

**Clarke v Parkway Vil. Equities Corp.**

2011 NY Slip Op 30514(U)

March 7, 2011

Supreme Court, Queens County

Docket Number: 28283/2010

Judge: Robert J. McDonald

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF QUEENS - **IAS PART 34**

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MICHAEL CLARKE and MURIEL CLARKE  
a/k/a MURIEL POWELL,

Plaintiffs,

- against -

PARKWAY VILLAGE EQUITIES CORP.,  
CITICORP N.A. d/b/a/ CITICORP  
MORTGAGE, INC., CITIMORTGAGE, INC.

Defendants.

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BY: McDONALD, J.  
  
Index No.: 28283/2010  
  
Motion Date:02/17/11  
  
Motion No.: 9  
  
Motion Seq.: 1

Plaintiffs MICHAEL CLARKE and MURIEL CLARKE a/k/a MURIEL POWELL commenced an action against defendants PARKWAY VILLAGE EQUITIES CORP. ("Parkway") and CITICORP N.A. d/b/a/ CITICORP MORTGAGE, INC., CITIMORTGAGE, INC. ("CitiMortgage"), by service of an order to show cause containing the summons and complaint on November 10, 2010.

Parkway is a cooperative corporation consisting of approximately 675 residential units located at 144-17 Grand Central Parkway, Kew Gardens Hills New York. The plaintiffs are the holders of 119 shares of stock entitling them to use Unit 67GA. The shares were purchased by the plaintiffs in April 1988. The plaintiffs have a loan with CitiMortgage secured against the corporation shares held by them. The plaintiffs are responsible for maintenance payments of approximately \$988.00 per month. Parkway contends that the plaintiffs' account went into arrears in March, 2007.

CitiMortgage contends that pursuant to the cooperative loan security agreement, it has the right to advance payment without the borrower's consent in order to defend the lender's security interest and then seek reimbursement from the borrower. In November 1999, CitiMortgage paid Parkway the sum of \$24,093.33 to cover the plaintiffs' arrears. In July 2010, a second payment was made by CitiMortgage in the amount of \$9,744.70 on account of additional arrears. Plaintiffs' account with CitiMortgage was debited in the total amount of \$33,527.07.

In August 2010, notwithstanding the sums paid by CitiMortgage, the plaintiffs were served with a 30 day notice to

cure. The notice to cure alleged that at that time the arrears due were \$3,650.65. A notice of termination was served on October 8, 2010.

In his affidavit in support of the request for a preliminary injunction, dated November 4, 2010, plaintiff Michael Clarke states that since 2007 he has had problems with Parkway regarding the payment of maintenance fees and the arrears allegedly owed. Clarke states that he did not owe the amount of \$3,650.65 which was set forth in the August 2010 Notice to Cure as he paid all that he owed. He states that he has never been provided with a financial accounting despite numerous requests and despite a requirement to provide an accounting contained in the offering plan. He states that the inadequate record keeping of Parkway has caused them to unfairly accumulate late fees.

The plaintiffs' complaint sets forth five causes of action against Parkway for (1) a complete accounting of plaintiffs' account since 2007; (2) unjust enrichment in the amount of \$33,527, the amount allegedly overpaid to Parkway by CitiMortgage; (3) negligence in the processing and crediting of the plaintiffs' account for maintenance; (4) breach of fiduciary obligation to the plaintiffs in failing to properly account for charges owed to Parkway; and (5) breach of a contractual obligation to the plaintiffs. The complaint alleges two causes of action against CitiMortgage. The first is for wrongfully debiting the plaintiffs' account in the amount of \$33,527.07 for paying sums to Parkway which the plaintiffs claim they did not owe without consulting or getting the permission of the plaintiffs. The second cause of action alleged against CitiMortgage is for negligence in charging \$33,527.07 against plaintiffs' account without notice to the plaintiffs. The plaintiffs claim that the sums paid by CitiMortgage are in excess of the sums due and owing.

Defendant CitiMortgage has filed a separate motion for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against CitiMortgage for failure to state a cause of action.

