

R&L Realty Assoc. v 205 W. 103 Owners Corp.

2011 NY Slip Op 31603(U)

June 13, 2011

Sup Ct, NY County

Docket Number: 104662/2011

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

R&L Realty Assocs.

INDEX NO. 104652/11

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

205 West 103 Owners Corp.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this ~~motion~~ ^{petition} for Art. 78

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition is}

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

UNFILED JUDGMENT

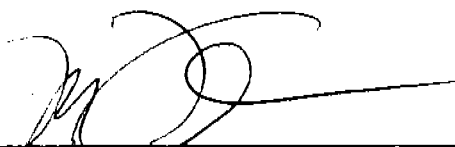
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MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 6/13/11


MARCY S. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDGMENT SETTLE ORDER/JUDGMENT

THIS DOCUMENT IS UNOFFICIALLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

R&L REALTY ASSOCIATES,
Petitioner,

Index No.: 104662/2011

- against -

205 WEST 103 OWNERS CORP.,
Respondent.

DECISION/ORDER

_____ x

In this Article 78 proceeding, petitioner R&L Realty Associates (R&L) seeks, among other relief, an order compelling respondent 205 West 103 Owners Corp. (205 West) to issue new executed and sealed stock certificates and proprietary leases for the 25 apartments that are the subject of a prospective bulk sale by R&L to purchaser David Paz (Paz) or his designees.

It is well settled that an Article 78 proceeding in the nature of mandamus “lies only to compel the performance of a purely ministerial duty and only where the party seeking mandamus demonstrates a clear legal right to that relief.” (Matter of Guzman v 188-190 HDFC, 37 AD3d 295, 296 [1st Dept 2007], lv denied 9 NY3d 801.) “Where the issue of the ownership of shares in a corporation is in dispute, mandamus to compel the corporation to transfer such shares is not available.” (Id. at 296-297.) In contrast, where there is no dispute over ownership, a court may properly direct the ministerial act of issuance of stock certificates. (See CMI II v Newman & Newman, P.C., 19 Misc3d 1131(A) [Sup Ct, New York County 2008], citing Matter of Moynihan, 80 NY2d 322 [1992].)

By judgment entered on September 7, 2010 (Shomron Aff. in Support, Ex. 3), this court

authorized Ruth Shomron, as the wind up partner of R&L, to enter into a bulk sale of the 25 cooperative apartments for which R&L owns the shares. 205 West appears to attempt to create an issue as to whether R&L in fact owns the shares for these apartments. However, R&L demonstrates that it has the original Stock Certificates for the 25 apartments – i.e., Certificate #2 from 1992 (see id., Ex. 13), and four Certificates from 2008 (id., Ex. 14) for the four apartments that Yoram Fuks was directed by this court to transfer back to R&L. (See Order dated November 16, 2006, id., Ex. 2.)

205 West claims that there is a Stock Certificate #12 that replaces Certificate #2, as evidenced by a stock book in the possession of the managing agent. (205 West “Response to Petition,” ¶ 4[a].) However, 205 West does not produce the stock book. 205 West also acknowledges that it hired an attorney in 2001 to issue new Stock Certificates and proprietary leases. (Id., ¶ 4[d].) Yet, it does not produce the Certificates.

To the extent that 205 West claims that there is a discrepancy between the number of shares (11,810) that R&L has contracted to sell to Paz (see Shomron Aff. In Support, Ex. 8 [Contract of Sale]) and the number of shares reflected in the Stock Certificates that R&L holds, this contention is also unavailing. Review of Certificate #2 and the four certificates for the Yoram Fuks’ apartments shows that the 25 apartments that are the subject of the sale have 11,810 shares allocated to them.¹

The court accordingly finds that 205 West fails to raise a bona fide issue as to R&L’s

¹ There is a de minimis discrepancy in that Certificate #2 allocates 585 shares to Apartment 6B. The 2008 Certificate which apparently corresponds to Apartment 6B allocates 600 rather than 585 shares. However, Ex. A to the Contract of Sale to Paz allocates the correct number of shares, 585, to Apartment 6B.

ownership of the shares.

Turning to 205 West's other arguments in opposition to the sale, the court finds unavailing 205 West's claim that R&L must post a bond. The bond requirement applies only to lost certificates. (Shomron Aff. In Reply, Ex. 5 [Proprietary Lease, § 7].) As held above, 205 West fails to show, or to raise a triable issue of fact as to whether, R&L has lost the certificates for the shares that are to be sold.

205 West further claims that R&L is in violation of an "Assurance of Discontinuance" agreement between R&L and the New York State Attorney General, dated October 23, 1995, which allegedly requires R&L to amend the offering plan for the cooperative prior to any "public offering or sale." (Shenkar Aff. In Opp., Ex. A, at 2.) Even assuming arguendo that 205 West has standing raise the contention, it fails to show that R&L has not complied with the terms of the agreement. The agreement provides in pertinent part that R&L "shall not hereafter make or take part in a public offering or sale . . . of any securities or commodities . . . unless and until there shall have been filed with the Department of Law, an offering statement or prospectus which is filed and is kept current." (See id.) 205 West fails to submit any authority showing that the offering plan on file with the Attorney General is not current, or that it was required to have been amended prior to a bulk sale.

