

Gibson v Castillo

2022 NY Slip Op 32835(U)

August 23, 2022

Supreme Court, New York County

Docket Number: Index No. 154827/2021

Judge: David Benjamin Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 154827/2021

CATHERINE GIBSON,

Plaintiff,

MOTION SEQ. NO. 010 and 011

- v -

JOSE CASTILLO, MARIA CASTILLO, 526 WEST 158TH
STREET HOUSING, DEVELOPMENT FUND CORP., and
JOHN DOES 1-4,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 143

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 140, 141, 142

were read on this motion to/for DISCOVERY.

Motion sequence numbers 010 and 011 are hereby consolidated for resolution.

In this action by plaintiff Catherine Gibson seeking, inter alia, damages for breach of contract and housing discrimination, defendant 526 West 158th Street Housing Development Fund Corp. (“the HDFC”) moves (mot. seq. 010), to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes the motion and moves separately (mot. seq. 011) for an order directing that discovery proceed. The HDFC opposes plaintiff’s motion.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this matter are set forth in the orders of this Court entered October 27, 2021 (Doc. 59), April 1, 2022 (Doc. 124), February 22, 2022 (Doc. 105), and August 11, 2022. Docs. 144-146). A brief synopsis of the facts and additional relevant facts are set forth below.

Plaintiff commenced the captioned action on May 18, 2021. Doc. 1. In her complaint, plaintiff, an African-American female, alleged, inter alia, that the HDFC discriminated against her based on her race and her son's disability. Doc. 1. The HDFC joined issue by its answer filed July 30, 2021. Doc. 21. In August 2021, plaintiff moved (mot. seq. 004) to amend the complaint to substitute Luis Cordero, a member of the board of the HDFC, as a defendant in place of John Doe #1, as well as to add a fifth cause of action sounding in discrimination against individual board members. Docs. 22, 35, 46. By order entered October 27, 2021, this Court granted plaintiff's motion solely to the extent of allowing her to amend the complaint to name Cordero as a defendant. Doc. 59.

By notice of motion filed November 24, 2021 (mot. seq. 006), the HDFC moved to dismiss the complaint and amended complaint. Docs. 84-94. By order dated April 1, 2022, this Court granted the HDFC's motion to the extent of dismissing the second cause of action sounding in tortious interference with contract and also dismissed the complaint as against Cordero and John Does 2-4 individually. Doc. 124. This Court further determined that plaintiff's "allegation that the HDFC engaged in a pattern or practice of discrimination is supported only by anecdotal evidence that she may have been denied an interview, or may have been prevented from inspecting the unit, since she was an African American female with an autistic son." Doc. 124 at 6. Despite finding that plaintiff failed to state a cause of action for housing discrimination due to a failure to plead that the denial of her application occurred under circumstances giving rise to an inference of discrimination, this Court granted plaintiff leave to replead this claim. Doc. 124 at 6-7.

On April 5, 2022 plaintiff filed a second amended complaint ("SAC") addressing the deficiencies noted by this Court in its April 1, 2022 order. Doc. 127. Specifically, plaintiff alleged that: the HDFC had a pattern and practice of housing discrimination based on race and disability

insofar as it commenced holdover proceedings against an individual named Beatrice Bush on the ground that she was elderly, disabled, and African-American; the HDFC had a pattern and practice of discriminating against disabled individuals because it had harassed the son of defendants Jose and Maria Castillo, who suffered from clinical depression; the HDFC discriminated against her because she was African-American and had an autistic son; the HDFC has never approved an African-American's application to purchase a unit in the building; and, finally, during the past 7 years, the HDFC had only approved purchasers of Latin/Hispanic descent. Doc. 127.

