Anchev v 335 W. 38th St. Co-op. Corp.
2010 NY Slip Op 32996(U)
October 12, 2010
Sup Ct, NY County
Docket Number: 602993/99
Judge: Charles E. Ramos
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SCANNED ON 10/26/2010

[* 1]

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

PRESENT: C E Ramos PART 53

Index Number : 602993/1999

ANCHEV, SLAVCHO

VS

335 WEST 38TH ST. COOPERATIVE

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

FILED

OCT 26 2010

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

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

Dated: 10/12/2010

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

----------X

SLAVCHO ANCHEV,

Plaintiff,

Index No. 602993/99

- against -

335 WEST 38TH STREET COOPERATIVE CORP., ROSENBERG & ESTIS, P.C., JOSEPH P. KELLY, KRIS ALEX, CLARK JOHNSON, "JOHN" SCHWINGHAMMER, and the "DOE" CORPORATION, said "buyers" jointly and severally,

Defendants.

----------X

FILED
OCT 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

Defendant 335 West 38th Street Cooperative Corporation (the Coop) moves for summary judgment dismissing the complaint of plaintiff, Slavcho Anchev.

The Coop owns the cooperative building in New York City where Anchev resided and did business. The original proprietary lessee assigned to Anchev shares to a ground floor commercial unit and to a second-floor residential unit. This action concerns the first-floor commercial unit.

In February 1997, using the shares of the commercial unit as collateral, Anchev borrowed $138,000 from defendant Kris Alex. In June 1998, using the commercial and residential unit shares as collateral, Anchev borrowed $240,000 from defendant Joseph P. Kelly. Additionally in June 1998, the Coop initiated a lawsuit against Anchev for failing to pay maintenance fees on both units. The parties settled the action on October 9, 1998, by entering into a Stipulation of Settlement, wherein Anchev would pay

maintenance arrears[1] on the units on or before November 8, 1998, would consent to the entry of a final judgment of possession granting legal possession of both units to the Coop, would agree to the issuance of a warrant of eviction against him which was stayed through November 8, 1998, and would pay $5,000 for the Coop's attorney's fees ($2,500 for each unit) [Ex. H].[2]

Plaintiff failed to pay the arrears on the commercial unit and was evicted from those premises. The Decision and Judgment of Possession states that plaintiff owes $14,960 for the commercial unit (Ex. I). Shortly after this action commenced, plaintiff filed for bankruptcy. In June 2000, the bankruptcy trustee sold plaintiff's residential unit.

The Coop undertook to cancel plaintiff's shares in the commercial unit and sell them at auction. The Coop served plaintiff with a Notice of Sale/Notice of Foreclosure (hereinafter Notice of Sale), and advertised the sale in the New York Post on April 15 and 22, 1999. On April 30, 1999, at least three potential bidders appeared at the auction, which was conducted by a professional auctioneer. Defendant John Schwinghammer made the highest bid at $193,000. The Coop, Schwinghammer, and defendant Clark Johnson entered into an agreement providing that the shares and proprietary lease appurtenant to the commercial unit would be issued to

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[1] Of the arrears, $14,960 was attributable to the commercial unit, and $7,480 to the residential unit.

[2] Unless otherwise stated, all cited exhibits are attached to the Coop's motion.

Schwinghammer and Johnson as tenants-in-common on the closing date of July 28, 1999, that Schwinghammer would pay monthly maintenance on the unit, and that the sale proceeds would be placed in escrow, where they remain to this day.

Plaintiff commenced the present action after the auction but before the sale on the commercial unit closed. The complaint alleges that the Coop unreasonably refused to allow plaintiff to sublet the commercial unit, unreasonably refused to consent to loans that plaintiff sought from various financial institutions (forcing plaintiff to borrow from the individual defendants Alex and Kelly), unfairly allowed other shareholders to alter their units without prior permission from the Department of Buildings while forcing plaintiff to get such approval, and wrongfully refused to allow Kelly and Alex to satisfy plaintiff's debt to the Coop.[3]

The complaint further alleges improprieties concerning the auction, and seeks to declare it commercially unreasonable and null and void. The complaint alleges that, if the commercial unit had been sold in a commercially reasonable manner, the proceeds would have been more than enough to satisfy Kelly's and Alex's liens, and the maintenance fees owed to the Coop. The complaint seeks an order allowing plaintiff to examine the Coop's books and records. Damages are not sought.

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[3] Various relief sought in the complaint is now moot and will not be addressed. For example, the complaint seeks to enjoin the closing of the commercial unit (a moot issue, since the sale closed), and to enjoin the sale of the residential unit (also a moot issue).

To obtain summary judgment dismissing the complaint, the Coop must show that the auction was commercially reasonable. Summary judgment will not be granted unless it is clear that no material and triable issue of fact exists (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The court will "draw all reasonable inferences in favor of the non-moving party," and will not "pass on issues of credibility" (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]).

The Coop contends that the auction was commercially reasonable under UCC Article 9, which applies to secured interests. The first issue for determination is whether, as plaintiff contends, the Coop had no security interest in the shares and no right to sell them under Article 9. As shares in a cooperative are treated as personal, rather than real property, a security interest in shares is governed by Article 9 (*Matter of State Tax Commn. v Shor*, 43 NY2d 151, 158 [1977]; *Brief v 120 Owners Corp.*, 157 AD2d 515, 515 [1st Dept 1990]). In order to sell the shares, the Coop would have to have some rights that could be enforced, such as a lien. The lien may arise via a court judgment for the unpaid maintenance, and execution of the judgment, pursuant to CPLR 5234, or through a security agreement under Article 9 (*see* Di Lorenzo, New York Condominium and Cooperative Law § 11:6, at text pertaining to n 39-42 [Westlaw

cite: NYCONDO § 11:6]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5201:11 [Westlaw ed]). The Coop does not discuss CPLR 5234 liens, and argues that it has an Article 9 lien on the shares.

By itself, a proprietary lease does not give a cooperative corporation a lien or security interest in the shares of a lessee (Di Lorenzo, NYCONDO § 11:6, n 29; *McMillan v Park Towers Owners Corp.*, 225 AD2d 742, 743-744 [2d Dept 1996]; *Saada v Master Apts.*, 152 Misc 2d 861, 863-864 [Sup Ct, NY County 1991]). To create a security interest, the creditor and debtor must make an agreement describing the collateral, the receipt of value by the debtor, and the debtor's rights in the collateral (*Fundex Capital Corp. v Reichard*, 172 AD2d 420, 420 [1st Dept 1991]; Di Lorenzo, NYCONDO § 11:6, n 32).

The relationship between the lessee and a cooperative corporation is governed by the certificate of incorporation, the corporation's bylaws, and the proprietary lease, which must be read together (*Fe Bland v Two Trees Mgt. Co.*, 66 NY2d 556, 563 [1985]). Here, the Coop's bylaws and the proprietary lease, as signed by the original lessee who assigned his shares to plaintiff, provide for a security agreement in the shares.

The bylaws provide that the Coop has a lien on the shares belonging to the proprietary lessees (Ex. F, at 85). The bylaws state that the lien on the shares secures the payments due by the shareholders under their respective proprietary leases, and that the Coop has the right to enforce the lien by selling the shares

of defaulting shareholders. The bylaws further provide that, upon such a sale, the shares issued to the defaulting shareholder are voided and new shares shall be issued to the purchasing party.

The proprietary lease of the original lessee/assignor provides that, upon termination of the lease, the lessor may issue a new lease and a new certificate for shares, and that the original lessee's shares are cancelled and rendered null and void (Ex. G, at 69).

Two cases not precisely precedential but nonetheless instructive are *160 Bleecker St. Assoc. v 160 Bleecker St. Owners, Inc.* (NYLJ, Aug. 22, 1990, at 22, col 3 [Sup Ct, NY County, Huff, J.]), where the fact that the cooperative corporation had the right to cancel the unit owner's shares and reissue new shares led the court to conclude that the corporation had a security interest in the shares, and a Minnesota case, *Mehralian v Riverview Tower Homeowners Assn.* (464 NW2d 571 [Minn App 1990]), which decided that the bylaws of a cooperative corporation constituted a security agreement. This Court agrees with the reasoning set forth in those cases. Therefore, the Coop had a secured interest in the shares.[4]

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[4] The Court notes that although the bylaws start with "Article I," the starting page number is 77, and the bylaws end abruptly without a concluding page (Ex. F). It is therefore unclear if the bylaws submitted by the Coop are complete. For the purposes of this motion, the court accepts the bylaws as attached, subject to a future presentation of a complete copy or a reasonable explanation of the apparent deficiency.

The Coop does not state whether it perfected its security interest in the shares, and whether perfection was needed is not clear. The original lessee signed the proprietary lease and purchased the shares to the units in 1976. As reported by various authorities in regard to liens created before October 1988, there was no requirement that a security interest in a cooperative had to be perfected by filing a UCC statement (Blair, Practice Insights, NY UCC 9-310 [Lexis ed]; Di Lorenzo, NYCONDO § 1:8, n 79-85; Neustadt, Real Estate and Title Trends, Procedure Outlined for Establishing a Security Interest in Co-op Shares, NYLJ, Sept. 20, 1989, at 35, col 1). Effective October 1, 1988, UCC 9-304 was amended to provide that a security interest in the shares of a cooperative apartment could be perfected only by filing, but this amendment did not apply to security interests created before that date. The Coop sold plaintiff's shares to the commercial unit in 1999, before further changes to Article 9 in 2001 (*see* DiLorenzo, NYCONDO § 9:8]).

According to the complaint, Kelly and Alex, who had secured interests in the same shares as the Coop, perfected their interests by filing UCC statements. If in the future a question arises as to priorities among creditors, the issue of perfection clearly must be determined.

Plaintiff makes much of the fact that the shares, and not the proprietary lease, were assigned to him, erroneously arguing that since he did not enter into a proprietary lease, the Coop cannot enforce the terms of the lease against him. "The

ownership interest of a tenant-shareholder in a co-operative apartment is *sui generis*. It reflects only an ownership of a proprietary lease. ... The leasehold and the shareholding are inseparable" (*Matter of State Tax Commn.*, 43 NY2d at 154; *see also Matter of Carmer*, 71 NY2d 781, 784 [1988] [what is owned is a right to possess real property]). Except as attached to the unit, the shares have no value.

Consistent with that analysis, the bylaws provide that the owners of shares are entitled to proprietary leases and entitled to occupy the unit specified in the lease to which the shares are appurtenant (Ex. F, at 84). The proprietary lease provides that an assignment of the lease or the appurtenant shares shall not be effective without the Coop's approval and without a writing by the assignee agreeing to be bound by the covenants and conditions in the lease (Ex. G, at 59). Plaintiff avers that he never made such a writing and the parties are silent about the Coop's approval. However, plaintiff owned the shares, occupied both units, and paid maintenance on them. In plaintiff's bankruptcy case, the residential unit sold as part of his estate.

Plaintiff also identified himself as an owner and proprietary lessee in other actions between himself and the Coop. A decision in a case that plaintiff commenced against the Coop concerned plaintiff's motion to prevent the Coop from terminating his proprietary lease (Coop's reply, Ex. U). A Decision/Order resulting from a trial in yet another Supreme Court case commenced by the Coop identified plaintiff as the lessee on a

proprietary lease (*id.*, Ex. V). A third Supreme Court action, in which plaintiff was respondent-tenant, was appealed by him and cross-appealed by the Coop. The appellate term's decision was based upon a finding and an averment by plaintiff that he was a tenant under a lease (*id.*, Ex. W).

"Collateral estoppel means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit" (*Matter of McGrath v Gold,* 36 NY2d 406, 411 [1975]). Res judicata means that "a final judgment bars further actions between the same parties on either the same cause of action or any claim related to the same course of conduct" (*Ginezra Assoc. LLC v Ifantopoulos,* 70 AD3d 427, 429 [1st Dept 2010]). Plaintiff may not now argue that he does not have the status of a proprietary lessee. Additionally, the Coop accurately observes that plaintiff's representations in the prior cases constitute informal judicial admissions in this case and are evidence of plaintiff's status as a lessee (*Matter of Union Indem. Ins. Co. of N.Y. v American Centennial Ins. Co.*, 89 NY2d 94, 103 [1996]).

Turning to the auction itself, under former UCC 9-504, the secured party may, after reasonable notice to the defaulting debtor, dispose of the collateral. The method, manner, time, place, and terms of the disposition must be commercially reasonable (*Long Is. Trust Co. v Williams,* 133 Misc 2d 746, 753 [Civ Ct, NY County 1986], *affd* 142 Misc 2d 4 [App Term, 1st Dept

1988]; *see also First City Div. of Chase Lincoln First Bank v Vitale,* 123 AD2d 207, 213 [3d Dept 1987]), that is, in good faith and to the parties' mutual best advantage (*Federal Deposit Ins. Corp. v Herald Sq. Fabrics Corp.*, 81 AD2d 168, 184-185 [2d Dept 1981]). Commercial reasonableness may also be gauged by examining the public notice of the sale (*see National Bank of Delaware County v Gregory,* 85 AD2d 839, 840 [3d Dept 1981]).

The Notice of Sale states that the Coop holds the first lien on the commercial unit, that plaintiff owes $86,706.27, which includes the Coop's legal fees, and that the amount of the lien will be increased by any additional maintenance, late charges, auctioneer's fees, and other charges that accrue through the date of the auction (Ex. L). It provides that the estimated value of the collateral unit is $1 million. The Notice of Sale states that the Terms of Sale will be made available on business days between nine in the morning and five in the evening by contacting the attorneys named on the Notice of Sale, the same firm named as a defendant in this action.

The Terms of Sale state that 10% of the purchase price must be paid by certified check on the day of the auction and that the balance must be paid within 30 days of the auction (Ex. N). It further states that the unit will not be made available for inspection at any time before or after the auction and that it will be sold "as is" without any warranties or representations as to its condition.

The Foreclosure Sale advertisement that appeared in the

newspaper gives the same information as to the unit's "as is" condition and the certified check for 10% (Ex. M). It indicates nothing about inspecting the unit.

Given that the Coop obtained a judgment of $14,960 against plaintiff, it was incumbent upon the Coop to explain the increase in the amount purportedly owed. The Coop does not do so. It also fails to explain how a unit valued at $1 million was sold for $193,000. The complaint alleges that the unit, located a few blocks from Times Square in Manhattan, is worth much more than the purchase price. Plaintiff's opposition to the motion attaches an order from his bankruptcy case showing that the residential unit sold for $800,000 (Opposition, Ex. 4). The wide discrepancy between the proffered value and the actual purchase price invites further scrutiny and raises a factual question as to the commercial reasonableness of the sale (*see Weinsten v Fleet Factors Corp.*, 210 AD2d 74, [1st Dept 1994]; *Federal Deposit Ins. Corp. v Forte*, 144 AD2d 627, 628 [2d Dept 1988]).

The complaint states that the advertisement says nothing about the size of the unit (allegedly 8,000 square feet), or its estimated value. The complaint alleges that Alex and others who were interested in buying the unit asked to see the Terms of Sale in the days before the auction, and that the Coop's counsel refused the requests. The complaint alleges that the Terms of Sale were not made available until the moment that the auction began, by which time it was too late for prospective bidders to obtain a certified check. Allegedly, by refusing to allow

perusal of the Terms of Sale, the Coop and its counsel prevented the public from having proper access to the auction. The complaint also alleges that the Coop refused to let two other individuals bid at the auction, despite their having large sums of cash with them, $35,000 and $40,000, respectively, more than the $20,000 paid by the successful bidder. The complaint also alleges that these individuals were prepared to bid as a unit up to a sum of $750,000.

The complaint further alleges that Schwinghammer, who prevailed at auction, and Johnson, Schwinghammer's tenant-in-common, already owned a unit in the building, and that one or both are on the board of directors. Thus, the complaint alleges, the Coop had a plan to sell plaintiff's unit to '"insiders"' for a low price (Ex. A, ¶ 101).

Plaintiff's allegations concerning the "as is" condition of the unit, the refusal to allow pre-sale inspection, and the failure to name the Terms of Sale in the public notice probably do not implicate conduct that is per se improper. However, all the circumstances of the auction taken together, including the low price of the unit and the refusal to give access to the Terms of Sale, raise a red flag as to commercial reasonableness.

As for the requirement that on the day of the auction the successful bidder present a certified check for a percentage of the purchase price, it is not unreasonable (*see Bank One, N.A. v Maser*, 11 Misc 3d 1059[A], *4, 2005 NY Slip Op 52276[U] [Sup Ct, Greene County 2005]). In this case, the newspaper advertisement

included the 10% down payment requirement. Although prospective bidders did not see the Terms of Sale before the auction, there was some public notice of the down payment. "However, under certain circumstances, a Referee in the interests of justice should grant an adjournment of the sale to permit a bidder to procure either cash or a certified check to pay the required down payment" (*Alben Affiliates v Astoria Term.*, 34 Misc 2d 246, 248 [Sup Ct, Queens County 1962]; *see also Crossland Mtge. Corp. v Frankel*, 192 AD2d 571, 572 [2d Dept 1993]). In this case, given the alleged insider status of the purchaser, the seemingly low price paid for the unit, and the presence of other potential bidders who wanted to pay more money, substantive questions have been raised as to the reasonableness of the auction.

The Coop fails to address the allegations in the complaint regarding the auction. Summary judgment dismissing the claim of commercial unreasonableness is denied.

The Coop sets forth other arguments in favor of dismissing the complaint, one being that the doctrine of law of the case bars plaintiff's objections to the auction. The law of the case doctrine precludes parties from relitigating an issue already decided in an ongoing action (*Matter of Midland Ins. Co.*, 71 AD3d 221, 225 [1st Dept 2010]). The doctrine applies only to legal determinations that were necessarily resolved on the merits in the prior decision (*Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]).

Earlier in this case, plaintiff moved to enjoin defendants

from closing the sale of the commercial unit shares and to declare the sale null and void. An August 24, 1999 decision denied the motion as moot, since the sale closed in July 1999 (Ex C). That decision concerned plaintiff's desire to prevent the closing and did not set down the law of the case as to whether the sale was commercially unreasonable. The decision does not bar plaintiff from claiming that the sale was not commercially reasonable and from obtaining remedies in the event that the claim is proved. The doctrine of the law of the case does not apply.

Regarding plaintiff's demand to examine the Coop's books and records, the Coop argues res judicata and collateral estoppel based on an April 17, 1997 decision in another Supreme Court action commenced by plaintiff (Ex D). In that action, plaintiff moved to compel the Coop to produce books and records so that plaintiff could determine whether the Coop had authority to proceed against him for nonpayment in a Civil Court action that was then pending. The court denied the motion on the ground that the discovery demand was unduly burdensome and, in the same decision, dismissed the Supreme Court action sua sponte, finding that the relief sought was more appropriately handled in the Civil Court action.

The April 1997 decision does not forever bar plaintiff from examining the Coop's books and records. That question was not litigated. The decision only opined that the particular request in that case was burdensome. Whether a request made in this case

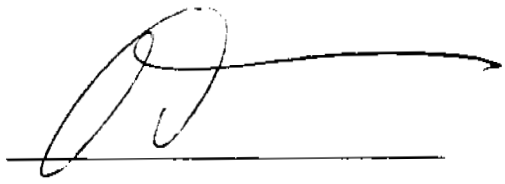
will be burdensome remains to be seen.

All arguments not addressed in this decision were carefully considered and deemed without merit.

Accordingly, it is

ORDERED that the motion by defendant 335 West 38th Street Cooperative Corporation to dismiss the complaint is denied.

Dated: October 12, 2010



J.S.C.

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