

**Fullilove v Board of Directors of the 351 W. 114th St.
Hous. Dev. Fin. Corp.**

2018 NY Slip Op 31178(U)

June 12, 2018

Supreme Court, New York County

Docket Number: 150301/2018

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

COURTNEY FULLILOVE,

Plaintiff,

-against-

THE BOARD OF DIRECTORS OF THE 351 WEST
114TH STREET HOUSING DEVELOPMENT FINANCE
CORPORATION a/k/a THE MONTEREY HDFC,

Defendant.

Index No.: 150301/2018
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 6301, of the papers considered in reviewing plaintiff's motion for a preliminary injunction by order to show cause.

Papers	NYSCEF Doc. Numbers
Plaintiff's Summon and Verified Complaint	1
Plaintiff's Order to Show Cause	2-25, 32
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Defendant's Affidavit in Opposition	34, 36-51
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Nadel & Ciarlo, P.C., New York, (Michael J. Ciarlo, Esq., Adam Hanan, Esq. of counsel) for plaintiff.
Kellner Hertlihy Getty & Friedman, LLP, New York (Jeanne-Marie Williams of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff Courtney Fullilove moves pre-answer by order to show cause for a preliminary injunction under CPLR 6301 to enjoin defendant Board of Directors of the 351 West 114th Street Housing Development Finance Corporation, a/k/a The Monterey HDFC (HDFC), and its agents from (1) enforcing the alleged deadline for plaintiff to complete the combination of Apartments 3A and 3B; (2) forcing plaintiff to sell her shares in Apartment 3B; and (3) preventing plaintiff and her agents from combining both apartments.

Plaintiff brought this action against the HDFC seeking (1) a judgment directing the HDFC specifically to perform its contractual obligations to allow plaintiff to combine the two units she owns; (2) equitable relief in connection with the HDFC's breach of contract and breach

of the implied covenant of good faith and fair dealing; (3) a declaratory judgment that the HDFC must cooperate with plaintiff to comply with all local-law requirements to permit plaintiff to commence and complete the work to combine her units unobstructed; and (4) a judgment for plaintiff's legal fees.

Plaintiff has been the shareholder and owner and resident of Apartment 3A at 351 West 114th Street, New York, New York, since 2012. The HDFC manages and operates 351 West 114th Street. On December 30, 2015, plaintiff bought and closed on an empty apartment, Apartment 3B, which is adjacent to Apartment 3A, and sought to combine the two units. Plaintiff and the HDFC entered into a unilateral agreement under which plaintiff agreed to complete all renovations and construction work to combine the two apartments within two years, or by December 30, 2017. Plaintiff's failure to combine the apartments by the contractual deadline could (1) lead to the HDFC's revoking its consent to combine the apartments; and (2) oblige plaintiff to take all necessary steps promptly to sell Apartment 3B. (NYSCEF Doc. No. 4, Plaintiff's Ex. B, ¶ 2.)

After plaintiff bought the shares to Apartment 3B, the HDFC and plaintiff jointly executed an alteration agreement to combine the apartments. (NYSCEF Doc. No. 4.) The agreement requires plaintiff to give the HDFC (1) a narrative describing the scope of the work and (2) detailed plans and specifications of the work prepared by a licensed architect, with changes to be adopted by the HDFC or its agents as required. The HDFC had to approve all plans and specifications. The HDFC also had to approve in writing plaintiff's contractors, subcontractors, and any contractors hired post work-commencement. (NYSCEF Doc. No. 4.)

For this motion, plaintiff and the HDFC submitted conflicting accounts regarding who caused the delays on the project. Plaintiff alleges that the HDFC intentionally frustrated her timely combination of the two apartments to force her to sell Apartment 3B. (NYSCEF Doc. No. 26, Affirmation in Support of Order to Show Cause, at 5, § C, ¶ 13.) The HDFC alleges that plaintiff's personal circumstances led to the delays in plaintiff's project. (NYSCEF Doc. No. 33, Affirmation in Opposition, at 1-2, ¶ 3.)

Analysis

Under CPLR 6301, a party succeeds on a motion for preliminary injunction when the opposing party violates the movant's rights or when an opposing party's action, if committed, would injure the movant. A movant must demonstrate (1) the likelihood of ultimate success on the merits; (2) the danger of irreparable injury absent an injunction; and (3) a balance of equities tipping in the movant's favor. (*Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005].) A court has the discretion to apply this three-part test (*id.*) and may stress the strengths in one of the elements to compensate for weaknesses in the others. (*See Danae Art Int'l Inc. v. Stallone*, 163 AD2d 81, 82 [1st Dept 1990].) When the relief derived from a preliminary injunction is expected to be obtained from a judgment, however, preliminary injunctions are granted with "great caution and only when required by imperative, urgent, or grave necessity, and upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile." (*Xerox Corp. v Neises*, 31 AD2d 195, 197 [1st Dept 1968].)

1. Movant must show likelihood of success on merits.

Plaintiff has not shown a likelihood of success on the merits of her claim. The threshold inquiry to determine whether a movant has shown a likelihood of success on the merits is this: Has the movant tendered sufficient evidence demonstrating that the movant will ultimately win the relief sought in the underlying action? The movant must also establish a clear right to relief under the law and the undisputed facts. (*1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011].)

Plaintiff and the HDFC's agreement was negotiated at arms' length. (*See* NYSCEF Doc. No. 33 at 2). Plaintiff alleges that the HDFC frustrated her ability timely to complete the work to force her to sell Apartment 3B. Other evidence shows that plaintiff contributed at least to some of the delay in obtaining the HDFC's approval for plaintiff's plan, such as taking a five-month trip overseas. (NYSCEF Doc. No. 40, the HDFC's Ex. C; NYSCEF Doc. No. 43, the HDFC's Ex. F; NYSCEF Doc. No. 44, the HDFC's Ex. G; NYSCEF Doc. No. 7, Plaintiff's Ex. E; NYSCEF Doc. No. 9, Plaintiff's Ex. G; NYSCEF Doc. No. 17, Plaintiff's Ex. O; and NYSCEF Doc. No. 18, Plaintiff's Ex. P.) Plaintiff contends that she communicated through telephone calls and texts with the HDFC about her progress in addressing the HDFC's concerns. (NYSCEF Doc. No. 54, Plaintiff's Affidavit in Reply, at 6, ¶ 9.) But plaintiff provides no evidence about these communications she attested to in her affidavit.

Plaintiff argues that the HDFC breached the implied covenant of good faith and fair dealing. It also argues that because the HDFC engaged in bad faith tactics to frustrate plaintiff's performance under the Agreement, the business-judgment rule is unavailable as a defense to the HDFC. (*See* NYSCEF Doc No. 26 at 4, § A, ¶ 10.)

i. Implied covenant of good faith and fair dealing.

The implied covenant of good faith and fair dealing assures that neither party does anything that will destroy or injure the other party's right to receive contractual benefits. This includes promises that a reasonable person in the promisee's position would be justified in understanding were included in the good faith and fair dealing duties. (*See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153-154 [2002]; *Nesconset Z/I 1 LLC v Nesconset Acquisition, LLC*, 2016 NY Slip Op. 31874 [U], *7, 2016 WL 5848840, at *7 [Sup Ct, NY County 2016], citing *Seitzman v Hudson Riv. Assoc.*, 126 AD2d 211, 213-214 [1st Dept 1987].)

Plaintiff alleges that the HDFC breached its implied covenant of good faith and fair dealing. Plaintiff claims that (1) the HDFC unreasonably delayed reviewing her submitted design plans and drawings; (2) the HDFC's engineer inconsistently and redundantly reviewed her plans and drawings multiple times; (3) the HDFC improperly sought to shift the HDFC's structural costs and expenses to her; (4) the HDFC set unreasonable and unlawful conditions for her to obtain HDFC's consent; (5) the HDFC arbitrarily refused to sign off on required filings with the Department of Buildings even after its consultant clarified that it was required; and (6) the HDFC purposely miscommunicated or made outright misrepresentation to her. (NYSCEF Doc No. 26 at 3, § A, ¶ 7; and NYSCEF Doc No. 27, Plaintiff's Affidavit.)

Plaintiff's arguments fail to persuade this court. It is unclear whether the HDFC engaged in any action that would destroy or injure plaintiff's right to receive the contractual benefits. (*See* NYSCEF Doc No. 27, Plaintiff's Affidavit and NYSCEF Doc No. 34, Rick O'Keefe's Affidavit in Opposition.) Conflicting evidence exists about whether the HDFC failed duly to cooperate

with plaintiff's efforts to obtain the necessary approvals to combine the apartments. For example, plaintiff alleged that the HDFC misrepresented that its engineer advised against removing the partition wall separating the two apartments because it was a load-bearing wall. Plaintiff claims that the building engineer did not conclude that the wall was a load-bearing wall and that the engineer did not caution her against removing the wall. Plaintiff also claims that the engineer advised her that, based on his observation, removing the wall could result in minor settling. (NYSCEF Doc No. 27, ¶ 7.) The HDFC's engineer, Patrick Chen, informed plaintiff that even though the wall was not a load-bearing wall, the wall had taken on some weight over time and therefore that a limited opening or openings would be better for the building. (NYSCEF Doc No. 37, Patrick Chen's Affidavit, ¶ 4.)

Plaintiff also claims that in August 2017, the HDFC caused more delay when it insisted on reviewing the third set of plans even though there were no significant changes to the demising wall. (NYSCEF Doc No. 27, ¶ 22.) Other evidence shows that the plan showed the increase of three feet to one of the wall openings. (NYSCEF Doc No. 18, Plaintiff's Ex. P, Plaintiff's email to the HDFC's Rick O'keefe, dated August 26, 2017.)

Plaintiff fails to show that the HDFC breached the implied covenant of good faith and fair dealing. Therefore, plaintiff has not demonstrated the likelihood of success on the merits of her claim.

ii. Business-judgment rule.

Under the business-judgment rule, board members are presumed, absent a showing of discrimination, self-dealing or misconduct, to act in good faith and exercise honest judgment in the lawful furtherance of corporate purposes. (*Jones v Surrey Co-op. Apartments, Inc.*, 263 AD2d 33 [1st Dept 1999].)

Plaintiff contends that because the HDFC engaged in bad faith to frustrate plaintiff's performance under their agreement, the defense of business-judgment rule is not available to HDFC. (NYSCEF Doc No. 26 at 4, § A, ¶ 10.)

Plaintiff has not shown that the HDFC intentionally delayed reviewing plaintiff's plans. The evidence shows that because plaintiff contributed at least to some of the delay, plaintiff has failed to show that the HDFC had engaged in discrimination, self-dealing, or misconduct. In particular, plaintiff contends that when the HDFC learned that plaintiff separated from her partner, the HDFC stopped cooperating with plaintiff to perform the work necessary to obtain the approval to combine the two apartments. (NYSCEF Doc. No. 53, Reply Affirmation in Further Support of Order to Show Cause, at 3, ¶ 6.) Yet evidence also shows that the HDFC continued to work with plaintiff to get her plans approved. (NYSCEF Doc. No. 34, ¶ 32.) Plaintiff's argument that the HDFC is not entitled to the business-judgment rule defense fails.

To show a likelihood of success on the merits, the movant's evidence must show that they will ultimately be successful in the underlying action. Here, conflicting evidence exists about who caused plaintiff's delay in combining the two apartments by the contractual deadline. The evidence also shows that plaintiff contributed at least to some of the delays in obtaining the plan approval from the HDFC. Plaintiff has not shown that the HDFC breached the implied covenant of good faith and fair dealing. Plaintiff has also not persuaded this court that the HDFC

is not entitled to the business-judgment defense. Plaintiff has, therefore, not tendered sufficient evidence demonstrating ultimate success on the merits of her claim.

II. Movant must show irreparable injury if the preliminary injunction is not granted.

Irreparable harm must consist of more than damages of an economic nature. (*Chiagkouris v 201 W. 16 Owners Corp.*, 150 AD3d 442, 422 [1st Dept 2017]; *After Six Inc. v 201 E. 66th St. Assoc.*, 87 AD2d 153, 156 [1st Dept 1982].) Evidence must show that the apartment was unique, for example. (*Lezell v Forde*, 26 Misc 3d 435, 445 [Sup Ct, Kings County 2009], citing UCC § 2-716, Office Comment 2.)

Absent the granting of the preliminary injunction, plaintiff will have to sell an empty Apartment 3B. Plaintiff continues to own her residence, Apartment 3A. (NYSCEF Doc. No. 54, at 11, ¶ 17.) No evidence shows that plaintiff is using Apartment 3B (NYSCEF Doc. No. 54, at 11, ¶ 19.) The Appellate Division has held that losing an apartment that is not a residence does not lead to irreparable harm. (*After Six*, 87 AD2d at 156.) Under the *After Six* holding, the court finds that plaintiff has not demonstrated irreparable injury absent the grant of the preliminary injunction.

III. A movant must show a balance of equities in its favor

Plaintiff has demonstrated a balance of equities in her favor. To satisfying the balance-of-equities requirement, plaintiff must show that the irreparable injury to be sustained is more burdensome to her than the harm caused to the HDFC or other shareholders through the imposition of the injunction. (CPLR 6301, citing *Nassau Roofing & Sheet Metal Co. v Facilities Development Corp.*, 70 AD2d 1021, 1022 [3d Dept 1979], *appeal dismissed* 48 NY2d 654 [1979].) The HDFC has not shown that it and the cooperative's other shareholders will suffer any detriment if the preliminary injunction is granted. The HDFC contends that the HDFC should not have to bear the cost of combining plaintiff's two apartments and to continue monitoring the process toward construction. The HDFC's argument is not persuasive. The HDFC can claim any additional cost incurred from plaintiff. There is also no showing that other moderate-income shareholders would suffer any detriment if Apartment 3B were not made available to purchase. Plaintiff has invested time and money into purchasing Apartment 3B and combing the two apartments. Apartment 3B is also the only apartment adjacent to Apartment 3A and therefore the only apartment with which Apartment 3A can combine. (NYSCEF Doc. No. 54, at 12, ¶¶ 4, 19-20.)

Plaintiff has satisfied the balance-of-equities requirement in her favor. But defendants still have the better argument overall. Under CPLR 6301's three-pronged test, plaintiff has not shown a likelihood of success on the merits or irreparable injury to her absent the preliminary injunction, even though she has shown a balance of equities in her favor. Plaintiff's motion for a preliminary injunction is denied.

Accordingly, it is hereby

ORDERED that plaintiff's CPLR 6301 motion for preliminary injunction is denied; and it is further


NYSCEF DOC. NO. 64

RECEIVED NYSCEF: 06/13/2018

ORDERED that Board of Directors of the 351 west 114th Street Housing Development Finance Corporation a/k/a The Monterey HDFC has 20 days from service of this order with notice of entry to file its answer; and it is further

ORDERED that the parties appear for a preliminary conference on August 1, 2018 at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: June 12, 2018

J.S.C. 

HON. GERALD LEBOVITS
J.S.C.