The HDFC's Motion to Dismiss The SAC (Mot. Seq. 010)

The HDFC now moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the SAC with prejudice on the ground that plaintiff failed to rectify the deficiencies cited by this Court. Doc. 128. In support of the motion, the HDFC primarily argues that plaintiff's discrimination claim must be dismissed because her allegations are made "upon information and belief." Doc. 137. The HDFC further argues, inter alia, that the complaint must be dismissed because plaintiff failed to plead the elements of a housing discrimination claim; because the business judgment rule protects boards of cooperatives in their management decisions; and because she made misrepresentations on her purchase application in order to avoid telling the HDFC that, in March and April 2021, she was in forbearance on one mortgage and in default on another. Docs. 129, 137.

In opposition to the motion, plaintiff argues, inter alia, that: she has adequately pleaded a prima facie case of housing discrimination; the single motion rule bars the HDFC's second motion to dismiss; the business judgment rule does not protect boards which discriminate; and that she was neither delinquent nor in default on any mortgage since her lender stopped collecting mortgage payments from her during the Covid-19 pandemic. Doc. 138.

In reply, the HDFC argues that the single motion rule does not apply herein since plaintiff set forth additional claims in the SAC, plaintiff fails to adequately plead a claim of housing discrimination, and the HDFC was justified in rejecting her application since there was a foreclosure on one of her properties. Doc. 143.

Plaintiff's Motion For Discovery To Proceed (Mot. Seq. 011)

Plaintiff moves, pursuant to CPLR 3215, "for discovery to proceed." Docs. 140-141. In support of the motion, plaintiff argues that the stay of discovery set forth in this Court's order entered December 7, 2021 must be vacated. Doc. 141.

In opposition, the HDFC argues that discovery must remain stayed until this Court decides the HDFC's motion to dismiss the SAC. Doc. 142.

LEGAL CONCLUSIONS

The HDFC's Motion to Dismiss The SAC (Mot. Seq. 010)

Failure To State A Cause Of Action

On a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Additionally, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (*see Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 621-622 [1st Dept 2018] citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

To state a prima facie case of housing discrimination, a plaintiff must demonstrate that (1) she is a member of the protected class by the statute; (2) she sought services in connection therewith that she was entitled to; (3) such services were denied; (4) the denial of such services

occurred under circumstances giving rise to the inference of discrimination (*See Sayeh v 66 Madison Avenue Apt. Corp.*, 73 AD3d 459 [1st Dept 2010]). "If plaintiff can show that she was adversely affected by reason of discrimination perpetrated against [her as] the prospective purchaser, she has a cognizable claim for discrimination." (*Axelrod v. 400 Owners Corp.*, 189 Misc.2d 461, 733 NYS2d 587 [Sup Ct New York County 2001] [Cahn, J.]).

In her SAC, plaintiff alleges that she was subjected to housing discrimination because: (1) she is a member of a protected class as an African-American female with a disabled son; (2) she was qualified to purchase the apartment; (3) the HDFC denied her application to purchase the unit; and (4) the circumstances of the denial of the purchase application give rise to an inference of discrimination because the HDFC commenced holdover proceedings against an individual named Beatrice Bush, an elderly, disabled, and African-American woman; the HDFC discriminated against the Castillos' son, who suffered from clinical depression; the HDFC discriminated against her because she was African-American and had an autistic son; the HDFC never approved an African-American's application to purchase a unit in the building; and, during the past 7 years, the HDFC only approved purchasers of Latin/Hispanic descent. Doc. 127. Viewing these allegations liberally and in a light most favorable to plaintiff, this Court finds that she has adequately pleaded a claim of housing discrimination.

Contrary to the HDFC's contention, plaintiff's allegations do not fail to state a claim merely because they were made "upon information and belief" (*See Harris v Structuretech NY, Inc.*, 191 AD3d 470, 470-471 [1st Dept 2021] [racial discrimination claim not insufficient solely because plaintiff's allegations made upon information and belief]). In asserting that plaintiff's claims in the SAC are deficient because they are for the most part asserted "upon information and belief", the HDFC relies, inter alia, on *Elmrock Opportunity Master Fund I, L.P. v Citicorp N. Am., Inc.*,

155 AD3d 411 (1st Dept 2017). However, the HDFC's reliance on *Elmrock* is misplaced since the Appellate Division held in that decision that a claim of fraudulent inducement, which is subject to a heightened pleading standard (*see* CPLR 3016[b]) requiring the plaintiff therein to establish the defendant's state of mind, could not be asserted upon information and belief (*see Cicchetti v TRNC Assoc., Ltd.*, 2020 NY Slip Op 33227[U], *4-5 [Sup Ct, NY County 2020] [collecting cases]). Here, however, where the allegations of discrimination made upon information and belief may be "established or disproven with minimal discovery, dismissal at the pleading stage is not required." (*id.*).

Documentary Evidence

A motion to dismiss may be granted if the defendant asserts "a defense . . . founded upon documentary evidence" (CPLR 3211 [a] [1]). A paper will qualify as "documentary evidence" only if it is: (1) "unambiguous"; (2) of "undisputed authenticity"; and (3) its contents are "essentially undeniable" (*Fontanetta v John Doe I*, 73 AD3d 78, 86-87 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-22 [2005 ed]). A court may not dismiss a complaint based on documentary evidence unless such evidence "utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 175 [2021] quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Despite the fact that the purchase application appears to be signed by plaintiff, there is no proof of its "undisputed authenticity." Nor is the credit check, which, the HDFC claims, contradicts the purchase application, of undisputed authenticity. Additionally, the contents of the purchase application and/or the credit check do not by themselves utterly refute plaintiff's claims;

rather, the HDFC's attorney seeks to refute the claims based on his interpretation of the documents. In other words, even assuming, arguendo, that the purchase application was denied because plaintiff made a misrepresentation in the same, there is no documentary evidence definitively establishing that the misrepresentation was the reason for the denial. Thus, plaintiff's claim is not subject to dismissal pursuant to CPLR 3211(a)(1).

Plaintiff's Motion For Discovery To Proceed (Mot. Seq. 011)

Plaintiff moves, pursuant to CPLR 3215, for an order directing that discovery proceed in this matter. Initially, this Court notes that CPLR 3215 pertains to default judgments and is thus inapplicable to the application. Next, this Court notes that, by order entered December 7, 2021, it directed that all discovery, with the exception of directing the HDFC to respond to plaintiff's interrogatories, was stayed "until further order of the court." Doc. 101. This was because defendant's motion to dismiss the complaint (mot. seq. 006) was pending at the time. Doc. 101. Since that date, no order was issued directing that discovery proceed. If anything, such discovery would have been stayed automatically when the HDFC filed its motion (mot. seq. 010) to dismiss the SAC (see CPLR 3214[b]). What plaintiff actually seeks in her motion is a lifting of the stay of discovery and, now that motion sequence 010 has been decided, a discovery conference will be scheduled.

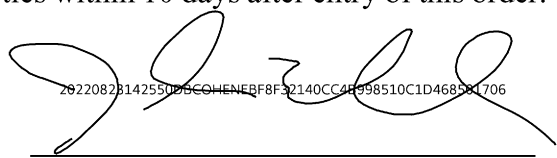
The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

ORDERED that the motion by defendant 526 West 158th Street Housing Development Fund Corp. seeking to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) (mot. seq. 010) is denied; and it is further

ORDERED that the motion by plaintiff Catherine Gibson seeking an order directing that discovery proceed in this matter (mot. seq. 011) is granted to the extent of directing that the parties are to appear for a preliminary conference via Microsoft Teams on September 20, 2022 at 3:30 p.m., unless the parties first complete a preliminary conference form (to be emailed to the parties by the Part 58 Clerk) and return it to the Part 58 Clerk at least two business days prior to the scheduled conference at sfc-Part58-Clerk@nycourts.gov; and it is further

ORDERED that counsel for defendant 526 West 158th Street Housing Development Fund Corp. serve this order, with notice of entry, upon all parties within 10 days after entry of this order.



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8/23/2022
DATE

HON. DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE