

**Devries v Plotch**

2010 NY Slip Op 33668(U)

December 1, 2010

Sup Ct, New York County

Docket Number: 111630/10

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

ANDREA DEVRIES,  
as Guardian for the Person and Property of

INDEX NO. 111630/10

AUDREY DEVRIES,  
An Incapacitated Person,  
Plaintiff

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

MOTION SEQ. NO. 001

- against -

**FILED**  
MOTION CALL NO. \_\_\_\_\_

ADAM PLOTCH AND WEST FORK  
CAPITAL EQUITIES, LLC  
Defendant.

DEC 15 2010

The following papers, numbered 1 to 3 were read on this motion by plaintiffs for an order and Judgement pursuant Civil Practice Law and Rules 6301 for a preliminary injunction.

NEW YORK  
COUNTY CLERK OF COURT

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

Cross-Motion:  Yes  No

Audrey DeVries ("plaintiff") was adjudicated an incapacitated person pursuant to Article 81 of the Mental Hygiene Law, and appointed a Guardian, per the order by Justice S. Hagler, JSC, dated June 24, 2010. By order dated August 12, 2010, Justice Hagler appointed plaintiffs' counsel, to Andrea DeVries, ("plaintiff's guardian"), and authorized counsel to commence this proceeding. (See *Andrea DeVries v Audrey DeVries*, index no. 500178/09). Plaintiffs' on August 31, 2010, by order to show cause, now move for a temporary restraining order and preliminary injunction seeking a stay against defendants from effectuating any transfer or other disposition or distribution of the stock and proprietary lease of the plaintiff's cooperative apartment during the pendency of the resolution of this action. Plaintiffs' August 31, 2010 summons and complaint challenges the non-judicial foreclosure sale of plaintiff's Gramercy Park cooperative apartment residence where she has resided for more

than 20 years. Defendants' based their sale upon an alleged plaintiff's default of a cooperative loan note and security agreement. Defendant West Fork Capitol Equities, LLC ("West Fork"), was assigned the note and security from an earlier note holder, and defendant Adam Plotch ("Plotch"), an officer of West Fork and subsequently received the transferred loan note, individually, from West Fork. The defendants file in opposition. Plaintiffs file a reply in opposition to defendants and in support of their application. The action is partially resolved as follows:

### BACKGROUND

On January 9, 2003, Audrey DeVries executed a cooperative loan note in the amount of \$165,000.00, with a Security Agreement for her 294 shares of stock in the Gramercy Arms Corporation with Astoria Federal Savings and Loan. The stock shares constituted her cooperative apartment located at 102 East 22<sup>nd</sup> Street, New York, New York, where she has lived since 1990. Plaintiff Audrey DeVries, made regular monthly payments on the note until December 2007 and Astoria Federal Savings allegedly defaulted her and accelerated the loan on or about April 24, 2008. Astoria Federal Savings subsequently transferred the note to Asset Management, LLC., who in turn assigned the note, to PJI Sam, LLC, (a New Jersey-based LLC), who on January 9, 2009, transferred the note to defendant West Fork. (See defendant Plotch's affidavit in opposition, exhibit b, exhibit c, West Fork debt letter and Perkins affidavit ¶ 3; plaintiffs' verified complaint ¶¶ 12-20).

On February 6, 2009, West Fork declared the note in default and accelerated the loan (*Id.*, West Fork debt letter ¶ 1). Defendant West Fork declared a non-judicial foreclosure sale pursuant to the Uniform Commercial Code Article 9-623 and allegedly advertised the sale in the Westsider Newspaper. The Westsider newspaper is published once a week, on Thursdays, claims a circulation of 11, 000 copies, "The Westsider, also

available by subscription, serves residents between 60th and 125th streets, from Central Park to the banks of the Hudson. It covers a wide range of news—from politics to environmental issues—that affect readers' everyday lives." See

[http://www.manhattanmedia.com/chelsea\\_westsider.php](http://www.manhattanmedia.com/chelsea_westsider.php) and

<http://www.momdotimes.com/1/world/us/32/1861/23562>.

On March 5, 2009, defendant West Fork then sold the note and security agreement at a non-judicial foreclosure sale to itself for \$100.00 and continued to assume plaintiff's accelerated debt now valued at \$197,918.76, (\$153,922.32 prin. sum, with interest rate at the default rate of 11%, with late fees).

On June 1, 2009, defendant West Fork, assigned the note and security to company officer and defendant Plotch, individually. On July 27, 2009 defendant Plotch commenced a holdover proceeding in New York Civil Court, Landlord Tenant Term and on September 3, 2009, defendant Plotch secured a possession of judgement to the plaintiff's cooperative apartment premises on default. (See *Plotch v DeVries*, New York Civil Court, Index No. 78624-09). Plaintiff was evicted pursuant to the court judgement on October 15, 2009, but later reentered the cooperative premises where she maintains to this day.

On November 4, 2009, plaintiff's guardian, by order to show cause before Justice S. Hagler, sought Article 81 relief pursuant to the New York State Mental Hygiene Law to care for the plaintiff and manage her affairs. Justice Hagler, after a hearing on February 9, 2010, granted plaintiff's guardian application and ordered a stay and status quo as to the plaintiff's possession of and residence in the apartment<sup>1</sup>. (See *Andrea DeVries v Audrey DeVries*, index no. 500178/09, June 24, 2010 court order and decision)

On August 12, 2010, Justice Hagler appointed plaintiff's counsel, pursuant to Article 81

---

<sup>1</sup> Justice Hagler first issued ordered the stay and status quo as to the plaintiff's possession of and residence in the apartment at the hearing on February 9, 2010 and continued the stay in his June 24, 2010 order.

of the Mental Hygiene Law, and authorized counsel to commence this proceeding. On August 30, 2010 plaintiffs filed a summons and complaint challenging the defendants non-judicial foreclosure sale of the subject premises. Plaintiffs' on September 15, 2010, now move for a temporary restraining order and preliminary injunction seeking a stay against defendants from effectuating any transfer or other disposition or distribution of the stock and proprietary lease of the plaintiff's cooperative apartment during the pendency or resolution of their August 30, 2010 proceeding. The plaintiffs' submit that the cooperative apartment has been conservatively appraised to value at more than \$850,000.00. (See plaintiff's reply, professional appraisal, exhibit b.)

On September 15, 2010, the Court denied plaintiff's temporary restraining order and after the parties consented to adjourn the matter, the Court held a hearing on the preliminary injunction on December 1, 2010.

#### DISCUSSION

The movant seeking a preliminary injunction must demonstrate a likelihood of success on the merits of the action; the danger of irreparable injury in the absence of preliminary injunctive relief; and a balance of equities in favor of the moving party. *See Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 (2005). The court must weigh a variety of factors and the matter is committed to the court's sound discretion. *See Doe v Axelrod*, 73 NY2d 748, 750 (1988).

The Court finds that plaintiffs have met the requirements for a preliminary injunction pending this action, notwithstanding defendants unspecified demand claims, which can be addressed at trial. Plaintiffs' have met the standard of irreparable harm and have demonstrated a prime facie showing of a right to relief, thus likelihood of success is met. The Court has reviewed the court proceedings and record in *Andrea DeVries v Audrey DeVries*, index no.

[\* 5]

500178/09. Plaintiffs' proof is sufficient for the purpose of provisional relief. (See *Terrell v. Terrell*, 279 AD2d 301, 719 NYS2d 41, [1<sup>st</sup> Dept 2001] [Appellate court reversed the trial court and granted handicapped, plaintiff's motion for a preliminary injunction staying defendant from taking any action to enforce or execute upon the judgment or warrant of eviction arising out of certain Housing Court proceedings. Plaintiff challenged the mental capacity of his mother and co-resident to execute a quickclaim deed transferring the resident to the defendants].

Moreover, the balance of equities are with the plaintiffs. Plaintiff filed this action at the earliest opportunity following Justice Hagler's Article 81 order authorizing the lawsuit, dated August 12, 2010. Plaintiff is a mentally incapacitated person who for all intensive purposes has lived in her apartment for more than 20 years. She is paying the monthly maintenance (incl. taxes) on the apartment to the Gramercy Arms Corp., (building manager) for \$1,129.25, per month, from the guardian escrow account, (as authorized by the order of Justice S. Hagler, JSC,) and the payments are current to this date. (See plaintiff guardian's affidavit in reply, ¶¶ 3-5, and record of checks, exhibit A.) In addition, plaintiffs' have already posted a \$45,000.00 bond in the Article 81 proceeding which was to include this litigation. See affirmation by C. Sigmond, plaintiffs' counsel ¶¶ 4-7.) The Court notes that plaintiff stands to lose her 20 year residence/home, with no where else to go and her cooperative apartment that is appraised at more than \$850, 000.00, while Plotch's financial interest to date is \$100 United States Currency and approximately \$200,000 in an assumed debt. (*Terrell* , supra)

It is hereby;

ORDERED that plaintiff's motion for a preliminary injunction pending discovery and a hearing on plaintiff's application challenging the non-judicial foreclosure sale of plaintiff's apartment residence is granted; and it is further,

ORDERED that all proceedings in the above action are hereby stayed, pending, the resolution of plaintiff's order to show cause, dated August 13, 2010, including; (1) defendants,

their agents, servants and employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, from effectuating any transfer or other disposition or distribution of the stock and proprietary lease during the pendency of this action; and (2) continuing the status quo as to the plaintiff possession of the apartment; and it is further,

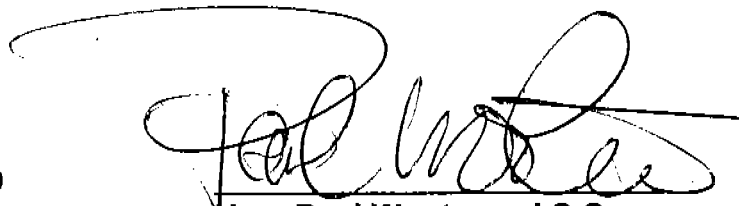
ORDERED that parties will follow the expedited discovery schedule ordered on December 1, 2010; and it is further,

ORDERED that defendant's application for bond is denied; and it is further,

ORDERED that all of the above matters are adjourned and are scheduled for a conference before Justice Paul Wooten, on March 10, 2011, in Part 7 (80 Centre Street, New York, New York) at 9:30 a.m.

This constitutes the Decision and Order of the Court.

*December 1,*  
Dated: ~~November 30,~~ 2010

  
Hon. Paul Wooten, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**FILED**

DEC 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE