

**Buttitta v Greenwich House Cooperative
Apartments, Inc.**

2003 NY Slip Op 30202(U)

October 10, 2003

Supreme Court, New York County

Docket Number: 100715103

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER PART 36
Justice

MONICA HANNASCH BUTTITTA and ,
ANTHONY BUTTITTA,
Plaintiffs,
-against-

INDEX NO. 100715103
MOTION SEQ. NO. 001

GREENWICH HOUSE COOPERATIVE APARTMENTS, INC.,
Defendant.

SCANNED
JUL 17 2003

The following papers, numbered 1 to 7, were read on this motion for a preliminary injunction:

	<u>PAPERS NUMBERED</u>
Notice of Motion — Affidavits — Exhibits	1
Cross-Motion — Answering Affidavits — Exhibits	2,3,4
Replying Affidavits	5,6,7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion and cross-motion are decided as set forth below.

Background

Defendant Greenwich House Cooperative Apartments, Inc. ("Greenwich House") is a residential cooperative corporation that owns three landmarked four-story townhouses, located at 26-30 Jones Street in Greenwich Village, and a small garden house located inside the townhouses' shared rear-yard garden. Greenwich House was incorporated on December 3, 1920, pursuant to the provisions of Article 3 of the Business Corporation Law of the State of New York. Defendant explains that Greenwich House was formed to provide affordable low-cost

housing for its members and retain its without-profit character by recycling its housing stock from retiring or deceased members to new members for below market prices, with retiring members' stock being redeemed or transferred for the same price paid by the entering member. This objective is codified in the By-Laws' specifically in Article II, which states, in relevant part, "[t]he particular objects for which this corporation is to be formed are to house the members as economically as possible through the uniting of funds and efforts of these members by means of purchasing, leasing and selling in common ... This corporation is not a competitive business to make money by owning and selling for profit." To further this end of providing an affordable living space and prevent the shares from being sold at market rates, the By-Laws direct, in Article III, Section 4, that "any stock to be sold shall first be offered for sale to the Cooperative Corporation at \$10.00 per share. It shall be the policy of this association to redeem capital stock owned by its members, but a member wishing to withdraw shall be required to give six months' notice of such intention with a request for such redemption."

Plaintiff Anthony Buttitta became a shareholder of Greenwich House in December 1957. During the shareholders' meetings held on September 18, 1957 and December 15, 1957, it was approved that 50 shares of Greenwich House would be sold to Mr. Buttitta for \$500. Mr. Buttitta was assigned the garden house space. On April 23, 1959, the shareholders approved Mr. Buttitta's purchase of an additional 50 shares for \$1,500 and assigned the adjoining garden shed space to him, which Mr. Buttitta renovated. Plaintiff Monica Hannasch Buttitta married Mr. Buttitta in 1991, and on December 4, 1994, Mr. Buttitta's 100 shares were transferred to Mr.

¹ The By-Laws were revised in 1931, 1947, and recorded in 1963. The section stating the objectives (Article II) and setting forth the redemption provision (Article III, Section 4) have remained unchanged through these revisions.

Buttitta and Ms. Hannasch Buttitta as “joint tenants with right of survivorship and not tenants in common.” Ms. Hannasch was provided with a copy of the Greenwich House by-laws when she became a shareholder in 1994.

By letter dated May 23, 2002, the plaintiffs notified Greenwich House of their intent to retire from the Coop’s membership at the end of the year. On June 11, 2002, a joint meeting was held with the directors and shareholder, who unanimously voted to redeem plaintiffs’ 100 shares for \$16,000. Defendant notes that this was a \$2,000 increase from the last transfers that took place in 1996, where each involved the transfer of 100 shares for consideration of \$14,000. Ms. Hannasch was notified of the decision by letter dated June 20, 2002. On December 17, 2002, Ms. Hannasch sent a letter informing Greenwich House that she did not intend to sell her shares and remitted the January 2003 monthly maintenance charge, or “rent,” as previously requested by Greenwich House. During the annual shareholders’ and directors’ meeting held on January 29, 2003, all the members present, except for Ms. Hannasch, voted for a per share assessment to pay for roof replacement and legal costs. During the February 24, 2003 meeting, the per share assessment was revoked and it was decided, by unanimous resolution, that, effective March 1, 2003, the monthly rents would be calculated on a per share basis. Ms. Hannasch was not present at the February meeting.

