

Steele v 400 E. 77th St. Corp.

2002 NY Slip Op 30133(U)

January 7, 2002

Supreme Court, New York County

Docket Number: 121328/00

Judge: Diane A. Lebedeff

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

DIANE A. LEBEDEFF

PRESENT:

PART 8

Justice

<i>Stelle</i>	INDEX NO.	<u>12432500</u>
<i>M.H.</i>	MOTION DATE	<u>8/29/01</u>
- v -	MOTION SEQ. NO.	<u>02</u>
<i>Shirley 97A Stuy</i>	MOTION CAL. NO.	<u>132</u>

The following papers, numbered 1 to _____ were read on this motion to/for

ST

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2-3</u>
R _____	<u>4-5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion _____

SCANNED

JAN 16 2002

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Date:

JAN 07 2002

DA

J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY: I.A.S. PART 8

-----X

MONICA STEELE and SCOTT STEELE,

Plaintiffs,

-against-

Index No. 121328/00
 Mot. Seq. No. 002

400 EAST 77TH STREET CORPORATION, PAMI
 WEXELMAN, STEPHANIE FAILLA, WILLIAM SERPE,
 STANLEY HEISLER, DANIEL OSBORN, GELICIA
 GOLDRING and BURTON A. BRUCKNER,

Defendants.

-----X

DIANE A. LEBEDEFF, J.:

This action seeks to recover compensatory and punitive damages for alleged racial discrimination against the plaintiffs, Monica Steele, who is Hispanic, and Scott Steele, who is African American, by defendants who rejected plaintiffs' proposed purchase of a cooperative apartment in Manhattan. The named defendants are the cooperative corporation (i.e., 400 East 77th Street Corp.), and its board of directors (i.e., Pami Wexelman, Stephanie Failla, William Serpe, Stanley Heisler, Daniel Osborn, Felicia Goldring s/h/a Gelicia Goldring and Burton A. Buchner s/h/a Burton A. Bruckner).

Defendants now move for an order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the complaint.

BACKGROUND

In or about October, 1999, plaintiffs entered into a contract of sale to purchase 298

shares of the cooperative corporation allocated to Unit 4L (the “Unit”) at 400 East 77th Street, New York, New York. The contract indicated that the purchase price for the Unit was \$205,000. Plaintiffs paid ten percent as a contract deposit. Of the \$184,500 balance due at closing, plaintiffs planned to pay \$20,000 in cash, and obtain financing to pay the remaining \$164,000. After review of plaintiffs’ application, and an interview, defendants rejected plaintiffs’ application.

In the complaint, verified October 13, 2000, plaintiffs claim that their purchase application was rejected based on their race and national origin, in violation the following laws: Civil Rights Law, **42** U.S.C. § 1982; the Fair Housing Act, 42 USC § 3604; the New York State Executive Law, Article 15, § 295; and the New York City Administrative Code, § 8-107. The sixth affirmative defense in defendants’ answer, verified November 21, 2000, of relevance here, alleges that “defendants acted reasonably, properly, lawfully and without any discriminatory animus, motive, intent or effect” (Answer, para. 18).

As explained by defendants, pursuant to the cooperative corporation’s proprietary lease and the standard contract of sale for the transfer of a cooperative unit, all transfers of shares are subject to the approval of the cooperative corporation. The board of directors delegated the responsibility of reviewing applications and conducting interviews, if indicated, to an Admissions Committee, comprised of three members of the board of directors. At the time when plaintiffs’ application was submitted and reviewed, the Admissions Committee’s members were Heisler, Failla and Wexelman; Failla, however, did not take part in the review of plaintiffs’ application.

Prospective purchasers are required to submit to the cooperative corporation or its managing agent an application for approval of the sale together with such documents as the cooperative corporation reasonably requires, and to attend an interview if requested. The cooperative corporation requires a prospective purchaser to submit for review the contract of sale, purchase application, personal financial statement, federal and state tax returns, bank statements, landlord and personal references, and credit card statements, and to sign an authorization permitting the managing agent to obtain a credit report for the prospective purchaser.

Plaintiffs allege that, in accordance with defendants' requirements, plaintiffs submitted an application with three letters of reference, pay stubs, verification of employment, income tax returns and documentation of assets and liabilities. Plaintiffs maintain that the application documented that plaintiffs had a combined income of \$133,000, and more than \$85,000 in cash. Plaintiffs also gave defendants authorizations to obtain their credit reports. Information submitted indicated that Mrs. Steele is an attorney and Mr. Steele a graduate of Cornell University. Plaintiffs were subsequently interviewed by board members Heisler and Wexelman in the lobby of the building.

Defendants contend that the Admissions Committee determined that plaintiffs' income and net worth together were insufficient to meet the obligations of a shareholder, and, for that reason, rejected plaintiffs' application. They claim that they were not satisfied with plaintiffs' initial application, which was confusing, and presented a number of financial concerns.' Defendants allege that they instructed the managing agent to request revised

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Specifically, defendants allege that the Admissions Committee could not

financial statements from plaintiffs. Defendants further claim that they told the managing agent that an interview with plaintiffs should not be scheduled until after receipt of the revised statements. However, according to defendants, the managing agent mistakenly invited plaintiffs to attend an interview with the Admission Committee even though plaintiffs had not yet submitted new financial statements. However, as long as plaintiffs were already in the building, the Admissions Committee went ahead with the interview. Plaintiffs submitted their revised financial statements to the Admissions Committee at that time.

