

Adetutu v 1715 Nelson Ave. HDFC
2012 NY Slip Op 33873(U)
February 15, 2012
Supreme Court, Bronx County
Docket Number: 306318/11
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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Anthony A. Adetutu a/k/a
Anthony Oluwole Adetutu a/k/a/
Anthony Mike Adetutu

Plaintiff,

Index No.: 306318/11

DECISION/ORDER

Against-

1715 Nelson Avenue HDFC ,

Defendant,

Hon. Howard H. Sherman
J.S.C.

-----x
The following papers numbered 1-3 read on this motion by defendant for summary judgment noticed on August 1, 2011 and submitted on November 14, 2011

	<u>PAPERS NUMBERED</u>	
Order to Show Cause - Affirmation and Exhibits [1-8] Annexed	1	
Affirmation in Opposition	2	
Affirmation in Reply -	3	

Upon the foregoing papers motions , and after oral argument, the motion for a preliminary injunction is denied.

Facts and Procedural Background

In this action plaintiff seeks injunctive and declaratory relief in connection with his claim of ownership of cooperative shares issued in 2005 with respect to an apartment located in a residential building owned by 1715 Nelson Avenue Housing Development Fund Corporation ("HDFC") located at 1715 Nelson Avenue, Bronx, New York. Plaintiff alleges that he purchased the shares from the former owner of the unit to whom he had paid rent since moving into the unit in November 2004. That owner was the former building

superintendent.

Plaintiff also seeks an order preliminarily and permanently enjoining defendant from continuing the prosecution of a holdover proceeding initiated against him in the Housing Part of the Civil Court of the City of New York, Bronx County [Index No. 36338/2010] , as well as a stay of that proceeding until the final disposition of this action [Verified Complaint ¶ 36 (a)-37 (b)].

By order to show cause dated July 15, 2011, this Court (Aarons, J.) granted a temporary restraining order staying the summary proceeding pending the hearing and determination of this motion.

During the pendency of this action, counsel for plaintiff moved for and was granted leave to withdraw as attorney of record [CPLR § 321(b)(2)].

Related Action

In this complaint plaintiff argues that his contention that defendant's books and records are not in order was also an allegation in a verified complaint commenced by the HDFC in 2008 : [1715 Nelson Avenue Housing Development Fund Corporation v. Lorenzo Dock, et.al., [Index No. 306651-2008]. In that action, the HDFC sought a judgment against the building's former property managers for return of the corporation's books and records .¹ By decision /order of this court (Friedlander, J.) , plaintiff was granted a default judgment.

¹ It was alleged that defendants served in this capacity from 04/02 through 02/20/08.

Motion and Contentions of the Parties

Plaintiff seeks a preliminary injunction staying defendant from prosecuting the holdover proceeding against him so that in this action he can be declared the lawful owner of cooperative shares issued by the defendant. In support , plaintiff tenders a copy of a certificate dated April 7, 2005, designating Anthony (Mike) Adetutu as the owner of the shares as certified , but not signed, by the designated Secretary -Treasurer and President of the HDFC.²

Defendant opposes the motion and contends that there is no basis for a declaration that plaintiff is a lawful shareholder as the moving papers are not supported by either a contract of sale, or the results of a title search, or an application for Board approval, or by other indicia of ownership. In addition, defendant submits the affidavit of the board member listed as "President" on the copy of the certificate relied upon by plaintiff disputing its bona fides.

In pertinent part , that board member attests that she has resided in the subject building since 1988, and has been a member of the cooperative board since 2005. She contests the purported sale of the subject premises in 2005 on the grounds that the person from whom the purchase was alleged to have been made, was a tenant with whom plaintiff resided , and not a shareholder. She further attests that "[p]laintiff has never had either a contract to purchase [the unit] or a monthly payment schedule to purchase [the unit]", nor did he ever appear before the board to seek approval for any purchase. In addition, she

² Neither of the officers was a defendant in the 2008 action commenced by the HDFC.

attests that the first time she saw the stock certificate submitted by plaintiff, was in June 2010 in connection with a summary proceeding .

In addition, it is argued that the action for declaratory relief with respect to plaintiff's real property claim is barred by the statute of limitations.

Discussion and Conclusions

It is settled that a party seeking a preliminary injunction must demonstrate by clear and convincing evidence : 1) a likelihood of success on the merits, 2) irreparable injury in the absence of the injunction , and 3) a balancing of the equities in the movant's favor (see, CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 NY3d 839, 840, 833 N.E.2d 191, 800 N.Y.S.2d 48 [2005], Gilliland v. Acquafredda Enterprises, LLC, 2011 N.Y. App.Div. LEXIS 9028, 2011 NY Slip Op 9207 [1st Dept. 12/20/11]). The purpose of this provisional remedy is not to determine the ultimate rights of the parties , but to maintain the status quo and prevent the dissipation of property until such time as there can be a full hearing on the merits (see, Ying Fung Moy v Hohi Umeki 10 A.D.3d 604; 781 N.Y.S.2d 684 [2d Dept. 2004]; Residential Board of Managers of The Columbia Condominium, v.. Alden , 178 A.D.2d 121; 576 N.Y.S.2d 859 [1st Dept. 1991]).

Upon review of the submissions here and upon consideration of the applicable law, it is the finding of this court that plaintiff has failed to sustain his burden on this motion.

Of crucial significance here is the failure to demonstrate any irreparable or continuing harm resulting in substantial prejudice from the continuation of the holdover proceeding in which context plaintiff has already asserted the claim here, i.e., that he occupies the

premises not as alleged, as a month-to-month tenant, but as an owner of cooperative shares.

Absent a showing here that the respective claims to possession of the premises cannot be fully litigated in the preferred forum for this dispute, the Civil Court of the City of New York the court finds no basis to stay that proceeding (see, *Spain v. 325 W. 83rd Owners Corp.*, 302 A.D.2d 587, 755 N.Y.S.2d 303 ; see also, *Blutreich v. Amalgamated Dwellings, Inc.*, 46 A.D.3d 352, 847 N.Y.S.2d 557 [1st Dept. 2007]).

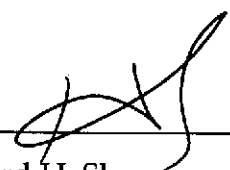
Plaintiff also fails to demonstrate on this record that the equities here balance in his favor as there is little in this record to indicate that plaintiff took any affirmative steps to enforce his rights of ownership during the period between the 2005 sale and the commencement of the most recent of the summary proceedings initiated during this period.

The court notes that at oral argument, it was confirmed that plaintiff is now on active duty in service of the armed forces of the United States, and as such, all further proceedings in the summary proceeding are to be continued in the Military Part of the Housing Court.

For the reasons above stated , it is ORDERED that plaintiff's motion for a preliminary injunction be and hereby is denied, and it is further ORDERED that the temporary restraining order granted by the court on July 15, 2011, as extended pending this determination , is hereby vacated, and the holdover proceeding in the Housing Part of the Civil Court restored to the calendar of the Military Part upon the filing with the Clerk of the Housing Part of the Civil Court of the City of New York - Bronx County, proof of service of a copy of this decision and order upon plaintiff by his commanding officer.

This constitutes the decision and order of this court.

Dated: February 15 2012


Howard H. Sherman