

De Leon v 70 W. 108 St. Hous. Dev. Fund Corp.
2008 NY Slip Op 31424(U)
May 20, 2008
Supreme Court, New York County
Docket Number: 0600069/2006
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
J.S.C. Justice

PART 55

Index Number : 600069/2006
DELEON, MAXIMO R. VEGA
vs
70 WEST 108 STREET
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 12/11/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

s motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-4
5-6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the amended memorandum decision, order and declaratory judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/20/08

JANE S. SOLOMON J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST DEFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

MAXIMO R. VEGA DE LEON, Individually and
as the Administrator of the Estate of
Maximino De Jesus De Leon,

DECISION, ORDER and
DECLARATORY JUDGMENT

Plaintiff,

INDEX NO. 600069/06

-against-

70 WEST 108 STREET HOUSING DEVELOPMENT
FUND CORPORATION, JOSE D. MEDINA,
CARMEN GELABERT, LICELLY GELABERT

Defendants.

UNFILED JUDGMENT
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and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1419).

-----X

JANE S. SOLOMON, J.:

Defendants move pursuant to CPLR 3211 and 3212 for
summary judgment dismissing the eight-count complaint. Plaintiff
opposes the motion, but does not oppose dismissal of the fourth,
fifth, sixth and eighth causes of action in the complaint.

Defendant 70 West 108 Street Housing Development Fund
Corporation (the "corporation") is a low-income cooperative
housing project on Manhattan's Upper West Side created pursuant
to Business Corporation Law ("BCL") § 402 and Private Housing
Finance Law ("PHFL") Article XI. The individual defendants are
officers and directors of the corporation. Because of its
mission to provide affordable housing for low-income individuals,
the corporation operates under various legal restrictions,
including having no part of its net income or earning inure to
the benefit of any private individual or entity, and having no

tenant-shareholders other than those defined as low-income by PHFL § 576.

Plaintiff's father, Maximino De Leon ("De Leon"), bought 250 shares (the "shares") in the corporation in 1991, and used and/or occupied his appurtenant apartment until his death in June 2004.¹ After his father died intestate, plaintiff successfully sought to be appointed voluntary administrator of the estate by the Surrogate's Court, and then tried to get the corporation to transfer his father's shares to his own name or that of the estate. This proved to be a lengthy process, which despite persistent efforts by plaintiff's counsel (see exhibits D-I to the complaint) proved unavailing and culminated with plaintiff accusing the corporation and its officers (the individual defendants) of fraud and conversion, and filing the instant lawsuit in January 2006. Plaintiff also sought to evict from the apartment Juan Estevez ("Estevez"), a person who had lived in the apartment for about ten years, either as De Leon's tenant or roommate prior to the latter's death and who remained in the apartment thereafter, apparently paying the maintenance due on the apartment directly to the corporation.

At this court's direction, defendants reissued De

¹ The complaint throughout cites the date of death as June 2005, but the holdover petition (exhibit D to opposing papers), the January 3, 2005 Surrogate Court certificates (at exhibit C to complaint), and all the other documents before the court indicate that the correct date is 2004.

Leon's certificate for the shares to his estate, and plaintiff received the certificate, dated January 30, 2007, in early February. Having transferred ownership of the shares, defendants began billing De Leon's estate instead of Estevez, commencing with the March 2007 maintenance. In July 2007, plaintiff brought a holdover proceeding against Estevez which resulted in Estevez's agreement to vacate the apartment at the end of January 2008 (exhibit D to opposing papers). No maintenance has been paid by either plaintiff or the estate.

Plaintiff filed a note of issue on September 28, 2007. Defendants now move for summary judgment dismissing the action. Plaintiff opposes dismissal of the first, second, third and seventh causes of action in the complaint.

The first cause of action seeks to enjoin defendants from "selling, transferring, or in any way divesting" the shares until this matter is resolved (§ 32). Since those shares, in accordance with plaintiff's wishes, have already been transferred to De Leon's estate, this cause of action is moot.

Plaintiff's second cause of action, which seeks to compel defendants to transfer the shares by issuing a stock certificate to either De Leon's estate or plaintiff in his own name (§ 41), is similarly moot since that certificate was issued more than a year ago.

The third cause of action seeks a declaratory judgment

stating that the shares "are the rightful and sole property of the estate of Plaintiff" (§ 49). To the extent plaintiff seeks to assert a right of possession to the shares superior to defendants', the claim is moot in view of the reissued certificate, and his opposition to the motion does not articulate a reason why declaratory judgment entitling him to any additional relief is appropriate.

The seventh cause of action, for conversion, seeks monetary damages based on defendants' failure to reissue a certificate for the shares. Since that has already been done, this claim too is moot.

Plaintiff's main opposition to dismissal of the complaint seems to be that he has prevailed in getting most of the relief sought in the complaint but has not been awarded any legal fees, which were substantial. Unable to rely on any contract or statute relevant to the controversy at hand which gives him the right to recover such fees (see Devlin v. 645 First Ave. Manhattan Co., 229 AD2d 343, 344 [1st Dept 1996]; Baker v. Health Management Systems, Inc., 98 NY2d 80, 88 [2002], rearg den 98 NY2d 728 [2002]), plaintiff's counsel has come up with the novel idea that plaintiff is entitled to legal fees under BCL § 626(a) because "while not specifically stated in the pleadings, the allegations in the complaint should be deemed to state a cause of action as a shareholder's derivative suit, given

the cardinal rule that pleadings are to be liberally construed" (Fletcher opposing affirmation, ¶ 16). In fact, the allegations in the complaint do not state a cause of action under BCL § 626. The complaint does not set forth with particularity what efforts the estate made to secure the defendant board of director's initiation of this action, or specify the reasons for not making such effort (BCL § 626[c]). Also, plaintiff brought this action individually and as the administrator of his father's estate, not on behalf of the corporation or even as a putative shareholder, and filed a note of issue and statement of readiness to proceed on the complaint that has been answered and litigated in which plaintiff is trying to establish a personal property right, not right a wrong committed against the corporation.

Plaintiff also opposes dismissal of the seventh cause of action on the ground that defendants' long delay in transferring the shares to De Leon's estate deprived plaintiff and the estate of the use of the apartment since it continued to be occupied by Estevez during that time because he could not evidence the ownership of the apartment necessary for him to bring an eviction proceeding against Estevez. This argument is unavailing. Defendants issued the new stock certificate to De Leon's estate on January 30, 2007, yet plaintiff did not commence the eviction proceeding against Estevez until July 2007. The damage plaintiff claims to have suffered is that defendants have been billing the estate for maintenance since March 2007 and

Estevez did not vacate the premises until January 2008. There is no evidence of such damage. According to the affidavit of the corporation's secretary, defendant Carmen Gelabert, neither plaintiff nor De Leon's estate has paid any maintenance (Gelabert affidavit, ¶¶ 14-16). Plaintiff, who did not submit an affidavit in opposition to defendants' motion, has not refuted this.

Furthermore, since defendants have not asserted a counterclaim for the maintenance arrears, dismissal of this cause of action will not expose plaintiff or the estate to any additional liability for such arrears. Furthermore, there is no evidence that defendants' delay was willful or malicious in any way.


According to Gelabert's unrefuted affidavit, the corporation faced a dilemma when plaintiff demanded that the shares be

transferred to him because, under the applicable law, only low-income individuals may be shareholders and plaintiff refused to give the corporation the financial information it needed to verify that his income made him a qualified shareholder under PHFL § 576. Accordingly, it hereby is

ORDERED, ADJUDGED and DECLARED, nunc pro tunc to the date of the directed turn over by the defendant corporation, that the Estate of Maximino De Jesus De Leon is the owner of the shares apurtenant to apartment 3W at 70 West 108th Street, New York, New York; and it further is

ORDERED that defendants' motion for summary judgment dismissing the complaint is otherwise granted, and the complaint hereby is dismissed, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements to defendants as taxed.

Dated: May 20, 2008



J.S.C.

JANE S. SOLOMON
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).