Defendants claim that, upon review of these new financial statements, the Admissions Committee was certain that plaintiffs were living beyond their means and not financially able to maintain and operate the Unit. In this regard, defendants claim that they determined that plaintiffs' income and net worth together with their outstanding liabilities were insufficient to meet the obligations of a shareholder. Defendants also felt that plaintiffs' monthly maintenance and mortgage charges would present financial difficulty for them, especially if the cooperative corporation imposed special assessments, as seemed likely.' According to defendants, some of the significant problems with the application,

accurately assess the true value of plaintiffs' assets and liabilities due to plaintiffs' submission of separate financial statements (as opposed to a joint statement). As such, it was not possible to ascertain whether some assets and liabilities were reported once or twice.

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For example, Frederick J. Rudd, the president of the managing agent, in his affidavit, sworn to August 27, 2001, attested to the need to increase maintenance by ten percent and impose a special assessment, of three dollars per share for the renovation of public areas of the building including new elevators, a boiler, and exterior work required by Local Law 10 and 11. In light of various renovations contemplated at the building, there would likely be special assessments imposed upon the shareholders, which are

which caused them to reject plaintiffs' application, include the following:

" if plaintiffs purchased the Unit, the monthly amount which they would be paying for maintenance for the Unit (\$83 1.90 per month) and mortgage (approximately \$1,150 per month), would be more than double the monthly rent that plaintiffs were then paying as rent.

"plaintiffs owed a \$17,500 credit card debt to American Express.

"Monica Steele owed \$23,000 for student loans.

"plaintiffs' credit report indicated that three of plaintiffs' credit accounts (i.e., two with Macy's and one with FDS National Bank) had been 'closed at the credit grantor's request.'"

Plaintiffs allege that the issues that defendants now raise to justify their rejection of plaintiffs' application -- i.e., the credit report, plaintiffs' credit card debt, and Monica Steele's student loan -- were never raised during the interview with plaintiffs, and are not genuine reasons for the rejection.

DISCUSSION

Defendants contend that summary judgment should be entered in their favor because they have adequately set forth: (a) the process for review of applications by the cooperative corporation; (b) the standards that are applied when considering applications; (c) details of the review and consideration given to plaintiffs' application; and (d) the legitimate non-discriminatory reason for rejecting plaintiffs' application. Defendants claim that the evidence shows that they acted without discriminatory intent and within the cooperative corporation's sound business judgment when plaintiffs' application was rejected. The rejection, defendants maintain, was based solely on their plaintiffs' financial

generally payable in lump sum or periodic installments over a brief period of time. Accordingly, defendants submit that it was important to the Admissions Committee that applicants demonstrate the ability to pay present maintenance as well as all future lump sum assessments.

condition and was unrelated to plaintiffs' race or national origin.

Plaintiffs submit that whether defendants' stated reasons for rejecting plaintiffs' application were valid, or merely a pretext for prohibited discriminatory conduct, is a question of fact that should be determined at trial. They maintain that defendants have not demonstrated their entitlement to summary judgment as a matter of law. Plaintiffs further argue that the motion is premature because depositions and other discovery have yet to be conducted.

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Upon review, the motion is denied because there exist material issues of fact with respect to the reasons for defendants' denial of plaintiffs' application to purchase the Unit (see, *Odell v. 704 Broadway Condominium*, 284 A.D.2d 52, 59 [1st Dept. 2001] [summary judgment motion must be denied where issue of threshold significance to the lawsuit cannot be resolved either way as a matter of law]; *Arnell Group Ltd. v. Danskin, Inc.*, -- A.D.2d --, 733 N.Y.S.2d 351 [1st Dept. 2001]; denial of motion for summary judgment was proper because "[i]ssues of fact exist as to whether plaintiff agreed to treat defendant's prepayment of one-half of the estimate for the fall 1999 photo shoot project as payment in full in light of defendant's dissatisfaction with plaintiffs work, and whether the parties agreed to a balance due after their relationship was terminated").

Plaintiffs also claim that the motion should be denied, as premature, because depositions have not yet been conducted. The court agrees (see, *First Bank of the*

Americas v. Motor Car Funding, Inc., 257 A.D.2d 287, 293 [1st Dept. 19991; see also, *Ross v. Jill Stuart Intl. Ltd*, 275 A.D.2d 650 [1st Dept. 20001; *Finnegan v. Ulrich*, -- A.D.2d --, 2001 WL 1504344 [2d Dept. 20011). Although defendants argue that they already responded to plaintiffs' combined demands and notice to produce (including production of its by-laws, rules, application, board minutes, 20 applications of prospective purchasers, and all correspondence concerning plaintiffs' application), plaintiffs' right to depose the individuals familiar with the board's application review process, and their review of the plaintiffs' application, is crucial to plaintiffs' ability to adequately prosecute this action.

CONCLUSION

It is ORDERED that defendants' motion for summary judgment is denied without prejudice to renewal upon completion of discovery herein.

Dated: January 7, 2002



J.S.C.