

**Cai-Lian Chen v 342 W. 48 St. Hous.
Dev. Fund Corp.**

2008 NY Slip Op 32126(U)

July 23, 2008

Supreme Court, New York County

Docket Number: 0108529/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Chen

INDEX NO.

108529/04

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

- v -

342 West 48 Street

The following papers, numbered 1 to _____ were read on this motion to/for CRP 33217.

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

HON. JUDITH J. GISCHE
J.S.C.

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

JUL 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/23/08

JUDITH J. GISCHE, J.S.C.

J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
CAI-LIAN CHEN and CHUNG CHEN YANG,

Plaintiffs,

-against-

342 WEST 48 STREET HOUSING
DEVELOPMENT FUND CORP.,

Defendant.
-----X

Decision/Order

Index No.: 108529/06

Seq. No. : 003

Present:

Hon. Judith J. Gische

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's n/motion [s] w/CCY affid exhs	1
JK affid in opp w/exhs	2
KL affid in opp w/exhs	3
JSD reply affirm w/exh	4

FILED
 JUL 30 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment. By order dated January 4, 2007, the court granted plaintiff's motion for injunctive relief and preliminarily enjoined defendant from either instituting and/or prosecuting any eviction proceedings in Civil Court against plaintiffs. Plaintiffs now move: [1] for summary judgment on the first cause of action for a declaration that plaintiff Cai-Lian Chen ("Chen") and Chung Chen Yang ("Yang") have validly assigned the shares and lease appurtenant to apartment 3FW ("apartment") at 342 West 48th Street, New York, New York (the "building") from Yang to his wife, Chen; and directing that the related shares and proprietary lease for the apartment be issued to Chen [2] for partial summary judgment in their favor on the

second cause of action seeking compensatory damages, punitive damages and sanctions based upon the service of a "fraudulent" 30 day notice of termination. CPLR § 3212.

Defendant 342 West 48 Street Housing Development Fund Corporation is the cooperative corporation which is the owner of the building in which the apartment is located. It opposes the motion because material issues of fact preclude summary judgment and also on the basis that it is premature because discovery is not complete. CPLR § 3212 (f).

Issue has been joined. The Note of Issue was withdrawn (Order Gische, J. 5/22/08). The motion is therefore properly before the court and will be considered on its merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Undisputed Facts

Certain facts are not in dispute.

In 1995 Yang was the tenant of the apartment. The building was being operated at that time by the Clinton Housing Development Company ("CHDC") and a plan was underway to convert it to cooperative ownership. Yang signed a subscription agreement and tendered a check for \$250 representing the full amount of the purchase price. The check clearly represented on its face that it was "to purchase apartment 3FW" and it was cashed by the CHDC. The endorsement indicates that the monies were deposited into a trust account for "342 W. 48th St. Tenant Assn." CHDC's business records reflect credit given for this payment and its purpose.

The closing on the sale of the building to defendant took place on June 28, 1995. There is no record of Yang physically attending the actual closing and Yang does not

assert anything to the contrary. Defendant never issued the stock certificate and the proprietary lease appurtenant to the apartment to Yang.

On March 16, 1996 defendant wrote to Mr. Yang in his capacity as purchaser, indicating that Yang needed to make an additional payment of \$159.10 toward the purchase of shares that were not otherwise sold to the tenants. Yang immediately tendered that amount on March 18, 1996 with a check that was made payable to the "342 W 48th T.A." and which clearly denoted "toward purchase shareholders apartment 3FW." The check was cashed on April 5, 1996. It was credited to Yang's account on the records of CHDC as "amount due for purchase of apts."

On May 7, 1998 Yang married Cai-lian Chen. The plaintiffs were married in the Republic of China and they have provided their Marriage Certificate along with an English translation of same. Defendant has not provided any evidence in opposition that contests the legitimacy of the document produced.¹

On September 15, 2003 Yang executed a written assignment of his shares and proprietary lease to his wife, Chen. On September 22, 2003, Attorney DeCastro wrote to defendant on plaintiffs' behalf asking for the lease and the shares to be issued in Chen's name. Attorney DeCastro disclosed in such letter that Yang was employed in Florida. He further stated that "Mr. Yang visits his family frequently, but does not know when he will be returning to New York to rejoin his family." Defendant sought and was given additional documentation at that time, including proof of the parties' marriage.

¹The Marriage Certificate was provided to defendant during document discovery. Although defendant at first contested the authenticity of the marriage, that issue appears largely abandoned based upon the opposition submitted to this motion.

Defendant also raised issues at that time about whether Yang was residing at the apartment as his primary residence and stopped taking rent for a period of time in 2003. After the documentation was sent sometime in October 2003, defendant began and continues to accept monthly payments for the apartment from Chen.² There is no dispute that shortly after the plaintiffs were married, and until this day, Chen has been continuously residing in the apartment as her primary residence.

Defendant has never sent share certificates or a proprietary lease in accordance with the plaintiffs' request. Instead, over two years later, on or about December 13, 2005, defendant sent a letter to the "current resident" of the apartment asserting that the original shareholder of record abandoned the unit and that the current occupant was considered a month to month tenant who would be evicted unless a new lease at market rent was signed. It, thereafter, attempted to commence a summary proceeding, which has been stayed by this court. (Order Gische, J. 8/17/06).

Arguments of the Parties

Plaintiffs claims that, as a matter of law, Yang is the owner of the apartment. They argue that he has fulfilled each and every requirement to be an owner and that the failure of defendant to fulfill its requirement to issue stock and provide a proprietary lease does not deprive him of that status. Once Yang is established as the true and rightful owner of the apartment, plaintiffs claim that he could assign his rights to his spouse. They claim that defendant has no right to attach any conditions to that

²Since August 17, 2006, however, the court directed that these monthly payments continue without prejudice to defendant's claims that plaintiff have no ownership or tenancy rights.

transfer, such as that Yang be a primary resident at the time of the assignment. They argue that, in any event, Yang was a primary resident at or about the time of the assignment and defendant has waived its right to claim otherwise. Plaintiffs further argue that once a valid assignment was made to Chen, and since no viable claim is made that she does not occupy the apartment as her primary residence, defendant has no right to evict her. Plaintiffs further claim that the defendant's affirmative defenses either are not applicable or not sustainable.

Defendant claims that because Yang did not attend the closing, and does not have a share certificate or proprietary lease evidencing ownership, he is not the owner of the apartment, or at least, there is an issue of fact about whether he is the owner. Even if he is the owner, defendant claims that because he did not occupy the apartment as his primary residence before the assignment to his wife took place, the assignment is not valid. It claims that there is at least a factual dispute about Yang's primary residence, which requires further discovery. Defendant further claims that it needs discovery before the issues raised in the affirmative defenses can be resolved as a matter of law.

Discussion

The moving party seeking summary judgment has the initial burden of proving its *prima facie* case. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment, as a matter of law, will the burden then shift to the opponent who must demonstrate, by admissible

evidence, the existence of a factual issue requiring a trial. Zuckerman v. City of New York, 49 NY2d 557 (1980). Granting a motion for summary judgment is the functional equivalent of a trial, therefore, it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

There are two central issues raised in this action, which are: [1] was Yang the owner of the apartment on September 15, 2003 and, if so, [2] was the assignment of his ownership interest made to Chen at that time valid.

Stock and a proprietary lease are the quintessential indicia of ownership of a cooperative apartment. At bar, however, plaintiffs have shown that Yang performed everything that he was required to do to purchase the apartment. He made all of the necessary payments and just as significant, defendant (and or its representative) accepted the payments. Yang did everything which would have, as a matter of law, required defendant to issue stock and a lease to him. See: Wylan v. Pandozy, 22 AD3d 385 (1st dept. 2005). Defendant's failure to fulfill its obligations cannot deprive Yang of his rightful ownership interest in the apartment. Indeed, up until at least the time that the parties' had a dispute about the assignment, Yang was treated as if he was the shareholder of record for the apartment.

Defendants fail to identify any provision under the subscription agreement that required Yang to physically attend the 1995 closing. After the closing defendant was still demanding that Yang tender additional monies for his ownership interest, a demand with which Yang complied. Defendant's argument that the check for payment of the shares was tendered before the plan to convert the building to cooperative ownership was

declared effective is a red herring. The endorsement on the check clearly indicates that the monies were put in a tenant association trust account that was, in due course and at the proper time, distributed to defendant. Defendant makes no claim that it did not actually receive the monies or that since the closing in 1995 it made any effort to return the monies to Yang. Defendant's argument about what occurred with other tenants is also unavailing because the facts of this particular case warrant that defendant should have given Yang stock and a proprietary lease.

The court holds that plaintiffs have *prima facie* established that on September 15, 2003, Yang was the owner of the apartment and that defendant has failed to come forward to show any legitimate issue of fact on such issue. Plaintiffs are, therefore, entitled to summary judgment establishing that on September 15, 2005 Yang was the owner of the apartment.

The issues relative to Yang's right to assign his ownership interest in the apartment to Chen involve several provisions of the offering plan.

Article 5.05 (A), (B) and (C) of the offering plan provide:

(A) The Directors or Shareholders, as the case may be, may grant or withhold consent to an assignment at their sole discretion except that such discretion shall comply with the nondiscrimination provisions of Paragraph 3.02(f) of this lease.

(B) The Directors or Shareholders, as the case may be, may not unreasonably withhold consent to assignment of this lease and a transfer of the Shares to a financially responsible member of the Shareholder's family (other than the Shareholder's spouse, as to whom no consent is required) who shall have accepted all the terms and conditions of this lease.

(C) If the lease is assigned in compliance herewith, Shareholder-assignor shall have no further liability on any of the covenants of this lease to be performed after the assignment.

Article 5.03 (b) (1) provides:

The Shareholder must use the Apartment as his or her primary residence, which is defined as follows: (A) Shareholder is domiciled at the Apartment or (B) if not domiciled at the Apartment, Shareholder spent more than 183 days in the preceding calendar year at the Apartment, unless such individual is in active service in the Armed Forces of the United States or began occupancy of the Apartment during the preceding calendar year. The Shareholder may create a rebuttable presumption of primary residence by providing satisfactory proof that he has filed a New York City Resident Income Tax Return at the apartment for the most recent preceding calendar year. If the apartment ceases to be the Shareholder's primary residence, then no occupancy or use of the Apartment, including any sublease or assignment, which otherwise complies with this lease will be permitted.

Domicile does not require a continuous physical presence. Rather it requires a physical presence with an intent to make a place a permanent home. Weslock v. Weslock, 280 AD2d 278 (1st dept. 2001).

Plaintiffs argue that under the offering plan, since no consent is needed for an assignment between spouses, the issue of Yang's primary residence is irrelevant. They further argue that even if the issue of primary residence is germane, they have *prima facie* established that Yang was in fact such a resident. In this regard, they offer redacted copies of Yang's tax returns, showing that in 2001 and forward, he filed New York State Income Tax Returns. Yang also claims that there was a four month period in 1997 and 1998 that he went to Florida for financial reasons and that for brief periods of time in the 2003 and 2005 he also worked in Florida. Despite going back and forth to Florida, Yang asserts that he always resided in New York in the apartment with his wife and step daughter. Plaintiffs further assert that all of these facts were known to defendant in 2003, yet it continued to accept monthly maintenance payments for the apartment for two years thereafter, without any reservation of rights. Plaintiffs' argue that this constitutes a waiver of their right to now disavow the assignment on the basis that Yang did not occupy the

apartment as a primary resident.

Defendant claims that even though its consent was not required for the assignment, it still had to be effectuated in accordance with the terms of the offering plan. Since the offering plan requires that no assignment be permitted unless the shareholder is a *primary resident*, and they believe Yang was not such a primary resident, they argue that the assignment is invalid. Defendant does not address the issue of waiver.

The court holds that under the terms of the offering plan, the issue of primary residence has no bearing on whether an intra spouse assignment is valid. The offering plan generally requires Director or Shareholder permission for assignments. This discretion to permit or not to permit an assignment is largely unfettered for non-family members. Where members of a shareholders's family are concerned (other than a spouse) the discretion to withhold permission to assignment is limited by reasonableness. Where a spouse is concerned, there is no discretion to withhold permission. The provision of the offering plan relied upon by defendant which requires Directors or Shareholders to deny their permission to an assignment when the shareholder is not a primary resident, necessarily only applies when such permission is necessary. Since no permission is necessary for an assignment to a spouse, the Directors or Shareholders cannot withhold permission for any reason, *primary residence notwithstanding*.

Even if the requirement of primary residence incident to assignment of an apartment to a spouse applies, defendant has waived its right to raise this issue. A waiver is a knowing and intelligent relinquishment of a known right. It may occur by conduct or a failure to act as to evince an intent not to claim the purported advantage. Golfo v. Kycia Associates, Inc. 45 AD3d 531 (2nd dept. 2007). It is well established that

when rent is accepted with knowledge of particular conduct which is claimed to be a default, the acceptance of rent is considered a waiver of such default, unless the landlord has promptly demanded correction of the disputed conduct. Madison Avenue Leasehold LLC v. Madison Bently Associates LLC, 30 AD3d 1 (1st dept. 2006). Even were the court to accept defendant's interpretation of the offering plan that primary residence is a condition to inter spousal assignment, the issue of whether Yang was a primary resident is still limited to the time in 2003 when the assignment to Chen was actually made. Thereafter, Chen would have had (and in this case did fulfill) the obligation to maintain the apartment as her primary residence. In 2003 Attorney DeCastro clearly informed defendant that Yang was, at that time, employed and living in Florida. Defendant made further inquiry at time on the issue of Yang's residency. Defendant did not at that time repudiate the claimed assignment. Instead, it accepted the monthly checks made by Chen for the apartment for approximately two years thereafter. Only in December 13, 2005 did it first challenge Chen's right to continue to reside in the apartment by writing a letter to the "current resident" (presumably Chen) that it considered her a month to month tenant because the "original shareholder of record (presumably Yang) abandoned the unit. Defendant's acceptance of rent for two years and failure to timely object to the assignment constitutes a waiver of its right to contest Yang's primary residence in 2003.

Defendant claims that the court should deny summary judgment because it has not been able to depose plaintiffs in this action. CPLR § 3212 (f) broadly provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure

to be had and may make such other order as may be just.” Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006).

At bar the only information that defendant claims it needs to pursue in discovery relates to Yang’s use of the apartment as his primary residence. Since the court finds that such information is irrelevant to the resolution of the controversy before the court, the court rejects defendant’s argument that summary judgment is premature on the first cause of action.

Plaintiffs also seek summary judgment on the issue of liability on their second cause of action. The gravamen of the second cause of action appears to be the service of a “fraudulent” Thirty (30) day Notice of Termination. Plaintiffs themselves refer to the pleading as “rather terse.” The court is unable to completely understand the nature of the cause of action asserted. If it is fraud, plaintiff has not *prima facie* established the elements of: a false material representation, intent, reasonable reliance by plaintiffs and damages. JAO Acquisition Corp. V. Stavitsky, 18 AD3d 389 (1st dept. 2005). If it is malicious prosecution, plaintiff has not *prima facie* established the elements of : (1) the initiation of a proceeding by defendant, (2) its termination favorably to the plaintiff, (3) a lack of probable cause, and (4) malice. Colon v. City of New York, 60 N.Y.2d 78, 82 (1983); Present v. Avon Products, Inc., 253 AD2d 183 (1st dept. 1999). If it is abuse of process, plaintiff has not *prima facie* established that regularly issued process was

issued with an intent to harm plaintiffs without excuse or justification and the use of process in a perverted manner to obtain a collateral objective. Curiano v. Suozzi, 63 NY2d 113 (1984); Panish v. Steinberg, 32 AD3d 383 (2nd dept, 2006). If it is simply for sanctions under 22 NYCRR 130-1.1, notwithstanding that plaintiff has prevailed on its first cause of action, it has not established that defendant's position is frivolous within the meaning of the court rule. Accordingly, the court denies plaintiffs' motion for summary judgment on the second cause of action.

Plaintiffs' also seek summary judgment dismissing the affirmative defenses. The answer asserts the following affirmative defenses: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, unjust enrichment, waiver and "any other matter constituting an avoidance or affirmative defense which the further investigation of this matter may prove applicable herein (first affirmative defense); failure to state a cause of action (second affirmative defense); defendant is an improper (third affirmative defense); plaintiff is an improper party (fourth affirmative defense); plaintiff lacks standing (fifth affirmative defense); "INTENTIONALLY OMITTED" (sixth affirmative defense); plaintiffs claim should be adjudicated in Landlord Tenant court (seventh affirmative defense).

The affirmative defenses are both blunderbuss and boilerplate. They have no specific application to the issues raised in this action and some of them are patently irrelevant and internally inconsistent. For example, some of them relate to a negligence action, which this is not, and others relate to claims based on contract. Some relate to

a bankruptcy, which has no application in this action and others make no sense, like "intentionally omitted." Plaintiffs have addressed each of these asserted affirmative defenses in their moving papers and revealed their deficiencies. In opposition, defendant simply contends that it is premature to address them because discovery is not complete. Since defendant has not in any way indicated in what fashion the known facts of this case relate to the asserted affirmative defenses and/or what discovery is needed to further develop such affirmative defenses and why such information is within plaintiffs' purview, the argument that further discovery is needed is rejected. Plaintiffs are entitled to summary judgment dismissing defendant's affirmative defenses.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion for summary judgment on the first cause of action is granted and the court hereby declares that the proprietary lease for Apartment 3FW and related shares of the 342 West 48 Street Housing Development Fund Corporation were owned by plaintiff husband Chung Chen Yang on September 13, 2003 and were properly assigned by him to his wife, plaintiff Cai-Lian Chen; and it is further

ORDERED that the defendant is hereby directed to issue a proprietary lease for Apartment 3FW to Chen and a stock certificate which reflects Chen's ownership of the shares appurtenant to Apartment 3FW; and it is further

ORDERED that plaintiffs' motion for partial summary judgment on the second cause of action on the issue of liability is denied; and it is further

ORDERED that plaintiffs' motion for summary judgment dismissing defendant's affirmative defenses is granted, and it is further

ORDERED that plaintiff's first cause of action and defendant's affirmative defenses are hereby severed from this action and the Clerk of the Court is directed to enter judgment in plaintiffs' favor on such severed claims in accordance with this decision and order, and it is further

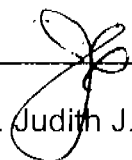
ORDERED that this matter is set down for a conference before this court on August 21, 2008 at 9:30 am to determine what, if any, discovery remains to be completed on the remaining second cause of action.

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 23, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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