaintiff's conclusion that it is "questionable" whether alleged irreparable harm can be measured monetarily insufficient]). As plaintiff fails to demonstrate that it would suffer irreparable harm absent a preliminary injunction, the remaining requirements for a preliminary injunction need not be addressed. (*See Zodkevitch v Feibush*, 49 AD3d 424, 425 [1st Dept 2008] [as plaintiffs failed to show clearly irreparable injury unless appellant directed to place funds in escrow, court did not need nor did it pass on whether plaintiffs established likelihood of success on merits and balancing of equities in their favor]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's order to show cause for a preliminary injunction is denied; and it is further

ORDERED, that the temporary restraining order is lifted and vacated.

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10/7/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE