SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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LOTHAR KROLL, INNA KHITERER, SERGEI LEONTEV, ANDREAS KROLL, individually and derivatively as shareholders of 440 WEST 164th STREET HDFC,

Plaintiffs,

-against-

440 WEST 164th STREET HDFC; FIA 164th ST HOLDINGS LLC a/k/a FIA 164th HOLDINGS LLC; SAC 492071714, LLC; MARK SCHWARTZ; DAVID GOLDWASSER; RIVERSIDE ABSTRACT, LLC; CITY OF NEW YORK,

Defendants.

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DECISION AND ORDER

Index No.: 653885/2014
Mot. Seq. No. 001

O. PETER SHERWOOD, J.:

In this motion sequence number 001, plaintiffs move by order to show cause for a panoply of injunctive relief. Defendant Riverside Abstract, LLC ("Riverside") cross-moves to dismiss the complaint as against it. On March 9, 2015, the court denied the motion for a preliminary injunction and advised the parties that a written decision would be issued. This Decision and Order is that decision.

Background

This action arises from a transaction for the sale of shares in a cooperative building corporation (defendant or the "HDFC") appurtenant to certain apartments in a building located at 440 West 164th Street in New York City (the "Building"). The HDFC has operated and maintained the Building since it assumed ownership in 1982. However, because of financial difficulties arising from the alleged failure of certain residents to pay rent and the need to make repairs to the Building, the HDFC was unable to pay its real estate taxes. As a result, the City of New York filed a tax lien on the Building and commenced a foreclosure action. In an attempt to raise funds to make needed repairs, plaintiff Inna Khiterer secured a loan for $150,000 (the "Shanghai Note") from Shanghai Holdings LLC ("Shanghai") secured by a mortgage on the Building (the "Shanghai Mortgage"). Nonetheless, due to the physical deterioration of the Building, Ms. Gloria Hopson was appointed as

administrator for the Building pursuant to article 7A of the New York State Real Property Actions and Proceedings law.

Plaintiffs had owned shares in the HDFC and resided in apartments in the Building. Specifically, plaintiffs Lothar Kroll, Andreas Kroll, Inna Khiterer and Sergei Leontev and non-party Mitchell St. Clair owned the shares to apartments 1, 31, 32, 44 and 42 respectively. After appointment of the administrator, these individuals decided to sell their shares in the HDFC. To that end, plaintiffs and St. Clair entered into negotiations with defendants Schwartz and Goldwasser. Schwartz agreed to purchase the shares in the HDFC appurtenant to the five apartments and formed defendant FIA 164 Holdings LLC ("FIA") for that purpose. Goldwasser agreed to purchase the Shanghai Note and Mortgage. He formed defendant SAC4902071714 LLC ("SAC") as the entity that would acquire the Shanghai Note and Mortgage.

Plaintiffs allege that the proposed transaction was to occur in two stages. First, FIA would purchase the shares relating to apartments 1, 31, and 42, and SAC would purchase the Shanghai Note and Mortgage. The shares, and Shanghai Note and Mortgage would be held in escrow by defendant Riverside Abstract LLC ("Riverside") pursuant to an escrow agreement pending completion of a second stage. In stage two, Schwartz, Goldwasser, FIA, and SAC would make funds available to the HDFC so that it could satisfy the tax debt, remove the tax lien, and make the repairs necessary to remove the Article 7A administrator. Thereafter FIA would purchase the shares relating to apartments 32 and 44, which were expected to have a higher market value (due to the removal of the tax lien and repairs to the Building). Plaintiffs allege that none of the shares relating to the apartments would be released to defendants until after the second stage was completed.

Plaintiffs allege that in accordance with this structure, FIA and SAC deposited $125,000 in escrow with Riverside. Pursuant to the terms of the escrow agreement, the deposit was to be released to plaintiffs at the earlier of the removal of the Article 7A administrator or December 1, 2014, but it was not. Moreover, defendants never completed stage two of the transaction. Plaintiffs also contend that they resigned their positions on the board of the HDFC in light of their agreement to sell their shares. Thereafter, the HDFC noticed and held a special board meeting to elect a new board. Defendants Schwartz and FIA allegedly fraudulently induced plaintiffs to provide proxies to vote their shares at the election. In fact Schwartz and FIA voted the shares and Schwartz was

elected to the board. Plaintiffs further allege that the election was tainted as family members of shareholders voted their relative's shares at the meeting, and shareholders who were more than two months in rental arrears voted despite a provision in the HDFC's bylaws disqualifying such shareholders from voting.

