

**Matter of 51-53 W. 129th St. HDFC v Attorney
General of the State of N.Y.**

2011 NY Slip Op 33096(U)

November 29, 2011

Sup Ct, NY County

Docket Number: 107352/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

Application of 51-53 WEST 129th STREET HDFC,
Petitioners,

Index No.: 107352/11

-against-

THE ATTORNEY GENERAL OF THE STATE OF
NEW YORK, THE NEW YORK CITY DEPARTMENT
OF HOUSING PRESERVATION AND DEVELOPMENT
and THE COMMISSIONER OF FINANCE OF THE
CITY OF NEW YORK,

Respondents.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PAPERS NUMBERED
FILED
NOV 29 2011
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NEW YORK

The petitioner is a New York State not-for-profit Housing Finance Development Corporation (HDFC). The petitioner, by order to show cause (OSC) dated June 27, 2011, seeks the Court's approval authorizing the sale of substantially all of its assets pursuant to the New York State Not Profit Corporation Law (N-PCL) § 511. (see affirmation of Eric Shamside-Deen, ¶¶ 1, 2a). As required by the N-PCL § 511(9)(b), the New York State Attorney General (AG) was served with notice of the application on May 9, 2011. Petitioner seeks the sale of its primary corporate asset, the real property located 51-53 West 129th Street, New York, New York (the subject premises). In support of its OSC, petitioner submits, *inter alia*, the affidavit of one of its Board Members. The premises is the subject of an *in rem* tax foreclosure judgment that was entered on February 23, 2011. A transfer of the subject premises to another not-for-profit HDFC is currently scheduled for November 30, 2011.

In its OSC, petitioner also requested a Temporary Restraining Order (TRO) and a

preliminary injunction against the respondents New York City Department of Housing Preservation and Development (HPD) and the Commissioner of Finance of the City of New York (collectively "City Respondents") prohibiting City Respondents from taking steps to transfer, convey, alienate or otherwise affect the petitioners title to or interest in the subject property until the Court issues an order determining the status of its application to sell the premises.

City Respondents opposed the TRO and injunction and represented they would not act to dispose of the property until after October 30, 2011. Thus, the Court denied the TRO and adjourned the initial hearing to allow the petitioner to meet with respondents, the AG in particular, to provide them with additional information to seek their approval for a no objection endorsement to the corporate sale.

BACKGROUND

The petitioner is a New York State not-for-profit HDFC which was incorporated as a Type D corporation in November 1984, consistent with the requirements of the New York State Private Housing Finance Law (PHFL) and the approval of HPD, the overseeing city agency. (see Certificate of Incorporation, petitioner's OSC Ex. A). The Certificate of incorporation reads "[t]he corporation is not formed for pecuniary profit or financial gain. The corporation is organized exclusively for the purposes of developing a housing project for persons of low income located at 51-53 West 129th Street, New York, New York" (see *id.* p.1, ¶ II). The premises is a six-story, 24 unit apartment building which the petitioner acquired on August 9, 1985, by mortgage agreement and with the approval of HPD. Petitioner satisfied the mortgage in December 1996. The premises have been and are still occupied by low-income tenants, consistent with the requirements of the petitioner's Certificate of Incorporation, PHFL, and HPD.

On January 4, 2008, the Commissioner of Finance of the City of New York filed an *in rem* tax foreclosure action against the petitioner for failure to pay real estate taxes and other

charges against the subject premises in the amount of \$571,431.07.

On or about June 28, 2010, petitioner entered into a contract to sell the subject premises to Tal Bar-Or, a private purchaser, in the amount of 1.5 million dollars. Petitioner also secured a real estate property appraisal for the premises for 1.5 million dollars from Thomas C. Salerno, MAI, Certified General Real Estate Appraiser (see petitioner's Ex. C, D).

On February 23, 2011, a judgment of foreclosure was entered against the premises. Pursuant to the Admin Code § 11-412.1(d) and Post Judgment Notice, the deadline for the mandatory tax redemption period was June 23, 2011 (see Petitioner's OSC Ex. 2, Post Judgment Notice). Petitioner failed to redeem the property during the mandatory redemption period.

Prior to the judgment of foreclosure being entered on February 23, 2011, on February 14, 2011, the petitioner filed a proposed OSC and verified petition for the sale of the premises, its corporate asset, with the AG, pursuant to N-PCL § 511(9)(b). On May 9, 2011, after conversations with the AG's representatives concerning the February 14, 2011 application, the petitioner filed an amended proposed OSC and verified petition.

Before this Court is an OSC brought by the petitioner, dated June 27, 2011, which seeks the Court's approval authorizing the sale of the premises and an injunction prohibiting the City Respondents from taking any steps to transfer, convey, alienate or otherwise affect the petitioner's title to or interest in the subject premises. In support of its OSC, petitioner attached a contract for sale, dated June 28, 2010 it entered into with Tal Bar-Or, a private purchaser, in the amount of 1.5 million dollars. Tal Bar-Or seeks the private development of the property, which would result in the displacement of the low-income tenants. The petitioner justifies the sale alleging; (1) "strictly limited revenues and rising costs... of operating the building have made it increasingly difficult in recent years, and eventually impossible, for the petitioner to meet it's tax obligation" and maintain decent services for their low income tenants; and (2)

petitioner needs to pay corporate debts to various vendors, including debts to: (a) its building manager Development Outreach Inc., in the amount of \$235,000, and (b) past due New York City real estate taxes in the amount of \$571,431.07 (*see id.*).

HPD opposes petitioner's motion to authorize the sale of its assets and to prevent the transfer of the property. HPD proffers that petitioner has no right to redeem the subject premises because the mandatory tax foreclosure redemption period has expired. Admin Code § 11-412 .1(d), permits a property owner included in an *in rem* foreclosure judgment, to redeem the property within four months of the entry of the foreclosure judgment, if such party pays all outstanding taxes or charges on the property or enters into an installment agreement to do so. HPD asserts that *in rem* tax foreclosure judgment was entered on February 23, 2011, and the petitioner failed to act by the four month deadline to redeem the property, which expired on June 23, 2011. Accordingly, it is now within the City's discretion to transfer the premises to a qualified third party. HPD also proffers that the petitioner cannot sell the subject property without its approval as the overseeing city housing agency pursuant Article XI of the PHFL, and that allowing the sale to a private purchaser would contravene the purpose for the HDFC's creation, namely to develop housing for persons of low income. Moreover, HPD maintains that the petitioner does not meet the standard for a preliminary injunction.

The AG also opposes the petitioner's motion to authorize the sale of its assets. While the AG's express approval is not required, N-PCL §§ 510(a)(3), 511(9)(b) and 511 requires that the sale of all or substantially all of the assets of the petitioner's not-for profit corporation requires court approval, *on notice to* the Attorney General. The AG is required to review the not-for-profit corporation's application to satisfy the procedural and substantive legal standards of N-PCL §§ 510-511. The AG has withheld their no objection endorsement on the grounds that: (1) the petitioner has not substantiated its alleged corporate debt to their satisfaction justifying the property sale; (2) petitioner has not received HPD's approval for the sale; and (3)

the petition is deficient because an exhibit is missing and the proposed order fails to identify the property that is the subject of the sale (see Affirmation of Paula Gellman, p. 2 ¶ 4).

DISCUSSION

Approval Authorizing Sale of Premises

N-PCL 510(a)(3) provides that a corporation, such as the petitioner, shall not sell any of its property without applying for and obtaining leave of the court pursuant to N-PCL § 511.¹ The Court may authorize the sale "[i]f it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted" (See N-PCL § 511 [d]). The Court concludes that petitioner has not met this standard. It appears that the sale is much more for the benefit of the for-profit purchaser/developer Tal Bar-Or and the outstanding corporate vendors of the petitioner rather than promoting the interests of the petitioner or its members. Though petitioner argues that it is necessary to sell the premises in order to pay off corporate debts, N-PCL § 517 provides that the members of a corporation shall not be personally liable for the debts, liabilities or obligations of the corporation, except under specific obligations, and none of those exceptions apply here. Additionally, the sale of the building to an individual purchaser rather than a transfer of the premises by the City to a qualified HDFC is in contravention with the purpose of the HDFC's creation, which was to use the premises as housing for low-income tenants.