In opposition to plaintiffs' motion for a preliminary injunction, CitiMortgage contends that pursuant to the security and recognition agreements executed by plaintiffs in conjunction with a refinancing of the mortgage in December 2003, CitiMortgage is entitled to defend its interest in the cooperative shares which includes making payments of amounts due under the lease without the plaintiffs' consent. Citimortgage contends that as to the causes of action alleged in the complaint, the plaintiffs

have failed to put forth evidence showing a likelihood of success on the merits, failed to demonstrate the prospect of irreparable injury if a preliminary injunction is withheld and failed to show that the balance of equities is in its favor. CitiMortgage claims that as the security agreement provides that the lender is entitled to advance payment under the lease and seeks reimbursement from the borrower, that the documentary evidence proves that plaintiffs' complaint should be dismissed.

Defendant Parkway also submits an affidavit in opposition to the motion for a preliminary injunction. Parkway contends that an accounting was provided to the plaintiffs on July 2, 2009 showing that the arrears due as of July 2, 2009 were \$17,682.00. Further, Parkway contends that the plaintiffs have failed to provide any checks or written receipts to show that the co-op's calculations were inaccurate or that there is a question of fact as to the amount of arrears due. Parkway contends that the plaintiffs will not suffer irreparable injury because any monetary damages they are seeking are capable of being recompensated. Parkway also contends that the balance of equities in their favor as plaintiffs are in arrears and have failed to show that Parkway failed to properly credit their account.

Upon review and consideration of the plaintiffs' order to show cause, defendants' opposition and plaintiffs' reply thereto, this court finds as follows:

In order to demonstrate entitlement to a preliminary injunction, the movant must establish (1) a probability of success on the merits, (2) the danger of irreparable harm in the absence of injunctive relief, and (3) a balance of the equities in favor of the movant (see Matter of Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd., 53 AD3d 612[2d Dept. 2008]; Montauk-Star Is. Realty Group v Deep Sea Yacht & Racquet Club, 111 AD2d 909[2d Dept. 1985]). "A court evaluating a motion for a preliminary injunction must be mindful that the purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2d Dept. 2009]; also see Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs., 65 AD3d 1051 [2d dept. 2009]; Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2d Dept. 2006]").

After reviewing the "Occupant Ledger" and the "Tenant History Summary" submitted by Parkway in opposition to the motion, it is not clear how the amounts which were paid by CitiMortgage were calculated. For example, the Tenant History

shows a balance due of \$26,349.36 in January 2010 without showing how this amount was derived. The occupant ledger leaves off in June 2009 and the Tenant History commences in November 2009. Although it is clear that the plaintiffs were in substantial arrears since March 2007, the plaintiffs are entitled to an adequate record of payment stating how the arrears and the amounts paid by CitiMortgage were calculated.

Although there is a question of fact as to the probability of success on the merits, where, as here, the denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced (see State v City of New York, 275 AD2d 740 [2d Dept. 2000]; Gramercy Co. v Benenson, 223 AD2d 497[1st Dept.1996]).

Further, the imminent threat of the plaintiff's loss of a valuable, long-term leasehold interest in the absence of an injunction satisfies the irreparable harm requirement for a preliminary injunction (see Chrysler Realty Corp. v Urban Inv. Corp., 100 AD2d 921 [2d dept. 1984]). A balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action (see Masjid Usman, Inc. v Beech 140, LLC, 68 AD3d 942 [2d Dept. 2009]; S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc., 57 AD3d 642 [2d Dept. 2008]; Jiggetts v Perales, 202 AD2d 341[1st Dept. 1994]).

Accordingly, a preliminary injunction is granted to the extent that Parkway is enjoined from taking any action to terminate the subject proprietary lease, to move for judicial or nonjudicial sale, from commencing summary proceedings to evict the plaintiffs or otherwise interfering with plaintiffs' occupancy and possession of the premises on the basis of defaults set forth in the notices to cure during the pendency of this action.

The foregoing is conditioned upon plaintiff continuing payments of maintenance and other related costs while the action is pending and filing an undertaking in accordance with CPLR § 6312, which amount shall be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking.

Settle Order on Notice.

Dated: March 7, 2011  
Long Island City, N.Y.

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**ROBERT J. MCDONALD, J.S.C.**

