

Prashad v New York City Dept. of Hous. Preserv. & Dev.

2021 NY Slip Op 30831(U)

January 25, 2021

Supreme Court, Queens County

Docket Number: 716325/20

Judge: Kevin J. Kerrigan

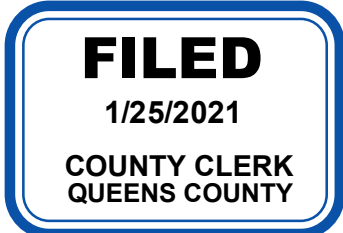
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NYSCEF DOC. NO. 59
Short Form Order

RECEIVED NYSCEF: 01/25/2021

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Dianna Prashad,

Index
Number: 716325/20

Plaintiff,

- against -

Motion

New York City Department of Housing
Preservation and Development and
Gail McMillan,

Date: 1/11/21

Motion Seq. No.: 1

Defendants.

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The following papers numbered E4-51 read on this motion by the City of New York (sued herein as New York City Department of Housing Preservation and Development) (HPD) to dismiss, and cross-motion by plaintiff to amend the complaint to add the City as a defendant.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	E 12-15
Affirmation in Opposition-Exhibits.....	E16-18
Affirmation in Opposition-Exhibits.....	E19-24

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City, pursuant to CPLR 3211(a) (2) and (a) (7), to dismiss the complaint against it is granted. Cross-motion by plaintiff to amend the complaint to add the City as an additional defendant is moot.

Plaintiff is the title owner of the premises 327 Beach 43rd Street in Queens County, also known as Ocean View Villas, having purchased the property on April 4, 2007 pursuant to HPD's Partnership New Homes Program a/k/a Ocean View Villas New Homes Project, a/k/a Edgemere B: Phase II, a program offered by HPD to people of low to moderate income seeking to purchase their first home in the Edgemere section of Far Rockaway. Applicants to the program who are found to meet HPD's income criteria are offered units to purchase at a reduced sale price and a 25-year interest-free mortgage loan, pursuant to an enforcement note and enforcement mortgage. Moreover, the purchasers are not required to make any payments on the principal, but rather, the principal self-amortizes at the rate of 1/25th of the initial principal sum each year, so that at the end of the 25th year, the homeowners would have no debt.

In addition, the homeowners receive special real property tax abatements. In other words, the "purchasers" would essentially be acquiring title to their properties for free, financed entirely by grants from the City and State. This offer, however, comes with conditions. The deeds, including the deed to plaintiff, include a covenant that the grantee and the grantee's successors and assigns shall occupy their units as their primary residence for at least 25 years from the date of the deed conveyance or for as long as the mortgage remains outstanding, whichever is later, and that the covenant runs with the land and is enforceable by the City, State and Federal government. The mortgage provides that if the grantees sell their unit prior to 25 years, or if they violate the covenant in their deed, they will be obligated to repay the grant. Also, depending upon whether they sell their unit within the first year or after three years, a percentage of the profit from the sale will be due upon the sale. If the property is sold within the first year, 100% of the profit from the sale will have to be paid, but only up to the combined recapture obligation. If the property is sold after three years, 50% of the profit up to the combined recapture amount will be owed.

Plaintiff acquired the subject unit in 2007 and executed a secured recapture note and secured mortgage in the sum of \$110,964, which is the secured recapture obligation. Of this sum, \$108,964 was provided by the City and \$2,000 was provided by the New York State Affordable Housing Corporation (AHC). AHC also provided additional funds in the sum of \$13,000, which sum is evidenced by an unsecured enforcement note and is the unsecured AHC recapture obligation. Both the secured recapture obligation and unsecured recapture obligation are called the combined recapture obligation. The mortgage, therefore, is for the purpose of securing plaintiff's covenant to live in the subject property for 25 years as a condition for offering her the grant, in default of which, plaintiff would have to repay the secured enforcement note sum, in plaintiff's case, \$110,964, and the City, as the mortgagee, would be entitled to recover the property by way of foreclosure if plaintiff failed to repay the grant. In addition, if the property is sold after three years from the date of the purchase, plaintiff will be obligated to pay half of the profit realized from the sale, called the appreciation, up to the combined recapture obligation, which in plaintiff's case is \$123,964.