Moreover, the Court is concerned by the issues the AG raised in declining to grant

¹ If the corporation is, or would be if formed under this chapter, classified as a Type B or Type C corporation under section 201, such sale, lease, exchange or other disposition shall in addition require leave of the supreme court in the judicial district or of the county court of the county in which the corporation has its office or principal place of carrying out the purposes for which it was formed. In addition, N-PCL § 201(c) provides . . . "[a] type D corporation is subject to all provisions of this chapter which are applicable to a type B corporation under this chapter unless provided to the contrary in, and subject to the contrary provisions of, the other corporate law authorizing formation under this chapter of the type D corporation."

petitioner a no objection endorsement of the sale. The AG expressed concern regarding the proposed use of the sale proceeds to pay certain related party liabilities to Development Outreach, Inc. (Outreach), a not-for-profit corporation that acts as the managing agent for the petitioner, and to other corporations under its control. Specifically, the AG has questions regarding the \$235,000 that the petition alleges is owed to Outreach. The AG was not satisfied with the lack of documentation from the petitioner for this debt and had questions relating to whether Outreach had been overcharging petitioner for its management services. The AG also noted that while Outreach is a not-for-profit corporation, Outreach and petitioner share some of the same Board members. In addition, the AG raised issues regarding the alleged \$250,223 corporate debt to 2 West 130th Street HDFC and lack of documentation for the debts to 31-33 West 129th Street and 43-45 West 129th Street HDFC (see Affirmation of Paula Gellman, ¶¶ 21, 22).

Preliminary Injunction

A party seeking a preliminary injunction must demonstrate three things: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party (see *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]; *Jones v Park Front Apartments, LLC*, 73 AD3d 612 [1st Dept 2010]; CPLR 6301). Petitioner has not met this standard.

Petitioner has failed to demonstrate the danger of irreparable harm in the absence of injunctive relief as the petitioner's Board Members are insulated from personal liability of its outstanding debts regardless of whether Tal Bar-Or or another third-party is transferred title, as petitioner is a corporation (see N-PCL § 517). The only entities that stand to benefit from the sale of the subject premises to Tal Bar-Or are the petitioner's vendors and Tal Bar-Or. Some of these are the same vendors that the AG questions and upon that basis withholds its no objection endorsement. Furthermore, the balance of equities are in the City Respondents'

favor as there is a strong public policy in favor of keeping the subject premises as low-income housing.

In light of the foregoing, the Court need not address whether petitioner requires HPD's approval for the sale of the premises.

CONCLUSION

Accordingly it is,

ORDERED that the petitioner's motion for the Court's approval authorizing the sale of substantially all the assets of the not-for-profit corporation Housing Development Finance Corporation pursuant to the New York State Not-For-Profit Corporation Law § 511 is denied; and it is further,

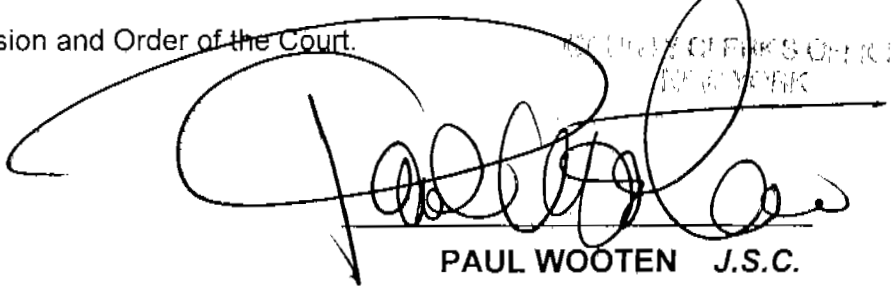
ORDERED that petitioner's request for an injunction is denied; and it is further,

ORDERED that the transfer of the premises to a third-party scheduled for November 30, 2011 is stayed for ten business days to allow the petitioner to file a Notice of Appeal and seek leave for a stay pending its appeal to the Appellate Division, First Department; and it is further,

ORDERED that the Clerk shall enter this matter accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11 / 29 / 2011


PAUL WOOTEN J.S.C.

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