

Williams v 29-35 West 119th St. Housing Dev. Fund Corp.

2007 NY Slip Op 34416(U)

January 18, 2007

Supreme Court, New York County

Docket Number: 403196/05

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

KISHA WILLIAMS, LAUREL DAWSON, ROCHELLE DAWSON, ROBIN JUDD,
Plaintiffs,

Index No.: 403196/05

Motion Date: 10/10/06

Motion Seq. No.: 01

- v -

29-35 WEST 119TH STREET HOUSING DEVELOPMENT FUND CORPORATION, and LISA PORTER,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 4 were read on this motion for a preliminary injunction.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED
1
2
3, 4

Cross-Motion: Yes No

Upon the foregoing papers,

By Order dated July 11, 2006 (Stallman, J.), this action, motion and cross-motion were transferred by random reassignment from the City IAS Part to this Justice and Part. By separate So-Ordered Stipulation dated May 17, 2006, this action was discontinued against the "City defendants on consent and with prejudice" leaving 29-35 West 119th Street HDFC and Lisa Porter as the only remaining defendants (hereinafter the "defendants"). By further So-Ordered Stipulation dated July 11, 2006, the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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caption of the action was amended as reflected in this Order.

Plaintiffs are tenants at 29-35 West 199th Street. The complaint alleges that the building was transferred to the HDFC in 2001. The tenants assert that the HDFC and Lisa Porter purchased the building with money deposited by the tenants and failed to tender shares in the corporation to the plaintiffs. Plaintiffs therefore seek a declaration that they are shareholders in the HDFC and that as shareholders they have standing to challenge the acts of the HDFC that plaintiffs claim are in violation of the HDFC charter and by-laws.

By the Order to Show Cause which was signed on September 15, 2005, the plaintiffs sought to enjoin the defendants from continuing non-payment proceedings brought against the plaintiff's in Housing Court. The court granted the plaintiff's a temporary restraining order (TRO) for such relief. The TRO was continued pursuant to stipulated orders dated September 23, 2005, January 20, 2006, February 8, 2006, March 28, 2006, May 2, 2006, and May 17, 2006. The continuation of the TRO was conditioned upon the plaintiffs payment of use and occupancy. By an Interim Order dated July 11, 2006 (Stallman, J.), this court set forth a briefing schedule to allow the defendants to interpose a cross-motion and reply papers and to allow the plaintiffs to submit opposition to the cross-motion and the action was then transferred to this Part for determination of the parties'

respective applications. The Interim Order also stated that "[t]he existing stay as to those plaintiffs currently protected by a stay (K. Williams, L. Dawson, R. Dawson and R. Judd) is hereby modified to permit non-payment proceedings to proceed; however, execution of judgment, and service of a Marshall's notice and execution of a warrant is stayed pending final determination of the motion and cross-motion. Timely payment of U & O as previously ordered is a condition of the continued stay."

Defendants have cross-moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (2), (3), (5), (8), and to vacate the TRO.

Defendants argue that this court lacks jurisdiction over them because the plaintiffs failed to serve the summons and complaint upon them and because proof of service was never filed with the court. Plaintiffs admit that proof of service of the Order to Show Cause and the summons and complaint was not filed with the court.

The court finds that it has personal jurisdiction over the defendants. The September 15, 2005, Order to Show Cause directed that the plaintiffs were to serve the defendants with the "order, together with a copy of the papers in support thereof, along with service of the summons and complaint by personal service." Although CPLR 3211 (e) requires that "papers in opposition to a

motion based upon improper service shall contain a copy of the proof of service, whether or not previously filed," defense counsel admitted at oral argument on this motion on October 10, 2006, that the plaintiffs "served the order to show cause" upon the defendants and that the summons and complaint were attached to the order to show cause. Defendants however contend that the plaintiffs were required to serve the summons and complaint separately from the Order to Show Cause and that the failure to do so requires dismissal of the action.

Defendants are incorrect. The Fourth Department has held that service of a summons confers jurisdiction even where the summons is merely an exhibit to motion papers stating "[t]here is no statutory requirement that the summons must be served alone (Matsuo v Matsuo, 92 AD2d 710, 710 [3d Dept 1983]; see CPLR 308; but see Iglesias v Rodriguez, 143 Misc 2d 498 [Sup Ct, Kings County 1989]). Personal service of the summons is complete when the summons is 'deliver[ed]' (CPLR 308 [1]), and '[a]ll the process server has to do is tender the summons to the defendant' (Siegel, NY Prac § 66, at 93 [3d ed])." Palladino v Sargent, 6 AD3d 1082, 1084 (4th Dept 2004). The court notes that although the affidavit of defendant Lisa Porter states that the defendants were not served with a copy of the complaint, the defendants do not deny that they were served with a copy of the Order to Show Cause containing the summons and complaint. By conceding that

they were properly served with the Order to Show Cause, the defendants also concede that they were served with the summons and complaint contained therein and therefore the defendants have waived any objection to this court's jurisdiction.

The court agrees with defendants that to the extent the complaint seeks relief from the now discontinued City defendants, those claims are not operative against the defendants. The plaintiffs concede this argument and the court shall therefore grant dismissal of the plaintiffs' first, third, fifth and sixth causes of action.

However, the court finds that the plaintiffs' second cause of action sufficiently pleads a cause of action for breach of contract insofar as it is asserted that defendants received money from the plaintiffs and failed to deliver shares in the HDFC. Based upon the resolution of the second cause of action the plaintiffs may have standing to raise the corporate governance claim in the fourth cause of action and therefore that claim is not subject to dismissal at this pre-answer stage of the litigation.

Defendants' statute of limitations and laches arguments lack merit. Plaintiffs' have discontinued their Article 78 claims against the City defendants and therefore the remaining claims against the defendant sound in contract are timely under the applicable limitations period. Furthermore, plaintiffs'

remaining claim seeks a declaration of their shareholder rights and is not equitable in nature. "While laches is a doctrine peculiarly applicable to suits in equity it does not operate to bar actions at law. And laches will be no defense to an equitable action where the Statutes of Limitation pertaining to actions at law are applicable, because the remedy is concurrent at law and in equity. Thus an action for an equitable remedy in aid of or to enforce a legal right is not barred by inaction until the legal remedy is barred by the Statute of Limitations." Bohemian Brethren Presbyterian Church v Greek Archdiocesan Cathedral of Holy Trinity, 94 Misc2d 841, 845 -846 (Sup Ct, NY County 1978).

The court shall grant plaintiffs' motion for a preliminary injunction staying the Housing Court proceedings on the same terms as the existing TRO. The plaintiffs have alleged that they have been deprived of their right to be shareholders in the HDFC. Tellingly, the defendants in opposition to the motion have not disputed any of the facts raised in the plaintiffs' motion with respect to their claim that the defendants' acts have deprived them of the opportunity to become owners in the premises. Based upon the facts before the court at this time including the affidavits of the respective parties, it appears that the tenants executed subscription agreements to purchase shares in the conversion. It further appears that the defendants utilized a

tenant's association bank account to purchase the premises from the City. The defendants present no documentation such as by-laws, minutes or rules relating to the operation of the HDFC nor is there any evidence that the defendants provided notices to the plaintiffs about their rights in the conversion.

On the facts before this court, the plaintiffs have established a likelihood of success on the merits of their claims that they were deprived of their conversion rights by the HDFC. Were the plaintiffs to be evicted prior to a determination of the rights as owners of the premises as opposed to mere lessees, the plaintiffs would suffer irreparable harm in losing not only the value of their homes, but their place of abode. As stated by the Court in a similar context "[a]lthough we have grave doubts regarding the likelihood of plaintiffs' success on the merits, they have demonstrated that if a preliminary injunction is not granted, any subsequent judgment might be rendered ineffectual. Many of the plaintiffs . . . cannot afford the scheduled rent increase and have no alternative residence to avail themselves of during the pendency of the action. The purpose of a preliminary injunction is to maintain the status quo." Schlosser v United Presbyterian Home at Syosset, Inc., 56 AD2d 615 (2d Dept 1977).

Finally, the equities balance in favor of the plaintiffs. Private Housing Finance Law 11 sets forth the strong legislative policy that HDFC conversions are intended to provide incentives

to create housing for low income tenants such as the plaintiffs and the allegations in the complaint that the statutory process and procedure has not been followed so as to effectuate the goals expressed in the statute raise a serious claim worthy of due consideration by this court.

The court shall in accordance with the foregoing deny the cross-motion to dismiss the complaint to the extent of the claims asserted against the HDFC and Lisa Porter. The court shall grant the plaintiffs' motion for a preliminary injunction upon the same terms as set forth in the court's July 11, 2006, Interim Order (Stallman, J.) conditioned upon the payment of use and occupancy which shall serve as the undertaking required by CPLR 6301. To the extent there are issues surrounding the payment of use and occupancy those shall be brought before the court at the preliminary conference scheduled herein.

Accordingly, it is

ORDERED that pursuant to this court's Order dated July 11, 2006, the caption of this action is amended as reflected by the caption of this ORDER and the Clerk is directed to amend the court records accordingly; and it is further

ORDERED that the defendants' cross-motion to dismiss the complaint is GRANTED as to plaintiffs' first, third, fifth and sixth causes of action; and it is further

ORDERED that defendants' cross-motion to dismiss is otherwise DENIED; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED upon the terms set forth in this court's July 11, 2006 Interim Order, to wit "[t]he existing stay as to those plaintiffs currently protected by a stay (K. Williams, L. Dawson, R. Dawson and R. Judd) is hereby modified to permit non-payment proceedings to proceed; however, execution of judgment, and service of a Marshall's notice and execution of a warrant is stayed pending final determination of the motion and cross-motion. Timely payment of [use and occupancy] as previously ordered is a condition of the continued stay"; and it is further

ORDERED that the parties are directed to attend a preliminary conference on February 13, 2007, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: January 18, 2007

ENTER:

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DEBRA A. JAMES J.S.C.
J.S.C.

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