Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ROBERT A. STIDOLPH,

Plaintiff,

-against-

771620 EQUITIES CORP., et al.,

Defendants.

Index No. 11636/11

Motion
Date September 20, 2011

Motion
Cal. No. 26

Motion
Sequence No. 1

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Order to Show Cause-Affidavits-Exhibits...	1-6
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Upon the foregoing papers it is ordered that the Order to Show Cause by plaintiff, Robert A. Stidolph seeking: 1) a preliminary injunction on any action by the defendants or their agents and attorneys to foreclose upon the cooperative shares allocated to or evict the plaintiff from his Unit 6J, located at 77-16 Austin Street, Forest Hills, New York 11375 ("Unit"); 2) granting a permanent injunction on any action by the defendants or their agents and attorneys to foreclose upon the cooperative shares allocated to or evict the plaintiff from his Unit; 3) compelling defendants to correct their corporate records to reflect the correct number of shares allocated to plaintiff's unit; 4) compelling defendants to confirm their corporate records with respect to the proper maintenance charges to be imposed against plaintiff's Unit; 5) compelling defendants to pay SCRIE credits improperly withheld from plaintiff; and 6) compelling defendants to remove all charges imposed for sublet fees against plaintiff's Unit is hereby decided as follows:

Those branches of the Order to Show Cause for the same and ultimate relief sought in the Complaint (ie. all relief sought other than the preliminary injunction) are premature, as issue has not been joined. It is noted that declaratory judgment is

not a provisional remedy and may not be obtained in a motion prior to the joinder of issue (*see*, CPLR 3001, 3211, 3212; *McHugh v. Weissman*, 46 AD3d 369 [2007]; *Elec. Data Sys. Corp. v. Xerox Corp.*, 273 AD2d 28 [2000]; *Durkin v. Durkin Fuel Acquisition Corp.*, 224 AD2d 574 [1996]).

That branch of the motion for a preliminary injunction is hereby granted as follows:

"The law is well settled that to prevail on an application for preliminary injunctive relief, the moving party must demonstrate '"(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position"'(*Barone v. Frie*, 99 AD2d 129, 132 [2d Dept 1984] *quoting from Gambar Enterprises v. Kelly Servs.*, 69 AD2d 297, 306, 418 [2d Dept 1979); *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 552 [1990]; and *W.T. Grant Co. v. Srogi*, 52 NY2d 496, 517, [1981]; *see also*, *Merscorp, Inc. v. Romaine*, 295 AD2d 431, 562 [2d Dept 2002]; and *Neos v. Lacey*, 291 AD2d 434 [2d Dept 2002]). The existence of factual disputes will not preclude the granting of temporary injunctive relief in order to maintain the *status quo* (*U.S. Reinsurance Corp. v. Humphreys*, 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also*, CPLR 6312[c]; and *Albany Medical College v. Lobel*, 296 AD2d 701,702 [3d Dept 2002]). The determination as to whether to issue a preliminary injunction is a matter left to the sound discretion of the Court (*see*, *Doe v. Axelrod*, 73 NY2d 748, 750 [1988]). Preliminary injunctive relief is a drastic remedy which will not be granted 'unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (*First Nat. Bank of Downsville v. Highland Hardwoods*, 98 AD2d 924, 926, 471 NYS2d 360; *accord*, *607 Buegler v. Walsh*, 111 AD2d 206, *Orange County v. Lockey*, 111 AD2d 896, 897 [1985]; *William M. Blake Agency, Inc. v. Leon*, 283 AD2d 423, 424 [2d Dept 2001]; and *Peterson v. Corbin*, 275 AD2d 35, 36 [2d Dept 2000]). As the court stated in *Tucker v. Toia*, 54 AD2d 322, 325-326, however, "it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (*Hoppman v. Riverview Equities Corp.*, 16 AD2d 631; *Weisner v. 791 Park Ave. Corp.*, 7 AD2d 75, 78-79; *Peekskill Coal & Fuel Oil Co. v. Martin*, 279 App Div 669, 670; *Swarts v. Board of Educ.*, 42 Misc 2d (761,) 764, *supra*; *cf. Walker Mem. Baptist Church v. Saunders*, 285 NY 462, 474)." The existence of factual disputes will not preclude the granting of

temporary injunctive relief in order to maintain the *status quo* (*U.S. Reinsurance Corp. v. Humphreys*, 205 AD2d 187, 192, 618 [1st Dept 1994]); *see also*, CPLR 6312[c]; and *Albany Medical College v. Lobel*, 296 AD2d 701,702 [3d Dept 2002]).

The plaintiff moves by order to show cause seeking, inter alia, an order granting a preliminary injunction on any action by the defendants or their agents and attorneys to foreclose upon the cooperative shares allocated to or evict the plaintiff from his Unit 6J, located at 77-16 Austin Street, Forest Hills, New York 11375. The plaintiff submits in support of this application, inter alia, his affidavit, a copy of a Proprietary Lease, and a copy of the Fourteenth Amendment to the Offering Plan.

To prevail on an application for preliminary injunction relief the first prong of the test is a demonstration by plaintiff of a likelihood of success on the merits. Here, the plaintiff has asserted causes of action for: a declaratory judgment that the defendants are not entitled to foreclose upon or to evict plaintiff from the Unit #6J, located at 77-16 Austin Street, Forest Hills, New York 11375 ("the Unit"), a declaratory judgment compelling the defendants to continue to accept payment of maintenance charges based upon the allocation of 585 shares to the Unit, a declaratory judgment compelling the defendants to confirm the prior allocation of 585 shares to the Unit and to perform and all necessary ministerial tasks in connection with such recognition, declaratory judgment compelling the defendants to recognize the plaintiff is a "Holder of Unsold Shares" and thereby exempt from any subletting charges, the monetary amount of $23,000, since defendants have wrongfully withheld SCRIE credits to which plaintiff is entitled, and abuse of process.

This court finds that plaintiff has made a sufficient showing of likelihood of success. As to likelihood of success, "(i)t is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits (citations omitted)" (*Tucker v. Toia*, *supra*, 54 AD2d at 326). Plaintiff has set forth facts supporting his claims. Accordingly, upon the record presented and in the exercise of its discretion, the Court concludes that the plaintiff has demonstrated a reasonable likelihood of success on the merits.

With regard to the second prong of the test, the plaintiff has demonstrated that he will suffer an irreparable injury if the preliminary injunction is not granted. The plaintiff's allegations that he is subject to the loss of his property,

constitutes an immediate injury which cannot be adequately compensated by monetary damages, and qualifies as an irreparable injury supporting an award of injunctive relief (*see, Jiggets v. Perales*, 202 AD2d 341 [1st Dept 1994]; *Housing Works, Inc. v. City of New York*, 255 AD2d 209 [1st Dept 1998]).

With regard to the third prong of the test, the plaintiff has demonstrated that equity is balanced in his favor. Where, as here, the plaintiff seeks to obtain by the issuance of this preliminary injunction the same injunctive relief sought in the complaint, a preliminary injunction will not be granted unless the plaintiff demonstrates, upon clear and undisputed facts, that such relief is imperative and because without it, a trial would be futile (*Xerox Corp. v. Neises*, 31 AD2d 195 [1968]). The Court, having weighed the drastic nature of the relief sought against the plaintiff's allegations of loss of his property and eviction, finds that the plaintiff demonstrated the existence of the extraordinary circumstances which would tip the balance of equity in his favor (*Di Marzo v. Fast Trak Structures, Inc.*, 298 AD2d 909 [2002]; *Penfield v. New York* , 115 AD 502 [1st Dept 1906]).

Moreover, upon review of the parties' factual averments, the Court concludes that the equities balance in favor of maintaining the *status quo* pending resolution of the underlying dispute (*Merscorp, Inc. v. Romaine, supra; Alside Div. of Associated Materials Inc. v. Leclair,* 295 AD2d 873, 875 [3d Dept 2002]; and *State v. City of New York,* 275 AD2d 740, 713 NYS2d 360 [2d Dept 2000]). That is, the harm to be suffered by plaintiff by the loss of his property and eviction outweighs the harm to defendants resulting from the granting of the requested injunctive relief.

Finally, CPLR 6312(b) directs the court to fix the undertaking in an amount that will compensate the defendants for damages incurred "by reason of the injunction", in the event it is determined that the plaintiff was not entitled to the injunction (*see, Margolies v. Encounter, Inc.*, 42 NY2d 475, [1977]; and *Schwartz v. Gruber,* 261 AD2d 526 [2d Dept 1999]). The fixing of the amount of an undertaking is a matter which rests within the sound discretion of the court (*Clover Street Associates v. Nilsson,* 244 AD2d 312, 313 [2d Dept 1997]). Upon a review of the papers submitted on the motion by the parties, the Court is unable to determine the amount of undertaking that will be reasonable and adequate under the circumstances presented. Accordingly, the Court's determination on this issue is reserved pending compliance with the directives set forth hereinafter.

Accordingly, it is,

ORDERED, that the plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED , that the plaintiff shall post a bond in an amount to be determined upon the serving and filing of a motion by plaintiff to fix the bond amount pursuant to CPLR 6312(b) within fifteen (15) days of entry of this decision. Defendants may submit their position on the amount of the bond in the form of opposition or a cross motion. Alternatively, the parties may stipulate to the waiver of a bond or as to the amount and nature of the bond. If such undertaking is not posted or if such motion to fix the bond amount is not filed within fifteen (15) days of entry of this decision, this motion is denied. Such undertaking shall be in the form of surety, deposited with the Queens County Clerk or in a joint interest bearing escrow account.

Those branches of defendants' cross motion to dismiss plaintiff's first, second, third, and fifth causes of action pursuant to CPLR 3211(a) are denied.

The first cause of action seeks a declaratory judgment that the defendants are not entitled to foreclose upon or to evict plaintiff from the Unit #6J, located at 77-16 Austin Street, Forest Hills, New York 11375 ("the Unit").

The second cause of action seeks a declaratory judgment compelling the defendants to continue to accept payment of maintenance charges based upon the allocation of 585 shares to the Unit.

The third cause of action seeks a declaratory judgment compelling the defendants to confirm the prior allocation of 585 shares to the Unit and to perform and all necessary ministerial tasks in connection with such recognition.

The fifth cause of action seeks $23,000, since defendants have wrongfully withheld SCRIE credits to which plaintiff is entitled.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of

the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.)

To the extent that the motion is based upon all of plaintiff's causes of action which are grounded in a Proprietary Lease and the Fourteenth Amendment to the Cooperative Offering Plan, this documentary evidence is insufficient to dispose of these causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Proprietary Lease and the Amendment to the Cooperative Offering Plan are insufficient to dispose of the causes of action. Here, there are triable issues of fact.

Those branches of defendants' motion seeking to dismiss plaintiff's causes of action pursuant to CPLR 3211(a)(1) are denied.

That branch of defendants' motion seeking to dismiss plaintiff's sixth cause of action for abuse of process pursuant to CPLR 3211(a)(7) is granted.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v. Martinez* , 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (*1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see, Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the

complaint (*see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development*, L.P., 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

The court decides that branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action for abuse of process is granted, as the Complaint fails to adequately state a cause of action for abuse of process. In order to maintain an action for abuse of process, "[f]irst, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act. Next, the person activating the process must be moved by a purpose to do harm without that which has been traditionally described as economic or social excuse or justification . . . Lastly, defendant must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process" (*Board of Education of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Association, Inc.*, 38 NY2d 397 [1975]). Merely commencing a civil action, "without unlawful interference with person or property", is not sufficient to state a cause of action sounding in abuse of process (*Artzt v. Greenburger* 555 NYS2d 127 [1st Dept 1990]; *Mago v. Singh*, 47 AD3d 772 [2d Dept 2008]). Also, commencing a civil action via summons and complaint is not legally considered process capable of abuse (*Mago, supra* at 773). In the instant case, plaintiff has failed to allege in the Complaint that there was "regularly issued process", and as such, the sixth cause of action is dismissed.

Additionally, to the extent that the cross motion seeks dismissal of plaintiff's causes of action on statute of limitations grounds [ie. CPLR 3211(a)(5)] or on grounds that plaintiff has no standing to assert claims, such causes of action shall remain as factual issues exist regarding these causes of action at this pre-Answer stage of the proceedings.

Finally, it must be noted that defendants have improperly sought to reach the merits of the Complaint on this mere CPLR 3211(a) motion (*see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra).*

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: January 10, 2012

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Howard G. Lane, J.S.C.