Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA
Justice

IA PART 33

LILY HSU, et al.

x

Index Number 5619 2009

Motion Date July 9, 2009

-against-

Motion Cal. Number 10

CARLYLE TOWERS COOPERATIVE, "B", INC., et al.

Motion Seq. No. 1

The following papers numbered 1 to 28 read on this motion by plaintiffs Lily Hsu and Peter Hsu for an order granting (1) a preliminary injunction enjoining the defendants from maintaining or pursuing a summary eviction proceeding; from transferring the stock and proprietary lease of the subject apartment; from placing any liens against the subject apartment and stock as security; and from using, diverting, or paying any claims from the proceeds of the non-judicial sale of the subject premises; and (2) transferring the two pending holdover proceedings from the Civil Court, Queens County to this court, pursuant to CPLR 602(b).

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Upon the foregoing papers this motion is determined as follows:

In 1996, plaintiffs Lily Hsu and Peter Hsu purchased a cooperative apartment identified as 15E, located at 138-10 Franklin Avenue, Flushing, New York,, and were issued shares of stock and a proprietary lease. Plaintiffs were also assigned a parking space in a garage. Plaintiffs were charged a monthly maintenance fee for the subject apartment, and a monthly garage fee.

The subject cooperative apartment building is owned by defendant Carlyle Towers Cooperative, "B", Inc. (Carlyle), and plaintiffs allege that defendants All Area Realty Services, Inc., and All Area Property Management Co., act as a management or service company for the cooperative.

Mr. and Mrs. Hsu, pursuant to the terms of their proprietary lease, were assessed monthly charges for electricity usage in their apartment. The charges for electricity usage were inserted in the monthly bills which included the maintenance and the garage rent fee. The Hsus did not pay all or part of the electric charges between 2004 and 2007, as they claimed said charges were unusually high and requested that the cooperative or its managing agent investigate and resolve this dispute. The cooperative maintained that the electric charges were correct.

On December 19, 2007, counsel for the cooperative sent Mr. and Mrs. Hsu a 30-day notice to cure, dated December 13, 2007, by regular mail and by return receipt requested. Said notice stated that the Hsus had breached the proprietary lease in that they failed to pay maintenance, garage and electric arrears totaling $4,506.65, which included late and legal fees. The Hsus were directed to cure said breach on or before January 15, 2008. They were also directed to add the sum of $836.28 for maintenance, garage and electric charges for January 2008, in the event that payment was made after January 1, 2008. Said notice provided that if full payment was not made by said date, Mr. and Mrs. Hsu would receive another notice terminating their proprietary lease.

On January 25, 2008, counsel for the cooperative sent Mr. and Mrs. Hsu a letter dated January 23, 2008, by regular mail and by return receipt requested, stating that they had failed to cure their default pursuant to the previously sent 30-day notice in that they failed to pay their maintenance within 30 days of the due date, and, therefore, their proprietary lease would expire on February 5, 2008, pursuant to paragraphs 27 and 27(d), and that "legal proceedings will be commenced against you."

A notice of lien of foreclosure sale, dated June 12, 2008 was served on Mr. and Mrs. Hsu on June 17, 2008, by affixing the notice to the Hsus' apartment door and by regular and certified mail. This notice states that Carlyle, the cooperative owner of the premises, has a lien against personal property consisting of 480 shares of stock in the subject apartment, and that said personal property would be sold unless the lien was satisfied on or before June 24, 2008. Said notice states, in pertinent part that:

> "1. Such lien is claimed for the amount of $12,058.42 representing the outstanding maintenance, assessments, electric payments and late charges due to the cooperative corporation, for which you are in default pursuant to the terms of your proprietary lease. An additional lien is claimed for reasonable attorney's fees and legal costs which have accrued in relation to the maintenance arrearage."
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> "5. The amount of the lien as of this date of this notice is $12,058.42 consisting of $7,785.12 in maintenance arrears due to date and $4,273.30 in attorneys' fees, disbursements and collection expenses incurred as of this date."

The notice stated that if the lien was not timely satisfied, the subject property would be sold at a public auction to be held on July 1, 2008 at the offices of the lienor's attorneys.

The cooperative advertised a notice of public auction of the sale of the personal property consisting of the shares of stock for said apartment in the New York Post on June 16, 2008, and June 23, 2008.

The cooperative's Board of Directors held an emergency meeting on June 30, 2008 which the Hsus attended, at which time they sought to convince the Hsus to pay the outstanding arrears and avert the need for the auction. The Hsus did not make such payments, and claim that they believed that the dispute over the electric charges would be resolved in court.

The 480 shares of stock to the subject apartment were sold at a non-judicial public auction by counsel for the cooperative on July 1, 2008 to defendants Bhanwaral Nawal and Kaushlaya Nawal for the sum of $120,000.00.

Mr. and Mrs. Nawal commenced a holdover proceeding to recover possession of the subject apartment in Civil Court entitled *Bhanwaral Nawal and Kaushlaya Nawal v Lily Hsu and Peter Hsu,* Index No. L & T 56600/09.

The cooperative has commenced a holdover proceeding to recover possession of the parking space in Civil Court entitled *Carlyle Towers Cooperative, "B", Inc. v Peter Hsu and Lily Hsu*, Index No. L & T 52832/09.

Plaintiffs Lily Hsu and Peter Hsu, in their amended verified complaint, seek in their first cause of action a declaration to the effect that the non-judicial foreclosure sale of the shares of stock was an ultra vires act, as the notice of sale was signed by an "assistant secretary," a title not provided for in the cooperative's bylaws, and that the dispute over the electrical charge was a legitimate dispute which could not form the basis of the non-judicial foreclosure sale.

The second cause of action seeks to set aside the non-judicial foreclosure sale and to have the proprietary lease returned to them on the grounds that the management companies and the cooperative did not have a security interest in the electrical charges allocated to the subject premises, as such charges are not part of the monthly maintenance fees; that these defendants exceeded the powers available to execute against personal property; and that the stock certificate and proprietary lease are hybrid personal and real property requiring judicial intervention.

The third cause of action alleges that the defendants were deprived of their rights to cure a condition or dispute after trial, pursuant to RPAPL 753(4).

The fourth cause of action alleges that plaintiffs have not received the surplus money from the non-judicial foreclosure sale and seeks an accounting as regards these funds.

The fifth cause of action alleges the Nawal defendants are real estate investors who own other real properties to select as their primary residence, and seeks a declaration to the effect that the Nawals cannot qualify as tenant shareholders in the subject cooperative and, therefore, said sale is void or voidable.

The sixth cause of action seeks a declaration to the effect that the Nawal defendants are not bona fide purchasers for value, and, therefore, the stock certificate and proprietary lease issued to the Nawal defendants should be canceled.

The seventh cause of action seeks to recover attorney's fees pursuant to Real Property Law § 234.

Plaintiffs, in their order to show cause dated March 18, 2009, seek a preliminary injunction, enjoining the defendants from proceeding with their respective holdover actions pending in the Civil Court, and seek to remove and consolidate said actions with the within action.

It is noted that counsel for Carlyle and the two management companies have submitted a "sur reply affirmation." Since counsel did not seek and obtain the court's permission for the submission of this affirmation and as the CPLR does not provide for such a submission, the court will not consider this affirmation.

The court may grant a preliminary injunction where plaintiff shows: (1) probability of success on the merits; (2) danger of irreparable injury in the absence of an injunction; and (3) balance of the equities in its favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

The peculiar status of cooperatives as hybrid interests partaking of both personalty and realty has long posed special problems, especially with regard to the perfection of security interests. However, in 1997, the state legislature made clear that an interest in a cooperative

is an Article 8 security subject to the Uniform Commercial Code (UCC 8-103[a], [Ch 566, Laws 1997]; *see also* 4-33 Warren's Weed, New York Real Property § 33.04).

It is noted that neither the Hsus nor the cooperative has submitted a copy of the Hsus' proprietary lease. The cooperative has submitted a copy of the proprietary lease it issued to the Nawals, and a blank lease, with accompanying forms that begin with the year "20__," but has not stated whether the identical lease form was issued to the Hsus in 1996.

However, assuming that the lease forms are identical, electric charges are not specifically included in the rent (maintenance) clause. Rather, paragraph 42 of lease entitled "Charges for Gas and Electricity" specifically sets forth how such charges are to be determined, with payments to be made by the lessee. Paragraph 9(b) of the lease creates a lessor's lien on the shares of stock owned by the lessee, "which shall be superior to all other liens, for all indebtedness and obligations owing and to be owing by the Lessee to the Lessor, arising under the provisions of this lease or otherwise arising."

Section 6 of the cooperative's bylaws, adopted on May 12, 1999 provides, in pertinent part, that "[t]he Corporation shall at all times have a first lien upon the shares owned by each shareholder for all indebtedness and obligations owing and to be owing by such shareholder to the Corporation, arising under the provisions of any proprietary lease issued by the Corporation and at any time such shareholder or otherwise arising including, but not limited to the obligations of a shareholder to Paragraph 9(b) of the Proprietary Lease...".

Therefore, the non-payment of electric charges by the Hsus could constitute a default under the terms of the proprietary lease and result in a first lien on the subject shares in favor of the cooperative. It is noted, however, as the parties have not submitted a copy of the shares of stock issued to the Hsus, the court cannot determine at this time whether the stock certificates contain any lien provisions.

The cooperative asserts that it served the Hsus a 30-day notice to cure their default, in compliance with terms of the proprietary lease. The court notes that the 30-day notice, dated December 13, 2007, requiring the Hsus to cure the non-payment of the electric charges by January 15, 2008 was not mailed to the Hsus until December 19, 2007. Thus, said notice actually provided less than 30 days in which the Hsus could cure their default, and did not comply with the terms of the lease.

The January 23, 2008 notice, mailed on January 15, 2008 which notified the Hsus that they were in default, and that their proprietary lease would terminate on February 5, 2008, while timely, cannot be viewed independently of the 30-day notice to cure.

The cooperative's counsel asserts in his opposing affirmation that the sale of the plaintiffs' shares was conducted in a commercially reasonable manner under Article 9 of the UCC. A non-judicial sale of collateral is regulated, in detail, by Article 9 of the UCC. Every

aspect of the sale, including the method, manner, time, place and terms, must be commercially reasonable (UCC 9-613). The secured party must, generally, send notice of the sale to the debtor and to any other secured party from whom the secured party has received written notice of a claim of an interest in the collateral (UCC 9-611). "These requirements of the Code generally may not, to the extent that they give rights to the debtor, or impose duties on the secured party, be waived or varied" (96 New York Jur 2d, Secured Transactions § 337).

The June 12, 2008 notice of non-judicial foreclosure sale failed to inform the debtors that they are entitled to an accounting of the unpaid indebtedness secured by the property, as required by UCC 9-613. Thus, the cooperative's claim that the sale of the collateral was commercially reasonable in all aspects cannot be established by the documentary evidence submitted herein.

The June 12, 2008 notice recited that the debtors "are entitled to bring a proceeding under Section 201-A of the Lien Law of New York State, within 10 days of the service of this notice if you dispute the validity of said lien or the amount claimed." Thus, it appears that the cooperative was proceeding under Article 9 of the Lien Law. Said notice was signed and verified by an assistant secretary. Although plaintiffs' claim that no such office of assistant secretary exists, Article IV, section 4 of the cooperative's bylaws provides that "[i]n the absence or unavailability of the secretary, the assistant secretary, if any, shall have all the powers and perform all the duties of the secretary."

The cooperative advertised the July 1, 2008 sale of the cooperative shares by placing an advertisement in the New York Post for the weeks of June 16, 2008 and June 23, 2008. However, as the June 12, 2008 notice of foreclosure sale provided that the debtors could satisfy the lien by payment on or before June 24, 2008, and as the newspaper advertisement ran for two consecutive weeks prior to the passing of the period of time for payment of the lien, said advertisement was premature and contrary to the provisions of Lien Law § 202.

The court, therefore, finds that the plaintiffs have established a probability of success on the merits on their action to set aside the foreclosure sale, as it does not appear that the cooperative complied with the provisions for a non-judicial foreclosure sale under Article 9 of the UCC or Article 9 of the Lien Law. In addition, plaintiffs have demonstrated irreparable injury and the balancing of the equities in their favor, and the need to preserve the status quo, as their interest in the subject apartment in which they reside has been adversely effected by the non-judicial foreclosure sale.

Defendants Carlyle and the two management companies' assertion that plaintiffs are estopped from seeking to set aside the non-judicial foreclosure sale, and a declaration regarding the correct amount of electric charges, is rejected. Estoppel requires (1) an act constituting a false misrepresentation or concealment of facts, (2) an intention or expectation that such facts will be relied upon, (3) knowledge of the true facts by the person making the

misrepresentation or concealment, and (4) reliance upon same by the innocent party to change its position to its substantial detriment (*Special Event Entertainment v Rockefeller Center Inc.*, 458 F Supp 72, 76 [1978]). Defendants are unable to establish the elements of the defense of estoppel. Even though plaintiffs have delayed in seeking to set aside the non-judicial foreclosure sale and judicial determination of the disputed electric charge, it is undisputed that plaintiffs continue to reside in the subject apartment and have sought to tender the monthly maintenance and garage fee. Delay alone, cannot, constitute an estoppel.

As regards the Nawals, their rights to the subject shares in the cooperative and the proprietary lease issued by the cooperative is entirely dependent upon a showing that the non-judicial foreclosure sale was in compliance with the Hsus' proprietary lease, the cooperative's bylaws, and the applicable provisions of either Article 9 of the UCC or Article 9 of the Lien Law. Contrary to these defendants' assertions, plaintiffs were not required to commence an Article 78 proceeding in order to assert claims against the cooperative that are, in essence, based upon breach of contract, and the failure to provide proper notices as required by law.

Therefore, that branch of plaintiffs' motion which seeks to enjoin the defendants from maintaining or pursuing a summary eviction proceeding; from transferring the stock and proprietary lease of the subject apartment; from placing any liens against the subject apartment and stock as security; and from using, diverting, or paying any claims from the proceeds of the non-judicial sale of the subject premises, is granted, upon the condition that plaintiffs file an undertaking in the amount to be determined at a hearing to be held on September 29, 2009 in this Part at 10:00 A.M.

That branch of plaintiffs' motion which seeks to remove the actions pending in Civil Court, is granted (*see* CPLR 602[a]), as common questions of law and fact exist as to the non-judicial foreclosure sale by the cooperative to the Nawals, the summary holdover proceedings commenced by the Nawals against the Hsus for possession of the subject apartment, and by Carlyle against the Hsus for possession of the parking/garage space.

The within action shall be known as Action No. 1. Defendants are directed to serve an answer in this action within 20 days from the date of service of this order, together with notice of entry, unless they have already done so.

These actions shall be tried jointly in this court and separate Index Numbers, Requests for Judicial Intervention (RJI) and Notes of Issue shall be filed in each action.

The Clerk of the Civil Court, Queens County, upon being served with a copy of this order together with notice of entry, is directed to transfer the files in the actions pending in the Civil Court, Landlord Tenant Part, entitled *Bhanwaral Nawal and Kaushlaya Nawal v Lily Hsu and Peter Hsu,* Index No. 56600/09, and *Carlyle Towers Cooperative, "B", Inc. v*

Peter Hsu and Lily Hsu, Index No. 52832/09, to the Clerk of the Supreme Court, Queens County, to be jointly tried with the within action.

The title of the actions combined for joint trial shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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LILY HSU and PETER HSU,	ACTION NO. 1
Plaintiffs,	INDEX NO. 5619/09
-against-	
CARLYLE TOWERS COOPERATIVE, "B", INC., BHANWARAL NAWAL, KAUSHKLAYA NAWAL, ALL AREA REALTY SERVICES, INC., and ALL AREA PROPERTY MANAGEMENT CO.	
Defendants	

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BHANWARAL NAWAL and KAUSHLAYA NAWAL,	ACTION NO. 2
Plaintiffs,	INDEX NO. (to be assigned)
-against-	
LILY HSU and PETER HSU,	
Defendants.	

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CARLYLE TOWERS COOPERATIVE, "B", INC.	ACTION NO. 3
Plaintiff,	INDEX NO. (to be assigned)
-against-	
LILY HSU and PETER HSU,	
Defendants.	

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A copy of this order with notice of entry shall be served on all parties to the actions combined, the Clerk of Queens County, and at the time of the filing of the Notes of Issue, on the Clerk of the Trial Term Office.

Dated: August 25, 2009

J.S.C.