

Arosemena v 8 Morningside Ave./352 W. 115th
2009 NY Slip Op 30903(U)
April 15, 2009
Supreme Court, New York County
Docket Number: 111143/08
Judge: Milton A. Tingling
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING
MILTON A. TINGLING J.S.C.
Justice

PART 44

CITE AROSEMONA
- v -
8 MORNINGSIDES AVE

INDEX NO. 11143/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with annexed decision and order.*
Parties are to appear for a conference on May 28, 2009 at 9:30 am.

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/15/09 mat
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: IAS PART 44

CHE AROSEMENA as Administer of the
Estate of ENRIQUE SILVESTER a/k/a
TONY SILVESTER, deceased, and
JACINTA SILVESTER,

Index No. 111143/08

Plaintiffs,

- against-

DECISION AND ORDER

8 MORNINGSIDE AVENUE/352 WEST 115th
Defendant.

FILED
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NEW YORK

MILTON TINGLING, J.S.C:

This action involves a dispute arising from the
failure of the defendant landlord to make repairs to the roof and
interior of apartment 5N (the apartment) at 8 Morningside
Avenue/352 West 115th St. (the building) in Manhattan. The
apartment is on the top floor of the building. The landlord has
admitted the existence of leaks from the roof and agreed to
repair them, as well as to repair resultant water damage to the
apartment, including mold. Plaintiffs allege that the
cooperative has breached the implied warranty of habitability.

The defendant landlord, 8 Morningside Avenue/352 West 115th
Street, HDFC (the landlord), a housing development fund company,
is a cooperative incorporated under Private Housing Finance Law
Article XI and Business Corporation Law § 402 (Private Housing
Finance Law § 573[1] [a]).

Until his death on November 26, 2006, Enrique Silvester (Enrique) and his mother, plaintiff Jacinta Silvester (Jacinta), owned the apartment as tenants in common. Enrique had lived there since 1949. Plaintiffs' counsel states that Jacinta no longer resides in the apartment, but does not state when she moved out. Jacinta has not asserted a claim for constructive eviction.

Plaintiff Che Arosemara (Che) appears as Enrique's administrator. Che is the son of Enrique and the grandson of Jacinta. Che is a Major in the United States Army, currently stationed at Fort Lewis, Washington. The Surrogate, New York County, issued letters of administration to Che on March 20, 2007.

Che's counsel states that Charmaine West, Enrique's long-time companion, resided with Enrique in the apartment at the time of his death, and continues to reside there. Ms. West is not a party to this action.

The building allegedly became a cooperative in the 1990's. Pursuant to court order, Edward J. Filemyr, Esq. (Filemyr), counsel for the landlord, has produced a proprietary lease for the apartment, dated August 1, 1991, which Jacinta has declined to admit is the applicable proprietary lease. The copy annexed to the notice to admit served by the landlord bears the

typewritten names of Enrique and Jacinta, preceded by the indication "/s/," but does not bear original signatures.

On October 2, 2007, Che and defendant entered into a court-ordered stipulation, settling a non-payment proceeding in the Civil Court of the City of New York, that had been commenced on October 26, 2006, a month before Enrique's death. Enrique appeared in that proceeding and asserted a claim for breach of the warranty of habitability. For many years, Enrique had withheld a portion of his rent because of the failure of the landlord to make repairs. Che asserts that the non-payment proceeding was retaliatory, in violation of Real Property Law § 223-B.

In that stipulation, Che and the landlord agreed that the amount due for unpaid rent for the period October 21, 2001, through October 2007 is \$29,501. Che consented to a money judgment in the amount of \$21,021, with \$8,580 to be paid to the petitioner by October 12, 2007. The \$8,580 represents the amount due for the period November 2005 through October 2007.

The stipulation provides that the petitioner may enter a judgment of possession in the event that the \$8,580 is not timely paid. It also provides that the petitioner may use any lawful means to collect the money judgment. Che paid the \$8,580.

The stipulation provided further that the petitioner would

commence repair of the roof within 60 days and "make diligent efforts to obtain funding to pay for such repairs," and that petitioner, after repair of the roof, will repair those areas of the apartment that were damaged by the leaks, and will repair the windows and apartment entrance door within 60 days. The stipulation does not expressly make the duty to repair the roof and apartment conditional upon the cooperative obtaining funding.

Che argues that the parties intended that defendant would only be allowed to enforce its \$21,021 money judgment if the rent were unpaid or the apartment were not placed for sale once the repairs were made, but there is no express language in the stipulation to that effect.

Che asserts that defendant repaired only one of three roof leaks, and that the New York City Fire Department created additional holes in the roof in order to vent fumes from a fire in an adjoining building.

On March 25, 2008, while Che was allegedly stationed in Korea, the landlord issued a "Notice of Sale to Owner of Personal Property to Satisfy Lien (ex. E to mov. aff. of Manuel Moses). On May 8, 2008, the landlord held an auction at the offices of Filemyr, and sold the shares allocated to the apartment that had been issued to Enrique and Jacinta. The identity of the purchaser of the shares is not set forth in the parties' submissions.

Che states that he asked Filemyr for the identity of the purchaser, and also for other documents relating to the condition and sale of the apartment. Che's counsel states that Filemyr refused to provide any of the requested documents, and would only provide information and documents that he is ordered to provide by a court. Filemyr does not dispute this.

The landlord argues that the purchaser of the shares at the auction is a necessary party to this action, yet Filemyr refuses to disclose the identity of the purchaser to plaintiffs.

The complaint, seeking declaratory relief and damages, contains seven causes of action.

The first cause of action seeks a declaration that plaintiffs retain full ownership of the shares of the apartment, and that the purported sale at auction on May 8, 2008, is void.

The second cause of action seeks a declaration that plaintiffs have no obligation to pay the rental charges for the apartment for the period commencing October 2, 2007, until the landlord completes all repairs agreed to in the stipulation, and makes the apartment habitable.

The third cause of action seeks a declaration that the \$21,021 money judgment is vacated because of the landlord's breach of the stipulation; or, alternatively, that the judgment is stayed until twelve months after completion of repairs or sale of the apartment by plaintiffs.

The fourth cause of action seeks restitution of the \$8,580 paid as past rent as well as all rent paid since October 2, 2007, on the ground that the landlord breached the stipulation.

The fifth cause of action seeks \$200,000 in compensatory damages for the landlord's breach of its obligations to repair.

The sixth cause of action seeks specific performance of the stipulation plus consequential damages for landlord's breach.

The seventh cause of action seeks punitive damages and attorneys' fees for the landlord's alleged "malicious wrongful misconduct ... in bad faith and in intentional derogation of plaintiffs' rights" (ex. A to mov. aff.).

Che, as administrator, and Jacinta move for an order seeking twelve categories of relief, including vacating the sale of the shares allocated to the apartment; directing defendant to supply plaintiff with numerous categories of documents; requiring defendant to complete all repairs required by the stipulation dated October 2, 2007; expunging any obligation for plaintiff to pay the \$429 monthly rent; refunding the \$8,580 paid to defendant by plaintiff pursuant to the stipulation; restraining defendant from enforcing its \$21,021 judgment until one year after defendant's satisfactory completion of repairs, or until plaintiff sells the apartment; vacating the judgment unless defendant completes the repairs by a date to be fixed by the

court; and granting costs and counsel fees to plaintiff.

Apparently Che has not attempted to obtain these items through use of the normal disclosure devices of Article 31 of the CPLR, but asks the court simply to order disclosure.

Defendant cross-moves to dismiss the complaint as untimely. The landlord argues that, pursuant to New York Lien Law § 201-a, Che had ten days from service of the Notice of Sale on April 2, 2008, to commence this action to determine the validity of the lien, but failed to do so.

Lien Law § 201-a., captioned, "[p]roceeding to determine validity of liens," provides, as pertinent:

[w]ithin ten days after service of the notice of sale, the owner or any person entitled to notice pursuant to section two hundred one of this article may commence a special proceeding to determine the validity of the lien. The special proceeding may be brought in any court which would have jurisdiction to render a judgment for a sum equal to the amount of the lien. If the owner or any such person shall show that the lienor is not entitled to claim a lien in the property, or that all or part of the amount claimed by the lienor has not been properly charged to the account of such owner or such person, or, as the case may be, that all or part of such amount exceeds the fair and reasonable value of the services performed by the lienor, the court shall direct the entry of judgment cancelling the lien or reducing the amount claimed thereunder accordingly. If the lienor shall establish the validity of the lien, in whole or in part, the judgment shall fix the amount thereof, and shall provide that the sale may proceed upon the expiration of five days after service of a copy of the judgment together with notice of entry thereof upon the owner or such person, unless the property is redeemed prior thereto pursuant to section two hundred three of

this article. If the lien is cancelled, the judgment shall provide that, upon service of a copy of the judgment together with notice of entry thereof upon the lienor, the owner or such person shall be entitled to possession of the property.

The fact that the personal property at issue, the shares in the cooperative corporation, have been sold is not a bar to a proceeding under Lien Law § 201-a. (see *Nachman v Crawford*, 114 AD2d 672, 673 [3d Dept 1985]).

Che argues that no perfected lien existed to foreclose upon, because Filemyr did not obtain an execution from the Surrogate. Che also argues that Enrique's 50% interest in the shares passed to Enrique's estate upon his death by operation of law, and that the cooperative could not sell them without first applying to the Surrogate. Filemyr argues that the unpaid rent constitutes a lien pursuant to the proprietary lease, but no agreed upon proprietary lease has been submitted.

Che also argues that, as an active duty servicemember, he is entitled to the protection of the federal Servicemembers Civil Relief Act (50 App USCA § 501 *et seq.*). Section 502 (2) states that one purpose of the Act is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service" (*id.*).

The New York State Soldiers' and Sailors' Civil Relief Act provides analogous relief (see New York Military Law § 300, *et*

seq.). Section 304, captioned, "[p]roceedings to be stayed unless interest unaffected by military service," provides, as pertinent:

At any stage thereof, any action or proceeding in any court ... in which a person in military service is involved as a party, during the period of such service or within sixty days thereafter may, in the discretion of the court or ... on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court ... the ability of plaintiff to prosecute the action, or the defendant to conduct his defense ... is not materially affected by reason of his military service.

Section 308, captioned, "[s]tatutes of limitations and statutes of a similar nature; time of military service not included," provides as pertinent:

[t]he period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation or order for the bringing of any action or proceeding in any court ... by or against any person in military service.

He is certainly entitled to relief under both the federal and State laws protecting servicemen. Pursuant to New York Military Law § 308, the ten day period of Lien Law § 201-a has not yet expired. Therefore, to the extent this action seeks relief pursuant to Lien Law § 201-a, this action is timely.

Both the federal and New York laws relating to protection of the rights of servicemen protect the interests of a bona fide purchaser for value. The § 521 of the federal law provides:

(h) Protection of bona fide purchaser

If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act [sections 501 to 596 of this Appendix], that action shall not impair a right or title acquired by a bona fide purchaser for value under the default judgment.

50 App USCA § 521; see New York Military Law § 303 (2).

There is no merit to defendants' argument that the Military Law does not apply because this is a private sale pursuant to the by-laws of the cooperative. Contrary to defendants' argument, an action pursuant to Lien Law 201-a does involve a court proceeding.

In addition to the turnover of numerous categories of documents, Che has requested various categories of relief including enforcement of the Civil Court stipulation and relief pursuant to the implied warranty of habitability.

The cross-motion is granted to the extent of dismissing the second, third, fourth, fifth, sixth and seventh causes of action. These causes of action, to the extent that some of them even state a cause of action, are all related to the stipulation in the Civil Court, and should be addressed to that court.

Although plaintiff has pleaded most of these causes of action as seeking a declaratory judgment, the causes of action clearly relate to the Civil Court proceeding and should be determined by that court. While the Civil Court lacks jurisdiction to render a declaratory judgment, it would be an

elevation of form over substance to give weight to plaintiffs' artifice in pleading the causes of action as seeking declaratory relief.

Civil Court has the same subject matter jurisdiction to compel compliance with this "so-ordered" settlement agreement (see CPLR 5221[a][3]; N.Y. City Civ. Ct. Act § 1508) as would the Supreme Court (see N.Y. City Civ. Ct. Act § 212). Once such jurisdiction is established, Civil Court is able to hear related matters

(*952 Associates, LLC v Palmer*, 52 AD3d 236, 236 [1st Dept 2008]).

The remaining cause of action, which seeks a declaration as to the rightful ownership of the shares allocated to the apartment, is properly before this court.

Plaintiffs' motion is granted to the extent of directing the parties to cooperate in disclosure pursuant to Article 31. The parties may bring any dispute over disclosure to my attention. In light of Filemyr's apparent admission that he refuses to disclose the name of the purchaser of the apartment, Filemyr is ordered to disclose the name and address of the purchaser to Che within two business days of receipt of a copy of this order with notice of entry.

Accordingly, it is

ORDERED that, plaintiffs' motion is granted to the extent of directing Filemyr to disclose to plaintiffs, within two business days of service of this motion upon defendant with notice of entry, the name and address of the purchaser of the apartment, and otherwise denied; and it is further

ORDERED that the cross-motion is granted to the extent of dismissing the second through seventh causes of action in the complaint, with leave to reassert those matters before the Civil Court of the City of New York.

Dated: April 15, 2009

E N T E R

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J. S. C.
HON. MILTON A. TINGLING
J.C.C.

FILED

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