

Scher v Turin Hous. Dev. Fund Co.
2018 NY Slip Op 32175(U)
September 5, 2018
Supreme Court, New York County
Docket Number: 156591/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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MARK SCHER, Individually and on behalf of similarly situated
shareholders of Turin Housing Development Fund Co., Inc.,

Index No. 156591/2017
Motion Seq: 001

Plaintiff,

DECISION & ORDER
ARLENE P. BLUTH, JSC

-against-

TURIN HOUSING DEVELOPMENT FUND CO., INC.,
MERCIE WILLIAMS, MAUREEN BERLINGS-MINSKY,
RONALD MISA, JAMES GOLDSTEIN, EVELYN RIVERA,
LINDA BURSTION, Individually and as Members of the Board
of Directors of TURIN HOUSING DEVELOPMENT FUND
CO., INC.,

Defendants.

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The motion, brought by order to show cause, for a preliminary injunction enjoining
defendants from negotiating or entering into a regulatory agreement with the New York
Department of Housing Preservation and Development (“HPD”) is denied.

Background

Defendant Turin Housing Development Fund Co., Inc. (“Turin”) was incorporated as an
HDFC. Turin entered into a forty-year regulatory agreement with the Department of Housing
and Urban Development (“HUD”) that ended in 2012. Turin also entered into an agreement with
the City of New York in 1969. In 2013, the shareholders at Turin voted 68-62 to *not* negotiate
with HPD about entering into another regulatory agreement (NYSCEF Doc. No. 10). Plaintiff
contends that this vote should have ended the Board’s ability to negotiate with HPD and wants

this Court to enjoin defendants from exploring any future agreements. Plaintiff insists that the individual board members are pushing Turin into an agreement with HPD so that they can make millions by acquiring additional units when an agreement is reached. Plaintiff argues that these board members are engaging in self-interested actions that amount to self-dealing;

Plaintiff points out that other HDFCs have continued operating after their regulatory agreements ended and that “[t]hese HDFCs have continued to operate with no restrictions on sales prices or other regulated restrictions, just as the law and prior City agreements contemplated” (NYSCEF Doc. No. 24 at 14). Plaintiff claims that he is entitled to a preliminary injunction because if a regulatory agreement is entered into it will diminish his property rights. Plaintiff maintains that the Board is not acting in the best interest of its shareholders.

Defendants offer a vastly different version of the circumstances surrounding the instant action. Defendants contend that the Board is seeking a regulatory agreement in order to address the building’s serious financial hardships. Specifically, defendants point out that Turin has an existing mortgage debt, owes over \$6 million in unpaid real estate taxes (an amount that continues to increase due to compounding interest) and will likely need to expend \$8 million in major capital improvements over the next five years. Defendants claim that entering into a regulatory agreement with HPD will solve these problems and allow the building to keep monthly maintenance fees low. Defendants contend that they have acted properly and put the issue to a shareholder vote in June 2018¹ where the shareholders voted 126 to 22 in favor of entering into a regulatory agreement with HPD.

¹This vote took place after plaintiff brought the instant motion and after this Court denied plaintiff’s request for a temporary restraining order preventing the vote.

In reply, plaintiff takes issue with the vote and claims it was an improperly-conducted sham vote and should be viewed as an invalid election. Plaintiff raises numerous issues with the vote, including the fact that it was done without vote monitors and there was no roll call or agenda read. Plaintiff questions why the Board has done nothing to address the mounting taxes due and insists that this demonstrates that the individual board members have breached their fiduciary duties to the shareholders. Plaintiff contends that in 2017 he sent the Board a list of sixteen lenders that provide loans to cooperatives and the Board did nothing. Plaintiff also states that the building is worth more than \$100 million and, therefore, the Board should have no problem receiving competitive mortgage rates or addressing the alleged financial issues.

Discussion

“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, 800 NYS2d 48 [2005] citing CPLR 6301). “Entitlement to a preliminary injunction depends upon probabilities, any or all of which may be disproven when the action is tried on the merits” (*Destiny USA Holdings, LLC v Citigroup Global Markets Realty Corp.*, 69 AD3d 212, 216, 889 NYS2d 793 [1st Dept 2009] [internal quotations and citation omitted]).

The Court denies plaintiff’s request for a preliminary injunction because plaintiff utterly failed to demonstrate a balancing of the equities in his favor. Although plaintiff purports to bring an action on behalf of similarly-situated shareholders, he failed to submit an affidavit from any other shareholder supporting plaintiff’s position. That leaves the Court to evaluate the claims of

a single shareholder in a building with 189 units. The interests of the building as a whole, which the defendants purport to represent, outweigh plaintiff's individual desires.

Also critical to the Court's determination is the fact that Turin is an HDFC. When considering the equities analysis, the Court cannot ignore that the stated purpose of an HDFC (Housing Development Fund Corporation) is:

"to build or rehabilitate housing for low income families . . . to enable such companies to participate more effectively in existing municipal, state and federal assistance programs . . . to coordinate activities aided under existing municipal state and federal programs with other public and private actions . . . [and] to provide assistance for existing not-for-profit housing companies by providing advances from the housing development fund to facilitate the rehabilitation or construction of housing for low income families"

(*546 West 156th Street HDFC v Smalls*, 43 AD3d 7, 13, 839 NYS2d 62 [1st Dept 2007] citing Private Housing Finance Law § 571)).

HDFCs provide opportunities for low-income families to own shares in affordable housing units. Unlike real estate purchased on the free-market, the value of the property is not a primary concern. That is why HDFCs typically have income restrictions on prospective buyers, caps on sale prices, and shareholders have low maintenance fees. The goal is to facilitate homeownership (usually with regulatory oversight) while keeping living costs low for both current and future shareholders. In other words, owning shares in an HDFC is supposed to guarantee access to affordable housing rather than a way to make millions when the units are sold.

That context is critical in this case because plaintiff's ultimate goal is to sell his apartment without any price restrictions. Plaintiff's ability to do so is contingent on preventing the Board from entering into a regulatory agreement with HPD. Plaintiff explains in great detail how the

building could function as an unregulated cooperative and how lenders would be eager to provide financing. But whether the building could conceivably function as a free-market co-op is besides the point. Plaintiff has not provided a sufficient reason why the Board should not consider, or why the shareholders should not decide, whether they wish to operate as an HDFC. The Court declines to foreclose that option because plaintiff wants to sell his apartment for full market value. The desire to fully capture the value of his shares does not eclipse defendants' intention to remedy the financial health of an HDFC while taxes and other liabilities continue to mount. While plaintiff doubts the existence and the extent of the building's financial troubles, it provides a plausible reason for the Board to present the shareholders with the opportunity to enter into a regulatory agreement.

To the extent that plaintiff cites to the 2013 shareholder vote disfavoring further negotiations with HPD, that is not dispositive. Plaintiff cites no case law for the proposition that a shareholder vote enjoys indefinite preclusive effect. Defendants were allowed to raise a proposal to shareholders nearly *five years* after a similar proposal was rejected.

The Court stresses that plaintiff's desire to sell his shares without any restrictions is a legitimate desire—it just does not provide a compelling reason to bar defendants from entering into an agreement that will purportedly alleviate the financial problems that affect all shareholders. Put another way, the equities favor the financial health of the building as a whole over plaintiff's individual desire to sell his shares for the most money possible. The fact that plaintiff believes the building could financially survive as an unregulated HDFC is plaintiff's opinion; it does not compel the Board to choose plaintiff's desired course of action. Plaintiff's

disagreement with the shareholders' decision to enter into a regulatory agreement has no bearing on the balancing of the equities.

The shareholder vote, while not dispositive by itself, also suggests that the equities favor defendants. The overwhelming support for entering into an agreement is persuasive evidence that a preliminary injunction would be inappropriate. The Court observes that the attorneys for both plaintiff and defendants sent notices to the shareholders in advance of the vote explaining their positions (*see* NYSCEF Doc. Nos. 56, 57). In fact, plaintiff's counsel sent a detailed letter warning shareholders that "The Cooperative may have to fill at least 30% of the apartments with persons from the City's Emergency Homeless Shelters" (NYSCEF Doc. No. 56). Plaintiff was provided an opportunity to persuade his fellow shareholders to vote against entering into an agreement and to vote himself. Apparently, the shareholders did not agree with him.

While the other elements required for a preliminary injunction are closer questions, the Court also finds that plaintiff has not shown a probability of success on the merits or that he will suffer irreparable harm. Discovery may reveal information about the Board members' alleged self-dealing— but what might be discovered is immaterial to the instant motion. The Court must rule on plaintiff's motion based on what is presented in this record and, on these papers, the Court sees no reason to enjoin defendants.

Summary

In this motion, the Court must assess whether the complaints raised by a single shareholder compel the Court to issue a preliminary injunction preventing defendants from entering a regulatory agreement with HPD. Plaintiff's objection is clear— if the Board enters into

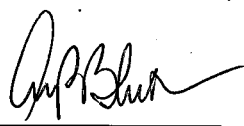
a regulatory agreement, then he will be unable to sell his apartment for full market value which plaintiff claims "is in excess of two million dollars" (NYSCEF Doc. No. 3, Scher aff, ¶ 69). That is not a reason to grant a preliminary injunction banning the Board from taking that action. A single individual who hopes to sell his shares in an *HDFC* for the maximum amount available in the free market does not justify enjoining the Board from taking action on behalf of nearly 200 units, especially when it appears that the shareholders approve.

Accordingly, it is hereby

ORDERED that the motion for a preliminary injunction is denied.

The parties are directed to appear for a preliminary conference on December 18, 2018 at 2:15 p.m.

Dated: September 5, 2018
New York, New York



ARLENE P. BLUTH, JSC

NON-ARLENE P. BLUTH