

**534 E. 11th St. HDFC v Hendrick**

2009 NY Slip Op 33069(U)

November 10, 2009

Supreme Court, New York County

Docket Number: 116064/08

Judge: Walter B. Tolub

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

PRESENT: TOLUB WALTER B. TOLUB  
Justice

PART 15

534 EAST 11TH STREET HOUSING  
DEVELOPMENT FUND CORPORATION

INDEX NO. 116064/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

- v -  
PETER HENDRICK

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  
the accompanying memorandum decision

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

**FILED**  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/10/09

WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
534 EAST 11<sup>th</sup> STREET HDFC

Plaintiff,

-against-

PETER HENDRICK,

Defendants.  
-----x

Index No. 116064/08  
Mtn Seq. 002

**FILED**  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

**WALTER B. TOLUB, J.:**

By this motion defendant moves for an order vacating and setting aside this court's order dated August 7, 2007 which granted petitioner's motion to dismiss defendant's defenses and third and fourth counterclaims on default.

The court has considered the arguments offered by defendant, and vacates the August 7, 2007 order issued in conjunction with motion sequence 001. However, counsel for defendant is sanctioned in the amount of \$250 dollars for their failure to appear at the call of the August 7, 2007 calendar. Motion sequence 001 is now decided on the merits in the following memorandum decision.

Motion Sequence 001

Plaintiff is a housing development fund corporation and the owner of the building known as 534 East 11<sup>th</sup> Street in Manhattan. Defendant became one of plaintiff's shareholders when he purchased shares of stock and the appurtenant Proprietary Lease for Apartment #5 in plaintiff's building. On June 27, 2007, plaintiff and defendant entered into an Assignment and Assumption

of Contract rights (the Assignment) (see, Notice of Motion, Exhibit 1 - Amended Verified Complaint). By the terms of the Assignment, plaintiff assigned its rights to purchase the shares of stock and appurtenant Proprietary Lease associated with Apartment #6 in plaintiff's building. The consideration for the Assignment was Defendant's promise that he would make 'best efforts' to sell the Shares of Stock and appurtenant Proprietary Lease associated with Apartment #5 to Dustin Shryock. This sale was to take place as soon as possible, and if found to be impossible, then defendant was to sell the shares of stock and Proprietary Lease associated with Apartment #5 as soon as possible, to a plaintiff-approved purchaser (id.).

According to the complaint, the anticipated sale to Dustin

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The relevant portion of the language in the assignment, annexed to the complaint as found in Exhibit A of Plaintiff's Notice of Motion for Sequence 001 reads as follows:

The parties hereto specifically covenant and agree that the written Assignment and Assumption has been entered into in consideration of the covenant and promise of Assignee that the will make best efforts to sell the shares of 534 East 11<sup>th</sup> Street HDFC and appurtenant Proprietary Lease both allocated to Apartment #5 in the building known as 534 East 11<sup>th</sup> Street, New York , New York, to Dustin Shryock for the sale price of \$110,000 as soon as possible and, if such sale is not possible, to sell said Shares and Proprietary Lease allocated to Apartment #5 to a Purchaser approved by Assignor as soon as possible.

Assignee hereby agrees to perform all of the terms of the Contract and to assume full responsibility under the Contract as if Assignee had signed the Contract as Purchaser.

(Notice of Motion, Sequence 001, Exhibit A).

Shryock failed to take place due to a lack of financing. Pursuant to plaintiff's By-Laws, defendant then advised that his proposed successor for the shares of stock and appurtenant Proprietary Lease allocated to Apartment #5 would be Lia Gangitano. The application of Lia Gangitano was not approved by a majority of plaintiff's shareholders. Instead, the majority of plaintiff's shareholders voted to approve the application of Dustin Shyrock.

According to the complaint, defendant refused to enter into a subsequent agreement with Dustin Shyrock in connection with Apartment #5. At some point thereafter, Mr. Shyrock informed plaintiff that he no longer wished to purchase the shares of stock and Proprietary Lease associated with said apartment. This action, seeking an injunction requiring defendant to sell his co-op apartment at a financial loss to a purchaser of plaintiff's choosing, followed.

In response to plaintiff's summons, defendant interposed seven affirmative defenses and four counterclaims. Defendant's first four affirmative defenses include: failure to state a cause of action, waiver, estoppel and bad faith and unclean hands. Defendant fifth through seventh affirmative defenses claim that plaintiff is either barred, precluded and estopped, or has waived its rights to relief predicated on its acts and conduct (Notice of Motion Sequence 001, Exhibit B). Defendants four

counterclaims include allegations of interference with prospective business relations (third counterclaim), and claims of entitlement to attorneys' fees (fourth counterclaim). In response, plaintiff moved to dismiss defendant's affirmative defenses, as well as the third and fourth counterclaims (Motion Sequence 001).

#### Discussion

Much like a motion to dismiss made by a defendant, a challenge to counterclaims and affirmative defenses advanced under CPLR 3211 only requires the court to determine whether the defendant's allegations, viewed in the most favorable light, state cognizable legal defenses (182 Fifth Avenue LLC v. Design Development Concepts, 300 AD2d 198 [1<sup>st</sup> Dept 2002]). See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2009] §36.01 *et seq.*

Defendant in this action, has stated a total of seven affirmative defenses which are, at best, comprised of single-sentence claims. While defendant correctly notes that the Court of Appeals has stated that an asserted affirmative defense of "statute of limitations" does not require the inclusion of the relevant statutory provision (see, Immediate v. St. John's Queens Hospital, 48 NY2d 671 [1979]), the same leniency does not apply to other affirmative defenses. Affirmative defenses must be composed of more than bare legal conclusions (see, Robbins v.

Growney, 299 AD2d 356 [1<sup>st</sup> Dept 1996]). This is especially true when an affirmative defense is based on claims of waiver (see, Glenesk v. Guidance Realty Company, 36 AD2d 852 [2<sup>nd</sup> Dept 1971]), fraud, mistake, misrepresentation or willful default (see, CPLR 3016(b)), and estoppel (see, Manno v. Levi, 94 AD2d 556 [2<sup>nd</sup> Dept 1983]).

Review of the pleadings, and in particular, defendant's answer, reveals no factual basis for any of defendant's second through seventh affirmative defenses. Even affording the most liberal of readings, each of these defenses are insufficiently pleaded and therefore must be dismissed (Robbins, 229 AD2d 356). Defendant's first affirmative defense is also dismissed, inasmuch as the balance of the affirmative defenses stated are legally insufficient (Raine v. Allied Artists Productions, Inc., 63 AD2d 914 [First Dept 1978]).

Defendant fares no better with his third and fourth counterclaims. Defendant's third counterclaim, which alleges interference with prospective business relations, lacks the sufficiency to demonstrate that plaintiff took proactive steps to intentionally and wrongfully interfere with a business relationship defendant had with a third party (see, Jacobs v. Continuum Health Partners, Inc., 7 AD3d 312 [1<sup>st</sup> Dept 2004]; Shared Communication Services of ESR, Inc. v. Goldman Sachs & Co., 23 AD3d 162 [1<sup>st</sup> Dept 2005]).

Nor is the counterclaim saved by defendant's claim that plaintiff's board prevented the sale of the apartment by rejecting his second choice for successor to the apartment. The apartment in question was the subject of an agreement which allowed for the transfer of shares for Apartment #6 to defendant in exchange for the sale of Apartment #5 to either Dustin Shryock, for the sale price of \$100,000, or a new purchaser approved by plaintiff, as assignor (Notice of Motion, Exhibit A). Defendant was therefore, and remains, under a contractual obligation to sell the apartment to a purchaser who has been approved by plaintiff. Furthermore, under the business judgment rule, plaintiff has the right, absent evidence that they acted with either wrongful purpose or bad faith, to reject a prospective purchaser of the apartment (Levandusky v. One Fifth Avenue Apartment Corp., 75 NY2d 530 [1990]). Since defendant has included no factual allegations or evidence supporting the claim that the board's decision to not approve his second-named successor was carried out in bad faith or with wrongful purpose, defendant's third counterclaim is dismissed.

Defendant's fourth counterclaim alleges violations of defendant's rights under plaintiff's By-Laws and under the proprietary lease, and based on those unspecified violations, demands attorneys' fees.

The By-Laws of the plaintiff corporation, annexed as Notice

\* 8]

of Motion, Exhibit D, sets forth the terms governing transfer of shares of stock and the appurtenant Proprietary Lease. In particular, the By-Laws state that if a tenant vacates their apartment, the vacating tenant may choose to recommend a successor to their lease. The By-Laws further state that if the recommended successor is approved by a majority of shareholders, that successor is accepted, provided that they meet the income restrictions as required by HPD (Notice of Motion, Exhibit D - By-Laws, Article VI Section 2). These provisions are echoed in the Proprietary Lease (Notice of Motion, Exhibit C).

Review of the pleadings do not support defendant's allegation that his rights under either the By-Laws and/or Proprietary Lease were violated. In consideration for the transfer of the shares of stock and appurtenant Proprietary Lease, the parties by agreement, designated a successor tenant for Apartment #5. When the successor tenant indicated that he was no longer interested in the apartment, defendant nominated a successor to the original successor tenant. In accordance with the By-Laws, the proposed successor tenant was the subject of a board vote, and, for whatever reason, did not receive a majority approval. This action, standing alone, does not support the claim that defendant's rights were somehow violated under the By-Laws, and certainly does not support a claim of violation of rights under the Proprietary Lease, thereby justifying an award

of attorneys' fees.<sup>2</sup> As such, defendant's fourth counterclaim is dismissed.

Inasmuch as defendant's asserted affirmative defenses as well as the third and fourth counterclaim fail to state cognizable legal defenses, it is

ORDERED that defendant's counsel is sanctioned in the amount of \$250 dollars, payable to the Lawyers' Fund for Client Protection, for failing to appear at the call of this court's August 7, 2007 calendar; and


ORDERED that plaintiff's motion is granted, and the affirmative defenses are dismissed; and it is further

ORDERED that defendant's third and fourth counterclaims are dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/10/09

**FILED**  
NOV 17 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

<sup>2</sup> The court notes that defendant does not allege a breach of the Proprietary Lease. As such, the counterclaim for attorney's fees predicated warrants dismissal (Silverstein v. Westminster House Owners, Inc., 50 AD3d 257 [1<sup>st</sup> Dept 2008]).