Plaintiff served a notice of claim asserting a claim for breach of contract upon the grounds that she executed the note and mortgage in reliance upon the primary residence requirement and representations that other owners would be bound by the same covenant and that HPD failed to enforce the covenant against McMillan who rented out her premises in violation of her covenant, thereby creating a nuisance and diminishing plaintiff's property value, and seeking a declaratory judgment declaring that she is no longer bound to pay the combined capture obligation or, alternatively, that that HPD immediately enforce the covenant

against the neighbor. Plaintiff also claimed \$200,000 as damages representing the remaining balance of the combined recapture obligation plus improvements to the property.

Plaintiff alleges in her complaint that her neighbor, defendant Gail McMillan, moved out of her neighboring unit in January 2020 and leased it to undesirable tenants in March who have 5-7 children who create a nuisance and who have visitors on a regular basis who loiter outside the property, engage in illicit drug activity, harass plaintiff and vandalize plaintiff's property, all of which have diminished plaintiff's quality of life and the property value of her home, which she alleges she improved with \$200,000 of renovations in reliance upon the primary residence covenant. Plaintiff filed a complaint with HPD, setting forth the foregoing allegations and asserting that these individuals were targeting plaintiff due to her sexual orientation. HPD acknowledged the complaint and promised to address it, but did nothing to rectify the situation, which continues to the present. Plaintiff alleges that HPD's failure to take any action to abate the illegal rental situation has negatively impacted her property value.

Plaintiff alleges six causes of action against defendants: a first cause of action against HPD for breach of contract, second cause of action against McMillan for private nuisance, a third cause of action against HPD for gross negligence, a fourth cause of action against McMillan for intentional infliction of emotional distress, a fifth cause of action against defendants for declaratory judgment, and a sixth cause of action against defendants for negligence. Plaintiff seeks compensatory and punitive damages, costs and expenses, including her legal fees, and a declaration that plaintiff is no longer precluded from renting or selling her property and is not obligated to repay the program grant for renting or selling the property.

The deed to the property provides, in applicable part, "Grantee covenants as follows: ... (b) Grantee and Grantee's successors and assigns shall occupy at least one (1) dwelling unit in the premises conveyed hereby as his or her primary residence until the later to occur of: (i) twenty-five (25) years from the date hereof, or (ii) as long as the mortgage dated the date hereof made by Grantee to the City of New York shall remain outstanding". The deed also states, "The foregoing covenants of Grantee shall run with the land and may be enforced by the City of New York, State of New York, or the United States of America." It is undisputed that all homeowners in Oceanview Villas have deeds containing the same covenant, including McMillan.

These covenants, on their face, are merely encumbrances on title placed by the grantor against the grantee and the grantee's successors enforceable only by the grantor against the grantee or grantee's successors of that specific property. There is no privity between plaintiff and McMillan and neither plaintiff nor McMillan

have any standing to enforce the occupancy covenant against each other. Indeed, although the City's counsel raises this argument, the concept of privity as between plaintiff and McMillan does not even apply to this matter since there is no agreement between them at all. Only the City may enforce the occupancy covenant against the property owner, and no contractual provision of any agreement between the City and plaintiff obligating the City to enforce McMillan's occupancy covenant in her lease is proffered or alleged to exist. The Ocean View Villas New Homes Project is not governed by a homeowners' association in which the deeds to the properties contain covenant restrictions intended for the benefit of the community, and plaintiff is not a tenant in an HPD housing project claiming that HPD breached the implied covenant of quiet enjoyment or the implied warranty of habitability. There is no basis for plaintiff's demand that the City enforce the occupancy covenant in McMillan's deed for the benefit of plaintiff or to "abate" the "nuisance" caused by McMillan's tenants in the manner that a tenant may demand that her landlord take action to force neighboring tenants of another apartment in the building to cease their nuisance activity.

Thus, although plaintiff's counsel contends that plaintiff executed the note and mortgage in "reliance" upon the City's "contractual duty to enforce the primary residence requirement", no contractual provision or agreement is submitted establishing a duty on the part of the City to enforce the covenant in McMillan's deed for the benefit of plaintiff. The record on this motion establishes the lack of any contractual duty on the part of HPD or the City to plaintiff regarding her neighbors. Indeed, the nature of the transaction between the City/HPD and plaintiff precludes any claim of reliance on the part of plaintiff at all, much less detrimental reliance, so as to support a cause of action for breach of contract.

The Program is part of the City's efforts to address the severe housing crisis in the City of New York by offering people of low to modest income the opportunity to own their own homes. As noted, the City and State provide families who qualify under the Program's income criteria a grant that pays for the cost of a property, and qualified persons are conveyed fee simple absolute title to the property. Although they are required to execute mortgage loans for the value of the property, they are not truly loans, but grants, since there is no requirement to pay back the loans, either interest or principal. In actuality, then, plaintiff was given a home for free. The only requirement imposed by the City as a condition for such offer was that plaintiff actually live in the unit given to her as her primary residence for 25 years, as the whole purpose of the Program is to provide housing to those who cannot afford to own a home otherwise. If she decides to sell the unit, or she moves out and rents it to tenants, prior to 25 years then she becomes obligated to pay back the grant. The secured note and mortgage is simply the mechanism for enforcing compliance with

the covenant of residence through the avenue of foreclosure in the event plaintiff breaches her covenant of primary residence and fails to repay the grant upon the City's election to demand repayment. But if plaintiff retains the unit as her home for 25 years, the mortgage evaporates and she has no further obligation to the City.

As noted, the residency covenant in the deeds at Edgemere is not akin to a restrictive covenant imposed under the rules of a homeowners' association which is placed to vet potential purchasers or set rules for the maintenance or alteration of the properties in order to maintain the character of the neighborhood and property values of the covenant community. The purpose of the 25-year residency covenant in the deeds at Edgemere has nothing to do with assuring that the wrong people do not move into the properties so as not to damage the property values and quality of life of the neighbors. It is only for the purpose of assuring that someone to whom the City is giving title ownership of a house for free is actually in need of housing and intends to be a long-term resident of the property, and not someone who intends to turn the grant of free property into an opportunity for financial gain at the City's expense.

Therefore, plaintiff cannot be heard to argue that she relied upon the City to enforce the residence covenant against the neighboring grantees as a condition for her agreeing to accept a free home from the City. Plaintiff does not argue, and the record does not reflect, that she moved into the subject property because she wanted to live in a neighborhood with good neighbors or that the City enticed her to do so with any such promise. She moved into the property because she was offered title to it at no cost to her, based upon her income. That she may have, upon being given title to the property, paid \$200,000 to renovate it (a claim that, if true, calls into question the needs-based criteria employed by the City to give property away at taxpayer expense) was her own prerogative as a fee simple absolute owner. Thus, the complaint fails to state a cause of action for breach of contract. Moreover, there is no basis for a cause of action either in gross negligence or simple negligence. The City is not responsible for and owes plaintiff no duty of care to address the behavior of other homeowners.

It is most certainly every property owner's nightmare to have the neighbors from hell, and this Court finds no fault with plaintiff for wishing to move rather than endure nuisance behavior and harassment. However, her argument that she is entitled to a declaration that she may abrogate the occupancy covenant of her deed and the terms of her mortgage, retain the benefit given to her of a free home at taxpayer expense, sell or rent the subject property, not have to pay back the remaining balance of the grant/loan, plus be awarded as "damages" reimbursement of her renovation expenses for the improvement of the property which she

hopes will be reflected in the sale or rental price she gets is not only unreasonable and without legal basis or merit, but is unworthy of any further expenditure of this Court's time to refute.

Inasmuch as the complaint fails to state a cause of action against the City for breach of contract, negligence or gross negligence and must be dismissed against the City/HPD, this Court need not address, and will not determine, the remaining grounds set forth by the City for dismissal.

Finally, plaintiff's cross-motion for leave to amend the complaint to add the City as an additional defendant, in response to that branch of the City's motion to dismiss the complaint against HPD upon the ground that it is not a distinct entity, is moot inasmuch as the City, in its motion, acknowledges that it is the defendant that was merely erroneously sued as HPD and the complaint against the City is dismissed for failure to state a cause of action.

Accordingly, the caption of the action is amended to read as follows:

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 Dianna Prashad, Index
Number: 716325/20
Plaintiff,
 - against -
 Gail McMillan,
Defendant.
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Dated: January 25, 2021



 KEVIN J. KERRIGAN, J.S.C.

