

Dukes v 45-53 W. 110 St. Hous. Dev. Fund Co.

2010 NY Slip Op 33200(U)

August 3, 2010

Sup Ct, NY County

Docket Number: 104434/2008

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

KIERA DUKES,
Plaintiff,

Index No.: 104434/2008

Motion Date: 03/20/10

- v -

Motion Seq. No.: 003

45-53 WEST 110 STREET HOUSING DEVELOPMENT
FUND COMPANY,

Motion Cal. No.: _____

Defendant.

The following papers, numbered 1 to 3 were read on this motion for summary judgment

Notice of Motion/Order to Show Cause -Affdavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

ORDERED that the Order of June 30, 2010 in this action is VACATED, RESETTLED AND CORRECTED AS FOLLOWS PURSUANT TO CPLR 5019. See Kiker v Nassau County, 85 NY2d 879 (1995).

Upon the foregoing papers, this motion for summary judgment by defendant 45-53 West 110 Street Housing Development Fund Company ("HDFC") shall be granted in part and denied in part.

Defendant HDFC is the owner of 45-53 West 110th Street, New York, New York (the "Building"), a cooperative corporation organized under Article XI of the Private Housing Finance Law.

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):

As set forth in the Certificate of Incorporation, the HDFC is organized exclusively for the purpose of developing a housing project for the primary residences of persons of low income under proprietary leases.

There is no dispute that plaintiff submitted an Application to the HDFC Board in which she represented that she would live in the Apartment. She listed herself as the sole household member employed and listed her employer as Target Corporation in Clark, New Jersey. She also listed her brother as a person who would live with her in the Apartment. Her representations made her eligible for a two-bedroom apartment.

Based on her application, the HDFC offered plaintiff a Lease for Apartment 5G (the "Apartment"). In the Rider to the Lease dated September 5, 2006, plaintiff acknowledged that the Apartment was an unregulated, non-rent stabilized Apartment located in the Building. The Lease states in pertinent part

OCCUPANTS and USE: The apartment may only be used and occupied for dwelling purposes by the named tenant or tenants and immediately family at the time of signing this lease. Tenant will not allow the apartment to be occupied by any roomer or boarder or sublet the apartment or any part thereof nor assign this lease, except as permitted by section 226b of the Real Property Law.

The Lease also has a merger clause that requires that any modification be in writing and signed by the landlord and tenant. In addition, the Lease states that the failure of the landlord to take action against the tenant for violation of any term or

condition of the Lease or rules and regulations shall not be deemed a waiver of the right of the landlord to enforce and take action against the tenant in the event of subsequent violation.

Rider 1 of the Lease provides that plaintiff "may" have the option to purchase shares attributable to the Apartment provided she abides by the terms of the Lease, house rules and riders and remains a tenant in good standing.

Plaintiff does not deny that at a meeting with the defendant's board members on December 17, 2007, she stated that she did not reside in the Apartment as her primary residence. Contrary to her representation in her application, her brother never moved into the apartment but she rented the Apartment to others.

By an examination before trial that took place on October 16, 2008, plaintiff testified that her vehicle is registered in New Jersey, that she filed her personal income tax returns through 2007 in New Jersey, that the utility bills for the Apartment are addressed to her mother's residence in New Jersey, and that she only voted in New Jersey. She also testified that non-relatives lived in the Apartment from October 2006 to August 2007.

Defendant moves for summary judgment to dismiss the complaint wherein plaintiff seeks, inter alia, specific performance of her option to purchase the Apartment. Plaintiff

opposes the motion, alleging that defendant modified the Lease and option, when its managing agent sent her a letter dated June 19, 2007 announcing that she had been approved to become a shareholder of the HDFC. She also cites the Questionnaire dated September 17, 2007 addressed to her at the Apartment and the Offering Plan sent to her on November 12, 2007.

The court agrees with defendant that plaintiff breached the Lease and the option by failing to abide by the occupancy requirements under the Lease. The record on this motion establishes, as a matter of law, that plaintiff resided in New Jersey with her mother which she listed as her official address in every official document, including her personal income tax returns. Pendas v 3 East 69th Street Associates, 119 AD2d 467 (1st Dept 1986).

Neither the approval communicated by the managing agent nor the other correspondence constituted a modification of the Lease requiring plaintiff to reside in the Apartment, since it is clear that the ultimate transaction was subject to the Board conducting due diligence to ascertain plaintiff's eligibility. Based upon the deferential standard enunciated in Levandusky v One Fifth Ave. Apartment Corp., 5 NY2d 530 (1990), this court may not disturb the actions of board in reviewing plaintiff's eligibility to purchase the Apartment at the end of her Lease, which were clearly taken in good faith and in the exercise of honest

judgment toward the lawful and legitimate furtherance of corporate purposes. Defendant is correct that the Board's decision to decline to offer the Apartment to plaintiff was in furtherance of its fiduciary obligation to offer exclusively to low income persons/families who live in their Apartments the opportunity to buy their Apartments.

Defendant is entitled to dismissal of plaintiff's complaint to the extent that plaintiff seeks a declaratory judgment and injunctive relief granting her specific performance on her option to purchase the Apartment. Moreover, defendant has demonstrated its right to recover on its counterclaims with respect to a declaration that plaintiff is in breach of the Lease.

As for defendant's counterclaim for ejectment, the termination notice of February 29, 2008 was sufficient in terms of content. As in 167-169 Allen Street HDFC v Ebanks, 22 AD2d 374 (1st Dept 2005), that notice detailed the conduct alleged to have been in violation of the Lease and was properly signed by the HDFC's agent. However, this court concurs with plaintiff that the predicate notices were improperly served. Pursuant to RPL 232-a, they had to be served in the same manner as a Notice of Petition in a summary proceeding. In that regard, RPAPL § 735(1)(a) requires that if the property sought to be recovered is not the residence of the plaintiff, such predicate notice must be served on the last residence address for which defendant has

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written information. Here, plaintiff listed the New Jersey address in the application she submitted to defendant, so defendant should have mailed the notices to that address. Defendant's failure to serve plaintiff at that address is fatal to its counterclaim for ejection.

Accordingly, it is

ORDERED that the motion for summary judgment of defendant is granted to the extent that it is:

(a) ORDERED, DECLARED and ADJUDGED as to the first and second counterclaims, that plaintiff breached the terms of the Lease, is not a tenant in good standing, is not entitled to exercise the option to purchase the shares and become a proprietary lessee of Apartment 5G at 45-53 110th Street, New York, NY (the "Apartment"); and it is further

(b) ORDERED that the preliminary injunction enjoining and restraining the defendant from taking any steps to evict plaintiff from the Apartment and enjoining and restraining the defendant from transferring the shares of stock and proprietary lease allocated to the Apartment to anyone other than plaintiff is vacated; and it is further

ORDERED that the defendant's motion for summary judgment in its favor and against the plaintiff on the third and sixth counterclaims and to dismiss the third cause of action are denied and it is further

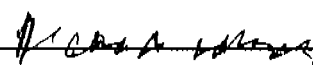
ORDERED, DECLARED and ADJUDGED the defendant's motion for summary judgment as to the third cause of action and fourth counterclaim is resolved to the extent that the Notices of Termination dated February 2008 are void and of no effect and that the plaintiff, as month-to-month tenant, is obligated to pay accrued and unpaid rent to date and rent as it becomes due on the first of each month; and it is further

ORDERED that the defendant's motion for summary judgment in its favor and against plaintiff as to the first and second causes of action is granted and such causes of action are dismissed.

This is the decision and order of the court.

Dated: August 3, 2010

ENTER:


DEBRA A. JAMES J.S.C.
J.S.C.