205 West further contends that prior to issuing new stock certificates for the purchaser, R&L must cure violations issued against its apartments by HPD and pay arrears for assessments issued in April and May of 2011. Again, 205 West does not cite any provision of the governing documents (e.g., by-laws, proprietary leases, or offering plan), or any legal authority that requires R&L to cure the violations prior to the issuance of Stock Certificates for the bulk sale.

205 West also fails to show that it was entitled to file a UCC-1 financing statement. It is well settled that while the filing of a UCC-1 financing statement perfects a security interest, a financing statement alone cannot create a valid security interest. (United States v Rodriguez Ramirez, 291 FSupp2d 266, 269 [SDNY 2003] [applying New York law] [decided under prior version of UCC Article 9].) 205 West wholly fails to demonstrate any basis for filing the security statement, as it fails to demonstrate the existence of any security agreement between it and R&L. (See UCC 9-509 [a][1], [b].) Nor does it show that the open HPD violations and/or an alleged “emergency repair lien” against the apartments give rise to a security interest. 205 West should therefore be ordered to file a UCC-3 termination statement, terminating the UCC-1 statement.

This court previously ordered that all of the proceeds of the sale shall be deposited with the court pending resolution of the partnership dispute in Fuks v Rakia Assocs., et al. (Sup Ct, New York County, Index No. 122768/96). (See Shomron v Griffin, Sup Ct, New York County, Index No. 102882/02, Judgment dated August 16, 2010, ¶ 6.) The court will further order that the amount of the alleged HPD repair lien (\$13,065) shall remain on deposit pending resolution between R&L and 205 West of the dispute over the HPD lien.

As to 205 West’s claim to arrears based on an assessment, the court finds that the circumstances under which the assessment was made are highly questionable. Even assuming that the assessment was valid, it is not a basis for delaying the bulk sale. However, the amount of the claim for the assessment (\$1,000 per apartment per month since April 2011), shall remain on deposit pending resolution between R&L and 205 West of the dispute over the assessment.

The court further rejects 205 West’s claim that the shares for the four Yoram Fuks

apartments are not unsold shares. In any event, any issue as to their status is not a basis for deferring the sale.

The court has considered 205 West's remaining objections to the sale and finds them to be without merit. This court noted in connection with its order dismissing a prior action by 205 West that the action appeared "to be nothing more than an attempt to make an end-run around the order made in September directing the bulk sale." (See 205 West 103 Owners Corp. v Shomron, Sup Ct, New York County, Index No. 102882/02, Order dated November 9, 2010, Transcript at 18.) 205 West's objections in response to the instant petition are yet another attempt to frustrate this court's order denying the bulk sale and will not be countenanced by the court.

Finally, R&L is entitled to inspect the books and records of 205 West. (Business Corporation Law § 624 [b], [f].)

It is accordingly hereby ORDERED that R&L's petition is granted to the following extent:

It is hereby ORDERED and ADJUDGED that respondent 205 West shall prepare, execute and deliver at the closing the following documents in connection with R&L's impending sale to Paz or his designees (hereafter purchaser) of the shares allocated to 25 apartments at 205 West 103rd Street, New York, New York (hereafter apartments): (1) new executed and sealed stock certificates and proprietary leases for each of the apartments, to be issued to R&L's purchaser or his designees, as specified by R&L; and (2) a letter from 205 West stating that R&L has paid fully its maintenance and all other charges due for the apartments through the date of the closing. Provided that: the amounts for an HPD emergency repair lien (\$13,065) and the amounts for an alleged assessment (\$1000 per apartment per month since April 2011) shall

remain on deposit with the proceeds of sale pending resolution between R&L and 205 West of the dispute over the lien and assessment, or until further order of the order; and (3) a UCC-3 termination statement terminating the UCC-1 financing statement that 205 West filed against Apartment 6A; and 4) such other documents as may be reasonably required in connection with R&L's sale of the apartments; and it is further

ORDERED and ADJUDGED that the UCC 3 statement shall be filed within 10 days after service of a copy of this order with notice of entry; and it is further

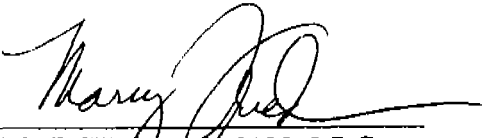
ORDERED and ADJUDGED that R&L may, upon two days' written notice to 205 West's attorney inspect the books and records of 205 West, as described in R&L's Demand dated March 28, 2011; and is further

ORDERED and ADJUDGED that R&L shall forthwith serve a copy of this order with notice of entry upon 205 West; and it is further

ORDERED that the Clerk shall enter judgment accordingly and that petitioner have execution thereof.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
June 13, 2011



MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT

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