Based on the foregoing, plaintiffs commenced this action and simultaneously moved by order to show cause for interim injunctive relief as follows:

> (1) enjoining FIA and Schwartz from holding themselves out as shareholders or owners of apartments #31, 42 and 1, collecting any rents for those units, or in any way encumbering, transferring, or entering into any agreements with respect to those shares;
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> (2) enjoining SAC, Goldwasser and Schwartz from assigning, encumbering or entering into any agreements with regard to the Property, declaring a default on the Shanghai Note, or exercising any rights pursuant to the Shanghai Mortgage;
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> (3) enjoining the HDFC , FIA, and Schwartz from representing or binding the HDFC to any agreements;
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> (4) enjoining FIA and Schwartz from encumbering, disposing or transferring the shares of apartments #31, 1 and 42;
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> (5) directing Riverside to release the $125,000 being held in escrow to plaintiff Inna Khiterer;
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> (6) enjoining the City of New York from conducting a foreclosure sale on or transferring title to the property;
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> (7) enjoining FIA, Schwartz, and the board members of the HDFC from noticing any shareholder meetings;
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> (8) directing SAC, Goldwasser and Schwartz to deposit with the court the amount of funds necessary to repair the property;
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> (9) permitting plaintiffs "derivatively to place a bond to satisfy the outstanding tax lien held by the City of New York for the property or undertaking for the tax lien to remove it from the property"
>
> (10) directing SAC and Schwartz to specifically perform on the agreement, including making all outstanding payments on the agreement and being responsible for all future payments; and
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> (11) enjoining SAC, and Goldwasser from transferring, assigning, pledging or selling the Shanghai Mortgage.

By stipulation of discontinuance dated February 9, 2015, the City of New York was dismissed as a defendant. By cross motion noticed on February 20, 2015, Riverside moved to be dismissed from the action. All other defendants have appeared and submitted opposition to the motion. On March 31, 2015, the HDFC filed for bankruptcy in the Southern District of New York.

Accordingly, on April 6, 2015, the Court issued an order staying this action as to the HDFC, but severed and continued the action as to the remaining defendant's. For the following reasons, the application for injunctive relief was denied on the record of the March 9th hearing, and Riverside's cross-motion to dismiss is granted.

Discussion

A. Plaintiffs' Order to Show Cause

The issuance of a preliminary injunction is governed by CPLR 6301, which provides, in pertinent part:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual . . . .

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). "The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the lower courts" (*id.*).

Given the breadth of the injunctive relief sought, plaintiffs seek through this order to show cause all of the ultimate relief they seek in this action. "It is settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment" (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]). Such extraordinary circumstances are not present here. Accordingly, plaintiffs' motion must fail. Moreover, because the plaintiffs have not satisfied the requirements for issuance of a preliminary injunction, the motion must be denied.

1. Probability of Success on the Merits

Plaintiffs assert causes of action for breach of contract, specific performance, fraud, declaratory judgment, fraudulent conveyances, rescission, and permanent injunctive relief. Plaintiffs make four arguments in support of the claim that they have demonstrated a probability of succeeding on the merits: (1) "[p]laintiffs have set forth sufficient proof that FIA and Schwartz breached their purchase agreement and engaged in fraud and collusion since they have not purchased the Stage Two

apartments at market value" (Mantia aff, NYSCEF Doc. No. 12, ¶ 54); (2) the "unambiguous terms of the escrow agreement require release of the $125,000 to Khiterer since the maturity date of December 1, 2014 has passed" (*id.* ¶ 55); (3) "the election of November 10, 2014 was not proper since delinquent shareholders were allowed to vote and be elected to the board, contrary to the bylaws" and non-shareholders were allowed to vote (*id.* ¶¶ 56-57); and (4) "the fact that the building continues to deteriorate and is not closer on removing the 7A [administrator] and failing to defend a tax lien foreclosure which could result in the sale of the building . . . pretty well establishes a breach of fiduciary duty" (*id.* ¶ 58). None of these arguments are persuasive.

Plaintiffs' first argument relates to the claims of breach of contract and fraud. "It is basic law, however, that injunctive relief may not be ordered to secure recovery in what amounts to a breach of contract action" (*Robjudi Corp. v Quality Controlled Products, Ltd.*, 111 A.D.2d 156, 157 [1985] [Titone, J. dissenting]; *see Halmar Distribs. v Approved Mfg. Corp.*, 49 AD2d 841, 841 [1st Dept 1975]). "The reason, of course, is that plaintiff has an adequate remedy at law, a remedy which is not made inadequate because the alleged insolvency of the corporate defendant may render a subsequent judgment unenforceable" (*Robjudi Corp.*, 111 AD2d at 157). Indeed, "[i]t is the ability to bring an action at law and recover judgment that determines the adequacy of the legal remedy, not the ability to collect on the judgment" (*id.*). As to the fraud claim, it is duplicative of the breach of contract claim and therefore must be dismissed (*see Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008] ["the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract"]). In any event, and as will be discussed below, monetary damages represents a fully adequate manner of compensating plaintiffs should they succeed on these claims. For the reasons plaintiffs' first argument fails.

Plaintiffs' second argument fails because the express terms of the escrow agreement are ambiguous. Exhibit "A" to the Escrow Agreement provides for release of the $125,000 deposit at the earlier of two events, labeled as "A" and "B" (*see* NYSCEF Doc. No. 25, at Riverside 7). Condition A is the removal of the Article 7A administrator, which indisputably has not happened (*see id.*). Condition B requires release of the funds on December 1, 2014, but imposes a further condition that Khiterer or her representative must "present proof of the above stated events to the escrow agent" (*see id.*). It could be argued that this further condition is a sub-condition to condition "B", and if so, obscures to what "proof" it is referring. In any event, monetary damages represents

a fully adequate manner of compensating plaintiffs should they succeed on their claims.

Plaintiffs' third argument fails because they have offered no evidence that any shareholder voting in the special election was not eligible to do so. Plaintiffs contend that shareholders who were in arrears on their rent, and non-shareholder relatives of shareholders were improperly allowed to vote. These allegations are not supported by evidence. Although plaintiffs' reply papers purport to attach rent records as exhibit "D", no document is attached to the reply affirmation as exhibit D.

Plaintiffs also contend that the continued deterioration of the building and failure of defendants to take action to remove the Article 7A administrator and defend the tax foreclosure action "pretty well establishes a breach of fiduciary duty" (Mantia aff, NYSCEF Doc. No. 12, ¶ 58). Apart from the fact that a claim for breach of fiduciary duty is not pleaded in the complaint, this argument simply asserts that defendants have not held up their end of the bargain with regard to the sale of the plaintiffs' shares in the HDFC. As such, the argument merely relates to the breach of contract claims, as to which injunctive relief may not be granted in this case.

Further, the complaint does not allege that plaintiffs made a demand on the cooperative board before bringing suit themselves, or that doing so would necessarily be futile. Thus, plaintiffs failed to demonstrate a likelihood of success on those claims that they purport to bring derivatively. In their reply affirmation plaintiffs argue for the first time that making a demand on the board would be futile (*see* Mantia reply aff, ¶ 8). Plaintiffs' position is that because shareholders who were in arrears in their rent were improperly allowed to vote in the special election following plaintiffs' resignation from the board, the special election was invalid because there was no quorum present. Thus, according to plaintiffs, "there is no present board of the co-operative" (*see* Mantia reply aff, ¶63). Despite the fact that plaintiffs improperly raised this argument for the first time in reply, it fails for the additional reason that plaintiffs have provided no evidence that those shareholders voting in the special election were not entitled to do so. Accordingly, plaintiffs have not demonstrated a likelihood of success on the merits as to any of the claims they purport to bring derivatively.

Finally, defendants contend that they have in fact paid plaintiffs all of the money owed them under the contracts for sale of all of the apartments, and that plaintiffs in fact have acknowledged receipt of those funds (*see* Carponter aff, NYSCEF Doc. No. 27, ¶¶14-15). Plaintiffs do not dispute this allegation.

2. Danger of Irreparable Harm

Plaintiffs have also failed to demonstrate a danger of irreparable harm. Plaintiffs have not shown any harm that could befall them that would not be compensable through an award of money damages. For example, plaintiffs contend that "plaintiffs will have transferred their interest in the Stage One apartments to [defendants] for reduced market value without having received the offsetting consideration at market value for the Stage Two apartments" (Mantia aff, ¶ 60). This is a harm that is compensable through an award of monetary damages. Similarly, plaintiffs contend that "Khiterer will suffer irreparable harm it she does not receive the funds to which she is unconditionally entitled pursuant to expressed provision of Escrow Agreement" (*id.* ¶ 61). Even accepting this contention as true, the alleged harm is entirely compensable through an award of money damages. Third, plaintiffs argue that if the Building is foreclosed upon and sold pursuant to the City of New York's tax lien, all of the shareholders in the cooperative will lose the equity in their apartments. Again, such harm is compensable in money damages. Lastly, plaintiffs allege that allowing "improperly elected directors to run the HDFC . . .would be disastrous for the HDFC" (Mantia aff, ¶ 64). This statement is conclusory and unsubstantiated as discussed above. Indeed, despite a multiplicity of causes of action alleged, this action is at bottom merely one for breach of an agreement to purchase plaintiffs' shares in the HDFC. Any harm flowing from that breach is compensable in money damages.

3. Balance of the Equities

Because plaintiffs have failed to carry their burden on the first two prongs, the court need not consider whether the balance the equities weigh decisively in plaintiffs' favor. Nonetheless, even if the court were to conduct such an analysis, plaintiffs have failed to meet their burden. Plaintiffs argue that "the building should remain a cooperative" and that defendants should not be permitted to "receive a windfall" (Mantia aff, ¶¶ 66-73). Plaintiff Khiterer was president of the board at the time the tax lien was placed on the Building. As a result, it is disingenuous for plaintiffs to contend that the state of the Building's finances including the impending foreclosure action is due to the defendants' actions or inactions.

B. Riverside's Cross-Motion to Dismiss

Riverside cross moves to dismiss on the grounds that (1) it has the contractual and statutory right to deposit the escrow funds into the court and be released from the action; (2) the escrow

agreement forestalls any of the claims asserted against Riverside; and (3) the breach of contract claim fails to state a claim. Finally, Riverside seeks to recover the fees and expenses it has incurred in defending this action. For the following reasons, the cross-motion is due to be granted.

Pursuant to ¶ 3(f) of the escrow agreement, Riverside has the right to deposit the escrow funds "with a court of competent jurisdiction, and abid[e] by the determination of such Court with respect thereto. In such event, such delivery shall constitute a complete discharge and release of" Riverside (Fleischmann aff, Ex. B, NYSCEF Doc. No. 25). Moreover, CPLR 2601(a) provides that "a party paying money into court pursuant to the direction of the court is discharged thereby from all further liability to the extent of the money so paid in." Accordingly, Riverside may deposit the funds into the Court and be released from this action. Once it has done so, plaintiffs will have no claim for damages against Riverside. Indeed, the escrow agreement specifically provides that Riverside shall not be liable for any error in judgment for any action taken or omitted except for acts or omissions that constitute willful misconduct or gross negligence (*see id.*, ¶ 3[d]). Plaintiff has not alleged that Riverside has engaged in acts or omissions rising to that level. Accordingly, once Riverside deposits the money into the court, it shall be dismissed from this action.

Lastly, Riverside is entitled to recover fees and expenses incurred in defending this action. Pursuant to ¶3(i) of the escrow agreement, FIA and Khiterer agreed to jointly and severally "defend, indemnify and hold [Riverside] harmless against all costs, claims and expenses (including reasonable attorneys' fees) incurred in connection with the performance of Escrow Agents' duties hereunder" (*id.*, ¶ 3[i]). Thus, Riverside is entitled to its fees and expenses from Khiterer and FIA jointly and severally.

Accordingly, it is hereby

ORDERED that plaintiffs motion for a preliminary injunction is DENIED; and it is further

ORDERED that the cross-motion of Riverside to dismiss the complaint as to it is GRANTED; and it is further

ORDERED that the portion of Riverside's claim that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees Riverside may recover against the plaintiffs and FIA is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within thirty (30) days from the date of this

order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1], upon the Special Referee Clerk in the General Clerk's Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

DATED: April 15, 2015

ENTER,

O.P. Sherwood

O. PETER SHERWOOD
J.S.C. 4/15/15

[1]Copies are available in Room 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).