Mr. Buttitta is now residing in Italy and Ms. Hannasch seeks to sell their shares at market value, which is estimated at \$500,000. Plaintiffs commenced this action for declaratory and injunctive relief, and brings the instant motion seeking a preliminary injunction: (1) enjoining Greenwich House from enforcing any by-laws that prevent plaintiffs from selling their shares on the open market or require plaintiffs to offer the stock first to Greenwich House at a below

market price; (2) enjoining Greenwich House from otherwise restricting plaintiffs' right to sell their shares; and (3) enjoining Greenwich House from imposing or assessing charges on the plaintiffs unless such charges are calculated on a per share or per space basis. Defendant cross-moves seeking to dismiss the complaint.

Defendant's Cross-Motion to Dismiss

Defendant seeks to dismiss the complaint pursuant to CPLR 3211(a)(1)(5) and (7), based upon documentary evidence, failure to state a cause of action, and the statute of limitations. Plaintiffs assert seven causes of action in their amended Complaint. The first three causes of action seek a declaration that Article III, Section 4 of Greenwich House's By-Laws ("redemption by-law") is illegal because it violates the Business Corporation Law and constitutes an improper restraint on alienation. The fourth and fifth causes of action allege that Greenwich House's failure to adopt a proprietary lease interferes with plaintiffs right of possession and quiet enjoyment. Based on these claims plaintiffs seek an injunction compelling Greenwich House to issue proprietary leases or assign occupancy of units on a revolving basis. The sixth cause of action alleges that the increase in monthly maintenance decided during the December 2002 meeting was unfairly apportioned, and plaintiffs seek an injunction enjoining the imposition of the new maintenance charges. The seventh cause of action seeks a declaration that financial assessments imposed by Greenwich House are unlawful, and plaintiffs seek an injunction enjoining the imposition of such assessments.

First, Second and Third Causes of Action

Defendant claims that the first three causes of action challenging Greenwich House's

redemption by-law is barred under the six year statute of limitations applicable to contract claims and other claims for which the CPLR does not specify a particular limitation (CPLR 213(1) and (2)). Defendant argues that the statute on a shareholder's action to declare a corporate by-law illegal begins to run when s/he becomes a shareholder and is bound by the by-laws. In support, defendant cites *35 Park Ave v Campagna*, 48 NY2d 813 (1979), and *McCarthy v Zoning Bd. of Appeals of the Town of Niskayuna*, 283 AD2d 857 [3rd Dept 2001]); however neither case involve shareholders' actions and do not stand for the proposition cited. Defendant's position, if adopted, would require shareholders "to bring declaratory judgment actions long before the shareholder had any present intention to sell, and thus long before a ripe case or controversy could be presented to a court" (*Lowy v Bay Terrace Cooperative*, 698 F Supp 1058, 1064 [EDNY 1988]). The statute cannot begin to run at the time when plaintiffs became shareholders since injury to the plaintiffs did not occur and thus their cause of action was not complete until they actually attempted to sell their shares (*Id.*). "To hold otherwise would subject shareholders to the risk of having their rights foreclosed long before they became aware of the concrete adverse impact of illegal resale policies" (*Id.*) This Court adopts this application of the statute of limitations and accordingly, the plaintiffs causes of action challenging the redemption policy of the by-laws are not untimely.

Alternatively, defendant contends that the first and third causes of action, alleging that the redemption by-law violates the Business Corporation Law, must be dismissed because they fail to state a claim. It is well-settled that in a CPLR § 3211(a)(7) motion to dismiss for failure to state a cause of action, the factual allegations of the complaint are deemed true and the affidavits submitted on the motion are considered only for the limited purpose of determining whether the

plaintiffs have stated a claim, not whether the plaintiffs have one (*Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept 1999]). Unlike a motion for summary judgment, the relevant inquiry here is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from the four corners of the complaint (*Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]).

Defendant argues that pursuant to Cooperative Corporations Law § 133, the right of a cooperative corporation formed under Article 3 to redeem its shares is not governed by the current Business Corporation Law, and therefore any alleged violation of the Business Corporation Law is inapplicable. However, contrary to defendant's blanket contention that the Business Corporation Law does not apply to Greenwich House because it governed by the provisions of the Cooperative Corporations Law, Article I § 5 of the Cooperative Corporations Law specifically contemplates the applicability of the Business Corporation Law to cooperative corporations, providing that "[i]f any provision of this chapter relates to a matter embraced in the [B]usiness [C]orporation [L]aw but is not in conflict therewith, both provisions shall apply" (New York Cooperative Corporation Law § 5(a)). The cited provisions of the Business Corporation Law are arguably not "in conflict" with the redemption provision of the Cooperative Corporations Law, but can be interpreted as supplementing the Cooperative Corporations Law with additional criteria. Accordingly, this Court finds that plaintiff has adequately plead its first and third causes of action.

Defendant contends that the second cause of action fails to state a claim because the disparity between market price and redemption price does not constitute an unreasonable restraint on alienation. The common-law rule evaluates the reasonableness of the restraint based on its

duration, purpose and designated method for fixing the purchase price (*see Wildenstein & Co. v Wallis*, 79 N.Y.2d 641[1992]). The plaintiff has sufficiently plead these elements and the application to dismiss the second cause of action is denied.

Fourth and Fifth Causes of Action

Defendant moves to dismiss the fourth and fifth causes of action which allege that the failure of the defendant to provide proprietary leases violate plaintiffs' "right of possession and quiet enjoyment" (Complaint ¶ 42). Since plaintiffs have failed to set forth any facts or any cognizable legal claim to support their contention that the lack of a proprietary lease violates the right to possession and quiet enjoyment, the fourth and fifth causes of action are inadequately plead and dismissed accordingly.

Sixth and Seventh Causes of Action

The sixth and seventh causes of action are rendered moot, as it is undisputed that the challenged assessment has been revoked and the method of calculating maintenance/"rent" increases has been changed to a per-share calculation.

Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs moves for a preliminary injunction on the grounds that the redemption by-law violates Business Corporation Law § 512 and constitutes an unreasonable restraint. To prevail upon a motion for a preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see Doe v Axelrod*, 73 NY2d 748 [1988]). "A mandatory injunction should not be granted,

absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, *pendent lite*" (*St. Paul Fire and Marine Ins. Co. v York Claims Service, Inc.*, 2003 WL 22100841(1st Dept 2003). The function of a preliminary injunction "is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Olympic Tower Condominium v Coccoziello*, 306 AD2d 159[1st Dept 2003]; see CPLR 6301). To grant the ultimate relief sought by plaintiff under the guise of a provisional remedy would be to treat the motion as one for accelerated judgment (*St. Paul Fire and Marine Ins. Co. v York Claims Service, Inc.*, *supra*; CPLR 3212), which this is not. Viewed within this framework, this Court must deny the motion for a preliminary injunction since plaintiffs has failed to establish by clear and convincing evidence that they will suffer irreparable harm in the absence of the preliminary injunction.

Conclusion

For all the foregoing reasons, it is

Ordered that plaintiffs' motion for a preliminary injunction is denied; and it is further

Ordered that defendant's cross-motion to dismiss the amended complaint is granted only to the extent of dismissing the fourth, fifth, sixth and seventh causes of action, and it is further

Ordered that the action will continue with respect to the first, second, and third causes of action.

This reflects the decision and order of this Court.

Dated: October 10, 2003

MARILYN SHAFER

 J.S.C.
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION